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Foreword

From: A Practitioner's Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Maritime matters have been at the heart of international law since the days of Grotius. The law of the sea has been central to international law for centuries. That law has undergone remarkable development since the Second World War. It has seen both profound progressive development and extraordinary codification. The Third United Nations Convention on the Law of the Sea––'UNCLOS'––was the product of a decade of intensive, worldwide negotiation. It was the longest, most complex, and one of the most important treaty-making endeavours in world history. In the large, and in multiple respects, UNCLOS is the code of law for the seas, a comprehensive constitution for the oceans––despite the critical fact that, as regards maritime delimitation, the Conference could not produce a clear formula and left the law to development in the light of the sources of international law listed in Article 38 of the Statute of the International Court of Justice 'in order to achieve an equitable solution'.

The terms of UNCLOS––extensive, encompassing, precise, and yet in respect of maritime delimitation so fundamentally imprecise––are governing not only for its almost universal adherents. Even the handful of States that have not as yet become parties mostly affirm their acceptance of its essential principles or maintain that they constitute customary international law. This includes the United States of America, which was a principal progenitor of UNCLOS, and which, for irrational reasons that defy coherent explanation but which are rooted in the Constitutional singularities of Senate advice and consent to the ratification of treaties, so far stays apart. Even as the Russian Federation and other Arctic States advance their legal claims in the Arctic to the Continental Shelf beyond 200 nautical miles, the United States debars itself from presenting its claims before the Commission on the Limits of the Continental Shelf constituted by UNCLOS.

Maritime delimitation of the overlapping claims of States in the seas has become ubiquitous since the Second World War. Modern international law, in recognizing that States enjoy not only a defined territorial sea and a zone contiguous to it, an exclusive economic zone, and rights in the continental shelf, entails maritime delimitation of overlapping claims of opposite and adjacent States. The increased numbers of independent States contribute to the increased demands that their fishermen and fishing fleets, ships and shipping, companies and governments, and their consuming populations make on and in and through,

under, and over the seas. The extraction of petroleum and gas from the seabed is of huge economic importance. The need for maritime delimitation has magnified the world over. (p. vi) That need in recent decades has been met by agreements between the States immediately concerned, by judgments of the International Court of Justice and by awards of arbitral tribunals, latterly of tribunals constituted pursuant to UNCLOS. It has begun to be met by judgments of the International Tribunal on the Law of the Sea.

A Practitioner's Guide to Maritime Boundary Delimitation addresses that need with exceptional acuity and facility. It recounts and analyzes the modern law and jurisprudence of maritime delimitation. It sets out the practical and technical aspects of maritime delimitation together with its legal elements, and does so with the illumination of multiple, specially prepared maps. The illustrations and technical analyses found throughout the book are the work of Dr Robin Cleverly (how aptly named he is). They go hand in hand, or eye and eye, with the written exposition. They turn the written exposition into graphic demonstration. They also provide a wealth of technical explication and practical advice which will be of material help to the practitioner.

Part A of the book provides a commentary on the content of the modern law; Part B provides an exposition and analysis of the score of cases that have played the predominant role in developing that law; and Part C identifies and examines four future challenges. The chosen challenges are the subjectivity of base-point selection in the drawing of maritime boundaries; inconsistency in the adjustment of equidistance lines to respond to equitable considerations; the role of proportionality in the adjustment of maritime boundaries; and the delineation and delimitation of the outer continental shelf. The exploration of these challenges searches for 'predictable, objectively-determined criteria for delimitation, as opposed to subjective findings lacking precise legal or methodological bases…' (*Barbados/ Trinidad and Tobago*, Award of 11 April 2006, 139 ILR 449). The importance of that search is not only a matter of academic or professional concern. The recurring reports in the media about conflicting claims to maritime delimitation in the South China Sea illustrate that maritime delimitation bears on vital questions of international commerce and international peace and security.

A Practitioner's Guide to Maritime Boundary Delimitation provides not only the practitioner, but the student, the professor, the government official, the arbitrator and the adjudicator, and others concerned with maritime delimitation, with a lucid guide to a complex subject of cardinal importance to modern law and life.

Stephen M. Schwebel

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Preface

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We devised this book following several years of collaboration advising sovereign States and energy companies about the legal, technical, and practical implications of international maritime boundary disputes. It struck us both that, despite the many volumes of learned treatises written by eminent commentators during the late nineteenth and early twentieth centuries on the law of maritime delimitation, there was no authoritative text that addressed together the complex legal and technical elements of the subject. This book attempts to fill that void.

The interplay between the legal and technical aspects is central to the modern law and practice of maritime delimitation. A sound legal and technical approach is a *sine qua non* of any reliable and lasting delimitation solution, whether that solution is reached by negotiation or third-party dispute resolution. Moreover, delimitation is at its heart an inherently practical exercise. Professor Malcolm Evans correctly observed in his 1989 monograph on *Relevant Circumstances and Maritime Delimitation* that 'above all else, delimitation is a practical exercise, despite the amount of theoretical study which both surrounds and obfuscates the subject'.[1]

As an early nineteenth-century American advertising executive is reputed to have said, 'a picture is worth a thousand words'.[2] In no area of law is that more true than the law of maritime boundary delimitation. The days of lengthy, esoteric legal argument before the International Court of Justice are long gone in this field. Modern delimitation disputes are at the forefront of trial graphics technology, with advocates relying heavily on their technical colleagues to produce illustrations that will convince the bench of the 'equitable' nature of one delimitation solution over another. In the same way, the 100 or so original colour illustrations in this book attempt to bring to life to the reader many of the (largely geographical) factors that may be determinative of any given delimitation scenario.

With its emphasis on the technical and practical aspects alongside a comprehensive overview of the law and modern jurisprudence of maritime delimitation, we hope that this book will be of use to a broad constituency interested in the subject, whether they be State leaders or officials, energy companies, legal and technical practitioners, academics,

students, or others. If this book is embraced by that broad constituency, then we will have achieved the primary objective of our work.

(p. viii) At the heart of our subject matter is the United Nations Convention on the Law of the Sea of 1982 (UNCLOS), a 'comprehensive legal order for the world's seas and oceans',[3] which at the time of writing has 167 States parties and has been described by many as one of the most successful multilateral treaties in the history of international law. But while UNCLOS is remarkable in its breadth, encompassing sixteen parts, 320 articles, and nine annexes, its provisions about maritime delimitation are famously brief. In order to strike a compromise between the 'equidistance' and 'equitable principles' camps during the Third Conference negotiations, the final text of Articles 74 and 83 speaks only of the requirement for an 'equitable solution'. It has been left to subsequent State practice and, more importantly, jurisprudence to explain what that means. This book charts the development of that jurisprudence, starting with the seminal *North Sea Continental Shelf* cases of 1969, and identifies its application across the various zones of maritime jurisdiction that exist under UNCLOS.

This book is divided into three parts, each of which has more specific objectives. Part A provides a brief overview of the history of maritime delimitation and the relevant treaty texts, before explaining in detail the concepts of equidistance, relevant/special circumstances, and (dis)proportionality that are at the heart of the modern law. It also addresses a number of important practical questions, including the nature and extent of States' obligations with regard to natural resources prior to delimitation and the effective pursuit of modern maritime boundary litigation. Part B reviews the maritime delimitation jurisprudence since 1969, identifying the arguments presented in each case and the legal and technical conclusions reached by the court or tribunal concerned. It also assesses the lasting relevance of each judgment or award in today's law. Part C identifies four enduring challenges (or, alternatively put, controversies) that the authors expect to be at the forefront of the next generation of delimitation disputes and attempts to identify some potential solutions to those challenges. Finally, we include three annexes consisting of a technical glossary, extracts from the most relevant treaty instruments, and sample arbitration agreements taken from recent delimitation cases in which we have been involved.

This book has been a collaborative exercise from beginning to end and we take joint responsibility for it. We alone are answerable for any errors or inaccuracies in the text or illustrations. No doubt some will be brought to our attention over the months and years ahead. We look forward to taking the opportunity to make the necessary corrections and updates, and thereby to improve our work, in future editions. Nevertheless, we hope this work will prove a reliable and user-friendly text for those with an interest in international law and maritime boundary delimitation.

Stephen Fietta and Robin Cleverly

December 2015

Footnotes:

1 Evans, M. D., *Relevant Circumstances and Maritime Delimitation* (Clarendon Press, 1989).

2 In fact, the saying likely has far more ancient roots somewhere in East Asia.

3 *Philippines/China* Award on Jurisdiction and Admissibility (29 October 2015), para. 2.

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This work has been more than five years in the making. Over that time, the authors have been assisted by a flotilla of people too numerous to name here, many of whom share our deep interest and passion for the law of the sea. We extend our sincere thanks to each and every one of them.

Special thanks go to our erstwhile colleagues at Latham & Watkins, Volterra Fietta, and the United Kingdom Hydrographic Office, who consistently supported and encouraged our labours on the project. Of the associates, interns, and secretaries of Volterra Fietta who have contributed to this work in a multitude of ways, we are particularly grateful to Naomi Burke, Nathan Eastwood, Maria Fogsdam-Agius, Chloe Jacobs, Ioannis Konstantinidis, and Ashique Rahman, all of whom have rendered substantial assistance in research, referencing, checking, and otherwise. Naomi and Ioannis each have an encyclopaedic knowledge of the law of the sea, while Ashique has an acute understanding of the practicalities of international disputes. At the UK Hydrographic Office, special thanks are due to Fiona Bloor for assistance in analyzing the awards and the rest of the Law of the Sea Group for their contributions to many technical debates.

At the outset of our discussions with Oxford University Press in 2010, we received a series of invaluable insights and suggestions on our book proposal from three expert reviewers (Sam Wordsworth QC, Simon Olleson, and a third who has remained anonymous). It is thanks in part to their knowledgeable input that the book takes the form that it does. We are eternally grateful also to Professor Michael Reisman of Yale University for his encouragement at the conception of this project during our collaboration on the *Barbados/ Trinidad and Tobago* case, and to Judge Schwebel for his insightful and erudite suggestions on early drafts of our work.

We also thank our publishers (and particularly our editors John Louth, Merel Alstein, and, more latterly, Emma Endean, Caroline Hawley, and Sophie Rosinke) for their support and enthusiasm throughout the project. We were especially delighted by Oxford University Press's decision to make this work its first ever colour legal publication. Without the numerous colour maps and illustrations that support its textual analysis, the practical utility of the book to our readers would have been much diminished. And, of course, the colour

theme extends to the artwork featured on the front cover of the book, for which we thank the artist Victoria Leader, who has kindly given permission to use it.

(p. x) Finally, and above all else, we thank our families for their encouragement, support, and patience over the past five years. Such are the pressures of modern professional life that we have been required to devote innumerable weekends and holidays to getting the book done. Without the extraordinary understanding and forbearance of everybody at home (particularly Laura and Irene, and not forgetting little Alessia and Sebastian), this work could never have happened. We promise to take a break before starting work on the new edition…

Stephen Fietta and Robin Cleverly

1 November 2015

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International Court of Justice/Permanent Court of International Justice

(p. xvii) International Tribunal for the Law of the Sea

International arbitration

Other

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Abbreviations

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ASEAN

Association of South-East Asian Nations

1958 CCS

Convention on the Continental Shelf, done at Geneva on 29 April 1958, 499 UNTS 311

CLCS

Commission on the Limits of the Continental Shelf

CMATS Treaty

Treaty on Certain Maritime Arrangements in Timor Sea

CNMC

Cameroon-Nigeria Mixed Commission

1958 CTS

Convention on the Territorial Sea and the Contiguous Zone, done at Geneva on 29 April 1958, 516 UNTS 205

DOC

Declaration on the Conduct of Parties in the South China Sea (2002)

EEZ

exclusive economic zone

FAO

Food and Agriculture Organization of the United Nations

GIS

geographic information systems

GPS

global positioning system

HAT

highest astronomical tide

ICJ

International Court of Justice

IHO

International Hydrographic Organization

ILC

International Law Commission

ILR

International Law Reports. Lauterpacht, Greenwood, and Lee (eds), Cambridge University Press

IMB

International Maritime Boundaries, Charney and Alexander (eds), Vols 1–7, Brill

ITLOS

International Tribunal for the Law of the Sea

JDA

joint development agreement

JDZ

joint development zone

JPDA

joint petroleum development area

LAT

lowest astronomical tide

LBT

land boundary terminus

LTE

low-tide elevation

M

nautical mile (see also ‘nm’)

MHWS

mean high water springs

MSL

mean sea level

NGO

non-governmental organization

NM

Notices to Mariners

nm

nautical mile (see also ‘M’)

OAS

Organization of American States

Pact of Bogotá

American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948, 30 UNTS 84

PCA

Permanent Court of Arbitration

PCIJ

Permanent Court of International Justice

RIAA

Reports of International Arbitration Awards, United Nations

(p. xxiv) SOLAS

Safety of Life at Sea Convention

TST

Timor Sea Treaty

UAE

United Arab Emirates

UK

United Kingdom

UN

United Nations

UNCLOS I

First United Nations Conference on the Law of the Sea, Geneva, 1956–58

UNCLOS III

Third United Nations Conference on the Law of the Sea, New York, 1973–82

UNCLOS

United Nations Convention on the Law of the Sea, concluded at Montego Bay on 10 December 1982, 1833 UNTS 3

UNTS

United Nations Treaty Series

US/USA

United States of America

USSR

Union of Soviet Socialist Republics

UTM

Universal Transverse Mercator

VCLT

Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, 1155 UNTS 331

WGS84

World Geodetic System, 1984

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Part A Commentary on the Modern International Law of Maritime Boundary Delimitation, 1 Context

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Subject(s):

Coastal states — Delimitation — Straits — Territorial sea — UNCLOS (UN Convention on the Law of the Sea) — Boundaries

(p. 3) 1 Context

> The question at issue is the OUTER SEA, the OCEAN, that expanse of water which antiquity describes as the immense, the infinite, bounded only by the heavens, parent of all things
>
> Grotius, Mare Liberum (1609)[1]

I. What is the International Law of Maritime Boundary Delimitation?

The international law of maritime delimitation is that body of rules regulating the drawing of boundaries between the overlapping maritime entitlements of neighbouring coastal States. Since the writings of Grotius, Selden, and others in the early seventeenth century, the extent of maritime sovereignty and jurisdiction at international law has been substantially clarified and developed such that, by the late twentieth century, States could legitimately claim rights over areas of maritime space extending 200 nautical miles or more from their coasts. Maritime delimitation is the process by which competing State claims are resolved definitively, according to international law, so as to identify the maritime areas within which coastal States will be left to exercise their sovereign rights.

By definition, any exercise of maritime delimitation involves overlapping claims or entitlements. As Tanja states, 'delimitation is the determination of a maritime boundary in a situation where two (or more) states are confronted with overlapping titles'.[2] Weil comments simply that 'unless there are overlapping titles, there is nothing to delimit'.[3] Nevertheless, overlapping titles are omnipresent in modern relations between coastal States. As Brownlie observes, 'there is no coastal state in (p. 4) the world that does not have an overlapping maritime zone with at least one other state'.[4] The consequences of such overlapping titles are described by Weil:

> Every time the maritime projections of two States meet an overlap, each of them must inevitably forego the full enjoyment of the maritime jurisdictions it could have claimed had it not had the geographical misfortune to find its appropriation in conflict with that of its neighbour. A separation then has to be drawn which is exactly what maritime delimitation is all about.[5]

So what is the body of international rules that governs the delimitation of overlapping maritime titles? The sources of international law are encapsulated by Article 38(1) of the Statute of the International Court of Justice: namely international conventions (i.e. treaties), international custom, 'general principles of law recognized by civilised nations', and, as 'subsidiary means for the determination of rules of law', 'judicial decisions and the teachings of the most highly qualified publicists'. In the context of maritime delimitation, the modern starting point is the rules set out in the United Nations Convention on the Law of the Sea of 1982 ('UNCLOS', or the 'Convention') to which, at the time of writing, there are 167 States parties.[6]

However, in the words of one learned tribunal, the rules of delimitation set out in UNCLOS (particularly those related to the EEZ and continental shelf) contain little more than a 'simple and imprecise formula'.[7] As such, and in the absence of any clear detailed customary rules based on State practice, it has been left to international courts and tribunals to develop the modern international law of maritime boundary delimitation.

As Adam Smith, author of *The Wealth of Nations* and the so-called 'father of modern economics', stated in his 1762 *Lectures on Jurisprudence*, 'jurisprudence is that science which enquires into the general principles which ought to be the foundation of laws of all nations'. Articles 15, 74, and 83 of UNCLOS establish such 'general principles' of maritime delimitation, upon which the modern jurisprudence examined in Part B of this book has built for the purposes of defining the modern law. Indeed, such is the dominance of the jurisprudence that Weil concludes:

> [T]he legal conquest of maritime delimitation is not the work of either treaty or custom but of the courts which, far from being a subsidiary source of international (p. 5) law, here play the role of a primary and direct source of law, even if they have chosen modesty to ascribe the credit to customary law.[8]

Neither UNCLOS nor customary international law identifies any prevailing *method* of delimitation beyond the territorial sea; rather, they specify only the *objective* of an 'equitable solution'. It has been left to international courts and tribunals to identify (and frequently implement) the method (or methods) of delimitation to be adopted in pursuit of the mandated objective. As the Arbitral Tribunal in the recent Bay of Bengal arbitration between Bangladesh and India stated, 'the ensuing—and still developing—international case law constitutes…an *acquis judiciare*, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 74 and 83 of the Convention'.[9] It is that fundamental *acquis judiciare* in the law and practice of international maritime delimitation that the present work strives to identify and explain.

A cardinal principle of international law that forms the backbone of the *acquis judiciare* is that all States are born equal. Just as the United Nations is based on the principle of the sovereign equality of all its members,[10] so the international law of maritime delimitation is based on the sovereign equality of all competing coastal States. As Weil observes:

> Unless one appropriation is to be completely sacrificed to the other—and this would conflict not only with the demands of justice and good sense but also with the principle of equality of States—the sacrifices must be shared equally.[11]

While sovereign equality (and equal sacrifice) may not always prevail in bilaterally negotiated boundary outcomes, a review of the jurisprudence analyzed in Part B of this book demonstrates that, by and large, it is treated as sacrosanct in the practice of international courts and tribunals. Such respect for equality is perhaps the most important attribute of any third-party dispute settlement process. As explained later in this work, it has been manifested by the priority accorded to equidistance-based methods of delimitation in the modern law. More of that later.

II. The Early History of Maritime Claims and Maritime Boundary Delimitation

The modern maritime delimitation jurisprudence, analyzed in detail in Part B of this book, begins with the *North Sea Continental Shelf* cases. In many senses, and (p. 6) for strictly practical purposes, the contemporary practitioner need look no further than that jurisprudence (together, of course, with the applicable provisions of UNCLOS and modern State practice) in order to understand the modern law of delimitation. However, the history of maritime claims and maritime boundary delimitation extends back several millennia. A brief review of that history, and particularly the developments of the early and mid twentieth century, provides valuable context to the contemporary position. As the South African/British jurist Lord Steyn once famously said, 'in law context is everything'.[12]

The context must begin with the origins of the concept of sovereign rights over maritime space. This dates back to antiquity. In his 1635 magnum opus, *Mare Clausum* ('the closed sea'), the English jurist John Selden advocated the theory of legal dominion over the seas, harking back to the days of ancient Rome, where the Emperor was 'Lord of the whole world', and to other historical claims of Tyrrhenian dominion over the Phoenician Sea, Egyptian dominion over the Alexandrian Sea, and the Persian King Cyrus's claimed dominion over all the seas. Selden cited examples of forms of maritime delimitation involving the ancient Romans, Syrians, Athenians, and Persians. He urged that imaginary lines be drawn for the purposes of 'bounding the sea', whether with the help of a 'seaman's compass' or using 'Celestial degrees either of Longitude or Latitude together with the doctrine of Triangles arising therefrom'.[13]

Selden's work was a riposte to that of the Dutch jurist Hugo Grotius, who is widely acknowledged as a forefather of modern international law. In his 1609 paper *Mare Liberum* ('the free sea'), Grotius argued that the freedom of the seas formed an essential condition to the development of free trade. He did so in the context of Portuguese claims at the time to hegemony over the expanding trade routes between Europe and the East Indies. Portugal's claims were accompanied by assertions of sovereignty over what Grotius described as 'the whole expanse of the sea which separates two parts of the world so far distant the one from the other, that in all the preceding centuries neither one has so much as heard of the other'. He ridiculed the notion that Portugal could claim sovereignty over the Indian Ocean, whether by way of 'occupation', 'prescription', or otherwise. He argued that 'in the legal phraseology of the Law of Nations, the sea is called indifferently the property of no one (*res nullius*), or a common possession (*res communis*), or public property (*res publica*)'. He accordingly rejected any prospect of Portugal and Spain (the other assertive maritime power at the time) 'dividing up the world' by way of 'imaginary lines' in the sea, observing that 'if that were a recognised method, and such a delimitation of boundaries were sufficient to make possession (p. 7) valid, our geometers long since would have got possession of the face of the earth, our astronomers of the very skies'.[14]

Nevertheless, while asserting that the sea was incapable of becoming the private property of any person or nation, Grotius did recognize the legitimate assertion of sovereign rights and jurisdiction over parts of the sea for purposes of, for example, the prosecution of piracy. Such limited rights and jurisdiction were, after all, both recognized by State custom and entirely consistent with Dutch maritime and trade interests at the time. Grotius elaborated on the idea in his own 1625 *magnum opus, De Jure Belli Ac Pacis* ('On the Law of War and Peace'), alluding to the existence of sovereign rights over those waters adjoining coast States over which they exercised effective control.[15] Less than 100 years later, another Dutch jurist, Cornelis van Bijnkershoek, advanced the idea of coastal State sovereignty and jurisdiction, expressing the limits of such sovereignty and jurisdiction thus: 'the power of the land properly ends where the force of arms ends'.[16] Consequently, van Bijnkershoek posited that maritime dominion extended seawards from the land, but was restricted to the range of a cannon (known as the 'cannon shot rule'). This approach ultimately gave rise to widespread State claims to a 3-mile territorial sea limit, many of which persisted until the mid or late twentieth century and the development of the 12M rule under UNCLOS ('M' stands for nautical mile).[17] Some States still maintain 3-mile territorial sea limits today.

Thus, the state of international law by the mid seventeenth century was such that, in the *Grisbådarna* arbitral award of 1909 (discussed further below), the tribunal concluded that, according to 'fundamental principles of the law of nations, both ancient and modern', a cession of land territory to Sweden in 1658 had 'automatically' included 'the radius of maritime territory forming the inseparable appurtenance of this land territory'.[18]

As will be seen in the following sub-section, the theories of Selden, Grotius, and van Bijnkershoek resound strongly, and have in many senses been reconciled, by the modern law of the sea as embodied in UNCLOS. Thus, for instance, UNCLOS recognizes the dominion of coastal States over areas of territorial sea, (p. 8) and sovereign rights over the resources of the EEZ and continental shelf, while at the same time preserving rights of innocent passage and freedom of navigation for all States and maintaining the status of the high seas and its resources as *res communis*. But what of the historical delimitation of overlapping State claims?

Prior to the First United Nations Conference on the Law of the Sea in 1958, there was no international consensus on the rules applicable to maritime boundary delimitation, in part because there was limited State practice of delimitation at that time. Methods used to delimit the territorial sea included the median-line system, the drawing of a line perpendicular to the general direction of the coast, the prolongation of the land boundary, the thalweg system, and the so-called 'common zone system'.[19]

Under the 'common zone system', a disputed maritime area would be designated as a zone common to both States.[20] An example was an 1879 treaty between France and Spain, which divided the Bay of Figuier into three distinct, equal zones, one French, one Spanish, and a third reserved for common use.[21] This general approach was advocated by Bluntschli and Rivier in the late nineteenth century.[22]

A thalweg is most commonly understood as constituting a line joining the lowest points along the entire length of a riverbed or valley in its downward slope, defining its deepest channel.[23] As such, the thalweg system is suitable for delimitation only in specific geographical circumstances, normally involving navigable boundary rivers. By the nineteenth century, the principle that boundary rivers should be delimited along the line of the deepest channel of the river was well established, although State practice regarding its use in maritime delimitation remained relatively rare.[24] An example was the convention of 21 December 1923 between Denmark and Germany concerning lateral maritime boundaries in the North Sea and the Baltic Sea, where the thalweg principle was applied as an independent rule of delimitation for certain segments of the maritime boundary.[25]

(p. 9) In comparison with the thalweg and common zone systems, the use of the median or equidistance lines was more common in early maritime delimitation practice. Early negotiated examples included the 1809 Peace Treaty of Fredrikshamn between Russia and Sweden and the 1846 Treaty between Great Britain and the United States for the Settlement of the Oregon Boundary, along the channel separating the North American continent and Vancouver Island.[26] The early twentieth century saw further examples of equidistance-based delimitations, including the 1932 Convention between Italy and Turkey for the Delimitation of the Territorial Waters between the Coasts of Anatolia and the Island of Castellorizo and the 1932 Declaration between Denmark and Sweden concerning the Boundary of their Territorial Waters in the Sound (Sund or Oresund).[27]

An early example of a delimitation dispute giving rise to a median line boundary following referral to a third party was the Award of 20 October 1903 in the *Alaska Boundary* case.[28] The case concerned a dispute between Great Britain and the United States regarding the course of the maritime boundary in the Portland Channel and beyond. The United States argued that the boundary should follow the channel of maximum convenience using the thalweg principle, while Great Britain claimed that the boundary should follow a different channel based on historical evidence, and that the thalweg principle was inapplicable in matters of maritime delimitation. The Court of Arbitration rejected the thalweg approach

and found in favour of Great Britain. Both parties and the court agreed that the boundary line through the preferred channel should be based on a median line.

A seminal early maritime delimitation case was the *Grisbådarna* arbitration of 1909 between Norway and Sweden.[29] While it by no means constitutes modern jurisprudence, and is thus excluded from the analysis in Part B of this book, the award remains relevant to the contemporary law in a number of respects and is thus worthy of some attention. The dispute concerned valuable lobster fishing banks located between the Swedish mainland and certain Norwegian islands, which were fished by the nationals of both States. Sweden and Norway requested that the arbitral tribunal (1) decide whether the maritime boundary in the area in dispute had been fixed by a boundary treaty of 1661 and (2) to the extent that it (p. 10) had not, 'determine the boundary line, having regard to the circumstances of fact and the principles of international law'. The tribunal concluded that the area had not been delimited by the 1661 treaty. It considered that, when the Norwegian province of Bohuslän was ceded to Sweden in 1658, 'the radius of maritime territory constituting an inseparable appurtenance of this land territory must have automatically formed a part of that cession'. The tribunal therefore applied the doctrine of intertemporal law, examining what was the state of international law at the time of the cession in order to delimit the boundary. It determined that 'the principle of drawing a median line midway between inhabited islands did not find sufficient support in the law of nations in force in the 17th century', and reached the same conclusion in respect of the thalweg method. The tribunal decided instead that, according to 'the ideas of the 17th century', the boundary was to be delimited by 'drawing a line perpendicular to the general direction of the coast'.

The *Grisbådarna* tribunal calculated that the perpendicular should 'run to the west about 20 degrees to the south'. However, noting that the perpendicular would pass through the northern part of the Grisbådarna banks and recognizing 'the great inconvenience' this would cause, the tribunal determined to adjust the line slightly so as to run in a westerly direction 19 degrees to the south. As a result, the boundary would pass midway between the banks of Grisbådarna and those of Skottegrunde. The tribunal noted that the resulting assignment of the Grisbådarna banks to Sweden was supported by several circumstances. In particular, (1) 'lobster fishing in the shoals of Grisbådarna has been carried out for a much longer time, to a much greater extent, and by a much greater number of fishermen on the part of the subjects of Sweden than on the part of those of Norway'[30] and (2) 'Sweden has performed in the Grisbådarna region, particularly in recent times, many acts based on the conviction that these regions were Swedish, as, for example, the placing of beacons, the survey of the sea and the installation of a lightship'.

The resulting adjusted perpendicular boundary (extending seawards from 'point XX') is illustrated in Figure A1.1.

The *Grisbådarna* award is echoed in a number of the more modern maritime delimitation precedents reviewed in Part B of this book. In particular, its use of a perpendicular and its desire to delimit consistent with the fishing practice of the parties' nationals bears some resemblance to the *Gulf of Maine* case, decided by a Chamber of the ICJ in 1984,[31] and the final-stage adjustment of the line presages the modern concept of 'relevant circumstances'. Indeed, in his 2003 review of maritime (p. 11)

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Figure A1.1: The Grisbådarna award showing the general direction of the coast, the original perpendicular (W20°S), and the adjusted final award (W19°S).

delimitation jurisprudence, Kolb describes the *Grisbådarna* award as 'the first precedent in which a tribunal decided for an equitable maritime delimitation'.[32]

Following the First World War, a number of attempts were made by non-governmental groups to codify the emerging rules of international law related to maritime jurisdiction and the delimitation of overlapping claims. In 1929, the Harvard Law School produced a Draft Convention on Territorial Waters. The Draft Convention included an article on delimitation of territorial waters in straits, providing that, in the absence of special agreement to the contrary, the territorial waters of each State bordering a strait 'extend to the middle of the strait'.[33]

Shortly after the Harvard draft, the international community (through the League of Nations) convened an attempt to codify the international law related to territorial waters at The Hague Codification Conference of 1930. A clear majority of (p. 12) the forty-seven States in attendance supported the principle that the coastal State possessed territorial sovereignty over its territorial sea, the airspace above, and the seabed and subsoil below.[34] Consequently, the Report adopted by the Second Committee at the Hague Conference stated that 'it was recognized that international law attributes to each coastal State sovereignty over a belt of sea around its coasts'.[35] However, the delegates at the Conference failed to adopt any convention because they were unable to reach an agreement on the breadth of the territorial sea.

By the late 1930s, starting in the Gulf of Mexico, advances in exploration and drilling technology were making the hydrocarbon resources of the seabed more accessible. Consequently, coastal States began to assert claims to sovereignty and jurisdiction over the resources of the seabed beyond the territorial sea limit. The Truman Proclamation of 1945 provided a clear and definitive assertion of authority over the resources of the continental shelf.[36] The Proclamation declared that 'the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control'. In what Brownlie correctly describes as 'a remarkable exercise in prescience', the Proclamation proceeded to address the question of the delimitation of competing continental shelf claims in the following terms:

> In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles.

The reference to ‘equitable principles’ was to be taken up subsequently by other coastal States and by the ICJ in the *North Sea Continental Shelf* and subsequent cases, as discussed below. However, even before the Truman Proclamation, the first treaty of delimitation beyond the territorial sea was agreed in 1942 between Great Britain (on behalf of Trinidad) and Venezuela in the Gulf of Paria.[37] Under the treaty, each State recognized the sovereignty of the other over the resources of the continental shelf in the Gulf beyond their (3-mile) territorial waters. The treaty defined a simple, three-legged, line of delimitation, illustrated in Figure A1.2. Each (p. 13)

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Figure A1.2: The Trinidad–Venezuela 1942 continental shelf agreement (Gulf of Paria).

State agreed not to assert any claim to sovereignty or control over those submarine areas which fell on the other State’s side of the agreed boundary line. Unusually in continental shelf delimitation, the treaty provided (at Article 4) that the parties would appoint a mixed commission to ‘take all necessary steps to demarcate the lines…by means of buoys or other visible methods on the surface of the sea’.

Soon after the advent of claims over the continental shelf, coastal States began to assert claims over vast areas of the high seas, far beyond what had been the traditional limits of the territorial sea. On 23 June 1947, Chile declared national sovereignty over the continental shelf off its coasts and islands, and over the water column above, to a distance of 200M.[38] Chile was motivated by several considerations, including the protection of offshore whaling operations. Peru and Ecuador followed suit soon afterwards, on 1 August 1947 and 22 February 1951 respectively, in order to protect domestic fishing from overseas fleets.[39] The year after (p. 14) Ecuador’s 200M claim, Peru and Ecuador agreed the delimitation of an all-purpose maritime boundary extending 200M from their coasts. The boundary followed a simple parallel of latitude, drawn from the point where the parties’ land boundary met the sea at the mouth of the Tumbes River. There followed a series of maritime agreements between Chile, Ecuador, and Peru in respect of the maritime areas off their Pacific coasts, from 1952 onwards.[40]

Several other States followed suit, generating the need for new rules regarding the delimitation of the continental shelf.

Against this background of increasingly assertive State claims to the oceans and their resources, the international community came together once more in an attempt to codify the law and, in particular, to define the limits of State sovereignty and jurisdiction and the basic rules for delimitation of overlapping claims. The International Law Commission, which was established by the UN General Assembly in 1947 to promote the progressive

development of international law and its codification, commenced its examination of the law of the sea at its first session in 1949. Seven years later, at its eighth session, the ILC submitted its 'Articles concerning the Law of the Sea' ('ILC Articles') and accompanying report to the General Assembly.[41] The Articles addressed, *inter alia*, delimitation of the territorial sea between opposite coasts (which, absent agreement or 'special circumstances', was to be 'the median line')[42] and delimitation of the territorial sea between adjacent coasts (which, absent agreement or 'special circumstances', was to be by way of 'the principle of equidistance').[43] It also made identical provision for the delimitation of 'continental shelf' claims between opposite and adjacent coasts (i.e. with reference to 'the median line' and 'the principle of equidistance', respectively, in each case absent agreement or 'special circumstances').[44] In short, therefore, the ILC Articles stated a clear preference for an equidistance-based approach to territorial sea and continental shelf delimitation, absent agreement or special circumstances.

In its report, the ILC recommended that the General Assembly summon an international conference of plenipotentiaries to examine the law of the sea 'taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem', and to embody the results of its work in one or more international conventions.

(p. 15) The First United Nations Conference on the Law the Sea was accordingly convened in Geneva on 24 February 1958 (the so-called 'UNCLOS I' conference). Eighty-six States participated in the Conference, which culminated in the adoption of four conventions. These included two multilateral treaties that codified, for the first time, rules for the delimitation of overlapping territorial sea and continental shelf claims: namely, the Convention on the Territorial Sea and the Contiguous Zone ('1958 CTS') and the Convention on the Continental Shelf ('1958 CCS').

The 1958 CTS, which made no provision for the breadth of the territorial sea, dealt with territorial sea delimitation between opposite and adjacent coasts in a single article which, like the ILC Articles, gave precedence to the rule of equidistance. Article 12 of the 1958 CTS provided that neither State is entitled 'to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured'.[45] This rule would only be inapplicable where it was 'necessary by reason of historic title or other special circumstances' to delimit the territorial sea differently.

The 1958 CCS codified the first international legal regime of the continental shelf. Article 1 of the CCS, which has now been superseded by Article 76 of UNCLOS (see section 1IIIb 'Continental shelf' below), defined the continental shelf as 'the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas'.[46] It embodied recognition of the international community of the sovereign rights of coastal States over the continental shelf for the purposes of exploring and exploiting its natural resources.

On delimitation, the 1958 CCS adopted verbatim the text formulated in the ILC Articles. In the absence of agreement or 'special circumstances', Article 6(1) thus provided that the continental shelf boundary between opposite States was the median line, while Article 6(2) provided that the continental shelf boundary between adjacent coasts was to be determined by application of 'the principle of equidistance'.[47] As the Court of Arbitration observed in the 1977 *UK/France Continental Shelf* case, Articles 6(1) and 6(2) were 'essentially the same', albeit the Court of Arbitration also correctly noted that there was a greater risk that

equidistance may produce an inequitable delimitation in the case of adjacent coasts than in the case of opposite coasts.[48](p. 16)

III. The Relevant Zones of Maritime Sovereignty and Jurisdiction under the Modern Law

As Tanaka observes, the legal framework established by the 1958 Conventions 'very soon came to encounter serious challenges'. He identifies four factors in particular that led the international community to recognize an urgent need to review the 1958 Conventions: first, the trend towards extended claims to national jurisdiction over the water column and its resources, with some twenty coastal States having by the 1970s claimed exclusive fishery zones beyond the territorial sea; second, developments in seabed mining technology, which threatened to encourage coastal States to extend their legal continental shelf towards the deep seabed on the basis of the 'exploitability test' set out in Article 1 of the 1958 CCS; third, the protection of the marine environment, which had previously attracted little attention; and fourth, 'structural changes of the international community due to the independence of former colonised regions in the 1960s'.[49]

On 17 December 1970, the UN General Assembly convened a conference on the law of the sea (the so-called 'UNCLOS III' conference[50]), the first session of which took place in New York in December 1973. The eleven sessions of the UNCLOS III conference took place between 1973 and 1982 and the participants included all member States of the United Nations and its specialized agencies. The mandate given to the conference by the General Assembly could hardly have been wider: 'to adopt a convention dealing with all matters relating to the law of the sea'.[51] The resulting UNCLOS text, which runs to 320 articles and nine annexes, is one of the most important and comprehensive multilateral treaties in history. Tanaka states that it 'marked the beginning of a new era in the international law of the sea'.[52] UNCLOS was adopted by 130 States signatories on 30 April 1982 and, as at the time of writing, has 167 States parties (the most recent being the State of Palestine). While a number of those States remain also parties to the 1958 Conventions, Article 311 provides that UNCLOS 'shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958'.

UNCLOS identifies the three principal zones of maritime sovereignty and jurisdiction that are subject to the modern law of maritime boundary delimitation: the territorial sea (regulated by Part II of UNCLOS), the exclusive economic zone (or 'EEZ') (regulated by Part V), and the continental shelf (regulated by Part VI). The extent of, and relationship between, these zones is illustrated in Figure A1.3. The (p. 17)

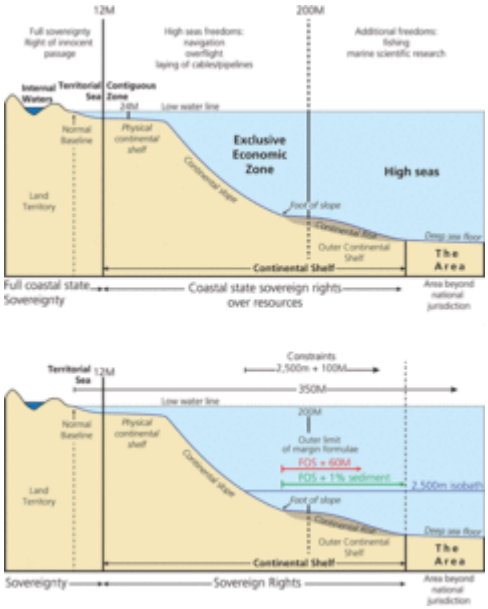

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Figure A1.3: (i) Maritime zones under UNCLOS; (ii) Definition of the continental shelf under Article 76.

relevant provisions relating to each will be summarized in turn, followed by a short discussion of the 'régime of islands' under Part VIII of UNCLOS.

a. Territorial sea

The territorial sea (along with the contiguous zone) is regulated by Part II of UNCLOS. Article 2(1) provides that: 'the sovereignty of a State extends beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to a belt of sea adjacent to its coast, described as the (p. 18) territorial sea'. Article 2(2) provides that this sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil. This text duplicates equivalent provisions contained in the 1958 CTS (with the exception of the references to archipelagic status, now governed by Part IV of UNCLOS). However, for the first time, UNCLOS sets out a limit on the territorial sea: Article 3 provides that a coastal State has the right to establish a territorial sea not exceeding 12M, measured from baselines determined in accordance with the Convention.[53]

All told, the UNCLOS provisions demonstrate a definitive acceptance by States of sovereignty over the territorial sea and an end to the historical debate on the juridical character and the extent of the territorial sea.[54] Nevertheless, the sovereign rights of the coastal State in the territorial sea are not absolute, being subject to certain restrictions under UNCLOS.[55] In particular, pursuant to Articles 17 and 24, the ships of all States enjoy the right of innocent passage through the territorial sea.

b. Continental shelf

As Churchill and Lowe observe, during the twentieth century the law developed from an initial recognition that rights in the seabed of the high seas could be acquired by effective occupation to an acceptance that States had certain inherent sovereign rights over the seabed adjacent to the territorial sea.[56] This process of development culminated in the codification of a comprehensive continental shelf regime in Part VI of UNCLOS.

A substantial theme of debate throughout UNCLOS III was the question of what should be the outer limit of the juridical continental shelf, and thus the outer limit of coastal State sovereign rights and jurisdiction over the resources of the seabed. There was widespread agreement that the establishment of a definitive international regime for the seabed would require a precise definition of what are the outer limits of the juridical continental shelf. A

major division arose between those (narrow margin) States that wanted to base outer limits on a criterion of distance from the coast and those (wide margin) States wishing to introduce geomorphological criteria.[57] At the fourth session of the UNCLOS III conference in 1976, Ireland proposed a compromise definition that incorporated references both to (p. 19) distance and geomorphological criteria.[58] The Irish proposal provided the basis for much of what was to become Article 76 of UNCLOS.

Paragraph (1) of Article 76 sets out the modern juridical definition of the continental shelf:

> The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

A coastal State is thus entitled to a continental shelf of 200M regardless of the geological or geomorphological configuration of the seabed extending from its coast. In other words, physical natural prolongation does not form the basis of continental shelf rights within 200M under modern international law.[59] However, where the geological or geomorphological configuration of the seabed allows, the coastal State may be entitled to a continental shelf beyond 200M, based on the natural prolongation of its land territory. In other words, physical natural prolongation can form the basis of continental shelf rights in areas beyond 200M from the coast.

Paragraph (3) of Article 76 defines the continental margin as comprising ‘the submerged prolongation of the land mass of the coastal State and consists of the seabed and subsoil of the [physical] shelf, slope and rise. It does not include the deep sea floor with its oceanic ridges or the subsoil thereof’. The problem then became how to define the extent of the continental rise, which is not easily identified (and not always physically present). Two solutions were proposed at UNCLOS III. The first was a suggestion from Gardiner, an Irish geologist, who proposed that the outer edge of the margin should be delineated by a line representing the outermost points where the thickness of sedimentary rocks is at least 1 per cent of the distance from the foot of the slope (known as the ‘Gardiner formula’). This was ultimately adopted as sub-paragraph (4)(a)(i) of Article 76. The second solution was proposed by Hedberg, a US petroleum geologist, who proposed that the outer edge of the margin should be defined at a fixed distance, 60M, from the foot of the continental slope (known as the ‘Hedberg formula’). This was ultimately adopted as sub-paragraph (4)(a)(ii) of Article 76.

Sub-paragraph (4)(b) provides that, in the absence of evidence to the contrary, the foot of the continental slope for the purposes of sub-paragraphs (a)(i) and (ii) shall (p. 20) be determined as the point of maximum change in the gradient at its base. Paragraph (5) sets constraints to the outer limits of the juridical continental shelf at 350M from the territorial sea baselines or 100M from the 2,500 metre isobath, except for submarine ridges, which are restricted to 350M under paragraph (6). The final outer limit is to be defined by a series of fixed points not more than 60M apart, each of which must satisfy one or other of the criteria above (Figure A1.3 (ii) above).

This combination of formulae, limits, and constraints, while providing certainty as to the outer limit of the juridical continental shelf, imposes on coastal States wishing to establish binding outer limits beyond 200M an onerous and expensive task of scientific data collection and analysis, especially the acquisition of bathymetric and seismic data. The precise technical requirements for the establishment of outer shelf entitlement are set out in the CLCS’s ‘Scientific and Technical Guidelines’.[60] The difficulties of interpretation and

application of Article 76 and the Guidelines have presented the CLCS with a complex and lengthy task in assessing coastal States' outer shelf claims.

The new juridical definition of the continental shelf under Article 76 of UNCLOS did, however, lay to rest the test of 'exploitability' that had existed under Article 1 of the 1958 CCS, which had threatened with the advance of technology to engulf the entire ocean floor as continental shelf space subject to coastal State jurisdiction. As a result of the establishment of firm outer limits under Article 76, vast areas of deep ocean floor and their resources, beyond the limits of the juridical shelf, have been safeguarded as 'the common heritage of mankind'.[61]

In its 2012 judgment in *Nicaragua/Colombia*, the ICJ confirmed that the definition of the continental shelf under Article 76(1) of UNCLOS represents customary international law.[62] A 200M 'distance-based' continental shelf therefore exists automatically by operation of law and requires no action or claim on the part of the coastal State, whether or not it is an UNCLOS State party. In contrast, where a coastal State party to UNCLOS wishes to claim continental shelf rights beyond 200M, it must submit its proposed outer limits to the Commission on the Limits of the Continental Shelf ('CLCS'), established by Annex II of UNCLOS. Any claim to an outer limit beyond 200M does not become final and binding as against other UNCLOS States parties unless and until established on the basis of recommendations from the CLCS in accordance with the procedure set out in Article 76.[63]

(p. 21) Article 77 outlines the rights of the coastal State over the continental shelf. Article 77(1) provides that the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. The term 'sovereign rights' in this context therefore does not allow the exercise of complete authority over the shelf to the exclusion of other States. Rather, the rights of the coastal State extend only to activities related to exploring the shelf and exploiting its natural resources (principally, hydrocarbons and other minerals but, in addition, the 'living organisms belonging to sedentary spaces'). Article 77(2) provides that continental shelf rights are, however, exclusive in the sense that if the coastal State does not exercise them, no other State is entitled to do so.

Importantly, Article 77(3) confirms that the rights of the coastal State over the continental shelf do not depend on any form of occupation or proclamation. This restates the position under Article 2(3) of the 1958 CCS and customary international law. As the 1969 judgment of the ICJ stated in the *North Sea Continental Shelf* cases, the rights of the coastal State in respect of the continental shelf are 'inherent' and 'exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land'.[64]

Part VI sets out a number of restrictions on the rights of the coastal State over its continental shelf. For example, Article 78(2) provides that the exercise of sovereign rights over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States. Further, other States retain certain rights over the continental shelf. For example, under Article 79(1), all States are entitled to lay submarine cables or pipelines over the continental shelf. In addition, Article 82 requires coastal States exploiting the shelf beyond 200M to make payments or contributions in kind, to be distributed via the International Seabed Authority to other States parties, particularly the least developed and land-locked States parties.[65]

c. Exclusive economic zone ('EEZ')

The term 'EEZ' was introduced by Kenya in the UN Seabed Committee in 1972.[66] The concept of an EEZ has origins in the Declaration of the Organization of African Unity adopted at Addis Ababa in 1973 and endorsed by the Declarations (p. 22) of the League of Arab States in 1973 and 1974.[67] The broader concept of sovereign rights over the water column beyond the narrow belt of territorial sea can also be traced back to the claims made

by certain Latin American States from the late 1940s, referred to above. By the early 1970s, many coastal States (including a number of island States) in Latin America and the Caribbean asserted claims to an extensive ‘patrimonial sea’, culminating in a number of regional declarations.[68]

The modern law related to the EEZ concept is set out in Part V of UNCLOS. Article 55 provides that the EEZ is ‘an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention’.[69] Article 56(1) states that, in the EEZ, the coastal State has ‘sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the Zone, such as the production of energy from water, currents and winds’. Article 56(3) provides that EEZ rights with regard to the seabed and subsoil shall be exercised in accordance with the continental shelf regime established by Part VI of UNCLOS.

Article 57 provides that the EEZ shall not extend beyond 200M from the territorial sea baseline. Consequently, in many parts of the world, the outer (200M) limit of the EEZ coincides with the outer limit of the juridical continental shelf. However, in places where the continental margin extends beyond 200M, coastal State continental shelf rights will extend further seawards than their corresponding rights over the EEZ. This can give rise to significant practical issues through the creation of so-called ‘grey zones’ of maritime sovereignty and jurisdiction, discussed further in Part C of this book.

The EEZ regime created by Part V of UNCLOS represents a balancing of competing interests between those States wishing to preserve high seas freedoms to the fullest extent possible and those States wishing to ensure that others would not plunder natural resources in waters adjacent to their coasts. As a result, the sovereign rights of the coastal State in the EEZ are variously limited. For example, (p. 23) Article 58 of UNCLOS preserves the rights of all States regarding non-resource-related activities in the EEZ, including navigation, overflight, the laying of submarine cables and pipelines, and activities associated with the operation of ships and aircraft. Articles 61 to 71 make detailed provision about exploitation of the living natural resources of the EEZ, requiring the coastal State to determine the ‘allowable catch’, promote ‘optimum utilization’, and grant access to other States to the ‘surplus of the allowable catch’. All in all, as Kwiatkowska has observed, the EEZ is a multifunctional zone in which the coastal State and other States are entitled to exercise rights with a specific function.[70]

In contrast to the ICJ’s remarks about the continental shelf in the *North Sea Continental Shelf* cases, the coastal State’s sovereign rights in the EEZ are not ‘inherent’. A State must expressly declare the existence of an EEZ to be entitled to exercise sovereign rights over the resources therein, and is required to give ‘due publicity’ to the outer limits of its EEZ.[71]

The declaration of an EEZ by a large number of coastal States has meant that the concept is now considered part of customary law (thus extending beyond the States parties to UNCLOS).[72] This was confirmed by the ICJ in the *Libya/Malta* case, where the court noted that ‘the institution of the exclusive economic zone…is shown by the practice of states to have become a part of customary law.’[73]

d. The ‘régime of islands’ under Part VIII of UNCLOS

Part VIII of UNCLOS (comprising just one provision—Article 121) regulates the maritime zones that can be claimed by or from an ‘island’. Pursuant to subparagraph (1) of Article 121, an island is ‘a naturally formed area of land, surrounded by water, which is above water at high tide’. It is thus different from a low-tide elevation, defined at Article 13 as ‘a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide’.

Subparagraphs (2) and (3) of Article 121 then distinguish between two types of island feature: first, ‘rocks which cannot sustain human habitation or economic life (p. 24) of their own’ and, second, all other islands. Whereas ‘rocks’ generate a territorial sea but cannot generate any EEZ or continental shelf, other islands can generate territorial sea, EEZ, and continental shelf in exactly the same way as any other land territory. Low-tide elevations, on the other hand, generate no self-standing maritime entitlements of their own.

Therefore, as observed by the ICJ in the *Nicaragua/Colombia* case, all rocks, however small and insignificant, can generate a territorial sea of 12M from their baselines.[74] By contrast, any island feature that is capable of sustaining human habitation or economic life of its own will (subject to the overlapping claims of any neighbouring State) generate full EEZ and continental shelf rights. As observed by the Arbitral Tribunal in the *St Pierre and Miquelon* case, such rights are vested in island features regardless of their political status (e.g. as overseas territories of States principally located in another part of the world).[75]

The substantial difference between the maritime entitlements of low-tide elevations, ‘rocks’, and other island features and Article 121 of UNCLOS has given rise to a series of disputes around the world as to the legal classification of small offshore features. Well-known examples include the disputes that have arisen in connection with multiple small features located in the South China Sea and the small feature in the Caribbean Sea called ‘Aves Island’ (by Venezuela) or ‘Bird Rock’ (by Dominica). To date, while international courts and tribunals have willingly distinguished between low-tide elevations and island features in maritime delimitation disputes,[76] they have provided little or no practical guidance on how to apply the Article 121 distinction to specific features.[77] It is to be hoped that such guidance will, however, be forthcoming in the future.[78]

IV. The Basis of the Modern Law of Delimitation: Articles 15, 74, and 83 of UNCLOS

Articles 15, 74, and 83 of UNCLOS codify the modern law on the delimitation of overlapping entitlements to territorial sea, EEZ, and continental shelf, respectively. (p. 25) As such, they will provide the starting point for any modern delimitation exercise. This is the case even in respect of non-States parties to UNCLOS because, as confirmed by the ICJ in, *inter alia*, the *Qatar/Bahrain* case (in respect of Article 15) and the *Jan Mayen* case (in respect of Articles 74 and 83), the delimitation provisions of UNCLOS represent rules of customary international law.

Article 15 of UNCLOS provides:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however,

> where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

As the ICJ observed in the *Qatar/Bahrain* case, Article 15 of UNCLOS is 'virtually identical' to Article 12 of the 1958 CTS.

By contrast, Articles 74 and 83 of UNCLOS, which make identical provision as regards the delimitation of EEZ and continental shelf areas, were new. They provide:

> 1. The delimitation of the [exclusive economic zone (Article 74)/continental shelf (Article 83)] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
>
> 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 cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardise 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 [exclusive economic zone (Article 74)/continental shelf (Article 83)] shall be determined in accordance with the provisions of that agreement.

Articles 74 and 83 reflect a legal and diplomatic compromise reached at the UNCLOS III conference between two groups of States with very difficult legal and philosophical views of maritime delimitation: first, those that advocated EEZ and continental shelf delimitation based upon the principle of equidistance (subject to an exception for 'special circumstances'); and, second, those that advocated delimitation based upon the more flexible (and arguably more nebulous) doctrine of 'equitable principles'.[79] While each group acknowledged that delimitation by (p. 26) agreement was always the most satisfactory way of resolving overlapping claims, they were singularly unable to agree what should be the guiding principles and methodology for delimitation in the absence of agreement. The matter became somewhat intractable during the UNCLOS negotiations. Thus, for example, at the seventh session of the UNCLOS III conference, held in 1978, a group of twenty States proposed an EEZ and continental shelf delimitation formula based on 'the median or equidistance line',[80] only to receive a counter-proposal by twenty-seven States based on delimitation 'in accordance with equitable principles'.[81]

At the tenth session, held in 1981, the newly elected President of the Conference, Tommy T. B. Koh (Singapore), undertook direct negotiations with the delegates of Ireland and Spain, as representatives of the two opposing delimitation groups. Following those negotiations, he submitted a new compromise text focused on delimitation 'by agreement on the basis of international law' and 'in order to achieve an equitable solution'. The proposal thus focused on the *objective* of the delimitation process, rather than the contested question of the *methodology* to be used. It received the support of both delimitation groups and was incorporated into Articles 74 and 83 of the Convention.[82]

The compromise wording of Articles 74 and 83, described by the arbitral tribunal in the *Barbados/Trinidad* case as an 'apparently simple and imprecise formula',[83] deliberately omitted any discussion of the methodology to be used in the delimitation of EEZ and continental shelf boundaries. It has therefore been left to subsequent State practice (in the form of delimitation treaties), learned writers, and, much more importantly, the jurisprudence of international courts and tribunals, to provide much-needed guidance about the methodologies to be applied in pursuit of the pervasive objective of an 'equitable solution'. As the ITLOS tribunal held in its 2012 judgment in the *Bangladesh/Myanmar* case, 'international courts and tribunals have developed a body of case law on maritime delimitation which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of methods employed to that end'.[84]

(p. 27) Such has been the importance of the modern case law in defining the method or methods to be used in maritime delimitation that the arbitral tribunal in the *Bangladesh/India* case declared, in its 2014 award, that the case law constitutes an '*acquis judiciare*, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 74 and 83 of the Convention'.[85] That case law, which 'adds flesh to the bones' of Articles 74 and 83, and thus forms the *corpus* of the modern law of international maritime boundary delimitation, is summarized in Part A.2 below, and analyzed in detail in Part B of this book.

V. 'The Land Dominates the Sea'

Before turning to questions of delimitation methodology, however, there is one overriding principle that must be acknowledged from the outset. That principle pervades the law of the sea generally, and the modern law and practice of maritime delimitation in particular. Indeed, every commonly used method of maritime delimitation relies upon it. The principle is that, in the words of the ICJ in the *North Sea Continental Shelf* cases, 'the land dominates the sea'.

The land dominates the sea because, as the court observed in its 1969 judgment, 'the land is the legal source of the power which a State may exercise over territorial extensions to seaward'.[86] This is as true, if not more so, under UNCLOS as it was under the law as it stood in 1969. In particular, the limits of sovereign rights in the territorial sea (Article 3), EEZ (Article 57), and continental shelf (Article 76) are all defined with reference to distances from the baselines from which the breadth of the territorial sea is measured.[87] As explained in Part, A Chapter 2 below, those baselines are, by definition, dictated by the geography of the coastal State, whether it be a continental mainland State, an island State, or an archipelago.

The principle that the land dominates the sea has been confirmed repeatedly by international courts and tribunals since 1969 in the context of maritime delimitation. This has often been by reference to the overriding importance of the 'geographical configuration' of the area to be delimited (and, in particular, the geographical configuration of the relevant coasts). Thus, for example, in the *Cameroon/Nigeria* case, the ICJ observed that '[t]he geographical configuration of the maritime areas that the Court is called upon to delimit is (p. 28) a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation'.[88]

The dominant role played by geographical configuration and coastlines in maritime delimitation has had a number of significant tangible impacts on delimitation process and methodology. Six impacts, in particular, stand out:

1. the need to resolve land boundary, island, or other sovereignty disputes related to land territory as a necessary precursor to any maritime delimitation exercise; [89]

2. the importance of identifying the coasts and areas that are 'relevant' to the delimitation, i.e. those coasts that generate overlapping claims in the disputed area, because, as the ICJ observed in the *Romania/Ukraine* case, 'the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned'; [90]

3. the need to classify any small territorial features (e.g. islands, rocks, low-tide elevations) at the outset of the delimitation process because, as described above, such classification will have a substantial impact on the potential maritime entitlement of such features; [91]

4. the distinction drawn between 'opposite' and 'adjacent' coasts, which can have a substantial effect upon any given delimitation exercise; [92]

5. the central role played by coastal geography in determining the delimitation methodology to be employed in any given situation (and, in particular, in determining whether there should be any deviation from the standard three-stage approach to delimitation, described in Part, A Chapter 2 below); [93] and

(p. 29) 6. the overriding influence of geographical considerations throughout the standard 'three-stage approach' to delimitation under the modern law (i.e. in the construction of a provisional equidistance line, the consideration of relevant or special circumstances and the application of any final 'proportionality check'). [94]

Footnotes:

1 Grotius, *The Freedom of the Seas* (Magoffin trans, Liberty Fund, Inc.), p. 68 [trans. of *Mare Liberum* (first published 1609)].

2 Tanja, G. J., *The Legal Determination of International Maritime Boundaries* (Kluwer Law, 1990), p. 16.

3 Weil, P., *The Law of Maritime Delimitation—Reflections* (Cambridge Grotius Publications Ltd, 1989), p. 47.

4 Crawford, J., *Brownlie's Principles of Public International Law* (Oxford University Press, 2012), p. 281 and accompanying global map at p. 282.

5 Weil, P., *The Law of Maritime Delimitation—Reflections* (Cambridge Grotius Publications Ltd, 1989), p. 3.

6 1833 *UNTS* 3; 21 *ILM* 1261 (1982); At the time of writing, there are a number of notable absences from the list of States parties to UNCLOS, including the United States, Turkey, Colombia, and Venezuela. Nevertheless, the rules of delimitation set out in UNCLOS are universally recognized as reflecting rules of customary international law that thereby bind non-parties to the Convention.

7 *Barbados v. Trinidad and Tobago*, Award (2006), para. 222.

[8] Weil, P., *The Law of Maritime Delimitation—Reflections* (Cambridge Grotius Publications Ltd, 1989), p. 8. To similar effect, see the comments of the International Court of Justice in *Libya/Malta*: ICJ Reports 1985 at p. 13.

[9] *Bangladesh v. India*, Award (2014), para. 339.

[10] UN Charter, Art. 2(1).

[11] Weil, P., *The Law of Maritime Delimitation—Reflections* (Cambridge Grotius Publications Ltd, 1989), p. 5.

[12] *R. v. Secretary of State for the Home Department, ex p. Daly* [2001] 2 WLR 1622, HL.

[13] Selden, J., *Mare Clausum* (1635), Book I ch. Xxii, pp. 136–45.

[14] Grotius, H., *The Freedom of the Seas* (Magoffin trans, Liberty Fund, Inc.) [trans. of *Mare Liberum* (first published 1609)].

[15] Grotius, H., *On the Law of War and Peace* (Campbell trans., Kitchener) [trans. of *De Jure Belli ac Pacis* (first published 1625)].

[16] Bijnkershoek, C., *De Dominio Maris Dissertatio* (1703), reproduced in Scott, J. B. (ed.), *Classics of International Law*, No. 11 (Oxford University Press, 1923).

[17] Adherence to the cannon shot rule and 3-mile territorial sea limit was not, however, universal. For example, from the mid eighteenth century, several Scandinavian countries claimed sovereign rights over maritime space up to 4 miles off their coasts. Other countries such as France and Italy claimed varying maritime limits for different purposes. See further Churchill, R. R. and Lowe, A. V., *Law of the Sea*, (Manchester University Press, 1999), p. 78 and O'Connell, D. P., *The International Law of the Sea*, Vol. 1 (Oxford University Press, 1983), p. 165.

[18] *Grisbådarna Arbitration* (*Norway v. Sweden*), Award of 23 October 1909, 11 RIAA 147.

[19] Tanaka, Y., *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart Publishing, 2006), pp. 19–32.

[20] Aasen, P. J., 'The Law of Maritime Delimitation and the Russian-Norwegian Maritime Boundary Dispute', *Fridtjof Nansens Institute* FNI Report 1/2010, p. 9.

[21] Tanaka, *Predictability and Flexibility*, pp. 31–2.

[22] Bluntschli, J. C., *Le droit international codifié*, translated by M. C. Lardy (Librairie Guillaumin, 1881), p. 190. Rivier, A., *Principes du droit des gens*, Vol. I (Librairie de droit et de jurisprudence, 1896), p. 64. Tanaka observes that, strictly speaking, the 'common zone system' cannot be regarded as a delimitation method, as it does not delimit overlapping maritime claims.

[23] For discussion about alternative meanings of the term 'thalweg' in delimitation treaties, see the *Kasikili/Sedudu Island case (Botswana v. Namibia)*: ICJ Reports 1999, pp. 1061–2, paras 24–5.

[24] Jennings, R. and Watts, A., *Oppenheim's International Law*, Vol. 1 (9th edn, Oxford University Press, 2008), pp. 664–5; Tanaka, Y., *The International Law of the Sea* (Cambridge University Press, 2012), pp. 28–31.

[25] Protocol of 3 September 1921 concerning the Delimitation of the Boundary between Denmark and Germany, cf. Executive Order No. 497 of 21 December 1923. See also Convention between the Republic of Finland and the Kingdom of Norway concerning the frontier between the Province of Finmark and the Territory of Petsamo (28 April 1924).

26 (1845–46) 34 British and Foreign State Papers 14. In 1871, the German Emperor Wilhelm I arbitrated a dispute between the parties and again adopted a median line solution.

27 Convention between Italy and Turkey for the Delimitation of the Territorial Waters Between the Coasts of Anatolia and the Island of Castellorizo, 28 December 1932; Declaration between the Danish and Swedish Governments Concerning the Boundary of their Territorial Waters in the Sound (Stockholm, 30 January 1932), also cited in Tanaka, above. See also Kariotis, T. C., *Greece and the Law of the Sea* (Martinus Nijhoff, 1997), pp. 141–2.

28 15 Reports of International Arbitral Awards 481–540.

29 *Grisbådarna Arbitration* (*Norway v. Sweden*), Award of 23 October 1909, 11 RIAA 147.

30 Notably, the tribunal observed that this conclusion was supported by the depositions and declarations of witnesses. By contrast, the tribunal found that Norwegian fishermen had 'almost always participated in lobster fishing in the Skottegrunde in a comparatively more effective manner than at Grisbådarna'.

31 Part B, chapter 6.

32 Kolb, R., *Case Law on Equitable Maritime Delimitation: Digest and Commentaries* (Martinus Nijhoff, 2003), p. 16. Moreover, as former ITLOS Judge David Anderson has noted, the award was notable from a procedural perspective, not least because the tribunal rendered its decision just five days after the close of hearings: Anderson, D., 'Grisbadarna Revisited' in *Modern Law of the Sea: Selected Essays* (Martinus Nijhoff, 2008), pp. 156–7.

33 Article 9, Draft Convention on Territorial Waters, prepared by the Research in International Law of the Harvard Law School, 23 *American Journal of International Law* (1929, Special Supplement), pp. 243–4.

34 This marked a significant shift since the drafting of a resolution on the territorial sea at the *Institut de Droit International* in 1894, where the proposition that the coastal State had sovereignty over the territorial sea was opposed by several delegates. See O'Connell, D. P., *The International Law of the Sea*, Vol. 1 (Oxford University Press, 1983), p. 68. The text adopted on 31 March 1894 referred instead to '*un droit de souveraineté*' in the territorial sea: *Annuaire de l'Institut de Droit International* (1928–31) 517.

35 League of Nations, Report adopted by the Second Committee on April 10, 1930, reproduced in Rosenne, S. (ed.), *League of Nations Conference for the Codification of International Law 1930*, Vol. 4 (New York, Oceana, 1975), p. 1411.

36 Proclamation on US Policy regarding Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 10 Fed. Reg. 12305 (*1945*), [reproduced at Annex X below].

37 Treaty relating to Submarine Areas in the Gulf of Paria, 205 UNTS 121.

38 Presidential Declaration Concerning Continental Shelf of 23 June 1947, *El Mercurio*, Santiago de Chile, 29 June 1947.

39 Presidential decree No. 781 of 1 August 1947, UN Doc. ST/LEG/SER.B/1 (Peru); Maritime Hunting and Fishing Law, Decree No. 003, 22 February 1951 (Ecuador).

40 For further discussion of those agreements and their legal effect, see the ICJ's 2014 judgment in *Peru/Chile*, analyzed and illustrated in Part, B Chapter 22 below.

41 Yearbook of the International Law Commission, 1956, Vol. II, pp. 265–301.

42 ILC Articles, Art. 12.

[43] ILC Articles, Art. 14.

[44] ILC Articles, Art. 72.

[45] Convention on the Territorial Sea and Contiguous Zone of 1958, 516 *UNTS* 205, Art. 12.

[46] Convention on the Continental Shelf, 1958, 499 *UNTS* 311, Art. 1.

[47] Convention on the Continental Shelf, 1958, 499 *UNTS* 311, Art. 6.

[48] See discussion of opposite and adjacent coasts at Section 2 II, and UK/France at Part, B Chapter 3.

[49] Tanaka, Y., *The International Law of the Sea* (Cambridge University Press, 2012), pp. 24–5.

[50] The so-called UNCLOS II conference was convened at Geneva in 1960 in order to discuss the outer limit of the territorial sea and fisheries zone, but failed to reach any agreement.

[51] UN General Assembly Resolution 3067 [XXVIII] of 16 November 1973.

[52] Tanaka, Y., *The International Law of the Sea* (Cambridge University Press, 2012), p. 29.

[53] See Part, A Chapter 2, Ic 'The 'baseline'.

[54] Lucchini, L. and Voelckel, M., *Droit de la Mer*, Vol. I (Pédone, 1990), pp. 164–7.

[55] UNCLOS, Art. 2(3).

[56] Churchill, R. and Lowe, A. V., *The Law of the Sea* (3rd edn, Manchester University Press, 1999), p. 121.

[57] Moore, J. N., Nordquist, M. H., Nandan, S. N., and Rosenne, S. (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, University of Virginia (the 'Virginia Commentaries'), Vol. II (Martinus Nijhoff, 1993), part VI, para 76.3, p. 842.

[58] Notes of the 75th information meeting of the Second Committee (15 April 1976). The text proposed by Ireland was referred to as the 'Irish formula'.

[59] See, e.g., *Libya/Malta*, paras. 34–40, which confirmed also that physical natural prolongation is no longer a 'relevant circumstance' for continental shelf delimitation within 200 M.

[60] Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, 13 May 1999 (CLCS/11), available from <http://www.un.org/depts/los/clcs_new/documents/Guidelines/CLCS_11.htm>.

[61] UNCLOS created an entirely separate legal regime over the deep ocean floor beyond the outer limits of coastal State jurisdiction (defined as 'the Area'), which is regulated by the International Seabed Authority under Pt XI of UNCLOS.

[62] *Nicaragua/Colombia*, para. 118.

[63] Report of the International Law Association Committee on Legal Issues of the Outer Continental Shelf (2006), Conclusion No. 11 and explanatory note, 16–17. Notably, non-States parties to UNCLOS are also entitled as a matter of customary international law to claim continental shelf rights beyond 200M, as the United States has done in, for example, the Gulf of Mexico. However, the CLCS has no jurisdiction in relation to the claims of such States, which are therefore not final and binding as against other coastal States absent agreement.

[64] *North Sea Continental Shelf* cases, para. 19.

[65] Developing States that are not importers of the resource concerned are exempt from making such payments as contributions under Art. 82(3).

[66] Draft Articles on Exclusive Economic Zone Concept (Kenya), Report of the Committee on the Peaceful Use of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, UN Doc. A/8721 (1972).

[67] Akintoba, T., *African States and Contemporary International Law. A Case Study of the 1982 Convention on the Law of the Sea and the Exclusive Economic Zone* (Martinus Nijhoff, 1996); Churchill, R. and Lowe, A. V., *The Law of the Sea* (3rd edn, Manchester University Press, 1999), p. 160.

[68] See, e.g., the Montevideo Declaration on the Law of the Sea, 8 May 1970, 9 *ILM* 1970, p. 1081; Declaration of Latin American States on the Law of the Sea ('Lima Declaration'), 8 August 1970, 10 *ILM* 1971, p. 207; and the Santo Domingo Declaration, 1972, 11 *ILM* 1972, p. 892.

[69] UNCLOS, Art. 55.

[70] Kwiatkowska, B., *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Martinus Nijhoff, 1989), p. 4.

[71] UNCLOS, Art. 75.

[72] Not all UNCLOS States Parties have declared an EEZ, although some that have not have enacted national legislation establishing exclusive fishing zones beyond the territorial sea. The UK did not enact legislation declaring an EEZ until 2013. The US, by contrast, has declared an EEZ, although it is not a State party to UNCLOS. The *Gulf of Maine* case (discussed in Part B, below) provides an example of a maritime delimitation between exclusive fishing zones rather than EEZs. At the time of the signature of the treaty in which the US and Canada agreed to submit their dispute regarding the delimitation to the ICJ, both States had claimed 200M fishing zones. Notably, however, virtually all of the non-UNCLOS maritime States have declared EEZs (Colombia, El Salvador, Israel, North Korea, Syria, Turkey, UAE, USA, and Venezuela have all done so).

[73] Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 ICJ Reports 13.

[74] For an extreme example of a minute rock feature generating a full territorial sea entitlement around it, see discussion of the feature labelled 'QS 32' (and surrounding low-tide elevations) in the *Nicaragua/Colombia* case, at paras. 182–3. The ICJ further confirmed that the 'régime of islands' under Art. 121 constitutes customary international law: see paras. 132–6.

[75] *St Pierre and Miquelon*, para. 49.

[76] See, e.g., the ICJ's analysis of various small features in its *Qatar/Bahrain* judgment (2001).

[77] As shown, e.g., by the ICJ's reluctance to classify Serpents' Island as a 'rock' or otherwise in *Romania/Ukraine* (2009).

[78] In the UNCLOS Annex VII arbitration between the Philippines and China, which is pending at the time of writing, the Philippines has requested the tribunal to, *inter alia*, determine whether certain of the disputed features of the South China Sea are islands, low-tide elevations, or submerged banks, and whether they are capable of generating entitlement to maritime zones greater than 12M.

[79] See the Virginia Commentaries, which notes that the discussion at the Sixth Session of the UNCLOS III conference was 'equally divided' as between the two approaches. Some of the most vociferous proponents of each approach were adverse to one another in extant delimitation disputes at the time. For example, while Turkey was a strong advocate at the

UNCLOS III conference of the equitable principles approach, Greece was an equally strong advocate of the equidistance approach.

80 The twenty States proposing an equidistance-based formula comprised Bahamas, Barbados, Canada, Colombia, Cyprus, Democratic Yemen, Denmark, Gambia, Greece, Guyana, Italy, Japan, Kuwait, Malta, Norway, Spain, Sweden, United Arab Emirates, United Kingdom, and Yugoslavia.

81 The twenty-seven States proposing delimitation based on 'equitable principles' comprised Algeria, Argentina, Bangladesh, Benin, Congo, France, Iraq, Ireland, Ivory Coast, Kenya, Liberia, Libya, Madagascar, Mali, Mauritania, Morocco, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Poland, Romania, Senegal, Syria, Somalia, Turkey, and Venezuela. Notably, the proposal stated that the equitable principles approach would be utilized 'taking into account all relevant circumstances and employing any methods, where appropriate, to lead to an equitable solution'.

82 The Virginia Commentaries, paras. 74.10 and 83.17.

83 *Barbados/Trinidad* award, 11 April 2006, para. 222.

84 *Bangladesh/Myanmar* judgment, 14 March 2012, para. 226.

85 *Bangladesh/India* award, 7 July 2014, para. 339.

86 *North Sea Continental Shelf* cases (1969), para. 96.

87 The only exceptions relate to situations in which the physical continental margin extends beyond 200M, according to the formulae in Art. 76(4), which uses the foot of the continental slope as a point of reference. However, as the court observed in the *North Sea Continental Shelf* judgment, the physical continental shelf consists of 'stretches of submerged land' and is thereby 'evocative of the land and not of the sea'. Accordingly, in respect of this modern outer limit of the continental shelf, it can equally be said with certainty that 'the land dominates the sea'.

88 *Cameroon/Nigeria* (2002), para. 295.

89 See, e.g., the resolution of land sovereignty disputes prior to addressing maritime delimitation in the *Eritrea/Yemen* (1999), *Qatar/Bahrain* (2001), *Cameroon/Nigeria* (2002), and *Nicaragua/Colombia* (2012) cases, reviewed in Part B, Chapters 12, 13, 15, and 21 respectively, below.

90 *Romania/Ukraine* (2009), paras. 77 and 110. See also, to similar effect, *Barbados/Trinidad* (2006), para. 239: 'To the extent that the coast is abutting on the area of overlapping claims, it is bound to have a strong influence on the delimitation…'. The 'relevant coast' and 'relevant area' are addressed at Part, A Chapter 2, 'Methodology', below. As discussed at Part, C Chapter 2 below, the question of how to identify them has been the subject of contrasting approaches in the delimitation jurisprudence.

91 See, e.g., the ICJ's distinction between numerous island and low-tide elevation features in the *Qatar/Bahrain* and *Nicaragua/Colombia* cases.

92 See, e.g., the *UK/France Continental Shelf* case, para. 95, where the Court of Arbitration contrasted the impact of specific geographical features on an equidistance line drawn between opposite and adjacent coasts. See further discussion and illustration in Part, B Chapter 3 below. In addition, the transition between relationships of oppositeness and adjacency has frequently led courts and tribunals to separate areas of delimitation in any given dispute, and to apply different methodologies or results in those separate areas. For

example, see *UK/France Continental Shelf, Gulf of Maine, Barbados/Trinidad*, and *Nicaragua/Colombia*, see Part B, Chapters 3, 6, 16, and 21 respectively.

93 See, e.g., the *Nicaragua/Honduras* case, where the ICJ determined that the 'particular circumstances' of the coastal geography rendered an equidistance-based delimitation 'not feasible' (para. 84), Part, B Chapter 18 below.

94 See Part, A Chapter 2, II, The 'Three-Stage Approach'. below. As first discussed by the ICJ Chamber in the *Gulf of Maine* case, geographical criteria are particularly prevalent in single boundary delimitations covering the water column and seabed, since such criteria are perceived to be of a 'more neutral character' and 'best suited for use in a multi-purpose delimitation' (para. 194).

Part A Commentary on the Modern International Law of Maritime Boundary Delimitation, 2 Methodology

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(p. 30) 2 Methodology

I. Some Essential Preliminaries in the Delimitation Process

a. Is there a delimitation agreement in force?

Whenever approaching any delimitation, a fundamental initial question is whether there is already any delimitation agreement in force between the relevant coastal States. This is because each of Articles 15, 74, and 83 of UNCLOS, together with customary international law, accord primacy to delimitation by way of agreement. Further, it is only in the absence of agreement that the obligation under Articles 74(2) and 83(2) to refer EEZ and continental shelf delimitation to third-party dispute resolution procedures under Part XV of UNCLOS comes into to play.[1]

The most straightforward case of agreement will be that in which a delimitation treaty exists between the coastal States concerned. The Vienna Convention on the Law of Treaties 1969 ('VCLT'), which regulates, *inter alia*, the conclusion, application, and interpretation of treaties and is in many respects declaratory of customary international law, defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more of related instruments and whatever its particular designation'.[2]

In most situations, the existence of a delimitation agreement between two States will be clear. However, the history of maritime boundary delimitation disputes is replete with situations in which the existence (or not) of such an agreement has been a central issue of dispute. Thus, for example:

- A central issue of dispute in the *Guinea/Guinea-Bissau* case was whether or not an 1886 treaty between France and Portugal, which was binding on the parties by virtue of the *uti possidetis* principle, had established a maritime boundary— (p. 31) the tribunal concluded that it did not, but had rather been limited to the designation of sovereignty over certain island features.

- In the *Cameroon/Nigeria* case, the ICJ determined that a delimitation agreement existed throughout the territorial sea (and just beyond) by virtue of the combination of a 1913 Anglo-German treaty and two post-colonial declarations made by Nigeria and Cameroon.

- In the *Jan Mayen* case, the ICJ determined that a 1965 agreement between Denmark and Norway on the delimitation of the continental shelf between them did not extend to the area of dispute between Greenland and the small Norwegian island of Jan Mayen.

- In the *Bangladesh/Myanmar* case, ITLOS concluded that two sets of 'agreed minutes' arising out of maritime boundary negotiations between the two States did not constitute a delimitation agreement because, *inter alia*, the evidence indicated that the States had not intended them to be legally binding.

- In the *Peru/Chile* case, the ICJ concluded that certain unilateral proclamations did not amount to a boundary agreement because of, *inter alia*, their 'conditional language' and 'provisional nature', but proceeded to find that a subsequent agreement relating to violations by fishing vessels of '*la frontera maritima*' had confirmed the existence by that time of a maritime boundary between the two States.

Perhaps the most detailed analysis in the modern jurisprudence of the requirements under international law for a binding delimitation agreement was that of the tribunal in the first phase of the *Newfoundland and Labrador/Nova Scotia* case (where the disputing Canadian provinces agreed that principles of international law would regulate the delimitation between them). Nova Scotia argued that a joint statement by the premiers of the Canadian provinces, together with an unsigned *communiqué*, constituted a maritime boundary agreement. The tribunal rejected the argument, observing that the fact that two States are generally *ad idem* on a boundary is not enough to constitute an 'agreement' between them for the purposes of UNCLOS. While there were no specific requirements 'of form' for the existence of a treaty,[3] the intention of two States to be bound by a delimitation agreement was essential. Furthermore, on a matter of importance such as the determination of a maritime boundary, the tribunal considered that a lack of precision in language and the absence of a signature were highly significant in demonstrating the absence of any intent to form a binding agreement.[4]

The importance of evidence in situations where there is no explicit binding delimitation agreement was demonstrated further by the ICJ in the *Nicaragua/(p. 32) Honduras* case, where Honduras argued for the existence of a maritime boundary based on 'tacit agreement'. The court dismissed the argument, commenting that 'the establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed'. Consequently, it held that evidence of a tacit delimitation agreement must be 'compelling'.[5] Nevertheless, the evidential threshold is not insurmountable. Thus, in the *Peru/Chile* case, the ICJ was satisfied that a tacit delimitation agreement existed by virtue of an 'evolving understanding' which had been cemented by a subsequent agreement.[6]

In the context of formerly colonized States, it is well established that a delimitation treaty between former colonial powers will be binding on subsequently independent States as a matter of international law pursuant to the principle of *uti possidetis juris*. Thus, for example, in the *Guinea-Bissau/Senegal* case, the tribunal determined that a 1960 agreement between the former colonial powers of France and Portugal was binding on the newly independent States and delimited the territorial sea and continental shelf between them.[7]

An important principle of international law in the context of the interpretation of historic delimitation treaties is that of intertemporal law, pursuant to which the law to be applied to a given situation must be the law in force at the time when it arose. As a result, in the *Guinea-Bissau/Senegal* case, the tribunal refused to extend the 1960 agreement to the EEZ because that concept had not existed at the time. Similarly, in the *Black Sea* case, the ICJ found that a 1949 'procès-verbal' between Romania and the USSR had delimited a territorial sea boundary, but could not extend to the continental shelf or EEZ because, *inter alia*, neither State had claimed a continental shelf or EEZ at that time.

b. Coastlines as the foundation for maritime claims

Delimitation is an exercise of resolving competing claims over maritime areas over which two States have overlapping legal title. Such legal title over maritime space follows from the coastal State's sovereignty over land territory and as a result of the coastal projection of that land territory. The process of delimitation inevitably leads to one or, more usually, both States being deprived of areas over which they would otherwise have legal title.

(p. 33) An essential preliminary to the delimitation process is therefore the determination of the coasts that generate overlapping projections, and thus overlapping legal claims. This is because, as the ICJ observed in the *Romania/Ukraine* case, 'the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned'.[8] The 'relevant coasts' in any given delimitation are therefore those that

generate overlapping claims;[9] those that generate claims that do not overlap can be discounted.[10]

The role of the relevant coasts is central to any delimitation process. Indeed, they provide a critical reference point in all three stages of the 'standard' delimitation process described in this chapter at 'II. The 'Standard' Methodology', below. At the first stage, they are used to establish the extent of the respective States' maritime zones (territorial sea, EEZ, and continental shelf), to identify the areas of overlap, and to define the base points used to draw a provisional equidistance line; in the second stage, a significant disparity in the lengths of the relevant coasts may be considered a relevant or special circumstance requiring adjustment of the provisional equidistance line; and in the third and final stage, they are used in the final check to ensure no gross disproportionality between the ratio of maritime areas allocated and the ratio of coastal lengths.

Coasts, coastlines, and coastal projections are thus fundamental to describing a State's entitlement to maritime space. However, the term 'coast' is not defined in the Convention. Generally, the coastline is where the land meets the sea, but the precise legal definition of this point can vary from jurisdiction to jurisdiction. For international law of the sea purposes, however, the coast is appraised by reference to baselines drawn according to detailed rules set out in UNCLOS. It is to those rules, therefore, that we now turn.

c. The 'baseline from which the breadth of the territorial sea is measured'

According to Article 5 of UNCLOS (and Article 3 of the 1958 CTS), the normal baseline for measuring the breadth of the territorial sea (and hence the EEZ and, in most situations, the continental shelf) is 'the low-water line along the coast as marked on large-scale charts officially recognised by the coastal State'. The baseline can also be drawn with reference to islands, rocks, low-tide elevations, reefs, roadsteads,[11] and harbour works, as well as closing lines drawn across bays and (p. 34)

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Figure A2.1: Elements of the territorial sea baseline.

rivers (Articles 6, 9, 10, 11, 12, and 13 of UNCLOS). Many coastal States have also adopted straight baselines along all or part of their coasts (regulated by Article 7), while archipelagic States under Part IV of UNCLOS are entitled to draw archipelagic baselines (regulated by Article 47).

In some areas, then, the baseline will be coincident with the coastline as it follows the low-water line; in others, it will diverge markedly as it follows a bay closing line, or a straight or archipelagic baseline, or some other deviation mandated by UNCLOS.

Figure A2.1 shows a schematic[12] of different components of the territorial sea baseline. Usually, a coastal State will define its baseline with reference to a variety of elements so as to maximize the extent of its maritime space. Pursuant to Article 8 of UNCLOS, areas landward of the territorial sea baseline are 'internal waters', which fall within the exclusive

sovereignty and jurisdiction of the coastal State and are not subject to the UNCLOS regime.[13]

Large-scale charts, other data sources, and low- and high-water lines

Article 5 refers to the low-water line 'as marked on large-scale charts officially recognised by the coastal State'. Nautical charts[14] provide the best data for a (p. 35)

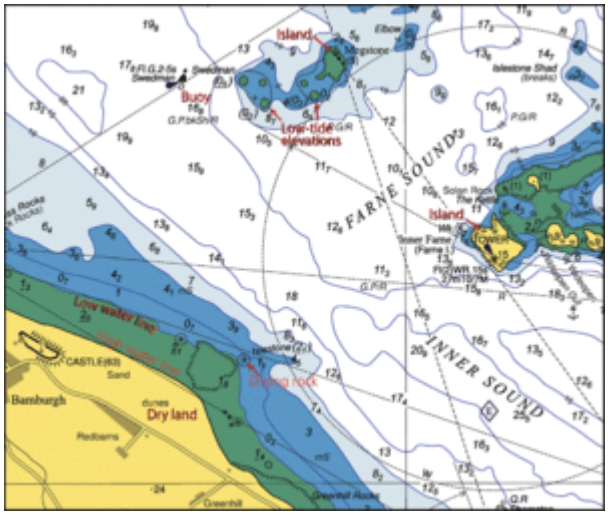

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Figure A2.2: Example of a nautical chart (Admiralty chart 111).

Note: Not to be used for navigation. © British Crown Copyright and/or database rights. Reproduced by permission of the Controller of Her Majesty's Stationery Office and the UK Hydrographic Office (<http://www.ukho.gov.uk>).

maritime area. In this respect they are quite different from land maps, which usually only have sketchy information offshore and are not recommended for maritime applications (and certainly not for delimitation). Charts are based on detailed hydrographic surveys and show all maritime features relevant for delineation and delimitation of the territorial sea and other maritime zones (low-water line, islands, rocks, reefs, low-tide elevations, harbour works, etc.). They also show aids to navigation, which are relevant for the mariner, but generally not relevant for delimitation purposes (lights, buoys, navigation routes, pipelines, cables, safe anchorages, etc.). Notably, however, the principal purpose of charts is for the safety of navigation; on many charts, the very shallow water, including the low-water line, is not surveyed regularly as it is of little interest to the mariner. Accordingly, the selection of appropriate charts, using detailed and up-to-date data, can be an essential element of any delimitation exercise.

An example of a nautical chart is shown in Figure A2.2. Note that labels in red have been added for clarity.

(p. 36) Nautical charts are drawn to closely specified standards laid down by the International Hydrographic Organization that specify all aspects of the design, colours, and symbology. A mariner should be able to pick up a chart from anywhere in the world and understand precisely the information portrayed.

The beige/yellow areas are dry land above high water; the green areas are exposed at low water; the outer edge of the green areas constitutes the low-water line. Dark blue, light blue, and white areas represent increasing water depth.[15]

Most charts contain a 'source data diagram', which indicates the age and source of the hydrographic surveys. In many parts of the world, these may be old and unreliable. The

United Kingdom and other hydrographic offices maintain an extensive archive of historical charts that may be relevant when researching the situation at a critical date.[16]

Many charts are updated frequently with new editions, while small changes are applied through the system of 'Notices to Mariners' (NM). Changes to the chart are published and notified to mariners who are required to keep their charts corrected and up to date.[17] The charts are labelled with the reference numbers of the NMs which have been applied. While most of the updates refer to changes to navigational aids (buoys, lights, etc.), some are significant for determining the baseline: for example, details of a new harbour work or a new hydrographic survey. This continuous updating and issuing of new editions means that, whenever available, the latest charts (with latest amendments) should be used to define the baseline as part of any delimitation exercise.[18]

Although Article 5 refers to 'large-scale charts',[19] in practice nautical charts at the largest available scale are used as many parts of the world are only charted at small scales. This means that relatively small-scale charts (e.g. 1:100,000 or 1:300,000) are used for most coastlines. Where larger-scale charts exist (e.g. 1:25,000, 1:10,000) for ports and port approaches, these more detailed coastal segments will supplement the smaller-scale charts. The low-water line will therefore frequently be derived from a variety of charts at different scales, age, and accuracy.

Where charts are 'officially recognized' in the State's domestic legislation or otherwise, they should be used. Often, however, States do not officially recognize (p. 37) any particular chart. In such cases, any available charts may be considered. The United Kingdom Hydrographic Office produces the only easily available worldwide series of charts under the 'Admiralty' brand;[20] however, charts produced locally by the coastal State may offer coverage that is more up to date and at larger scales. With the increasing move to digital charting, in future the official charts may only be digital and not available in paper form (although there are no examples of these being used at the time of writing).

Charts of a small scale are often used for illustrative purposes to depict the course of a boundary line, including by way of appendage to delimitation treaties, judgments, or awards. In most recent judgments and awards, the illustrations have used a generalized and simplified coastline,[21] although the actual base points and all calculations will generally have been generated using more accurate large-scale charts (and other data sources).

Other data sources may also be used in the construction of baselines, and in the delimitation process generally. Satellite imagery will often assist in defining a State's baseline, especially where the available charts are old or inaccurate. However, satellite imagery provides an image of the coastline at the time of overpass; only exceptionally will this coincide with low-tide. This may not be a significant issue in areas of rocky coastlines or where there are small differences in tidal level, but where there are extensive shallow banks satellite imagery may not give a reliable indication of the full extent of the low-water line. Nevertheless, satellite data have the advantage of a guaranteed accuracy in location, being an unbiased and independent source of data. Importantly, in the context of maritime delimitation disputes, satellite data can be acquired without physical access or permission (or even knowledge) of the coastal State concerned.

Satellite data are available for most areas of the world, although cloud-covered tropical areas may have limited coverage. Many such data are free; for example, the Landsat satellites have been acquiring data since the early 1970s and an extensive archive is publicly available for download.[22] In the *Nicaragua/Honduras* case, both parties presented to the ICJ a sequence of Landsat imagery over twenty years to demonstrate the evolution, and instability, of the coastline.

Higher resolution data are also widely available, although not necessarily free of charge (and the higher resolution is not always required for the identification of base points). For most places in the world, data will already exist, but special (p. 38) requests can be made to the satellite operators for specific acquisitions.[23] Other public domain data sources include the readily accessible, and often detailed, satellite imagery on Google Earth and similar websites. These can be useful for a ‘quick look’ at the delimitation area and for illustrative purposes; however, for more reliable and detailed analysis and for submission as evidence in a court or arbitration proceeding, the original source data are preferable.

The vertical datum of a chart or map is the level to which depths or heights are referred (Figure A2.3). The choice of vertical datum for a chart is critical for the definition of the low- and high-water lines and particularly for the status of islands (defined by Article 121 of UNCLOS by reference to the high-water line) and low-tide elevations (defined by Article 13 of UNCLOS by reference to both the high- and low-water lines).

The tidal range is controlled by many factors associated with the local geography and current flows, the movements of the moon, and those of the sun and other planets. This gives a tidal cycle that each month varies from a large tidal range (known as ‘spring tides’, which are associated with full and new moons) to a small tidal range (known as ‘neap tides’, which are associated with half-moons). Spring tides have the greatest range at the time of the equinoxes in spring and autumn, while there is a further 18.6-year cycle associated with the alignments of the sun and planetary bodies.

Vertical datums are seldom mentioned in boundary agreements. The use of a particular chart to define base points normally implies that the vertical datum of that chart has been used.

Modern nautical charts are mostly standardized on the lowest astronomical tide (‘LAT’) as a vertical datum, as recommended by the International Hydrographic Organization.[24] This is the lowest predictable tide under normal meteorological conditions and occurs on an 18.6-year cycle, controlled by planetary alignments. It reflects the lowest level to which the sea will fall and is chosen for navigational safety so that there will always be more water than is charted in any given location. The LAT is significant for maritime boundary delimitation as it defines the low-water line for the purposes of drawing the territorial sea baselines and outer limits and provides base points for construction of equidistance or median lines.

(p. 39)

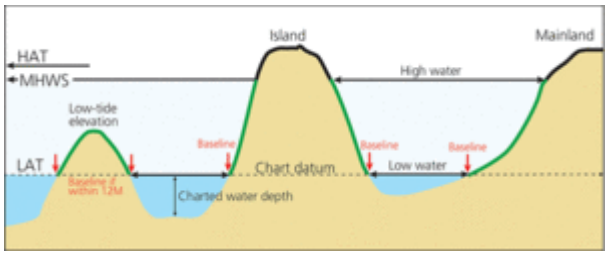

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Figure A2.3: Vertical datums as used in UNCLOS.

The high-water line, although charted, is of less importance for navigational safety. Most charts use mean high water springs (‘MHWS’) for the high water line, although clearances under bridges and the like are referred to highest astronomical tide (‘HAT’), so that the headroom or clearance will always be greater than charted. HAT is the corollary of LAT and is the highest tide predictable under normal meteorological conditions. MHWS is the average of high water springs over the 18.6-year tidal cycle and is slightly below the level of HAT.[25]

The only use of the high-water line in UNCLOS is in the definition of an island in Article 121. However, unlike the low-water line, there is no single widely accepted definition of 'high tide'. In practice, high tide is taken to be the charted high water line and may vary depending on the vertical datum (see Figure A2.3) used by the coastal State on the chart.

The apparently concise language of Article 5 ('the normal baseline…is the low-water line… marked on large-scale charts') has been interpreted in two ways, depending on whether the baseline is a line on a chart, or a line on the surface of the Earth. In the first case, the charted low-water line is the legal normal baseline and the chart itself is determinative of the baseline; in the second case, the actual low-water line is the legal normal baseline and the chart just one of several sources of evidence.[26] In areas where either the coastline is highly mobile (e.g. the River Coco between Honduras and Nicaragua or the Bengal Delta) or the charts are out of date or only available at small scales, the differences can move the baseline several miles.

The preference of courts and tribunals appears to be to use the best evidence available and not to restrict themselves to charted data alone. For example:(p. 40)

- In *Qatar/Bahrain*, the question arose as to whether Qit'at Jaradah was a low-tide elevation or an island. Chart evidence showed that it was a low-tide elevation, but eyewitness and expert evidence submitted by Bahrain indicated that it was an island. The court concluded on the basis of all the evidence that Qit'at Jaradah was an island.

- Similarly, in *Nicaragua/Colombia*, the court accepted Colombia's contemporaneous field and expert evidence that Quitasueño was an island, despite appearing as a permanently submerged rock on the large-scale chart of the area.

- In *Guyana/Suriname*, neither party assumed that the charts were dispositive and both presented evidence in support of, or against, their accuracy. The tribunal weighed all the evidence and ultimately used the chart submitted by Suriname. All participants proceeded on the assumption that officially recognized charts can be challenged before an international tribunal, which can determine the actual location of the baseline by reference to other evidence.

- In *Nicaragua/Honduras*, the land boundary terminus was located at a highly unstable river mouth. Neither party relied on charts (in fact, there were no modern large-scale charts available) and both used satellite imagery to establish the low-water line.

- In *Bangladesh/Myanmar*, both parties used the same British Admiralty chart (BA 817) to define the baselines, especially for the territorial sea delimitation, despite the fact that there had recently been significant changes to the physical coastline.

Geodetic, horizontal, or map datums have proved to be a major source of dispute over apparently settled boundary agreements or the implementation of judgments. The geodetic datum defines the mathematical model of the Earth, the ellipsoid, used by surveyors for positioning. Because of the uneven and curved surface of the Earth, there is no perfect model. A particular geodetic datum will specify the ellipsoid to be used and the point of origin, or reference point, from which the coordinates are calculated.

National surveys, both onshore and offshore, will use a local datum designed to give the best fit for the region. However, the adjacent States may use different local datums—in which case the same point, for example their land boundary terminus, will have different coordinates. Provided the specifications of both datums are known, conversion from one to the other can be done precisely using specialized software.

There are also global datums that use an ellipsoid derived from satellite observations and a reference point at the centre of the earth. A leading example is World Geodetic System 1984 (WGS84), to which most modern charts (and boundary treaties, judgments, and awards) are now referred. These datums are in universal use, especially with the advent of satellite-derived navigation using GPS.

All quoted coordinates must be referred to a geodetic datum. Without an assigned datum, there is no unique position for a specified coordinate; potential errors or confusion may lead to differences of several hundred metres, even kilometres.

(p. 41)

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Figure A2.4: Mercator projection for the Earth showing geodesic lines and loxodromes.

When defining a maritime boundary, it is especially important to ensure that the coordinates are correctly specified. Land boundaries, by contrast, may be controlled by physical features (e.g. rivers, watersheds) or marked by pillars, so the precise coordinates can be less important. Many older treaties are not referred to a datum, or refer to a chart that has no datum, which produces uncertainty in their precise location. This can be of critical importance where offshore oil and gas concessions are concerned. Where a maritime boundary touches on such concessions, in the absence of clarity over the datum used, lengthy further negotiations can be necessary to resolve the parameters to be used to define the datum and to convert it to WGS84. Such a problem arose in the *Cameroon/ Nigeria* case, where the ICJ judgment coordinates were referred to a chart with no defined datum. This led to substantial further discussions after the judgment and the appointment of a mixed commission to resolve the confusion.

A variety of projections are used to represent the curved surface of the Earth precisely on a flat plane or chart. Apart from large-scale charts (showing small areas), virtually all navigational charts are constructed using the Mercator projection. This is also the most familiar world map, seen in classrooms around the world. It shows the lines of latitude (parallels) and longitude (meridians) as straight lines at right angles. It is well suited to navigation because lines of constant course appear as straight lines crossing each parallel at the same angle, as shown in Figure A2.4.

(p. 42) A disadvantage of a Mercator projection is that it suffers from scale distortion away from the equator, giving rise to, for example, the misleading impression that Greenland is larger than Africa. Identical lines drawn on a Mercator chart at different latitudes will therefore have different lengths. Corrections need to be applied when constructing equidistance lines that depend on the lines being exactly the same length, regardless of latitude or orientation.[27] Modern computer software using advanced geodetic principles will take these distortions into account. Figure A2.4 shows three (red) lines at different

latitudes, each 40° of longitude, that appear the same length on the Mercator map. In fact, the equatorial line is nearly six times the length of the line at 80°N.

Other projections in common usage include Lambert Conic (used for high latitudes), Transverse Mercator (including Universal Transverse Mercator—UTM, standard for land-mapping applications), and polar stereographic (for maps centred on the poles). Virtually all the illustrative maps used in this book are based on the Mercator projection, except for *Argentina/Chile* (Figure B2.1 in Part B inset), *Jan Mayen* (Figure 11.1 in Part B), and *Newfoundland and Labrador/Nova Scotia* (Figure B15.1 in Part B), which use a Lambert Conic projection, recognizable by its converging meridians.

All projections use a grid system whereby the variable scales of latitude and longitude are converted to a metric grid (akin to the regular grid on graph paper) to allow for ease of plotting. Rather than the geographical units of degrees, minutes, and seconds, grid units are defined in metres referred to a specified origin.[28] Occasionally in boundary agreements, coordinates will be specified in such grid units where precise details of both the projection and its horizontal datum need to be specified. This is more common in land boundary agreements, which may nevertheless be important for maritime delimitation purposes where they specify the land boundary terminus.

The question of what is a ‘straight line’ has arisen in several of the delimitation decisions featured in Part B of this book. The shortest line between two physical points (and also a strict equidistance line), drawn on the curved surface (spheroid) of the Earth, is known as a geodesic. This appears as a curved line on a Mercator chart, except when drawn along the equator or a north-south meridian. The differences are greater at higher latitudes, nearer the poles. A parallel, or line of latitude, other than the equator is not a geodesic. The direction, or ‘azimuth’, of a geodesic line changes continuously on a Mercator chart along its length and should therefore be defined as beginning at a fixed point and with a specified starting (p. 43) azimuth. A practical demonstration of this is the long-haul airline routes that take the shortest polar route, which would be shown as a curved line on a Mercator chart curving towards the pole.

In contrast to a geodesic, a loxodrome (or rhumb line) is a straight line of constant bearing along its length that appears as a straight line on a Mercator chart. While it has advantages for navigation, it does not represent the shortest route. If two points are joined by straight lines, the geodesic will curve towards the pole relative to the loxodrome. Figure A2.4 shows ‘straight’ lines drawn between London and New York: one as a loxodrome, which appears straight on the Mercator projection and is 5,353M long; the other as a geodesic, which curves towards the pole and is the shortest distance between the two points, being only 3,015M long (even though it appears longer than the loxodrome). Cape Town and Sydney are approximately on the same latitude: the loxodrome runs along a line of latitude due east and is nearly 8,000M long; the geodesic, curving to the south, is only 5,900M long.

Geodesics and loxodromes have each been used explicitly in the delimitation jurisprudence and in State practice. As a geodesic line is more difficult to plot on a chart, there are situations where a loxodrome may be preferred (e.g. in defining fishery limits or oil concession blocks, many of which are defined along lines of latitude and longitude). Likewise, some States prefer loxodromes; for example, the UK-France and UK-Ireland maritime boundaries are defined using loxodromes along their whole length, although the other UK boundaries in the North Sea are defined using geodesics.[29] At low latitudes (near the Equator) and over short distances, the differences between a loxodrome and a geodesic are small.

In the *UK/France Continental Shelf* case, the final (Atlantic) section of the boundary was defined by the Court of Arbitration as a loxodrome of fixed azimuth. This was unsuccessfully challenged, following the decision, by the United Kingdom which maintained that a geodesic line was technically more correct. If a geodesic line had been used from the same point and with the same azimuth, it would have curved southwards away from the loxodrome, making a 4M difference in favour of the United Kingdom at the terminal point some 200M distant.

d. Low-tide elevations

Low-tide elevations are defined at Article 13 of UNCLOS. They are naturally formed areas of land which are surrounded by water and exposed at low tide but submerged at high tide. As such, they are sometimes described as 'drying features'. Where they fall within the territorial sea of an island or the mainland, Article 13 provides that their low-water line can be used as part of the territorial sea baseline. (p. 44) Low-tide elevations differ from island or mainland territory in that they cannot be appropriated in their own right; rather, as the ICJ confirmed in the *Qatar/Bahrain* case, they will only be the subject of sovereign rights to the extent that they are located within the maritime space of a coastal State.

The distinction between island features and low-tide elevations, from a sovereignty perspective, received special attention from the ICJ in the *Malaysia/Singapore* dispute about sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge. The Court found that the islands of Pedra Branca and Middle Rocks were subject to the sovereignty of Singapore and Malaysia, respectively. By contrast, the court held that sovereignty over South Ledge, which was a low-tide elevation, belonged to the State in the territorial waters of which it was located.[30]

In *Nicaragua/Colombia*, the status of a shallow bank called Quitasueño was disputed. Extensive tidal data and modelling were included in the parties' pleadings. On the basis of field evidence, in the form of a modern survey presented by Colombia, the court ruled that one rock (labelled QS 32) was permanently dry and a further fifty-five features located within 12M of it were low-tide elevations.[31] In its survey, Colombia used HAT as the measure of high tide and its height measurements were recalculated relative to this.[32]

The status of Eddystone Rock as an island or low-tide elevation was similarly disputed in the *UK/France Continental Shelf* case. The question was complicated by the fact that over 4 feet had been removed off its top to build a lighthouse in the nineteenth century. The Court of Arbitration did not rule on its status, but decided that Eddystone could be used as a base point for drawing a median line as France had accepted its use as a base point for measuring the UK's fishery limit.[33]

As described above, different States may use different vertical datums. This can cause difficulties when defining base points using low-tide elevations, as a sand bank may appear as a low-tide elevation at LAT, but be shown as permanently underwater on a chart that uses a higher datum. For example, the maritime boundary between France and Belgium was controlled by low-tide elevations on both sides. French charts used LAT and showed one of their banks, Banc Breedt, as a low-tide elevation; Belgian charts, however, used mean low water springs as a vertical datum, which is about 30cm higher and showed Banc Breedt as being permanently covered by water. The States did not resolve this issue (p. 45) and agreed a line that divided the area of overlap between their respective equidistance lines.[34]

e. Identification of the ‘relevant coasts’ and the ‘relevant area’

As discussed above, the title of a State to maritime areas, including the territorial sea, EEZ, and continental shelf, is based on the principle that ‘the land dominates the sea’. Such domination is effected through the projection of its coasts or coastal fronts. At an early stage in the delimitation process, it is therefore important to determine those coasts of the States concerned that generate rights to maritime areas, the overlapping projections of which will define the area to be delimited. Only then will it be possible to resolve the overlapping claims by drawing the ‘line of separation’ referred to by the ICJ in the *Romania/Ukraine* case.[35] On the other hand, those coasts that generate projections that cannot overlap with the extension of the other State can be excluded.[36]

The ‘relevant coasts’ in any given delimitation are therefore those that generate overlapping claims, while the resulting area of overlapping projections is often termed the ‘relevant area’.[37] Each concept has received substantial attention in the modern delimitation jurisprudence, particularly in the context of pursuit of the ‘equitable solution’ mandated by Articles 74 and 83 of UNCLOS. The relevant coasts will likely play a central role in any EEZ or continental shelf delimitation process, providing a critical reference point in all three stages of the ‘standard’ delimitation process described in this chapter at II. The ‘Standard’ Methodology, below. The role of the relevant area is, in some senses, more subtle and intangible. Certainly, it facilitates an assessment of the geographical characteristics of the area in dispute and the overall equitableness of any result, often through the application of the so-called ‘proportionality check’ as a final step in the delimitation process.

UNCLOS provides no guidance as to the identification of the relevant coasts or the relevant area. Indeed, it makes no reference to the terms at all. As with so many aspects of the modern law of maritime delimitation, one must therefore look to the jurisprudence for guidance.

While there has been some inconsistency, the process of identifying the relevant coasts and relevant area broadly involves the following three stages:(p. 46)

1. calculation of territorial sea, EEZ, and continental shelf limits to define which segments of coast project onto the area to be delimited;
2. identification of the ‘relevant area’ of overlapping territorial seas, EEZs, and continental shelves, and hence the ‘relevant coasts’ that produce those projections; and
3. measurement of the lengths of the ‘relevant coasts’ and the total ‘relevant area’.

The first stage, then, is to calculate the limits of each coast’s projections. As explained above, UNCLOS provides that the territorial sea and EEZ outer limits are measured from the territorial sea baseline, while the continental shelf outer limit is determined either by distance from the territorial sea baselines or by natural prolongation, where such prolongation extends beyond 200M.

Limits based on distance are calculated using the technique of ‘envelope of arcs’, whereby a series of arcs of radius 12M (for the territorial sea limit) or 200M (for the EEZ or distance-based continental shelf limit) are drawn from all points on the baseline; the outermost envelope of which constitutes the limit. This generates a line broadly parallel to a straight coastline, but radiating from a headland or island. Only a limited number of the coastal base points are used for the drawing of a limit, as only the outermost or most protuberant points will contribute to it.

Modern computer techniques using a baseline digitized at a high resolution will use hundreds or thousands of base points to construct the limit. The number of contributing base points depends on the width of the zone being delimited: a 12M territorial sea limit will use many times the number of base points as is required for a 200M EEZ limit. A slightly different technique is used to measure a limit drawn from a straight baseline (or a bay river closing line). As the straight line segment will effectively contain an infinite number of base points that make up the straight line, the line is transposed by a distance equal to the width of the zone.[38]

Figure A2.5 shows the construction of a territorial sea limit using the technique of envelope of arcs. The most protuberant points on the coastline and outermost islands control the limit; sections of straight baselines or bay and river closing lines produce straight sections of limit; low-tide elevations within 12M of the mainland or an island are also valid base points for drawing the territorial sea, but not those situated outside.

In a similar, but technically incorrect and now outmoded, technique known as *tracés parallèles*, the outer limit is drawn by moving the coastline, with all its sinuosities, a constant distance seaward thus creating a territorial sea or EEZ limit that replicates the coastline (Figure 2.6). This technique will only produce a correct limit when moved exactly perpendicular to each part of the coast. As the (p. 47)

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Figure A2.5: The construction of a 12M territorial sea limit using envelopes of arcs from components of the territorial sea baseline.

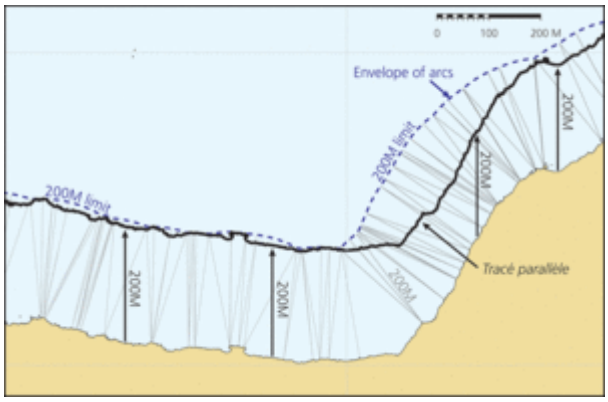

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Figure A2.6: The (incorrect) *tracés parallèles* technique (as compared with the envelope of arcs technique) involves shifting a replica coastline a constant distance. Where the shift is not precisely perpendicular to the coastline the limit can be seriously underestimated.

movement of the replica coast cannot be at right angles to all parts of the coast, this method can seriously underestimate the limit. Figure A2.6 shows the *tracés parallèles* method applied to a coastline that changes direction, compared with the technically correct envelope of arcs method. While, on the left-hand side of the figure, the (p. 48) *tracé parallèle* is displaced nearly at right angles to the coast and approximates the correct 200M limit, on the right-hand side the displacement is oblique to the coast and in parts only about

100M from the nearest coast. Where the shift is not precisely perpendicular to the coastline, the limit can be seriously underestimated. The method does, however, have an application in the case of straight or archipelagic baselines, where the limit can be drawn more easily by moving the straight line perpendicular to the baseline.

Once the outer limits of each coast's projections have been identified, the extent of overlapping claims will become evident, thus facilitating identification of the relevant area and relevant coasts. The relevant area is usually identified by reference to the overlap of the States' coastal projections, extending to the outer limit of the area to be delimited.[39] Where the area extends beyond 200M to the outer limit of the continental shelf, there may no longer be a direct connection to coastal

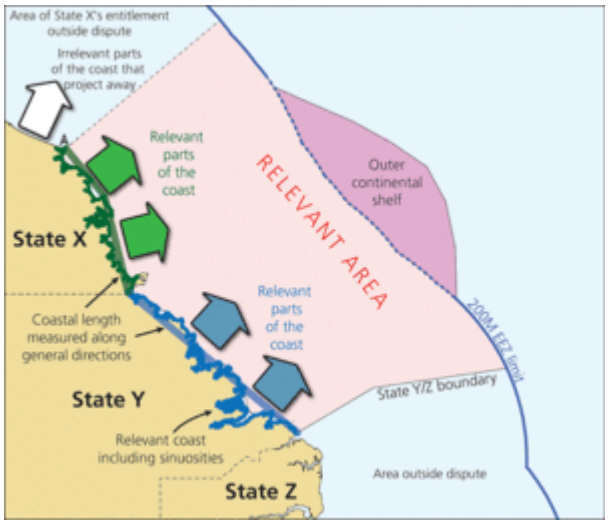

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Figure A2.7: Depiction of the relevant area and relevant coasts between adjacent States.

(p. 49) projections, as the continental shelf beyond 200M is a function of natural prolongation beneath the sea rather than distance from the baseline.

Figure A2.7 shows the derivation of a relevant area for a delimitation between two States with adjacent coasts. The area of overlapping entitlements is shown in pink. Areas shown in blue are not part of the relevant area because they are located more than 200M from one of the States, or beyond the outer continental shelf limits. To the north is an area that can be excluded as the coast faces away; likewise an area to the south belonging to a third State. As both States' coastlines are indented, the edges of the relevant areas are taken as simplified approximations to the coastline, excluding the numerous indentations.

The identification of relevant coasts has been the subject of contrasting approaches in the modern delimitation jurisprudence, but the preferred view is that (in the words of the *Barbados/Trinidad and Tobago* tribunal) the relevant coasts are those that 'abut as a whole upon the disputed area by a radial or directional presence'.[40] Thus, for example, in GFigure A2.7, the relevant coasts of States X and Y are identified through their projection into the relevant area, while the remainder of the coasts projecting away from the relevant area are irrelevant.[41]

This concept of the 'relevant area' is distinguishable from the area between the claim lines advanced by the two States in the course of the delimitation dispute. The area between those two claim lines is sometimes termed the 'area of overlapping claims' or the 'area in dispute'. The final delimitation will normally fall somewhere between the claim lines advanced by the parties. However, international courts and tribunals are not constrained by

the parties' claims and have on occasion allocated areas that were not claimed in the submissions before it.[42]

The darker pink area in Figure A2.8 shows the area of overlapping claims between State Y's (blue) claim of a mainland-to-mainland equidistance line and State X's (green) claim giving full weight to its small islands located close to the land boundary terminus. In this situation, the islands might be considered to be a relevant circumstance and given reduced weight.[43] Also shown are the approximately equal coastal lengths of State X and State Y, measured as straight lines (in respect of which, Figure A2.9 and discussion.[44]

(p. 50)

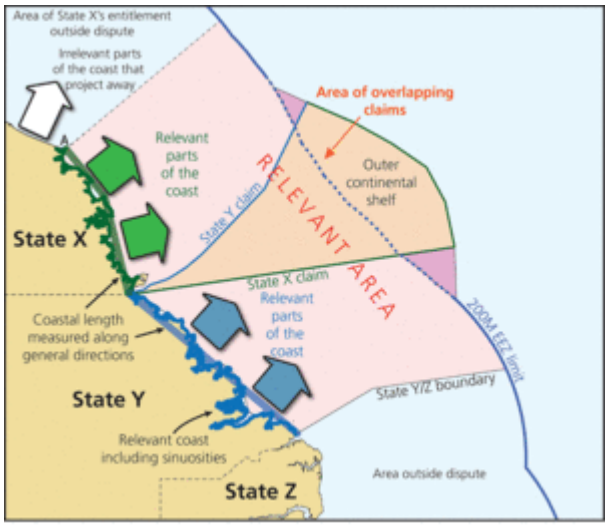

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Figure A2.8: The relevant area and area of overlapping claims for adjacent States.

In many cases of adjacency it may not be practicable to define the relevant coasts or areas. In *Peru/Chile*, where both States, but especially Chile, have long coasts stretching far beyond the delimitation area, the ICJ did not define the coastal lengths or carry out any proportionality test. This was in large part because the initial 80M of the boundary had been agreed along a parallel of latitude, making the calculation of relevant areas and coastal lengths 'difficult if not impossible'.[45] In *Cameroon/Nigeria*, when faced with a long and mostly irrelevant Nigerian coast, the ICJ concluded in response to Cameroon's coastal length arguments that 'whichever coastline of Nigeria is regarded as relevant, the relevant coastline of Cameroon, is not longer than that of Nigeria'.[46]

Third-party interests and delimitation agreements can play an important role in defining the relevant area in any given dispute. If boundary agreements exist (p. 51) between one of the disputing States parties and a third State whereby the disputing State party has relinquished maritime claims to particular areas, those areas can be excluded from the relevant area. Thus, for example, in *Nicaragua/Colombia*, the relevant area was constrained by the existing Colombian delimitation agreements with Panama and Costa Rica to the south and with Jamaica to the north. It was further constrained to the north by the ICJ's earlier judgment in *Nicaragua/ Honduras* (see Figure B21.2 below). In the absence of agreed boundaries, calculated or approximate median lines can be used in order to identify the limit of the relevant area as against third States' interests. However, this does not mean that a disputing State can always exclude maritime space from the relevant area by delimiting it with a third State neighbour, in disregard of its opponent's potential entitlements. For example, in *Romania/Ukraine*, the ICJ included in the relevant area a triangle of maritime space that had been ceded by Ukraine (USSR at the time) to Turkey in a 1978 treaty on the basis that it was located within the potential 200M entitlement of Romania. The court observed that the relevant area would be used only for the purpose of

approximate identification of the overlapping entitlements of the parties to the dispute, without prejudice to third State entitlements in the area.

As for the question of the measurement of relevant coastal lengths, this is a classic intractable mathematical problem to which there is no correct answer. The length depends on the scale of measurement: as the scale becomes larger, the coast becomes more detailed, more sinuous, and longer. As a rule of thumb, if the scale of mapping is enlarged by a factor of 10, for example from 1:100,000 to 1:10,000, the length of the coast will double. To avoid this complication, coastal lengths are normally calculated using simplified coastal fronts, where the coastline is approximated to one or more straight lines. Examples of this approach are the *Jan Mayen* case and the two *Bay of Bengal* cases (*Bangladesh/Myanmar* and *Bangladesh/India*). Occasionally, the coastal length is calculated using all the sinuosities of the coast, as the court did in *Romania/Ukraine* and *Nicaragua/Colombia*. The difference between these two calculation techniques can be very substantial, as illustrated in Figure A2.9.

Figure A2.9 shows a hypothetical example of a coastline projecting onto an area to be delimited. Two sections of the coast are relevant: that facing northwest (A–B), and that facing southwest (B–C), respectively. A third section east of A, facing eastwards, is not relevant as it projects away from the area to be delimited. The relevant coast therefore extends from A to C. The general direction of the coast can be represented by a straight line approximation—or in this case two straight lines hinged at point B. Measuring the coast along the straight line of general direction gives a relevant coastal length of 353km. By contrast, measuring the coast along all its sinuosities, without any simplified straight line, gives a relevant coastal length of 1,266km, four times as much.

As the coastal length is normally measured along the general direction of the coast, closing lines will generally be drawn across gulfs and bays so as to represent and (p. 52)

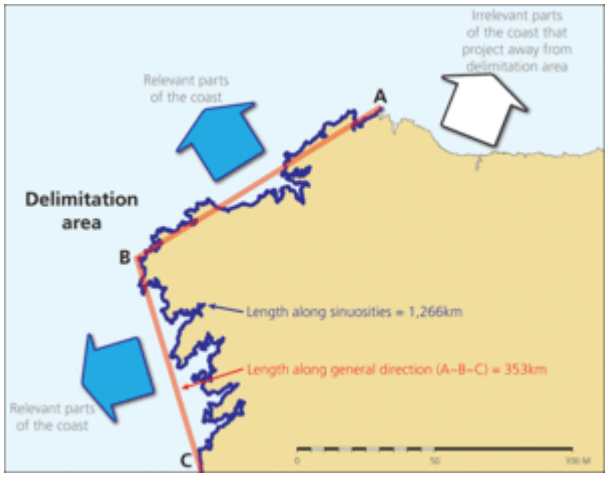

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Figure A2.9: Contrasting measurements of relevant coastal length using general direction and sinuosities.

simplify the projection of land areas behind. Such an approach was taken, for example, in the Gulf of Maine and St Pierre and Miquelon cases. An exception was the ICJ's treatment of the Karkinits'ka Gulf in *Romania/Ukraine*, where the closing line was excluded from the court's coastal length calculations because it considered the coastlines within the Gulf not to form part of the relevant coast. This was because, in the court's view, those coasts faced each other across the Gulf and did not project into the area to be delimited.

The contrasting practice of courts on tribunals in respect of relevant areas and relevant coasts is analyzed further in Part C, Chapter 3, of this book.

II. The ‘Standard’ Methodology in Modern All-Purpose Maritime Delimitations: The ‘Three-Stage Approach’

As outlined above, the delimitation of territorial sea, EEZ, and continental shelf boundaries under the modern law is regulated by Articles 15, 74, and 83 of UNCLOS, respectively. Each of those provisions is reflective of customary international law, and thus applicable even to non-States Parties to UNCLOS.

(p. 53) As described above, Articles 74 and 83 reflect a legal and diplomatic compromise reached at the UNCLOS III conference between those States that advocated delimitation based upon the principle of equidistance and those States that advocated delimitation based upon the doctrine of ‘equitable principles’. The resulting compromise wording of Articles 74 and 83 focuses on the *objective* of the delimitation process (namely, the achievement of an ‘equitable solution’), rather than the contested question of the *methodology* to be used. As the ITLOS tribunal observed in the *Bangladesh/Myanmar* case, it has been left to international courts and tribunals to develop ‘a body of case law on maritime delimitation which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of methods employed to that end’.[47] The substantial questions of methodology that were deliberately left unanswered at the close of the UNCLOS III conference have thus been taken up in the delimitation jurisprudence. As discussed in Part B of this book, the origins of that jurisprudence are found prior to UNCLOS, not least in the seminal *North Sea Continental Shelf* cases of 1969. However, it is only recently that questions of methodology have become more settled in the jurisprudence.

Such is the importance of the modern jurisprudence, particularly to questions of methodology, that the arbitral tribunal in the *Bangladesh/India* case concluded that it constitutes an ‘*acquis judiciare*, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 74 and 83 of the Convention’.[48] A recurrent feature of that *acquis judiciare* has been the search for ‘predictable, objectively-determined criteria for delimitation, as opposed to subjective findings lacking precise legal or methodological bases’.[49]

Questions of methodology have largely been addressed by courts and tribunals in the context of so-called ‘all-purpose’ (or ‘single’) maritime delimitations, encompassing the EEZ, continental shelf, and, where applicable, the territorial sea. As the ICJ observed in the *Qatar/Bahrain* case, ‘the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and…finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various—partially coincident—zones of maritime jurisdiction appertaining to them’.[50] Consequently, as the court observed in that case and reiterated in *Cameroon/Nigeria*, the methodology adopted in territorial sea delimitations, with reference to Article 15, has not been much different from that adopted in EEZ and continental shelf delimitations, with reference to Articles 74 and 83.[51]

(p. 54) So what is the methodology to be applied? Certainly, neither Article 15 nor Articles 74 and 83 prescribe any mandatory methodology, and no single methodological approach has been universally applied across every situation. However, the modern jurisprudence has identified a preferred methodology, to be applied in the absence of particular geographical circumstances, rendering it ‘inappropriate’. That methodology was first articulated by the ICJ in the *Black Sea* case, in the context of a single EEZ and continental shelf delimitation.[52]

It divides the delimitation process into three stages, each of which is examined in further detail below:

1. The first stage requires the establishment of a provisional delimitation line using methods that are 'geometrically objective'. The court stated that, in the context of delimitations between opposite coasts, the provisional delimitation line will consist of a median line between the two coasts; [53] while in the context of delimitations between adjacent coasts, the provisional delimitation line would be an equidistance line 'unless there are compelling reasons that make this unfeasible in the particular case'.

2. The second stage requires consideration of whether there are factors calling for the adjustment or shifting of the provisional equidistance or median line in order to achieve an equitable result. Such factors are commonly referred to as 'relevant circumstances' (and are broadly equivalent to the 'special circumstances' requiring adjustment of a provisional equidistance line in territorial sea delimitation under Article 15 of UNCLOS).

3. The third stage requires verification that the delimitation line arrived at following the first two stages 'does not lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line'. This is commonly referred to as the 'disproportionality check'.

The jurisprudence since the *Black Sea* case has accorded overwhelming primacy to this three-stage approach in EEZ and continental shelf delimitation.[54] It has done so because the use of equidistance at the first stage is transparent and objective, while the application of relevant circumstances at the second stage provides necessary flexibility, particularly with reference to the geography of the area, in order to achieve the equitable solution ultimately mandated by UNCLOS. The third stage is treated as a 'final check' of the equitableness of (p. 55) the line (and, as discussed further in Part C, Chapter 3, below, has not in the jurisprudence to date led to any further adjustment of the delimitation line following the second stage).

As discussed by the ICJ in the *Libya/Malta* case, the use of equidistance in the delimitation process is also consistent with the fact that modern maritime claims (at least within 200M), within both the EEZ and continental shelf, are based exclusively on the criterion of distance from the coast. Consequently, the use of a delimitation method that is founded upon equal distance from the coasts of the respective States will generally provide a good indicator of what will be an 'equitable solution' in an all-purpose maritime boundary dispute. As a result, as can be seen from the jurisprudence, the threshold to be met before any 'relevant circumstance' will be deemed to require adjustment of a provisional equidistance line is quite high. However, before reviewing what might (or might not) constitute 'relevant circumstances' in delimitation, it is important to understand the concept of equidistance and the technical process of construction of an equidistance (or median) line.[55]

a. Stage one: equidistance

What is an equidistance line?

An equidistance line is one drawn such that it is the same distance from the nearest base points on either side. The court explained in the *Black Sea* case that an equidistance line will generally provide the first step in delimitation because it utilizes a method that is 'geometrically objective'. As such, it provides an objective first step in the delimitation, before application of the more subjective second and third stages in the process. As ITLOS observed in the *Bangladesh/Myanmar* case, the provisional equidistance line is also faithful to the geography of the delimitation area, being 'based on the geography of the Parties'

coasts and mathematical calculations';[56] accordingly, it implements the cardinal principle of delimitation that 'the land dominates the sea'.

A critical first step in the construction of any equidistance line is the identification of the base points from which it is to be constructed. Article 15 indicates, as did (p. 56) the 1958 Conventions before it,[57] that those base points will be located on the territorial sea baselines.[58] Since it is only the 'nearest points' on the baselines that will contribute to the construction of an equidistance line, it is generally only the most protruding points marking changes in direction of the coast that will contribute to construction of an equidistance line. Accordingly, there will often be large stretches of the coastline that do not contribute any base points. The base points can be located on the low-water line of, *inter alia*, islands, low-tide elevations, and harbour works, depending on the circumstances and according to the rules described above.[59] However, the weight to be given to any particular base point can be reviewed at the second stage of the delimitation process, resulting in adjustment of the provisional equidistance line as necessary in order to arrive at an equitable solution.

Where the coastline is rugged or indented, the base points can be obvious to the layperson or the naked eye, but their location will be far less obvious on smoother coasts, especially where the coastline is slightly concave. Being a technical construct based on 'geometric criteria' and 'mathematical calculations', an equidistance line (and its constituent base points) can most reliably be constructed using specialized computer software.[60] Using a full coastline model or base points based on up-to-date charts, the software will calculate a median line and indicate all the base points that are used to construct it.[61]

Figure A2.10 below illustrates the construction of a median line using base points on the opposite coasts of our two fictional States, State X and State Y.

State X has an indented coastline and the nearest base points to the median line are located on the outermost protuberant points of the coast. Points X1 to X6 lie on headlands; points X7 to X10 lie along a straighter stretch of coast, each in turn being the nearest point to the median. There are large parts of the coast of State X, for example between base points X6 and X7, that constitute part of the 'relevant coast', but do not contribute any base points because they are further away.

(p. 57)

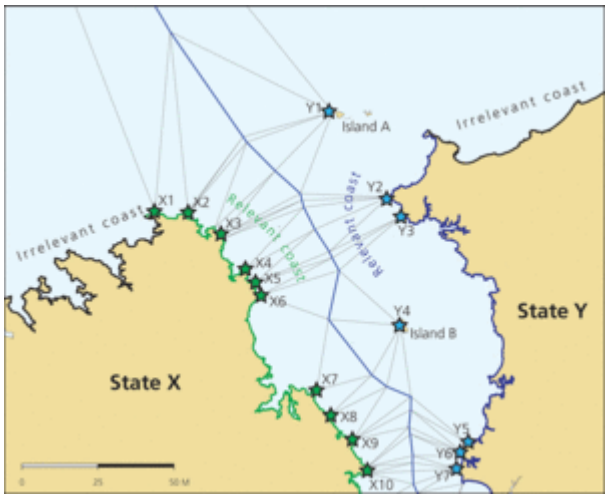

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Figure A2.10: Base points and the construction of a median line between opposite coasts.

State Y has a similar coastline but also two small islands that control the median line for large parts of its length. Island B controls the median line between base points Y3 and Y5, shielding the long concave coast behind it. Likewise, Y1 on Island A is the final base point to the north and will control the entire northern part of the median line (extending into an area of open sea in which the relationship between the States' coasts becomes more one of

adjacency rather than oppositeness). As is required by the objective and geometric exercise at the first stage of the delimitation process, the equidistance line is constructed from all these base points, without consideration of their relative size and importance and the overall equitableness of the result.

As elaborated at Part C, Chapter 1, below, the objective and geometrical approach to construction of a provisional equidistance line, while consistently advocated by courts and tribunals, has not been consistently applied by them. In *Romania/Ukraine*, the ICJ stated that determination of the baseline used for measuring the breadth of the EEZ and the continental shelf and the identification of base points used for delimitation are 'two different issues', and proceeded to ignore an island (Serpents' Island) and a harbour work (Sulina Dyke) for the purposes of drawing the provisional equidistance line. In the *Bangladesh/Myanmar* case, ITLOS did precisely (p. 58) the same thing in respect of another island (St Martin's Island), while in *Bangladesh/India*, the arbitral tribunal rejected base points situated on a number of 'detached low-tide elevations' that otherwise met the requirements for a territorial sea baseline under Article 13 of UNCLOS.[62] In resorting to a more subjective approach to the 'selection' of base points from the outset, these decisions appear to have ignored the geometric objectivity that is integral to the role of equidistance at the beginning of the delimitation process. They have also pre-empted the more subjective elements that should normally be introduced in the subsequent stages of the process.

How is an equidistance line constructed in a legally and technically precise manner?

An equidistance line consists of a series of straight lines, each controlled by one base point on either side. These meet at a series of turning points, each controlled by three base points: two on one side and one on the other. The line thus can be defined by coordinates defining a series of points connected by straight, or geodesic, lines. At every point on the equidistance line, only the nearest base point on either side is used. This is a manifestation of the concept of proximity, whereby a coastal State is *prima facie* entitled to those maritime areas that are closer to its coasts.

Although simple as a concept, the drawing of a precise equidistance line is a complex and difficult process, requiring the use of modern computer software for a precise solution. The engagement of competent technical expertise is essential. One of the complexities is the requirement for all the calculations to be made on the curved surface of the Earth or ellipsoid as the use of charts, especially Mercator, produces scale distortions that are hard to correct. Early equidistance solutions were done by hand and lack the precision of modern computer techniques. For example, in 1965, the southern leg of the UK–Norway median line in the North Sea was calculated by hand using specially printed over-sized charts and long beam compasses. When the line was continued into the northern leg in 1978 using computer-based techniques, an error of 330m was found in the previous hand calculation.[63] Similarly, in the *UK/France Continental Shelf* case, the use of a Mercator chart led to material errors through construction of an equidistance line as a loxodrome rather than a geodesic.

The basic elements and considerations for the construction of an equidistance line between (1) opposite and (2) adjacent coasts is examined in the paragraphs that follow.(p. 59)

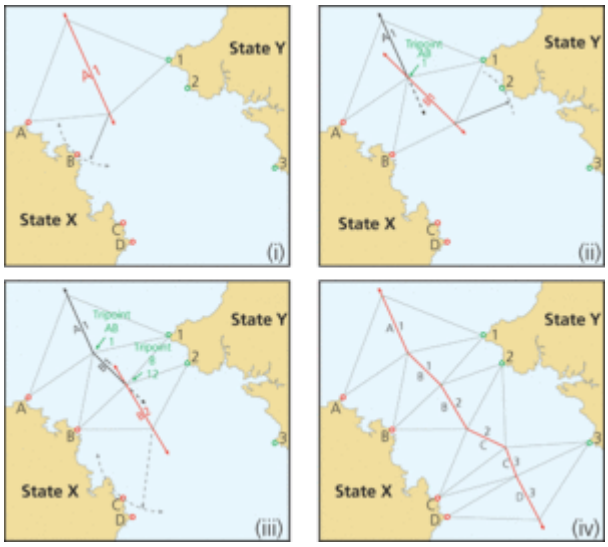

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Figure A2.11: The construction of a median line between opposite coasts.

Opposite coasts

Figure A2.11 shows the construction of an equidistance line between States with opposite coasts. The coastlines have been simplified to four base points for State X (A to D) and three for State Y (1 to 3). Starting at Figure A2.11(i) in the north, the nearest base points are Point A on State X and Point 1 on State Y. The first part of the line can be drawn equidistant between these two base points (A and 1). For clarity, the line segment is labelled with the two controlling base points (i.e. A1). This line can be extended in both directions until another base point becomes closer. In this case, as the line extends to the south, Point B becomes closer than Point A on the side of State X. The next line segment (Figure A2.11(ii)) is drawn equidistant between Point B and Point 1, resulting in a slight change in direction at the location where Point B takes over control of the median line from Point A. The point where the two lines A1 and B1 intersect is a ‘tripoint’, or turning point equidistant from Points A, B, and 1. As the line continues to the south (Figure A2.11(iii)), Point 2 comes into play on the State Y side, generating the next tripoint equidistant from Points B, 1, and 2.

The line proceeds southwards (Figure A2.11(iv)), changing base points on one side or the other, resulting in a series of straight lines connected by turning points. In this example, the four base points on the State X side and three on the State Y side (p. 60)

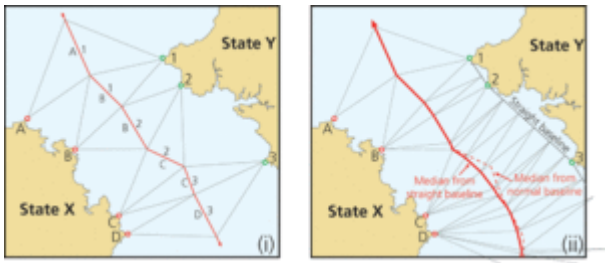

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Figure A2.12: Comparison of a median line drawn from normal baselines (i) with a median line drawn from straight baselines on one side (ii).

have produced five turning points. The resulting line can be identified by a list of five coordinates, stating that they are joined by geodesics and referred to a specific map datum (e.g. WGS84). The ends of the line are shown with arrows, implying that they extend along the same geodesic azimuth. Assuming there are no more base points, these would normally

continue until they meet an area under the jurisdiction of a third State (or an equidistance line with a third State, forming a further tripoint).

For opposite coasts, the general presumption is that the median line produces an equal division of the maritime area and a result that is inherently equitable.[64] The geometry of such a median line means that each base point only controls the median line for a short distance, thus avoiding the situation that can be found with adjacent coasts where a single point, perhaps on a very minor or irregular feature, might control the line over long distances.[65]

An alternative method that has been used between some opposite coastlines involves drawing straight lines from coast to coast and connecting their mid-points to form a median line. This has the benefit of being easy to draw, but does not use the closest base points on the two coasts. Modern computer software has made this technique redundant.

Where one of the coastal States adopts a straight territorial sea baseline (e.g. enclosing a bay or other significant indentation in its coast), that State will always reap an advantage if the median line is calculated with reference to intermediate points on that baseline. Figure A2.12 shows the same area as Figure A2.11, this time with a hypothetical straight baseline for State Y. The median is drawn using (p. 61)

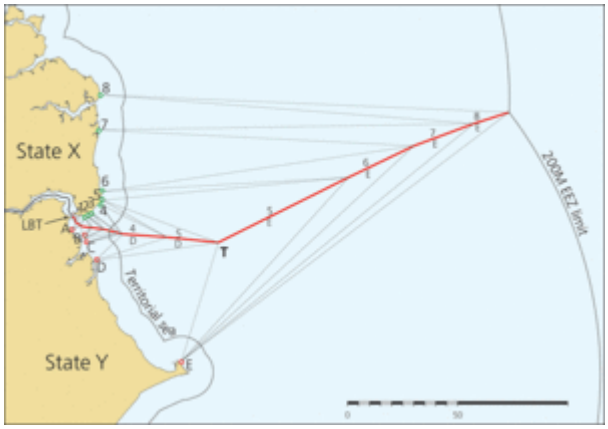

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Figure A2.13: The construction of an equidistance line between adjacent coasts.

intermediate points along the baseline. This has a notable effect in favour of State Y opposite Points 2 and 3.

The use of intermediate points along straight baselines for the purposes of constructing a median line can be highly contentious. Strictly speaking, the use of such intermediate points is not improper for the purposes of the definition of an equidistance line at Article 15 of UNCLOS, which specifies the use of the territorial sea baseline. Where both States use straight baselines, the resulting median line between them might in principle be equitable, but in practice intermediate points on straight baselines are rarely used in the delimitation of maritime boundaries.[66]

Adjacent coasts

For States with adjacent coasts, the basic technique for construction of an equidistance line is exactly the same. Figure A2.13 shows a hypothetical situation of two States, X and Y, which share a land boundary along a river. The equidistance line extends seawards from the land boundary terminus (LBT). The most seaward point (p. 62) of the equidistance line on the 200M limit is controlled by Point E on State Y and Point 8 on State X. As the line moves landwards, Points 8 to 5 come into play on State X's side, while Point E remains the controlling base point on State Y. Each straight section is controlled by the two nearest base points; the straight sections on the equidistance line meet at tripoints, or turning points, each controlled by three base points. As the equidistance line starts at the LBT, the first few

base points are typically very close together, becoming further apart as the line extends seawards.

The principal technical difference between an equidistance line between adjacent coasts and a median line between opposite coasts is that small features, especially when close to the land boundary terminus, can have a disproportionate effect between adjacent coasts and thereby dictate the course of the equidistance line over a long distance. Point E on State Y, which is situated at the tip of a small peninsula, controls the whole of the equidistance line seaward of Point T—a distance of some 150M in this example. As explained below, at the second stage of the delimitation process, it might be given reduced weight as a special or relevant circumstance.

Compared with the opposite coastline in Figure A2.11 above, the control lines joining the base points meet the equidistance line at a much more acute angle and lead to an inherently less stable solution. While some situations of adjacency can produce stable solutions (such as in *Guyana/Suriname*, where the base points were widely spread along the coasts of both States), the jurisprudence demonstrates that such situations create a greater likelihood of geographical special or relevant circumstances requiring adjustment of a provisional equidistance line in order to achieve an equitable solution.

In many situations, the coastal relationship between two States will change over the course of the maritime boundary. Thus, those States may have both opposite and adjacent coasts over different parts of a boundary.[67] Figure A2.14 shows a strict median line (blue) drawn between the coasts and islands of States X and Y. The line consists of some twenty-five turning points connected by straight lines. In the south of the figure, the coasts are opposite and each base point only controls the line for a short distance before giving way to the next. The control lines of equal length connecting the turning points to their base points meet the median line at relatively large angles—either side of 90°—which produces a solution that is stable geometrically. Where there is an anomalous feature, such as the small island at Point B, its effect is significant in the vicinity of the island, but is short-lived as its base points quickly give way to others on the mainland coast of State Y.

As the equidistance line extends to the north, the coasts assume a position of adjacency. The last section of the median line is controlled by the two last base (p. 63)

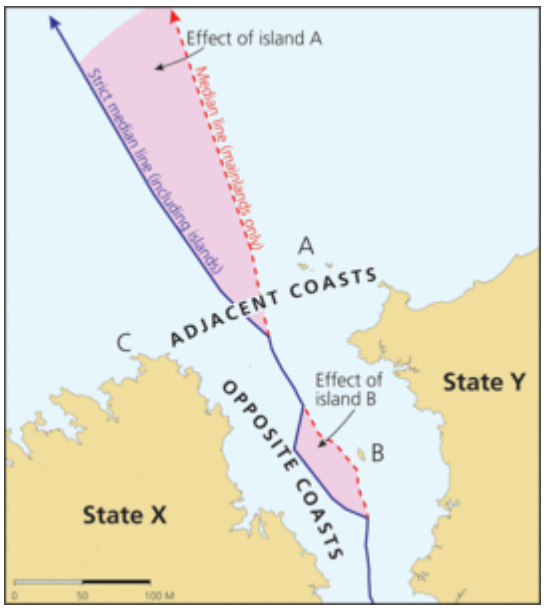

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Figure A2.14: Equidistance line: opposite and adjacent coasts and the effect of islands.

points on the two coasts, respectively Point C on the mainland of State X and Point A on another small island offshore from State Y. Point A controls the entire final 200M of the equidistance line (and generates an impact on the mainland-to-mainland line that is about ten times the impact of the similarly sized island at Point B). The equidistance line produces a less stable result in this area of adjacency due to the fact that the long final section of the line depends on single base points. The change from a situation of oppositeness to one of adjacency can give rise to a relevant circumstance requiring some adjustment of the adjacent coast equidistance line, while the opposite coast median line is left unadjusted.[68] In Figure A2.14, one possibility is that the equidistance line would be adjusted to use base points located on State Y's mainland (red dash line), or some intermediate variant attributing only limited weight to Point A. See further section 'Distorting effects of islands etc' below about giving reduced weight to small features.

The stability of the equidistance line is a function of the separation of the base points compared to the length of the line, or the angle of convergence of the (p. 64) control lines at the equidistance line. Where base points, particularly on adjacent coasts, are close together and at a very acute angle to the median, the line is highly sensitive to small variations in the position of the base points. Such variations can be caused by natural forces like coastal erosion or deposition or by revised surveys. Small effects close to the land are magnified as the equidistance line moves further from the coast. For example, in a situation where an equidistance line is controlled by two base points each 1M from the land boundary terminus between two adjacent States, if one of those base points were to move seaward by only 50m, then the effect on the equidistance line is to shift it 5km at a point located 100M out to sea. A similar 50m shift in a base point located between opposite coasts would only shift a median line 25m.

Simplified v. strict equidistance

An equidistance line drawn using the full set of base points on the territorial sea baselines of two States can consist of many hundreds or even thousands of turning points, especially when calculated by computer and using high-density baseline data. The resulting high volume of boundary coordinates is impractical, so the number of base points and turning points is normally reduced in technical discussions so as to produce a more simplified (and thus practical) equidistance line solution. An example simplification of an equidistance line is illustrated below.

The first stage of simplification involves reduction of the number of base points along the territorial sea baseline. Figure A2.15(i) shows the result of a computer calculation of a median line using a coastline digitized at a high resolution. The resulting median line has over 100 turning points, which is clearly too many to be practical for boundary purposes. This is due in particular to the rounded headlands that generate multiple base points depending on their facing direction. Figure A2.15(ii) shows the same area as Figure A2.15(i), but with the calculation simplified using a baseline that has been limited to a single base point on each major headland. The resultant median line now has ten turning points instead of over 100. As can be seen from a comparison of Figures A2.15(i) and (ii), this first stage of the simplification process need have no significant effect on the position of the median line—indeed, the course of the two median lines is virtually identical—but it can greatly simplify the technical definition of the line.

The second stage of simplification is to simplify the median line itself, without further reference to the base points. This might be desirable to reduce major changes in direction in the line, ensuring where possible that the final result is neutral as against the unsimplified line by balancing areas of adjustment, so neither side gains from the simplification process. In the example in Figure A2.15(iii), the median line can be simplified to four turning points by constructing a line connecting points M1, M2, M3, and M4 with

straight lines. There is a small ‘exchange’ of areas between the two States between points M3 and M4, which can (p. 65)

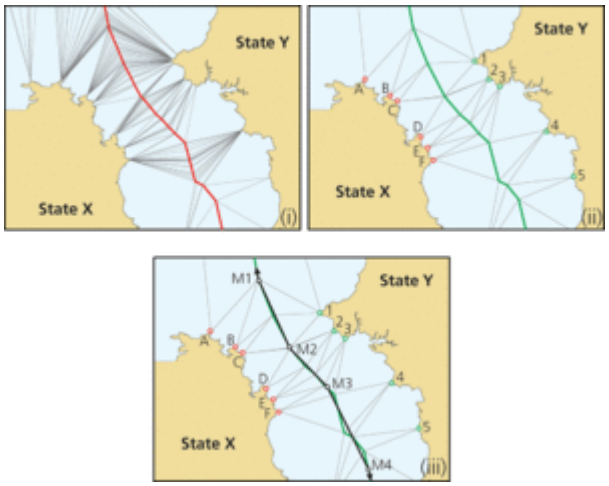

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Figure A2.15: A complex median line (i) simplified by reducing the number of base points (ii) and further by reducing the number of turning points (iii).

either be adjusted or exchanged elsewhere to give a balanced result.[69] In some cases of delimitation agreement, the equidistance line has been simplified to a simple straight line defined either by specified coordinates or by a simple azimuth.[70]

b. Stage two: adjustment of the provisional equidistance line as required by ‘special’ or ‘relevant’ circumstances in order to achieve an ‘equitable result’

The threshold for adjustment of a provisional equidistance line

The second stage of the standard delimitation process requires consideration of whether there are ‘relevant circumstances’ calling for the adjustment or shifting of the provisional equidistance or median line in order to achieve an equitable result. As the *Barbados/Trinidad and Tobago* tribunal commented, relevant circumstances are ‘case specific’. However, they will require adjustment of the provisional line only when necessary in order to achieve an equitable solution. In many cases, particularly (p. 66) those of delimitation between coastlines with unremarkable geography, no such adjustment will be required. As a result, many cases of delimitation begin and end with a median or equidistance line over all or the majority of the boundary.

An important factor in determining whether any adjustment might be required is the coastal relationship between the parties. This is because, as discussed above, a provisional equidistance line between adjacent coasts may be inherently more unstable, or inherently more vulnerable to distortion by a small geographical feature, than a median line between opposite coasts. Therefore, courts and tribunals will commonly classify the coastal relationship in the area of delimitation at the outset of their analysis. As the International Law Commission observed during its work during the early 1950s, and as the *North Sea Continental Shelf* cases confirmed, an unadjusted equidistance line can be more open to objection between adjacent coasts than an unadjusted median line between opposite coasts.

An early jurisprudential example showing the importance of the distinction between adjacent and opposite coasts was the 1978 *UK/France Continental Shelf*, where the Court of Arbitration explicitly recognized that ‘in the case of “opposite” States the median line will normally effect a broadly equitable delimitation’, whereas ‘the lateral equidistance line extending outwards from the coasts of adjacent States for long distances may not infrequently result in an inequitable delimitation by reason of the distorting effect of individual geographical features’.[71] It accordingly proceeded to make a significant

adjustment to the equidistance line in the Atlantic Ocean (where the two States were in a relationship of coastal adjacency).

The classic situation in which provisional median lines will typically be left unadjusted concerns mainland-to-mainland delimitations between opposite coasts. However, as described in the analysis of relevant circumstances below, some situations of oppositeness might require adjustment of a provisional median line to take account of, for example, small offshore islands or substantial disparities in coastal lengths. By contrast, the adjustment of provisional equidistance lines between adjacent coasts is more common, often in order to abate the distorting effect of small features or prevent encroachment on coastal projection. That said, as the *Guyana/Suriname* tribunal observed, an unadjusted equidistance line between adjacent coasts can provide a perfectly equitable delimitation in cases involving no 'geographical peculiarities'.[72]

Geographical relevant circumstances

While there is no fixed list of 'relevant circumstances' that might require adjustment of a provisional equidistance line, the modern law and State practice accord (p. 67) precedence to geographical criteria (particularly in the context of EEZ and continental shelf delimitation).[73] As Judge Schwebel put it in his Separate Opinion in *Gulf of Maine*, 'in every case of delimitation of a maritime boundary, the particular pattern of the area's geographical configuration must govern'. In a speech to the Sixth Committee of the General Assembly of the United Nations in 2001, Judge Guillaume (then President of the ICJ) commented that the factors that might require correction of an equidistance line in the pursuit of an equitable solution were 'essentially geographical in nature'.[74]

Such a geography-centric approach is faithful to the adage that 'the land dominates the sea' and the fact that State entitlements to maritime space derive from the coast, and are thus dictated by coastal geography. Also, geographical criteria are viewed as neutral and objective, bestowing no preference on elements that are more closely connected either to the EEZ/water column or to the continental shelf. As such, they are particularly appropriate in cases of single maritime boundary delimitation, which have become the norm in modern State practice and jurisprudence for reasons of convenience and practicality in the administration of concurrent maritime zones.[75]

The reliance primarily on geographical factors in the identification of relevant circumstances has also been led by a perceived need for 'stability and certainty in the outcome of the legal process' of delimitation. This is because, as the *Barbados/Trinidad and Tobago* tribunal observed in its discussion of 'equitable considerations', 'equity lies within and not beyond the law'.[76]

The modern jurisprudence focuses in particular on the following three categories of geographical circumstance as potentially requiring adjustment of a provisional equidistance line in order to ensure an equitable result:

1. the prevention of encroachment upon the projection of a State's coastline into adjacent maritime space (otherwise known as the 'cut-off' effect);

2. a marked disparity in the length of the delimiting States' relevant coastal lengths; and

(p. 68) 3. the disproportionate distorting effect that islands, rocks, promontories, and other small features can have on the course of an equidistance line.

Each of these potential relevant circumstances will be addressed in turn.

Non-encroachment and the ‘cut-off ’ effect

The principle of non-encroachment has been described by Prosper Weil as ‘one of the pillars of the law of maritime delimitation’.[77] The juridical foundation of the principle is found in the *North Sea Continental Shelf* cases of 1969, where the ICJ held that the three States parties were obliged to delimit their boundary in a way that would safeguard the physical natural prolongation of each of their respective continental shelves, without encroaching upon the physical natural prolongation of the others. In that case, the court determined that it would be ‘unacceptable’ for Denmark and the Netherlands to acquire substantial continental shelf areas at the expense of West Germany by application of an equidistance-based boundary, in circumstances where West Germany’s coastline was ‘markedly concave’.

While the concept of physical natural prolongation has lost relevance given the advent of distance-based entitlements under UNCLOS,[78] the principle of non-encroachment remains highly relevant in modern delimitation jurisprudence and State practice. This is particularly so in situations, like the *North Sea Continental Shelf* cases, where one State stands to lose out due to a concave coastline, with the result that its coastal projection into its maritime territory would be ‘cut off’ by the application of a strict equidistance line. As the court remarked in its 1969 judgment, the effect of equidistance in such a situation is to ‘pull the line of the boundary inwards, in the direction of the concavity’. The court illustrated this cut-off effect (and the contrary effect of a convex coastline on the course of an equidistance line) in a series of figures, replicated in Figure A2.16.

Two leading recent examples of adjustment to provisional equidistance lines so as to abate a ‘cut-off effect’ were provided by the *Bay of Bengal* cases (*Bangladesh/Myanmar* and *Bangladesh/India*), where the geographical configuration of the coastline was strikingly similar to that in the *North Sea* cases, and where Bangladesh stood to lose out from an equidistance-based delimitation in the same way as West Germany did in the 1969 case. In the *Bangladesh/Myanmar* case (which was decided first), ITLOS summarized the application of the non-encroachment principle in the context of delimitation between concave coastlines:

> [W]hen an equidistance line drawn between two States produces a cut-off effect on the maritime entitlements of one of those States, as a result of the concavity of the coast, then an adjustment of that line may be necessary in order to reach an equitable result.[79]

(p. 69)

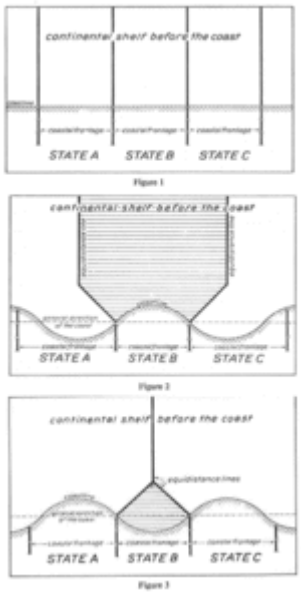

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Figure A2.16: Figures used in the *North Sea* cases to demonstrate the cut-off effects of a convexity (2), and concavity (3) compared to an equivalent straight coastal front (1).

(p. 70) ITLOS concluded that the 'manifestly concave' coastal configuration in the Bay of Bengal, and the resulting cut-off effect that the provisional equidistance line had on the maritime projection of Bangladesh, constituted a relevant circumstance requiring adjustment of the line in favour of Bangladesh. In *Bangladesh/India*, the UNCLOS Annex VII tribunal similarly observed that the provisional equidistance line with India 'cut off' the seaward projection of the Bangladeshi coast, noting that the cut-off effect became increasingly severe as the line moved further seawards. The tribunal determined that, in order to warrant adjustment of a provisional equidistance line, such a 'cut-off effect' must, first, prevent a State from extending its maritime boundary as far seaward as international law permits and, second, prevent the achievement of an equitable solution. The tribunal considered that those dual requirements were met and made an adjustment to the provisional equidistance line in Bangladesh's favour that was broadly equivalent to the adjustment made less than two years earlier in the ITLOS case.[80] The combined result of the two decisions, and the adjustments of the two provisional equidistance lines in favour of Bangladesh, was that Bangladesh secured a delimitation outcome that safeguarded its coastal projection into the Bay of Bengal, including into areas of outer continental shelf beyond 200M.[81]

Another situation in which the principle of non-encroachment can constitute a relevant circumstance is where small islands belonging to one State are located off the mainland coast of another. Thus, in *Nicaragua/Colombia*, the ICJ observed that a provisional median line between a group of small Colombian islands and the Nicaraguan mainland had the effect of cutting off Nicaragua from three-quarters of the maritime area into which its coast projected. This led the court to make a significant adjustment to its provisional line in favour of Nicaragua. Similarly, in the *St Pierre and Miquelon* case, the small French islands were accorded only a very narrow southerly projection in the delimitation so as to avoid any encroachment on the parallel southerly projection of the Canadian coast of Newfoundland. Notably, in both cases, the ICJ and arbitral tribunal (respectively) were at pains to ensure that the final delimitation line did not encroach unduly upon the seaward projection of the small islands concerned. They did so by, in effect, safeguarding the maritime projections of the islands in directions facing away from the adjacent mainland coasts.

An important consideration in the context of arguments of non-encroachment and cut-off as a relevant circumstance is the concept of the so-called ‘radial projection’ of the coast. The concept derives from the dissenting opinion of Prosper Weil in the *St Pierre and Miquelon* case, and was taken up by the UNCLOS tribunals in (p. 71)

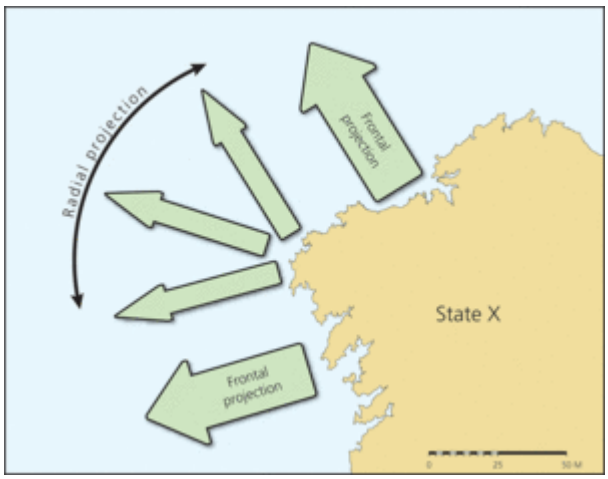

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Figure A2.17: Radial and frontal projections of coasts.

Barbados/Trinidad and Tobago and *Bangladesh/India*. Pursuant to the concept, coastlines do not project in a single, perpendicular direction, but rather abut the sea by means of a ‘radial or directional presence’ (Figure A2.17). As the *Bangladesh/India* case shows, this consideration can also be material in the identification of what are the parties’ relevant coasts.

The identification of relevant coasts can also be a significant factor in the determination of whether any adjustment of a provisional equidistance line is required in order to prevent encroachment or abate a cut-off effect caused by coastal concavity. For example, in the *Cameroon/Nigeria* case, the court rejected Cameroon’s cut-off argument because the coastline that it had identified as relevant to the delimitation exhibited ‘no particular concavity’. Furthermore, it is clear that, in order to constitute a relevant circumstance in any given delimitation, an encroachment or ‘cut-off’ effect must arise within the area to be delimited, without reference to the coastlines of any third State. Thus, in *Cameroon/ Nigeria*, the court refused to consider the effect of Bioko Island (part of Equatorial Guinea) in constraining Cameroon’s coastal projection in the Gulf of Guinea. Similarly, in *Bangladesh/India*, the tribunal emphasized that its decision was based ‘solely on consideration of the relationship between Bangladesh and India and their respective coastlines’, regardless of the adjoining relationship between Bangladesh and Myanmar. In other words, the coastlines of third States (Equatorial Guinea and (p. 72) Myanmar, respectively) were disregarded in determining whether coastal concavity should be treated as a relevant circumstance in the delimitations.[82]

Marked disparity in relevant coastal lengths

A second geographical relevant circumstance, recognized throughout the modern delimitation jurisprudence, is the existence of a marked disparity in the relevant coastal lengths of the coastal States. As Churchill and Lowe observe, coastal length disparity is a relevant circumstance ‘especially (perhaps only) in the case of opposite coasts’.[83]

The first example of this circumstance arising in the jurisprudence was the *Libya/Malta* case, where the court identified a ‘very marked difference in the lengths of the relevant coasts of the Parties’, equating to a coastal length ratio of 8 to 1 in favour of Libya. In *Jan Mayen*, the disparity was even greater, equating to a ratio of more than 9 to 1 in favour of Denmark. In the more recent *Nicaragua/Colombia* case, the court found that a relevant coastal length ratio of 8.2 to 1 in favour of Nicaragua constituted a ‘substantial disparity’.

In all of these cases, the disparities were found to constitute relevant circumstances requiring adjustment of the maritime boundary in favour of the State with the longer relevant coast. Notably, however, as the court emphasized in *Jan Mayen*, the resulting adjustment will not be by means of a 'direct and mathematical application', but will often be more modest in nature.[84]

In order for a disparity in relevant coastal lengths to constitute a relevant circumstance, the disparity must generally be 'marked' or 'substantial'. Failure to meet this threshold led the ICJ to reject arguments based upon disparity in the *Cameroon/Nigeria* and *Black Sea* cases. An exception was the *Gulf of Maine* case, where a relevant coastal ratio of just 1.38 to 1 was held to constitute a relevant circumstance requiring adjustment of a median line in favour of the United States. This contrasts with the *Black Sea* case, where the court determined that a relevant coastal length ratio of 1 to 2.8 was held insufficiently 'marked' to constitute a relevant circumstance. However, the ICJ Chamber's conclusion in *Gulf of Maine* was heavily influenced by the specific coastal configuration of the delimitation area and, in particular, the fact that the United States' coast occupied two of the three sides of the Gulf, including the entire back portion facing out into the delimitation area.

In most cases, the task of measuring coastal length will be simplified using straight lines. For example, in *Bangladesh/Myanmar*, ITLOS decided to break down each (p. 73) State's relevant coast into two straight lines so as to avoid the difficulties that would otherwise arise from the 'sinuosity of the coast'. Straight or 'closing' lines will often also be used across inlets, bays, and gulfs, as happened in *Gulf of Maine* (across the Bay of Fundy) and *St Pierre and Miquelon* (across the Gulf of St Lawrence). In each of those cases, the lines concerned counted towards the relevant coastal length as they represented the projection of the coastline behind them into the disputed area. However, in the *Black Sea* case, the court refused to include a closing line across the Karkinits'ka Gulf as part of Ukraine's relevant coast as it concluded that the feature did not project into the disputed area.

Distorting effect of islands, rocks, promontories, and other small features

As illustrated in Figures A2.10 and A2.14 above, the course of an equidistance line can become significantly distorted by base points located on islands, rocks, and other small features. Such distortions are often treated as relevant circumstances requiring adjustment of a provisional equidistance line. Indeed, the distorting effect of small or irregular coastal features is probably the most commonly recognized and applied relevant circumstance in the modern delimitation jurisprudence.[85]

It is important to note, however, that islands, rocks, or other features will only constitute relevant circumstances where they have a distortive effect on the geography of the delimitation area, and thus on the course of an equidistance or median line. As Evans observes, 'it is not geographical features that might be special circumstances, but unusual geographical features: unusual in the sense that they do not conform to the general geographical relationship that is held to exist'.[86]

The extent of any distorting effect can be quantified by drawing a strict equidistance line using the feature and one without it. Depending on the circumstances, the feature can be ignored or given reduced weight.

Islands are the features that most often present challenges in drawing and adjusting equidistance lines. Depending on their size, status, and distance from the mainland, they may be given limited or no weight.

Figure A2.18 shows an example of two adjacent States with an island that belongs to State Y situated inconveniently close to the land boundary terminus and largely on the State X

side of an equidistance line drawn from the mainland (represented by red dashes). Giving full weight (or effect) to the island results in a substantially (p. 74)

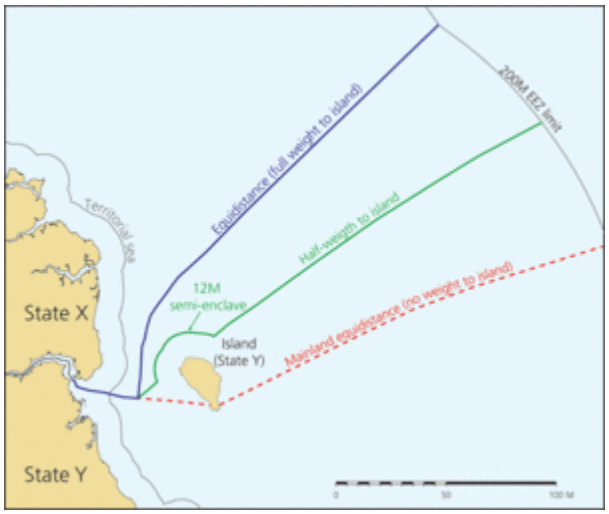

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Figure A2.18: Adjacent coasts: calculating reduced effect for an island.

distorted (blue) equidistance line that veers north in front of State X, broadly parallel to its coast, before turning to the northeast. That line clearly cuts off State X's coastal projection into the delimitation area and thus requires adjustment in order to produce an equitable result. Depending on the circumstances, the island could be given no weight (the red dashed line), half weight (the green line), or indeed some other weighting. In the illustration, the red-dashed line would give an unsatisfactory result since it would leave the island on the 'wrong' side of the boundary. By contrast, the green line preserves the island's territorial sea, leading to a so-called semi-enclave on the 'right' side of the boundary (in respect of which, see 'Enclaves and semi-enclaves' below).

A reduced weight line is calculated by, first, drawing the equidistance line using the island (i.e. a full-weight line) and, second, drawing the line without the island (i.e. a nil-weight line). A reduced-weight line can then be drawn. In this case, a half-weight (or 50 per cent) line has been constructed that is equidistant between the two.

Similar (albeit generally less dramatic) adjustments can be required in order to prevent islands having a distorting effect in delimitation between opposite coasts. Figure A2.19 shows two States with opposite coasts and an island, belonging to (p. 75)

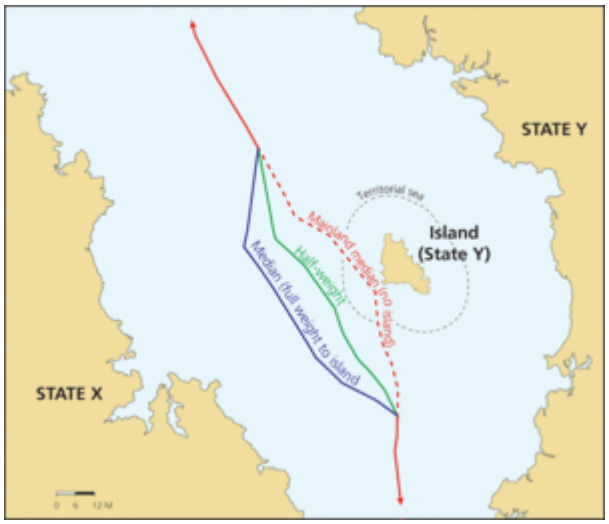

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Figure A2.19: Opposite coasts/reduced weight for islands.

State Y, situated close to the mainland-to-mainland median line (represented by red dashes). The median line calculated using the island (the blue line) is situated close to State X's coast. As in the adjacent coasts example above, a half-weight (or 50 per cent) line can be calculated between the two (the green line). If the island's territorial sea limit intersects the reduced weight line, this might lead to a 12M semi-enclave around the island.

In some situations, usually involving delimitation between a single small island and a mainland State, it is not possible to calculate the nil-weight line. One solution is to use the baseline of the island so that the half-weight line is midway between the median line and the baseline. Where the island is situated beyond 200M from the mainland, a half-weight line could be considered between the median and the mainland's 200M limit. This approach was taken by the court in *Jan Mayen*.[87]

A similar weighting approach can be taken to reduce the effect of other irregular features, such as extensive harbour works or prominent headlands (Figure A2.20).[88] Again, the half-weight line is calculated with reference to a strict equidistance line (p. 76)

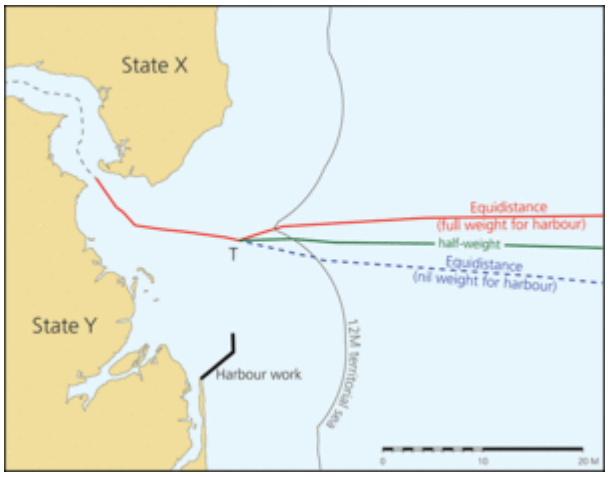

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Figure A2.20: Reduced weight for a prominent feature/harbour work.

and an equidistance line ignoring the irregular feature. In Figure 2.20, the harbour work starts impacting the equidistance line at Point T.

The distorting effect of small and irregular features is most readily apparent in the context of delimitations between adjacent coasts. An early example in the jurisprudence was the *UK/France Continental Shelf* case, where the distorting effect of the Scilly Isles (which lie between 21 and 31M off the mainland coast of the United Kingdom) was identified as a special circumstance for the purposes of Article 6 of the 1958 CCS. In reaching its conclusion, the Court of Arbitration noted that the adoption of an equidistance line drawn from base points on the islands would accrue approximately 4,000M² of additional maritime space for the United Kingdom. Therefore, it accorded the islands only half effect in the delimitation. The ICJ accorded similar treatment to the Tunisian Kerkennah Islands in the *Tunisia/Libya* case, so as to prevent those features having 'excessive weight' in the delimitation.

In *Gulf of Maine*, the ICJ Chamber accorded half effect to Seal Island in the sector of the boundary delimited between the parties' opposite coasts. It observed that it would be 'excessive' to treat the Canadian coast as effectively being transferred by the whole (7.8M) distance between the tiny island and the Canadian mainland, since this would move the median line 3.9M in favour of Canada.[89]

(p. 77) Sometimes, the distorting effect of a small island feature can be so substantial that it will be discounted altogether in the delimitation. This is particularly likely where the feature is uninhabited and located well offshore in an adjacent coast situation, in which case it can have a dramatic effect on the course of an equidistance line. An example was the small Bahraini island of Fasht al Jarim in the *Qatar/Bahrain* case, where the ICJ concluded that equity required that the feature should have no effect in delimiting the boundary. The tribunal in the *Newfoundland and Labrador/Nova Scotia* case similarly gave no effect to Sable Island, which lies about 88M off the Nova Scotia mainland and occupies an area of around 33km², noting that, in the context of an adjacent coast delimitation, the feature was 'capable of having major effects' if given excessive weight.

Where a comparatively small island sits immediately off two adjacent mainland coasts, it might be accorded full weight in delimitation of the territorial sea, but little or no weight in delimitation of the EEZ and continental shelf beyond. An example was the treatment of St Martin's Island, which has a permanent population of about 7,000 people and covers approximately 8km², in *Bangladesh/ Myanmar*. ITLOS considered that the island had a 'right' to a 12M territorial sea, including in the maritime areas where its territorial sea no longer overlaps with that of Myanmar.[90] However, ITLOS accorded the feature no effect beyond the island's 12M limit.

In the case of territorial sea delimitations between opposite mainland coasts, an equitable solution may require the boundary to pass well within 12M of small island features located between the mainlands. An example was the territorial sea delimitation in *Qatar/Bahrain*, where the ICJ delimited the boundary immediately to the east of the small island of Qit'at Jaradah so as to prevent that feature from having a disproportionate effect.

A significant factor when determining the weight to be accorded to small island features is their proximity to the mainland coast. Thus, in *Eritrea/Yemen*, the tribunal distinguished between a group of islands fringing the Eritrean mainland coast, which formed 'an integral part' of that coast, with a number of small, isolated islands located almost halfway between the States' opposite coasts. Whereas the former were accorded full weight in construction of the median line boundary in the Red Sea, the latter were given no effect (although the tribunal noted that the median line still accorded them a full territorial sea).[91] Equivalent considerations applied in the *UK/France Continental Shelf* case, where the Scilly Isles were given half effect in the construction of the equidistance-based boundary, while the Channel Islands (located much closer to France) were instead enclaved. (p. 78) In *Black Sea*, the

remote Serpents' Island was similarly discounted as part of Ukraine's coastal configuration, and thus ignored in the construction of the equidistance-based boundary.

Another significant factor can be the existence of State conduct or acquiescence recognizing the validity of an island or other small feature as a base point. For example, in the *UK/France Continental Shelf* case, the Court of Arbitration concluded that Eddystone Rock (a tiny feature situated 8M off the UK mainland and the location of a lighthouse since the eighteenth century) should be accorded full weight in the construction of the median line boundary. Central to that conclusion were the facts that French hydrographic experts had previously agreed to the use of Eddystone Rock as a base point during negotiations and France had also accepted the feature in the delimitation of UK fisheries limits. Similarly, in *Newfoundland and Labrador/Nova Scotia*, the tribunal accorded full weight to St Paul Island (a small island in Nova Scotia of less than 5km^2 which had never supported human habitation) because Newfoundland had expressly accepted the feature as a base point for the purposes of delimitation during earlier inter-provincial discussions.

Another situation in which small islands or other irregular features might be accorded full weight in delimitation is where they are present on either side of the boundary, such that the resulting equidistance line represents an equitable and balanced outcome between the two States. Thus, for example, in *Eritrea/Yemen*, the tribunal accorded full weight to a series of islands fringing the coasts of both States in construction of the northernmost stretch of the median line boundary. Similarly, in *Dubai/Sharjah*, the tribunal accorded full weight to harbour works located on either side of the land boundary in the construction of an equidistance line between the adjacent coasts. The tribunal was unperturbed by the fact that Dubai's harbour works projected a mile further into the sea than Sharjah's because the resulting deflection of the line was only 'slight'.[92]

Special considerations can apply in the case of islands constituting independent States. Obviously, a delimitation line between two small island States will *prima facie* accord full weight to the base points on each island. The position may be different in the case of delimitations between small island States and continental mainland States. In *Libya/Malta*, the court observed that, in principle, the coastal relationship between Malta, as an independent State, and its continental neighbours was necessarily different from the relationship that would have existed if (p. 79) Malta were part of the territory of a mainland State. After all, as Evans notes, only islands politically integrated into a mainland State which is itself involved in the delimitation can be deemed to be relevant circumstances.[93] However, the ICJ proceeded to adjust the Libya-Malta median line by three-quarters of the distance between it and the hypothetical median line between Italy and Sicily, thus conceptually giving Malta only 25 per cent effect. This end result, which was on one view highly favourable to Libya, was arguably inconsistent with the very principle that the court had said should apply in the context of delimitation between two independent sovereign States.[94] It is perhaps not very different from the result in *St Pierre and Miquelon*, which concerned delimitation between a large continental State (Canada) and a group of small islands falling under sovereignty of a distant State (France). In that case, while the French islands were accorded a full 200M entitlement, this was limited by way of a narrow 10.5M corridor projecting southwards into the Atlantic Ocean. In delimiting the corridor, the majority of the tribunal rejected the concept of 'radial' coastal projection, which has broadly been accepted in subsequent cases. Although the tribunal did not base its decision upon the particular paradigm of a delimitation between a continental mainland State and the small overseas island territories of a distant State, it is open to question whether the tribunal would have taken a different approach to the concepts of coastal projection and non-encroachment if St Pierre and Miquelon had been an independent sovereign State.

A principle that has been applied more faithfully in the jurisprudence is that islands falling under the sovereignty of a third State are not capable of constituting relevant circumstances in delimitation. Thus, in *Cameroon/Nigeria*, the ICJ dismissed Cameroon's arguments to the effect that the location of Bioko Island (part of Equatorial Guinea) should form a relevant circumstance requiring adjustment of the Nigeria-Cameroon equidistance line. The court stated that the effect of Bioko on the seaward projection of the Cameroonian coast was an issue between Cameroon and Equatorial Guinea (which was not a party to the proceeding, although it had intervened in the case).

The weighting method above can be likened to a 'split-the-difference' approach and has the benefit of being easy to visualize and calculate. An alternative, but (p. 80)

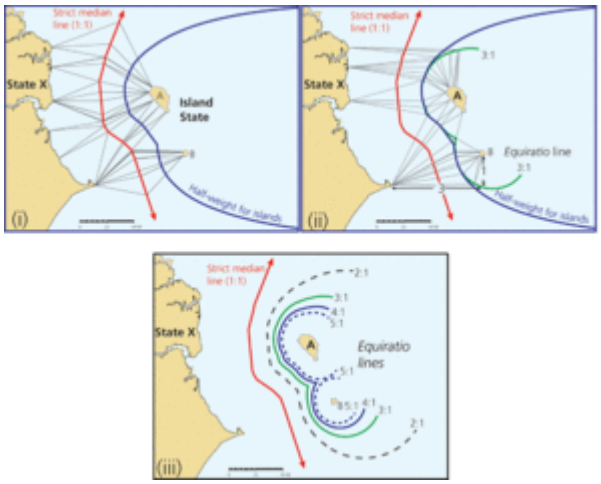

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Figure A2.21: Development of an *equiratio* line.

highly complex, approach was developed by Langeraar,[95] who proposed a quantitative or algorithmic weighting approach. The idea was to produce a method that is more flexible than equidistance and capable of fine adjustment. This method is often described as the *equiratio* method.

A normal median line is drawn such that it is an equal distance from the base points of the two States. These are often shown with control lines indicating which of the base points are in use for each segment. Figure A2.21(i) shows a typical median line between an island State and mainland State X. Control points on the mainland and on the two small islands control the median line; control lines connecting the base points and turning points on the median line on each side are the same length. Figure A2.21(i) also shows a half-weight line calculated using the methods described above, which is drawn midway between the median line and the island baselines. This line is located one-quarter of the way between the islands and the mainland.

For the *equiratio* approach, a line is drawn such that the distance from the turning points on the line to each set of base points is in a defined ratio. Where the weights (p. 81) are equal (1:1), an equidistance line results as above; different weights result in an '*equiratio*' line. In Figure A2.21(ii), an *equiratio* line is calculated such that each point on the line is three times as far from the State X base points to the west as it is from the island State base points to the east. This provides the same weighting as the half-weight line in Figure A2.21(i). The effect of the shorter control lines on parts of the boundary is to make sections of it highly curved. These are likely to be simplified for the final result. Figure A2.21(iii) illustrates different *equiratios* lines using different ratios between the respective States' base points.

The *equiratio* line is a highly complex line that is difficult to calculate, but provides complete flexibility in weighting of base points. It tends to produce very curved lines that are not always practical solutions. The technique has to date only been applied in *Nicaragua/Colombia*, where a 3:1 line was used, similar to the hypothetical example above. In the final delimitation, however, the boundary was formed by straight lines that simplified the *equiratio* result.[96]

Enclaves and semi enclaves

In many cases, small offshore islands have been accorded a full 12M territorial sea, but no more, resulting in the creation of so-called 'enclaves' or 'semi-enclaves'. The enclavement (or semi-enclavement) of islands that fall on the 'wrong' side of mainland-to-mainland median lines is relatively common, both in State practice and in the jurisprudence.

Figure A2.22 shows three islands (A, B, and C) belonging to State Y that lie on the 'wrong' side of a median drawn between the mainlands of States X and Y. Such is their distorting effect to the prejudice of State X that any delimitation based upon a median line using the islands (shown in blue) is unlikely to result in an equitable solution. In such a situation, a more equitable result might be to delimit in a way that safeguards the territorial seas of the islands, but prevents them from having any impact beyond their 12M limits. The territorial seas of islands A and C intersect the mainland-to-mainland median line. The boundary in their vicinity is therefore drawn so as to create a 'semi-enclave', giving them a full 12M territorial sea. By contrast, island B lies entirely on State X's side of the mainland-to-mainland median line and has been enclaved fully within its 12M limit.

A classic example of a full enclave of a substantial populated group of islands was the treatment of the Channel Islands in *UK/France*. The Channel Islands are a UK dependency consisting of four principal islands covering approximately 195km², with a population of more than 100,000. They are just over 6M from the French mainland, but almost 50M from the UK mainland. As such, they are located well on the French side of the mainland-to-mainland median line.[97] The Court of Arbitration observed that, if the Islands were given full effect in the delimitation, (p. 82)

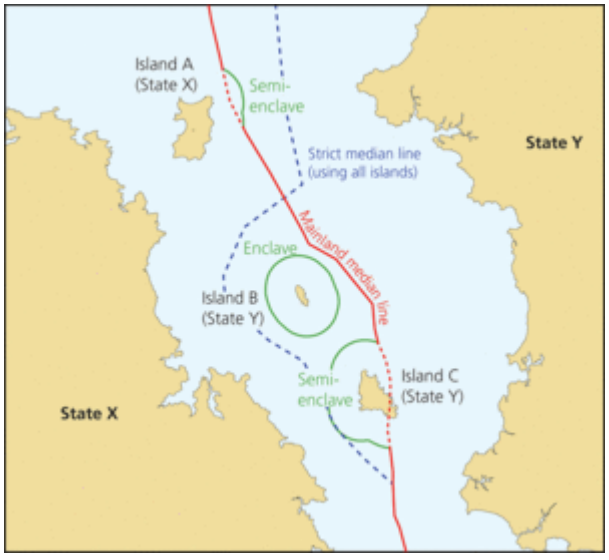

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Figure A2.22: Enclaves and semi-enclaves for islands on the 'wrong' side of a median line.

this would 'manifestly result in a substantial diminution of the area of continental shelf which would otherwise accrue to the French Republic'. Accordingly, they constituted a special circumstance for the purposes of 1958 CCS. The court concluded that an 'equitable balance' was to delimit the boundary by way of a mainland-to-mainland median line

ignoring the Channel Islands, and then to delimit a separate boundary according the islands a 12M enclave within the French continental shelf.[98]

Unlike full enclaves, semi-enclaves do not require the delimitation of entirely separate boundary lines around isolated small features. Rather, they are normally used for the purposes of according small islands limited weight; most commonly, to accord them a full 12M territorial sea around their coasts, but no weight in EEZ and continental shelf delimitations beyond. Examples include the treatment of Abu Musa in *Dubai/Sharjah*, Serpents' Island in the *Black Sea* case, various small cays in *Nicaragua/Honduras* and *Nicaragua/Colombia* (which resulted in a (p. 83) combination of both enclaves and semi-enclaves), and St Martin's Island in *Bangladesh/Myanmar*.[99]

Low-tide elevations

The treatment of low-tide elevations can raise very different considerations, particularly when located in areas of overlapping maritime claims. This is because low-tide elevations do not constitute land territory for the purposes of international law. Accordingly, they cannot be appropriated by coastal States in the same way as island or rock features that are above water at high tide. Also, low-tide elevations have no territorial sea (let alone EEZ or continental shelf) of their own under UNCLOS. Therefore, the maxim 'the land dominates the sea' has no application in this context.

In *Qatar/Bahrain*, the court faced a situation where a number of low-tide elevations were present within the territorial sea limits of both Qatar and Bahrain, and thus within the area of dispute between them. The court observed that both States were entitled in principle, under Article 13 of UNCLOS, to use the low-water line of such features for measuring the breadth of their territorial seas. As such, the features formed part of the coastal configuration of both States. The court held that, for the purposes of delimitation, such low-tide elevations must be disregarded in constructing an equidistance line. As a result, the question of which State had sovereignty over the low-tide elevations would be resolved by the location of the delimitation line.[100]

Indeed, recent jurisprudence casts doubt over whether low-tide elevations should ever be capable of constituting base points for the construction of a provisional equidistance line, particularly where they are detached from the coast. In the *Bangladesh/India* case, the tribunal discounted low-tide elevations altogether in constructing the equidistance line, even in the territorial sea. In doing so, it observed that such features did not fit the criteria elaborated in the *Black Sea* case, where the ICJ stated that base points are to be constructed from 'the most appropriate points on the coasts'. As elaborated in Part C, Chapter 1 of this book, the decision to ignore low-tide elevations and other small features altogether in the construction of a provisional equidistance line where they would otherwise constitute valid base points under UNCLOS, as opposed to treating them as a relevant circumstance at the second stage of delimitation, appears to deviate from the (p. 84) geometric objectivity that is supposed to be integral to the first step of the three-stage delimitation process. On the contrary, the engagement of judicial discretion so as to select 'the most appropriate points' for construction of a provisional equidistance line has inserted an inherently subjective element to the first stage of the delimitation process in recent cases.

Natural resources—special considerations

Many (probably most) modern maritime delimitation disputes involve sovereign States' competing claims to actual or prospective natural resources: most often oil, gas, or mineral resources located in the seabed, or fisheries resources located in the water column. The

question therefore often arises: Can the presence, historical exploitation, or comparative importance of such resources constitute relevant circumstances in delimitation?

As explained in the previous subsection, for a number of reasons, modern international jurisprudence has tended to accord priority to geographical circumstances, which are perceived as being ‘neutral and objective’ as between the water column and the seabed and thus particularly appropriate in cases of single maritime boundary delimitation. This does not mean that natural resources are entirely irrelevant to delimitation and have no role to play in the three-stage approach. On the contrary, early cases such as the *North Sea Continental Shelf* cases and *Libya/Malta* indicate that, in principle, the natural resources of the area ‘so far as known or readily ascertainable’ might constitute relevant circumstances in delimitation. However, the court emphasized in those early cases that delimitation is not a question of ‘awarding a just and equitable share of a previously undelimited area’, and that there can be ‘no question of distributive justice’ of the resources of any given disputed area. As more recent jurisprudence like *Nicaragua/Colombia* shows, a substantially higher threshold applies such that natural resource considerations will lead to adjustment of the provisional equidistance line only in ‘exceptional’ situations. So what are those ‘exceptional’ situations? The treatment of hydrocarbon resources, on the one hand, and fisheries resources, on the other, merits separate discussion.

Hydrocarbon resources and exploitation

The historic hydrocarbon concession practice of the disputing States may be a relevant circumstance in delimitation, at least in the context of continental shelf delimitation or single boundary delimitation where no significant fisheries resources are at stake. However, the jurisprudence indicates that arguments based on historic hydrocarbon practice will face a high threshold. A rare case where such practice played a decisive role was *Tunisia/Libya*. There, the court delimited the first leg of the continental shelf boundary with reference to a line representing the parties’ uniform *de facto* hydrocarbon practice, because it considered the line indicative of what ‘the parties themselves may have considered equitable’. In many subsequent cases, arguments based on hydrocarbon concession practice have generally been unsuccessful. For example, in *Newfoundland and Labrador/Nova Scotia*, the tribunal rejected such arguments due to the (p. 85) absence of any ‘unequivocal pattern of conduct’ between the provinces concerned. It also noted the fact that, in contrast with *Tunisia/Libya*, the historic practice had been limited to seismic activity rather than the discovery of exploitable fields.

More recent jurisprudence has focused even more on the question of whether historic hydrocarbon practice demonstrates the existence of a tacit boundary agreement. In *Cameroon/Nigeria*, the ICJ commented that ‘oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line’. Only if they were ‘based on express or tacit agreement between the parties’ would they be taken into account.[101] Since there was no evidence of agreement between Nigeria and Cameroon regarding their respective oil concession practice, such practice could not constitute a relevant circumstance in the delimitation.

As discussed above, modern jurisprudence indicates that evidence of any tacit boundary agreement must be ‘compelling’ if it is to be determinative in any delimitation process.[102] This now appears to be the case in connection with arguments of tacit agreement around historic hydrocarbon concession practice. In light of this, the *Guyana/Suriname* tribunal observed the ‘marked reluctance of international courts and tribunals to accord significance to the oil practice of the parties in the determination of the delimitation line’.[103] As a result, *Tunisia/Libya* remains the only jurisprudential example where historic hydrocarbon practice has played a determinative role in maritime delimitation.

Fisheries resources and exploitation

Cases where fisheries resources and exploitation have been determinative of the course of a maritime boundary are no less ‘exceptional’. However, courts and tribunals have been loath to ignore such factors altogether when presented with compelling evidence about the importance of fisheries in the disputed area to the populations of one party or the other. This has led to the adoption of some innovative solutions beyond the mere delimitation of the boundary line in order to ensure equitable access to fisheries resources.

There is only one case in the modern jurisprudence where the need to ensure access to fisheries resources was found to constitute a relevant circumstance requiring adjustment of a single maritime boundary: the *Jan Mayen* case, which concerned the delimitation in the northern Atlantic Ocean between Greenland and the small Norwegian island of Jan Mayen. In that case, the circumstances demonstrably were ‘exceptional’. Fisheries were the only known natural resource of any value in the delimitation area and the evidence of their comparative importance to Greenland was compelling. Fisheries employed about one-quarter of the Greenland labour force and accounted for approximately 80 per cent of its (p. 86) total export earnings; by contrast, Jan Mayen had no permanent population. Of particular importance was the fishery for capelin, which was a migratory species commonly found in the southern part of the disputed area during the summer and autumn months. The court determined that the provisional median line was located too far to the west for Denmark (i.e. Greenland) to be assured of ‘equitable access’ to the capelin stock. It therefore adjusted the median line eastwards, implementing progressively more significant adjustments as the boundary moved from north to south so as to reflect the importance of the fishery in the southern part of the delimitation area.

Jan Mayen is often contrasted with the ICJ Chamber’s earlier judgment in *Gulf of Maine*, where arguments about the relevance of fisheries to the delimitation were no less central to the dispute, but where fisheries ultimately played no part in the delimitation line. In *Gulf of Maine*, the totality of the evidence in support of adjustment of the single maritime boundary for fisheries reasons was less compelling. First, fisheries were not the only natural resource of concern in the disputed area; it had been the subject of hydrocarbon exploration activities since the 1960s. Second, while clearly important to the local populations of each State, their reliance on the fisheries was less extreme and all-encompassing than in the *Jan Mayen* case. Third, each State (as opposed to one State) demonstrated reliance by its fishing populations on the fisheries in the disputed area (in particular, on the Georges Bank). Fourth, and critically, the ICJ Chamber determined that its proposed boundary line posed no risk of being ‘radically inequitable’, since it would allow for continued fishing activities by the fishermen of each State on the Georges Bank. As such, the line would not ‘entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned’.[104]

Since *Jan Mayen*, many States have tried unsuccessfully to convince courts and tribunals to adjust provisional equidistance lines with reference to fisheries as a relevant circumstance. For example, in *Barbados/Trinidad and Tobago*, Barbados argued for a substantial adjustment of the provisional median line on account of its historic and contemporary fishing for flying fish and other species off the coast of Tobago. Barbados argued, *inter alia*, that its economy and culture were particularly dependent on the fishery (referencing, for example, the fact that the flying fish is the national symbol of Barbados). The tribunal was not persuaded, holding that Barbados had failed to show that any denial of access to the waters of Tobago would entail ‘catastrophic repercussions’. It concluded that ‘determining an international maritime boundary between two States on the basis of traditional fishing on the high seas by nationals of one of those States is altogether exceptional’.[105]

(p. 87) Notwithstanding their reluctance to allow fisheries to ‘determine’ the course of a maritime boundary, courts and tribunals have on several occasions adopted more subtle solutions to ensure continued equitable access to fisheries following delimitation. In doing so, they have striven to minimize the impact of a boundary on the interests of local fishing communities, while ensuring that objective geographical factors remain dominant in the delimitation process.

A leading example of a creative solution designed to safeguard fisheries interests around a delimitation line determined by geographical factors alone was the *Eritrea/Yemen* case. There, each party advanced extensive arguments on fisheries as a relevant circumstance in the delimitation. The tribunal observed that ‘fishing in general is an important activity for both sides of the Red Sea coast’, and that the artisanal fishing activities undertaken in the delimitation area reflected ‘deeply-rooted, social and legal traditions that had prevailed for centuries’. However, the tribunal concluded that neither party had demonstrated that the delimitation line proposed by the other would ‘produce a catastrophic or inequitable effect’ and that, accordingly, fishing and fisheries should have ‘no significant effect’ on the delimitation line. Nevertheless, the tribunal held that the ‘traditional fishing regime’ present in the delimitation area was entitled to the respect and protection of the law and must therefore be preserved by the parties so as to ensure ‘free access and enjoyment for the fishermen of both Eritrea and Yemen’.[106]

The tribunal in the *Barbados/Trinidad and Tobago* case adopted a somewhat different solution in order to safeguard continued access by Barbadian fishing communities to fisheries off the coast of Tobago. Having rejected fisheries as a relevant circumstance in delimiting the boundary, and having rejected also an *Eritrea/Yemen*-style solution on jurisdictional grounds, the tribunal seized upon a statement made by the Agent of Trinidad and Tobago on the last day of the hearing in which he indicated a readiness to negotiate a fisheries access agreement with Barbados. The tribunal held that this created an obligation, as a matter of international law, for Trinidad and Tobago to negotiate in good faith an agreement that would give Barbadians access to fisheries located within its EEZ.[107]

In *St Pierre and Miquelon*, both parties made extensive arguments about dependence upon fisheries in the disputed area. The tribunal similarly rejected those arguments for delimitation purposes, noting that the parties had acknowledged that geographical criteria should take the primary role in the delimitation. Instead, when considering whether the delimitation it proposed was ‘not radically (p. 88) inequitable’ or ‘likely to entail catastrophic repercussions’ (for the purposes of the tests laid down in *Gulf of Maine*), the tribunal observed that both parties had stated that the delimitation would be without prejudice to their respective rights under a 1972 agreement on mutual fishing relations. The tribunal concluded that it was ‘confident that by abiding in good faith with the 1972 Agreement, the Parties will be able to manage and exploit satisfactorily the fishing resources of the area’.

The *Peru/Chile* case provides an example of (albeit historic) fisheries being used as a reference point in determining the extent of a boundary established by tacit agreement during the 1950s. The ICJ relied heavily on evidence of the extent of fishing activities at that time and concluded, on the basis mainly of contemporaneous representations by State representatives and the FAO, that the tacit agreement did not extend beyond 80M from the coast.

Conclusion on natural resources

Modern jurisprudence demonstrates that the existence or accessibility of natural resources in the disputed area will rarely constitute a relevant circumstance in delimitation, particularly in the context of single maritime boundaries encompassing the seabed and water column. Certainly, the evidential threshold to be met in order for natural resource considerations to require adjustment of a provisional equidistance line is high, as

demonstrated by the fact that it has been met in only one modern case (*Jan Mayen*), where the circumstances were truly exceptional. In the absence of evidence showing that 'catastrophic repercussions' will result from a particular delimitation line, courts and tribunals have generally adopted a preference for neutral criteria of a geographical character.

In the context of hydrocarbon resources, the modern jurisprudence indicates that these will only be relevant to the extent that their exploitation is demonstrative of some form of actual or tacit agreement as to the location of a maritime boundary (in relation to which, see 'Is there a delimitation agreement in force?' Again, the evidential threshold is high, requiring 'compelling evidence' of an agreement or, at the very least, an 'unequivocal pattern of conduct' before hydrocarbon practice will be treated as a relevant circumstance. While there is some authority in the context of continental shelf delimitation for the proposition that the effect of any given line on the allocation of hydrocarbon resources can be taken into account,[108] the better view is that allocation of natural resources should not be a relevant circumstance in single boundary delimitation.

The result, as Brownlie points out, is that resource-related criteria have not generally been applied as a relevant circumstance in delimitation—'at least explicitly'.[109] However, such are the underlying motivations of most maritime (p. 89) boundary disputes that natural resources will remain ever-present in delimitation. Consequently, reference to natural resource factors will often be necessary so as to confirm the equitable nature of a delimitation line dictated by considerations of geography or to assess the overall equitableness of a solution. Further, particularly where a delimitation will have a tangible impact upon local human populations, the determination of a universally 'equitable solution' may involve the imposition of other solutions besides the formal delimitation line, as happened in *Eritrea/Yemen* and *Barbados/Trinidad and Tobago*.

Navigation and security interests

Navigation interests have frequently been proposed by States as a relevant circumstance, but have generally failed to impact the course of the final delimitation line, particularly beyond the territorial sea. This is in large part because, pursuant to Articles 17 and 58 of UNCLOS, respectively, all States enjoy the right of innocent passage in the territorial sea, and freedom of navigation in the EEZ.

The two leading examples of navigational interests being found to constitute a circumstance necessitating adjustment of an equidistance line in the territorial sea are the *Beagle Channel* case and *Guyana/Suriname*. In *Beagle Channel*, which concerned a territorial sea delimitation through a narrow international strait, the tribunal indicated that it would take into account factors of 'convenience, navigability and the desirability of enabling each Party so far as possible to navigate its own waters'. Consequently, the tribunal implemented a deviation of the median line in the vicinity of a small island so as to follow 'the habitually used navigable track'. *Guyana/Suriname* concerned an adjacent coast delimitation projecting from the Corentyne River (a navigable watercourse within the exclusive sovereignty of Suriname). The tribunal cited *Beagle Channel* with approval and found that the evidence demonstrated an 'established practice of navigation' and Surinamese control over the maritime approaches to the river. Together, the tribunal held that these factors, which related to Suriname's navigation and security interests, constituted special circumstances requiring significant adjustment of the equidistance line over the first 3M of the territorial sea boundary.

In many cases of territorial sea delimitation, adjustment of a provisional equidistance line will be unnecessary due to the universal right of innocent passage. This was illustrated vividly in the *Qatar/Bahrain* case, where the ICJ noted that its delimitation left Qatar with two maritime zones connected only by a narrow channel that was 'little suited to navigation'. To address this practical concern, the court emphasized the right of innocent

passage accorded to Qatari vessels in Bahrain's territorial waters lying between the Hawar Islands and the other Bahraini islands.

To date, no international court or tribunal has delimited an EEZ or continental shelf boundary so as to accommodate navigation or security interests. In relation to (p. 90) navigation, this is essentially because of the broad right to freedom of navigation that all States enjoy in the EEZs of other States. Consequently, for example, issues of navigation played no role in the *UK/France Continental Shelf* delimitation, despite the fact that the disputed area encompassed one of the world's busiest sea lanes. As the ICJ recently stated in the *Nicaragua/Colombia* case, control over the EEZ and continental shelf 'does not affect rights of navigation'.[110]

In *Guinea/Guinea-Bissau*, the tribunal rejected security considerations as a relevant circumstance in EEZ or continental shelf delimitation because (unlike the territorial sea) such zones do not fall within the sovereignty of the coastal State. The better view is that security interests are in principle capable of constituting relevant circumstances in EEZ and continental shelf delimitation, as confirmed by the ICJ in the *Libya/Malta* and *Black Sea* cases. However, as with other non-geographical relevant circumstances, the evidential threshold is high, such that in both cases the ICJ concluded that its delimitation line would respect the legitimate security interests of both parties, thus necessitating no further adjustment.

In *Nicaragua/Colombia*, the ICJ rejected Colombia's argument about anti-drug trafficking and other law enforcement activities in the EEZ, commenting that control over the EEZ and continental shelf is 'not normally associated with security considerations'. However, the court highlighted that 'legitimate security concerns might be a relevant consideration if a maritime delimitation was effected particularly near to the coast' and indicated that it would 'bear this consideration in mind in determining what adjustment to make to the provisional median line'.[111]

Other relevant circumstances

There is no fixed list of circumstances that might be considered 'relevant' so as to mandate adjustment of a provisional equidistance line in order to achieve the 'equitable solution' mandated by international law.[112] As a result, such circumstances are generally 'to be assessed on a case-by-case basis, with reference to international jurisprudence and state practice'.[113] However, as described above, the modern single boundary delimitation jurisprudence, starting with *Gulf of Maine*, has seen a marked shift towards the use of geographical criteria, often to the exclusion of all other circumstances. In particular, in delimitations within 200M, there has been a clear move away from those criteria (such as, for example, physical natural prolongation of coastal landmass through the seabed) that have greater weight in one maritime zone than another.

(p. 91) That said, it is certainly true that courts and tribunals have recognized a number of non-geographical circumstances as playing a potentially significant role in delimitation. The potential role of hydrocarbon practice, fisheries, navigation, and security interests had been addressed in the subsections above. Further non-geographical relevant circumstances might include:

- State conduct, particularly where demonstrative of an express or tacit agreement as to the location of the boundary, [114] or where one State party has expressly recognized (or acquiesced in) an important aspect of the claim of the other; [115]
- related situations of estoppel, where one State is legally precluded from departing from its past clear and consistent representations, upon which the other State has relied to its detriment. [116] However, as with arguments of State conduct, a high

evidential threshold will apply before delimitation will be made with reference to estoppel; [117]

- the regional context, in the form of delimitations already made or still to be made between other States in the region; [118]

(p. 92) • the position of any land frontier, or, more precisely, the position of its intersection with the coastline; [119] conversely, where there is uncertainty over the land boundary terminus, a court or tribunal may decide to begin a maritime delimitation at some distance out to sea, particularly where it has no jurisdiction over land boundary issues; [120] and

- the 'orderly management of maritime resources, policing and the public order of the oceans in general', adopted by the ICJ in *Nicaragua/Colombia* in rejecting a Nicaraguan proposal for multiple enclaves around small Colombian islands. Instead, the court adopted a 'simpler and more coherent division of the relevant area'. [121]

While it is likely that further special or relevant circumstances will be identified in future arising out of the specific facts of specific cases, it is clear that factors of geography will retain the most dominant influence in the delimitation of territorial sea, EEZ, and continental shelf areas.

Circumstances generally insufficient to require adjustment of a provisional equidistance line

The modern jurisprudence is replete with examples of courts and tribunals rejecting other circumstances as irrelevant in maritime delimitation. Many examples concern circumstances that bear no relation to the basis of continental shelf and EEZ entitlement under the modern law, or that relate only to one or the other maritime zone. Examples of such 'irrelevant circumstances' are:

- comparative economic wealth and resources; [122]
- comparative landmass or populations; [123]
- physical natural prolongation, geology and geomorphology (particularly in delimitations within 200M of the coast), especially in light of the distance-based entitlement within 200M under Article 76 of UNCLOS; [124]

(p. 93) • the existence of oil wells and oil concessions in the disputed area (absent evidence of tacit agreement, acquiescence, or estoppel); [125]

- the unity of hydrocarbon deposits straddling a boundary; [126] and
- climate change, global warming and sea level rise, including in situations where base points might move or disappear over time. This is because, as the *Bangladesh/India* tribunal observed, 'only the present geophysical conditions are of relevance'. [127]

c. Stage three: the 'disproportionality check'

The third and final stage of the three-stage methodology in modern all-purpose delimitation requires verification that 'the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line'.[128] Ever since the *North Sea Continental Shelf* cases, this exercise has been described as 'a final factor to be taken account of' or, more recently, as 'an *ex post facto* check of non-disproportionality of the result reached at the second stage'.[129] It is to be distinguished from the relevant circumstance of marked disparity in

coastal lengths, discussed above in the context of the second stage of the delimitation process.[130] See also the discussion in Part C, Chapter 3.

The objective of the disproportionality check is to ensure that the overall result in the delimitation is an equitable one. As the ICJ explained in *Black Sea*, the test of disproportionality 'is not in itself a method of delimitation. It is rather a means of (p. 94) checking whether the delimitation line arrived at by other means needs adjustment because of a significant disproportionality in the ratios between the maritime areas which would fall to one party or the other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts'.[131] In conducting the disproportionality check, the relevant area will encompass 'all of the areas, both within and beyond 200nm, in which the seaward projections of the parties' relevant coasts overlap' (i.e. including overlapping continental shelf areas beyond 200M).[132]

Courts and tribunals have emphasized that the disproportionality check is 'not a mathematical exercise' and does not require 'mathematical precision'. On the contrary, it will generally be 'approximate', particularly given the vagaries often inherent in identifying relevant coasts and relevant areas. Thus, in an early application of the check in *Tunisia/Libya*, the court determined that a coastal length ratio of approximately 31:69 between Libya and Tunisia (or 34:66 using straight lines) as against a continental shelf ratio within the relevant area of 40:60 was sufficient 'to meet the requirements of the test of proportionality'. In situations where the calculation of the relevant coastal lengths and coastal areas is difficult, as in the circumstances of the *Peru/Chile* case, any final check will necessarily entail only a 'broad assessment of disproportionality'.

Importantly, as the court held in *Nicaragua/Colombia*, in order to require any final adjustment of the delimitation line, there must be 'a significant disproportionality so gross as to taint the result and render it inequitable'.[133] Similarly, the *Black Sea* judgment speaks of a 'marked disproportion'. Such is the threshold for adjustment of a delimitation line pursuant to the disproportionality test that, to date, its application has not led to any final adjustment to the delimitation line in the jurisprudence. This is despite the fact that, in some cases, the test has exhibited a numerically significant degree of disproportionality between the ratios of maritime space and coastal length. For example, in *Nicaragua/Colombia*, the ICJ calculated that the relevant area was divided approximately 1:3.44 in Nicaragua's favour, while the ratio of relevant coasts was 1:8.2 in Nicaragua's favour. The court nevertheless declined to make any adjustment for disproportionality. This reticence might be because, in effect, the test will only be engaged in circumstances where an inadequate adjustment has been made for relevant circumstances in the second stage of delimitation; a lapse that the court or tribunal administering the test is unlikely to acknowledge having committed.

The disproportionality test is not without its challenges and critics. It is widely acknowledged that the test can give rise to practical difficulties. This is especially so (p. 95) where the identification of the relevant coasts or relevant area is complicated by widely polarized claims (as in *Newfoundland and Labrador /Nova Scotia*) or where future delimitations with third States might render redundant the figures or ratios arrived at (as noted with regard to future delimitations with Italy in *Libya/Malta*).[134] Indeed, in *Newfoundland and Labrador/Nova Scotia*, the tribunal concluded that 'the test may be more contrived than constructive in some instances' and declined to apply the test altogether.

In his Dissenting Opinion in *Libya/Malta*, Judge Schwebel posited that 'it is doubtful whether the test of proportionality has any place in a delimitation between purely opposite States'. He cited the *North Sea Continental Shelf* judgment, which emphasized the need to measure coastlines 'according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts'.

He cited also Professor Derek Bowett who, in his seminal 1979 treatise entitled *The Legal Régime of Islands in International Law*, observed that:

> it would seem that the disproportionality factor might only be applied, or be meaningful, in the case of adjacent States (not 'opposite') where the existence of a markedly concave or convex coastline will produce a cut-off effect if the equidistance principle is applied: that is to say, will allocate to one State shelf areas which in fact lie in front of, and are prolongation of, the land territory of another.[135]

On this view, the only meaningful role of the disproportionality test might be as a final check to ensure that adequate adjustment has been made in order to abate the cut-off effect of an irregular coastal configuration.[136]

III. Situations Where the 'Standard' Methodology Might Be Inappropriate or Inapplicable

As described in the previous section, the modern jurisprudence since *Black Sea* has identified the equidistance-based three-stage approach as a preferred methodology in maritime delimitation, to be applied in the absence of particular geographical circumstances rendering it 'inappropriate'. However, this does not mean that other methodologies are redundant in the modern law. Both State practice and recent jurisprudence confirm the continued application of a multitude of other delimitation approaches and methodologies. But what are those other approaches and (p. 96) methodologies, and in which situations might they be used? Is it the case that, as the ICJ commented in *Black Sea*, equidistance will always provide a first step in delimitation between opposite coasts, and will also provide a first step in delimitation between adjacent coasts where there are 'compelling reasons' that make it 'unfeasible in the particular case'?

What is virtually certain is that, absent specific agreement between the States concerned, geography will play a dominant role in any modern delimitation. As Evans observes, '[a]lmost all methods advocated are consequential upon geography. Equidistance is normally calculated from baselines drawn from, and reflecting, the coasts. Perpendiculars and bisectors are normally a function of the general coastal direction'.[137]

This section identifies the leading alternative delimitation methods, such as perpendiculars and bisectors, that have been adopted by courts and tribunals in the modern jurisprudence. It analyzes also some of the (largely geographical) circumstances that have led to their adoption in preference to the three-stage approach. As will be explained, most of the alternative methods are 'geometrically objective', in much the same way as the three-stage approach, while others are plainly not. A common theme, however, is that all, to one extent or another, manifest the 'transparency and predictability' that is universally recognized as being essential to the delimitation process.

a. The existence of a prior delimitation agreement

The most obvious situation in which a court or tribunal will not apply the three-stage approach is where there already exists a delimitation agreement between the States concerned. After all, Articles 15, 74, and 83 of UNCLOS, together with customary international law, accord primacy to delimitation by way of agreement. As explained at the start of this chapter 'Is there a delimitation agreement in force?', above, while the existence of a prior delimitation agreement (particularly in the form of a treaty) will frequently be obvious,[138] there have been many instances of dispute in the modern jurisprudence as to whether an agreement exists over all or part of the boundary. The section just mentioned

has already set out the legal rules applied by courts and tribunals in previous cases in order to establish the existence (or not) of a valid and binding delimitation agreement.

In many of those cases where a delimitation agreement does exist, it will not extend over the entirety of the maritime boundary. This is particularly likely where the agreement is old (perhaps harking back to a period of colonial occupation), limited in distance from the coast, or applies only to specific maritime zones. In such (p. 97) situations, a court or tribunal will need to delimit the remainder of the boundary itself. As shown by cases such as *Cameroon/Nigeria* and *Peru/Chile*, the preference in such situations will be to revert to an equidistance-based approach over the remainder of the boundary, save where there are special or relevant circumstances requiring adjustment in order to attain an equitable solution.

The section below provides some examples of novel delimitation agreements at variance with the delimitation methodologies commonly used by courts and tribunals.

b. Alternative delimitation methods absent a delimitation agreement

In the absence of a prior delimitation agreement, the situations in which courts and tribunals have delimited most or all of a maritime boundary without reference to an equidistance line are rare.[139] The leading modern example is the *Nicaragua/Honduras* case, which concerned delimitation of a single maritime boundary projecting from the adjacent coasts of Honduras and Nicaragua.

As illustrated in the case summary maps in Part B18 below, the geographical context of the delimitation was highly unusual, leading each party to the dispute to acknowledge in its pleadings that an equidistance-based approach was inappropriate. The court agreed, holding that 'the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate'.[140] The court proceeded to identify a series of geographical and geomorphological factors leading it to adopt an alternative (bisector) approach to the delimitation, including:

- the 'sharply convex' coastline around the land boundary, as a result of which only two base points (one on either side) dominated the construction of an equidistance line;
- the close proximity of those two base points to each other (meaning that small errors in their location could have a disproportionate impact on the course of the equidistance line);
- the fact that the base points were located at a river mouth where the continual accretion and erosion of sediment raised the prospect of major (and unpredictable) shifts in the location of the base points over time, leading the court to conclude that the two base points were 'inherently unstable'; and
- the existence of a dispute between the parties over title to multiple small islands and sandbanks located at the river mouth.

(p. 98) The court concluded that the combination of these and other factors meant that it would be 'impossible' to identify reliable base points for the construction of a provisional equidistance line.

The exceptional nature of the circumstances that cumulatively led the court to depart from construction of a provisional equidistance line in *Nicaragua/Honduras* can be illustrated by comparison with other cases in which courts and tribunals have refused to make such a departure. In *Cameroon/Nigeria*, the court was content to delimit a continental shelf and EEZ boundary on the basis of an equidistance line constructed from one base point located on each of the parties' adjacent coastlines. In *Bangladesh/India*, the tribunal rejected Bangladesh's argument that the instability of the coastline in the vicinity of its land

boundary with India required departure from an equidistance-based approach, concluding that the situation in *Nicaragua/Honduras* was clearly distinguishable. In particular, both parties were able to identify base points on the coast of the other for construction of a provisional equidistance line, so arguments to the effect that the identification of base points was impractical or unreliable were 'not sustainable'.

In the context of delimitation between opposite coasts, it is unlikely that the factors present in *Nicaragua/Honduras* will ever apply. This is because, as the court confirmed in *Nicaragua/Colombia*, construction of a median line between opposite coasts is technically straightforward. By definition, it will require the use of multiple base points along the opposite coasts. As the court held in that case, the factors that might render a median line boundary inequitable between opposite coasts (such as, for example, a huge disparity in relevant coastal lengths) do not justify disregarding the three-stage methodology altogether. Rather, they will be taken into account as relevant circumstances at the second stage of the delimitation process. Consequently, with the exception of situations mandating enclavement of small features, it is highly questionable whether departure from the equidistance-based three-stage approach is ever required in the context of opposite coast delimitation.[141]

The adoption of alternative delimitation methods over discrete parts of a maritime boundary is more common. Thus, for example, in *Tunisia/Libya*, the court divided the continental shelf delimitation area into two sectors, adopting different delimitation methods in each. In *Gulf of Maine*, the ICJ Chamber divided the maritime boundary into three sectors and adopted different delimitation methods in each of them, only using a provisional equidistance line in the second sector (between the parties' opposite coasts). In *St Pierre and Miquelon*, the tribunal divided the (p. 99) boundary into two sectors, one of which departed completely from an equidistance-based methodology in order to preserve the southerly coastal projection of the French islands into the Atlantic Ocean.

In the context of territorial sea delimitation, special considerations can sometimes apply as a result of Article 15 of UNCLOS, which requires consideration of whether historic title or other special circumstances exist before the equidistance principle is applied.[142] However, as *Qatar/Bahrain* illustrates, in most cases it is unlikely that this will make much practical difference in the methodological approach to be adopted over the course of a single boundary.

The remainder of this section will consider the leading alternative delimitation methods and some of the circumstances in which they have been adopted in practice. Like equidistance, the majority of those methods are, if properly applied, faithful to the geography of the delimitation area and adopt objective 'geometrical methods' suitable for delimitation of both the seabed and the water column. Some are akin to a surrogate (or substitute) for equidistance, particularly in places of complex or unusual geographical configurations where construction of an equidistance line is not possible or appropriate. All, of course, must be utilized in a way that ultimately achieves the 'equitable solution' mandated by UNCLOS and customary international law.

c. Bisectors: a true surrogate for equidistance

The most commonly adopted alternative to equidistance-based delimitations is the so-called bisector method. This involves two steps: first, construction of a straight line that simplifies the coastal geography and represents the general direction of each State's relevant coast; and, second, drawing a boundary line that bisects the angle between those two straight lines.

The attraction of the bisector method is that it can provide a reliable substitute for (or approximation of) equidistance. Like the equidistance method, it is based upon geometric techniques with reference to the coast. As the court has commented, the bisector method ‘comparatively seeks to approximate the relevant coastal relationships, but does so on the basis of the macro-geography of a coastline as represented by a line drawn between two points on the coast’.[143]

The use of a bisector line is appropriate in situations where the construction of an equidistance line is not possible or feasible due to an absence of reliable and stable base points. This can happen where coasts are highly convex and the only base points that control the equidistance line are situated very close together.

(p. 100)

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Figure A2.23: Construction of a bisector using the general direction of the coast.

Figure A2.23 shows part of a deltaic coast divided between adjacent States X and Y. The land boundary runs along the middle of one of the distributary channels and meets the sea at a convex part of the coast. While it is technically possible to draw an equidistance line, it is only based on two points, X and Y, situated at the mouth of the river a mere 1M apart. These two points control the entire length of the line out to 200M. Small changes in location of the base points caused by accretion or erosion will have a magnified effect on the boundary 200M out to sea. The resulting equidistance line trends slightly north of due east, to the advantage of State Y due to the distorting effect of point Y. In this situation, an alternative method is to approximate the coastlines to straight lines corresponding to their general directions and to bisect the angle between them. In this example, the general direction of State X’s coast is 354°, the general direction of State Y’s coast is 214°; and the bisector is the mid-point between the two, which is 284° (or its complement, which is an azimuth of 104°). The resulting bisector can be considered an equitable substitute for an equidistance line drawn between the parties’ mainland coasts.

A bisector might also be utilized in cases where coastlines are heavily indented or irregular, particularly where multiple small features have a distorting effect.[144]

(p. 101)

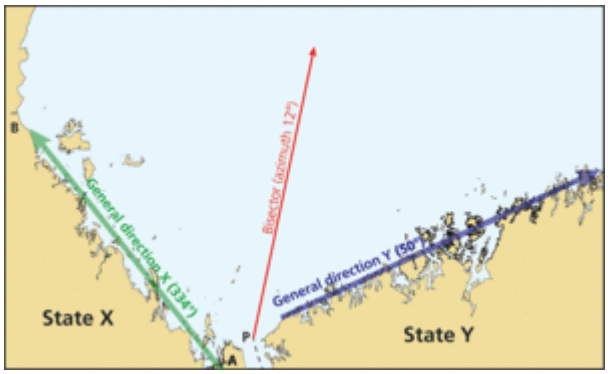

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Figure A2.24: Simplification of complex coasts and construction of a bisector.

Figure A2.24 shows two adjacent States with complex coastlines, including many indentations and small islands, some situated well offshore. Despite the detailed complexities, each coastline has a clearly perceptible general direction, or coastal front. Drawing a strict equidistance line using all the features would not only be complicated, but may also give undue effect to small features. An effective and stable solution in such a situation is to draw straight lines approximating the respective States' coastal fronts, measure their angles, and draw a bisector between them.[145]

In many cases, the general directions of the coastlines between adjacent States are drawn meeting at the land boundary terminus. This is not always possible (as illustrated in Figure A2.24). In such instances, the angle of the bisector is defined by the directions of the coast and can be transposed to the desired starting point. In this hypothetical example, the general directions of the coast have azimuths of 334° and 50° and the resultant bisector is 12°. The bisector has been drawn with the azimuth of 12° and to start at 'point P', the terminus of the parties' river-mouth boundary.[146]

A disadvantage of the bisector method (as with other methods that rely on simplified coastal fronts, such as the perpendicular method) is that the identification of a simplified coastal front is inherently subjective. Its direction will often turn upon which particular length of coast is being considered. As a result, parties will likely present contrasting positions about what are the relevant coastal front lines for the (p. 102) purposes of drawing a bisector. For example, in Figure A2.24, the general direction of State X's coastline has been measured along the initial mainland section, between Points A and B. Beyond Point B, the coastline of State X changes direction and a different general direction could be drawn, using a longer coast. This could result in significant benefits for State X in the construction of the bisector, so it is likely that State X would present a markedly different view of what is its relevant coastal front in the delimitation.

The leading modern juridical example of use of the bisector method is *Nicaragua/Honduras*. In that case, having noted the 'impossibility' of identifying reliable base points on the parties' adjacent but unstable coastlines, the court adopted the bisector method as a 'viable substitute' for equidistance.[147] The parties had presented significantly divergent positions on what were the relevant coastal fronts (with reference to which the bisector line would be drawn). Nicaragua maintained that the entire Caribbean coastline of each State was relevant, whereas Honduras argued that much shorter coastal fronts should be used.[148] The court ultimately adopted a compromise solution, which fairly reflected each State's land territory and was sufficiently long to account for the coastal configuration in the disputed area.

Other examples of the adoption of bisectors in the jurisprudence are:

- *Tunisia/Libya*, where the court adopted a bisector in order to give 'half effect' to the Kerkennah Islands over the second leg of the boundary;
- *Gulf of Maine*, where a bisector was used over the first leg of the boundary so as to avoid the use of base points 'located on a handful of isolated rocks' and to circumvent difficulties that would otherwise be presented by a sovereignty dispute over a small offshore island and by the parties' choice for the starting point of the boundary; and
- arguably, *Bangladesh/Myanmar*, where ITLOS rejected a bisector approach in favour of the three-stage approach, but ultimately delimited an adjusted equidistance line following the same angle as a bisector that had been presented by Bangladesh.

Notably, in none of the cases to date where the bisector method has been used has there been any consideration of adjustment of the bisector by reason of relevant circumstances, in order to achieve an equitable solution. In principle, however, such an adjustment should be possible, particularly where non-geographical relevant circumstances require.[149](p. 103)

d. Perpendiculars: an approximate surrogate for equidistance

In an analogous fashion to the drawing of a bisector of two coastal directions, when the coasts of the two States form a straight line, a perpendicular can be drawn. This is a special form of a bisector, in effect the bisector of a 180° angle. A simple example is illustrated in Figure A2.25.

The construction of a perpendicular from a straight line along the coast is a simple delimitation method dating back centuries. Thus, in the *Grisbådarna* award of 1909, the tribunal observed that delimitation by means of a perpendicular was consistent with 'the ideas of the 17th century'.

A more recent example of the use of a perpendicular in the jurisprudence was *Gulf of Maine*, where the ICJ Chamber delimited the third (and final) segment of the boundary by way of a perpendicular drawn seawards from a closing line across the Gulf. In selecting a perpendicular as the most suitable 'geometrical method' over the third segment, the Chamber noted that it would be situated in the 'open ocean', and that the use of a perpendicular was, in the circumstances, 'recommended above all by its simplicity'. It was reassured also by the fact that the closing line used to create the perpendicular corresponded to the general direction of the US and Canadian coastline at the back of the Gulf.

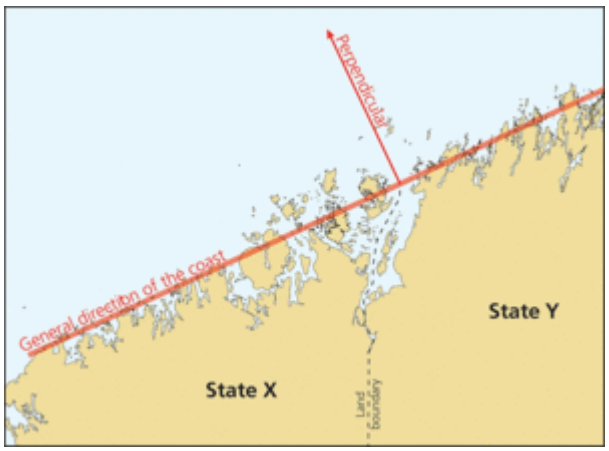

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Figure A2.25: Construction of a perpendicular from a straight coastal front.

(p. 104) *Guinea/Guinea-Bissau* provides a more innovative example of the use of a perpendicular. There, the tribunal resolved to delimit the boundary between the two States in a way that would take overall account of the shape of the West African coastline. Accordingly, it constructed a 'maritime façade' consisting of a straight line joining points between Senegal, to the north, and Sierra Leone, to the south. It then proceeded to delimit the majority of the boundary by way of a perpendicular to that 'maritime façade'.[150] As in *Gulf of Maine*, the use of the perpendicular served to simplify the coastal configuration (albeit a configuration that, unusually, included the coastlines of three non-parties to the dispute), in the context of the part of the boundary that extended into the open ocean.

e. Parallels, meridians, and azimuths

In some situations, delimitation lines are drawn that bear no direct relationship to the coastline or coastal fronts. These can take the form of straight lines, usually in the form of geographic parallels of latitude (lines east–west), meridians of longitude (lines north–south), or lines of a particular azimuth (lines drawn at a constant angle—geodesics or loxodromes). Such lines are all artefacts of the cartographic process. They are most common in delimitation agreements, where they may be considered attractive by negotiating parties for reasons of ease of reference and construction.

An early example of the use of a parallel of latitude was the 1952 Ecuador–Peru agreement, which delimits the two States' single maritime boundary in the Pacific Ocean by way of a parallel of latitude extending from their land frontier at the mouth of the Tumbes River.[151] In a number of subsequent cases, States have adopted parallels as a means of preventing the cut-off effect that would otherwise result from use of an equidistance-based delimitation method. Leading examples are the 1975 delimitation agreement between The Gambia and Senegal and the 1987 delimitation agreement between Dominica and France (Guadeloupe and Martinique).[152]

In the Argentina–Chile continental shelf delimitation agreement, illustrated in Figure A2.26, the parties used a combination of meridians and parallels in order to define a boundary in a generally southerly direction into remote areas of open ocean.[153] Coastal geography had no direct impact on the delimitation.

(p. 105)

View full-sized figure

Figure A2.26: Use of meridians and parallels (The Argentina–Chile 1984 agreement).

Examples of the use of parallels and meridians are also found in the jurisprudence. In *St Pierre and Miquelon*, the tribunal used meridians for the purposes of delimiting the southerly part of the boundary up to the French 200M limit.[154] In *Nicaragua/Colombia*, the ICJ used parallels in a similar situation, this time in the easterly part of the single boundary up to the Nicaraguan 200M limit.[155]

Modified equidistance lines can also lose their direct relationship with the coastal geography. For example, in both *Bangladesh/Myanmar* and *Bangladesh/India*, the provisional equidistance line was modified such that the outer section of the delimited boundary was a geodesic line with a defined azimuth that was not directly related to the coastal configuration.(p. 106)

IV. Special Considerations in the Delimitation of Specific Maritime Zones

This section identifies some special considerations that can apply in the context of territorial sea delimitations and distinct EEZ or continental shelf delimitations.

a. The territorial sea: UNCLOS Article 15; historic title; other special circumstances

In *Qatar/Bahrain*, the court explained that the methodologies used for delimitation of the territorial sea, on the one hand, and continental shelf and EEZ, on the other, are ‘closely interrelated’. As a result, the practical approach taken to delimitation of those maritime zones will often be the same. In particular, the delimitation process will normally begin by way of construction of a provisional equidistance line.

The text of Article 15 of UNCLOS related to delimitation of the territorial sea is, however, notably different from the text of Articles 74 and 83. For example, Article 15 ‘places primacy on the median line as the delimitation line between the territorial seas of opposite or adjacent States’.[156] It also specifically mandates departure from an equidistance line where ‘necessary by reason of historic title or other special circumstances’. Thus, as remarked in *Nicaragua/Honduras*, nothing in the wording of Article 15 suggests that ‘special circumstances’ can only be used as a corrective element to a provisional equidistance line (in contrast to the continental shelf and EEZ context, where relevant circumstances should only play a corrective role pursuant to the three-stage approach).[157]

Tanaka defines ‘historic rights’ as those that exist ‘over certain land or maritime areas acquired by a State, through a continuous and public usage from time immemorial and acquiescence by other States, although those rights would not normally accrue to it under general international law’.[158] The absence of any reference to historic title or historic rights from the text of Articles 74 and 83 indicates that they should not constitute relevant circumstances in EEZ or continental shelf delimitation. This appears to be confirmed by the jurisprudence reviewed at part B of this book. Thus, for example, in *Tunisia/Libya*, Judge Oda commented that ‘it may be assumed that historic title by reason of long-standing practice of sedentary fisheries might justify some deviation in the line of delimitation of the territorial sea, but otherwise historic title would not have any impact on delimitation of the continental shelf’.[159]

(p. 107) The particular characteristics of the territorial sea can give rise to further special considerations that would not so readily apply in the continental shelf and EEZ. Importantly, the treatment of some circumstances can be different in the territorial sea as compared to the continental shelf and EEZ.

First, the modern jurisprudence does not show as concentrated a focus on geographical circumstances in territorial sea delimitation. In *Guyana/Suriname*, the tribunal emphasized that it was not constrained by any finite list of special circumstances, which should instead be assessed 'on a case-by-case basis'. Consequently, it accepted that Suriname's navigational and security interests constituted special circumstances in the territorial sea delimitation, particularly over the first 3M of the boundary. In the *Beagle Channel* case, the tribunal similarly accorded relevance to matters of 'convenience, navigability, and the desirability of enabling each party so far as possible to navigate in its own waters'. By contrast, such factors have never been determinative of the course of any continental shelf or EEZ boundary in a court or tribunal setting.

Second, small islands and rocks might be accorded more weight in a territorial sea delimitation than in delimitations beyond 12M from the mainland. In *Bangladesh/Myanmar*, ITLOS observed that the distorting effect of an island on an equidistance line can increase substantially as the line moves further from the coast. Accordingly, it gave St Martin's Island full effect in the territorial sea, but zero effect beyond its 12M limit.[160] As noted above, small islands are more likely to be accorded limited or no weight if they are located beyond the territorial sea of the mainland.[161]

Third, some other geographical relevant circumstances may have a greater effect beyond the territorial sea. Thus, in *Bangladesh/India*, the tribunal rejected Bangladesh's argument about concavity as a special circumstance in the territorial sea, noting that the coastline of the Bay of Bengal did not produce a significant cut-off warranting adjustment of the equidistance line close to the coast. By contrast, the provisional equidistance line was subjected to substantial adjustment in the continental shelf and EEZ so as to avoid 'an unreasonable cut-off effect to the detriment of Bangladesh'.

(p. 108) Finally, the historical focus of coastal (and colonial) States upon control of maritime territory close to the shore makes delimitation agreements more prevalent in the territorial sea,[162] as is the potential application of the principle of *uti possidetis juris*.[163]

b. Single EEZ, fisheries zone, or continental shelf delimitations

Ever since *Gulf of Maine*, courts and tribunals tasked with delimiting water column and seabed boundaries have focused on methods, criteria, and relevant circumstances that give no preferential treatment to one maritime zone or the other. This has been a significant factor in the confirmation of geographical considerations as playing the predominant role in modern maritime delimitation (and in the concomitant decline in resource- and human-based considerations). It has also meant that no court or tribunal has to date delimited separate boundaries over the water column and seabed, whether under Articles 74 and 83 of UNCLOS or otherwise. This is because of the perceived need, in the words of the ICJ Chamber, 'to avoid as far as possible the disadvantages inherent in a plurality of separate delimitations'.[164]

Indeed, such are the perceived practical disadvantages of separating water column and seabed boundaries that they are rare even in State practice—normally arising only where there are overriding political or economic reasons to divide sovereign rights over fisheries and mineral resources.[165] Examples include the agreed delimitations between (1) the United Kingdom and the Faroe Isles,[166] (2) Australia and Papua New Guinea, and (3) Australia and Indonesia.[167]

Even in those (now comparatively rare) situations where courts and tribunals are tasked with delimitation of a separate water column or continental shelf boundary (at least, within 200M), the equidistance-based three-stage approach remains the default method. This is largely because, as the court recognized in *Libya/Malta*, with the advent of universal

distance-based entitlements within 200M under UNCLOS, geological and geomorphological considerations have become ‘completely immaterial’ to continental shelf delimitation.

The one respect in which the delimitation of a separate water column or continental shelf boundary might lead to a different result, as compared to a single boundary delimitation, relates to natural resources. As explained above, the (p. 109) threshold to be met before a court or tribunal in order for natural resources (whether fisheries or hydrocarbons) to constitute a relevant circumstance in single boundary delimitation is a high one.[168] By contrast, in cases of single fisheries or seabed delimitations, the existence or allocation of natural resources is more likely to constitute a relevant circumstance. The only twentieth-century delimitation case in which the existence of natural resources was recognized as a potentially relevant circumstance—*Newfoundland and Labrador/Nova Scotia*—concerned only delimitation over the continental shelf.

c. The continental shelf beyond 200 nautical miles and the ‘grey area’

As explained above, pursuant to Article 76 of UNCLOS (and customary international law), the continental shelf of a coastal State extends throughout the natural prolongation of its land territory to the outer edge of the continental margin (or to a distance of 200M, where the physical continental margin does not extend that far). Consequently, the basis of entitlement to continental shelf rights changes at the 200M limit: within that limit, such entitlement is based on distance, whereas beyond it is based on physical natural prolongation and associated geological and geomorphological factors.

Soon after the advent of Article 76, the ICJ in the *Libya/Malta* case declared an end to the relevance of ‘geophysical or geological factors’ in delimitation, ‘in so far as seabed areas less than 200 miles from the coast are concerned’.[169] However, the court left open the question of whether (and, if so, to what extent) such physical factors remain relevant in the delimitation of overlapping continental shelf entitlements beyond 200M. As explored in detail in Part C, Chapter 4, below, as a matter of principle it would seem clear that geological and geomorphological factors should have a role to play in delimitation beyond 200M, given that such factors are determinative of State entitlement in such areas. This led one leading commentator to remark in 2003 on the ‘re-emergence of the physical features of the seabed and seafloor as relevant facts in a delimitation of the outer continental shelf’.[170]

Where the outer edge of the continental margin of one State extends up to the 200M limit of another State whose physical continental margin does not extend that far, the delimitation line between those States’ continental shelf entitlements (p. 110) will extend up to (and perhaps even beyond) the 200M limit of the latter State.[171] In such situations, most likely to arise between opposite coasts more than 400M apart, geological and geomorphological evidence will likely be heavily influential in the delimitation. This is borne out by some State practice.[172]

Where the physical continental margins of two States overlap beyond their respective 200M limits, both State practice and jurisprudence indicate that geological and geomorphological factors will not be determinative of delimitation. Thus, for example, the Mexico–US delimitation treaty in the Gulf of Mexico delimits the so-called ‘doughnut hole’ using equidistance, without any reference to physical factors.[173] In the *Bay of Bengal* cases, where each of Bangladesh, Myanmar, and India was found to enjoy continental shelf entitlement beyond 200M, the same three-stage, equidistance-based methodology was used to delimit the boundaries within and beyond the 200M limit. Bangladesh’s argument that its ‘most natural prolongation’ in the delimitation area should be a relevant circumstance beyond 200M was expressly rejected. Instead, in each case the only relevant circumstances requiring adjustment of the provisional equidistance line beyond 200M were those that had also applied within 200M.[174] In *Bangladesh/India*, the tribunal remarked that such a unified

approach was consistent with the concept of a ‘single continental shelf’ within and beyond 200M. It also observed that delimitation in the outer shelf by way of a straight line continuing from within 200M would be ‘simple to implement and administer by the Parties’.

A critical factor in the willingness of ITLOS and the Annex VII tribunal to delimit areas beyond 200M in the *Bay of Bengal* cases was the relative certainty that each of the three States enjoyed overlapping entitlements to outer continental shelf. Where such certainty does not exist, courts or tribunals will defer delimitation beyond 200M pending delineation by the CLCS of the outer limits of the continental margin. This is because, as ITLOS pointed out in *Bangladesh/ Myanmar*, there is a clear distinction between the delimitation of the continental shelf under Article 83 of UNCLOS and the delineation of its outer limits under Article 76. Pursuant to Article 76 of UNCLOS, it is the CLCS that is tasked with (p. 111) determining the limit of any outer shelf entitlement; by contrast, dispute settlement over continental shelf boundaries is entrusted to courts and tribunals under Part XV.

An early example of a tribunal declining to delimit beyond 200M absent a determination of outer shelf entitlements by the CLCS was *St Pierre and Miquelon*. France requested the tribunal to extend the delimitation beyond 200M of the French islands. Canada objected, arguing, *inter alia*, that the French delimitation line might extend beyond the edge of the physical margin, into areas of deep seabed. France had yet to make a submission to the CLCS in respect of the area. In the circumstances, the tribunal observed that any decision recognizing continental shelf rights beyond the 200M limit would constitute a delimitation not between the parties, as such, but between each of them and ‘the international community’ (which exercises rights over the deep seabed pursuant to Part XI of UNCLOS). The tribunal concluded that it was not competent to undertake such an exercise.

In *Nicaragua/Colombia*, the ICJ similarly declined to consider Nicaragua’s claim for delimitation beyond its 200M limit on the basis that Nicaragua had not established that its continental margin extended that far. Nicaragua subsequently made a detailed submission about its outer limit to the CLCS. Less than three months later, it initiated fresh delimitation proceedings against Colombia at the court requesting delimitation beyond its 200M limit. Those proceedings are still pending at the time of writing. It remains to be seen whether the court will accept jurisdiction and proceed with the delimitation before the CLCS has made any recommendation on Nicaragua’s outer shelf submission.

The CLCS has adopted an annex to its Rules of Procedure, entitled: ‘Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes’. Paragraph 5(a) of the annex provides that:

> In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.

Consequently, the CLCS is prohibited from delineating the outer limits of the shelf in areas where entitlement is disputed between two or more States, absent the consent of all parties to the dispute. Such consent may be forthcoming in some instances because, pursuant to Article 76(10) of UNCLOS, Annex II to UNCLOS, and the CLCS’s Rules of Procedure, the CLCS process is entirely without prejudice to the delimitation of continental shelf boundaries between States. However, in many other cases, such consent will be absent. For example, China has consistently objected to any consideration by the CLCS of outer shelf submissions of other States littoral in the South China Sea. This can give rise to a (p. 112) serious practical problem, as noted by ITLOS and the Annex VII tribunal in the *Bay of Bengal* cases. Specifically, in such a situation, a deadlock may arise due to the inability of the CLCS to rule on a submission and concomitant unwillingness of a court tribunal to delimit beyond 200M. As ITLOS commented in *Bangladesh/Myanmar*, such a situation

would not be conducive to the efficient operation of UNCLOS, as it will leave both delimitation and delineation questions unresolved.

State practice indicates a number of practical ways through such a conundrum. Five possible solutions for coastal States are:

1. expressly limit the jurisdiction of a court or tribunal to delimitation of the maritime boundary within 200M, pending completion of the CLCS process beyond that limit (as happened in *Guyana/Suriname*);

2. reach agreement on unresolved boundary issues within and beyond 200M before making any submission to the CLCS (as Australia and New Zealand did in 2004, prior to submitting to the CLCS in 2004 and 2006 respectively); [175]

3. make a partial submission to the CLCS, avoiding areas in dispute with other States (as the Philippines did when making a partial submission relating only to the Benham Rise, thus excluding areas in the South China Sea);

4. make a joint submission to the CLCS alongside other States with claims or potential claims over the area, with a view to delimiting only once the Commission has issued its recommendation on the outer limit (as France, Ireland, Spain, and the United Kingdom did in respect of the Bay of Biscay, and Mauritius and the Seychelles have also done); or

5. make separate submissions to the CLCS in consultation or coordination with the relevant neighbouring State(s), with specific mutual agreement not to object to the CLCS's consideration of each submission (as Benin, Côte d'Ivoire, Ghana, Nigeria, and Togo have done in the Gulf of Guinea). [176]

A practical consideration that will often arise in the context of outer shelf delimitation between adjacent States is the creation of so-called 'grey areas'. Whenever a boundary is other than an equidistance line through the 200M limit, the consequence will be a 'grey area' in which one State enjoys EEZ (p. 113) jurisdiction and the other enjoys continental shelf jurisdiction. Leading examples were the two delimitations in the *Bay of Bengal* cases, in each of which the equidistance line on either side of the Bangladesh 200M limit was adjusted in Bangladesh's favour. As illustrated in map B23.5 in Part B below, this created areas within Myanmar's and India's EEZs (but beyond Bangladesh's EEZ limit) that nevertheless formed part of Bangladesh's outer continental shelf. In *Bangladesh/Myanmar*, ITLOS observed that the Convention requires EEZ and continental shelf States to exercise their rights and perform their duties 'with due regard to the rights and duties of the other'. ITLOS concluded that it fell to the two States to identify the measures appropriate to discharge these obligations, whether in the form of specific agreements, cooperative arrangements, or otherwise.[177] In *Bangladesh/India*, which reached exactly the same practical conclusion, the tribunal noted that its delimitation left an area of potentially overlapping EEZ rights between India and Myanmar in the waters above the Bangladeshi outer shelf. At the time of writing, those overlapping EEZ entitlements have yet to be delimited.[178]

Footnotes:

1 In respect of this duty, and Part XV generally, see 'c. The 'baseline from which the breadth of the territorial sea is measured', below.

2 1155 *UNTS* 331, Art. 2(1)(a).

[3] See, to similar effect, *Philippines/China*, where the tribunal commented that 'international agreements may take a number of forms and be given a variety of names': *Philippines/China* Award on Jurisdiction and Admissibility, para. 214.

[4] *Newfoundland and Labrador/Nova Scotia*, First Phase Award.

[5] *Nicaragua/Honduras*, para. 253.

[6] *Peru/Chile*, para. 91. Notably, however, the court rejected Chile's argument that the tacit agreement extended to a minimum of 200M from the coast, finding instead that fishing practices contemporaneous with the agreement indicated that the agreement did not extend beyond 80M (para. 117).

[7] However, as demonstrated by the ICJ's judgment in the *Nicaragua/Honduras* case, the evidential burden of demonstrating the existence of a maritime boundary on the basis of the *uti possidetis juris* principle is a substantial one.

[8] *Romania/Ukraine*, para. 77.

[9] *Romania/Ukraine*, para. 78. As discussed in Part C, Chapter 3, below, the question of how to identify the 'relevant coasts' has been the subject of contrasting approaches in the delimitation jurisprudence.

[10] See, e.g., *Tunisia/Libya*, para. 75.

[11] A roadstead is an area near the shore used for the safe loading, unloading, and anchoring of ships and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea.

[12] The figures in Part A of this book, unless otherwise stated, are only illustrative. Some are purely hypothetical; others use real-life geography, but have been simplified to emphasize the principles involved.

[13] The exception is where straight baselines are used to enclose an area of internal waters not previously considered as such, in which case the right of innocent passage applies. For example, the Minches in western Scotland which were enclosed in 1964 by the Scottish straight baseline.

[14] The term 'chart' is used specifically to refer to published nautical charts designed for navigation; the term 'map' is used more generally for other representations of the Earth's surface, including land maps and illustrative maps of maritime areas.

[15] The chart also shows numerous features relevant to navigation, including lights, anchorages, and depth soundings.

[16] For example, in *Bangladesh/India*, chart data from 1947 were submitted to the tribunal for the determination of the river boundary terminus.

[17] To comply with the carriage requirements of the Safety of Life at Sea (SOLAS) Convention.

[18] For example, in *Bangladesh/India*, charts were supplied to and used by the tribunal that had been published since the start of the proceedings. The tribunal stated that it would avail itself of the most reliable evidence, resulting from the latest surveys and incorporated in the most recent large-scale charts officially recognized by the parties.

[19] Large-scale charts cover a small area; small-scale charts cover a large area.

[20] Available from chart agents worldwide. See <http://www.ukho.gov.uk> for details.

[21] For example, the World Vector Shoreline is a global dataset of coastline data produced by the US National Geospatial Intelligence Agency and is used as the base for all the illustrations in this book.

[22] See the US Geological Survey Global Visualization Viewer for download information: <http://glovis.usgs.gov/>.

[23] Data providers include Digital Globe, Satimaging Corporation, and SPOT.

[24] See International Hydrographic Organization Resolutions, Publication M-3 (October 2014), p. 41, available at <http://iho.int/iho_pubs/misc/M3-E-OCT14.pdf> (accessed October 2015). Other sources of mapping, e.g. land mapping for civil jurisdiction purposes, may use different datums such as mean sea level ('MSL'), but this has little or no applicability for law of the sea purposes. For example, the foreshore in England is defined as being between the mean high water and mean low water and most is managed by the Crown Estate.

[25] For the UK port of Dover HAT is = 7.4m, MHWS 6.8m, MSL 3.8m above chart datum according to Admiralty Total Tide.

[26] See the report by the Baselines Committee of the International Law Association (Conference Report Sophia, 2012), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1028> (accessed 12 January 2016).

[27] For example, see the use of such scale corrections in the technical report by Beazley appended to the judgment in *Gulf of Maine*.

[28] For example, a position of 21° 38' 40.2" N, 89° 09' 20.0" E referred to WGS84 expressed in latitude and longitude (or geographical units) converts to 9924751m E, 2453142.7m N expressed in simple Mercator grid units (metres) also referred to WGS84.

[29] The UK–Norway boundary was actually defined as arcs of great circles, which in effect are the same as geodesics, but use a spherical rather than spheroidal (i.e. a slightly flattened sphere) model of the Earth.

[30] *Malaysia/Singapore*, paras 291–9. The court was not mandated by the parties to delimit the territorial seas. The territorial sea boundary remains undetermined at the time of writing, so the question of sovereignty over South Ledge will be resolved at a later date.

[31] *Nicaragua/Colombia*, paras 28–38.

[32] Colombia calculated the tidal range to be 561.9mm. HAT was +272.99mm, LAT –288.91mm relative to MSL.

[33] *UK/France Continental Shelf* case, paras 139–44.

[34] *Belgium/France*, Agreement between the Kingdom of Belgium and the French Republic Concerning the Delimitation of the Territorial Sea; Agreement Concerning the Delimitation of the Continental Shelf, 19 *LOS Bulletin* 27 (1991).

[35] *Romania/Ukraine*, para. 77.

[36] See, e.g., *Tunisia/Libya*, para. 75.

[37] *Romania/Ukraine*, paras 77–8 and 110–14. As discussed in Part B, Chapter 19, and Part C, Chapter 2, below, however, the question of how to identify the 'relevant coasts' and 'relevant areas' has been the subject of contrasting approaches in the delimitation jurisprudence.

[38] Note that the limits must be calculated using geodetic techniques that take into account the curvature of the Earth; this is especially important when measuring the longer distances such as 200M, and at higher latitudes.

[39] An exception was the *Jan Mayen* case, where the ICJ distinguished between three areas: a relevant area, an area of overlapping potential entitlements, and an area of overlapping claims.

[40] *Barbados/Trinidad and Tobago*, para. 331. See also *Bangladesh/India*, paras 299–305, which includes discussion of coastal projection into areas of outer continental shelf beyond 200M.

[41] A different approach was taken in the *Guyana/Suriname* case, where the tribunal identified the relevant coasts by reference to base points generating the provisional equidistance line. See Part B, Chpater 17, and Part C, Chapter 2, below, for further discussion.

[42] See, e.g., *Nicaragua/Honduras*, where Honduras was allocated areas south of the 15th parallel it had never claimed before the court, and *Nicaragua/Colombia*, where Colombia gained areas west of the 82nd meridian it had likewise never claimed.

[43] See *Eritrea/Yemen* for a similar geographical configuration.

[44] Note that the highly simplified vectors that are used to measure the coastal length are different from the edges of the relevant area that more closely approximate the coastline. This was the case in *Romania/Ukraine*, where the relevant area extended to the coastline, but not in the two *Bay of Bengal* cases (*Bangladesh/Myanmar* and *Bangladesh/India*), where the over-simplified coastal fronts used for measuring the coastal length also defined the limits of the relevant area.

[45] *Peru/Chile*, paras 192–4.

[46] *Cameroon/Nigeria*, para. 301.

[47] *Bangladesh/Myanmar* judgment, 14 March 2012, para. 226.

[48] *Bangladesh/India* award, 7 July 2014, para. 339.

[49] *Barbados/Trinidad and Tobago*, para. 230.

[50] *Qatar/Bahrain*, para. 173.

[51] Although see further Section IV ‘Special considerations in the delimitation of specific maritime zones’ below in relation to some specific considerations that might only apply in the context of territorial sea delimitation.

[52] *Romania/Ukraine*, paras 116–22. As described in detail in Part B of this book, the discussion of equidistance-based approaches can be traced through a series of prior cases dating back to the *North Sea Continental Shelf* cases. It became more pronounced following the adoption of distance-based maritime entitlements within 200M under UNCLOS. See, e.g., discussion in the *Libya/Malta* case.

[53] Indeed, prior to the *Black Sea* case, median lines had provided the foundation of a number of delimitations between opposite coasts. See, e.g., *Gulf of Maine, Jan Mayen*, and *Eritrea/Yemen*.

[54] This has included reliance on the approach in some unusual geographical situations, such as *Nicaragua/Colombia*.

[55] As indicated by the ICJ in the *Black Sea* case, distinction is sometimes made between the use of an ‘equidistance line’ in delimitations between adjacent coasts and the use of a ‘median line’ in delimitations between opposite coasts. An example is at Art. 6 of the 1958 Convention on the Continental Shelf (‘CCS’). Technically speaking, each line is constructed in the same way and is a form of equidistance line. The terms ‘equidistance line’ and ‘median line’ tend to be used interchangeably in the jurisprudence, as they are from time to time in this work. The distinction between adjacent and opposite coasts becomes more

relevant when considering possible special or relevant circumstances at the second stage of the delimitation process.

56 *Bangladesh/Myanmar*, para. 240.

57 See Art. 12 of the 1958 the Convention on the Territorial Sea and the Contiguous Zone ('CTS') and Art. 6 of the 1958 CCS.

58 Notably, as the court observed in *Black Sea*, the issue of determining the baseline for the purpose of measuring the breadth of the continental shelf and EEZ and the issue of identifying base points for drawing an equidistance/median line for purposes of delimitation are 'two different issues'. In the first case, the coastal State may determine the relevant base points in conformity with the provisions of UNCLOS. In the second case, the court should not base itself solely on the choice of base points made by one of the parties, but rather embark on its own identification of the base points of each State to construct the provisional line. See *Black Sea*, para. 137.

59 See *Eritrea/Yemen* for an unsuccessful attempt to invoke the high-water line in the construction of a median line.

60 The most commonly used specialist law of the sea software is produced by CARIS and GEOCAP. The ESRI ArcGIS also has some of the required functionality.

61 In *Bangladesh v. India*, the tribunal held that future changes in the coastline of the Bay of Bengal due to instability, climate change, or other forces should not be taken into consideration in constructing or adjusting a provisional equidistance line (para. 399).

62 These cases can be contrasted with, e.g., *Qatar/Bahrain* and *Newfoundland and Labrador/Nova Scotia*, where a purer geometric approach was taken to the construction of the equidistance line. There are also cases of low-tide elevations being used for construction of equidistance lines in State practice, particularly when they are balanced on both sides and thus produce an equitable result. An example is the Belgium–France boundary (IMB Vol. II, Report 9-16).

63 As both sections of the line had been calculated legitimately, the two sections were connected by a straight line.

64 See, e.g., the UK–Norway continental shelf delimitation and other examples in the North Sea.

65 See section 'Adjacent coasts' for examples of adjacent coast situations where this might militate against use of an equidistance line.

66 In *Bangladesh/Myanmar* and *Bangladesh/India*, all three States had straight baselines, but intermediate points were neither used in the States' pleadings nor considered by the tribunals. See also the unsuccessful attempt by Bahrain to use intermediate points on straight baselines for the purposes of delimitation in *Qatar/Bahrain*. In *Barbados/Trinidad and Tobago*, intermediate points on the latter's archipelagic baseline were used, although they were located only along a short baseline off the small island of Tobago and thus made little difference to the course of the equidistance line.

67 Examples analyzed in Part B of this book are *UK/France, Gulf of Maine, Qatar/Bahrain, Barbados/Trinidad and Tobago*, and *Romania/Ukraine*.

68 For example, in *UK/France Continental Shelf*, for the final Atlantic section of the boundary, the median line was adjusted in France's favour by giving base points on the UK's Scilly Isles only half weight.

[69] The ICJ's adjustment of the weighted median line in *Nicaragua/Colombia* is such an example (although there the adjustment was mainly at the expense of one of the parties). See Figure B21.3 below.

[70] In the Brazil–France (IMB Vol. 1, report 3-3) and Brazil-Uruguay (IMB Vol. 1, report 3-4) boundary agreements, the lines are specified with simply a starting point and an azimuth.

[71] *UK/France Continental Shelf*, para. 95.

[72] See *Cameroon/Nigeria* for another example of an unadjusted equidistance line delimitation between adjacent States.

[73] While the concept of 'relevant circumstances' is most commonly used in the context of EEZ and continental shelf delimitation, it is closely related to the concept of 'special circumstances' in the context of territorial sea delimitation under Article 15 of UNCLOS. The term 'special circumstances' is also used at Article 6 of the CCS 1958, in the context of delimitation of the continental shelf. Accordingly, the terms 'relevant circumstances' and 'special circumstances' are used interchangeably in this work. See also, however, Section IV 'Special considerations' below about special considerations that can arise in the delimitation of the territorial sea.

[74] Cited in Colson, D. A., 'The Delimitation of the Outer Continental Shelf between Neighboring States' (2003) 97 *AJIL* 91–107.

[75] See, e.g., discussion in the *Gulf of Maine* and *Barbados/Trinidad and Tobago* cases of the desirability, in cases of single maritime boundary delimitation, of applying geographical considerations suitable for delimiting both the EEZ and the continental shelf.

[76] *Barbados/Trinidad and Tobago*, para. 230.

[77] See Dissenting Opinion of Prosper Weil in *St Pierre and Miquelon*, 31 *ILM* 1145 (1992), 1197–219 at para. 17.

[78] See, e.g., discussion in *Libya/Malta*.

[79] *Bangladesh/Myanmar*, para. 292.

[80] Notably, the tribunal did not make any adjustment in the territorial sea, as it considered that the concave coastline did not produce a significant cut-off effect within the 12M limit. For another example of a delimitation dictated by a desire to avoid a 'cut-off effect', see *Guinea/Guinea-Bissau*.

[81] See further detailed analysis and maps on the two cases in Part B, Chapters 20 and 23, below.

[82] Delimitation agreements with third States should also be irrelevant in the context of cut-off arguments. Thus, for example, the bilateral agreement between Venezuela and Trinidad and Tobago was not considered relevant to the latter's cut-off argument in *Barbados/Trinidad and Tobago*.

[83] Churchill, R. R. and Lowe, A. V., *The Law of the Sea* (3rd edn, Manchester University Press, 2002), p. 189.

[84] See *Gulf of Maine* for a rare example of a median line adjustment calculated with specific reference to the precise mathematical ratio of coastal fronts.

[85] As a consequence, extensive commentary has been devoted to the topic. See, e.g., Bowett, D. W., *The Legal Régime of Islands in International Law* (Dobbs Ferry, 1979); Dipla, H, *Le régime juridique des îles dans le droit international de la mer* (Presses Universitaires de France, 1984); and various discussions in [Charney and Alexander]. [Bowett, D., 'Islands,

Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations', in Charney, J. and Alexander, L., *IMB* Vol. 1 (Martinus Nijhoff 1991), pp. 131–52.]

86 Evans, M. D., *Relevant Circumstances and Maritime Delimitation* (Clarendon Press, 1989), p. 135.

87 Section B, Chapter 11.

88 Sulina dyke, a Romanian harbour work, was ignored in *Romania v. Ukraine*.

89 See Figure B6.4, below.

90 *Bangladesh/Myanmar*, para. 169.

91 For another case distinguishing between fringing islands and features further offshore for the purposes of delimitation, see *Guinea/Guinea-Bissau*.

92 See, by contrast, the treatment of the Sulina dyke, which had no corresponding feature on the Ukrainian coast, in the *Black Sea* case, where the court decided to use only the landward end of the feature as a base point. Another factor in that case, however, was the court's observation that there was no convincing evidence that the dyke served any direct purpose in port activities.

93 Evans, *Relevant Circumstances and Maritime Delimitation*, p. 135.

94 In his Dissenting Opinion, Judge Schwebel highlighted the inconsistency between the court's statement of principle and its application to the delimitation, observing that the court's approach had involved 'discounting the whole of the islands of Malta—which together constitute that independent State—as if they were the anomalous dependent islands of a large mainland State'. Judge Oda was similarly critical of the court's delimitation, describing it as 'taking the entire territory of one Party as a special circumstance affecting a delimitation which the Court has no call to make [i.e., the delimitation between Libya and Sicily] and which excludes that very Party!' In doing so, he said, 'partial effect is given to the country itself for which a delimitation was to be drawn'.

95 Langeraar, W., 'Equitable Apportionment of Maritime Areas through the Equiratio Method' (1985) 36 *Hydrographic Journal* 19–28.

96 See analysis and maps in Part B, Chapter 21, below.

97 The Court of Arbitration remarked that they were also 'practically within the arms of a gulf on the French coast'.

98 For an example of full 12M enclaves being accorded to much smaller, unpopulated islands, see the treatment of Quitasueño and Serrana in the *Nicaragua/Colombia* case.

99 For an example of a small island located just off the mainland being accorded less than 12M of territorial sea in an adjacent coast delimitation, see the treatment of Alcatraz in *Guinea/Guinea-Bissau*. However, in that case Guinea had not claimed a full 12M territorial sea around the island, with the result that the tribunal did not feel constrained to accord it such entitlement. For an interesting example of the use of semi-enclaves extending slightly more than 12M from remote small islands, see Agreement between the Government of the Italian Republic and the Government of the Tunisian Republic Relating to the Delimitation of the Continental Shelf between the Two Countries, 20 August 1971, in Charney, J. and Alexander, L. (eds), *International Maritime Boundaries*, Vol. 2 (Martinus Nijhoff, 1991), p. 1611.

100 The court reached the same conclusion in its 2008 judgment in the *Malaysia/Singapore* case, when concluding that South Ledge was a low-tide elevation and, as such, would

belong to the State in the territorial waters of which it was located. *Malaysia/Singapore*, para. 299.

101 *Cameroon/Nigeria*, para. 304.

102 See, e.g., *Nicaragua/Honduras*, para. 253.

103 *Guyana/Suriname*, para. 390.

104 *Gulf of Maine*, para. 237.

105 *Barbados/Trinidad and Tobago*, para. 269. For a similar example of failure to meet the necessary evidential threshold to secure adjustment of a provisional equidistance line for fisheries reasons, see *Bangladesh/India*.

106 This solution may be unavailable in other cases due to the unusual terms of the parties' joint referral to arbitration in *Eritrea/Yemen*, which explicitly requested the tribunal to rule in the (island territory and delimitation) dispute on the basis of 'historic titles'. For example, in *Barbados/Trinidad and Tobago*, the tribunal held that it had no jurisdiction under UNCLOS to impose a fisheries regime in waters located on the Trinidadian side of the EEZ boundary.

107 *Barbados/Trinidad and Tobago*, paras 287–92.

108 See *Newfoundland and Labrador/Nova Scotia*.

109 Crawford, J., *Brownlie's Principles of Public International Law* (Oxford University Press, 2012), p. 292.

110 *Nicaragua/Colombia*, para. 222.

111 Ibid.

112 In the territorial sea, Article 15 of UNCLOS specifically indicates that there is no closed list of 'special circumstances'.

113 See, e.g., *Guyana/Suriname*, paras 302–3.

114 See discussion of the legal and evidential requirements for delimitation by agreement, at Section A2Ia above.

115 See, e.g., discussion about the relevance of State conduct in the recognition of Eddystone Rock and St Paul Island as base points in the *UK/France* and *Newfoundland and Labrador/Nova Scotia* cases, respectively.

116 See discussion of the principle of estoppel in the context of an argument about Germany's assumption of obligations under the 1958 CCS in the *North Sea Continental Shelf* cases, para. 30. For a recent exposition of the doctrine of estoppel in international law, including in connection with the preservation of fishing rights around small islands, see *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award dated 18 March 2015, paras 434–48. The UNCLOS tribunal stated that: 'estoppel may be invoked where (a) a State has made clear and consistent representations, by word, conduct, or silence; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in question; (c) the State invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and (d) such reliance was legitimate, as the representation was one on which that State was entitled to rely' (para. 438). This exposition was adopted verbatim by the *Philippines/China* tribunal in its Award on Jurisdiction and Admissibility (para. 250). For discussion about the legal distinction between acquiescence and estoppel in the context of maritime delimitation, see *Gulf of Maine*, paras 130–51.

[117] See, e.g., *Barbados/Trinidad and Tobago*, paras 361–6, where the tribunal rejected Barbadian arguments of estoppel based on the absence of Trinidadian protest against Barbadian seismic surveys, oil concessions, and coast guard patrols in the disputed area.

[118] The leading case adopting this circumstance was *Guinea/Guinea-Bissau*, where the delimitation took place in the context of a number of neighbouring delimitations that had already been made or were to be made on the convex coastline of West Africa. More commonly, third-State delimitation agreements will only be relevant for the purposes of identifying any limit to a party's maritime claims or the extent of claims by third States. For example, in *Barbados/Trinidad and Tobago*, the tribunal took account of an earlier delimitation agreement between Trinidad and Venezuela as representing the limit of Trinidad's maritime claims. The tribunal rejected any broader influence of that or other delimitation agreements since they were *res inter alios acta* (paras 339–49). As the ICJ explained in *Nicaragua/Colombia*, '[i]t is a fundamental principle of international law that a treaty between two States cannot, by itself, affect the rights of a third State' (para. 227). Consequently, treaties which Colombia had concluded with Jamaica, Panama, and Costa Rica could not confirm upon Colombia rights against Nicaragua in the delimitation between them.

[119] *Tunisia/Libya*, para. 81. However, the ICJ rejected any notion that the maritime boundary should continue in the northerly direction of the land frontier in that case. Rather, the land boundary provided only the 'starting point' and a 'basic point of reference' for the maritime boundary (para. 85).

[120] See, e.g., *Nicaragua/Honduras* (where the ICJ set a starting point 3M out to sea) and *Guinea/Guinea-Bissau* (where the parties' land boundary was defined by reference to the thalweg of the Cajet River, leading the tribunal to define a seaward starting point that would move as the thalweg moved).

[121] *Nicaragua/Colombia*, para. 230.

[122] *Tunisia/Libya*; *Libya/Malta*; *Newfoundland and Labrador/Nova Scotia*; *Jan Mayen*.

[123] *Libya/Malta*.

[124] *Tunisia/Libya*; *Libya/Malta*; *Gulf of Maine*; *Bangladesh/Myanmar*. See further discussion at Section IV c 'The continental shelf beyond 200M' above about the replacement of physical natural prolongation with non-encroachment as a relevant circumstance in delimitation since the advent of a distance-based entitlement within 200M under UNCLOS. As discussed in section IV c 'The continental shelf beyond 200 nautical miles and the "grey area"', below, different considerations can still apply in the context of continental shelf delimitation beyond 200M, as there will normally be no co-existing EEZ rights in such cases and the basis of entitlement is different under Article 76. As a result, arguments based on the physical geology and geomorphology of the seabed as a relevant circumstance continue in cases of shelf delimitation beyond 200M.

[125] *Cameroon/Nigeria*; *Guyana/Suriname*.

[126] The desirability of maintaining unity of hydrocarbon deposits can, however, be an important practical factor in delimitation negotiations. It was identified by the court as a matter for the parties to 'take into consideration' in their negotiations in the *North Sea Continental Shelf* cases. In *Eritrea/Yemen*, the tribunal observed that recent decades have seen the emergence of 'a significant body of cooperative State practice in the exploitation of resources that straddle maritime boundaries'. Accordingly, the tribunal held that the parties were 'bound to inform one another and consult one another' in connection with straddling mineral resources and that they 'should give every consideration to the shared or joint unitised exploitation of any such resources' (Phase II, paras 84–6). While that decision was in many ways specific to the facts and jurisdictional basis of that case, some have argued that there now exists a customary duty to inform, consult, and cooperate in the exploitation

of straddling hydrocarbon resources (see, e.g., Bundy, R. R., ‘Natural Resource Development (Oil and Gas) and Boundary Disputes’ in Blake, G. H. et al. (eds), *The Peaceful Management of Transboundary Resources* (Graham & Trotman, 1995).

127 *Bangladesh/India*, para. 399.

128 *Black Sea*, para. 122.

129 *Bangladesh/India*, para. 341.

130 Thus, for example, the ‘final check’ was undertaken in *Libya/Malta, Barbados/Trinidad and Tobago*, and *Nicaragua/Colombia* notwithstanding the fact that coastal disparity had already been applied as a relevant circumstance; cf. *Newfoundland and Labrador/Nova Scotia*, which commented (incorrectly) that proportionality had already been taken into account in cases of disparity in coastal lengths, and would thus not need to be considered separately as a final check.

131 *Black Sea*, para. 110.

132 *Bangladesh/India*, para. 490; *Bangladesh/Myanmar*, para. 493.

133 *Nicaragua/Colombia*, para. 242.

134 However, as noted in *Bangladesh/Myanmar*, the fact that a third State might claim part of the relevant area does not prevent its inclusion for the purposes of the disproportionality test (paras 489–96 and Figure B20.3, below).

135 Bowett, D. W., *The Legal Régime of Islands in International Law* (Dobbs Ferry, 1979), p. 164.

136 In the context of future challenges, see further analysis of proportionality in Part C, Chapter 3.

137 Evans, *Relevant Circumstances and Maritime Delimitation*, p. 119.

138 For a comprehensive compilation of delimitation treaties in force around the world, see Charney, J. and Alexander, L., *International Maritime Boundaries*, Vols. 1–6 (Brill Nijhoff, 1993).

139 As explained in the previous sub-section, departure from an equidistance-based approach is more common in the context of agreed maritime boundaries.

140 *Nicaragua/Honduras*, para. 272.

141 This was confirmed in *Black Sea*, where the court stated that the provisional delimitation line in the context of opposite coasts ‘will consist of a median line between the two coasts’ (para. 116). The enclavement of small features is addressed above, in the context of islands and rocks as a relevant circumstance.

142 See further discussion of territorial sea delimitation in Part IV, ‘a. The territorial sea: UNCLOS Article 15…’, below.

143 *Nicaragua/Honduras*, para. 289.

144 Although, as *Bangladesh/India* shows, the construction of an equidistance line can be appropriate even in such circumstances. Much will depend on the complexity of the coastline and its distorting features.

145 In *Gulf of Maine*, the court drew simplified coastal fronts for the construction of the initial bisector and in the outermost segment drew a perpendicular to the bay closing line. In *Guinea-Guinea Bissau*, a regional coastal direction that crossed third States was used as the base for a perpendicular.

146 In *Gulf of Maine*, the calculated bisector was shifted to the starting point agreed by the parties.

147 Contrast with *Bangladesh/Myanmar* and *Bangladesh/India*, where bisector arguments were rejected because both parties could identify base points for construction of the provisional equidistance line.

148 See Figure B18.2, below.

149 In *Grisbådarna*, the initial line drawn as a perpendicular was modified in the light of Swedish fishery resources on Grisbådarna Bank (see Figure A1.1 above).

150 See Figure B7.2, below.

151 See further discussion about the historic use of parallels off the Pacific coast of Latin America in *Peru/Chile* in Part, B Chapter 22 below.

152 Treaty fixing the maritime boundaries between the Republic of the Gambia and the Republic of Senegal, Gambia-Senegal, signed 4 June 1975, and Agreement on Maritime Delimitation between the Government of French Republic and the Government of Dominica, France-Dominica, signed 7 September 1987, 1546 *UNTS* 305.

153 IMB Vol. 1, Report 3-1.

154 See Figure B10.2, below.

155 See Figure B21.2, below.

156 *Guyana/Suriname*, para. 296.

157 See also *Bangladesh/Myanmar*, para. 129.

158 Tanaka, Y., *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart Publishing, 2006), p. 299.

159 Dissenting Opinion of Judge Oda, *Tunisia/Libya*, ICJ Reports 1982, p. 210, para. 87. However, this view is not universally held. For example, in the same case, Judge Jiménez de Aréchaga considered that historic rights may be relevant for the delimitation of the continental shelf. He dismissed the notion that the *ab initio* nature of continental shelf rights excluded historic rights as a relevant factor in continental shelf delimitation, stating that it would be 'absurd to contend that the Truman Proclamation Albany 1958 Convention abolished or disregarded pre-existing rights over the continental shelf'. Separate Opinion of Judge Jiménez de Aréchaga, p. 123, para. 80.

160 By contrast, low-tide elevations will often be accorded zero weight even in the territorial sea: see, e.g., *Qatar/Bahrain* and *Bangladesh/India*.

161 See, e.g., contrasting treatment of different features in *UK/France, Eritrea/Yemen*, and *Qatar/Bahrain*.

162 See, e.g., *Cameroon/Nigeria* and *Black Sea*.

163 See discussion in *Nicaragua/Honduras*. See also discussion of the *uti possidetis* principle in connection with historic bays and territorial sea areas in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* [1992] ICJ Rep. 1992, 351.

164 *Gulf of Maine*, para. 194. See also, to similar effect, *Guyana/Suriname*, para. 334.

165 *Barbados/Trinidad and Tobago*, para. 235.

166 United Kingdom Treaty Series No. 76 (1999) or 41 *LOS Bulletin* 58 (1999).

[167] Available at <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/IDN.htm>. See also Figure A3.1.

[168] In the case of negotiated boundaries, fisheries might more readily be determinative of delimitation. For example, Icelandic dependence on fisheries resources appears to have influenced the location of Iceland's agreed boundaries with Denmark and Norway; see Agreements between Iceland and Norway Establishing Maritime Boundaries between Iceland and Jan Mayen, 28 May 1980, in Charney, J. and Alexander, L. (eds), *International Maritime Boundaries*, Vol. 2 (Martinus Nijhoff, 1991), p. 1755.

[169] *Libya/Malta*, para. 40.

[170] Colson, D. A., 'The Delimitation of the Outer Continental Shelf between Neighboring States' (2003) 97 *AJIL* 91–107.

[171] See further analysis and illustrations in Part C of Chapter 4 below.

[172] See, e.g., the Treaty between the Government of Australia and the Government of New Zealand establishing certain Exclusive Economic Zone and Continental Shelf Boundaries, 25 July 2004, in Colson, D. and Smith, R. (eds,), *International Maritime Boundaries*, Vol. 5 (Martinus Nijhoff, 2005), p. 3759.

[173] Treaty between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles, 9 United States-United Mexican States, 2143 *UNTS* 417 (entered into force 17 January 2001).

[174] See further analysis of the *Bangladesh/Myanmar* and *Bangladesh/India* cases (and illustrations) in Part B, Chapters 20 and 23, below. For another juridical example of delimitation of outer continental shelf areas in a situation of clear overlapping entitlements beyond 200M, see *Newfoundland and Labrador/Nova Scotia*.

[175] For a slightly different situation, where the delimiting States agreed, in effect, that the relevant area of delimitation beyond the 200M limit would be defined according to subsequent recommendations of the CLCS and then allocated according to a specific (53:47) ratio between them, see the Agreed Minutes on the Delimitation of the Continental Shelf beyond 200 Nautical Miles between Greenland and Iceland in the Irminger Sea signed and concluded in Reykjavík and Copenhagen on 16 January 2013. The context and implications of this arrangement are discussed in Kunoy, B., 'Agreed Minutes on the Delimitation of the Continental Shelf beyond 200 Nautical Miles between Greenland and Iceland in the Irminger Sea' (2013) 12 *Chinese Journal of International Law* 125–42.

[176] For further discussion, see Lathrop, C., 'Continental Shelf Delimitation Beyond 200 Nautical Miles: Approaches Taken by Coastal States before the Commission on the Limits of the Continental Shelf' in Colson, D. and Smith, R. (eds), *International Maritime Boundaries*, Vol. 6 (Martinus Nijhoff, 2011), pp. 4139–60.

[177] *Bangladesh/Myanmar*, paras 474–6. For a treaty that makes provision for divided fisheries and continental shelf jurisdiction, see the 1978 Torres Strait Treaty between Australia and Papua New Guinea, 1429 *UNTS* 207. An alternative solution is for the State with EEZ rights beyond the 200M limit of the other State to transfer those EEZ rights by treaty to the other State, thus leaving the latter State with jurisdiction over both the seabed and water column. For example, see Article 3 of the 2010 Treaty Concerning Maritime Delimitation and Co-operation in the Barents Sea and the Arctic Ocean between Norway and Russia.

178 Other examples of creation of ‘grey areas’ in the jurisprudence include *Gulf of Maine* and *Guinea/Guinea-Bissau*, each of which involved adjacent coast delimitation at variance with equidistance up to the 200M limit.

Part A Commentary on the Modern International Law of Maritime Boundary Delimitation, 3 Practical Considerations

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(p. 114) 3 Practical Considerations

I. Negotiation or Litigation?

a. The pre-eminence of ‘agreement’ under Articles 15, 74, and 83 of UNCLOS

Articles 15, 74, and 83 of UNCLOS emphasize the fundamental importance of agreement in the delimitation of maritime boundaries. Article 15 indicates that the territorial sea boundary shall be based on an equidistance line ‘failing agreement to the contrary’; Articles 74 and 83 provide that EEZ and continental shelf delimitation ‘shall be effected by agreement on the basis of international law’. Agreement between States on the location of a maritime boundary thus represents the starting point under UNCLOS—it is only when agreement cannot be reached that resort should be had to third-party dispute settlement.

The delimitation of maritime boundaries by agreement offers the parties maximum control over the delimitation process. States have discretion over the methodology chosen and outcome arrived at, in order to achieve an equitable solution. The parties are free to take into account any geographical, political, historical, economic, or other circumstances they wish, regardless of whether an international court or tribunal might consider such circumstances relevant to the delimitation process. As the court stated in the *North Sea Continental Shelf* cases, there is ‘no legal limit to the considerations which States may take account of’.

In some circumstances, however, delimitation by a third-party court or tribunal may be politically desirable for a State. For example, if faced with a strong legal claim from a neighbouring State, it may be easier for a State to accept the result when it is imposed by a court or tribunal. Otherwise, acceptance of an outcome perceived as ‘unfavourable’ may be viewed by the constituents of a State as a ‘failure’ on the part of the negotiators, even if the solution arrived at complies with international law. Litigation may also be preferable to agreement where significant inequality of resources or power exists between the parties. A State with more political or economic power might try to use that power to pressurize its weaker neighbour into accepting a particular delimitation outcome in negotiations. Such (p. 115) inequality of power should be irrelevant in any court of arbitration setting in light of the fundamental international law principle that all States are equal. Therefore, in such a situation, the weaker neighbour might resolve to refer delimitation to third-party dispute settlement rather than submit to the pressure of its neighbour.

b. Novel negotiated outcomes at variance with standard delimitation methodologies

When States delimit maritime boundaries by agreement, they are free to arrive at any acceptable arrangement ‘on the basis of international law’. Delimitations by agreement may differ significantly from the outcome at which an international court or tribunal might arrive if asked to delimit the same boundary.

Examples of novel negotiated outcomes include:

- agreements where, in a particular area, States agree that one of them shall have jurisdiction over the water column and the other shall have jurisdiction over the seabed; [1]

- agreements where disproportionate weight has been accorded in the delimitation to minor features that might otherwise be discounted, or accorded reduced effect, by any third-party court or tribunal; [2]

- agreements where enclaves around small island features have been varied in size, depending on the individual circumstances of each feature; [3]

- agreements providing for the preservation of traditional fishing rights notwithstanding delimitation; [4]

(p. 116) • agreements providing for mutual fishing access by each State's fishing communities on the other side of a delimitation line; [5]

- agreements providing for the exploitation (and unitization) of hydrocarbon deposits that straddle a maritime boundary or that are otherwise disputed between the parties; [6]

- agreements providing for substantial modification of equidistance or median lines to take into account known oil and gas fields of structures in the delimitation area, thus leaving them entirely on one side of the boundary or another; [7] and

- agreements providing for the creation of 'buffer zones' within a specific distance of the boundary, within which certain fishing or hydrocarbon activities may be prohibited or regulated between the parties. [8]

Many more maritime boundaries exist in State practice containing novel features or idiosyncrasies, the detail of which is beyond the scope of this work. However, an important and distinct category of arrangement that is generally only achievable by specific agreement is the so-called 'joint development zone' (or 'JDZ'), addressed in the following subsection.

c. 'Provisional arrangements of a practical nature'

Articles 74(3) and 83(3) of UNCLOS provide that, while agreement on the delimitation of the continental shelf and EEZ is pending:

> 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. (p. 117)

From the outset of the Third United Nations Conference on the Law of the Sea, there was a general agreement to the effect that the Convention should contain a specific provision encouraging interim measures to be applied pending agreements and without prejudice to the final delimitation. The main differences between States concerned the question of whether or not to prohibit certain activities during the transitional period. While some delegations proposed rules prohibiting the exploitation of natural resources or other unilateral measures within a disputed area pending delimitation, others criticised what they felt to be an unwarranted moratorium of economic activities in the area. The consensus position, however, was that some mutual restraint should be exercised by littoral States in disputed areas pending any delimitation agreement or judicial settlement.

The compromise result combines positive duties to cooperate with negative duties to refrain from unilateral conduct. The duties of coastal States under Articles 74(3) and 83(3)

therefore have two aspects. In the words of the *Guyana/Suriname* tribunal, they 'simultaneously attempt to promote and limit activities in a disputed maritime area'.[9]

The first is the positive duty to 'make every effort to enter into provisional arrangements of a practical nature'. This imposes an obligation on coastal States to negotiate in good faith with a view to reaching agreement on 'interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation'.[10] As one leading commentator has noted, 'this requirement is not merely a nonbinding recommendation or encouragement, but a mandatory rule whose breach would represent a violation of international law'.[11]

The second is the duty 'not to jeopardize or hamper the reaching of the final agreement'. This prohibits unilateral conduct within the disputed area that might prejudice the prospects of a final delimitation agreement. In *Guyana/Suriname*, the tribunal considered what types of unilateral conduct might violate this obligation. It drew a distinction between activities causing 'permanent physical change, such as exploitation of oil and gas reserves [e.g., exploratory drilling into the sea bed] and those that do not, such as seismic exploration', observing that only the former will violate the obligation.[12] It also confirmed that any threat or use of force within a disputed area would violate the obligation.

Ultimately, in *Guyana/Suriname*, the tribunal found that both States had violated their obligations under each of the two elements of Articles 74(3) and 83(3) (p. 118) through (in Guyana's case) the authorization of exploratory drilling in the disputed area and (in Suriname's case) the threat of force in response.

Any provisional arrangement will be 'without prejudice' to a final boundary settlement. Accordingly, it cannot be interpreted as renouncing any legal claims over a disputed area. As Lagoni notes, activities undertaken in the context of a provisional arrangement 'cannot create acquired rights with respect to the area or its resources' and one cannot assume that the parties 'accept or otherwise acquiesce in the arrangements as being final'.[13]

Provisional arrangements can take a number of shapes and forms, which vary in the degree to which they promote or constrain the activities of coastal States pending delimitation. They include provisional boundaries,[14] mutually agreed moratoriums on all activities in overlapping areas,[15] the creation of joint development regimes for fisheries,[16] joint development of hydrocarbon resources,[17] agreements on environmental cooperation,[18] and agreements on allocation of criminal and civil jurisdiction.[19]

An example of a multilateral, broad, but 'soft' (i.e. non-binding) provisional arrangement is the 2002 Declaration on the Conduct of Parties in the South China Sea ('DOC'), adopted by the Foreign Ministers of ASEAN and the People's Republic of China at the 8th ASEAN Summit on 4 November 2002.[20] The DOC was signed in the context of the unresolved (and seemingly intractable) (p. 119) delimitation dispute between the six littoral States on the South China Sea. Pursuant to its terms, the parties 'undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability'. In 2011, ASEAN adopted 'Guidelines for the Implementation of the DOC', with the stated aim of guiding 'the implementation of possible joint cooperative activities, measures and projects as provided for in the DOC'.[21] Both the DOC and the Guidelines refer to the eventual adoption of a binding code of conduct in the region.

A more comprehensive form of provisional arrangement, commonly used by States to facilitate the exploitation of natural resources pending delimitation, is the creation of a so-called joint development zone ('JDZ') by way of a joint development agreement ('JDA'). In this context, joint development refers to:

> a procedure under which boundary disputes are set aside, without prejudice to the validity of the conflicting claims, and the interested States agree, instead, to jointly explore and exploit and to share any hydrocarbons found in the area subject to overlapping claims.[22]

Joint development allows each disputing State to enjoy the benefits of the resources in a disputed area without fear of being contested by the other disputing States. In the *North Sea Continental Shelf* cases, the ICJ observed that agreements for joint exploration can be 'particularly appropriate when it is a question of preserving the unity of a deposit' in areas of overlapping claims. Thirty years later, in the *Eritrea/Yemen* award, the tribunal observed that 'there has grown up a significant body of cooperative State practice in the exploitation of resources that straddle maritime boundaries'.[23]

It is generally agreed that there is no positive obligation, whether under UNCLOS or customary international law, to enter into a JDA pending delimitation.[24] Nevertheless, JDAs are now commonplace around the world in areas where States (p. 120) parties share a desire to exploit maritime natural resources notwithstanding the absence of an agreed boundary. Examples include those between: Malaysia and Thailand; Malaysia and Vietnam; South Korea and Japan; Saudi Arabia and Kuwait; Iceland and Norway; Nigeria and São Tomé and Príncipe; and Jamaica and Colombia. While some are administered by bespoke regulatory authorities,[25] created and appointed jointly by the States parties, others are administered by the pre-existing authorities or national oil companies of States parties themselves.[26]

A series of treaties between Australia and Timor-Leste has created one of the most well-known (if also infamous) JDAs, in an area of continental shelf known to contain substantial hydrocarbon resources. Following the independence of East Timor, Australia and Timor-Leste signed the Timor Sea Treaty ('TST') in 2002.[27] This established the Joint Petroleum Development Area (the 'JPDA'), a zone located to the north (i.e. on the Timor-Leste side) of the median line between the two States, where the exploration and exploitation of petroleum resources is jointly controlled and managed by them. The TST provides that 90 per cent of all petroleum produced in the JPDA belongs to Timor-Leste and 10 per cent belongs to Australia. The location of the JPDA and its relation to the median line between the parties is illustrated in Figure A3.1.

In 2003, Australia and Timor-Leste signed a further agreement relating to the unitization of certain hydrocarbon fields (collectively known as 'Greater Sunrise') that straddle the JPDA and an area deemed to be part of Australia's continental shelf.[28] The 2003 agreement allocated 20.1 per cent of the petroleum produced at the fields to the JPDA and 79.9 per cent to Australia. Following substantial controversy, this allocation was replaced in 2006 by the Treaty on Certain Maritime Arrangements in Timor Sea (the 'CMATS Treaty'). In force until 2057, the CMATS Treaty provides for an equal share of the revenues from Greater Sunrise between the two States. The CMATS Treaty also establishes a moratorium (p. 121)

View full-sized figure

Figure A3.1: The Australia–Timor-Leste Joint Petroleum Development Area, and the Australia–Indonesia seabed and EEZ boundaries.

on claims to sovereignty rights, jurisdiction, and maritime boundaries for the duration of the CMATS Treaty.[29]

While providing a useful example of a JDA in an undelimited maritime area, the TST, JPDA, and CMATS Treaty have been the subject of substantial political and legal controversy, including a perception that they are lopsided in favour of Australia. In April 2013, Timor-Leste instituted arbitral proceedings against Australia under the TST, by which Timor-Leste seeks to have the CMATS Treaty declared invalid by reason of espionage allegedly carried out by Australia during the course of negotiation of the treaty.[30] In parallel, Timor-Leste requested the ICJ to indicate provisional measures against Australia following the seizure by Australian intelligence officers of certain documents and data from a legal representative of Timor-Leste. On 3 March 2014, the court indicated provisional measures, *inter alia*, requiring Australia to ensure that the content of the seized material was not used to the disadvantage of Timor-Leste and prohibiting Australia from interfering with communications between Timor-Leste and its legal advisers in connection with the pending arbitration. Australia returned the seized documents and data on (p. 122) 12 May 2015. The arbitration proceedings are still pending at the time of writing.[31]

Sometimes, JDAs might be created so as to lay down delimitation ‘markers’ vis-à-vis third State claims over a particular maritime space. For example, the 2003 EEZ Joint Cooperation Zone Treaty between Barbados and Guyana created a Cooperation Zone located within the 200M arcs of Barbados and Guyana, but beyond the 200M arc of any third State. Notably, the Cooperation Zone was located in areas of outer continental shelf claimed at the time by both Venezuela and Trinidad and Tobago (but disputed by Barbados and Guyana).[32]

While courts and tribunals will rarely impose joint development arrangements (not least because this will normally exceed their jurisdiction), in a number of situations they have encouraged States to agree such arrangements following a judgment or award. For example, in *Guinea/Guinea-Bissau*, the tribunal encouraged the parties to pursue ‘mutually advantageous cooperation’ to assist their economic development. Similarly, in *Eritrea/Yemen*, the tribunal urged the parties to ‘give every consideration to the shared or joint or unitised exploitation’ of hydrocarbon resources that straddled the maritime boundary, or that lay in its immediate vicinity. In each of these examples, the encouragement of joint development arrangements provided a convenient alternative to formal delimitation based on the natural resources activities concerned.

II. Third-Party Dispute Resolution

a. The duty to negotiate

Under customary international law, States must resolve their disputes by peaceful means. This rule is codified, *inter alia*, by Article 33 of the UN Charter, which provides:

> parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

The obligation to settle disputes by peaceful means without doubt applies to the law of sea and, specifically, to delimitation disputes. Article 279 of UNCLOS echoes the general rule, requiring that 'States parties shall settle any dispute (p. 123) between them concerning the interpretation or application of this Convention by peaceful means'. Article 283(1) similarly requires the States parties to an UNCLOS dispute to 'proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means'.

Regardless of the existence of any dispute, Articles 15, 74, and 83 give priority to delimitation by 'agreement'. Any agreement requires some form of negotiation and, as a matter of international law, any negotiation must be undertaken in good faith. Article 26 of the VCLT and Article 300 of UNCLOS codify this obligation, requiring that the parties perform their obligations 'in good faith'.[33] In *North Sea Continental Shelf*, the ICJ elaborated on the duty of good faith in the context of delimitation negotiations, observing that:

> the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.[34]

In the event that a delimitation agreement is reached in accordance with international law, that agreement will prevail. However, if negotiations are unsuccessful, UNCLOS provides a clear path to third-party dispute settlement, as discussed below.

b. The duty to litigate/arbitrate

In practice, it might be difficult for States to reach a negotiated delimitation agreement, whether for legal, political, economic, or other reasons. Negotiations might fail due to a single intractable issue that leads to deadlock, or due to a host of factors such as delay, procrastination, or a sudden change in events (such as an offshore licensing round or a spate of fishing arrests).

Articles 74(2) and 83(2) of UNCLOS compel States parties to resort to the mandatory dispute settlement procedures provided in Part XV of UNCLOS if no delimitation agreement can be reached within a 'reasonable period of time'. What constitutes 'a reasonable period of time' must be determined on a case-by-case basis. In *Barbados/Trinidad*, Trinidad and Tobago argued that the tribunal had no jurisdiction to hear Barbados's claims because negotiations had still been ongoing when Barbados instituted the proceeding. The tribunal disagreed, finding that nine rounds of failed fisheries and delimitation negotiations over the course of more than three years constituted a failure to reach agreement within 'a reasonable (p. 124) period of time'.[35] The tribunal further held that the obligation of

disputing parties to ‘exchange views’ under Article 283 did not impose an obligation to commence fresh negotiations following the failure of delimitation discussions.

Indeed, as ITLOS observed in the *Arctic Sunrise* case, Article 283(1) requires no more than that ‘the Parties exchange views regarding the means by which a dispute that has arisen between them may be settled…Article 283(1) does not require the Parties to engage in negotiations regarding the subject matter of the dispute’.[36] Still less does it ‘require the Parties to set out the specifics of the legal claims in advance of dispute settlement’.[37]

In *Cameroon/Nigeria*, Nigeria argued that Cameroon’s delimitation claims beyond ‘point G’ were inadmissible and beyond the ICJ’s jurisdiction because, *inter alia*, ‘the requirement of prior negotiations’ had not been met. The ICJ rejected the argument, finding that delimitation negotiations had taken place since the 1970s. The court held further that States are free to amend their claims once a dispute reaches a judicial or arbitral setting, without having to revert back to negotiations as a precondition to admissibility or jurisdiction. The court observed that any other approach would lead to ‘delays and complications in the process of delimitation’.[38]

Importantly, under Article 286 of UNCLOS, where no settlement has been reached through negotiations, a delimitation dispute shall be submitted ‘at the request of any party to the dispute to the court or tribunal having jurisdiction’. In the words of the *Barbados/Trinidad* tribunal, the ability to invoke compulsory dispute resolution under Part XV is a ‘unilateral right’. Accordingly, subject to the ability of States to withdraw their consent under Article 298 UNCLOS (addressed below), States parties have the right to commence binding judicial or arbitral proceedings without prior notification to the other State party to the dispute.

The dispute resolution framework under UNCLOS has a number of practical consequences. First, States that are engaged in negotiations (and especially those that have been engaged in protracted negotiations) must be ready for the possibility that the other may, at any time, submit the delimitation to the third-party procedures mandated at Part XV. The *Barbados/Trinidad* tribunal viewed this as (p. 125) an inherent part of the dispute resolution architecture of the treaty. It was unequivocal that the unilateral invocation of arbitration procedures could not be viewed as an abuse of right, contrary to Article 300 of UNCLOS or general international law.[39] Conversely, however, States must be cognizant of the risk of pursuing dispute resolution under Part XV prematurely. This may lead to a successful jurisdictional challenge due to a failure to negotiate for ‘a reasonable period of time’ (or a failure to ‘exchange views’).[40]

As explained in the subsection that follows, pursuant to Article 287 of the Convention, delimitation disputes may be submitted to one of three binding dispute resolution fora. However, this is without prejudice to the right of States parties under Articles 280 and 281 to first submit such disputes to other procedures of their own choice. Thus, for example, States can still decide by agreement to refer a delimitation dispute to third-party mediation prior to any referral to binding settlement process. In *Eritrea/Yemen*, the French Government assisted in mediation efforts between the disputing parties that led to the cessation of hostilities and an arbitration agreement between the two States. In the delimitation dispute between Qatar and Bahrain, the King of Saudi Arabia acted as a mediator between the parties prior to submission of the dispute to the ICJ. UNCLOS parties may even decide to resolve their delimitation dispute by way of ad hoc arbitration (although that has yet to happen in practice in any case limited to maritime delimitation).

Where a delimitation dispute has been submitted by agreement of the parties to alternative procedures of their own choice, Article 281 provides for the subsequent application of Part XV dispute resolution if no settlement is reached via those alternative procedures. The only exception is where the parties have explicitly agreed to exclude Part XV procedures. The *Philippines/China* tribunal determined that ‘a clear exclusion of Part XV procedures is required in order for Article 281 to present an obstacle for jurisdiction’.[41] Furthermore, it

determined that the Declaration of Conduct of Parties in the South China Sea did not constitute an 'agreement' for the purposes of Article 281, since it 'was not intended to be a legally binding agreement with respect to dispute resolution'. Rather, the tribunal concluded that it was intended by its drafters to be only an 'aspirational political document'.[42]

(p. 126) Article 284 of UNCLOS also provides for the possibility of conciliation of a delimitation dispute prior to its submission to binding dispute resolution. Like mediation, any conciliation process will be dependent on the mutual consent of the parties and any recommendations made or non-binding. Pursuant to Article 284(3), if a State declines an invitation to conciliation, or the parties do not agree upon the conciliation procedure, the conciliation option is deemed to have terminated.[43]

Ad hoc conciliation has also been used on occasion to facilitate settlement of delimitation questions. An example was the Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen, established by agreement between Iceland and Norway.[44] The Commission's mandate was to make recommendations with regard to the division of the continental shelf area between Iceland and Jan Mayen. Its terms of reference required it to take into account Iceland's 'strong economic interests in the sea areas, the existing geographical and geological factors and other special circumstances'. They permitted the Commission to consider State practice and court decisions 'so as to ascertain possible guidelines for the practicable and equitable solution of the questions concerned.' In June 1981, the Commission issued a report recommending that the delimitation line should coincide with the existing delimitation between the parties' economic zones. The Commission also recommended that the two States cooperate to explore and exploit hydrocarbon resources in an area on both sides of the delimitation line. Shortly after the Commission's report, Iceland and Norway entered into a delimitation agreement based on the Commission's recommendations.[45]

c. Non-appearance by a State party to the dispute

In the event of a unilateral commencement by one State against another of the dispute resolution procedures under Part XV of UNCLOS, the respondent State might decide not to participate at all in the proceeding. This is exactly what happened in *Philippines/China*, which related to certain highly contentious questions in the South China Sea. China took the position of 'neither accepting nor participating' in the arbitral proceedings commenced by the Philippines. Consequently, China played no role in the proceeding, whether in the appointment of the arbitral tribunal, the designation of its seat, the setting of its rules of procedure, the submission of written argument, the presentation of oral argument, or (p. 127) otherwise.[46] This was a high-risk strategy by China––respondent States parties that object to the jurisdiction of international proceedings, however strongly, generally do choose to play a full role in order to argue their case and thereby maximize their prospects of success.

The *Philippines/China* tribunal noted that this situation of so-called 'default of appearance' is addressed expressly in the UNCLOS arbitration context by Article 9 of Annex VII, which provides that absence of a party 'shall not constitute a bar to the proceedings'.[47] Consequently, notwithstanding its non-appearance, China remained a party to the proceedings and remained bound by the decision of the tribunal finding jurisdiction over substantial aspects of the Philippines' claims.

III. Practical Considerations Surrounding the Choice of Forum: ICJ, ITLOS, or Arbitration?

If delimitation negotiations fail to result in an agreement, the States concerned must consider the best course of action for achieving an effective settlement of the dispute. This will require detailed analysis of the dispute resolution options available under Section 2 of Part XV of UNCLOS, which is devoted to 'compulsory procedures entailing binding decisions'. The *Philippines/China* tribunal described the system for dispute settlement set out in Part XV as an 'integral part of the Convention'.[48] Article 287(1) regulates the choice of procedures. The fora to which a delimitation dispute may be referred for binding settlement pursuant to that provision are ITLOS, the ICJ, and an arbitral tribunal constituted in accordance with Annex VII.[49] Under Article 287, States parties to UNCLOS can, at any time, declare their preferred option(s) for the resolution of their dispute.[50] In the event that two disputing States have declared a preference for the same forum, the dispute must be referred to that forum (in the absence of contrary agreement between them). In the absence of a mutually preferred forum, the default procedure is arbitration in accordance with Annex VII.[51]

(p. 128) The selection of a preferred forum for the resolution of delimitation (and other) disputes will be informed by a multitude of practical and strategic considerations. Each of ITLOS, the ICJ, or an Annex VII tribunal has advantages and disadvantages, some of which are summarized below. Whatever the selection, it should not be made lightly. As with any international dispute, the ultimate outcome may turn on what institution decides the case and the make-up of the court or tribunal concerned.

Among the advantages of ITLOS as a delimitation dispute forum are that:

- it is a permanent international tribunal composed of twenty-one judges, many of whom are experts in the law of the sea;
- it has a standing statute and rules of procedure, providing a predictable framework for the proceeding;
- it has an established registry capable of providing legal, administrative, financial, library, conference, and information support services;
- States parties to the Convention are not required to pay the costs of the proceedings;
- compared to the ICJ, ITLOS has relatively fewer cases on its docket. This can allow ITLOS to deal expeditiously with a delimitation case, as compared with other fora. For example, the *Bangladesh/Myanmar* proceeding before ITLOS took approximately 2.5 years from the initiation of the proceeding to the rendering of the final award, while the parallel Annex VII arbitration proceeding in *Bangladesh/India* took almost five years. The ICJ took more than six years to resolve *Peru/Chile* (and many of its delimitation cases have taken much longer);
- cases can be referred by agreement of the parties to a dedicated 'special chamber' of three or more of its elected members, the composition of which chamber must be approved by the parties (in contrast to the ICJ, where only the number of judges in a chamber is determined with the approval of the parties, as opposed to its composition); and
- it has a modern, state-of-the-art hearing facility in Hamburg, Germany.

Among the disadvantages of ITLOS are that:

- it is only available to States parties to UNCLOS;
- it is relatively inexperienced in delimitation cases, having only decided one maritime delimitation case at the time of writing (*Bangladesh/Myanmar*); [52]
- consequently, it does not have an established body of jurisprudence (and there is no obligation for it to follow ICJ or other decisions);
- its standing statute and rules of procedure mean that it has inherently less flexibility than arbitration;

(p. 129) • parties have no means of controlling the constitution of the majority of the tribunal (being entitled at most to appoint only single ad hoc members);

- according to its rules, it is required to bifurcate (i.e. suspend proceedings on the merits) in the event of challenges to jurisdiction;
- its statute and rules of procedure provide for the possibility of intervention by third States; and
- it does not have an enforcement mechanism—the ITLOS Statute states that an ITLOS decision is final and shall be complied with by all the parties to a dispute, but no specific procedures are provided for enforcement of the judgment.

Among the advantages of the ICJ as a delimitation dispute forum are that:

- it is one of the six principal organs (and the principal judicial organ) of the United Nations, established by the UN Charter, and thus undoubtedly has the greatest institutional experience and gravitas of any of the Article 287 fora;
- it has resolved more maritime delimitation disputes than any other forum (it decided almost half of the modern cases analyzed in Part II of this book);
- consequently, it has an established body of jurisprudence and institutional expertise in delimitation disputes;
- it has a standing statute and rules of procedure, providing a predictable framework for the proceeding;
- it has an established registry capable of providing legal, administrative, financial, library, conference, and information support services;
- States are not required to pay the costs of the proceedings; and
- it has a well-established enforcement mechanism. According to Article 94 of the UN Charter, each member of the United Nations undertakes to comply with the decisions of the ICJ in any case to which it is a party. If a party fails to comply with the judgment in a case to which it is a party, the other party may have recourse to the UN Security Council. The Security Council may make recommendations or decide upon measures to be taken to give effect to the judgment.

Among the disadvantages of the ICJ are that:

- its standing statute and rules of procedure mean that it has inherently less flexibility than arbitration;
- parties have no means of controlling the constitution of the majority of the court (being entitled at most only to appoint single ad hoc judges);

- given the composition of the court (for example, each of the 'Permanent Five' UN Security Council members has a judge), it can be perceived as a disadvantageous forum for disputes involving certain States;
- it has a comparatively busy docket, with the result that proceedings can take longer than in other fora;
- according to its rules, it is required to bifurcate (i.e. suspend proceedings on the merits) in the event of challenges to jurisdiction;

(p. 130) • Although it appoints a technical expert to assist in its delimitation task, the identity of the expert is not made known, nor is a technical annex attached to its judgments, with the result that on occasion its judgments can be technically deficient or unclear; [53] and

- its statute and rules of procedure provided for the possibility of intervention by third States. [54]

Among the advantages of Annex VII arbitration as a delimitation dispute forum are that:[55]

- it is inherently flexible, giving the tribunal and the parties a significant degree of control over the process; [56]
- among the procedural and logistical issues that can be influenced by the parties are the place of arbitration and location of hearings, the timetable for submissions, the scope of document production, the appointment of experts to assist the tribunal and the parties, [57] third-party intervention rights, and the modalities and conduct of hearings;
- the parties can control the constitution of the tribunal (which is composed of five members, one appointed by each party and the remaining three (including the president of the tribunal) appointed by agreement). This can be an especially important factor when the party considers that the dispute raises issues requiring particular expertise, or a particular legal, practical, or philosophical approach, by the tribunal; [58]
- arbitration can be better suited to some practicalities of the dispute resolution process, such as rigorous fact or expert witness cross-examination or extensive document production exercises;

(p. 131) • objections to jurisdiction will not necessarily be bifurcated, resulting in less delay;

- Annex VII tribunals normally appoint technical experts to assist them in their delimitation task and prepare a technical annex, which can improve the technical quality of their awards; [59]
- site visits will generally be more practicable in the case of a five-member arbitration panel than a seventeen-member ICJ panel or twenty-three-member ITLOS panel; [60] and
- the proceedings (or parts of them) can be confidential—for example, the obligation of the ICJ and ITLOS to notify other States parties to UNCLOS of the commencement of any proceedings under that treaty do not apply in the case of Annex VII arbitration. Closed hearings are also more common (although interested third States may on application be allowed to attend as observers, as in *Philippines/China*). [61]

Among the disadvantages of Annex VII arbitration are that:

- since an arbitral tribunal is not a permanent body, it does not have any institutional history or expertise (although the tribunal will often appoint a registry, such as the Permanent Court of Arbitration in The Hague, in consultation with the parties to assist with certain logistical and other matters);
- unlike proceedings before ITLOS or the ICJ, the expenses of the tribunal, including the remuneration of its members and the costs of the hearing, are borne directly by the parties;
- the substantive and procedural capabilities of the tribunal are dependent on the identity of its members;
- like ITLOS, the scope of its jurisdiction is limited (for example, it cannot resolve combined land sovereignty and maritime delimitation disputes); [62] and
- it does not have a discrete enforcement mechanism—Annex VII states that an award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure, and requires that the award be complied with by the parties to the dispute.

These are only a sampling of some of the practical considerations that will be taken into account in deciding on an appropriate forum for any delimitation dispute. Ultimately, the circumstances of the particular dispute will be highly (p. 132) determinative. In any event, the decision should always be taken in close consultation with specialist legal and other advisers.

IV. The Life of a Typical Delimitation Case

As explained above, when a delimitation dispute cannot be resolved through a negotiated agreement, the States parties have an obligation to resort to the dispute settlement procedures provided in Part XV of UNCLOS.

A host of practical and strategic considerations will come up during the life of any delimitation case. These practical and strategic considerations cannot be enumerated exhaustively here, not least because the considerations arising will differ substantially from case to case. However, it is invariably the case that many of the most important practical and strategic decisions to be made in any delimitation case will arise at the outset, even before the case has been formally initiated. For example, the conduct and substance of negotiations during the months or years leading up to the initiation of a case might have a substantial impact on its eventual outcome. Equally, decisions about, *inter alia*, the choice of forum, the scope of the dispute (and thus jurisdiction), and the identity of arbitrators or judges ad hoc will need to be made well before any formal proceeding begins. In order to make such important decisions, a State needs to know what its objectives are in any delimitation exercise, and to develop a strategy and tactics in pursuit of those objectives. As elaborated further in section ‘VII. The Preparation of a Claim’, below, it is therefore essential that all key legal, technical, and other members of the delimitation team are in place well before the initiation of any proceeding.

Once a delimitation proceeding has commenced before a court or tribunal, it typically follows a number of standard stages, the principal of which are:

- at the outset, constitution of the arbitral tribunal or court (including appointment of judges ad hoc)—which is one of the most important stages in the entire process and will require identification and detailed analysis of potential candidates; [63]

- shortly following its constitution and in consultation with the parties, determination by the court or tribunal of outstanding procedural issues such as the (p. 133) order of written pleadings (e.g. simultaneous or consecutive) and the timing of written pleadings; [64]
- submission by the parties of their written pleadings, together with supporting documentary, fact witness, expert witness, and other evidence;
- consideration of any requests by one or both of the parties for document production or other compulsive measures relating to evidence (usually during the course of preparation of written pleadings);
- conduct of the hearing, at which each party will present oral submissions (including in response to any questions posed by the court or tribunal) and any fact or expert witnesses may be cross-examined (and re-examined by the presenting party);
- completion of any post-hearing written submissions; and
- delivery of the final judgment or award.

These stages may vary from case to case, particularly in the event of (1) preliminary objections, challenges to jurisdiction, or admissibility and bifurcation, in which case a separate phase may be required in order to resolve those challenges, (2) requests for provisional measures or intervention by third States (each of which is discussed further below), in which case such requests will be treated as a preliminary issue, or (3) other specific circumstances that might disrupt or otherwise complicate the third-party adjudication process, such as allegations of corruption on the part of a judge or arbitrator as witnessed in the *Croatia/Slovenia* case.[65]

Some particular issues arising out of the judgment or award and its implementation are addressed in sub-section ‘a. Different forms of judgment and award’ in section VIII, below.

a. Provisional measures

A consideration that will often arise in delimitation disputes is whether or not to seek urgent preliminary relief by way of provisional measures from the court or tribunal. This can be especially important in instances of unilateral State conduct by one party prior to or during the proceeding that risks causing substantial prejudice to the other party (such as unilateral hydrocarbon activity, fishing arrests, or environmental degradation in the disputed area).

(p. 134) States can seek provisional measures immediately upon submission of a delimitation dispute to third-party adjudication or at a later point during the life of the case. The object of the measures is to preserve the rights of the parties pending the final delimitation decision.[66]

Article 290 of UNCLOS sets out the power of a court or tribunal seized of an UNCLOS dispute to prescribe provisional measures. Article 290(1) provides:

> If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

This power is replicated at Article 41 of the ICJ Statute and Article 25 of the ITLOS Statute. Notably, however, in contrast to Article 41 of the ICJ Statute, the power to prescribe provisional measures under UNCLOS explicitly extends to situations requiring prompt action to prevent serious harm to the marine environment.

International courts and tribunals, in particular the ICJ, have developed substantial jurisprudence about the conditions that must be met in order for provisional measures to be indicated. These conditions include the existence of *prima facie* jurisdiction,[67] urgency of the situation, and the risk of irreparable damage to one of the parties.[68] As the *Guyana/ Suriname* tribunal observed, the power to indicate provisional measures is 'an exceptional one'. A threshold to be met by any request is higher than that applicable to complaints under Articles 74(3) and 83(3) of the Convention related to conduct that hampers or jeopardizes a final delimitation agreement.

A leading early authority on the power to indicate provisional measures in the delimitation context is the ICJ's 1976 decision in the *Aegean Sea Continental Shelf* case. Greece had requested that Turkey be ordered to refrain from all exploratory activity (which included the detonation of small explosions) and scientific research on the continental shelf without its consent, pending a final judgment. The ICJ refused to indicate provisional measures on the bases that: (1) seismic exploration did not involve any risk of physical damage to the seabed or subsoil; (2) the (p. 135) Turkish activities were of a 'transitory character' and did not involve the establishment of installations; and (3) Turkey had not embarked upon any operations involving the actual appropriation or other use of the natural resources. In short, Turkey's conduct did not pose the risk of 'irreparable prejudice' to Greece's rights in the proceedings.[69]

More recently, an ITLOS Special Chamber prescribed a series of provisional measures under Article 290(1) of UNCLOS in the delimitation dispute between Ghana and Côte d'Ivoire (the merits of which are pending at the time of writing). The Special Chamber's decision provides valuable guidance on the circumstances in which provisional measures may be prescribed in delimitation disputes, particularly in the context of unilateral hydrocarbon activity.

Côte d'Ivoire requested a series of provisional measures within less than three months of the parties' joint referral of their delimitation dispute to the Special Chamber. These included measures requiring Ghana to suspend all ongoing oil exploration and exploitation operations (including drilling operations) in the disputed area. In a demonstration of the urgency with which provisional measures requests should be considered by a court or tribunal, the Special Chamber held a hearing within one month of the request and delivered its order less than four weeks later.

The Special Chamber determined that it could only prescribe provisional measures in the event of a real and imminent risk that irreparable damage may be caused to the rights of Côte d'Ivoire. It considered that this requirement would be met in the event of activities resulting in a significant and permanent modification of the physical character of the disputed area, and where such modification could not be fully compensated by financial reparations. It concluded that the exploration and exploitation activities planned by Ghana met the required threshold, since they presented an imminent risk of irreparable prejudice to the rights of Côte d'Ivoire over the shelf and its superjacent waters. It concluded that Côte d'Ivoire had failed to adduce sufficient evidence to support its allegations that Ghana's activities created an imminent risk of serious harm to the marine environment. However, it underlined that the risk of serious harm to the marine environment was of 'great concern'.

Based on these findings, the Special Chamber prescribed measures requiring Ghana, *inter alia*, to ensure that no new drilling would take place in the disputed area and to carry out 'strict and continuous monitoring' of any activities undertaken. Notably, it considered that the suspension of drilling activities that had already commenced in the disputed area would entail the risk of considerable financial loss to Ghana and its concessionaires and could also pose a serious danger (p. 136) to the marine environment. Therefore, the Special Chamber refrained from suspending those activities for fear of creating an 'undue burden' on Ghana. It did, however, require Ghana to ensure that non-public information resulting from its exploration activities in the disputed area would not be used to the detriment of Côte d'Ivoire.[70] This aspect of the Special Chamber's decision illustrates the balancing of interests that will be undertaken in the context of any application for provisional measures by one State against another.

Pursuant to Article 290(3) of UNCLOS, provisional measures can only be prescribed at the request of a party to the dispute. However, as the *Ghana/Côte d'Ivoire* example illustrates, once a party has requested provisional measures, that court or tribunal is not bound to prescribe only those measures that have been requested. Instead, it can prescribe such measures 'which it considers appropriate under the circumstances'.

Importantly, Article 290(5) provides ITLOS with jurisdiction to prescribe provisional measures even before an Annex VII arbitral tribunal has been constituted, where it considers that the urgency of the situation so requires. This can be an important tool in Annex VII cases, since the constitution of the tribunal might take some time. Once constituted, the Annex VII tribunal can modify, revoke, or affirm those provisional measures.

A number of strategic considerations will inform whether a State will choose to seek provisional measures in a delimitation case. The benefits of obtaining provisional measures can extend beyond the tangible protection from harm that they provide. The prescription of provisional measures may substantially improve a State's negotiating position and provide impetus to reach a negotiated outcome to the dispute. It can also allow the requesting State to start the delimitation proceeding on the front foot by scoring an 'early victory' against its opponent. The flipside, however, is that an unsuccessful request may be counter-productive both vis-à-vis the court or tribunal and the counterparty.

b. Questions of jurisdiction, scope, and mandate

It is a fundamental principle of international adjudication between States that jurisdiction will only exist to the extent that each State party has consented to such jurisdiction, whether by way of a standing treaty consent, an ad hoc consent, or otherwise. As the ICJ held in the *Monetary Gold* case:

> To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in (p. 137) the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.[71]

Concepts of party consent and jurisdiction are no less critical in maritime delimitation disputes. A delimitation court or tribunal will hear a delimitation dispute only to the extent that the States parties have consented to its jurisdiction. If a State has given no consent, or has excluded the issues in dispute from the scope of a standing consent, then the court or tribunal will have no jurisdiction to proceed.

Consent in the context of maritime delimitation disputes can take two forms. First, it can take the form of a special or ad hoc agreement or exchange of letters between the States parties to the dispute. This was common in the delimitation disputes prior to the entry into force of UNCLOS, and remains quite common in the context of disputes extending beyond maritime delimitation (e.g. in combined land sovereignty and maritime boundary disputes such as *Eritrea/Yemen* and *Qatar/Bahrain*). Second, it can take the form of a standing consent under a multilateral instrument such as the ICJ Statute (Article 36(2))[72] or a more specific or regional treaty such as the American Treaty on Pacific Settlement (Pact of Bogotá) (Article XXXI).[73] Since the entry into force of UNCLOS in 1994, the most commonly cited basis for standing consent is under that treaty.

As explained above, Section 2 of Part XV of UNCLOS makes provision for 'compulsory procedure…intending binding decisions' in UNCLOS disputes, including disputes related to maritime boundary delimitation under Articles 15, 74, or 83. Article 288(1) of UNCLOS provides that 'a court or tribunal referred to in article 287 [i.e., in the present context, either ITLOS, the ICJ or an Annex VII tribunal] shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this [Part XV]'. Pursuant to sub-paragraph (4) of that Article, any dispute as to whether a court or tribunal has jurisdiction shall be settled by that court or tribunal.

Importantly, however, not every State party to UNCLOS has consented to binding dispute resolution of maritime boundary disputes under Part XV. This is because, pursuant to Article 298(1)(a)(i), a State party may at any time declare in writing that it does not accept any one or more of the procedures provided for in section 2 with regard to 'disputes concerning the interpretation or application of (p. 138) articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles'.

A number of States parties to UNCLOS have made Article 298 declarations withholding consent to binding third-party resolution of delimitation disputes. These include some with significant outstanding delimitation disputes, such as China and Russia. Indeed, some States parties have made declarations specifically in order to avoid third-party adjudication of particular delimitations. For example, Australia withdrew its consent to UNCLOS (and ICJ) jurisdiction on the eve of Timor-Leste's independence. Trinidad and Tobago made its Article 298 declaration shortly after the Annex VII award in its delimitation dispute with Barbados, but still in time to prevent Grenada from submitting its own case for adjudication. The risk of a sudden Article 298 declaration 'pulling the plug' on binding dispute resolution procedures under Part XV of UNCLOS should be ever-present in the minds of those engaged in negotiations with a view to possible future resort to such procedures. Indeed, that risk was an important factor in the timing of Barbados's submission to Annex VII arbitration.

A State that has made an Article 298 declaration can withdraw it at any time. For example, on 22 September 2014, shortly before submission of its delimitation dispute with Côte d'Ivoire to a Special Chamber of ITLOS, Ghana withdrew its declaration.

In the absence of withdrawal, a State engaged in a delimitation dispute with another State that has made an Article 298 declaration is not without options. First, Article 298(1)(a) provides that the State that has made a declaration must accept submission of the delimitation to conciliation under Annex V, section 2, of UNCLOS if no agreement is reached via negotiations within a 'reasonable period of time'. Following conciliation, the parties must engage in negotiations based on the conciliation report. If they still cannot reach agreement, the parties must, by mutual consent, submit the question to one of the binding procedures provided for in section 2, unless they otherwise agree. Second, it might be possible to frame a maritime dispute without requesting delimitation under Articles 15, 74,

and 83 of UNCLOS, and thus to bring the matter outside the scope of an Article 298 declaration.

A leading example of the evasion of an Article 298 declaration through the careful framing of a dispute was the arbitration initiated by the Philippines against China in January 2013 in respect of a number of issues arising in the South China Sea. The Philippines introduced the case as concerning a 'dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea'.

However, the Philippines emphasized throughout that it was not asking the Annex VII tribunal to delimit any maritime boundaries (nor to rule on issues of territorial sovereignty, which would also fall outside the scope of Part XV). Rather, the Philippines sought the following:

> 1. declarations that the parties' respective rights and obligations in regard to the waters, seabed, and maritime features of the South China Sea were governed by (p. 139) UNCLOS and that China's maritime claims based on 'historic rights' encompassed within its so-called 'nine-dash-line' were inconsistent with UNCLOS and therefore invalid;
>
> 2. determinations as to whether, under UNCLOS, certain maritime features claimed by both China and the Philippines were properly characterized as islands, rocks, low-tide elevations, or submerged banks; and
>
> 3. declarations that China had violated UNCLOS by interfering with the exercise of the Philippines' sovereign rights and freedoms under the Convention and through construction and fishing activities that it claimed had harmed the marine environment.

China did not participate in the proceeding, but published a 'Position Paper', which the tribunal understood 'to reflect China's position on issues raised therein'. This raised what the tribunal decided to treat as objections to jurisdiction. In particular, China argued that 'the essence of the subject-matter of the arbitration is territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention'. Second, it argued that, even if the dispute were concerned with UNCLOS, it 'would constitute an integral part of maritime delimitation between the two countries, thus falling within the scope of the [Article 298] Declaration filed by China in 2006'.[74]

In its Award on Jurisdiction and Admissibility, the tribunal found unanimously that it had jurisdiction to consider seven of the Philippines' fourteen submissions (subject to certain conditions) and reserved consideration of its jurisdiction to rule on the seven remaining submissions to the merits phase of the case.[75] The tribunal agreed with China that maritime boundary delimitation was 'an integral and systemic process'. However, it continued:

> In particular, the Tribunal notes that the concepts of an "'equitable solution', of 'special circumstances' in respect of the territorial sea, and of 'relevant circumstances' in respect of the exclusive economic zone and continental shelf may entail consideration of a wide variety of potential issues arising between the parties to the delimitation. It does not follow, however, that the dispute over an issue that may be considered in the course of a maritime boundary delimitation constitutes a dispute over maritime boundary delimitation itself.
>
> In particular, the Tribunal considers that a dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements of parties overlap. While fixing the extent of parties' entitlements and the area in which they overlap will commonly be

> one of the first matters to be addressed in the delimitation of a maritime boundary, it is nevertheless a distinct issue…

(p. 140) In these proceedings, the Philippines has challenged the existence and extent of the maritime entitlements claimed by China in the South China Sea. This is not a dispute over maritime boundaries. The Philippines has not requested the Tribunal to delimit any overlapping entitlements between the two States, and the Tribunal will not effect the delimitation of any boundary.[76] Accordingly, given the 'distinct issues' presented to the tribunal by the Philippines' submissions, China's Article 298 declaration was unable to prevent findings in favour of jurisdiction in the first stage of the bifurcated proceeding.

Article 297 of UNCLOS provides some further limitations on the applicability of binding procedures that might also be relevant in the delimitation context. In particular, under Article 297(3)(a), coastal States are not obliged to accept submission to binding settlement of any dispute relating to its sovereign rights with regard to living resources in the EEZ, including its discretionary powers in relation thereto under the Convention. This led the *Barbados/Trinidad* Annex VII tribunal to decline jurisdiction to establish a right of access for Barbadian fishermen within the EEZ of Trinidad and Tobago.

Barbados/Trinidad shows the enduring importance of defining the terms of reference of any court or tribunal in a way that will allow it to grant any and all remedies that either party might ultimately request. The tribunal rejected Barbados's request for fishing access within the Trinidadian EEZ because it had not been included within the Barbadian Statement of Claim or written submissions and was therefore *ultra petita*.[77] Similarly, the Court of Arbitration in the *UK/France Continental Shelf* case observed that its competence did not extend to delimitation of the territorial sea boundary around the Channel Islands, since this was outside the scope of the questions posed by the parties. In each case, the States parties were required to reconvene to negotiate these issues following the award.

Of course, in some situations States parties will deliberately limit the mandate of a court or tribunal. States parties sometimes deliberately fall short of requesting the identification of precise coordinates and turning points. For example, in the *North Sea Continental Shelf* cases, the parties requested the ICJ to decide only 'what principles and rules of international law' were applicable to the delimitation. Similarly, in Peru/*Chile*, the court noted that Peru had not requested it to determine the precise geographical coordinates of the boundary. In both cases, this final act of delimitation was left to the parties and their experts. In other situations, the States may deliberately restrict the mandate to resolution of the land boundary or sovereignty dispute, with a view to holding maritime delimitation negotiations later.[78]

(p. 141) Questions of competency can also arise in the context of requests for continental shelf delimitation beyond 200M, at least in situations where there is uncertainty as to the existence of shelf rights beyond 200M under Article 76.[79]

In the event of an objection to jurisdiction, whereas the ICJ and ITLOS are required to bifurcate (and thus suspend proceedings on the merits pending a decision on jurisdiction), Annex VII tribunals can proceed to rule on jurisdiction and merits together. Thus, for example, the *Barbados/Trinidad* and *Guyana/Suriname* awards addressed issues of jurisdiction and merits together. By contrast, the *Philippines/China* tribunal (with reference to the ICJ's practice) decided to bifurcate pleas on jurisdiction unless they did 'not possess an exclusively preliminary character'.[80] This potential for non-bifurcation on jurisdiction issues in arbitral proceedings can be an important practical consideration in the context of unilateral referrals of delimitation disputes to third-party dispute resolution, since they often generate objections to jurisdiction.

Another important factor in setting the framework for any third-party dispute process is the question of the applicable law. When referring disputes to a court or tribunal jointly, States are free to choose what will be the applicable law. Delimitation disputes between States will invariably be governed by international law, whether in the form of customary international law or an applicable treaty. In relation to disputes under UNCLOS, Article 293(1) provides that a court or tribunal 'shall apply this Convention and other rules of international law not incompatible with this Convention'.[81]

A final important factor is the need to ensure that any delimitation decision is final and binding on the parties to the dispute. In the UNCLOS context, this is confirmed by Article 296.

V. The Critical Role of Evidence in Modern Delimitation Disputes

As in any major international litigation or arbitration proceeding, the comparative strength or weakness of evidence can play a critical role in the outcome of (p. 142) modern delimitation disputes. No legal claim (whether in negotiation or in a dispute setting) can stand without supporting evidence. A State may believe that its legal case is irresistible, but without the supporting evidence to back it up the case can still easily fail, or the outcome can easily become less than satisfactory.

As Part B of this book illustrates, modern maritime delimitation jurisprudence is replete with instances where the success or failure of a case turned on the strength of the evidence and the effectiveness of its presentation. The evidence should be sourced and organized early in the life of a dispute (and well before the initiation of any formal proceeding) so it can inform the State's case theory and litigation strategy. Some evidence can take a substantial amount of time to collect, requiring careful advance planning. For example, historic and archival evidence, particularly if located in the colonial or other archives of third States, can be cumbersome to locate, research, and digest. The compilation of effective fact witness and expert evidence also requires extensive work, both in the identification of competent and suitable witnesses or experts and in the preparation of their statements and reports.

Modern maritime boundary delimitation is a truly multifaceted discipline. As a result, the types of evidence that might be required in order to support any given case will be multifarious and often complex. In some situations, such as those where a State intends to argue the existence of a boundary by way of tacit agreement or a risk of 'catastrophic repercussions' of a given boundary result, the legal and evidential threshold is especially high. It is impossible to identify all of the varieties of evidence that might be of assistance to a court or tribunal, since the details vary from case to case, but the following arise frequently:

- historical records, diplomatic correspondence, and other documentary evidence relating to State conduct, including the extent of any State agreement over the location of the boundary or the validity of baselines or base points;
- navigation and security-related evidence, whether in connection with coastguard, naval or private shipping, or other related activities;
- cartographic, bathymetric, physical survey, satellite, and other evidence related to the status of maritime features;
- fisheries-related evidence, whether about the extent and location of fishing activities, their economic or cultural importance, or otherwise;

- evidence related to the hydrocarbon exploration and/or exploitation activities of States parties and their concessionaires in the disputed area;
- scientific evidence about a multiplicity of potentially relevant issues, such as the stability of coastlines and base points, the existence and extent of natural resources, environmental considerations, and fisheries migration patterns;
- fact witness evidence (in the form of witness statements or affidavits) in support of any or all of the above;

(p. 143) • geological and geomorphological evidence about the existence and extent of any outer shelf entitlement; [82]

- forensic evidence related to the authenticity of one or more documents; [83] and
- evidence in support of any ancillary claims, such as complaints about illegal threats or use of force and their consequences.

In addition to locating and organizing the evidence, the effective presentation of evidence can be critical to the successful pursuit of a delimitation claim. Written pleadings in modern maritime delimitation cases are copiously illustrated with a variety of detailed maps and graphics. The most compelling oral pleadings often employ a variety of animations and illustrations to enhance the legal, factual, or evidential arguments. The design of graphics, choice of colour and line-styles, and other presentational details are assessed as carefully as the choice of words in written or oral pleadings. An impactful graphic can resonate with an adjudicator and reinforce an argument in a way that no written or spoken word can do. An effective graphic can save a thousand words and might even be determinative of the case.

The creation of a set of graphics is a time-consuming process, which starts with the assembly of a complete digital geographical database for the delimitation area. Modern geographic information systems (GIS) allow a wide range of data to be stored.[84] This should include versions of the coastline digitized from available charts, a comparison with satellite imagery (especially if the charting is outdated), details of any negotiating positions or historical data, outlines of hydrocarbon or fishery licence areas, and locations of any relevant incidents or other *effectivités*.

The practical aspects of compiling and presenting evidence, including through the engagement of a specialist technical expert, are analyzed further in section ‘VII. The Preparation of a Claim’, below.(p. 144)

VI. Intervention by Third States and Role of Third-State Interests

The ICJ and ITLOS Statutes and Rules of Procedure each provide for intervention by third States in maritime delimitation proceedings. The Statute of the ICJ does so by way of two provisions, as follows:

> Article 62
>
> 1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
> 2. It shall be for the Court to decide upon this request.

Article 63

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

Articles 31 and 32 of the ITLOS Statute make similar provision.

Any intervention under Article 62 of the ICJ Statute or Article 31 of the ITLOS Statute requires the intervener to demonstrate 'an interest of a legal nature' in order to succeed with its request. The jurisprudence demonstrates that this is a high legal benchmark in the delimitation context. A rare instance of intervention having been allowed by the ICJ in a delimitation case was *Cameroon/Nigeria*, where the court allowed an intervention by Equatorial Guinea in circumstances where neither Nigeria nor Cameroon had objected. Subsequently, the ICJ took care to ensure that its equidistance-based delimitation did not extend beyond the point where it might affect the rights of Equatorial Guinea.[85]

In cases where one or both States parties have objected, the ICJ has shown a marked reluctance to allow third-State intervention, frequently finding no interest of a legal nature which might be affected by the decision at hand. For example, in *Tunisia/Libya*, Tunisia and Libya both opposed an Article 62 request for intervention by Malta. In denying Malta's request, the court observed:

> The interest of a legal nature invoked by Malta does not relate to any legal interest of its own directly in issue as between Tunisia and Libya in the present proceedings or as between itself and either one of those countries. It concerns rather the potential implications of reasons which the Court may give in its decision in the present case on matters in issue as between Tunisia and Libya with respect to the delimitation of (p. 145) their continental shelves for a subsequent delimitation of Malta's own continental shelf.[86]

When rejecting requests to intervene, the court has repeatedly emphasized that its delimitation judgment is only binding on the parties before it, and that any delimitation line can in any event be limited so as not to affect third-State claims. In doing so, it has sought to reassure applicants that its judgment will not prejudice their own delimitation claims (and, in doing so, has made the application to intervene worthwhile notwithstanding its formal rejection). For example, in *Libya/Malta*, the court rejected Italy's application to intervene, but noted that it could not 'wholly put aside the question of the legal interest of Italy…and they will have to be taken into account'. In its final decision, the court accordingly limited the scope of its delimitation line so as not to prejudice Italy's claims. It held:

> The decision of the Court will, by virtue of Article 59 of the Statute, have binding force between the Parties, but not against third States…The present decision must, as then foreshadowed, be limited in geographical scope so as to leave the claims of Italy unaffected, that is to say that the decision of the Court must be confined to the area in which, as the Court has been informed by Italy, that State had no claims to continental shelf rights. The Court, having been informed of Italy's claims, and

> having refused to permit that State to protect its interests through the procedure of intervention, thus ensures Italy the protection it sought.[87]

More recently, in *Nicaragua/Colombia*, the court rejected Costa Rica's and Honduras's separate requests for intervention. With regard to Costa Rica's request, the court observed that, since the parties had agreed that any boundary between them should stop short of the area in which Costa Rica's rights could be affected, Costa Rica had not demonstrated that it had an interest of a legal nature that could be affected by the court's decision. With regard to Honduras, the court recalled that its boundary with Nicaragua had been fully resolved in the earlier *Nicaragua/Honduras* case. It held that the maritime boundary between Nicaragua and Colombia would be determined separately, pursuant to those States' coastlines and maritime features, and that Honduras had thus failed to demonstrate an interest of a legal nature that could be affected by its decision.

Even absent requests for intervention, courts and tribunals have consistently been careful to avoid extending delimitation lines into areas of potential claims by third States. In most cases, the issue has been addressed by determining that the boundary will continue in a given direction until it reaches an area where the (p. 146) rights of third states may be affected.[88] However, in *Eritrea/Yemen*, the ad hoc tribunal took a more cautious approach, identifying specific endpoints in the Red Sea that were 'well short' of any point that may be disputed by any third State.

Sometimes, interested third States might be able to declare their position to a court or tribunal and obtain copies of pleadings without formally intervening in the proceeding. A leading example is the *Philippines/China* case, which raised issues of interest to a number of other littoral States on the South China Sea (and beyond). During the jurisdiction and admissibility phase of the proceeding, Vietnam, Malaysia, and Japan each sent *Notes Verbales* to the UNCLOS Annex VII tribunal without seeking formally to intervene. Vietnam enclosed with one such Note a 'Statement of the Ministry of Foreign Affairs for the Attention of the Tribunal', in which it *inter alia* stated that Vietnam had 'no doubt that the Tribunal has jurisdiction in these proceedings' and 'resolutely' protested and rejected any claim by China based on its nine-dash line. The tribunal cited the Vietnamese Statement in its Award on Jurisdiction and Admissibility.[89]

VII. The Preparation of a Claim and the Importance of an Effective and Well-Managed Delimitation Team

a. The composition of the team

No two delimitation teams will ever be identical. The composition of any given team will depend on the individual circumstances of the case, including the objectives of the State party concerned. Further, the team will likely develop over the life of a case, particularly between the negotiation phase and any litigation phase. However, any 'full-service' delimitation team will consist of domestic and external elements. The composition of each will be addressed in turn.

Maritime delimitation disputes tend to attract significant national, economic, and political interest within the States parties. States will typically have multiple domestic stakeholders, each of which will have its own views, perspectives, and objectives in the delimitation. Leading stakeholders in substantial delimitation exercises may include:

- the Head of State and/or Prime Minister;

- the Ministries (and Ministers) of Foreign Affairs, Energy and Natural Resources, Economy, Fisheries, Defence, Environment, Justice and Communications/Public Relations;

(p. 147) • the military (particularly navy) and coastguard;

- fishing communities and representatives;
- offshore hydrocarbon concession-holders; and
- local NGOs and media.

Maritime delimitation is a complex and highly multidisciplinary process. Few, if any, States will be able to put together a delimitation team with the necessary experience utilizing exclusively domestic people and resources. Indeed, even when this is theoretically possible, some outside, objective perspective will be invaluable. A delimitation team will typically comprise a number of external consultants and specialists, who may include:

- an external legal counsel team, often comprising a blend of specialist practitioners and academics, headed by a lead counsel; [90]
- one or more technical experts (whose role is examined further in ‘c. The role of the technical expert’ in section VII , below);
- geographers, hydrographers, surveyors, or bathymetric surveyors;
- archivists or historians;
- scientists, including fisheries or geophysics experts;
- geologists or geomorphologists; and
- graphics or court-hearing presentation experts.

The appointment, management, and coordination of domestic and external team members is a substantial task, requiring detailed planning and implementation from an early stage. Considerable time will be required to, *inter alia*, identify objectives, compile fact and expert evidence, develop legal and technical arguments, and define a strategy and tactics (both for negotiations and any third-party dispute process). The identification of the expertise (and experts) necessary to pursue the delimitation is another complex task. Time will be of the essence, particularly as failure to appoint a given expert may present an opportunity to the opposing State to appoint that same expert first, and thus achieve an early advantage.

b. The structure, management, and leadership of the team

Clear structure, management, and leadership are critical to the effective running of the delimitation team, as with any team responsible for a major litigation or inter-State negotiation. Without a clear leadership, structure, and task allocation, the team will not function effectively or efficiently.

As with team composition, there is no single optimum team structure, management, or leadership configuration. Much will depend on the individual case and (p. 148) circumstances. However, in most situations, it will be preferable to make one individual responsible for each of the domestic and external parts of the team so as to optimize decision-making, coordination, and communication. Close coordination between the domestic and external leadership will, of course, be essential in order for the team to operate smoothly and efficiently.

The domestic team leader will often be a senior government figure, responsible for reporting to, and consulting with, the political leadership of the State. His or her other functions may include:

- management and coordination of the domestic stakeholders and team;
- ensuring inter-agency and inter-stakeholder transparency and cooperation;
- communication with major stakeholders outside government and relevant third States; and
- being a first point of contact for the delivery of instructions to, and receipt of advice from, the external legal team (and, in particular, the lead counsel).

The structure of the domestic team will often revolve around a central committee (and, as appropriate, sub-committees), meeting as necessary throughout the process.

The lead counsel will normally take a multifarious role, including:

- acting as 'project manager' for the process and team and 'go-to' trusted adviser through the life of the case;
- leading on the formulation and implementation of case strategy and tactics;
- identifying strengths and weaknesses in the case from an early juncture and from an objective and experienced viewpoint;
- advising on the transition between negotiation and third-party dispute resolution;
- advising on the composition of the external team;
- coordinating the external team, which is critical to ensuring effective negotiation and submission of comprehensive and timely written and oral submissions to an international court or tribunal;
- making the 'final call' on behalf of the external team on challenging questions of law, evidence, or fact;
- anticipating the strategy, tactics, and substantive arguments of the opposing party;
- advising on important early procedural aspects of any court or tribunal process, including choice of forum and appointment of arbitrators or ad hoc judges;
- with the assistance of co-counsel and technical and other advisers, presenting written and oral arguments on behalf of the State;
- advising on the timing and nature of any ancillary legal procedures (e.g. objections to jurisdiction, applications for provisional measures, applications for document production); and

(p. 149) • providing post-judgment or award advice and assistance so as to maximize the prospects of smooth implementation (or, if necessary, commence any available revision, correction, or other procedures).

In order to fulfil this role, it is essential that the individual concerned has the expertise, gravitas, energy, and experience to play the lead counsel role. Few individuals around the world are well suited to successful prosecution of this important role.

As with any piece of major litigation, another important part of the external team will likely be a dedicated law firm. Often, the lead counsel will hold a partner or other senior role in that firm. Gone are the days when an international boundary dispute could be properly prosecuted by a cast of leading individuals, without the support provided by a law firm with

the human and technical resources necessary to run a case. The law firm's role may include:

- collecting, organizing, and presenting complex documentation and other evidence (often using sophisticated document management software and other technology);
- taking witness statements and assisting experts with preparation of their reports;
- preparing, updating, and monitoring compliance with work plans for the team;
- leading on the preparation and filing of voluminous written pleadings and accompanying evidence; and
- hearing planning and logistics, including preparation of court bundles and ensuring readiness of witnesses and experts for cross-examination.

A multitude of other tasks will be undertaken by the State's law firm over the duration of a maritime boundary delimitation case.

Throughout the life of the case, domestic and external teams must remain closely coordinated. Again, the details of such coordination will vary, but it will inevitably include frequent communications between the domestic and external team leadership, regular calls and meetings within the domestic and external teams, and periodic meetings of the global team.

c. The role of the technical expert

Geography plays an overriding role in modern maritime delimitation. Consequently, it is essential that States present the geographical configuration and other characteristics of the delimitation area in a way that will maximize the prospects of their case. There are many technical elements that can enhance such a presentation. Depending on the complexity of the case, a variety of technical skills may be required, necessitating input from experts from different fields. Even the most basic delimitation skills of plotting coordinates and producing illustrative maps will require specialist software and expertise. Technical support is essential from the beginning and will be centrally involved in the legal, political, and diplomatic process.

(p. 150) From the outset, knowledge of charting and hydrography is fundamental to the identification of base points. This requires a detailed understanding of tidal models and vertical datums, not least to determine the status of islands and low-tide elevations. For example, the assessment of the status of Eddystone Rock in *UK/France*, and Quitasueño in *Nicaragua/Colombia* required detailed technical analysis of tides and vertical datums.

Proper handling of coordinates and map or horizontal datums is also a vital part of the technical expert's role. Many old charts are drawn to an outdated or undefined datum and conversion of these to a modern consistent base can be challenging. This calls for an understanding of the complexities of geodesy—the study of the shape of the earth.

Maritime delimitation also demands specific technical disciplines that are not present in land boundary delimitation. While land boundaries are mainly based on natural physical features like rivers, ridges, watersheds, and the like and can be physically demarcated on the ground with pillars, maritime boundaries require accurate calculations, often over vast distances, in order to be plotted and depicted clearly on charts. A small error on the direction or azimuth of a line will be magnified over long distances. The accurate calculation of equidistance lines and the measurement of large distances should all be done using correct geodetic techniques. Such accuracy can make a material difference. For example, the Court of Arbitration's choice of a loxodrome rather than a geodesic for the

final section of the UK-France boundary moved the boundary about 4M at the western end of its Atlantic section.

Once the raw geographical data has been assembled, the technical analysis can begin. The expert will work closely with the legal team to evaluate baselines and base points, measure relevant coasts and areas, and construct equidistance lines. A variety of different solutions will often be calculated using different assumptions about weighting and base points. For each solution ultimately proposed, many others will have been rejected during the course of the analysis.

A minimum requirement for the technical expert will be knowledge of hydrography and bathymetric surveying, the ability to carry out simple calculations and measurements, and the capacity to prepare the graphics for oral and written pleadings. The latter are essential to the ability of counsel effectively to present on issues such as relevant coastal length, relevant area, coastal projection and encroachment, the distorting effect of small or unusual features, proportionality, and the adjustment of provisional equidistance lines. In providing such a role, the expert will not prepare any discrete technical report or appear for cross-examination, but will work hand-in-glove with counsel and other members of the team.

Sometimes, the technical issues are so central to a party's argument that one or more discrete technical reports are submitted as part of the written pleadings. In such situations, the expert giving the report appears as an independent witness and (p. 151) is susceptible to being called for cross-examination by opposing counsel (and further questioning by the court or tribunal). This is a process unlike any other that the expert will ever have experienced and requires thorough preparation. In *Tunisia/Libya*, for example, expert witnesses were called from both sides to present geological data and were examined and cross-examined before the ICJ.[91]

Alternatively, it is possible for technical experts to appear as counsel and thus present part of the argument in the written and oral pleadings. Examples were *Cameroon/Nigeria*, where a surveyor presented detailed analysis of the map evidence, and *Bangladesh/Myanmar* and *Nicaragua/Colombia*, where geologists presented geological data relating to the nature and extent of the physical continental shelf. However, the ICJ has expressed disquiet about the appearance of experts as counsel, stating that it:

> would have found it more useful had they been presented by the Parties as expert witnesses…instead of being included as counsel in their respective delegations. The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court.[92]

As well as providing invaluable assistance to parties, technical experts also play an important support role to courts or tribunals. In particular, they are responsible for conducting calculations, identifying coordinates, turning points, and appropriate datums and preparing the illustrations contained in judgments and awards. Sometimes, tribunal experts will be appointed with the agreement of both parties and play a part during the oral hearings. They may also prepare a detailed technical annex to the judgment or award. The first of these was prepared by Commander Beazley for the ICJ Chamber in *Gulf of Maine*, which has served as an example for later arbitration cases.[93] In contrast to arbitral tribunals, the ICJ and ITLOS have not publicised the identity of their experts, nor do they include a detailed technical report with their decisions.

Where the tribunal has appointed its own expert, cooperation with the Parties' experts can materially assist parts of the case.[94] In *Barbados/Trinidad*, for example, (p. 152) the parties exchanged data on baselines with the tribunal's expert and agreed the course of the provisional median line. In *UK/France*, substantial parts of the continental shelf boundary were agreed between the parties by means of identical technical reports lodged with the Court of Arbitration. In both of these cases, these agreed median lines were adopted in the awards.

VIII. The Judgment or Award and Its Implementation

a. Different forms of judgment and award

The form and effect of judgments and awards rendered by the ICJ, ITLOS, and Annex VII tribunals are regulated by scope of the parties' consent in any particular case, combined with the relevant constitutional and procedural instruments of the court or tribunal concerned.

Under Part XV of UNCLOS, signatory States consent to submit disputes 'concerning the interpretation or application' of the Convention to binding third-party adjudication. This scope of consent clearly extends to disputes relating to maritime delimitation (subject to Article 298, discussed above). However, this does not necessarily mean that a court or tribunal must determine the precise location of the boundary (by way of precise geographical coordinates, etc.) in every case. While a precise delimitation is often the outcome of a judicial or arbitral proceeding, States parties to maritime delimitation disputes can limit the scope of jurisdiction so as to leave the parties themselves to complete the delimitation process, by way of further negotiations and a boundary treaty, following guidance received from the court or tribunal.

For example, in the *North Sea Continental Shelf* cases, the Netherlands, Denmark, and West Germany limited their request to the court to deciding 'what principles and rules of international law are applicable to the delimitation'.[95] Following the judgment, the parties proceeded to negotiate (albeit over nine rounds of negotiations) and (finally) agree the final continental shelf boundaries between them, faithful to the principles and rules that had been outlined by the court.

Perhaps mindful of the relatively protracted nature of the negotiations that followed the *North Sea* cases, in the subsequent *Tunisia/Libya* and *Libya/Malta* cases, the parties requested the court to decide not only the 'principles and rules of international law' applicable, but also to provide practical guidance about how such principles and rules should be applied, in order that they would be able to (p. 153) proceed to delimit 'without difficulty'.[96] In *Peru/Chile*, the parties similarly requested the court not to detail the precise geographical coordinates of the boundary, leading the court to observe that it expected them to determine the coordinates in accordance with the judgment and 'in the spirit of good neighbourliness'.

b. Post-judgment or award considerations: revision, interpretation, and related procedures

The delimitation judgments and awards of the ICJ, ITLOS, and Annex VII tribunals are final and binding on the parties.[97] The same is invariably true of the awards of ad hoc tribunals in delimitation cases (although it falls to the parties to make this clear in their arbitration agreement). While not binding on third States, the rules and principles set out in delimitation judgments and awards will often inform their negotiating and litigating

positions (as well as possibly influencing the final conclusion of later courts and tribunals in cases between third States).

Since they are final and binding, delimitation judgments and awards are not subject to appeal. However, they can be subject to more limited post-judgment or award proceedings with regard to their 'interpretation' or 'revision'.[98] For example, Article 60 of the ICJ Statute provides that a party can request the court to clarify the 'meaning or scope' of an ICJ judgment if it is in dispute. Similarly, Article 12 of Annex VII gives a party the right to submit any 'controversy' regarding the 'interpretation or manner of implementation of the award' to the arbitral tribunal which made the award. Article 61 of the ICJ Statute allows a party to apply for revision of a judgment 'upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence'. An application for revision must be made within at least six months of the discovery of the new fact, but cannot be made after ten years have elapsed from the date of the judgment.[99]

Modern delimitation jurisprudence demonstrates the scope of the rights to seek post-judgment or award interpretation or revision. Indeed, to date there have been (p. 154) no cases where the delimitation judgment has been changed due to the later discovery of a new fact.

In *Tunisia/Libya*, Tunisia applied under Articles 60 and 61 of the ICJ Statute for interpretation and revision of the ICJ judgment. Tunisia also made a request to 'correct an error' in the judgment, even though, as the court observed, 'such a power is not mentioned in any article of the Statute or of the Rules of Court.' The court rejected Tunisia's application for interpretation because, *inter alia*, it did not relate to the *dispositif* of the judgment. It rejected Tunisia's application for revision because, *inter alia*, the alleged 'new fact' advanced by Tunisia had been obtainable during the delimitation proceeding and was not a 'decisive factor' in any event.[100]

Ad hoc arbitration proceedings may be the subject of slightly different forms of post-award challenge. For example:

- in *UK/France*, the United Kingdom made an application to the Court of Arbitration questioning the 'meaning or scope' of its decision, pursuant to a procedure mandated in the parties' arbitration agreement. The Court of Arbitration agreed to make a technical correction to its decision in light of a contradiction between the expression of its intentions regarding the boundary and the contents of its *dispositif*. It refused, however, to make a rectification allowing for the use of a geodesic line instead of a loxodrome, despite acknowledging that the former would have been more technically rigorous;
- in *Guinea-Bissau/Senegal*, Guinea-Bissau requested the ICJ to declare the award of the ad hoc arbitral tribunal a nullity, basing its application upon Article 36(2) of the ICJ Statute. The ICJ accepted jurisdiction, but rejected Guinea-Bissau's arguments on the merits notwithstanding its acceptance that parts of the award were 'open to criticism'. [101]

c. Implementation: challenges and pitfalls

In most delimitation cases, the final judgment or award is unambiguous and can be implemented without difficulty (following completion of any interpretation or rectification proceedings, discussed above). Where problems arise, they usually relate to ambiguities or mistakes in the technical details of the final decision rather than issues of legal principle. This underlines the importance of engaging high-quality technical assistance from the outset of any delimitation case, and of presenting technical evidence clearly and coherently,

so that the technical aspects can be adopted by the court or tribunal in its final decision. This process will be enhanced where the court or tribunal has appointed its own technical expert.

(p. 155) A specific respect in which the parties can mutually improve the prospects of technical accuracy and ease of implementation relates to the identification of base points and equidistance lines. Agreement between them (or their experts) on such issues can materially simplify the task of the court or tribunal, as was the case regarding a significant part of the boundaries in *UK/France* and *Barbados/Trinidad*.

The final decision of the court or tribunal invariably represents some form of compromise, with neither party prevailing in all its claims or arguments. This can be an important consideration for any party in developing its litigation strategy and tactics. It is not unusual for States to present a maximum, or even exaggerated, position with the aim of securing a final result that meets its objectives in the delimitation. However, in doing so, States must be careful to ensure that their positions remain legally and technically coherent and credible: otherwise, the court or tribunal may depart altogether from their positions and 'formulate its own solution independently of the proposals made by the Parties', as happened in *St Pierre and Miquelon*.

Absent full implementation of a judgment or award line, a number of scenarios are possible, as reflected by the jurisprudence reviewed in Part B of this book. These include:

- *Modification or extension of the judgment or award line by way of fresh negotiation and agreement between the parties*. For example, in *Jan Mayen*, although the judgment was explicit in its careful description of the boundary and coordinates, the treaty between Denmark and Norway implementing the judgment included several boundary points that departed from those in the judgment by up to 3M. In *Beagle Channel*, Argentina and Chile used the tribunal's territorial sea award as a springboard to negotiate and agree a full EEZ and continental shelf boundary. Sometimes, post-judgment or award negotiations can have significant practical benefits, as in the *North Sea Continental Shelf* cases, where the parties were able to ensure that the operation of existing gas fields was unaffected by the delimitation.

- *Mutual appointment of a new body, such as a mixed boundary commission, to correct small errors or otherwise facilitate smooth implementation of the judgment or award*. For example, shortly following the judgment in *Cameroon/Nigeria*, the UN established the Cameroon/Nigeria Mixed Commission (at the mutual request of the parties' heads of state) in order to facilitate implementation of the judgment. While much of the Commission's work related to the land boundary and associated demilitarization and transfers authority, it also acted to correct a material technical error in the court's delimitation line.

- *Rejection of the judgment or award*. It is rare for States unilaterally to reject a judgment or award that is legally binding upon it. As discussed in the previous sub-section, Guinea-Bissau attempted unsuccessfully to nullify the ad hoc arbitral award by way of an application to the ICJ in *Guinea-Bissau/Senegal*. (p. 156) Such an application was within Guinea-Bissau's legal rights, however (and the ICJ explicitly accepted jurisdiction over the complaint). More controversially, following the ICJ's November 2012 judgment in *Nicaragua/Colombia*, Colombia unilaterally rejected the judgment (and renounced the Pact of Bogotá, on which the court had founded its jurisdiction). This has led Nicaragua to lodge a second case alleging violations of its sovereign rights and maritime zones and requesting an order that Colombia comply with the court's judgment. Those proceedings remain pending at the time of writing.

Sometimes, a delimitation judgment or award might leave important issues to be resolved subsequently. For example, in *Barbados/Trinidad*, the tribunal observed Trinidad and Tobago's undertaking to grant Barbadians fishing access within its EEZ, but left the detail of such access to be negotiated and agreed between the parties. In *Nicaragua/Colombia*, the court refused to uphold Nicaragua's claims to outer continental shelf, leaving Nicaragua to complete a CLCS submission and then file a new case to the court requesting delimitation over areas beyond 200M.

d. The role of the technical expert in ensuring the smooth interpretation and implementation of a delimitation judgment or award

The prospects of successful implementation of any maritime boundary judgment or award are materially advanced by technical precision. Obviously, therefore, it is essential that any court or tribunal charged with a delimitation exercise ensures that its analysis is both legally and technically rigorous. In order to ensure the latter, it will usually be necessary for the court or tribunal to appoint its own technical expert. It may also be highly desirable for the judgment or award to include a specific technical annex. Compare and contrast, for example, the *Guyana/Suriname* award, which included a technical annex and handled all technical aspects of the case in an exemplary manner, with *Cameroon/Nigeria*, where the court's judgment included no technical analysis and contained two major significant deficiencies (addressed in detail in the 'technical considerations' analysis of the case in Part II below).

As for the parties' technical experts, their role will not end with the completion of the written and oral submissions in a case. After the judgment or award is rendered, technical experts will be required to assist with the interpretation and implementation of the decision. This may require close collaboration with the opposing party's experts. Sometimes, this process will be explicitly anticipated by the parties at the outset of a case (as happened in *Libya/Malta* and *Tunisia/Libya*).

In *Peru/Chile*, although the court did not determine the specific coordinates of the boundary, it did nonetheless provide a detailed explanation of how the boundary was to be calculated, together with apparently accurate sketch-maps that could be used by the parties. The court expected them to determine the precise coordinates in accordance with the judgment, in 'the spirit of good neighbourliness'. In such (p. 157) circumstances, the technical experts from both parties are required to interpret the judgment and collaborate in order to determine the boundary's coordinates. Requiring parties to agree in this way, on the basis of clear and binding guidance from a court or tribunal, is in principle a sensible solution to a boundary dispute and can avoid lingering technical disagreements. However, in order to be successful (and, arguably, lawful), any such post-judgment or award process must be conducted in good faith and without undue political interference.(p. 158)

Footnotes:

1 For example, the 1978 Torres Strait Treaty between Australia and Papua New Guinea provides for separate seabed and fisheries boundaries. The agreement also creates a Protected Zone, cutting across the seabed and fisheries jurisdiction lines, in which Torres Strait islanders and the coastal people of Papua New Guinea can carry on their traditional way of life. Mining or drilling in the Protected Zone is prohibited for ten years. See Treaty between Australia and the Independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known

as Torres Strait, and related matters, 18 December 1978, 1429 *UNTS* 207. See also Figure A3.1.

2 For example, the Netherlands Antilles-Venezuela agreement utilizing Aves Island (Bird Rock) and the Australia-France (New Caledonia) delimitation utilizing uninhabited reefs and low-tide elevations. Charney, J. and Alexander, L. (eds), *International Maritime Boundaries*, Vol. 1 (Martinus Nijhoff, 1991), p. 615.

3 For example, the continental shelf agreement between Italy and Tunisia, in which the Italian island of Lampione is accorded a 12M semi-enclave while the Italian islands of Pantelleria, Lampedusa, and Linosa were accorded a 13M semi-enclave. Charney, J. and Alexander, L. (eds), *International Maritime Boundaries*, Vol. 2 (Martinus Nijhoff, 1991), p. 1611.

4 For example, the 1980 agreement between Papua New Guinea and Indonesia delimiting the continental shelf and EEZ provides for 'the recognition of traditional fishing rights of each party's nationals in the waters of the other'. See Agreement between the Government of Indonesia and the Government of Papua New Guinea Concerning the Maritime Boundary between the Republic of Indonesia and Papua New Guinea and Cooperation on related Matters, 13 December 1980 in Charney, J. and Alexander, L. (eds), *International Maritime Boundaries*, Vol. 1 (Martinus Nijhoff, 1991), p. 1040.

5 See, e.g., the 1988 Agreement between Sweden and the USSR on the Principles for Delimitation of the Sea Areas in the Baltic Sea, which allocated annual fishing quotas of 18,000 tons and 6,000 tons to the USSR and Sweden respectively in areas allocated to the other State in the delimitation. Charney, J. and Alexander, L. (eds), *International Maritime Boundaries*, Vol. 2 (Martinus Nijhoff, 1991), pp. 2060–1.

6 See, e.g., various delimitation agreements in the North Sea; also, *Agreement concerning settlement of offshore boundaries and ownership of islands between Qatar and the United Arab Emirates*; Qatar-United Arab Emirates, 2402 *UNTS* 49 (entered into force 20 March 1969); and *Treaty between the Government of Australia and the Government of New Zealand establishing certain exclusive economic zone boundaries and continental shelf boundaries*, Australia-New Zealand, 2441 *UNTS* 235 (entered into force 25 January 2006).

7 See, e.g., *Agreement between the Russian Federation and Kazakhstan on Delimitation of the Seabed of the Northern Part of the Caspian Sea for the Purposes of Exercising Their Sovereign Rights to the Exploitation of its Subsoil*, Russia-Khazakstan, Annex III UN Doc. A/52/983 (signed 6 July 1998); and *Agreement Concerning the sovereignty over the islands of Al-'Arabiyah and Farsi and the delimitation of the boundary line Separating the submarine areas between the Kingdom of Saudi Arabia and Iran*, Saudi Arabia-Iran, 696 *UNTS* 189 (entered into force 29 January 1969).

8 See, e.g., creation of a 'fishing buffer zone' in the *Declaration on the maritime zone*, Chile-Ecuador-Peru, 1006 *UNTS* 301 (entered into force 18 August 1952).

9 *Guyana/Suriname*, para. 459.

10 Guyana/Suriname, para. 460.

11 Lagoni, R., 'Interim Measures Pending Maritime Delimitation Agreements' (1984) 78 *AJIL* 345, 354.

12 *Guyana/Suriname*, para. 467 The tribunal elaborated on the 'delicate balance' to be struck between the rights and interests of disputing States whenever considering the scope of the prohibition of unilateral conduct under Arts 74(3) and 83(3), see *Guyana/Suriname*, paras 465–70.

[13] Lagoni, R., 'Interim Measures Pending Maritime Delimitation Agreements' (1984) 78 *AJIL* 345, 359.

[14] Agreement on Provisional Arrangements for the Delimitation of the Maritime Boundaries between the Republic of Tunisia and the People's Democratic Republic of Algeria of 11 February 2002, which provides that the provisional boundary agreed on will be binding on the parties for six years in Colson, D. and Smith, R. (eds), *International Maritime Boundaries*, Vol. 5 (Martinus Nijhoff, 2005), p. 3927.

[15] Maritime Delimitation Treaty between Jamaica and the Republic of Colombia, 12 November 1993, Art. 3, in Charney, J. and Alexander, L. (eds), *International Maritime Boundaries*, Vol. 3 (Martinus Nijhoff, 1998), p. 2179.

[16] Provisional agreement of 11 January 1978 between the Soviet Union and Norway on fishing adjacent to the Barents Sea.

[17] Treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tome and Principe on the Joint Development of petroleum and other resources, in respect of Areas of the Exclusive Economic Zone of the Two States, 21 February 2001, in Colson, D. and Smith, R. (eds), *International Maritime Boundaries*, Vol. 5 (Martinus Nijhoff, 2005), p. 3639.

[18] Agreement between the Government of Jamaica and the Government of the Republic of Cuba on the Delimitation of the Maritime Boundary between the Two States, 18 February 1994, Art. 5, in Charney, J. and Alexander, L. (eds), *International Maritime Boundaries*, Vol. 3 (Martinus Nijhoff, 1998), p. 2203.

[19] Agreement between the Government of the Kingdom of Thailand and the Government of Malaysia on the Constitution and Other Matters relating to the Establishment of the Malaysia-Thailand Joint Authority, 30 May 1990.

[20] 2002 Declaration on the Conduct of Parties in the South China Sea, signed at the 8th ASEAN Summit on 4 November 2002 in Phnom Penh, Cambodia by the Foreign Ministers of ASEAN and the People's Republic of China.

[21] Notably, in 2004, the national oil companies of three of the DOC parties (China, Philippines. and Vietnam) signed a joint marine seismic undertaking, pursuant to which they undertook joint seismic exploration in a substantial part of the disputed area.

[22] Shihata, I. and Onorato, W., 'Joint Development of International Petroleum Resources in Undefined and Disputed Areas' in Blake, G., Pratt, M., Schofield, C. et al. (eds), *Boundaries and Energy: Problems and Prospects* (Kluwer Law International, 1998), p. 433. For a broader definition of joint development, encompassing also the situation where a joint development zone straddles a defined delimitation line, see Fox, H. et al. (ed.), *Joint Development of Offshore Oil and Gas: A Model Agreement for States for Joint Development with Explanatory Commentary* (British Institute of International and Comparative Law, 1989), p. 45. Such joint development of mineral resources straddling a defined boundary is referred to in this work as 'unitization'. See discussion of the unitization arrangement entered into between Australia and Timor-Leste in relation to the 'Greater Sunrise' field in Section 3Ib 'Novel negotiated outcomes' below.

[23] *Eritrea/Yemen*, Phase II, para. 86.

[24] Bundy, R., 'Natural Resource Development (Oil and Gas) and Boundary Disputes' in Blake, G. H., Hildesley, W. J., Pratt, M. A. et al. (eds), *The Peaceful Management of Transboundary Resources* (Kluwer Law International, 1995), p. 39; Ong, D. M., 'Joint

Development of Common Offshore Oil and Gas Deposits: “Mere” State Practice or Customary International Law?’ (1999) 93 *AJIL* 771, 797.

25 For example, the Malaysia-Thailand Joint Authority, which administers the Malaysia-Thailand JDA.

26 For example, pursuant to their 1992 JDA, Malaysia and Vietnam nominated Petronas and PetroVietnam, respectively, to pursue petroleum exploration and exploitation activities in the JDZ. For further discussion, see Zhiguo, G., ‘Legal Aspects of Joint Development in International Law’ in Atmadja, M. K., Mensah, T. A. and Oxman, B. H. (eds), *Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21, Proceedings of the Law of the Sea Institute 29th Annual Conference in 1995* (University of Hawaii, 1997), pp. 629–44.

27 Timor Sea Treaty, 20 May 2002, 2258 *UNTS* 3.

28 Unitization is a technique applied where a single mineral deposit straddles an established boundary line. Although a joint development practice, it is fundamentally distinct from the creation of a JDZ as a provisional arrangement pending the delimitation of a maritime boundary. See Bastida, A., Mahmud, S., Walde, T. et al., ‘Cross-Border Unitization and Joint Development Agreements: An International Law Perspective’ (2007) 29 *Houston Journal of International Law* 2, 358.

29 This can be contrasted with, for example, the JDA between Malaysia and Vietnam, which is expressly without prejudice to the parties’ respective claims.

30 Timor-Leste has been unable to refer questions of delimitation or other disputes with Australia to the ICJ or the dispute settlement provisions under Pt XV of UNCLOS because, shortly before Timorese independence, Australia withdrew its consent to jurisdiction over such disputes.

31 For discussion of the background to the TST arbitration, see Anton, D. K., “The Timor Sea Treaty Arbitration: Timor-Leste Challenges Australian Espionage and Seizure of Documents” (2014) 18(6) *ASIL Insights* For an update on the arbitral proceeding, see the website of the Permanent Court of Arbitration at <http://www.pca-cpa.org>.

32 For the location of the Barbados-Guyana Cooperation Zone, see Figure B16.1, below.

33 In respect of the duty to negotiate in good faith, see also *Cameroon/Nigeria*, para. 244.

34 *North Sea Continental Shelf*, para. 85.

35 Notably, the jurisdictional requirement that negotiations last a ‘reasonable period of time’ does not apply where the basis of jurisdiction is other than Pt XV of UNCLOS. Thus, in *Cameroon/Nigeria*, the court held that the requirement did not apply because its jurisdiction was based on Art. 36(2) of the ICJ Statute, which does not contain any condition relating to prior negotiations. See Judgment on Preliminary Objections of 11 June 1998, para. 109.

36 *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Merits, Award of 14 August 2015, para. 151.

37 *Philippines/China* Award on Jurisdiction and Admissibility, para. 351. See discussion of the requirements of Article 283 generally at paras. 332–52 of the Award.

38 *Cameroon/Nigeria*, para. 244.

39 *Barbados/Trinidad*, para. 208, cited, and confirmed in the *Philippines/China* Award on Jurisdiction and Admissibility, para. 126.

[40] However, as discussed below, waiting too long before starting may also pose risks. In particular, it may allow the opposing State to make an Art. 298 declaration to avoid one or more of the binding dispute resolution procedures under Pt XV, as happened to Grenada in respect of its delimitation dispute with Trinidad and Tobago.

[41] Philippines/China Award on Jurisdiction and Admissibility, para. 286.

[42] Philippines/China Award on Jurisdiction and Admissibility, para. 217.

[43] However, see 'b. The duty to litigate/arbitrate' in section II, above, in connection with mandatory conciliation procedures applicable in the event of Art. 298(1)(a) declarations withdrawing consent to compulsory dispute resolution procedures under Pt XV.

[44] Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen: Report and Recommendations to the Governments of Iceland and Norway (1981) 20(4) *International Legal Materials* 797.

[45] Agreement between Norway and Iceland on the continental shelf between Iceland and Jan Mayen, Iceland-Norway, 2124 *UNTS* 247 (entry into force: 2 June 1982), preamble.

[46] China stuck to this position consistently throughout the proceedings on jurisdiction on admissibility, up to and including the Award on Jurisdiction and Admissibility dated 29, October 2015. At the time of writing, there was no indication that China would change its position during the merits phase.

[47] The tribunal also made detailed provision in anticipation of China's ongoing non-participation in its rules of procedure, which it fixed at the outset of the proceeding.

[48] *Philippines/China* Award on Jurisdiction and Admissibility, para. 2.

[49] Special arbitral tribunals constituted in accordance with Annex VIII of UNCLOS are unavailable in delimitation disputes.

[50] For an up-to-date list of declarations made by UNCLOS States parties in respect of Art. 287, see <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm>.

[51] For an example of a specific agreement transferring a delimitation case from an Annex VII tribunal to ITLOS, see *Bangladesh/Myanmar*.

[52] On 3 December 2014, Ghana and Côte d'Ivoire submitted their delimitation dispute to a special chamber. That case is pending at the time of writing.

[53] This was perhaps most notable in *Cameroon/Nigeria*, where the judgment included technical deficiencies with relation to the erroneous positioning of an equidistance point and the lack of a specified map datum.

[54] For example, in *Cameroon/Nigeria*, the court allowed Equatorial Guinea to intervene (although, notably, neither party objected to the intervention).

[55] Most of the advantages and disadvantages of Annex VII arbitration apply in principle also to ad hoc arbitration, although ad hoc arbitration is by definition even more adaptable to the individual circumstances of the dispute and scope of consent of the States parties. It is therefore particularly well suited to disputes extending beyond the interpretation or application of UNCLOS. An obvious example would be a combined sovereignty and delimitation dispute such as *Eritrea/Yemen*, reviewed in Part B of this book.

[56] Pursuant to Art. 5 of Annex VII: 'Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case'. In practice, this allows the parties to have

significant input into the procedures to be followed, since an Annex VII tribunal will consult (and normally meet) with them before determining its rules of procedure.

57 For example, in *Guyana/Suriname*, the tribunal appointed an expert to oversee the parties' access to certain archives in the Netherlands Ministry of Foreign Affairs.

58 If the parties are unable to agree, the remaining members will be appointed by the President of ITLOS (or such other person or entity agreed by the parties).

59 For example, see the technical annexes to *Barbados/Trinidad, Guyana/Suriname*, and *Bangladesh/India*.

60 For example, the Annex VII tribunal conducted a site visit in *Bangladesh/India*, which may have facilitated its consideration of the location of base points and understanding of the geographical configuration of the Bay of Bengal.

61 By contrast, for example, hearings before the ICJ are public unless the court decides otherwise or unless both of the parties demand non-admission of the public (ICJ Statute, Art. 59).

62 This disadvantage does not apply to ad hoc arbitration (see, e.g., *Eritrea/Yemen*).

63 The selection of arbitrators or judges ad hoc is a complex process, which will require detailed thought and analysis by the counsel team. The inclination of some States is to appoint an arbitrator or judge ad hoc who will definitely find in its favour (such as its own national). However, such an approach can be counter-productive as the person concerned may have limited persuasive influence over the remainder of the court or tribunal. This might result in the individual concerned departing from a judgment or award rendered by the majority. For a recent example of a delimitation case where a State appointed its own national to an arbitral tribunal, who proceeded to dissent from the majority decision, see India's appointment of Dr P. S. Rao in the *Bangladesh/India* case, summarized at B.23 below.

64 In the case of arbitral proceedings, this stage will also require adoption of the tribunal's rules of procedure, in consultation with the parties.

65 For details and an update on the *Croatia/Slovenia* story, which at the time of writing had led to the resignation of three arbitrators and a pending notification by Croatia of termination of the applicable arbitration agreement, see the case database of the Permanent Court of Arbitration: <http://www.pcacases.com>.

66 *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures Order of 29 July 1991, *ICJ Reports* 1991, pp. 12–21, para. 16; Karaman, I., *Dispute Resolution in the Law of the Sea* (Martinus Nijhoff, 2012), p. 96.

67 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, ICJ Reports 2009, p. 147, para. 40.

68 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Provisional Measures, Order of 8 April 1993, *ICJ Reports* 1993, p. 19, para. 34; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, *ICJ Reports* 2009, p. 151, paras 56–7.

69 *Aegean Sea*, Interim Protection, Order, *ICJ Reports* 1976, at paras 30–31.

70 *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire) (Order for Provisional Measures)*

(Special Chamber of the International Tribunal for the Law of the Sea), Case No. 23, 25 April 2015.

71 *Case of the monetary gold removed from Rome in 1943 (preliminary question) (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)* [1954] *ICJ Reports* 19, at p. 17. See also *South West Africa (Ethiopia v. South Africa) (preliminary objections)*, Joint dissenting opinion of Sir Percy Spender and Sir Gerald Fitzmaurice [1961] *ICJ Reports* 465, at pp. 473–4, referring to 'the principle of consent as the indispensable foundation of international jurisdiction'.

72 E.g. *Jan Mayen, Cameroon/Nigeria*.

73 E.g. *Nicaragua/Honduras, Nicaragua/Colombia*, and *Peru/Chile*, each of which also invoked Art. 36(2) of the ICJ Statute as a basis of jurisdiction.

74 *Philippines/China*, Award on Jurisdiction and Admissibility (29 October 2015) (accessible at <http://www.pcacases.com>), para. 133.

75 Ibid., para. 413. The proceeding on the merits was ongoing at the time of writing.

76 Ibid., paras 155–7.

77 *Barbados/Trinidad*, paras 285–93.

78 See, e.g., the *Malaysia/Singapore* case, where the jurisdiction of the court was deliberately limited to the question of sovereignty over a number of small island features with a view to the States parties entering into separate delimitation negotiations following the court's judgment on sovereignty.

79 In this context, contrast *St Pierre and Miquelon* and *Nicaragua/Colombia* (where entitlement beyond 200M was not established) with the *Bay of Bengal* cases (where such entitlement was established even in the absence of the CLCS recommendations).

80 The Award on Jurisdiction and Admissibility in the *Philippines/China* case contains an extensive examination of the distinction between jurisdictional issues of an 'exclusively preliminary character' (which were resolved as preliminary issues) and jurisdictional issues that depended on a merits determination (which were reserved to the merits phase of the proceeding). See the Award on Jurisdiction and Admissibility, paras 390–412.

81 Art. 293(2) states that this is subject to the ability of States to agree that a dispute will be decided *ex aequo et bono*.

82 See, e.g., *Nicaragua/Colombia*, where the court rejected Nicaragua's attempt to secure a continental shelf delimitation beyond its 200M limit on the basis that Nicaragua had not established that it had any continental margin extending that far, or far enough to overlap with Colombia's mainland continental shelf entitlement. Indeed, the court effectively held that the vast majority of States must complete the CLCS process, with all of the scientific and technical evidence that process entails, before seeking any third-party delimitation of outer shelf areas (the *Bay of Bengal* cases being the exception to that rule).

83 See, e.g., discussion of eighty-two allegedly forged documents in Reisman, M. and Skinner, C., '*Qatar v. Bahrain*: massive forgeries' in *Fraudulent Evidence before Public International Tribunals—The Dirty Stories of International Law* (Cambridge University Press, 2015), pp. 163–92. See also, in relation to the same episode, the Separate Opinion of Judge Fortier in *Qatar/Bahrain*, summarized in Part B, Chapter 13, below.

84 Numerous GIS software packages are available commercially, including ArcMap, Microimages, Mapinfo, and Autocad, as well as graphics packages such as Adobe Illustrator and CorelDraw. Court presentations are becoming standardized on Microsoft Powerpoint

(Apple Keynote is also used) and normally use wide-screen, high-definition display equipment.

85 See illustrations of the court's judgment line in Figures B15.1 and B15.2 in Part B, below.

86 *Tunisia/Libya*, Judgment on Malta's Request to Intervene, para. 19.

87 *ICJ Reports* 1984, p. 24, paras 41, 43 and p. 25–6, para. 21. For an illustration of how this constrained the easterly and westerly extent of the court's delimitation line, see Figure B8.3, below. Notably, the court's decision to reject Italy's application was the subject of a number of powerful dissents bemoaning the court's restrictive interpretation of Art. 62, including by Judges Jennings, Oda, and Schwebel.

88 See, e.g., *Nicaragua/Honduras, Black Sea*, and *Bangladesh/Myanmar*.

89 In its Award on Jurisdiction and Admissibility, the tribunal found that Vietnam was not an 'indispensable third party' for the purposes of the test set out in a number of ICJ cases (*Monetary Gold Removed From Rome*; *East Timor*), so Vietnam's absence as a party did not preclude the tribunal from proceeding with the arbitration. See paras 179–88.

90 The external counsel team should work alongside a local counsel team, the composition and role of which will depend on the available resources in the State concerned.

91 Notably, expert witnesses are increasingly being called for examination and cross-examination before the ICJ in other contexts where scientific evidence is central to the case. See, e.g., *Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment)* [2010] *ICJ Reports* 14; and *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) (Judgment)* (International Court of Justice, General List No. 148, 31 March 2014).

92 *Argentina v. Uruguay (Pulp Mills)* Judgment, para. 167.

93 See, e.g., the technical reports by David Gray, Hydrographer, annexed to *Bangladesh/India, Barbados/Trinidad*, and *Guyana/Suriname*.

94 The increasing standardization of methods, data formats, and software means that experts should be able easily to work together to find common ground.

95 Art. 1 of the Special Agreements between the Governments of the Federal Republic of Germany and the Netherlands and Denmark. *North Sea Continental Shelf* cases, pp. 6–7.

96 See, e.g., Art. I of the Special Agreement signed at Valletta on 23 May 1976 between the Socialist People's Libyan Arab Jamahiriya and the Republic of Malta.

97 See, *inter alia*, Art. 296 of UNCLOS, Arts 59 and 60 of the ICJ Statute, Art. 33 of the ITLOS Statute, and Art. 11 of UNCLOS Annex VII.

98 Arbitral rules or terms of reference might also provide for the possibility of 'correction' of an award. See, e.g., Art. 18 of the Rules of Procedure in *Bangladesh/India*, at [Annex X].

99 The ITLOS Statute and Rules related to interpretation and revision of its judgments are virtually identical to those applicable in the ICJ.

100 For further details, see case review in Part, B Chapter 5 below.

101 For further details of each case, see reviews in Part B, Chapters 3 and 9 below.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 1 North Sea Continental Shelf Cases (Judgment of the International Court of Justice, 20 February 1969)

From: A Practitioner’s Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):
Coastal states — Continental shelf — Delimitation — Straits — Territorial sea — Boundaries

(p. 161) 1 *North Sea Continental Shelf* Cases (Judgment of the International Court of Justice, 20 February 1969)

Case Note: continental shelf delimitation—adjacent coastlines on concave coast—rejection of submissions based on an equidistance rule and delimitation based upon 'just and equitable shares'—non-opposability of Article 6 of the 1958 Geneva Continental Shelf Convention to the Federal Republic of Germany as a non-Party—equidistance not an obligatory rule of customary international law and inapplicable where would give rise to inequities—delimitation based upon equitable principles taking account of all relevant circumstances—continental shelf as the natural prolongation of land territory—principle of non-encroachment—consideration of coastal configuration, geology, natural resources, and unity of deposits as factors relevant to the delimitation—final proportionality factor

Citation: *North Sea Continental Shelf (Germany/Denmark*; *Germany/Netherlands*), Judgment, 20 February 1969, *ICJ Reports* 1969, p. 3

Institution: ICJ

Basis of jurisdiction: Special Agreements between the Federal Republic of Germany and, respectively, Denmark and the Netherlands, for the submission to the Court of differences between them about the delimitation of the continental shelf in the North Sea, 2 February 1967

The court: Judges Bustamante y Rivero (President), Koretsky (Vice-President), Fitzmaurice, Tanaka, Jessup, Morelli, Zafrulla Khan, Padilla Nervo, Forster, Gros, Ammoun, Bengzon, Petrén, Lachs, Onyeama, Judges ad hoc Moslier (appointed by Germany), Sørensen (appointed by Denmark)

Applicable law: customary international law

Areas delimited: continental shelf

I. Introduction and Context

This case concerned the delimitation of the continental shelf of the North Sea between the adjacent coasts of the Federal Republic of Germany ('West Germany') (p. 162) on the one hand, and Denmark and the Netherlands on the other hand. As the court commented, the North Sea has the general look of an enclosed sea without actually being one. Its waters are shallow and the whole seabed consists of continental shelf at a depth of less than 200 metres, except for the feature known as the Norwegian Trough. Much of the continental shelf in the North Sea had already been delimited between the littoral States previously, largely by way of agreements based on equidistance. These included an agreement made between Denmark and the Netherlands on 31 March 1966, after their negotiations with West Germany had broken down, which reflected those two States' view that delimitation of the continental shelf should be based on equidistance. Before the breakdown in negotiations, West Germany had agreed boundaries immediately adjacent to its coasts with the Netherlands and Denmark by way of agreements dated 1 December 1964 and 9 June 1965, respectively, also based on equidistance. The location of the various agreed boundary lines, together with the geographical context generally, is shown on Figure B1.1.[1]

The concave coastline between the three States, with West Germany wedged between the Netherlands and Denmark, was of particular importance to the case. Bilateral negotiations between the parties to extend their 1964 and 1965 boundaries broke down mainly because Denmark and the Netherlands considered that the entire continental shelf delimitation should be based on the equidistance principle, whereas West Germany considered that such an approach would be inequitable and cut it off from its proper share of the shelf in the disputed area.

After the failure of bilateral negotiations, the parties held tripartite talks in 1966, at the conclusion of which they executed two Special Agreements (between West Germany and, respectively, Denmark and the Netherlands) submitting the delimitation dispute to the court. In parallel, West Germany notified Denmark and the Netherlands, by means of an *aide-mémoire*, that the delimitation agreement between those two States was *res inter alios acta* and thus could not 'have any effect on the question of the delimitation of the German-Netherlands or the German-Danish parts of the continental shelf in the North Sea' (para. 9).

By letter dated 16 February 1967, the Minister for Foreign Affairs of the Netherlands, on behalf of the three States, transmitted the two Special Agreements to the Registrar of the Court. According to Article 1(1) of the Special Agreements, the parties requested the court to decide:

> 'what principles and rules of international law are applicable to the delimitation as between the parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary' determined by agreements of (p. 163)

View full-sized figure

Figure B1.1: *North Sea* cases: regional setting and parties' positions.

1 December 1964 between Germany and the Netherlands and 9 June 1965 between Germany and Denmark.

The court was therefore not asked by the Parties to delimit the two continental shelf boundaries concerned. Rather, Article 1(2) of the Special Agreements stated that they would 'delimit the continental shelf in the North Sea as between their countries by

agreement in pursuance of the decision requested from the International Court of Justice'. (p. 164)

II. Positions of the Parties and Summary of the Judgment

a. Procedural issues arising from the involvement of three States Parties to the dispute

The Special Agreements recorded the parties' mutual understanding in relation to a number of procedural matters relating to the conduct of the proceedings. These included an agreement to request the court to join the two cases. On 26 April 1968, the court accordingly ordered the two cases to be joined on the basis that Denmark and the Netherlands were in the same interest for the purposes of Article 31(5) of the Statute. The court, however, noted that the cases remained separate as they related to different areas of the North Sea continental shelf and that there was no *a priori* reason why it must reach identical conclusions in each case. The Special Agreements also provided for Denmark and the Netherlands to appoint a single judge ad hoc.

In the proceedings, Denmark and the Netherlands submitted substantially identical legal arguments, either in common or in close cooperation. This led the court to comment that, while the cases were distinct, they involved a 'single situation' (para. 11).

b. Strict equidistance versus entitlement to a 'just and equitable share'

Denmark and the Netherlands each argued for delimitation based on equidistance. They submitted that the delimitation was governed by the principles and rules of international law expressed in Article 6(2) of the 1958 Geneva Convention on the Continental Shelf (the '1958 Convention').[2] Accordingly, the boundary would be determined by the principle of equidistance unless another boundary was justified by 'special circumstances'. Since no such circumstances had been established, the boundary must follow the equidistance line.

West Germany was not a party to the 1958 Convention, which was therefore not opposable to it. It argued that the rule contained in Article 6(2) had not become customary international law and that, even if it had, special circumstances excluded the application of the equidistance method in the present case. West Germany stated that the delimitation must instead be 'governed by the principle that each coastal State is entitled to a just and equitable share', in proportion to the length of its coastline.

(p. 165) The court observed that the parties had 'taken up fundamentally different positions'. Denmark and the Netherlands contended for a mandatory rule of equidistance (in the absence of special circumstances). West Germany acknowledged the utility of equidistance as a method of delimitation, but strongly denied its obligatory character for States not parties to the 1958 Convention. West Germany complained that any equidistance-based delimitation would cut it off from what it considered as its continental shelf 'entitlement' up to the median line with the United Kingdom. It argued that the configuration of its North Sea coast constituted a special circumstance requiring departure from an equidistance-based approach (paras 13–16).

At the outset of its judgment (at para. 8), the court, by reference to a number of diagrams, recognized the effect that significant concavity or convexity can have on an equidistance line drawn between three adjacent States. It observed that, in the case of a concave coast, such as that of West Germany, the effect of the equidistance method was to 'pull the line of the boundary inwards, in the direction of the concavity'. By contrast, convex coasts such as

those of Denmark and the Netherlands would have the effect of widening the gap between equidistance lines.[3]

Rejection of delimitation based on a 'just and equitable share'

The court began its analysis by rejecting West Germany's argument based on a 'doctrine of the just and equitable share'. It considered that such a doctrine was 'wholly at variance' with the 'fundamental' rule of law, enshrined at that time in Article 2 of the 1958 Convention, that the rights of the coastal State in respect of the continental shelf 'exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land'. This was an 'inherent right' that did 'not depend on its being exercised' (para. 19).

Rejection of the equidistance/special circumstances principle as a mandatory rule under the 1958 Convention and customary international law

The principal contention of Denmark and the Netherlands was that the delimitation should be effected using a rule described as the 'equidistance/special circumstances' principle. Denmark and the Netherlands argued that this was a mandatory rule of law contained in Article 6 of the 1958 Convention, which had been ratified by thirty-nine States (including each of them).

The court observed at the outset that:

> It has never been doubted that the equidistance method of delimitation is a very convenient one, the use of which is indicated in a considerable number of cases. It (p. 166) constitutes a method capable of being employed in almost all circumstances, however singular the results might sometimes be, and has the virtue that if necessary…any cartographer can *de facto* trace such a boundary on the appropriate maps and charts, and those traced by competent cartographers will for all practical purposes agree (para. 22).

In short, said the court, 'it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application' (para. 23).

However, the court remarked that these factors did 'not suffice of themselves to convert what is a method into a rule of law'. Indeed, as it had noted at the outset of its judgment, the equidistance method 'can under certain circumstances, produce results that appear on the face of them to be extraordinary, unnatural or unreasonable' (paras 23–4).

The court noted that West Germany was a signatory of the 1958 Convention, but had never ratified it and was consequently not a party to it. The court rejected the argument that West Germany had, by its conduct, unilaterally assumed or accepted the obligations of the 1958 Convention. It observed that such a conclusion was 'not lightly to be presumed' and could only be reached in the case of 'a very definite, very consistent course of conduct' (para. 28).The court noted that even if West Germany had ratified the 1958 Convention, it could still have adopted a reservation to Article 6 as permitted by Article 12 (para. 29).

The court resolved that the argument of Denmark and the Netherlands could only succeed if there existed a 'situation of estoppel'—namely, if West Germany was precluded from denying the applicability of the 1958 Convention regime by reason of its past conduct, which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark and the Netherlands, in reliance on such conduct, detrimentally to change their position or suffer some prejudice. The court observed that there was no evidence of any such estoppel situation in the present case (para. 30).

The court thus concluded that Article 6 of the 1958 Convention was not applicable to the delimitation.

Denmark and the Netherlands argued alternatively that West Germany was bound to accept the equidistance/special circumstances method of delimitation because it formed ‘part of the *corpus* of general international law’ or, specifically, a rule of customary international law.

First, Denmark and the Netherlands submitted that, pursuant to the test of appurtenance, which was intimately linked with the concept of natural prolongation, continental shelf delimitation must be effected by a method that left to each State all those areas that were nearest to its own coast. Only delimitation based on an equidistance line was consistent with this ‘basic continental shelf doctrine’ (p. 167) (para. 39).The court distinguished between notions of ‘proximity’ and ‘adjacency’. It remarked that the question of what areas of continental shelf ‘adjacent’ to a coastline were appurtenant to a particular State could not be determined exclusively on the basis of ‘proximity’. Rather, the notion of adjacency only implied proximity ‘in a general sense’. It did not imply any fundamental or inherent rule prohibiting States from exercising continental shelf rights over areas that were closer to the coast of another State (para. 42).

Second, the court noted that, in their pleadings, each of the parties relied on ‘the prolongation principle’, but interpreted it quite differently. Denmark and the Netherlands identified natural prolongation with closest proximity, thus calling for delimitation according to the equidistance principle. West Germany argued that the principle supported its notion of the just and equitable share and its version of the concept of proportionality. The court rejected both interpretations. In particular, as regards equidistance, it observed that this could deprive coastal States of their natural prolongation entitlement when the coastal configuration made the equidistance line ‘swing out laterally’ across its coastal front, cutting it off from areas adjacent to its coast (para. 44).

Third, Denmark and the Netherlands argued that the equidistance principle was inherent to the doctrine of the continental shelf. In considering this argument, the court undertook a detailed review of the history of that doctrine. The court began with reference to the Truman Proclamation, issued by the US Government on 28 September 1945. The court considered that this instrument had a ‘special status’, forming the starting point of the positive law on the concept of the continental shelf. With regard to adjacent continental shelf boundaries, the Proclamation provided that these ‘shall be determined by the United States and the State concerned in accordance with equitable principles’. The court observed that this approach, combined with the concept of delimitation by mutual agreement, had ‘underlain all the subsequent history of the subject’ (para. 47). The court also reviewed the work subsequently conducted by the International Law Commission of the United Nations, which did not consider the notion of equidistance as having any *a priori* character or special prominence in continental shelf delimitation (para. 50). It was only once the Commission had referred the question to a committee of hydrographical experts that the equidistance principle began to take precedence and, even then, the court found it significant that the committee noted that in ‘a number of cases this may not lead to an equitable solution’. Consequently, the Report of the Commission for 1953 had introduced an exception in favour of ‘special circumstances’ (paras 50–53).

The court also noted that neither before the committee of hydrographical experts, nor before the Commission, nor at the Geneva Conference that led to the 1958 Convention had there been any discussion of delimitation in the context of three or more adjacent States. From this, the court concluded that the present situation (p. 168) had not been envisaged.

Indeed, the court noted that its conclusion was supported by the text of Article 6(2), which spoke only of delimitation between 'two' adjacent States (para. 54).

In light of its review of the history, the court concluded that it was 'clear that at no time was the notion of equidistance as an inherent necessity of continental shelf doctrine entertained'. On the contrary, two beliefs have been prevalent: first, that 'no one single method of delimitation was likely to prove satisfactory in all circumstances'; and, second, that delimitation should be effected on equitable principles. Therefore, the court rejected the contention of Denmark and the Netherlands that the equidistance principle was inherent to the doctrine of the continental shelf (paras 55–6).

Fourth, Denmark and the Netherlands argued that the equidistance principle formed part of emerging customary law that had become 'crystallized' with the adoption of the 1958 Convention. As such, they said, it was binding on West Germany, regardless of the fact that it was not bound by the 1958 Convention. The court concluded with reference to its review of the history of the continental shelf doctrine that, while parts of the 1958 Convention may well have crystallized customary international law, this was not the case as regards Article 6. In particular, the International Law Commission had proposed the principle of equidistance 'with considerable hesitation…at most *de lege ferenda*, and not at all *de lege lata* or as an emerging role of customary international law'. The court also noted that the 1958 Convention allowed reservations to be made to Article 6 upon signature, ratification, or accession, which further confirmed that the States parties had not considered that Article 6 embodied rules of customary international law (paras 61–4).

Fifth, Denmark and the Netherlands argued that, even if there was at the date of the 1958 Convention no rule of customary international law in favour of the equidistance principle, such a rule had come into being after the adoption of the Convention. The court considered that, while this was 'perfectly possible', such a result was 'not lightly to be regarded as having been attained'. The court noted the existence of 'very considerable, still unresolved controversies' about the notion of special circumstances under Article 6 of the 1958 Convention. It noted also that the number of ratifications and accessions to the 1958 Convention, while respectable, was 'hardly sufficient' to indicate elevation of the conventional rules on delimitation to rules of customary international law. Turning to State practice in maritime delimitation subsequent to the 1958 Convention, this did not indicate either that such a customary principle had arisen. First, many of the delimitations concerned had been entered into by States parties to the 1958 Convention itself. Therefore, to the extent that they had adopted the equidistance method, there was no indication that the States concerned considered this to be anything other than a treaty, as opposed to customary, obligation. As regards the remainder of the (p. 169) delimitations, there was 'not a shred of evidence' that the States parties had believed themselves to be applying a mandatory rule of customary international law. Therefore, even if there had been any settled practice of equidistance-based delimitations, there was no evidence of any belief that this practice was necessitated by a binding rule of law. The requirement of an *opinio juris sive necessitatis* was therefore absent. Finally, almost all of the cases cited by Denmark and the Netherlands concerned median-line delimitations between opposite States, not lateral delimitations between adjacent States. The court considered that the difficulties associated with the equidistance principle were far more pronounced in the case of delimitation between adjacent States. The court thus concluded that Denmark and the Netherlands had failed to demonstrate the emergence of the equidistance principle as a rule of customary international law since the adoption of the 1958 Convention (paras 75–81).

In light of all this, the court concluded that the use of the equidistance method was not obligatory for the delimitation of the continental shelf areas at issue between the parties. It was therefore unnecessary for the court to determine whether or not the configuration of the West German coast constituted a ‘special circumstance’ for the purposes of Article 6 of the 1958 Convention or any rule of customary international law. This was because, since the equidistance method had been determined by the court not to be obligatory, it was not legally necessary to prove the existence of such circumstances in order to justify not using that method (para. 82).

c. The court’s determination as to the principles and rules of international law applicable in the delimitation

Having addressed the parties’ arguments, the court proceeded to identify the principles and rules of international law applicable in the delimitation. It explained that, notwithstanding the inapplicability of the 1958 Convention and the equidistance method as a mandatory rule of customary law, there were still rules and principles of law to be applied (para. 83).This was not a question of applying equity simply as a matter of abstract justice, or of making a decision *ex aequo et bono*, but of applying a rule of law. The parties were under an obligation to: (1) enter into negotiations with a view to arriving at an agreement; (2) act in such a way that, taking all the circumstances into account, equitable principles would be applied; and (3) safeguard the natural prolongation of their respective continental shelves in a way that did not encroach upon the natural prolongation of the other parties (paras 85, 88, 101).

The court reiterated that, in certain geographical circumstances arising out of the continental shelf delimitation between adjacent coasts, the equidistance method led to inequity. In particular, ‘the slightest irregularity in the coastline is automatically magnified by the equidistance line’. In the case of concave or convex (p. 170) coastlines, the greater the irregularity and further from the coastline the area to be delimited, the more unreasonable were the results produced. In the case of the North Sea, a delimitation between the parties based solely on the equidistance method would be inequitable in these circumstances (para. 89).

The court explained that ‘equity does not necessarily imply equality’ and there could ‘never be any question of completely refashioning nature’. However, in the present case, the North Sea coastlines of the parties were comparable in length and had therefore been given ‘broadly equivalent treatment by nature, except that the configuration of the coastlines would, if the equidistance method is used, deny to [West Germany] treatment equal or comparable to that given to the other two’. It would be ‘unacceptable’ for Denmark and the Netherlands to enjoy continental shelf rights considerably different from those of their neighbour, West Germany, merely because their coastlines were roughly convex, while West Germany’s was ‘markedly concave’. Equitable principles required abatement of the effects of this ‘incidental special feature’ from which an unjustifiable difference of treatment could otherwise result (para. 91).

The court indicated that there was ‘no legal limit to the considerations which States may take into account for the purpose of making sure they apply equitable procedures’. Rather, more often than not, a ‘balancing-up of all such considerations’ would be required. Among the relevant factors to be taken into account were the geographical configuration of the coasts, the geological aspects of the situation at hand, and ‘the idea of the unity of any deposits’ (paras 93–4, 101). In the context of the continental shelf, which constituted ‘stretches of submerged land’, it was particularly necessary to examine the geographical configuration of the coastlines concerned due to ‘the principle that the land dominates the sea’ (para. 96). In the context of the North Sea, State practice showed how the littoral States had dealt with the risk of prejudicial or wasteful exploitation of straddling hydrocarbon deposits. The court considered that ‘unity of deposit’ constituted a factual

element that was reasonable for the parties to ‘take into consideration’ in the course of their delimitation negotiations (para. 97). The court noted that this might be achieved, *inter alia*, by way of agreements for joint exploitation (para. 99).

The court concluded that:

> a final factor to be taken account of is the element of a reasonable degree of proportionality, which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines—these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions.

While the choice of the appropriate technical method was for the parties to agree, one method discussed during the proceeding consisted of drawing a straight (p. 171) baseline between the extreme points at either end of the coast concerned, or in some cases a series of such lines. The court observed that, where parties wished to employ the equidistance method, ‘the establishment of one or more baselines of this kind can play a useful part in eliminating or diminishing the distortions that might result from the use of that method’ (para. 98). In assessing proportionality, the court indicated that account should be taken of the effects, actual or prospective, of any other continental shelf delimitation between adjacent States in the same region (para. 101).

The court summarized the above rules and principles of international law applicable to the delimitation in the *dispositif* at para.101 of its judgment.

III. Technical Considerations

This seminal case introduced to the delimitation context the concept of natural prolongation, which had origins in the Truman Proclamation and was later to become enshrined in the 1982 Convention in Article 76 (‘The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin’). Subsequent judgments (and especially States’ pleadings—particularly in the Mediterranean cases of *Tunisia/Libya* and *Libya/Malta*, and more recently in Bangladesh’s pleadings in its dispute with Myanmar) have focused heavily on the question of whether natural prolongation, and the concept of ‘most natural’ prolongation, should influence the course of maritime boundaries. As the 1982 Convention established the 200M distance criterion for the continental shelf, delimitations within 200M have discounted natural prolongation as a relevant circumstance; recent judgments concerned with the delimitation of the outer shelf beyond 200M have focused on the concept of a single continental shelf and applied the same principles within and beyond 200M.

In fact, the whole of the North Sea, including the English Channel and extending west of Ireland, is underlain by a single juridical, and scientific, continental shelf. The Norwegian Trough, which was cited as a major discontinuity, is a relatively shallow (700m) glacial ice-age feature rather than a fundamental geological discontinuity. When Article 76 is applied to northwest Europe, the edge of the (juridical) continental shelf is far to the west, as evidenced by the limits identified in the continental shelf submissions to the CLCS for the Celtic Sea (jointly by France, Ireland, Spain, and the United Kingdom) and the Hatton Rockall area (separately by the United Kingdom, Ireland, and Denmark (Faroes)).

As the court was asked only to elaborate on the general principles to be applied in the delimitation, the technical details and implementation were left for the parties to decide in the ensuing negotiations.

(p. 172) IV. The Aftermath: The Continental Shelf Delimitation is Agreed by the Parties Pursuant to the Court's Judgment

Following the court's judgment, the three parties proceeded to negotiate and agree their continental shelf boundaries. While Denmark and the Netherlands had been able to maintain a common approach during the ICJ case, following the decision rejecting equidistance in favour of natural prolongation, they now had to reconcile their arguments with the West German position.

The States' objectives were fairly straightforward. Both Denmark and the Netherlands tried to minimize the deviation from equidistance. Denmark had been the most active in its gas exploration activity and wanted to retain its current drilling areas. West Germany's main objective was to reach the centre line of the North Sea (and thus the median line with the United Kingdom).This also became a priority for Denmark after it was cut off by an early German proposal that intersected its 1965 boundary with Norway.

There were nine rounds of negotiations—both bi- and trilateral—dominated by the difficult issue of defining natural prolongation. West Germany was in a strong position, which was supported by the judgment (although it was criticised for claiming a larger area in the negotiations than it had during the pleadings), while Denmark and the Netherlands appear to have had difficulty in coordinating their positions. The negotiations were also complicated by the variations in gas potential across the region, and the three States' differing views of the natural prolongation, geology, and prospectivity.

The final agreements (Figures B1.2 and B1.3) represented a pragmatic solution. They gave all three States access to the centre line of the North Sea (and for the first time a boundary (approximately 10M) between West Germany and the United Kingdom). They represented approximately equivalent concessions to West Germany from both Denmark (57 per cent) and the Netherlands (43 per cent) as compared to equidistance lines. Importantly, each of Denmark and the Netherlands retained their prospective gas areas.[4]

V. Significance of the Decision and its Contribution to International Law

The *North Sea Continental Shelf* cases are the juridical foundation of the modern law of maritime delimitation. The court's judgment sets out a series of fundamental (p. 173)

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Figure B1.2: *North Sea* cases: final continental shelf agreements.

principles that remain highly pertinent to this day, notwithstanding substantial developments that have taken place since in the law of the sea generally (not least the adoption of UNCLOS, the advent of a distance-based entitlement to continental shelf within 200M, and the creation of water column rights throughout the EEZ). The court's 1969 judgment is still probably the most widely cited in literature, pleadings, and judicial and arbitral decisions in the field of maritime delimitation.

The judgment is particularly renowned for its rejection of an equidistance-based approach to delimitation in favour of a more flexible approach in the application of '(p. 174)

View full-sized figure

Figure B1.3: *North Sea* cases: final agreements showing gas fields.

(p. 175) equitable principles'. As such, it is invariably relied upon by coastal States when arguing for delimitation based on something other than equidistance. However, it is notable that the court acknowledged the convenience and practicality of equidistance-based delimitations and their suitability in a broad range of circumstances. In particular, the court observed that equidistance-based delimitations would frequently be appropriate between opposite coasts and in areas close to the coast (see, for example, paras 57–9 and 79). It was only because of the inequity of an equidistance-based solution, in the context of a delimitation between three adjacent States with comparable coastal lengths on a concave

coastline, that the court determined that an alternative approach would be required in the specific circumstances.

Many aspects of the court's judgment have been adopted by State practice and the jurisprudence of international courts and tribunals. For example, its remarks about the absence of any mandatory equidistance rule, the overriding importance of geography and coastal configuration to maritime delimitation in light of the principle that 'the land dominates the sea', and the need to depart from pure equidistance in cases of marked concavity or other geographical irregularities (particularly in the context of adjacent coasts) remain as pertinent today as they were in 1969. The test of 'proportionality' propounded by the court as a final check in the process has also become a mainstay of modern maritime delimitation and has been applied in many subsequent cases. The modern requirement for an 'equitable solution' in EEZ and continental shelf delimitation under Articles 74 and 83 of UNCLOS can also be traced back to the court's insistence upon delimitation based on 'equitable principles'.

Other aspects of the judgment have, however, been superseded by subsequent developments in the law. For example, the advent of a distance-based entitlement to continental shelf under Article 76 of UNCLOS and the tendency towards unified maritime delimitations over areas of EEZ and continental shelf have rendered obsolete the court's comments about the need to prevent maritime boundaries from encroaching upon the natural prolongation of coastal States.[5] Instead, the modern law of maritime delimitation speaks of the need to prevent EEZ and continental shelf boundaries encroaching upon 'coastal projection'.[6] Consequently, the role of coastal geography has been strengthened in modern law and State practice, while factors of geology have been deemed irrelevant to delimitation (at least, within 200M of the coast).[7]

(p. 176) The court's comments about the preservation of the unity of hydrocarbon deposits have not been pursued in subsequent delimitation cases. This may be because those subsequent cases included the actual delimitation by the court or tribunal of the maritime boundary concerned, as opposed to the indication of rules and principles applicable to negotiations. A number of more recent decisions have emphasized the irrelevance of the presence (or not) of hydrocarbon resources in the area of delimitation.[8] However, some have argued with reference to the court's remarks about the unity of deposits that there exists as a matter of customary international law (and substantial State practice) an obligation for States to cooperate in the exploitation of straddling hydrocarbon deposits, 'even if a fully-fledged duty to unitise and jointly develop such resources does not yet exist'.[9]

Footnotes:

1 The 1965 Denmark–West Germany delimitation is depicted between points A and B; the 1964 Netherlands–West Germany delimitation is depicted between points C and D.

2 Article 6(2) 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'.

3 The diagrams used by the court to illustrate the distorting effect of an equidistance-based delimitation on concave or convex coastlines are reproduced in Figure A2.16.

[4] See Oude Elferink, A. G., *The Delimitation of the Continental Shelf between Denmark, Germany and the Netherlands: Arguing Law, Practicing Politics?* (Cambridge University Press, 2014).

[5] Indeed, in *Bangladesh/Myanmar*, ITLOS rejected natural prolongation as a relevant circumstance even in the delimitation of continental shelf areas beyond 200M. See further discussion of that case at Part B Chapter 20 below.

[6] See, e.g., *Barbados/Trinidad & Tobago*, discussed at Part, B Chapter 16 below.

[7] See, e.g., *Libya/Malta* and *Bangladesh/Myanmar*, discussed at Part B, Chapters 8 and 20 below.

[8] However, these findings are not inconsistent with the court's judgment in the *North Sea Continental Shelf* cases. As Judge Jessup stated in his Separate Opinion: 'It is of course true that there is no rule of international law which requires States surrounding an area such as the North Sea to delimit their respective sections of the continental shelf in such a way as to apportion to each State a "fair share" of the mineral resources on or in that shelf'. Jessup, Separate Opinion, p. 78.

[9] See Bundy, R. R., 'Natural Resource Development (Oil and Gas) and Boundary Disputes' in Blake, G. H. et al. (eds), *The Peaceful Management of Transboundary Resources* (Graham & Trotman, 1995).

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 2 Argentina v. Chile (Award of the Arbitral Tribunal, 18 February 1977)

From: A Practitioner's Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Coastal states — Continental shelf — Delimitation — Straits — Territorial sea — UNCLOS (UN Convention on the Law of the Sea) — Boundaries

(p. 177) 2 *Argentina v. Chile* (Award of the Arbitral Tribunal, 18 February 1977)

Case Note: Delimitation of territorial sea—narrow strait between opposite coasts—'principles of international law'—sovereignty over island features—interpretation of 1881 boundary treaty—'principle of appurtenance'—selection of base points in construction of median line—deviation of median line to accommodate navigational considerations

Citation: *Beagle Channel Arbitration between the Republic of Argentina and the Republic of Chile* (*Argentina/Chile*), Report and Decision of the Court of Arbitration, 18 February 1977, (1977) 52 International Law Reports 93

Institution: ad hoc Court of Arbitration, appointed by the United Kingdom as arbitrator under the General Treaty of Arbitration of 1902, sitting in Geneva

Basis of jurisdiction: Arbitration Agreement between Her Britannic Majesty's Government, the Government of the Argentine Republic and the Government of the Republic of Chile dated 22 July 1971

The tribunal: Fitzmaurice (President), Gros, Petrén, Onyeama, and Dillard

Applicable law: 'principles of international law'

Areas delimited: territorial sea

I. Introduction and Context

The Beagle Channel is a navigable international strait that runs in an east-west direction through the Tierra del Fuego Archipelago, at the southern tip of South America. It connects the Atlantic and Pacific Oceans, with an average width of 3 to 3.5 miles. Sovereignty over the Tierra del Fuego Archipelago is divided between Argentina and Chile. The land boundary between the two countries in the area was set out in the Boundary Treaty of 23 July 1881 (the '1881 Treaty').[1] The (p. 178) Treaty provided that the boundary line in Tierra del Fuego would run along the meridian of longitude at 68°36'W until it reached the Beagle Channel, with land to the west of the line belonging to Chile, and land to the east of the line belonging to Argentina.

The eastern mouth of the Beagle Channel, between the large Chilean feature of Navarino Island and the Argentinian portion of the Isla Grande, is marked by a number of smaller islands, the largest being Picton, Nueva, and Lennox. Regarding the islands of the region, Article III of the 1881 Treaty provided:

> to the Argentine Republic shall belong Staten Island, the small islands next to it, and the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia; and to Chile shall belong all the islands to the south of Beagle Channel up to Cape Horn, and those there may be to the west of Tierra del Fuego.

Article II of the 1881 Treaty established the boundary line in the north-west of the Archipelago along the 52nd parallel of latitude, providing that the allocation of territory thereunder was 'without prejudice' to the allocation set out in Article III. The geographical

context, including the proximate section of the land boundary on Isla Grande set out in the 1881 Treaty, is illustrated in Figure B2.1.

The dispute concerned the question of sovereignty over Picton, Nueva, and Lennox, together with a number of islets and other small features on the eastern side of the Beagle Channel, and the location of the corresponding maritime boundary between the parties.

Under the Treaty of Arbitration concluded between the parties in 1902 (the '1902 Treaty'), Argentina and Chile had agreed that the UK Government would arbitrate any dispute arising between them.[2] On 11 December 1967, the Chilean Ambassador in London addressed a note to the United Kingdom's Principal Secretary of State for Foreign Affairs referring to the dispute between Chile and Argentina in the region of the Beagle Channel, stating that attempts to reach agreement for the submission of the dispute to adjudication had come to nothing. The note continued that Chile had therefore decided to have recourse to the UK Government as 'permanent arbitrator' under the 1902 Treaty. Subsequent discussions between the parties culminated in an agreement to submit the dispute to arbitration, signed on 22 July 1971 between the United Kingdom, Argentina, and Chile (the 'Arbitration Agreement'). Pursuant to the Arbitration Agreement, the United Kingdom was to appoint a Court of Arbitration and to ratify that body's decision.

Article I of the Arbitration Agreement referred two questions to the Court of Arbitration, each of which was to be decided 'in accordance with the principles of international law': (1) whether Argentina or Chile had sovereignty over Picton, (p. 179)

View full-sized figure

Figure B2.1: *Argentina/Chile*: (Beagle Channel).

(p. 180) Nueva, and Lennox islands as well as the adjacent islands and islets; and (2) the delimitation of the boundary line between the parties' respective maritime jurisdictions in the Beagle Channel. For the purposes of the dispute, the limits of the region were set out in Article I of the Arbitration Agreement as a set of coordinates joined by six straight lines. These form an area referred to as the 'Hammer' on account of its shape (Figure B2.1).

Article XII of the Arbitration Agreement required the Court of Arbitration to include in its decision a drawing of the boundary line on a chart.

At the request of both parties, the Court of Arbitration visited the Beagle Channel region in March 1976 to inspect the islands and waterways concerned. The Court of Arbitration delivered its decision on 18 February 1977.

II. Positions of the Parties and Summary of the Decision

At the outset of its decision, the Court of Arbitration observed that the presence of the three principal disputed islands in the eastern extremity of the Beagle Channel caused the channel to divide into a 'northern arm' and a 'southern arm' at Picton Island. This had given

rise to a dispute over how to interpret and apply the reference, at Article III of the 1881 Treaty, to islands situated ‘to the south of Beagle Channel’ (para. 3).

a. Submissions of the parties

Argentina argued that the mouth of the Beagle Channel ran between Picton Island and Navarino Island and that the islands of Picton, Nueva, and Lennox were not in any case located ‘to the south of the Beagle Channel’. Accordingly, Argentina claimed that the three islands, as well as their adjacent small islands and islets, fell under the sovereignty of Argentina pursuant to Article III of the 1881 Treaty. Argentina further argued that the three principal islands were ‘on the Atlantic’ within the meaning of Article III and thus belonged to Argentina under the ‘Oceanic’ or ‘Atlantic’ principle (pursuant to which Atlantic coasts and islands vested in Argentina, while Pacific coasts and islands vested in Chile). Argentina submitted that the maritime boundary between the parties ran along the median line of its version of the Beagle Channel, deviating only where necessary to allow each State to navigate in waters of its own (see Figure B2.1).

Chile argued that Picton, Nueva, and Lennox, as well as the adjacent islands and islets, fell under its sovereignty on the basis that the mouth of the Beagle Channel ran between Nueva Island and Isla Grande and that the three islands were thus ‘to the south of the Beagle Channel’ for the purposes of the 1881 Treaty. Chile further argued that it had sovereignty over other islands and islets ‘appurtenant’ to the southern shore of the channel and in accordance with the ‘criterion of the main (p. 181) waterway’. In the alternative, Chile argued that all islands and islets falling within the scope of the Arbitration Agreement but outside of the allocation set out in Article III necessarily belonged to Chile as a result of the global effect of Article II of the 1881 Treaty (which set the southern boundaries of the parties other than in respect of Tierra del Fuego). Argentina rejected Chile’s interpretation of Article II, arguing that it did not apply to territory south of the Straits of Magellan. Chile rejected the existence of an ‘Atlantic’ principle and argued that, in any event, any such principle was irrelevant to the interpretation of Article III of the 1881 Treaty. Chile did not propose a specific maritime boundary in the Beagle Channel.

b. Interpretation of Article III of the 1881 Treaty and attribution of sovereignty over the islands of Picton, Nueva, and Lennox

The Court of Arbitration remarked that its task was to interpret the relevant provisions of the 1881 Treaty ‘in accordance with the traditional canons of treaty interpretation now enshrined in the Vienna Convention on the Law of Treaties, which…both Parties have accepted as governing the matter’. In particular, it must interpret the 1881 Treaty ‘in accordance with the ordinary meaning to be given to [its] terms…in their context and in the light of its object and purpose’ (VCLT, Article 31) (para. 15).

The Court of Arbitration held that there was nothing in the text of the 1881 Treaty (or its Article III in particular) to indicate that any ‘Oceanic’ or ‘Atlantic’ principle should *a priori* govern its interpretation (para. 66). Following a detailed review of the text, context, object, and purpose of the 1881 Treaty, the Court of Arbitration concluded that it had not been established that Article III had attributed Picton, Nueva, and Lennox to Argentina (para. 79). Turning to the question of whether Article III had attributed the islands to Chile, the Court of Arbitration observed that it must determine which arm of the Beagle Channel had been contemplated by the 1881 Treaty, in order to identify which islands lay to the south. It remarked that it had been unable to discover, in all the years of negotiation that preceded the Treaty, any discussion as to what was the course of the channel. It observed from this that it could ‘only be supposed that they regarded the Channel’s course as too evident to need discussion or definition’ (paras 86–7). However, the Court of Arbitration considered that the expression ‘to the south of’ in Article III would lose significance and applicability if,

as Argentina claimed, the Beagle Channel itself turned to run north-south in the vicinity of the disputed islands (para. 93). The Court of Arbitration continued:

> Given this situation, the Court thinks it almost mandatory, or at least a matter of compelling probability, to conclude that in the circumstances, the negotiators of the Treaty could only have seen the Beagle Channel as continuing past Picton by its northern arm, and to consider it as scarcely conceivable that, without comment, they can have intended a Channel that would turn away from the south shore of the Isla (p. 182) Grande at Picton Island, and proceed in quite a different direction, pointing ultimately towards Cape Horn (para. 96).

The Court of Arbitration observed that evidence supplied by the parties indicated that, in the periods prior to and after the 1881 Treaty, the northern arm of the Beagle Channel had been the customary track of vessels (para. 97). It concluded that the islands of Picton, Nueva, and Lennox were situated 'to the south of the Beagle Channel' for the purposes of Article III of the 1881 Treaty, noting that such a view was 'strongly supported by later confirmatory material' (para. 99). The three islands thus fell under the sovereignty of Chile.

c. Attribution of sovereignty over islets and other small features and delimitation of the maritime boundary in the Beagle Channel

The Court of Arbitration noted that, in the vicinity of Picton, Nueva, and Lennox, there were a number of 'small islands, islets, rocks, banks etc', over which it must determine which party had sovereignty. It considered that no difficulty arose over the features immediately adjacent to Picton, Nueva, and Lennox, since their ownership would follow that of the principal islands. Similarly, the islands located in the southern arm of the Beagle Channel were clearly Chilean in light of the Court of Arbitration's interpretation of Article III of the 1881 Treaty. The problem was therefore confined to a number of small features located along the northern arm of the Beagle Channel, in relation to which Article III of the 1881 Treaty made no provision because those features 'being in the Beagle Channel itself cannot lie to the south of it'. The Court of Arbitration proceeded to draw a boundary line in the channel 'which represents the Court's decision as to the boundary between the respective territorial and maritime jurisdictions of the Parties' in the disputed area (paras 105, 176).

In doing so, the Court of Arbitration dismissed Chile's version of the 'principle of appurtenance' because it would have had the effect of allocating to Chile not only the small islands within the channel, but also the channel itself. The Court of Arbitration stated that this would be contrary to the 'overriding general principle of law that, in the absence of express provision to the contrary, an attribution of territory must *ipso facto* carry with it the waters appurtenant to the territory attributed; and therefore, on the Channel, those extending up to some sort of median line'. The Court of Arbitration observed that the allocation to Argentina by the 1881 Treaty of the eastern half of the Isla Grande 'must include the appurtenant waters' (para. 107).

The Court of Arbitration then turned to consider Chile's argument based on the 'criterion of the main waterway'. It observed that this argument primarily affected certain small islands (the Bécasses group) located in the mid (northern) channel, between the Isla Grande and Picton Island (see Figure B2.1). Despite the fact that (p. 183) the islands were situated slightly closer to Argentina's part of the Isla Grande, Chile claimed them on the ground that the 'main waterway' normally used by shipping ran between the islands and the Isla Grande shoreline. The Court of Arbitration held that the 'main waterway' criterion was not compelling enough—at least in this locality—to justify derogation from the 'principle of appurtenance'. Accordingly, the Bécasses group of islands was allocated to Argentina.

The Court of Arbitration concluded that, in drawing its red boundary line, it had been:

> guided by the considerations indicated in Annex IV hereto (which shows how the line has been traced),—in particular, by mixed factors of appurtenance, coastal configuration, equidistance, and also of convenience, navigability and the desirability of enabling each Party so far as possible to navigate its own waters. None of this has resulted in much deviation from a strict median line except for obvious reasons, near Gable Island, where the habitually used navigable track has been followed (para. 110).

In its *dispositif*, the Court of Arbitration confirmed that, in the area of dispute, 'the title to all islands, islets, reefs, banks and shoals, if situated on the northern side of the…red line, is vested in the Republic of Argentina; and if situated on the southern, in the Republic of Chile' (para. 76).

Annex IV to the decision set out the considerations of the Court of Arbitration in tracing its boundary line. The Court of Arbitration explained that:

> The Boundary-Line itself is the resultant [sic] of construction lines drawn between opposite, shore to shore, points, sometimes to or from straight baselines. It is in principle a median line, adjusted in certain relatively unimportant respects for reasons of local configuration or of better navigability for the Parties. Over the whole course, account has been taken of sandbanks, siltings etc., which would make a strict median-line unfair, as in the case of certain islets or rocks (Annex IV, para. 4).

For example, for reasons of navigability the Court of Arbitration did not use the small islets of Lepper and Reparo off the east coast of Picton Island as base points.

III. Postscript to the 1977 Award

On 25 January 1978, Argentina issued a 'declaration of nullity' rejecting the Award. Referring to the provisions of both the 1902 Treaty and the Arbitration Agreement, Argentina claimed that the Award had 'serious and numerous defects', was not decided in accordance with principles of international law, and was accordingly null and void.[3] Chile responded with a note rejecting the 'unusual' (p. 184) declaration of nullity.[4] The parties thereafter recommenced negotiations on the dispute, eventually with the assistance of the Holy See. A Treaty of Peace, Friendship and Maritime Delimitation was concluded in 1984 (the '1984 Treaty').

Argentina implicitly accepted the delimitation set out in the Award by signing the 1984 Treaty. Article 7 of the 1984 Treaty refers to the 'existing boundary in the Beagle Channel' and takes as a starting point for delimitation the end point set out in the Court of Arbitration's Award (described as 'point A') (see Figure B2.1 inset). From 'point A', the 1984 Treaty delimits the EEZ and continental shelf boundary between Argentina and Chile, with adjustments made to the entitlements generated by the Chilean islands of Nueva, Lennox, and Wollaston, so as to avoid cutting off the entitlements of Argentina projecting towards the Atlantic Ocean.[5]

IV. Technical Considerations

Once the sovereignty aspects had been decided, the court adopted a sensible and pragmatic approach to drawing the median line, adjusting it to take into account the navigability of the channel, ignoring small rocks and islets, using straight baselines where appropriate, and adjusting the line to avoid shallow banks and to follow the main channel. No coordinates

were provided in the *dispositif*; rather, the line was drawn clearly on a map attached to the Award.

This was also one of the rare occasions when a court or tribunal has made a site visit (see also *Bangladesh/India*, (Part, B Chapter 23) for a more recent example).

V. Significance of the Decision and its Contribution to International Law

The *Beagle Channel* case principally related to a dispute between Argentina and Chile over the route of the channel for the purposes of applying their 1881 boundary treaty, together with associated questions of sovereignty over the islands of Picton, Nueva, and Lennox. As such, it is a relatively *sui generis* decision.

The decision is nevertheless significant in the context of territorial sea delimitation. It contains analysis of the 'principle of appurtenance' as it applies in the territorial sea (which is closely related to the tenet that 'the land dominates the sea', (p. 185) articulated by the ICJ in the *North Sea Continental Shelf* cases). It also provides a leading example of the variance of a geometric equidistance or median line in order to accommodate navigational interests in the territorial sea. In this regard, the decision was cited by the UNCLOS Annex VII tribunal in the *Guyana/Suriname* arbitration in support of a finding that 'special circumstances of navigation may justify deviation from the median line'.[6]

The decision is also notable for the subjective approach taken by the Court of Arbitration in its selection of base points. The Court of Arbitration rejected certain potential base points because of the perceived effect they would have on the course of the median line and on the navigability of the Beagle Channel by the parties.

Footnotes:

1 Boundary Treaty between the Argentine Republic and the Republic of Chile, 22 October 1881.

2 General Treaty on Arbitration between Chile and Argentina, 22 September 1902, 2246 UNTS 71.

3 Argentina–Chile: Exchange of Diplomatic Notes concerning the Beagle Channel Arbitration, 25–26 January, 1978, 17 *ILM* 738, p. 740.

4 Argentina–Chile: Exchange of Diplomatic Notes concerning the Beagle Channel Arbitration, 25–26 January, 1978, 17 *ILM* 738, p. 750.

5 Treaty of Peace and Friendship between Chile and Argentina, 29 November 1984, 1390 UNTS 89.

6 *Guyana/Suriname*, paras 303–6.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 3 United Kingdom of Great Britain and Northern Ireland v. French Republic (Decision of the ad hoc 'Court of Arbitration', 30 June 1977)

From: A Practitioner's Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Coastal states — Continental shelf — Delimitation — Straits — Territorial sea — UNCLOS (UN Convention on the Law of the Sea)

(p. 186) 3 *United Kingdom of Great Britain and Northern Ireland v. French Republic* (Decision of the ad hoc 'Court of Arbitration', 30 June 1977)

Case Note: continental shelf delimitation—effect of French reservations to the 1958 Convention—interplay between customary international law and treaty-based delimitation—lack of competence to delimit overlapping territorial seas—role of the equidistance method in achieving an 'equitable delimitation' between opposite and adjacent coasts—delimitation to reflect the coastal configurations of the parties—discussion of geographical 'special circumstances' necessitating variance from equidistance—relevance of State conduct in treatment of small island (Eddystone Rocks)—enclavement of islands (Channel Islands) located on the 'other side' of the median line between opposite mainland coasts—'half effect' adjustment of equidistance line to abate 'disproportionate effects' of offshore islands (Scilly Isles)

Citation: *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (*UK v. France*), Decision, 30 June 1977, (1977) 54 *International Law Reports* 6

Institution: ad hoc Court of Arbitration

Basis of jurisdiction: Arbitration Agreement between the French Republic and the United Kingdom, 10 July 1975

The Court of Arbitration: Castren (President), Gros (appointed by France[1]), Waldock, (appointed by the United Kingdom) Briggs, Ustor

Applicable law: 1958 Geneva Convention on the Continental Shelf; customary international law

Areas delimited: continental shelf (within 200M)(p. 187)

I. Introduction and Context

This case concerned the delimitation between France and the United Kingdom of the continental shelf boundary throughout the central and western portions of the English Channel and beyond 'as far as the furthest limits of the continental shelf in the Atlantic ocean'. The English Channel stretches some 300M from east to west, with a width between the parties' respective coasts varying between about 18M and 100M.

The UK coast in the delimitation area, while fairly regular in nature, was characterized by a number of small islands and island groups, principally the Isle of Wight, the Channel Islands, Eddystone Rocks, and the Isles of Scilly (all of which were to play differing roles in the delimitation). The Isles of Scilly, which lay 21M to 31M west of the UK mainland, consisted of forty-eight islands, six of which were inhabited with a total population of 2,428 at the time. The Eddystone Rocks lie 8M south of the mainland (thus beyond the United Kingdom's then 3M territorial sea limit) and were the location of a 51.2m high lighthouse. The French coast in the delimitation area follows a less regular course, featuring a number of peninsulas and, towards the Atlantic side, a number of small islands, islets, and rocks (the most prominent of which in the delimitation, Ushant, lies about 10M from the French mainland and had a population of about 2,500. Also included was part of the French coastline, the *Golfe normand-breton*, formed by the coasts of Normandy and Brittany. Within that *Golfe* lay the Channel Islands archipelago, which is a UK dependency consisting

of four principal groups (the Alderney group, the Guernsey group, the Jersey group, and the Minquiers group). The total area is approximately 195 km² and the population approximately 130,000. The Channel Islands are situated 6.6M from the French mainland and 49M from the UK mainland, at the nearest points.

The geographical context of the delimitation is illustrated in Figure B3.1.

The delimitation area formed part of the continental shelf of north-west Europe and formed a single geological structure.

Following negotiations between 1970 and 1974, the United Kingdom and France reached agreement in principle concerning the delimitation of the portion of the continental shelf in the English Channel situated eastward of 30 minutes west of the Greenwich Meridian. The parties were, however, unable to reach agreement as to the delimitation of the portion of continental shelf situated westward of that position. At the close of the negotiations, they agreed to submit the outstanding delimitation dispute to an arbitral tribunal. Consequently, they signed an Arbitration Agreement in Paris on 10 July 1975 (the 'Arbitration Agreement') submitting their outstanding delimitation dispute to an ad hoc arbitral tribunal described as a 'Court of Arbitration' ('the court').

(p. 188)

View full-sized figure

Figure B3.1: *United Kingdom/France*: UK claim.

(p. 189) The parties submitted the following question to the court:

> 1. …What is the course of the boundary (or boundaries) between the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic, respectively, westward of 30 minutes west of the Greenwich Meridian as far as the 1,000 metre isobath?
>
> 2. The choice of the 1,000 metre isobath is without prejudice to the position of either Government concerning the outer limit of the continental shelf. [2]

The outer limit of the delimitation at the 1,000-metre isobath was located approximately 160M from the Scilly Isles and 180M from Ushant. The approximate location of the 1,000-metre isobath is illustrated in Figure B3.1.

By virtue of Article 9(1) of the Arbitration Agreement, the parties required the court's decision to include 'the drawing of the course of the boundary (or boundaries) on a chart' and indicated that the court was entitled to appoint a technical expert to assist in doing so. The court accordingly appointed Mr Hans Ermel (Director of Nautical Surveys and Charting, Deutsches Hydrographisches Institut, Hamburg) as its technical expert.

II. Positions of the Parties and Summary of the Judgment

a. Lack of competence to delimit the territorial sea

The court noted that the Arbitration Agreement conferred competence specifically in relation to the delimitation of the continental shelf boundary. It observed that the term 'continental shelf', as used in international law at the date of the signing of the Arbitration Agreement, 'was a legal term denoting only "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea"'. Consequently, the Arbitration Agreement did not confer any competence to settle differences regarding the boundary of their respective zones of territorial sea or of their respective fishery zones (para. 13).

The court observed that, in their pleadings, each of the parties had addressed arguments relating to delimitation of 'continental shelf' in the narrow sea passages situated between the Channel Islands and the French mainland. It noted that, at the time of the proceeding, the United Kingdom claimed a 3-mile territorial sea (together with a 12-mile fishery limit) around the Channel Islands, while France had established a 12-mile territorial sea off all its coasts. As a result, the claims of the parties invited the court to delimit a boundary in areas either claimed by France as part of its territorial sea or by the United Kingdom as part of its fishery zone (and potential 12-mile territorial sea). In response to a question posed by the court, while the United Kingdom considered the court competent to delimit in (p. 190) those areas, France stated that the court's mandate extended only to delimitation of the continental shelf beyond the limits of the territorial sea. The court held that it 'necessarily derives its competence from the consent of both the Parties to the present arbitration'. Consequently, it did not suffice that one party might consider an area to be continental shelf while the other said it to be territorial sea. The court was thus not empowered under the Arbitration Agreement or otherwise to delimit the seabed and subsoil boundary in the areas concerned between the Channel Islands and the French mainland. The court's role would therefore be confined to deciding the course of the continental shelf boundary in the areas to the north and west of the Channel Islands, beyond areas of territorial sea (paras 14–22).[3]

b. Applicable law and relevance of French reservations to the 1958 Convention on the Continental Shelf

The parties disagreed as to the law applicable to the delimitation. Both the United Kingdom and France were parties to the 1958 Convention on the Continental Shelf (the '1958 Convention'). The United Kingdom considered that the 1958 Convention, and particularly Article 6 thereof, applied to the delimitation. France, by contrast, contended that the 1958 Convention, and particularly Article 6 thereof,[4] had never entered into force between France and the United Kingdom by reason of the United Kingdom's refusal to accept certain reservations formulated by France when depositing its instrument of accession. One of those reservations had referred specifically to Article 6. The reservation stated that France would not accept any continental shelf boundary determined by the application of the principle of equidistance if, *inter alia*, it extended beyond the 200-metre isobath or lay in areas where France considered that 'special circumstances' existed. The United Kingdom countered that its statement to the UN Secretary-General that it was 'unable to accept' the French reservations did not change the fact that it considered itself as being in treaty relations with France under the 1958 Convention.

In an attempt to identify the respective intentions of the parties in connection with the French reservations, the court noted that certain communications between them during 1965 to 1966 had given no indication that either considered the 1958 (p. 191) Convention inapplicable between them (para. 36). The court noted that the law governing reservations to multilateral treaties had been undergoing an 'evolution' at that time, which crystallized only later in Articles 19 to 23 of the VCLT of 1969. While the 1958 Convention itself

provided for the formulation of reservations, it could not be read as committing States to accept ‘any and every reservation’; such an interpretation would ‘amount almost to a license to contracting States to write their own treaty’ (para. 39). The court concluded that it had not been the United Kingdom’s intention, in rejecting the French reservations, to prevent the entry into force of the 1958 Convention as between the parties (para. 44).

The court noted that the parties were agreed that the rules of international law to be applied by the court were ‘the rules in force today’. It rejected a French argument that the 1958 Convention had been ‘rendered obsolete’ by recent evolution of customary law and the Third UN Conference on the Law of the Sea, holding that ‘only the most conclusive indications of the intention of the parties to the 1958 Convention to regard it as terminated could warrant this Court in treating it as obsolete and inapplicable’. The court concluded that the 1958 Convention was a treaty in force, the provisions of which were applicable between the parties for the purposes of Article 2 of the Arbitration Agreement. The court stressed, however, that this did not mean that the court was debarred from taking account of recent developments in customary law (paras 47–8).

The court then turned to examine the validity and effect of the three French reservations to Article 6 of the 1958 Convention. Each was to be construed according to ‘the natural meaning of its terms’ (para. 53). The court, relying in part on the definition of a ‘reservation’ in Article 2(1)(d) of the VCLT, rejected the United Kingdom’s contention that the French reservations were inadmissible or not true reservations (paras 50–55).

According to France, the cumulative effect of its three reservations was that Article 6 of the 1958 Convention was not in force between the parties and was thus inapplicable to the delimitation. The United Kingdom argued that its rejection of the French reservations rendered them wholly unopposable to it, with the result that Article 6 applied in full, unaffected by the French reservations. The court concluded that the effect of the United Kingdom’s rejection of the French reservations was ‘limited to the reservations themselves’. The result, as envisaged by Article 21(3) of the VCLT, was that Article 6 was inapplicable as between the parties ‘to the extent, but only to the extent, of the reservations’. Accordingly, in areas where the reservations operated, the applicable law would be the rules and principles governing continental shelf delimitation in general international law (paras 56–61).

The court, however, noted that ‘the practical significance of the French reservations to Article 6 in the present proceedings is very small’ because ‘the rules of customary international law lead to much the same result as the provisions of (p. 192) Article 6’ (para. 65). The court acknowledged that ‘under Article 6 the equidistance principle ultimately possesses an obligatory force which it does not have in the same measure under the rules of customary international law’. However, the combined ‘equidistance/special circumstances rule’ under Article 6 gave particular expression to the general norm of customary law that, failing agreement, a continental shelf boundary was to be delimited according to ‘equitable principles’ (paras 70, 75).

The court turned to examine the effect of its conclusions about applicable law in the Atlantic and Channel Islands sectors in particular. It noted that no suggestion had been made during the parties’ negotiations that, according to the French reservation, the extension of the delimitation beyond the 200-metre isobath into the Atlantic Ocean would render Article 6 of the 1958 Convention inapplicable. Accordingly, Article 6 was, in principle, applicable in that sector of the boundary. However, in light of its earlier comments, the court emphasized that ‘the course of the boundary in the region will be the same whether the delimitation is made on the basis of Article 6 or of the rules of customary law’. In the Channel Islands sector, the court concluded that the reservation related to delimitations in areas where France considered that ‘special circumstances’ existed clearly did apply. Accordingly, in light of the United Kingdom’s rejection of that reservation, the

delimitation in the Channel Islands region would be made by reference to the rules of customary law (paras 73–4).[5]

c. Coastal relationship of the parties and methodology of delimitation

The court turned to examine the observations of the ICJ in the *North Sea Continental Shelf* cases about the role of the equidistance principle, since those observations touched questions that were central to the determination of the continental shelf delimitation in the English Channel and Atlantic regions. While the United Kingdom argued for an equidistance-based delimitation throughout the boundary, whether under the 1958 Convention for customary international law, France said the governing principle was that the delimitation must be equitable and that the equidistance principle was merely one of numerous methods that may be used to produce an equitable delimitation.

Citing the *North Sea Continental Shelf* cases, the court held that 'the validity of the equidistance method, or of any other method, as a means of achieving an equitable delimitation of the continental shelf is always relative to the particular geographical situation'. The court noted the ICJ's comments to the effect that equidistance combined 'practical convenience' and 'certainty of application', and observed that (p. 193) State practice showed a large proportion of continental shelf delimitations that had been effected by way of equidistance or some variant of that method (paras 84–5).

The court observed that, in the *North Sea Continental Shelf* cases, the ICJ 'drew a clear, and even sharp, distinction' between geographical situations where the coasts of States abutting the same continental shelf are 'opposite' and where they are 'adjacent'. This was because, in the case of adjacent or 'lateral' boundaries, the effect of any irregularity in the coastline on an equidistance line was automatically magnified the greater the distance the boundary extended from the shore (paras 85–6). Accordingly, the court concluded that:

> Whereas in the case of 'opposite' States the median line will normally effect a broadly equitable delimitation, the lateral equidistance line extending outwards from the coasts of adjacent States for long distances may not infrequently result in an inequitable delimitation by reason of the distorting effect of individual geographical features (para. 95).

The court noted the parties' agreement that throughout the English Channel, where their coasts were in a relationship of oppositeness, the boundary should, in principle, be the median line. However, they were in 'radical disagreement' as to the appropriate method of delimitation in the Channel Islands region. They were also in 'radical disagreement' as to the correct characterization of the geographical situation in the Atlantic region. While the United Kingdom viewed the coasts of the parties to be opposite throughout the arbitration area, France viewed the coastal relationship in the Atlantic as one of adjacency, no longer one of oppositeness.

In concluding on methodology, the court observed that 'the appropriateness of the equidistance method or any other method for the purpose of affecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case' (para. 97). As for the adoption in the *North Sea Continental Shelf* cases of the criterion of a 'reasonable degree of proportionality' between continental shelf areas and the lengths of relevant coasts, the court considered this no more than a 'factor to be taken into account' in appreciating the effects of geography on a given delimitation, particularly when utilizing the equidistance method. Furthermore, it was 'disproportion

rather than any general principle of proportionality' which was the relevant criterion or factor (paras 99, 101).

d. Application of the rules of the delimitation treaty to the geographical context

Having thus established the rules of international law applicable, the court proceeded to consider their 'concrete application' in the present case. In doing so, the court distinguished between three sectors: the English Channel (excluding the Channel Islands); the Channel Islands; and the 'Atlantic region'. It addressed each in turn.

(p. 194) The English Channel and Eddystone Rocks

In the English Channel, the court observed that the delimitation was clearly one between 'opposite' States in which the parties agreed that the boundary should, in principle, be the median line. Any irregularities in the coastline of each State were broadly offset by irregularities in the coastline of the other, with the result that the median line would provide a 'generally equitable delimitation'. Accordingly, the court's first step was to determine the course of the median line to the east and west of the points where the Channel Islands would have to be taken into consideration (para. 103).[6]

The agents of each party confirmed to the court that, in these areas, the boundary was agreed to be the median line, subject to certain reservations and qualifications on points of detail. Following meetings held between the parties' technical experts in light of a request of the court, the parties agreed on the course of a simplified median line in the channel, subject to an outstanding difference between them about the legal status of Eddystone Rocks and their effect on the boundary line. While the United Kingdom considered Eddystone Rocks to be an island that should have full weight in constructing the median line, France considered it to be a low-tide elevation that should be discounted altogether. This difference prevented the parties from reaching any agreement between Points F and G on the line. The course of the agreed median line, together with the gap between Points F and G, is illustrated in Figure B3.2.

The United Kingdom cited evidence that the Eddystone Rocks were only covered entirely at 'high water equinoctial springs', meaning that they were uncovered at 'mean high water springs', which the United Kingdom considered the relevant test for island status pursuant to its own legislation and 'international practice'. The United Kingdom pointed to British Admiralty Charts showing the status of Eddystone Rocks and the absence of any objection to those charts from the French authorities. It cited also a series of historical documents dating back to 1693, including French charts and eighteenth-century evidence to the effect that 4.3 feet had been cut from the top of House Rock when preparing the foundations of the first three Eddystone lighthouses. It said that contemporaneous evidence showed that the base of that rock was about 2 feet above mean high-water spring tides and 0.2 feet above the highest astronomical tide. Finally, the United Kingdom argued that France had acquiesced in the use of Eddystone Rocks as a base point, both for the measurement of UK fisheries zones and for the construction of a median line in (p. 195)

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Figure B3.2: *United Kingdom/France*: France claim.

(p. 196) the early 1970s. France rejected the United Kingdom's evidence of French acquiescence and noted that the United Kingdom had not connected Eddystone Rocks to the British coast in establishing its straight baselines in 1964. It also questioned the United Kingdom's concept of 'high-water', arguing that a large number of States considered this as meaning the limit of the highest tides.

The court emphasized that it was not concerned with the general question of the legal status of Eddystone Rocks. Rather, it must decide their relevance in the delimitation of the median line. For this purpose, the court attached particular weight to the fact that the parties' respective hydrographic experts had, in 1971, agreed the course of true and simplified median lines in the channel that had treated Eddystone Rocks as a valid base point. This evidence was reinforced by French acceptance in the past of Eddystone Rocks in the delimitation of UK fishery limits. Accordingly, on the basis of France's historic conduct, the court concluded that it should treat Eddystone Rocks as a relevant base point for delimiting the continental shelf boundary (paras 139–44).The course of the resultant median line between Points F and G (together with the course of the line ignoring Eddystone Rocks) is illustrated in Figure B3.2.

The Channel Islands

The court proceeded next to delimit the continental shelf boundary to the north and west of the Channel Islands.

France considered that the relevant 'opposite' coasts for the purposes of a median line boundary were the mainland coasts of France and the United Kingdom, and that the Channel Islands should be treated as 'a separate territory located within the continental shelf of the French mainland'. It therefore proposed a mainland-to-mainland median line together with a separate Channel Islands delimitation within an area of French continental shelf, effected by way of a series of arcs of circles of 6M in radius around the islands. As a result, the Channel Islands would be enclaved within a 3M territorial sea area and an additional 3M continental shelf. France highlighted that the Channel Islands were located within a rectangular bay of the French coast and only a few nautical miles distant from it, thus being intrinsically linked with the French land mass while being detached from the UK landmass. It said that they were therefore 'on the wrong side of the median line'. It maintained that any application of the equidistance method would sever its continental shelf in two in a way that was both contrary to its security, navigation, and defence interests and wholly disproportionate to the size of the Channel Islands.

The United Kingdom insisted that the Channel Islands themselves constituted the relevant 'opposite' coast of the United Kingdom for the purposes of a median line boundary. It argued that, for the purposes of the equidistance/special circumstances rule, France had failed to show that the Channel Islands constituted (p. 197) 'special circumstances', or that they justified departure from the median line. It argued that, as a matter of principle, the Channel Islands were entitled to their own continental shelf and that it was only very small

islands that should not be given full effect in the opposite coast of delimitation. It highlighted the size, population, and economic importance of the Channel Islands, together with their degree of political independence from the United Kingdom. It raised its own arguments of security, defence, and navigation in favour of a continuous continental shelf between its mainland and the Channel Islands. It observed that, even if there was to be any enclave, this must extend at least to a full potential 12M territorial sea around the islands.

The significant difference between the parties' respective median line proposals in the vicinity of the Channel Islands is shown in Figure B3.3.

The court observed that 'the substantial point at issue is whether the presence of the British archipelago of the Channel Islands close to the French coast is a "special circumstance" or a circumstance creative of inequity that calls for a departure from or variation of the equidistance method of delimitation' (para. 148). It remarked that it was 'manifest from a mere glance at the map that, with respect to the delimitation of the continental shelf as between [France and the UK], the Channel Islands region presents particular features and problems' (para. 180). It highlighted that the Channel Islands were 'situated not only on the French side of a median line drawn between the two mainland but practically within the arms of a gulf on the French coast', and that their presence 'disturbs the balance of the geographical circumstances which would otherwise have existed between the Parties' (para. 183).

The court acknowledged that the Channel Islands, possessing a considerable population and economy, must be differentiated from many of the rocks or small islands that had been cited by the parties in their pleadings. What is more, as between the United Kingdom and France, they must be treated as islands of the United Kingdom, not as semi-independent States entitled to their own continental shelf. The relevant paradigm was therefore of two opposite States, one of which possessed island territories close to the coast of the other. Furthermore, the court felt obliged to take into account the fact that the Channel Islands had an existing 12M fishery zone, expressly recognized by France, and the potential for a 12M territorial sea. As for the parties' respective arguments about navigation, defence, and security, the court concluded that they could not exercise a decisive influence on the delimitation given the particular character of the English Channel as a major route of international maritime navigation (paras 184–7).

Turning to the principle of natural prolongation, the court held that this was 'not absolute'; otherwise a small island might block the natural prolongation of the territory of the nearby mainland (paras 191–2). The court concluded that:

(p. 198)

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Figure B3.3: *United Kingdom/France*: court's decision (detail).

(p. 199)

> The presence of these British islands close to the French coast, if they are given full effect in delimiting the continental shelf, will manifestly result in a substantial diminution of the area of continental shelf which would otherwise accrue to the French Republic. This fact by itself appears to the Court to be, *prima facie*, a circumstance creative of inequity and calling for a method of delimitation that in some measure redresses the inequity. If this conclusion is tested by applying the equidistance–special circumstances rule of Article 6, instead of the rules of customary law, it appears to the Court that presence of the Channel Islands close to the French coast must be considered, *prima facie*, as constituting a 'special circumstance' justifying a delimitation other than the median line proposed by the United Kingdom (para. 196).

However, in light of the equitable considerations cited above, the court determined that the French proposal of a 6M enclave around the Channel Islands was not valid either. Accordingly, an 'intermediate solution' was required reflecting an 'equitable balance' between the respective claims and interests of the parties (para. 198). This would consist of, first, a 'primary boundary' constituted by a mainland coast median line ignoring the Channel Islands and, second, a separate boundary drawn at a distance of 12M from the Channel Islands' territorial sea baselines. The court noted that the combined effect would be to accord France 'a substantial band of continental shelf in the mid-Channel which is continuous with its continental shelf to the east and west of the Channel Islands region'. The delimitation of the remainder of the boundary between the Channel Islands and France, in the territorial sea areas to the south and south-west of the islands, was beyond the competence of the court (paras 201–2).

The resultant boundaries between Points D and E, and in the vicinity of the Channel Islands, are illustrated in Figure B3.4.

The 'Atlantic region'

The remaining task of the court was to determine the course of the boundary in the 'Atlantic sector', to the west of Point J (the most westerly point of the mid-Channel median line). In this sector, the parties were in deep disagreement as to both the nature of their coastal relationship and the method of delimitation to be applied.

France argued that the relevant coasts were no longer opposite each other in the Atlantic region and requested the court to discard the equidistance method altogether beyond Point J. Instead, it argued that the natural prolongation of the parties' respective territories must be determined by prolonging into the Atlantic 'lines expressing the general direction of their Channel coasts', and that the boundary should be formed by 'the bisector of the angle formed by these two lines'. The proposed lines expressing the general direction of the parties' coasts took no account of Ushant, on the French side, nor the Scilly Isles, on the UK side. France argued that those islands would have a distorting effect on the boundary if the equidistance method were to be employed in the delimitation. Consequently, (p. 200)

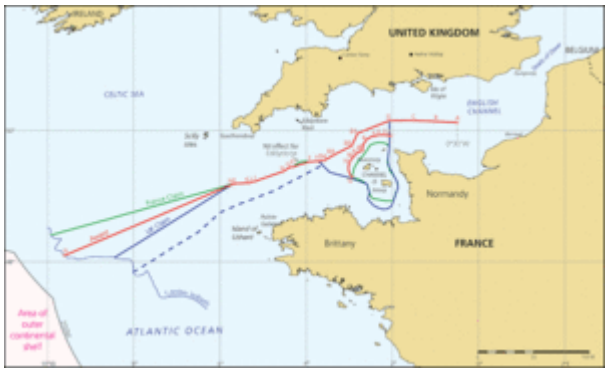

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Figure B3.4: *United Kingdom/France*: court's decision.

(p. 201) their existence constituted a special circumstance. This was particularly the case given the fact that the Scilly Isles were situated more than twice as far from the UK mainland as Ushant was from the French mainland. France highlighted the fact that the United Kingdom's proposed median line was constructed from only two base points, located in the Scilly Isles and Ushant, respectively, and asserted that it was therefore not an equidistance line as commonly understood either in customary international law or the 1958 Convention. France argued also that its position was confirmed by the principle of proportionality given that, while France had some maritime facade in the Atlantic region, the United Kingdom had none.

The United Kingdom argued that, as throughout the disputed area, the coasts of the United Kingdom and France were in a relationship of oppositeness throughout the Atlantic region. Consequently, pursuant to Article 6 of the 1958 Convention, the delimitation should be effected by way of a median line. The United Kingdom submitted that France had not discharged its onus of showing that special circumstances existed in the Atlantic region within the meaning of Article 6, nor that they justified a boundary other than the median line. The United Kingdom argued that special circumstances could only arise out of 'an exceptional geographical configuration in the sense of a geographical feature which is highly unusual', and that only 'very minor features' could distort a boundary in a manner totally disproportionate to their importance. It stated that, by contrast, both Ushant and the Scilly Isles were 'islands of considerable size' and that the Scilly Isles in particular represented a 'continuation of the Cornish peninsula'. To ignore them would therefore be to refashion nature and, drawing an analogy with West Germany's situation in the *North Sea Continental Shelf* cases, to compress the United Kingdom's continental shelf between France and Ireland in a way that would cause serious injustice. The United Kingdom's proposed median line boundary therefore gave full effect to all islands and low-tide elevations in the area, including Ushant and the Scilly Isles.

The parties' claims in the Atlantic region, including the French lines purporting to represent the general direction of their respective Channel coasts, are shown in Figures B3.1 and B3.2.

The court stated that the Atlantic region had characteristics which 'distinguish it geographically and legally' from the region within the English Channel. In particular, the shelf within this region was not confined within the arms of a comparatively narrow channel, but rather extended seawards from the coasts of the two countries into the open spaces of the Atlantic Ocean. The areas of continental shelf to be delimited 'lie off, rather than between, the coasts of the two countries'. Consequently, the geographical relation of the parties to the shelf was 'one of the lateral rather than opposite coasts' (paras 232–3).

The court rejected the French argument that the United Kingdom had no coastal frontage in the region, stating that the respective coastal frontages of the parties (p. 202) were broadly comparable. However, the court noted that the United Kingdom's coastal frontage projected further into the Atlantic due to the greater extension westwards of the Scilly Isles beyond the UK mainland than that of Ushant beyond the French mainland (paras 234–5).

The court observed that the two paragraphs of Article 6 of the 1958 Convention, related to delimitation of continental shelf areas between opposite and adjacent coasts, were 'essentially the same'. Indeed, the legal rule and method of delimitation prescribed in each was precisely the same. However, in the case of adjacent coasts, there was a greater risk that the equidistance method may produce an inequitable delimitation, due to the effect that individual geographical features might have on the course of an equidistance line (paras 238–40). The court was inclined to the view that the Atlantic region fell within the terms of Article 6(2) of the 1958 Convention, but concluded that the precise legal classification of the region was of little importance (para. 242).

The essential point was to determine whether, in the natural geographical circumstances, the prolongation of the Scilly Isles further westwards than Ushant rendered 'unjust' or 'inequitable' an equidistance boundary. The court noted that the effect of the Scilly Isles was to deflect the equidistance line considerably to the south-west (by an angle of 16°3614''), potentially accruing the United Kingdom an area of maritime space of approximately 4,000M². When account was taken of the comparability of the two States' respective coasts in other respects, the court considered that the further projection westwards of the Scilly Isles had much the same tendency to distort the equidistance line as 'the projection of an exceptionally long promontory'. As such, it was a 'special circumstance' for the purposes of the 1958 Convention that justified the delimitation of a boundary of other than the strict median line (paras 243–4).

This did not, however, give the court *carte blanche* to employ any method of delimitation. The method of delimitation proposed by France did not appear to the court 'to be one that is compatible with the legal régime of the continental shelf'. The court considered that the method of delimitation to be adopted 'must be one that has relation to the coasts of the Parties actually abutting on the continental shelf of that region'. Neither the Scilly Isles nor Ushant, each of which formed part of the land mass of the parties and was of a certain size and populated, could be disregarded without refashioning geography (paras 245–8).

The court recalled that, in a large proportion of the delimitations known to it where a particular geographical feature influences the course of the boundary, the method of delimitation adopted was 'some modification or variant of the equidistance principle, rather than its total rejection'. The court considered it in accordance with both the applicable legal rules and State practice to seek a solution whereby the equidistance line would be modified by giving the Scilly Isles half effect. Thus, in the Atlantic sector the boundary would be delimited by, first, (p. 203) delimiting lines equidistant between the two coasts both with and without using the Scilly Isles and, second, drawing a line midway between those two equidistance lines. The court observed that a further indication of the suitability of the half-effect method was the fact that the Scilly Isles extended the UK coastline slightly more than twice the distance that Ushant extended the French coastline (paras 249, 251).

The court, with the assistance of its technical expert, thus proceeded to delimit the continental shelf boundary in the Atlantic region out to the 1,000-metre isobath. In doing so, it first extended the median line to Point J, where the coasts of the two parties were still considered to be 'opposite'. The boundary then ran to a point equidistant from Ushant and the Scilly Isles (Point L), before following the half-effect line to its terminus at Point M. The

construction of this final leg of the continental shelf boundary, including the half-effect line, is illustrated in Figure B3.4.

III. Post Decision Application Related to Meaning and Scope of the Court's Decision

Following the Decision, the United Kingdom submitted an application to the court concerning two technical questions as to the meaning or, alternatively, the scope of the court's Decision, in accordance with Article 10.2 of the Arbitration Agreement. The first question related to the drawing of the 12M enclave boundary, where the line drawn by the court differed from the 12M fishery limit drawn by the United Kingdom around the Channel Islands. The second question concerned the drawing of the boundary out into the Atlantic, where the United Kingdom maintained that a more technically correct solution would be to use a geodesic line rather than a loxodrome.

France objected to the application on the grounds, *inter alia*, that it exceeded the competence of the court or, alternatively, that the original Decision was clear and contained no obscurity or contradiction. The court rejected the French objections and proceeded to consider the United Kingdom's request for interpretation.

On the issue of the 12M enclaves, the court agreed that both it and its expert had used coordinates that were not consistent with those used by the United Kingdom for fishery purposes. The court noted that there was no dispute between the parties as to the course of the 12M enclave boundary, but there was a contradiction between the 'expression of the court's intention' regarding the boundary and its expression in the *dispositif*. This discrepancy was a 'material error' equivalent to a 'slip of the pen' and within the power of the court to rectify. Accordingly, the court corrected its Decision such that it followed the base points presented by the United Kingdom in its Application (and agreed by its own technical expert). (p. 204) This produced an enclave consisting of 12 points connected by 12M arcs, Points 1 and 12 being on the median lines in the east and west respectively (see Figure B3.5).

As for the boundary line in the Atlantic, the court rejected the United Kingdom's request for a rectification. Here, the court had used a half-weight calculation drawn between two equidistance lines, all based on straight lines on a Mercator system (i.e. loxodromes). It admitted that the United Kingdom's use of geodesic lines drawn on a curved surface was more technically rigorous.[7] However, the court ruled that the method used by its expert was both valid and meticulously exact and there was thus no contradiction between the intention of the court and its expression in the *dispositif*. The line contained in the decision was therefore held to be *res judicata* and not open to correction (Figure B3.5).

IV. Technical Considerations

This was a highly technical case, involving technical experts representing both parties and an independent expert, M. Ermel, appointed by the court, whose detailed report is appended to the Decision. Despite this, there were technical failings that led to a challenge by the United Kingdom of the Decision, leading to a subsequent set of hearings and, ultimately, a correction of the Decision.

Geological arguments were put forward by the United Kingdom in proposing the Hurd Deep Fault Zone as a natural discontinuity forming the basis of its alternative delimitation proposal. The court, however, rejected this argument, considering the zone to be a minor feature in a largely continuous and shared continental shelf.

A significant portion of the boundary between their opposite coasts was agreed between the parties as a median line—both in the earlier negotiations and formally in identical submissions to the court, the exceptions being the portions at points D to E (adjacent to the Channel Islands), Points F to G (affected by Eddystone Rocks), and the westerly Atlantic section beyond Point M.

There was considerable argument concerning the status of Eddystone Rocks as a low-tide elevation or a permanently dry rock. Article 10 of the 1958 Convention (and Article 121(1) of UNCLOS) defines an island as being above water at high tide, without specifying which measure of high tide should be used. Mean high (p. 205)

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Figure B3.5: *United Kingdom/France*: UK's application for correction of the court's decision.

(p. 206) water spring tide has become the accepted definition of high tide as used on nautical charts and this was used as the measure by the United Kingdom. The position of Eddystone Rocks was complicated by the construction of the lighthouse on the highest point, and by the removal of over 4 feet of rock for its construction in the eighteenth century. These arguments were in the end not resolved by the court, which accepted Eddystone Rocks as a legitimate base point on the basis that France had already acquiesced to its use as a base point for determining the fishery limit. The trend in modern jurisprudence, however, might be to ignore such a small feature (see discussion in *Black Sea*, Part, B Chapter 19).

This was the first case to evaluate the effect of an island and to calculate a precise half-weight. The method used for the definition of a half-weight line is now in standard use. Two lines are drawn: one giving full weight to all features and the other ignoring the feature to be given reduced weight. The half-weight line is then drawn in between.

The inclusion of a detailed technical report as an annex to the Decision is to be commended and acted as a model for subsequent cases (although not in the practice of the ICJ). Despite its detail and apparent technical precision, the report contained notable errors in its definition of the 12M enclave, and a lack of clarity in the method to be used for the Atlantic section—loxodrome or geodesic—that led to the Post-Decision application by the United Kingdom.

V. Significance of the Decision and its Contribution to International Law

The *UK/France* case is a leading example of the use of ad hoc arbitration procedures to achieve a fast and effective result to a maritime delimitation dispute. The Arbitration Agreement emphasized the 'urgency' of the situation and the need for a 'speedy decision'. The Court of Arbitration duly obliged, rendering its Decision less than two years later. This

contrasts with the *Tunisia/Libya* case of the same era, where the ICJ took almost five years to render its delimitation judgment following referral by the two States.

The *UK/France* case is a classic example of a delimitation dispute where one State (the United Kingdom) argued for delimitation based on strict equidistance, while the other (France) argued that equidistance was not obligatory and should, in large part, be displaced by other methods in order to achieve a delimitation that was in accordance with 'equitable principles'. While the outcome of the case represented a compromise between the two States' various claims, the Decision represents a foundational example in modern jurisprudence of the use of equidistance as a starting point in maritime delimitation. The Court of Arbitration varied the equidistance line between the two mainland coasts only in the Atlantic region of (p. 207) the boundary, and even then only to the extent necessary to achieve an equitable delimitation.

In light of the ICJ's recent judgment in the *North Sea Continental Shelf* cases, both States framed their arguments with reference to the 'principle of natural prolongation'. However, the Court of Arbitration rejected any notion of delimitation based upon the physical characteristics of the seabed. It stated that the 'geological continuity' of the delimitation area justified an equidistance-based approach. Such a justification would be unnecessary today, as shown by more recent jurisprudence demonstrating the irrelevance of physical geology and geomorphology in continental shelf delimitations within 200M of the coast.

The Decision is a clear early example of the priority given to equidistance in delimitations between opposite coasts. Building on the *North Sea Continental Shelf* cases, the Court of Arbitration gave a clear exposition of the reasons why an equidistance-based delimitation will often be equitable in such cases, and why equidistance will more commonly require some adjustment, or rejection altogether, in the case of adjacent coasts.

The Decision is also an important forerunner to subsequent cases that have emphasized the overriding role of geography in determining the applicability of equidistance and the extent of any adjustment of a provisional equidistance line. The circumstances that led the Court of Arbitration to vary the median line in the Channel Islands and Atlantic regions were all of a geographical nature. Other arguments based upon, *inter alia*, geology, navigation, security, and defence were rejected. In a precursor to subsequent jurisprudence about non-encroachment, the Court of Arbitration held that the delimitation in the Atlantic region must bear relation to the coasts 'actually abutting on the continental shelf of that region'.

The Decision is particularly notable in connection with the different treatment accorded to various islands and island groups.

First, the Court of Arbitration accorded full weight to Eddystone Rocks, a small feature lying 8M from the English coast, on which a lighthouse has been situated since the eighteenth century. It reached this conclusion based upon the conduct of the parties and, in particular, France's historic acceptance of the feature as a base point in technical negotiations about the median line and in the establishment of UK fishery limits.[8] This aspect of the Decision emphasizes the importance of diplomatic protest or other objection in response to disputed claims to maritime space based on small offshore features.

(p. 208) Second, the Court of Arbitration delimited a separate continental shelf boundary to the north and west of the Channel Islands, within an area of French continental shelf. This represents the leading example in modern delimitation jurisprudence of the enclavement of a significant offshore island group.[9] The Court of Arbitration emphasized the exceptional geographical circumstances that mandated this solution: in particular, the fact that the Channel Islands were located close to the French mainland, on the 'wrong side' of the mainland-to-mainland median line, and 'practically within the arms of a gulf on the French

coast'.[10] Consequently, the Channel Islands were a 'circumstance creative of inequity' requiring departure from an equidistance-based approach in their vicinity.

Third, the Court of Arbitration accorded 'half-effect' to the Scilly Isles. This was the first modern example of a limited effect being given to a group of island features in an equidistance-based delimitation. The Court of Arbitration rejected France's proposed bisector solution, which ignored island features on both sides, on the basis that it would 'refashion geography'. Instead, it focused on working within the geography of the delimitation area, thus according full weight to the French island of Ushant and half weight to the Scilly Isles, whose comparatively remote seaward position would otherwise unduly distort the equidistance line.

Technical experts had a particularly significant role in this delimitation. Each party and the Court of Arbitration relied upon its own technical input. This facilitated a substantial measure of agreement between the parties in relation to the delimitation in the English Channel, but unfortunately the initial Decision was technically defective in several key aspects that led to the challenge by the United Kingdom and a partial rectification as a result (see Figure B3.5).

VI. Postscript: Developments since the Decision

There have been a number of delimitation developments since the Decision in this case that show the ongoing relevance of the court's delimitation.

On 24 June 1982, the United Kingdom and France concluded an agreement delimiting the continental shelf boundary eastward of 30°W up to a point described as point 14.[11] The delimitation from point 14 to the tripoint with the (p. 209) continental shelf of Belgium was effected by a further Agreement of 23 July 1991.[12] The territorial sea boundary in the Dover Strait was agreed in 1988, and the territorial sea boundary between Jersey and the French mainland coast was agreed in 2000.[13] The territorial sea boundary between Guernsey and France is outstanding (as at the time of writing), although a fisheries management boundary was agreed in 1992.

On 19 May 2006, France, Ireland, Spain, and the United Kingdom submitted information on the limits of the continental shelf beyond 200M in the area of the Celtic Sea and the Bay of Biscay. The four States informed the CLCS that the area concerned was not in dispute between them and would not prejudice matters concerning the delimitation of the continental shelf. The CLCS adopted recommendations on the joint submission on 24 March 2009.[14] Delimitation of this quadripartite area among the four States is yet to be agreed (at the time of writing).

In March 2013, the United Kingdom enacted legislation setting out its claimed EEZ.[15] The legislation reflects EEZ delimitation agreements made with France under a 2011 Exchange of Letters (up to point N in the Decision) and with Ireland on 28 March 2013. However, the UK legislation includes a line extending from point N out to a point at 200M equidistant from French and UK baselines (point 85 in the legislation, at 10°37'W 9°52'W), which potentially overlaps with the EEZ and continental shelf entitlements of France in that area.

Footnotes:

1 Replacing Mr Paul Reuter, who resigned for reasons of ill health.

2 Arbitration Agreement, Art. 2.

3 The court noted that the parties were agreed, in principle, that their seabed and subsoil boundary between the Channel Islands and the French mainland should be the median line,

and that selection of base points for that purpose was ‘a matter peculiarly suitable for determination by direct negotiations between the Parties’ (para. 22).

4 Art. 6.1. ‘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 points of the baselines from which the breadth of the territorial sea of each State is measured’.

5 Mr Herbert Briggs issued a separate declaration dissenting from this aspect of the Decision. He concluded that the French reservations had no object or relevance and that, consequently, the 1958 Convention applied to the delimitation, supplemented as required by customary international law.

6 The United Kingdom presented a subsidiary argument to the effect that, in the absence of a median line, the Hurd Deep and Hurd Deep Fault Zone should determine the course of the continental shelf boundary in the English Channel. The court rejected the argument due to the ‘essential geological continuity’ of the shelf in the disputed area, with the result that there was no legal ground for discarding the equidistance or any other method of delimitation (para. 108 and ‘Technical Considerations’ below).

7 Moreover, the use of a geodesic rather than a loxodrome makes about a 4M difference to Point N in the United Kingdom’s favour.

8 For a similar case of full weight being accorded to a small offshore feature as a base point in delimitation as a result of historic acquiescence, see *Newfoundland/Nova Scotia*, Part, B Chapter 14.

9 For a more recent example of enclaving of smaller offshore features by the ICJ, see *Nicaragua/Colombia*, Part, B Chapter 21.

10 The court also emphasized the distinction between the present case and the situation of the small French islands of St Pierre and Miquelon off the Canadian coast (para. 200). Subsequently, a court of arbitration effectively accepted the distinction and thus dismissed Canada’s attempt to enclave those islands: see Part, B Chapter 10.

11 Agreement between the Government of the French Republic and the Government of the United Kingdom of Great Britain and Northern Ireland relating to the Delimitation of the Continental Shelf in the Area East of 30 Minutes West of the Greenwich Meridian, 24 June 1982, 1316 UNTS 120.

12 Agreement between the Government of the French Republic and the Government of the United Kingdom of Great Britain and Northern Ireland relating to the completion of the delimitation of the continental shelf in the southern North Sea, 23 July 1991, 1692 UNTS 296.

13 Agreement between the Government of the French Republic and the Government of the United Kingdom of Great Britain and Northern Ireland concerning the establishment of a maritime boundary between France and Jersey. 4 July 2000, UK Treaty series No 8 (2004).

14 Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Joint Submission made by France, Ireland, Spain, and the United Kingdom of Great Britan and Northern Ireland in respect of the area of the Celtic Sea and the Bay of Biscay on 19 May 2006, available at <http://www.un.org/Depts/los/clcs_new/submissions_files/frgbires06/fisu_clcs_recommendations_summary2009.pdf>

15 The Exclusive Economic Zone Order 2013, made under the Marine and Coastal Access Act 2009, came into force on 31 March 2014.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 4 Dubai-Sharjah Border Arbitration (Award of the ad hoc 'Court of Arbitration', 19 October 1981)

From: A Practitioner's Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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(p. 210) 4 *Dubai-Sharjah Border Arbitration* (Award of the ad hoc 'Court of Arbitration', 19 October 1981)

Case Note: delimitation of territorial sea and continental shelf entitlements between adjacent Emirates forming part of a federal State—effect of historic administrative decision falling short of binding arbitral award—construction of equidistance line—use of harbour works as base points—consideration of 'special circumstance' constituted by small offshore island—relationship between 12M territorial sea entitlement of offshore islands and continental shelf claims of neighbouring States

Citation: *Dubai-Sharjah Border Arbitration*, Award, 19 October 1981, (1981) 91 *International Law Reports* 543

Institution: ad hoc Court of Arbitration

Basis of jurisdiction: Arbitration Agreement of 30 November 1976

The court of Arbitration: Cahier (President), Simpson, and Simmonds

Applicable law: Customary international law (taking into account the 1958 Convention on the Territorial Sea and Contiguous Zone, the 1958 Convention on the Continental Shelf, developments at the Third UN Conference on the Law of the Sea and State practice)[1]

Areas delimited: territorial sea; continental shelf (within 200M)

I. Introduction and Context

This case arose out of a dispute over the land and maritime boundary between the Emirate of Dubai and the Emirate of Sharjah in the United Arab Emirates ('UAE'). The UAE has the second longest coast line (after Iran) on the Arabian/(p. 211)

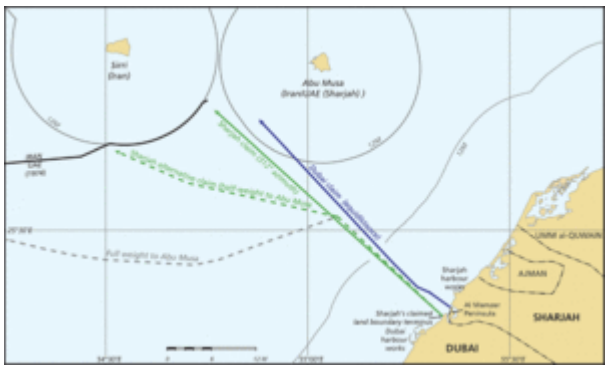

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Figure B4.1: *Dubai/Sharjah*: regional setting and parties' claims.

Persian Gulf (the 'Gulf'), extending from its lateral boundaries with Qatar (at that time) and Oman for approximately 250M.

The parties have adjacent coastlines that cumulatively extend for approximately 41M. The island of Abu Musa (claimed by both Sharjah/UAE and Iran) lies approximately 35M offshore from the UAE (and 43M offshore from Iran), near the middle of the Gulf. Iran and the UAE signed an agreement in 1974 regarding the delimitation of a section of their continental shelf boundary. The general geographical context is illustrated in Figure B4.1.

The parties had been under the protection of Great Britain between 1892 and 1971, but had no clearly defined boundaries. The first attempt to delimit a land boundary took place in 1937, in order to facilitate the definition of British oil company concessions with the parties' respective rulers. A British official surveyed the territory. In 1956 to 1957, on the basis of the official's reports and following a request by the Rulers of Sharjah and Dubai to the British Government to 'arbitrate' the boundaries between them, the British Political Agent, Mr Tripp, made a series of decisions or 'awards' on the coastal terminus, the coastal region, and the interior (the 'Tripp Decisions'). However, the Ruler of Dubai declined to accept the Tripp Decisions. The Tripp Decisions did not extend to the maritime boundary.

In 1949, at the instigation of British authorities, the Rulers of Sharjah and Dubai made declarations in a general form regarding their continental shelf rights, namely to territory 'extending seaward to boundaries to be determined more precisely as occasion arises, on equitable principles'. In 1963, the British Government (p. 212) attempted to secure agreement on the offshore boundaries between the parties, proposing the adoption of a 312° rhumb line (or loxodrome) running seaward as a lateral boundary from the land boundary terminus as established in the Tripp Decisions. This was rejected by the Ruler of Dubai as it would have divided sovereignty over the Al Mamzer peninsula, which formed part of the dispute.

The parties submitted the dispute to arbitration pursuant to an Arbitration Agreement signed on 30 November 1976.

II. Positions of the Parties and Summary of the Award

a. The applicable law

The Arbitration Agreement contained no applicable law provision. Dubai argued that international law governed the dispute. Sharjah highlighted the inter-federal character of the dispute and argued that UAE law applied alongside international law, with the implication that the boundaries were already internally settled. The tribunal noted that the Constitution of the UAE contained no provisions relating to the law applicable to territorial disputes between member Emirates. It found this 'scarcely surprising' as the same would be 'true of the constitutional documents of the majority of Federations'. It observed that federal territorial disputes are 'almost always resolved by reference to international law'. The tribunal thus determined that, although the dispute affected internal relationships within a federation, international law was applicable (pp. 585–90).

b. The Tripp Decisions and the land boundary terminal point

Sharjah argued that the Tripp Decisions constituted arbitral awards which the tribunal was bound to follow as *res judicata* in respect of the land boundary, including its terminal point. Dubai argued that the tribunal had to determine the boundary *de novo* as the Tripp Decisions were administrative decisions only, rather than arbitral awards. On that basis, the concept of *res judicata* could not apply. Dubai also argued that the consent of the Ruler of Dubai to the determination of the land boundary by Mr Tripp had not been given freely.

The tribunal agreed with Dubai that the Tripp Decisions were binding administrative decisions, but not arbitral awards. As such, they had legal effect, but could be set aside where the boundary was 'in whole or in part rejected' by a party and was 'neither recognized nor effectively applied in practice' by both parties. The tribunal referred to the 1958 International Law Commission Model Rules of Arbitral Procedure, noting that the Tripp Decisions had lacked the two characteristics of arbitration set out in the Model Rules: namely, the ability of parties to 'address their arguments to a tribunal…each replying to the other' and the (p. 213) existence of a reasoned decision. Accordingly, the tribunal determined that it would consider the land and maritime boundary *de novo*.[2] The tribunal rejected Dubai's argument about lack of consent to the Tripp process, noting that while

international negotiations were always subject to influences and pressures, in this case there was no evidence that Great Britain had procured Dubai's agreement to the process by way of duress within the meaning of Articles 51 and 52 of the VCLT (pp. 568–85).

The tribunal divided the land boundary into three zones: (1) the coastal zone; (2) the boundary near to the coast; and (3) the internal boundary. The 'coastal zone' referred to an area extending from Dubai Creek to Khan Creek (Figure B4.2), a distance of approximately 5 miles. The dispute in this zone centred on the question of whether Dubai or Sharjah exercised effective control over the Al Mamzer peninsula. The tribunal found that Sharjah had controlled part of the peninsula during the nineteenth century, but had abandoned such control, and thus lost any legal title, by 1940. By contrast, during the twentieth century, Dubai had increasingly asserted its control over the peninsula (for example, through police patrols, guarding a wrecked vessel, and conducting inquests into bodies found on the beach). Sharjah had not protested Dubai's activities until the 1970s. The tribunal concluded that Dubai had undertaken sufficient acts of control and sovereignty which, coupled with its rejection of the Tripp Decisions, demonstrated a clear assertion of sovereignty. The Al Mamzer peninsula was accordingly under the control of Dubai (pp. 595–625).[3]

c. Delimitation of the maritime boundary

The positions of the parties

Sharjah proposed adoption of the 312° rhumb line (or loxodrome) advanced by the British Government in 1963, on the condition that it was drawn from the land boundary terminal point set in the Tripp Decisions. It argued that this boundary had in practice been accepted by the parties. If the tribunal rejected the land boundary terminal point set out in the Tripp Decisions, Sharjah argued that the boundary was to be based on equidistance. Dubai rejected the 312° line as it disputed both the division of the Al Mamzer peninsula and the location of the land boundary terminal point determined in the Tripp Decisions. Dubai considered that there was no existing maritime boundary and that the tribunal must therefore determine it *de novo* based on equidistance.

(p. 214)

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Figure B4.2: *Dubai/Sharjah*: the parties' claims and award.

The parties differed as to how an equidistance-based delimitation was to be applied to the facts. In particular, they differed as to whether certain harbour works could be used as base points in drawing an equidistance line and the question of the treatment to be given to the offshore island of Abu Musa.

(p. 215) In relation to harbour works, Dubai argued that its harbour works in the vicinity of the land boundary terminus (which extended three times further seaward than those of Sharjah) provided legitimate base points pursuant to Article 8 of the 1958 Convention on the Territorial Sea and Contiguous Zone ('Territorial Sea Convention').[4] Sharjah argued that the use of such base points would be prejudicial to it and thus inequitable.

In relation to Abu Musa, Sharjah claimed that the island should be given half-effect in delimiting the continental shelf boundary.[5] It cited the treatment of the Scilly Isles in the *UK/France Continental Shelf* case and the treatment of the island of Kharg in the 1968 continental shelf delimitation between Iran and Saudi Arabia. It described Abu Musa as 'considerable' and 'economically important'. It said that all of its oil revenues were derived from the adjacent seabed and pointed out that the feature had a population of over 800 people. It said that the attribution of half-effect would be equitable since it would (unlike a full-effect equidistance line) not encroach upon Dubai's offshore oilfields. Dubai argued that the island was remote, small, and very close to the equidistance boundary between Dubai and Sharjah. It pointed out that Abu Musa was claimed by Iran, with the result that, as a disputed feature, it should be given no weight in the delimitation. Furthermore, it argued that use of the island and the resulting diversion of the boundary across Dubai's coast would contravene the principle of 'non-encroachment'.

The parties' respective claim lines are illustrated in Figure B4.1.

The tribunal's assessment of its task

As the tribunal had rejected the coastal terminus of the land boundary set out in the Tripp Decisions, it did not give further consideration to the 312° rhumb line (or loxodrome). Accordingly, its task was to construct 'an entirely new maritime boundary by fixing an equidistance line, modified for the reasons set out below in two important particulars', from the tip of the Al Mamzer peninsula to a point at which it would intersect a possible future continental shelf boundary between Iran and the UAE. In doing so, it would apply the governing rules and principles of customary international law. The tribunal took into account also the terms of the 1958 Territorial Sea Convention and Continental Shelf Convention and developments within the Third UN Conference on the Law of the Sea up to the August 1980 Draft Convention on the Law of the Sea.[6] It further stated that it had taken (p. 216) 'full account of State practice in the region of the Arabian Gulf, and elsewhere'. It declared that it had sought to ensure that the boundary conformed to 'equitable principles', producing a result which allowed, in equity, a 'proportionate influence to the existence of "special circumstances" or "special and unusual features" which require special treatment' (p. 654).

The use of harbour works as base points

The tribunal noted that the sole matter in dispute concerned the 'admissibility, or inadmissibility, of taking into account, *as part of the coast*, the outermost permanent harbour works of Dubai and Sharjah' (p. 661).

The tribunal observed that Dubai's harbour works were approximately 2 miles in length and projected approximately 1.5 miles seaward, while those of Sharjah were approximately 2 miles in length and projected approximately half a mile seaward. It observed that the parties had adduced 'no authorities of direct value and compatibility…to show either the use, or the non-use, of harbour works in the construction of maritime boundaries between adjacent coastal States'. It noted, however, that there was a 'body of practice, and of conventional law, in which full effect has been given to harbour works in the construction of

frontal maritime boundaries as between opposing States'. The tribunal held that the 'same principles apply to the construction of lateral maritime boundaries as between adjacent States' (p. 662).

The tribunal concluded that, in the light of the provisions of Article 8 of the Territorial Sea Convention and Article 11 of (the then draft of) UNCLOS, the permanent harbour works of both Dubai and Sharjah 'must be treated as a part of the coast for the purpose of drawing the base lines from which the lateral sea boundary between them is constructed'. In the opinion of the tribunal, giving 'full effect' to both sets of harbour works would not produce an inequitable result because, having regard to the whole of the maritime area, the consequent deflection of the line was 'slight'. The tribunal concluded that the resulting line was 'in all respects equitable as between the territorial seas' (pp. 662–3).

Treatment of the island of Abu Musa

The tribunal identified its task as being to examine, first, the extent of the territorial sea to which Abu Musa was entitled, and, second, the extent, if any, of the island's entitlement to a share of the continental shelf of the Gulf beyond its territorial sea. Regardless of the competing claims of Iran in respect of the feature, (p. 217) the tribunal viewed Abu Musa as a 'territory appurtenant to one of two adjacent States in dispute over their maritime boundary' (p. 673).

Dubai argued that Sharjah's claim to a 12M territorial sea around Abu Musa would be contrary to State practice with regard to disputed islands and that this entitlement would cross into Dubai's continental shelf. It therefore argued that the maritime zones generated by the island should be limited to a territorial sea of 3M. The tribunal found that the entitlement of all islands to a territorial sea was 'well established' in international law, citing Article 10 of the Territorial Sea Convention and Articles 3 and 121 of (the then draft of) UNCLOS. On this basis, the tribunal declared that:

> Every island, no matter how small, has its belt of territorial sea. The island of Abu Musa, for which a belt of territorial sea extending to a breadth of 12 nautical miles from the low-water base lines of its coast is claimed by the Government of Sharjah, is no exception (p. 673).

What is more, Abu Musa's 12M territorial sea entitlement existed 'quite independently and separately from either the actual or potential continental shelf claims of neighbouring States'. Accordingly, the tribunal concluded that 'full effect must be given to the territorial sea generated by the island and thus the notional continuation of the lateral equidistance boundary between the continental shelves of Dubai and Sharjah is displaced…by the outer limit of the extent of the territorial sea (of 12 nautical miles in breadth) claimed by Sharjah' (p. 674).

The tribunal turned to address the question of whether Abu Musa should additionally be given some effect in the continental shelf delimitation between the parties. Following a review of Article 6 of the 1958 Continental Shelf Convention and developments at the Third UN Conference on the Law of the Sea, together with the recent jurisprudence, it stated that it was 'satisfied that use of the equidistance method is generally appropriate to, and required in, the present case and that the delimitation of the maritime boundary between the Parties beyond their respective territorial seas should properly be based upon this method where that boundary is unaffected by the presence of the island of Abu Musa which is the only "special circumstance" of which account must be taken in the area concerned' (pp. 672–3). It cited commentary of Dr Derek Bowett stating that 'to give islands

full effect, partial effect or no effect may be equitable or not, depending on the particular geographical and other relevant circumstances of each particular case'.[7]

The tribunal continued:

> Certain islands are clearly capable of giving rise to 'special circumstances' and thus to the invocation of equitable considerations where their existence would otherwise (p. 218) produce a distortion of an equidistance line or an exaggerated effect which would be inequitable. It may thus be necessary, in the delimitation of a boundary, to abate the effect of an island which forms an incidental special feature (p. 676).

The tribunal concluded that to allow Abu Musa any entitlement to an area of continental shelf beyond the extent of its belt of territorial sea would produce 'a distorting effect upon neighbouring shelf areas'. Applying equitable principles, the tribunal held that no effect should be accorded to Abu Musa for the purpose of plotting equidistant shelf boundaries between it and neighbouring continental shelf areas. This would 'preserve the equities of the geographical situation' and would, furthermore, be consistent with 'comparable regional practice' (p. 677).

The tribunal thus determined that:

> the maritime boundary between the Emirates of Dubai and of Sharjah shall be based upon an equidistance line beginning at the terminal point of the land boundary and proceeding thence seawards, taking account of the harbour works of both Dubai and of Sharjah, until such line intersects a 12 nautical mile limit around the island of Abu Musa and the low tide elevations in its vicinity. Thence the line shall follow the 12 nautical mile limit until the latter intersects the maritime boundary between Iran and the United Arab Emirates at a position yet to be determined (p. 677).

The maritime boundary thus delimited by the tribunal is illustrated in Figure B4.2.

III. Technical Considerations

Once the land boundary terminus had been established as the tip of the Al Mamzer Peninsula, apart from the effect of Abu Musa, the parties' claim lines were very similar. The original Tripp 312° azimuth line, calculated as perpendicular to the general direction of the coast, is very similar to the final award once transposed to the same starting point. Given that the Tripp line was only a perpendicular, the tribunal could have transposed it to the Al Mamzer Peninsula, but instead dismissed it without discussion as it started in the wrong place.

The use of harbour works on both sides as base points for drawing the equidistance line is notable, especially as the Dubai works were three-times further seaward. If this case were to be re-run today, recent massive harbour developments (and the construction of extensive artificial islands), especially on the Dubai side, would either give a very different result or mean that harbour works would have to be accorded little (or no) weight.

Although there was no proportionality analysis carried out, there was discussion of the additional maritime space (133.8M²) that Abu Musa would generate if given half effect (in addition to the 544.5M² of space generated by its territorial sea). This was considered to produce a 'disproportionate and exaggerated entitlement to (p. 219) maritime space' (p. 677). Enclaving Abu Musa within a 12M territorial sea also conformed to regional State practice. In particular, the islands Al-'Arabiyah and Farsi along the Iran-Saudi Arabia

boundary, and Dayinah on the UAE-Qatar boundary, were all given only a territorial sea and not used as base points for constructing equidistance lines.

IV. Significance of the Decision and its Contribution to International Law

The *Dubai/Sharjah* arbitration, like the later *Newfoundland and Labrador/Nova Scotia* case, represents a leading example of the application of international law to the delimitation of maritime boundaries between the internal units of a federated State. The Award was rendered on the cusp of the signature of UNCLOS and provides a useful indication of the state of customary international law at that time as regards the delimitation of territorial sea and continental shelf boundaries. Notably, for the purposes of establishing the state of customary international law, the tribunal paid extensive regard to events at the Third UN Conference on the Law of the Sea and the then draft text of UNCLOS. Article 83 of that draft, which sought to navigate an uneasy course between delimitation based upon 'equidistance' and delimitation based upon 'equitable principles', was substantially different from the final text of UNCLOS Article 83.

Building on the recent precedent of the *UK/France Continental Shelf* case, the tribunal set out a clear exposition of the equidistance/special circumstances approach to delimitation of the territorial sea and continental shelf between adjacent coasts. In doing so, and with an eye on the then draft text of Article 83, the tribunal emphasized that its delimitation would also comply with 'equitable principles'—an emphasis that has been absent from more recent judgments and awards. The application of an equidistance-based approach was made straightforward by the fact that, as the tribunal observed, the relevant coastlines of the parties were 'more or less straight'.

Two aspects of the decision are particularly notable:

- First, the tribunal's decision to accord full weight to the 2-mile-long harbour works of each of the parties in its assessment of base points for construction of the equidistance line. It was unswayed by the fact that the harbour works of Dubai extended three times further seawards than those of Sharjah. The tribunal's decision in this respect was faithful to the text of Article 8 of the 1958 Territorial Sea Convention (as replicated at Article 11 of UNCLOS) as regards treatment of permanent harbour works forming 'part of the coast'. Nevertheless, this aspect of the decision can be contrasted with the ICJ's decision to exclude the substantially longer (7.5km) Sulina dyke as a base point in the (p. 220) *Black Sea* case. One of the reasons given for exclusion in that case was the need to 'avoid or mitigate the problem of excessive length'.

- Second, the tribunal's treatment of the small offshore island of Abu Musa. The tribunal struck a balance by safeguarding the island's full 12M territorial sea entitlement while otherwise according it zero weight in the continental shelf delimitation. In doing so, it sought to avoid the 'distorting effect' that any greater weighting would have on neighbouring continental shelf areas. As a result, part of the delimited continental shelf boundary between Dubai and Sharjah follows the 12M arc of the island. This approach has been replicated in the treatment of similar small offshore features in subsequent cases such as Serpents' Island (in the *Black Sea* case), various small cays (in *Nicaragua/Honduras*, and St Martin's Island (in *Bangladesh/Myanmar*).

Footnotes:

[1] The United Arab Emirates was not a party to either of the 1958 Conventions.

[2] John Simpson QC dissented, finding that the process leading to the Tripp Decisions was one of arbitration and that the decisions themselves were arbitral awards.

[3] In his dissenting opinion, John Simpson QC disagreed with the tribunal on this point, noting that the period during which Dubai claimed greater control was ‘much too short’ to defeat the *de jure* title of Sharjah.

[4] Article 8 of the Territorial Sea Convention, which mirrors the wording of the first sentence of Art. 11 of UNCLOS, provides: ‘For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast’.

[5] Abu Musa did not affect the construction of the equidistance line in the territorial sea.

[6] Notably, Art. 83(1) of the August 1980 draft of UNCLOS provided: ‘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’. This contrasts with the continental shelf delimitation wording ultimately adopted by Art. 83 of UNCLOS. The history of the drafting of Art. 83 of UNCLOS is addressed in Part A, Chapter 1, above.

[7] Bowett, D. W., *The Legal Regime of Islands in International Law* (Alfen aan den Rijn, 1979), p. 178.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 5 Tunisia v. Libya (Judgment of the International Court of Justice, 24 February 1982)

From: A Practitioner's Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Coastal states — Continental shelf — Delimitation — Territorial sea — UNCLOS (UN Convention on the Law of the Sea)

(p. 221) 5 *Tunisia v. Libya* (Judgment of the International Court of Justice, 24 February 1982)

Case Note: development of the juridical continental shelf—natural prolongation and its relationship with delimitation—relevance (or not) of geographical, geomorphological, bathymetric, and geological factors—application of 'equitable principles' to achieve an equitable result—equidistance not a mandatory or privileged method—evidence of '*modus vivendi*' insufficient to prove boundary—division of relevant area into two sectors—historic hydrocarbon concession practice indicative of '*de facto*' line in first sector—attribution of 'half effect' to islands in second sector—proportionality check

Citation: *Continental Shelf* (*Tunisia v. Libya*), Judgment, 24 February 1982, *ICJ Reports* 1982, p. 18

Institution: ICJ

Basis of jurisdiction: Special Agreement between the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya, 10 June 1977

The Court: *Judges* Elias (Acting President), Forster, Gros, Lachs, Morozov, Nagendra Singh, Mosler, Oda, Ago, Sette-Camara, El-Khani, Schwebel, *Judges ad hoc* Evensen (appointed by Tunisia), Jiménez de Aréchaga (appointed by Libya)

Applicable law: equitable principles, relevant circumstances and 'new accepted trends in the Third Conference on the Law of the Sea' (per Article 1 of Special Agreement)

Area delimited: continental shelf (within 200M)

I. Introduction and Context

Tunisia and Libya are situated on the northern coastline of the African continent fronting the Mediterranean Sea. The States' most proximate coastlines are adjacent, with Tunisia lying to the west and Libya to its east and south-east. The eastern coast of Tunisia coincides with the western end of a roughly rectangular (p. 222) indentation in the northern coastline of Africa, the eastern end of which forms the Libyan Gulf of Sirt. The seaward limit of the land frontier between Libya and Tunisia is at Ras Ajdir. To the west of the land frontier, just beyond the Tunisian island of Jerba, there is a significant (approximately 90°) change in direction of the coastline in the concavity formed by the Gulf of Gabes. This results in a length of Tunisian coastline running north-east to Ras Kaboudia, at which point the coast again turns towards a westerly orientation through the Tunisian Gulfs of Hammamet and Tunis.

The delimitation concerned the area of the continental shelf lying to the north of the coast on each side of Ras Ajdir. The western side of the area was bounded by part of the Tunisian coast, while the eastern side was unconfined by any visible feature or agreed delimitation.[1] Tunisia and Italy had entered into a continental shelf agreement in 1971, resulting in a delimitation between them that was based primarily on a median line but with special arrangements, including semi-enclaves, for the small Italian islands of Lampione, Lampedusa, Linosa, and Pantelleria.

The geographical context of the delimitation is illustrated in Figure B5.1.

The historic hydrocarbon activity of the parties formed an important backdrop to the dispute. Each had granted licences or concessions for exploration and exploitation off its coast in shelf areas regarded by the party concerned as appertaining to itself and a considerable amount of drilling had taken place. Libya had granted its first offshore concession in 1968, following which fifteen wells were drilled between 1960 and 1976, several of which proved productive. In the meantime, Tunisia had granted its first offshore concession in 1964. In 1974, the south-eastern boundary of a Tunisian offshore concession was specified to be formed by 'the equidistance line…determined in conformity with the principles of international law pending agreement between Tunisia and Libya defining the limit of their respective jurisdictions over the continental shelf'. The same year, Libya granted a concession the western boundary of which (consistent with a previous concession) was a line drawn from Ras Ajdir at 26° to the meridian (i.e. to the west of the equidistance line—see Figure B5.1). The outcome was an overlapping of claims in an area some 50M from the coasts.

In 1976, following protests by each party against the hydrocarbon activities of the other, diplomatic discussions led to the signing of a Special Agreement of 10 June 1977 that referred the delimitation dispute to the ICJ.[2]

(p. 223)

View full-sized figure

Figure B5.1: *Tunisia/Libya*: the parties' claims and the court's judgment.

Under Article 1 of the Special Agreement, the parties requested the court to render its judgment in the following matter:

> What principles and rules of international law may be applied for the delimitation of the area of the continental shelf appertaining to [Libya] and the area of the continental shelf appertaining to [Tunisia], and the Court shall take its decision according to equitable principles, and the relevant circumstances which characterize the area, as well as the new accepted trends in the Third Conference on the Law of the Sea.
>
> (p. 224) Also, the Court is further requested to clarify the practical method for the application of these principles and rules in this specific situation, so as to enable the experts of the two countries to delimit these areas without any difficulties.

Pursuant to Article 2 of the Special Agreement, immediately following the court's judgment, the two parties would meet to put into effect these principles and rules to determine the line of delimitation of the continental shelf, with a view to the conclusion of a treaty.

The US, the Netherlands, Canada, Argentina, Malta, and Venezuela, in reliance on Article 53(1) of the Rules of Court, requested copies of the pleadings in the case. After objection by one of the parties, the President decided that the pleadings and their annexures would not, for the present, be made available to States not parties to the case. However, after ascertaining the further views of the parties, the court decided that the pleadings should be made accessible to the public with effect from the opening of the oral proceedings in the case (as is customary in ICJ proceedings and allowed by Article 53(2) of the Rules).

In January 1981, Malta applied for permission to intervene in the case pursuant to Article 62 of the ICJ Statute. The court refused Malta's request in a judgment dated 14 April 1981, holding the fact that its judgment might cite reasons that would be raised in the subsequent delimitations of Malta's continental shelf as an insufficient basis for intervention.

II. Positions of the Parties and Summary of the Judgment

a. The applicable law and the scope of the court's mandate

The court observed that, while it was bound to have regard to all the legal sources specified in Article 38(1) of its Statute in determining the relevant principles and rules applicable to the delimitation, it was also bound, in accordance with Article 38(1)(a), to apply the provisions of the Special Agreement. The court noted that two of the three factors referred to in Article 1 of the Special Agreement ('equitable principles' and 'relevant circumstances') were in harmony with its jurisprudence, as embodied by the North Sea Continental Shelf cases.

With regard to the third factor ('new accepted trends'), the court noted that the Third United Nations Conference on the Law of the Sea had not yet come to an end and the draft convention of 28 August 1981 was 'not yet the final text to be submitted for signature'. Nevertheless, it observed that 'the Court would have had *proprio motu* to take account of the progress made by the Conference even if the Parties had not alluded to it in their Special Agreement', to the extent that the court concluded that draft provisions embodied or crystallized pre-existing or emergent rules of customary international law (paras 23–4).

(p. 225) The parties agreed that the court's mandate effectively fell between those in the *North Sea Continental Shelf* cases (where the court was asked only to indicate the principles and rules of international law applicable to the delimitation) and the *UK/France Continental Shelf* arbitration (where the Court of Arbitration was requested to delimit the course of the boundary throughout the relevant area). However, the parties disagreed on the precise limits of the court's mandate under the Special Agreement. Tunisia considered that the court was required to specify precisely the practical way in which the principles and rules of delimitation should be applied, leaving 'only a technical task of application'. Libya maintained that the court was not authorized to 'carry the matter right up to the ultimate point before the purely technical work' and had not been invited to set out the specific method of delimitation. The court observed that, pursuant to the Special Agreement, the parties anticipated reaching a delimitation agreement within three months of its judgment. Accordingly, at that stage, the court considered that 'there will be no need for negotiation between experts of the Parties regarding the factors to be taken into account in their calculations, since the Court will have determined that matter'. The court would therefore proceed to render its judgment with the degree of precision required to fulfil its role under the Special Agreement (paras 25–30).

b. Analysis of the juridical continental shelf, the principle of natural prolongation, and its relationship to delimitation

The arguments of the parties centred in large part upon the physical seabed in the disputed area and the relevance and application of the principle of natural prolongation, as espoused in the *North Sea Continental Shelf* cases. The court observed that the character of the seabed had been the subject of 'very abundant examination by the Parties, and of detailed scientific studies by their experts during the written and oral proceedings'. The parties and their experts expended substantial effort disputing the nature and effect of a series of physical features of the seabed, including two submarine ridges, certain submarine cliffs, and the deep-water 'Ionian Abyssal Plain'. The court noted that the disputed area formed part of a broader submarine region constituting the submerged part of a large geomorphological feature referred to by the parties as the Pelagian Block (para. 32).

The court remarked that 'the concept of the continental shelf, which may be said to date from the Truman Proclamation of 28 September 1945, has become one of the most well known and exhaustively studied, in view of the considerable economic importance of the exploitation activities effected under its aegis'. Tunisia and Libya were not parties to the 1958 Geneva Convention on the Continental Shelf. However, they each devoted much attention to what the court had described in the *North Sea Continental Shelf* cases as 'the fundamental concept of the continental shelf as being the natural prolongation of the land domain'. For both parties, therefore, the starting point for the delimitation was the court's 1969 (p. 226) judgment and the concept of natural prolongation was 'commanding'. However, they differed as to the meaning and application of 'natural prolongation' in the disputed area and the extent to which considerations other than the dictates of geography, geomorphology, and geology operated to determine the natural prolongation of each State (paras 36–8).

Tunisia and Libya agreed that equitable considerations would not justify a delimitation whereby one State was permitted to encroach on the natural prolongation of the other. However, Libya contended that the natural prolongation was determinable as a matter of scientific fact by the application of geological criteria alone. Libya argued that a delimitation which gave effect to the principle of natural prolongation would necessarily be in accordance with equitable principles, as it would respect the inherent rights of each State. In particular, Libya maintained that the appropriate method of delimitation was to reflect the northerly direction of the natural prolongation of the African land mass by drawing a line in that direction from the terminal point of the land boundary. On the other hand, Tunisia maintained that the prolongation of the land territory of the individual State, and not of the entire continent, was the central question. Thus, for Tunisia, considerations of geography, geomorphology, and bathymetry were as relevant as those of geology (paras 39–40).

With reference to the workings of the International Law Commission and other *travaux préparatoires* of the 1958 Convention, the court highlighted the 'lack of identity between the legal concept of the continental shelf and the physical phenomenon known to geographers by that name'. Furthermore, 'while the idea of the natural prolongation of the land territory defined, in general terms, the physical object or location of the rights of the coastal State, it would not necessarily be sufficient, or even appropriate, in itself to determine the precise extent of the rights of one State in relation to those of a neighbouring State'. Thus, the court observed that, in the *North Sea Continental Shelf* cases, it had not regarded an equitable delimitation and a determination of the limits of natural prolongation as synonymous:

> it would be a mistake to suppose that it will in all cases, or even in the majority of them, be possible or appropriate to establish that the natural prolongation of one State extends, in relation to the natural prolongation of another State, just so far and no farther, so that the two prolongations meet along an easily defined line.…the two considerations—the satisfying of equitable principles and the identification of the natural prolongation—are not to be placed on a plane of equality.

The court therefore denied Libya's contention that delimitation became a matter of complying with the dictates of nature once the natural prolongation of a State had been determined. It held that the satisfaction of equitable principles was of 'cardinal importance' in the delimitation process (paras 42–4).

Turning to the 'new accepted trends' emergent from the Third Conference on the Law of the Sea, the court observed that the legal concept of the continental shelf (p. 227) has been modified by Article 76 of the draft convention by discarding the exploitability test set out in the 1958 Convention. Furthermore, in providing that in certain circumstances distance would be the basis for title over the continental shelf, the draft convention departed from the principle that natural prolongation was the sole basis of title. Against this backdrop, the court noted that neither of the parties had advanced any argument based on the 'trend' towards the equidistance principle (paras 45–8).

As for Article 83 of the draft convention about continental shelf delimitation, the court noted that no indication was given in the text of what criteria could assist in achieving the mandated objective of an 'equitable solution' (para. 50).

Geological structure and history in the relevant area

Having put the concept of delimitation by natural prolongation into its 'proper perspective', the court proceeded to examine the contentions of the parties as to its application in the present case. It started by addressing the parties' (and their experts') arguments about the geological structure and history of the disputed area.

Libya advanced a complex geological argument based on the recently developed theory of 'plate tectonics'. It maintained that the land territories of Tunisia and Libya adjoining the Pelagian Block comprised two distinct areas of different geological history. Libya's principal contention was that the area in front of its coast constituting the Pelagian Block was the natural prolongation, or 'northward thrust', of the North African land mass (paras 51–7).

By contrast, Tunisia emphasized the geological continuity of the Pelagian Block with its own land territory. It contended that the Pelagian Block represented the natural prolongation eastwards of Tunisia into the Mediterranean Sea (paras 58–9).

The court viewed these arguments as an invitation for it to choose between two interpretations of 'natural prolongation' as a geological concept. The court held, despite the 'confident assertions of the geologists on both sides', that a given area formed the prolongation of one or the other party, for legal purposes it was not possible to define the areas of continental shelf appertaining to Tunisia and to Libya by reference to geological considerations. The function of the court was to make use of geology only so far as required for the application of international law. It concluded that 'what must be taken into account in the delimitation of shelf areas are the physical circumstances as they are today' (paras 60–1).

Geomorphology and bathymetry

Although Libya attributed less value to bathymetry and geomorphological features, it considered that geography supported and confirmed its geological argument about natural prolongation to the north. It contended that the consonant (p. 228) indications of geology and geography supported its proposed boundary line projecting northward from the land frontier (see Figure B5.1). While it accepted that the northward line would have to veer

eastwards at some point in order to achieve an equitable result, that shift was only required to take account of a relevant geographical circumstance.

Tunisia presented a series of detailed arguments based upon the bathymetry and topography of the seabed in the disputed area. It pointed out a number of submarine features that it said 'identified clearly and convincingly the natural prolongation of Tunisian territory under the sea'. It identified one feature in particular, the Tripolitanian Furrow, as constituting 'a true natural submarine frontier'. Libya countered that the shelf area within the Pelagian Block formed an area of fundamental continuity from its coast, both geologically and geormorphologically, such that the submarine features noted by Tunisia were of minimal importance (paras 63–4) (see Figure B5.2).

The court determined that the evidence and arguments presented by Libya to support its geological 'northward thrust' argument could not prevail over the rival geological contentions of Tunisia. The court likewise ruled that the features pointed out by Tunisia did not involve 'such a marked disruption or discontinuance of the sea-bed as to constitute an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations' (para. 66).

Conclusion on natural prolongation and physical features

Following its review of the evidence presented by the parties and their experts, the court concluded that Libya and Tunisia derived continental shelf title from a single natural prolongation that was 'common to both territories'. Consequently, the ascertainment of the extent of continental shelf areas appertaining to each party 'must be governed by criteria of international law other than those taken from physical features'. However, the court noted that its conclusion did not necessarily exclude the possibility that certain geomorphological configurations of the seabed, which did not amount to an interruption of natural prolongation as such, may be taken into account as 'relevant circumstances' in the delimitation. The court thus turned to the question of the equitable principles applicable to the delimitation (paras 67–8).

c. Analysis of 'equitable principles'

At the outset, the court observed that the parties had addressed the meaning and significance of equitable principles in close relationship with the principle of natural prolongation, and had 'devoted less attention to the question of what are the equitable principles to be taken into account'. It remarked that, since it was bound to decide the case on the basis of equitable principles, it would first examine what such principles entailed in a way that was 'divorced from the concept of natural prolongation'. It noted that the principles to be indicated had to be (p. 229)

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Figure B5.2: *Tunisia/Libya*: regional geology.

selected ‘according to their appropriateness for reaching an equitable result’. The court considered that the question of equitable principles was ‘of primordial importance in the delimitation of the continental shelf’ (paras 69–70 and 72).

The court highlighted that the application of equitable principles was to be distinguished from a decision *ex aequo et bono* which, pursuant to Article 38(2) of the ICJ Statute, could only be resorted to if the parties agreed. The court was ‘bound to apply equitable principles as part of international law, and to balance the (p. 230) various considerations that it regards as relevant to produce an equitable result’. This was ‘very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice’ (para. 71).

d. Identification of ‘relevant circumstances’

The court proceeded to address the third factor identified in the Special Agreement: ‘the relevant circumstances which characterize the area’. The parties recognized that equitable principles dictated that relevant circumstances must be taken into account, but differed as to what those circumstances were. As a ‘first and most essential step’ in its analysis, the court addressed the question of what was the area relevant to the delimitation. The court observed that the area in dispute was that lying both off the Libyan coast and off the Tunisian coast. Specifically, it held that there came a point on the coast of each of the two parties beyond which the coast no longer had any relationship with the coast of the other party for the purposes of the delimitation. In the present context, the two points concerned were Ras Kaboudia on the Tunisian coast and Ras Tajoura on the Libyan coast (paras 72–5). The relevant area thus identified by the court is illustrated in Figure B5.3.

Coastal geography and geomorphology

The first relevant circumstance addressed by the court was the factor referred to in the *North Sea Continental Shelf* cases as ‘the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features’. The court observed that, while the initial part of the Tunisian coast, westwards from Ras Ajdir, ran for some distance in approximately the same direction as the Libyan coast, it subsequently changed direction, so as to run roughly southwest-northeast. This change was ‘legally significant’ as one of the relevant circumstances that characterized the area and modified the relationship of lateral adjacency between the parties. As a second material and relevant circumstance, the court

identified the presence of the Kerkennah Islands and surrounding low-tide elevations off the eastern coast of Tunisia (paras 76–9).

At this juncture, the court turned back to re-examine the seabed features that had been discussed between the parties as part of their argument about natural prolongation. Specifically, it identified the Tripolitanian Furrow as a potential relevant circumstance. However, the court ultimately excluded it from consideration because it did not 'disrupt the essential unity of the continental shelf so as to justify a delimitation on the basis of its identification as the division between areas of natural prolongation' (para. 80).

The land frontier terminus

Since there had never been any agreement between the parties about maritime delimitation, the court considered the undisputed land frontier between the parties, (p. 231)

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Figure B5.3: *Tunisia/Libya*: judgment and relevant area.

established by colonial treaty in 1910 and subsequently adopted by the independent states of Tunisia and Libya, as a circumstance of 'considerable relevance'. The land boundary terminus at Ras Ajdir provided a starting point for the maritime boundary and a 'base point of reference' in the delimitation. However, the court was unable to accept a suggestion by Libya that the maritime boundary should continue in the northward direction of the land frontier (paras 82–5).

(p. 232) The conduct of the parties: unilateral claims, modus vivendi, and hydrocarbon concession activity

The court considered that the relevance of Ras Ajdir was underlined by the fact that it had been the starting point in the parties' past attempts to establish, by unilateral claims, certain partial maritime delimitations. The court proceeded to analyze two such previous attempts in turn.

The first unilateral claim line, presented by Tunisia, was the so-called 'ZV 45° line'. Tunisia claimed that this represented a zone of historic rights over sedentary and other fisheries that had existed since time immemorial. Tunisia stated that the line had been established by an Instruction of the Director of Public Works in 1904 and later expressed in a 1951 Decree dealing with an exclusive fisheries zone. The court observed that the ZV 45° line was a

unilateral act that was never agreed by Libya. Accordingly, it was 'not opposable to Libya, even as a mere inchoate maritime boundary between the two countries' (para. 90).[3]

The second unilateral claim line, presented by Libya, was based upon a 1955 Libyan Petroleum Law and Petroleum Regulation. The latter included an official map depicting 'Territorial Boundaries' running from Ras Ajdir due north. The court observed that both the Law and the Regulation were 'purely internal legislative acts, intended to identify domestic zones for the petroleum exploration and exploitation activities of Libya'. There was no indication of any acquiescence by Tunisia, nor had Libya even made any formal claim at the international level to a boundary based upon the map. Accordingly, the line depicted in the 1955 map was not opposable to Tunisia and neither it nor the ZV 45° line would be taken into consideration for the purposes of the court's judgment (para. 92).

The court then proceeded to evaluate a line drawn perpendicular to the coast at Raj Ajdir by Italy in 1914, when Italy exercised sovereignty over Tripolitania. The line had been proposed following Italy's arrest of three Greek fishing vessels in 1913, had subsequently been adopted formally by the Italian authorities, and became 'a sort of tacit *modus vivendi*'. The exact angle of inclination of the line had never been specified, the relevant Italian regulations referring merely to a line following 'the approximate bearing north-north-east'. The court held that:

> the evidence of the existence of such a *modus vivendi*, resting only on the silence and lack of protest on the side of the French authorities responsible for the external relations of Tunisia, falls short of proving the existence of a recognized maritime boundary.…Nonetheless, in view of the absence of agreed and clearly specified maritime boundaries, the respect for the tacit *modus vivendi*, which was never formally contested by either side throughout a long period of time, could warrant its acceptance as a historical justification for the choice of the method for the (p. 233) delimitation of the continental shelf between the two States, to the extent that the historic rights claimed by Tunisia could not in any event be opposable to Libya east of the *modus vivendi* line (para. 95).

Lastly, the court noted the existence of a *de facto* line from Ras Ajdir at an angle of 26° east of north, which represented a boundary between the parties' respective concessions for offshore hydrocarbon exploration and exploitation. This line had been 'tacitly respected for a number of years' and appeared to the court to constitute 'a circumstance of great relevance for the delimitation' (para. 96).

Historic fishing rights

The court next examined a Tunisian claim in relation to an area off its coasts over which it claimed historic rights deriving from long-established fishing activities. These activities related to the exploitation of swimming species in shallow inshore areas and sponges in deeper offshore areas. According to Tunisia, the antiquity of this activity and its continuous exercise, accompanied by rights of surveillance and control, amounted to the exercise of sovereign rights with at least the tacit toleration and recognition of third States. Tunisia argued that this had resulted in the acquisition of historic rights over a substantial area of seabed that must not be encroached upon by the delimitation. Libya countered that the fishing practice of one State could not prevail over the inherent and *ab initio* rights of another State in respect of its natural prolongation. Libya also questioned whether the rights claimed by Tunisia could amount to an exercise of sovereignty (paras 97–8).

The court held that 'historic titles must enjoy respect and be preserved as they have always been by long usage'. It noted that the draft convention of the Third Conference on the Law of the Sea contained no detailed provision about a regime of historic waters, but observed that the matter continued to be governed by general international law. Nevertheless, the notion of historic rights or waters and that of the continental shelf were 'governed by

distinct legal regimes in customary international law': the first based on acquisition and occupation, the second based on the existence of rights *ipso facto* and *ab initio*. While it could be that Tunisia's historic rights and titles were more clearly related to the EEZ, it had chosen not to base its claims upon that concept (para. 100).

The court concluded that it was only if the method of delimitation found appropriate was such that it would or may encroach upon the historic rights area claimed by Tunisia that the court would have to determine the validity and scope of those rights and their opposability to Libya. Since this was not the case, a finding on the subject was unnecessary (para. 105).

Economic and resource factors

Finally, the court addressed a number of 'economic factors' invoked by the parties. Tunisia drew attention, *inter alia*, to its relative poverty vis-à-vis Libya in terms of (p. 234) natural resources such as agriculture and hydrocarbons. Libya, on the other hand, argued that, in view of its invocation of geology as evidence of natural prolongation, the presence or absence of hydrocarbons in continental shelf areas should play an important part in the delimitation.

The court concluded that these economic considerations should not be taken into account for the delimitation of the continental shelf. They were 'virtually extraneous factors' and 'variables' such that 'a country might be poor today and become rich tomorrow'. However, the presence of oil wells in an area to be delimited 'may, depending on the facts, be an element to be taken into account in the process of weighing all relevant factors to achieve an equitable result' (para. 107).

e. Practical method for the application of the principles and rules of delimitation

The court then turned to the second part of its task under the Special Agreement: namely, to clarify the practical method for the application of the principles and rules of international law applicable to the delimitation of the continental shelf. In doing so, it would define approximately the course of the line which it would be the task of the parties' experts subsequently to plot with accuracy (para. 108).

The court began by making 'some observations on the equidistance method'. It recalled its ruling in the *North Sea Continental Shelf* cases that the equidistance method of delimitation of the continental shelf was not prescribed as a mandatory rule of customary law. The court held that it was not even required, as a first step, to examine the effects of the equidistance method, and to reject that method in favour of some other only if it considered the results of an equidistance line to be inequitable. The equidistance method was neither a mandatory legal principle nor a method having some privileged status. Indeed, the court considered that it must take into account the fact that each party had submitted that any equidistance-based delimitation would be inequitable. Moreover, there was no single obligatory method of delimitation and several methods may be applied to one and the same delimitation (paras 109–11).

Libya advanced a claim line based upon its 'northward thrust' or prolongation, subject to a modification over the outer part of the boundary to reflect certain geographical circumstances. Tunisia advanced a 'sheaf of lines' based upon its own version of natural prolongation and other geometrical methods. The lines resulting from the parties' respective delimitation methods are illustrated in Figure B5.1.

The court recalled that it had rejected each of the parties' claims for delimitation based upon natural prolongation. Furthermore, the methods proposed by both parties gave insufficient weight to one circumstance in particular, which led the court to reject Tunisia's geometrical methods. That circumstance, which was (p. 235) 'highly relevant to the

determination of the method of delimitation', was the parties' historic hydrocarbon licensing practice (paras 113, 117).

Division of the disputed area into two sectors

The court determined that the particular geographical situation and the 'relevant circumstances which characterize the area' called for the area close to the coasts of the parties to be treated differently from the areas further offshore. Further, such difference in treatment was 'ultimately dictated by the primordial requirement of achieving an overall equitable result'. Thus, the court divided the area into two sectors, with one method of delimitation to apply in the first sector (starting from the territorial sea limit) and another method to apply in the second sector (paras 114–16).

Delimitation in the first sector dictated by petroleum licensing practice of the parties

In the first sector, the parties' historic hydrocarbon licensing practice was the dominant factor in the delimitation. The court commented that:

> the history of the enactment of petroleum licensing legislation by each Party, and the grant of success of petroleum concessions, during the period from 1955 after the signing of the Special Agreement, shows that…the phenomenon of actual overlapping claims did not appear until 1974, and then only in respect of areas some 50 miles from the coast (para. 117).

The court observed that an enlarged Tunisian concession of 1966 was bounded to the east by a 'stepped' line, the eastern angles of which lay on a straight line at a bearing of approximately 26° to the meridian. In 1968, Libya had granted a concession whose western boundary followed a line at the same angle from Ras Ajdir, and the western boundaries of subsequent Libyan concessions followed the same line. The result, said the court, 'was the appearance on the map of a *de facto* line dividing concession areas' by which the parties authorized exploration activities, without interference or (until 1976) protests by the other (para. 117).

The court emphasized that it was not here making a finding of tacit agreement between the parties, nor was it holding that they were debarred by conduct from pressing claims inconsistent with the 26° line on the basis of estoppel. Rather, it stated that it 'must take into account whatever indicia are available of the line or lines which the Parties themselves may have considered equitable or acted upon as such'. The court recalled also its earlier finding that, in the relations between France and Italy during the colonial period, there came into existence a *modus vivendi* concerning the lateral delimitation of fisheries jurisdiction expressed in a line drawn from the land frontier at approximately 26° from the meridian, proposed on the basis that it was perpendicular to the coast. The court considered that the factor of perpendicularity to the coast and the concept of prolongation of (p. 236) the general direction of the land boundary were relevant criteria to be taken into account in ensuring an equitable solution (paras 118–20).

Accordingly, for the initial stage of the delimitation, the practical method to be applied was to first determine the point on the outer limit of the territorial sea that corresponded to the intersection of that limit with a line drawn from the terminal point of the land frontier at an angle corresponding to the western boundary of certain Libyan petroleum concessions aligned with the eastern points of the south-eastern boundary of the 1966 Tunisian concession. The court observed that the angle appeared to be 26°, but left it to the experts to determine it with exactness. From this intersection point, the continental shelf boundary would initially run at the same angle to the meridian, which reflected 'all appropriate factors'. Thereafter, as the line extended further seawards, the court found that other

relevant factors came into play warranting a change in the method of delimitation (para. 121).

Change in coastal direction and 'half effect' of islands in the second sector

The court observed that the most evident geographical feature of the coastlines fronting on that area of shelf relevant for the delimitation was the 'radical change in the general direction of the Tunisian coastline marked by the Gulf of Gabes'. The court continued 'clearly no delimitation of the continental shelf in front of the coasts of the Parties could be regarded as equitable which failed to take account of that feature' (para. 122). The court noted that a considerable amount of argument had been addressed by the parties as to what was the point at which the change in coastal direction could be said to occur. It concluded that an appropriate point, and one that had the advantage of being susceptible to objective determination as a matter of geography, was the most westerly point of the Tunisian coastline between Ras Kaboudia and Ras Ajdir, that is to say, the most westerly point on the shoreline of the Gulf of Gabes. This point is illustrated in Figure B5.3.[4] Thus, the first sector of the delimitation line would extend from the outer limit of the territorial sea until its intersection with the parallel of latitude of that point.

In the second (seaward) sector of the boundary, the court considered that it would not be proper to assume that the parties would necessarily accept as equitable a continuation of their *de facto* concession line closer to the coast. Furthermore, a line drawn perpendicular to the coast became, generally speaking, less suitable the further it extended from the coast. However, the court considered that a (p. 237) reasonable and equitable result would be achieved by the drawing of another straight line in the second sector, albeit at a different angle (paras 124–5, 127).

Alongside the change in direction of the Tunisian coast, a relevant circumstance in the second sector of the boundary was the existence of the Kerkennah Islands. These features, which included a series of offshore islets and low-tide elevations and which had an area of some 180 km^2, were by virtue of their size and position a circumstance relevant for the delimitation.

The court observed that a line drawn from the most westerly point of the Gulf of Gabes to Ras Kaboudia, which would reflect the general change in direction of the Tunisian coast, would have a bearing of approximately 42° to the meridian. A line drawn instead through the seaward coast of the Kerkennah Islands would have a bearing of approximately 62° to the meridian. Such a line would, in the view of the court, give the Kerkennah Islands 'excessive weight'. Accordingly, with reference to State practice, the court determined to give the Kerkennah Islands 'half effect'. This resulted in a delimitation line that was parallel to a bisector drawn between the 42° and 62° lines, 'that is to say at an angle of 52° to the meridian' (paras 128–9). The construction of the 'half-effect' line over the second sector of the boundary is illustrated in Figure B5.1.

The court observed that the question of how far the boundary extended north-eastwards would depend on the delimitations ultimately agreed with third States (particularly Italy and Malta).

Proportionality test

Finally, the court turned to the 'criterion of proportionality'. It observed that the seaward limit of the area to be taken into account was bounded by the coasts of Tunisia as far as Ras Kaboudia and Libya as far as Ras Tajoura. The parallel of latitude passing through Ras Kaboudia and the meridian of latitude passing through Ras Tajoura, illustrated in Figure B5.3, would afford appropriate seaward limits of the areas to be compared. Without prejudging the potential rights of third States, the court would also work on the hypothesis of the whole of the relevant area being divided by the delimitation line. The length of the relevant Libyan coast from Ras Ajdir to Ras Tajoura, without taking into account small

inlets, creeks, and lagoons, was approximately 185km. The length of the relevant Tunisian coast from Ras Ajdir to Ras Kaboudia was approximately 420km, ignoring small indentations and the island of Jerba. Thus, the ratio of relevant coastal lengths was approximately Libya 31: Tunisia 69 (or 34:66 if using straight lines). This compared with a ratio of seabed areas below the low-water mark of Libya 40: Tunisia 60. The court concluded that this met the requirements of the test of proportionality as an aspect of equity (paras 130–1).

The delimitation line resulting from the court's judgment is illustrated in Figures B5.1 and 3.(p. 238)

f. Post-judgment application for revision and interpretation

On 27 July 1984, Tunisia filed an Application for Revision and Interpretation of the judgment on the basis of Articles 61 and 60 of the Statute (respectively).[5] First, for the purposes of its revision application, Tunisia put forward a text of a March 1986 resolution of the Libyan Council of Ministers, which it said determined the real course of the north-western boundary of a Libyan petroleum concession. Tunisia maintained that the course of the concession was different from the descriptions given by Libya during the delimitation proceedings. Second, Tunisia requested an interpretation of the judgment with regard to the determination of the most westerly point of the Gulf of Gabes.

In its supplementary judgment of 10 December 1985, the court rejected Tunisia's revision request on three main grounds. First, one essential condition for revision—ignorance of a new fact not due to negligence—was lacking since the concession boundary coordinates had been obtainable by Tunisia during the delimitation proceeding. Second, as the Libyan petroleum concessions were not the sole basis for the delimitation decision, any 'new fact' discovered in connection with the concessions was not necessarily a decisive factor. Third, what the court had regarded as significant was not merely the delimitation by Libya of its 1968 concession, but that both States had chosen a line corresponding to a line drawn from Ras Ajdir at 26° to the meridian as the boundary for the concessions they granted. Consequently, the court's reasoning was 'wholly unaffected' by Tunisia's new evidence (paras 28, 35, 37, and 38 of the December 1985 judgment).

The court rejected Tunisia's interpretation as regards the most westerly point of the Gulf of Gabes on account that what the court had meant was simply the point on the shoreline that is further to the west than any other point on the shoreline. The reference by the court to the latitude 34°10'30'' north as approximating to the most westerly point was not meant to identify that point precisely, but rather to give a general indication of the latitude of the most westerly point. Notably, that reference did not appear in the *dispositif* of the court's delimitation judgment. The precise coordinates were for the parties' experts to determine (paras 58 and 60 of the December 1985 judgment).

The court concluded its December 1985 judgment by observing that it was 'bound to note that the obligation still rests upon both Parties to carry out the Special Agreement to the very end, and to have the 1982 Judgment implemented so that the dispute is finally disposed of' (para. 68 of the December 1985 (p. 239) judgment). The parties duly did so by way of their implementation agreement of 8 August 1988.[6]

III. Technical Considerations

The geomorphological and geological arguments played a major part in the case for both parties. This was unusual in that both parties argued on the same premise—natural prolongation of their land masses onto the Pelagian Basin (or Block). This is an area of relatively shallow water extending to Sicily in the north and to the Ionian Abyssal Plain in the east from which it is separated by the north-south Ionian Flexure (see Figure B5.2). Both parties considered this to be their natural prolongation: Libya arguing that Africa in general (including Tunisia), based on regional plate tectonics, has a natural prolongation

northwards; Tunisia arguing that the predominantly east-west structural trends onshore continued into the offshore area and claiming prolongation eastwards along several structural features (the most relevant being the Tripolitanian Furrow). The court rejected these arguments based on geological history and evolution and considered that it is the present-day configuration that is crucial for delimitation. After reviewing the related geomorphological evidence, the court could only conclude that both parties had a common natural prolongation over the Pelagian Block with no major physical discontinuities capable of making a 'natural submarine frontier'.

The construction of the half-weight line for the Kerkennah Islands echoed the principles applied in the *UK v. France* case. However, the method whereby the court transposed the direction of the line was new (using a bisector between the different coastal directions generated with and without the features).

This was the first case to define clearly a relevant area and to apply the proportionality test in a quantitative manner. The relevant area was clearly defined as being limited by the parallel of Ras Kaboudia to the north and Ras Tajoura to the east. Despite the potential interests of other States (Italy, and principally Malta, whose boundary with Libya had yet to be determined), the court satisfied itself that the overall delimitation was proportionate and equitable, in the ratio of Libya 40: Tunisia 60 measured from the low-water line (Figure B5.3).

The court was only asked to delimit the continental shelf and its delimitation thus starts at the territorial sea limit. Because of the nature of the Tunisian coastline with its indentations and islands and its straight baseline legislation, a much larger area is occupied by its territorial sea and internal waters than in the case of Libya. (p. 240) If the proportionality calculation is undertaken using areas of continental shelf only, the ratio is inverted and becomes Libya 54: Tunisia 46. It is notable, however, that in subsequent cases (for example, *Black Sea*, where also only the area beyond the territorial sea was disputed), the same area measurement principles were followed.

An agreement on the implementation of the judgment was concluded in August 1988, some six years later.[7] This follows precisely the description and the coordinates indicated in the original judgment, including the open-ended line, and the parallel 34°10'30''N reflecting the most westerly point of the Gulf of Gabes.

IV. Significance of the Decision and its Contribution to International Law

The *Tunisia/Libya* case was the court's first foray into the subject of maritime boundary (specifically, continental shelf) delimitation since the *North Sea Continental Shelf* cases, decided thirteen years beforehand. In that time, much had changed both as a matter of State practice and consequent to the Third United Nations Conference on the Law of the Sea (which was, within less than a year of the court's judgment, to result in the UNCLOS treaty). Notably, the Special Agreement referring the dispute to the court specifically required it to take account of 'recent trends admitted at the Third Conference on the Law of the Sea'. Those trends, as embodied in the advanced draft convention available by the time of the judgment, were to play a significant part in the court's analysis and resulting delimitation decision. This was particularly notable in the court's identification of the 'primordial requirement' of achieving an equitable result, adopting the language of the draft convention despite the absence of any reference to such a result in the Special Agreement.

Each of the parties' submissions about the principles and rules of international law applicable to the delimitation relied heavily on the concept of natural prolongation. This was perhaps unsurprising, given the overriding role of the concept in the development of the juridical continental shelf since the 1945 Truman Proclamation and given the emphasis placed on the concept in the court's 1969 *North Sea* judgment. However, the court gave short shrift to the parties' arguments (and their extensive geological, geomorphological, and bathymetric evidence)—just as it was to do again three years later in respect of Libya's similar arguments in the *Libya/Malta* case. It found that both States derived their continental shelf entitlements from a single physical prolongation. It also took note of the fact that the draft (p. 241) convention provided that in certain circumstances, distance, rather than physical natural prolongation, would be the basis for legal title over the continental shelf.[8]

The judgment includes an interesting passage about the role of equity and equitable principles in continental shelf delimitation that still holds true today. The court was quick to caution that the application of equitable principles is not to be confused with an *ex aequo et bono* decision or with distributive justice. It held that its task was limited to the application of equitable principles as part of international law and to the balancing of considerations deemed relevant to achieving an equitable outcome.

Picking up on the cardinal delimitation principle that 'the land dominates the sea', the court observed that the coast of each of the parties constituted the starting point of resolving their competing claims. However, the court proceeded to identify two 'relevant circumstances' in the delimitation (the course of the agreed land frontier and the parties' conduct prior to 1974) that bore no relation to geography.

The more recent jurisprudence of the court and arbitration tribunals has been more cautious in attributing such weight to non-geographical circumstances in continental shelf delimitation. In particular, subsequent cases have backed away from the identification of *de facto* lines or *modus vivendi* (whether dividing hydrocarbon concessions, fishing activities, or otherwise), which the court cited in support of its delimitation in the first sector. Instead, recent courts and tribunals have inclined towards requiring proof of 'tacit agreement' between States in order that their conduct can be considered a relevant circumstance in shelf delimitation; moreover, they have required the evidence of any such agreement to be 'compelling'.[9] In any event, this aspect of the court's judgment emphasizes the importance of prompt objection by coastal States in the face of unilateral acts by their neighbours that might otherwise prejudice maritime claims.

In ascertaining the practical methods of delimitation, the court reiterated the *North Sea Continental Shelf* ruling that the equidistance method was not a mandatory rule and had no 'privileged status' in relation to other methods. Following the enactment of UNCLOS and the prioritization under Article 76 of claims based on a distance within 200M of the coast, this aspect of the decision has been superseded by a series of subsequent judgments and awards establishing the (p. 242) equidistance/relevant circumstances approach as the preferred method for continental shelf delimitation, to be varied only where specific situations require.

The court's approach of dividing the delimitation area into two sectors, each of which would be treated separately utilizing different delimitation methods, was sensible in the circumstances and has become relatively commonplace in subsequent jurisprudence. Such treatment can be particularly apposite where, as in the present case, there is a marked change in coastal relationship between the parties beyond a certain point. Another important consideration, which has also arisen in several subsequent cases, was the fact

that certain relevant circumstances were more clearly applicable in the first sector of the boundary (i.e. close to shore) than the second.

This was the first case where the court attempted to remedy the distorting effect of relatively small island features by way of the attribution of limited effect. That said, it was not without precedent—the decision to attribute the Kerkennah Islands half effect echoed the attribution of half effect to the Scilly Isles by the ad hoc Court of Arbitration in the *UK/France Continental Shelf* case five years earlier.

A notable postscript to the court's judgment was Tunisia's application for interpretation and revision under Articles 60 and 61 of the ICJ Statute. While the court's rejection of much of Tunisia's application illustrated the high legal threshold applicable to interpretation or revision requests under the Statute, the court's decision on the application did provide practical guidance to the parties' technical teams as they worked to implement the court's delimitation. The final implementation agreement signed in August 1988 followed the coordinates of the judgment precisely.

Footnotes:

1 This case predated the court's *Libya /Malta* judgment by three years, so there was no delimitation between Libya and Malta at the time (nor was there any delimitation between Tunisia and Malta).

2 Each of the parties filed its own French or English translation of the original Arabic text of the Special Agreement. For convenience, the court referred in its judgment generally to the English translation made by Libya, which was in turn translated by the ICJ Registry into French. That English translation was also 'generally consistent with the translation made by the Secretariat of the United Nations following registration of the Special Agreement pursuant to Article 102 of the Charter' (para. 22).

3 Para. 86 of the judgment, at p. 66.

4 The court remarked that the major change in Tunisian coastal direction seemed to go some way towards transforming the coastal relationship between Tunisia and Libya from one of adjacency to one of oppositeness. This produced a situation in which the position of an equidistance line became a factor to be given more weight in the balancing of equitable considerations (para. 126).

5 Application for Revision and Interpretation of the Judgment of 24 February 1982.

6 Agreement between the Libyan Arab Socialist People's Jamahariya and the Republic of Tunisia to Implement the Judgment of the International Court of Justice in the Tunisia/Libya Continental Shelf Case dated 8 August 1988. Available at: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/LBY-TUN1988CS.PDF>

7 Agreement between the Libyan Arab Socialist People's Jamahariya and the Republic of Tunisia to Implement the Judgment of the International Court of Justice in the Tunisia/Libya Continental Shelf Case, 8 August 1988.

8 Notably, the court did not exclude the possibility that certain geomorphological configurations of the seabed might be taken into account as relevant circumstances in continental shelf delimitation. This aspect of the court's judgment has been superseded by subsequent decisions noting the dominance of distance as a basis of title within 200M pursuant to Article 76 of UNCLOS.

9 See, e.g., the court's judgments in the *Nicaragua/Honduras* and *Peru/Chile* cases. The Court's *obiter* comment that the presence of oil wells in a disputed area may be 'an element to be taken into account' in pursuing an equitable result has also been qualified in

subsequent cases where evidence of tacit agreement has been absent. See, e.g., *Cameroon/Nigeria*.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 6 Canada v. United States of America (Judgment of the Chamber of the International Court of Justice, 12 October 1984)

From: A Practitioner’s Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):

Exclusive fishery zone — Coastal states — Continental shelf — Delimitation — Territorial sea — UNCLOS (UN Convention on the Law of the Sea)

(p. 243) 6 *Canada v. United States of America* (Judgment of the Chamber of the International Court of Justice, 12 October 1984)

Case Note: single continental shelf and exclusive fisheries zone boundary—Chamber of the ICJ—opposite and adjacent coasts—examination of 'equitable criteria' and 'practical methods'—central role of geographical criteria in cases of multi-purpose delimitation—failure of estoppel, acquiescence, and *modus vivendi* arguments based on historic conduct—use of bisector, median line, and perpendicular methods of delimitation over different boundary segments—consideration of socio-economic factors to ensure line 'intrinsically equitable'—fishing activity only significant if boundary 'radically inequitable'

Citation: *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada v. United States of America*), Judgment, 12 October 1984, *ICJ Reports* 1984, p. 246

Institution: International Court of Justice

Basis of jurisdiction: Special Agreement dated 29 March 1979 ('Special Agreement')

The Court: Ago (President of the Chamber), Gros, Mosler, Schwebel, and *Judge ad hoc* Cohen (appointed by Canada)

Applicable law: customary international law

Areas delimited: continental shelf and exclusive fisheries zone (within 200M)

Technical expert appointed by the Chamber: Commander Peter Beazley

I. Introduction and Context

This case concerned delimitation of a single maritime boundary in the 'Gulf of Maine area'. The Gulf of Maine is a broad oceanic indentation in the eastern coast of the North American continent. It is roughly the shape of an elongated rectangle, bordered on three sides by land and on the fourth side by the open Atlantic Ocean.

(p. 244) The international land boundary between the United States and Canada in this region follows the Saint-Croix River and terminates in the Grand Manan Channel, located in the northern corner of the Gulf. Beyond that point to the north-east is the Bay of Fundy, which cuts deep into the Canadian landmass. The Gulf of Maine is bounded by the US states of Maine, New Hampshire, and Massachusetts, and the Canadian provinces of New Brunswick and Nova Scotia. The parties agreed that a seaward 'closing line' across the Gulf could be drawn between the south-eastern point on Nantucket Island (United States) and Cape Sable (Canada).

To the seaward side of the 'closing line' is located Georges Bank, which the Chamber identified as 'the main focus of the dispute' (para. 38). Georges Bank was known to be rich in fisheries resources and was the subject also of hydrocarbon exploration interest from the 1960s.

The geographical context of the delimitation, including the agreed ‘closing line’ across the Gulf of Maine and its relation to Georges Bank, is illustrated in Figure B6.1.

The dispute first developed in relation to the continental shelf, following the commencement of hydrocarbon exploration activities by both parties in the 1960s. In the absence of any delimitation in the area at that time, Canada treated the equidistance line as a working boundary, based on Article 6 of the 1958 Continental Shelf Convention (to which both States were parties). The United States rejected a Canadian claim that it had also used an equidistance line as a working boundary for hydrocarbon exploration.

Following a number of diplomatic exchanges, in November 1969 the United States presented a diplomatic note to Canada requesting a moratorium on hydrocarbon activities on Georges Bank and stating that, until the location of the continental shelf boundary was agreed, the United States would be unable to acquiesce in any such Canadian activities in that area. Canada replied in December 1969, observing that the United States had not previously protested against Canadian hydrocarbon permits. Canada declined to agree to a moratorium, but did agree to continental shelf delimitation negotiations. The court considered that it was at this stage that the dispute had crystallized between the parties (para. 64).

Formal negotiations began in July 1970. Canada stated in the negotiations that, in the absence of special circumstances, the continental shelf boundary should be the equidistance line. The United States, by contrast, asserted that the equidistance line was inequitable in view of the existence of special circumstances. It argued that the boundary should follow the Northeast Channel (thus placing Georges Bank entirely on the US side of the boundary).

In 1977, each party adopted a 200M fishery zone off its coast, which had the effect of broadening the dispute to include a fishery zones boundary. An interim fisheries agreement was short-lived and, in June 1978, trans-boundary fishing ceased. At (p. 245)

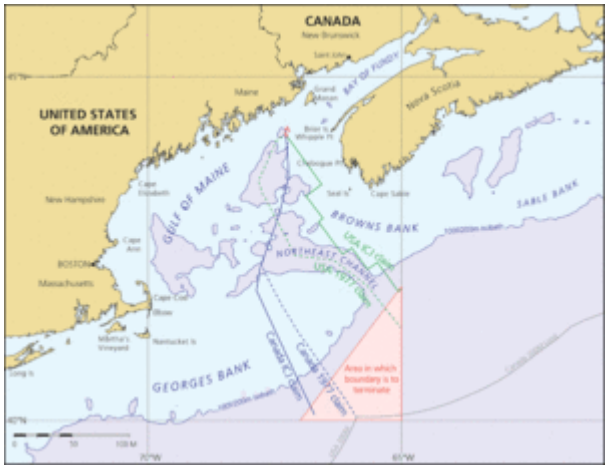

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Figure B6.1: *USA/Canada (Gulf of Maine)*: regional setting and parties’ claims.

(p. 246) this stage, following the decision of the Court of Arbitration in the *UK/France* case, Canada advanced an amended (and more aggressive) claim line, asserting that the seaward projections of the Cape Cod peninsula and the islands of Nantucket and Martha’s Vineyard constituted ‘special circumstances’. The United States rejected the amended Canadian claim, citing, *inter alia*, the distorting effect of the Nova Scotia peninsula.

In 1979, the parties concluded two treaties: one about fisheries access and the second submitting the delimitation dispute to binding dispute settlement. In the face of disapproval by the New England fishing communities, the United States did not ratify the fisheries access treaty. Instead, it assured Canada that if the delimitation dispute settlement treaty was ratified, then the United States would refrain from enforcement activities against

Canadian fishing vessels until the boundary was established. The delimitation dispute settlement treaty was accordingly ratified and, on 25 November 1981, the Special Agreement was notified to the Registry of the ICJ.

Article I of the Special Agreement provided for submission of the parties' delimitation dispute to a Chamber of the Court, pursuant to Articles 26(2) and 31 of the Statute of the Court, to be constituted after consultation with the parties. Article II requested the Chamber to decide, in accordance with the principles and rules of international law applicable as between the parties, the following question:

> What is the course of the single maritime boundary that divides the continental shelf and fisheries zones of Canada and the United States of America from a point in latitude 44°11' 12" N, longitude 67° 16' 46" W to a point to be determined by the Chamber within an area bounded by straight lines connecting the following sets of geographic coordinates: latitude 40°N, longitude 67°W; latitude 40°N, longitude 65°W; latitude 42°N, longitude 45°W.

The Special Agreement requested the Chamber to describe the course of the boundary in terms of 'geodetic lines, connecting geographic coordinates of points'. It also requested the Chamber to appoint a technical expert nominated jointly by the parties to assist it in respect of technical matters, including the depiction of the boundary on charts 'for illustrative purposes only'. The Chamber accordingly appointed Commander Peter Beazley as technical expert.

Article V of the Special Agreement prohibited the parties from introducing into evidence, or disclosing in any manner, the nature or content of any proposals made in the course of the boundary negotiations undertaken since 1969. It further required each party to notify and consult the other prior to introducing into evidence any diplomatic or other confidential correspondence between the parties related to maritime boundary delimitation.

On 25 November 1981, the Ambassadors of Canada and the United States to the Netherlands transmitted to the Registrar a certified copy of the Special Agreement. Following certain supplementary explanations and clarifications, the court acceded (p. 247) to the request to form a special Chamber of five judges to deal with the case (the 'Chamber'). Since Canada did not have a sitting judge on the ICJ at the time, it appointed Judge ad hoc Cohen, who joined the US appointee Judge Schwebel on the Chamber.

II. Positions of the Parties and Summary of the Judgment

a. Jurisdiction and the starting and termination points of the delimitation

The Chamber noted that, having been seized by means of a special agreement, no preliminary question arose with regard to jurisdiction (para. 19).

The Chamber observed that, according to Article II of the Special Agreement, the delimitation was to start from a point ('Point A') that was seaward of the international land boundary terminus, at the intersection between the fishing zones respectively claimed by the parties (see Figure B6.1). It noted that the parties had chosen this starting point because immediately seaward of the land boundary terminus were located Machias Seal Island and North Rock, two small features over which sovereignty was disputed. The parties wished to reserve for themselves the possibility of a direct solution of that dispute and had thus excluded the surrounding maritime space from the present delimitation exercise (para. 20).

The Chamber observed also that the triangle enclosing the area within which, according to Article II of the Special Agreement, the delimitation line was to terminate (see Figure B6.1) had been established to avoid the possibility of the Chamber's decision prejudging the determination of the outer edge of the continental margin. It noted that the parties similarly intended to address this issue by negotiation in the first instance (para. 21).

The Chamber concluded that it must conform to the limits thus defined by the parties in the Special Agreement; otherwise it would overstep its jurisdiction (para. 23).

The Chamber noted that, in contrast to previous cases before the court, the parties had requested the delimitation of a single continental shelf and fisheries zones boundary. It observed that the parties had 'simply taken it for granted that it would be possible, both legally and materially, to draw a single boundary for two different jurisdictions'. It opined that there was no rule of international law to the contrary and thus concluded that it could carry out the delimitation requested of it (para. 27).

b. Delimitation of the maritime boundary

The Chamber's assessment of the Gulf of Maine area

The Chamber observed that the description of the Gulf of Maine area as a 'rectangle' afforded a 'good simplified representation of the configuration of that (p. 248) Gulf, as outlined by its coasts'. It rejected, however, an argument of the United States to the effect that the Gulf was encompassed by 'primary' and 'secondary' coastal fronts, the former of which would be regarded as of greater importance for the purposes of the delimitation. It rejected also a US claim that the south-westward protrusion of Nova Scotia into the Gulf was an 'anomaly', together with a Canadian claim that the Cape Cod peninsula should be ignored because it formed a salient on the Massachusetts coast. The Chamber determined that 'the facts of geography are not the product of human action amenable to positive or negative judgment, but are the result of natural phenomena, so that they can only be taken as they are' (para. 37).

As regards geology, the parties recognized that the structure of the whole continental shelf of North America, including the Gulf of Maine area, was essentially continuous. Consequently, they agreed that geological factors were not significant in the case (para. 44). As regards geomorphology, the Chamber stated that the evidence showed that the continental shelf of the area was a 'single, continuous, uniform and uninterrupted physiographical structure'. The parties did not dispute that there was nothing in this 'single seabed' to distinguish the natural prolongation of the US coast from the natural prolongation of the Canadian coast. Although a series of physical shelves, banks, basins, and channels were present, these constituted 'ultimately a somewhat insignificant body of rugosities' (para. 45).

Each party advanced substantial arguments and supporting evidence related to the characteristics and relevance of the water column. Canada argued that Georges Bank formed 'part of a continuous oceanic system belonging to the Nova Scotian biogeographical province', which was distinct from the 'Virginian, mid-Atlantic biogeographical province' to the south. By contrast, the United States identified three different oceanographic and ecological regimes: the Gulf of Maine basin, the Scotian Shelf, and Georges Bank, the last of which it said was linked to the Nantucket Shoals and separated from Canada by the Northeast Channel. As such, the United States argued that the Northeast Channel must be seen as a natural boundary for drawing a single maritime delimitation line. The Chamber rejected each party's argument. It held that the water column possessed the same character of unity and uniformity as the seabed, such that it was impossible to discern a 'natural boundary' capable of serving as a basis for delimitation (paras 54–5). The Chamber

observed also that, even where a natural boundary is discernible, a legal-political delimitation does not necessarily have to follow the same line (para. 56).

Role of political and economic considerations in the delimitation process

In light of the value and importance of the living natural resources of the disputed area, fishing formed a centrepiece of the argumentation of each party in the case. Early in its judgment, the Chamber observed that the parties had exchanged ‘lengthy argument’ about whether the fishermen of one or the other had been first to fish in the area, and about the contemporaneous importance of the fishery (p. 249) to their respective economies’ coastal populations. The Chamber remarked that each party had given gloomy predictions about the deleterious effects of one delimitation outcome or the other, and that ‘the Parties sometimes gave the impression of overemphasizing these prospects’ (para. 58).

In any event, the Chamber concluded that ‘these fishing aspects, and others relating to activities in the fields of oil exploration, scientific research, or common defence arrangements, may require an examination of valid considerations of a political and economic character’. However, it noted that it was bound to take a decision on the basis of law, not *ex aequo et bono*. For that purpose, the Chamber held that international law required that ‘equitable criteria’ be applied, and that such criteria ‘are essentially to be determined in relation to what may be properly called the geographical features of the area’. Consequently, it was only once the Chamber had, on the basis of those criteria, envisaged the drawing of a delimitation line that it could and should ‘bring in other criteria’ to ensure the achievement of an equitable result (para. 59). The Chamber would therefore return to address the parties’ fishing (and other political and economic) arguments at the end of its judgment.

The parties’ claims

The Chamber observed that the Canadian claim consisted of an equidistance line excluding certain base points located on the US coast of Massachusetts. Specifically, Canada excluded those base points located at the outer end of the Cape Cod peninsula and Nantucket Island, moving them to the west, to the eastern end of the Cape Cod Canal. The US line was ‘somewhat more complex in its construction, though its justification is simple’. It consisted of a perpendicular to the general direction of the coast, adjusted to take into account the relevant circumstances of the area—namely, to avoid the splitting of fishing banks. The United States justified the amendments made to its earlier claims during negotiations on the basis that, *inter alia*, ‘considerable development of the law’ had occurred between 1976 and the filing of its Memorial (para. 77).

The Chamber noted that the lines proposed by Canada had been drawn ‘primarily with the continental shelf in mind’, while those proposed by the United States ‘each treated the fishery régime as essential’. It observed also that the gap between the parties’ respective positions had ‘become noticeably wider’ between crystallization of the dispute and its referral to the Chamber (para. 78) (see Map B6.1).

The applicable principles and rules of international law

The Chamber recalled that Article II of the Special Agreement requested it to reach a decision ‘in accordance with the principles and rules of international law applicable in the matter as between the Parties’. Citing Article 38(1) of the ICJ Statute, it held that reference would be made for this purpose to conventions and international custom, to the definition of which the judicial decisions of the court (p. 250) and arbitration tribunals had already made a ‘substantial contribution’. It held that the relevant codifying conventions on the law of the

sea ‘must be seen against the background of customary international law and interpreted in its light’ (para. 83).

In relation to the 1958 Continental Shelf Convention, which was in force between the parties, the Chamber noted that it concerned only the seabed and its subsoil. At the time of its conclusion, no problem of determining boundaries for the superjacent waters had yet arisen (para. 84). The Chamber cited the *North Sea Continental Shelf* cases, the *UK/France* case, and the more recent *Tunisia/Libya* case as enunciating the general rule of customary international law that, failing agreement, a continental shelf boundary must be determined in accordance with ‘equitable principles’ (paras 91–3).

Turning to the Third United Nations Conference on the Law of Sea, the Chamber acknowledged that UNCLOS had not yet entered into force, but noted that Articles 74 and 83 each made reference to ‘the obligation to achieve an equitable solution’. The Chamber observed that their text ‘serves to open the door to continuation of the development effected in this field by international case law’. The Chamber remarked that the identity of the language employed across Articles 74 and 83 was ‘particularly significant’ in the case of a single boundary delimitation over the seabed and superjacent fishery zone (which was included within the EEZ concept) (paras 94–6).

The Chamber was unpersuaded that the concept of equidistance formed a rule of customary international law, or a method to be given priority or preference in delimitation. Rather, it viewed equidistance as a ‘practical method that can be applied for the purposes of delimitation’, and one that had rendered ‘undeniable service in many concrete situations’ (paras 106–7). It also rejected an argument of the United States to the effect that the Massachusetts coast should be viewed as the ‘principal coast’ in the delimitation since it followed the general direction of the mainland coastline (para. 108).

The court concluded that these and other arguments of the parties, such as a Canadian argument that the boundary should ensure the preservation of existing fishing patterns vital to coastal communities, were erroneous because they relied on ‘a set of rules which are not there’. Even ideas of ‘non-encroachment’ and ‘no cutting-off’, although they might constitute equitable criteria, did not amount to rules endorsed by customary international law (para. 110).

The Chamber concluded its discussion of the applicable rules of international law by observing that customary international law did not contain a body of detailed delimitation rules. Rather, it embodied a more limited ‘fundamental norm’, which it expressed as follows:

> (1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought (p. 251) and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.
>
> (2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result (para. 112).

Analysis of 'equitable criteria' and 'practical methods'

Assessment of criteria and methods applicable in principle

The Chamber observed that customary international law did not prescribe the application of any specific equitable criteria. These criteria were to be assessed on the basis of the geographical features of the area on a case-by-case basis (paras 59, 156–8, 191, 197–8).

The Chamber took the view that, although Article 6 of the Convention on the Continental Shelf was binding on both States, it could not apply to a delimitation of the continental shelf and the exclusive fishery zone. To hold otherwise would be to make the water column a 'mere accessory' of the continental shelf (paras 118–19, 125). Furthermore, there was no question of the 'combined equidistance/special circumstances rule' forming a rule of general international law (paras 122–3). Rather, the greater or lesser appropriateness of one delimitation method or another could only be assessed with reference to the actual situations in which they were used (para. 163).

The Chamber considered whether the conduct of the parties had given rise to any legal obligation to apply any particular method. Canada argued that the conduct of the United States provided: first, evidence of acquiescence in a median line boundary and resultant estoppel; second, an indication of the existence of a *modus vivendi* or *de facto* boundary; and, third, indicia of the type of delimitation that the parties considered equitable. The United States, relying in particular upon its November 1969 diplomatic note, strongly disputed that its conduct could have the consequences attributed by Canada.

The Chamber held that the concepts of acquiescence and estoppel 'both follow from the fundamental principles of good faith and equity', but that they are based on different legal reasoning. Specifically, acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion (para. 130). The Chamber concluded that the evidence did not establish that the United States had acquiesced in a median line delimitation of the continental shelf on Georges Bank (let alone more broadly). Nor did any failure of the United States to react to Canadian exploration activities between 1964 and 1969 legally debar the United States from claiming a boundary at variance with a median line. The fact that the attitude of the (p. 252) United States towards Canada was 'unclear and perhaps ambiguous' did not entitle Canada to invoke the doctrine of estoppel (paras 137–8, 141, 148). Nor did the Chamber consider the facts demonstrative of a *modus vivendi* or *de facto* boundary, not least because the period 1965 to 1972, during which Canada said the *modus vivendi* had been instituted, was 'too brief to have produced a legal effect of this kind' (paras 150–1). Finally, the Chamber also concluded that the evidence did not demonstrate that the parties had regarded an equidistance line as an equitable delimitation (para. 152).

The Chamber concluded that the parties were not bound, under treaty law or other rules created as a result of their conduct, to apply particular criteria or methods for the establishment of their single maritime boundary. It accordingly proceeded to consider what criteria and method could be applied on the facts (para. 155). In doing so, it emphasized that a combination of different delimitation methods may be required in the event of changes in relevant circumstances between different segments of the boundary (para. 163).

Criteria and methods proposed by the parties

The Chamber first examined the respective criteria and methods proposed by each of the parties, together with a comparison of their respective claim lines (each of which is illustrated in Figures B6.1 and B6.2).

The Chamber recalled that, during the 1970s negotiations, the United States had proposed a delimitation line that, according to more recent explanations by that party, accorded decisive importance to factors such as the geomorphology and ecology of the area. The United States proposed adopting a line that corresponded to a line of the greatest depths in order to keep the unity of each ecosystem intact. The Chamber concluded this line was 'too much geared to one aspect of the problem for it to be capable of being considered equitable'. While it may be justified for a delimitation concerning fisheries zones alone, it was unsuitable for a delimitation involving the continental shelf. The Chamber considered that it was 'obviously impossible to employ, for the delimitation of the entire length of a single delimitation line which, as in the present case, simultaneously concerns two distinct and important objects, a criterion and a method that would be suitable for delimiting the one but not for delimiting the other' (para. 168).

The Chamber then recalled that, in its 1982 Memorial, the United States had proposed a new line in the context of recent developments in jurisprudence and State practice. That line focused on certain geographical aspects of the area, particularly the general direction of the coast and the frontal projection of the 'primary coastal front' into the disputed area. The new US line consisted of a perpendicular to the general direction of the coast, adjusted to ensure that jurisdiction over the German Bank and Browns Bank should belong to Canada. Meanwhile, the line would result in the United States having exclusive jurisdiction over Georges Bank. The United States argued that such an approach was consistent (p. 253)

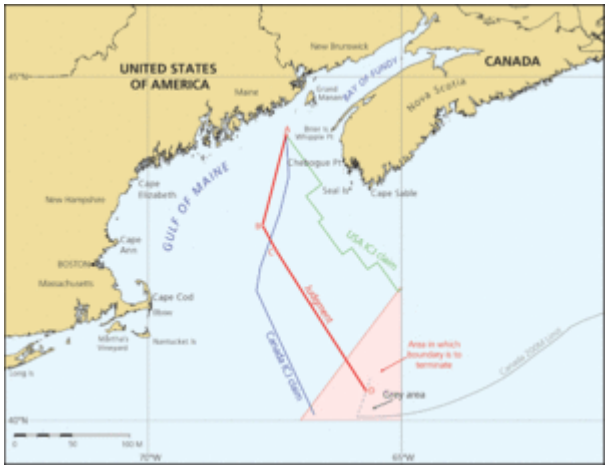

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Figure B6.2: *USA/Canada (Gulf of Maine)*: parties' claims and judgment.

(p. 254) with the principle that a single State should be entrusted with the management of the fish resources of the principal banks of the area. The Chamber observed that the net result was a 'compromise solution between two fundamentally different methods' (para. 173). It stated that the 'ideal case' for the perpendicular method was one in which the course of the line would leave an angle of 90° on either side of the land boundary on a rectilinear coast. It said that it was 'hard to imagine a case less conducive' to the application of the perpendicular method given the geographical configuration of the Gulf of Maine. This difficulty could not be resolved by disregarding alleged 'secondary' coasts or the introduction of ecological adjustments (paras 176–7).

As for Canada, it had proposed separate lines in 1976 and 1977. Canada presented the first as a strict equidistance line and the second as a modified equidistance line disregarding certain alleged 'geographical anomalies' on the US side. While the Chamber had already

established that the equidistance method was not mandatory, it observed that this did not imply that Canada must refrain from applying the method altogether (para. 180).

The Chamber observed that the only part of the rectangular configuration of the Gulf of Maine formed by a Canadian coast was the short right side, whereas both the short left side and entire long side were formed by US coasts. Accordingly, the length of the US coasts on the perimeter of the Gulf was 'considerably greater' than that of the coasts belonging to Canada. The Chamber described this as 'a special circumstance of some weight', which justified 'a correction of the equidistance line, or of any other line'. This was not to say that a maritime delimitation could be established by a division of the area in dispute that was proportional to the respective lengths of coasts; but a 'substantial disproportion' that resulted from a delimitation effected on a different basis would constitute a circumstance calling for correction (paras 184–5).

The Chamber recalled the finding in the *UK/France* case that regard must be had to the difference between adjacent and opposite coast delimitations in assessing the appropriateness of the equidistance method. Canada had failed to take into account the 'radical' change in the geographical situation of the parties' coasts as the maritime boundary moved toward the outer opening of the Gulf. In particular, the initial relationship of lateral adjacency between the parties gave way in that area to one of frontal opposition. In the Chamber's view, Canada's proposals had failed to take proper account of this change in the geographical situation (paras 187–9).

The Chamber's assessment of the criteria and methods applicable to the delimitation

Having rejected the criteria and methods proposed by both parties, the Chamber undertook the task of formulating its own criteria and methods to apply to the delimitation. The Chamber stated that it must apply those criteria that it found likely to prove equitable in relation to the relevant circumstances of the case. The fact that, in previous jurisprudence, certain criteria had been found to be (p. 255) equitable in the delimitation of the continental shelf did not imply that they must automatically possess the same properties in relation to the simultaneous delimitation of the continental shelf and superjacent fishery zone (paras 191–2). The Chamber stated that a delimitation of both areas:

> can only be carried out by the application if a criterion, or combination of criteria, which does not give preferential treatment to one of these objects to the detriment of the other, and at the same time is such as to be equally suitable for the division of either of them.

With the gradual adoption by the majority of maritime States, following UNCLOS, of an exclusive economic zone and, consequently, an increasing demand for single boundary delimitations, the Chamber continued:

> so as to avoid as far as possible the disadvantages inherent in a plurality of separate delimitations, preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation (para. 194).

The Chamber said that, in the circumstances, it felt bound to turn to criteria that were 'especially derived from geography'; meaning, principally, the geography of the coasts. This pointed to a starting point whereby, in principle, there would be an equal division of the areas of convergence and overlap of the maritime projections of the coastlines involved in the delimitation. However, the Chamber observed that the 'special characteristics' of the Gulf of Maine area called for the application of three 'auxiliary criteria', to reflect: (1) the 'by no means negligible' difference in the lengths of the parties' relevant coasts; (2) the need to prevent cut-off of one party's coastline, or part of it, from its seaward projection

across the area; and (3) the necessity to grant some effect, as opposed to full or no effect, to islands or groups of small islands lying off the coast (paras 195–7).

With the ‘equitable criteria’ thus identified, the Chamber moved on to examine the ‘practical method’ that would be adopted to reflect those criteria in the drawing of the boundary. In the present case, the applicable practical method must be both appropriate for use against a background of geography and as suitable for the delimitation of the continental shelf as for the delimitation of the superjacent waters. Therefore, only ‘geometrical methods’ would be suitable (paras 198–9). Furthermore, the particular characteristics of the water column and its natural resources generally required ‘a degree of simplification’ and a clear boundary of a constant course (paras 202–3).

The Chamber observed that the configuration of the Gulf of Maine was such as to exclude any possibility of delimitation by way of a ‘unidirectional line’. In light of the change of coastal relationship over the course of the boundary within the Gulf from one of adjacency to one of oppositeness, the boundary would be a lateral delimitation line in the first sector and a median line (whether strict or corrected) (p. 256) in the second sector. Accordingly, geography required that the boundary within the closing line of the Gulf must be composed of two segments (paras 205–7).

For the first segment, closest to the land boundary terminus, the Chamber decided on an equal division of the overlapping areas, as there were no special circumstances (para. 209). The Chamber rejected the method of lateral equidistance because it would likely result in ‘the adoption of a line whose basepoints would be located on a handful of isolated rocks’. Such a method would also ‘encounter the difficulty of the persistent uncertainty as to the sovereignty over the Machias Seal Island and the Parties’ choice of point A as the obligatory point of departure for the delimitation line’ (paras 210–11).

The Chamber considered that a more suitable method, ‘inspired by the same considerations’ as equidistance, was the bisector method. The Chamber constructed the bisector as follows: first, it drew two lines that were respectively perpendicular to two ‘basic coastal lines’, one from Cape Elizabeth to the land boundary terminus and the other from the land boundary terminus to Cape Sable; second, it took a bisector of the reflex angle of 278° formed by the intersection of those perpendiculars at the obligatory starting point (point A). The Chamber considered that this method, the implementation of which is illustrated in Figures B6.3 and B6.4, combined simplicity and clarity and gave a result that was as close as possible to an equal division of maritime space over the first sector of the boundary (paras 212–13).

Turning to the second segment, the Chamber commented that, although the shortest segment of the boundary, it was ‘the central and most decisive segment for the whole of the delimitation line’. The Chamber called for a ‘two-stage operation’ composed of, first, choosing an appropriate method for use in establishing a provisional delimitation and, second, ascertaining what corrections were required by special circumstances. The Chamber recalled the ‘quasi-parallelism’ that existed across the Gulf between the opposite coasts of Nova Scotia (from Brier Island to Cape Sable) and Massachusetts (from Cape Ann to the elbow of Cape Cod). In these circumstances, the application of any practical method of geometrical origin could ‘only result in the drawing of a median delimitation line’ (paras 214–16). As regards the question of whether any correction was warranted to the median line in the second segment, the Chamber noted that the back of the Gulf was entirely composed of US coast, and that the land boundary with Canada was situated much further to the north-east. In those circumstances, it was impossible to disregard the ‘auxiliary criterion’ of the difference in length between the parties’ respective coastlines bordering on the delimitation area. The Chamber calculated that the total length of the US coastline in the Gulf was approximately 284M, while the total length of the Canadian coastline was approximately 206M. In calculating the Canadian coastline, the Chamber included a

substantial part of the coastline of the Bay of Fundy (up to a point where there ceased to be any waters (p. 257)

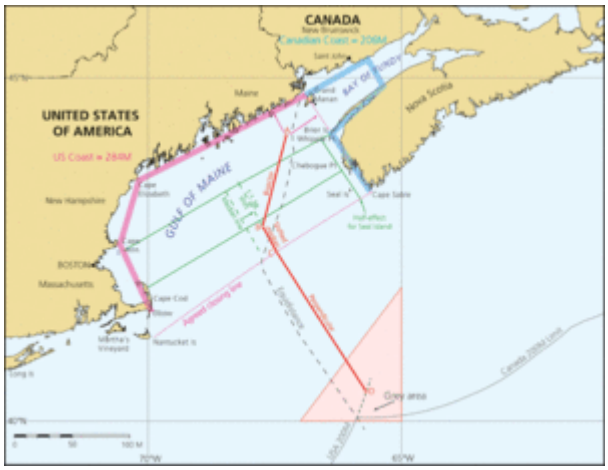

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Figure B6.3: *USA/Canada (Gulf of Maine)*: construction of judgment.

View full-sized figure

Figure B6.4: *USA/Canada (Gulf of Maine)*: construction of judgment (detail).

(p. 258) more than 12M from the low-water line).[1] The relevant coasts as identified by the Chamber are illustrated in Figure B6.3. This resulted in a ratio of coastal fronts of 1.38:1 (paras 218–22). A further correction was necessary due to the presence of Seal Island at the north-east entrance to the Gulf. The Chamber considered that, by reason both of its geographical position and its dimensions,[2] Seal Island could not be disregarded. However, it would be 'excessive' to treat the Canadian coast as transferred south-westwards by the whole distance between Seal Island and mainland Nova Scotia. The Chamber therefore gave Seal Island half effect (para. 222). As a result, the ratio to be applied to determine the position of the corrected median line was adjusted to 1.32:1 from 1.38:1.

Accordingly, the Chamber established a corrected median line in the second (central) segment of the boundary. The Chamber held that this segment would begin where the line intersected, within the Gulf, the bisector drawn from point A in the first segment, and end on reaching the closing line of the Gulf (para. 223).

Finally, the Chamber turned to consider the third segment of the boundary, beyond the closing line of the Gulf. The Chamber remarked that this segment would inevitably be situated in the open ocean over its entire length. The Chamber concluded that the geometrical method most suited in these circumstances, which was recommended above all by its simplicity, was the drawing of a perpendicular to the closing line of the Gulf. The

Chamber noted that the direction of the closing line corresponded generally to the direction of the coastline at the back of the Gulf.

As for the terminus of this final segment of the boundary (‘point D’), the Chamber determined that it should coincide with the last point within the overlapping 200M zones claimed by the two States (para. 228). In light of the adjustment to the median line effected in favour of the United States over the second segment of the boundary, this terminus was located on the US 200M limit, within the Canadian 200M limit.

(p. 259) The resulting three segments of the boundary, between points A, B, C, and D, are illustrated in Figure B6.3.

Check of the proposed delimitation against fishing and other economic and political considerations

In the final section of the judgment, the Chamber considered whether the boundary arrived at via the equitable criteria and methods described above was ‘intrinsically equitable’ in light of all the circumstances of the case. This exercise was unnecessary where the first two segments of the line were concerned, given the overriding importance of geographical factors within the Gulf (and the corresponding absence of factors relating to fisheries and hydrocarbons). The third segment of the line necessitated more thorough consideration because it traversed Georges Bank, which was the ‘real subject of the dispute’ due to its fisheries resources and perceived hydrocarbon potential. The Chamber reiterated that such factors of ‘human and economic geography’, while ineligible for consideration as ‘equitable criteria’ in the delimitation, could be relevant to an assessment of its equitable character (para. 232).

The United States emphasized its long-standing presence in the area, with particular regard to historic fishing activity, and advanced reasoning that the Chamber considered was ‘akin to the invocation of historic rights’. It contrasted those activities with the more recent and limited activities of Canada and its nationals. Canada focused its argument on contemporaneous fishing activities and what it considered to be the ‘decisive importance’ of socio-economic factors. It argued that any single maritime boundary should ensure the maintenance of the existing fishing patterns that were vital to the coastal communities of the region.

The Chamber rejected the positions of the parties. In relation to the US argument, the Chamber recalled that until very recently the areas in question had been part of the high seas, and as such freely open to fishermen of all countries. However, the position had ‘radically altered’ after the coastal States had declared 200M exclusive fishery zones. Whatever factual predominance the United States may have previously enjoyed, this was not a valid ground for claiming the incorporation into its fishery zone of an area that, in law, had become part of Canada’s. Similarly, in relation to Canada’s argument, the Chamber saw ‘no reason to consider *de jure* that the delimitation…must result in each Party’s enjoying access to the regional fishing resources which will be equal to the access it previously enjoyed *de facto*’ (paras 235–6).

Consequently, activities connected to fishing—together with others related to navigation, defence, or hydrocarbons—could not be taken into account as a relevant circumstance or an equitable criterion in determining the delimitation line. However, the Chamber expressed the following reservation:

> What the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and (p. 260) the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to

> entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned (para. 237).

The Chamber observed that there was ‘no reason to fear that any such danger will arise in the present case on account of the Chamber’s choice of delimitation line’. That line crossed Georges Bank in such a way as to leave the greatest concentrations of sedentary species exploited by Canadian fishermen on the Canadian side, while the areas in which US fishermen had traditionally fished would lie entirely on the US side. The Chamber concluded that ‘nothing less than a decision which would have assigned the whole of Georges Bank to one of the parties might possibly have entailed serious economic repercussions for the other’ (para. 238). The Chamber similarly observed that the delimitation line left on either side broad expanses of shelf in which hydrocarbon exploration had been undertaken in the past, and could be resumed in the future (para. 239).

The Chamber thus confirmed that its delimitation produced an ‘equitable overall result’ (para. 241).

III. Technical Considerations

This case was handled in an exemplary manner from the technical point of view. Article IV of the Special Agreement laid down in some detail the technical parameters to be used, specifying the map datum to be used, the type of lines (geodesics), equivalence of tidal datums across the Gulf, and the definition of the baselines and nature of the charts and symbols to be used. This provision was added mindful of the technical difficulties encountered by the United Kingdom and France in their continental shelf arbitration. The detailed technical annex produced by Peter Beazley has been used as a model by technical experts in later cases. Although his methods were technically rigorous and accurate, the advent of modern computer software should enable the same result in a simpler way.

As with most of the early cases, both parties presented arguments based on the geology and natural prolongation, although both were in agreement that these were not significant factors given the physical features of the disputed area. The United States did argue that the Northeast Channel represented a relevant natural geomorphological feature. However, echoing the *North Sea Continental Shelf* and *Tunisia/Libya* judgments, the Chamber held that the parties shared a common, continuous, and uninterrupted continental shelf. The banks, basins, and channels present in the disputed area were ‘a somewhat insignificant body of rugosities’, and even the most pronounced of these, the Northeast Channel, ‘does not have the (p. 261) characteristics of a real trough marking the dividing-line between two geomorphologically distinct units’ (para. 45).

The judgment applied three different techniques for the different sections of the boundary.

As the starting point of the maritime delimitation had been agreed beforehand, and was not an equidistant point, the Chamber felt that they could not apply the equidistance method (unlike in the later *Peru/Chile* case, where an offset equidistance line was calculated). Using the general directions of the two coasts to avoid undue influence from any small feature, the first stage used a bisector transposed to start at Point A. The bisector method was an effective method in this situation where the direction rather than starting position was most important.

The second section of the boundary is notable for its application of a coastal length ratio. The coastal length ratio of 1:1.38 was deemed significant and the Cape Cod–Chebogue Point line was divided in precisely that ratio. The shift was done by dividing the shortest line between the coasts in this exact proportion. The length of the line was then adjusted to give half weight to Seal Island, thereby treating it as if it was 7km (rather than 14km) from the shore and making an adjusted ratio of 1:1.32. This is the only judgment or award, to

date, where a coastal length ratio has been used quantitatively to adjust a provisional equidistance line.

The coastal lengths were calculated using straight line approximations to the coast, treating the Gulf of Maine as a rectangle with the opposing short sides along the coasts of Massachusetts and Nova Scotia, with the long side along the Maine coast at the back of the Gulf (para. 35).

The third stage used a perpendicular to the bay closing line (a special case of a bisector). This is parallel to the median line, but shifted to join the adjusted second stage line.

Despite the quantitative use of coastal length measurements, the Chamber did not carry out a conventional proportionality test based on the ratio of the areas allocated compared to the coastal length ratio.

As the final section was not based on equidistance and terminates at a specified point (Point D), there is an indeterminate area (or 'grey zone') seaward which lies within 200M from Canada (measured from Cape Sable), but beyond 200M measured from the United States (measured from Nantucket Island). There are also potential overlaps of continental shelf beyond 200M that have yet to be resolved. In December 2013, Canada made a partial submission to the CLCS in respect of its continental shelf beyond 200M in the Atlantic Ocean.

(p. 262) IV. Significance of the Decision and its Contribution to International Law

Gulf of Maine was a case of many firsts: the first delimitation dispute (indeed, the first dispute of any kind) to be referred to a Chamber of the ICJ under Article 26(2) of the ICJ Statute; the first maritime boundary case to be decided after the adoption of UNCLOS; the first time the court had been asked to delimit a single maritime boundary encompassing the continental shelf and exclusive fishery zones; and the first time the court had been charged not just with the enunciation of principles and methods, but also with the delimitation of an actual boundary line. In light of the final point, it was prudent for the parties to provide in their Special Agreement for the appointment of a technical expert to assist the Chamber with its task.

Pursuant to its mandate, the Chamber focused on criteria and methods that would be as suitable for the delimitation of the continental shelf as for the exclusive fishery zone. This led it to focus on the geography of the disputed area (and, in particular, the coastal configuration of the Gulf) to the exclusion of a host of other factors argued by the parties. As Judge Schwebel observed in his Separate Opinion, the Chamber had stressed that 'in every case of delimitation of a maritime boundary, the particular pattern of the area's coastal configuration must govern'. This emphasis on geography, to the exclusion of political and economic considerations, has been replicated by courts and tribunals in many subsequent single boundary delimitation cases. Subsequent jurisprudence has also acknowledged the Chamber's remark about the 'disadvantages inherent in a plurality of separate delimitations'; no court or tribunal has imposed separate seabed and water column boundaries on disputing States.[3]

Each of the three 'auxiliary criteria' identified by the Chamber was of a geographical nature. Furthermore, each auxiliary criterion (i.e. difference in lengths of the relevant coasts, prevention of cut-off of coastal projection, and the giving of limited effect to small offshore islands) has been treated as a relevant circumstance in subsequent cases. The ratio of relevant coastal fronts of 1.38:1 appears relatively insignificant at first sight (in contrast to the 8:1 and 9:1 ratios seen subsequently in *Libya/Malta* and *Jan Mayen*, respectively). However, the Chamber viewed it as significant in the context of the particular

coastal configuration of the Gulf of Maine, two sides (including the long back side) of which were entirely composed of US coastline.

(p. 263) The Chamber's lengthy analysis of Canada's arguments based on alleged historic US conduct provides a valuable example of the challenges faced by any party wishing to establish the existence of a maritime boundary based on acquiescence, estoppel, or the existence of some form of *modus vivendi*. The Chamber concluded that, while the United States may have shown 'a certain imprudence' in maintaining five years of diplomatic silence in the face of Canadian hydrocarbon licensing activity in the disputed area, that silence ultimately had no legal significance.

The judgment provides a valuable example of the application of three leading methods of delimitation (bisector, adjusted median line, and perpendicular) across the three sectors of the boundary. The Chamber set out a careful analysis of why each method was appropriate in each sector. Its application of a median line solution between opposite coasts and a perpendicular solution projecting from a flat closing line was particularly noteworthy.

The Chamber's decision in the second sector of the boundary confirmed the pre-eminence of the median line methodology in cases of delimitation between opposite coasts. The Chamber's adjustment of the median line in light of the particular geographical circumstances, in order to achieve an equitable result, has also become a mainstay of modern single boundary delimitation between opposite coasts. Indeed, the Chamber's approach was an important step in the evolution of the modern 'three-stage approach' to continental shelf and EEZ delimitation, articulated by the ICJ twenty-five years later in the *Black Sea* case.

A further formative aspect of the Chamber's judgment was its treatment of the parties' arguments about the relevance of historic and contemporaneous fisheries in the disputed area. Fisheries were the principal natural resource in the disputed area, particularly (although by no means exclusively) in the vicinity of Georges Bank. Nevertheless, the Chamber held that such factors as historic fishing by one party, or heavy contemporaneous reliance by the other party on the fishery resources, could not constitute 'equitable criteria' or relevant circumstances in the delimitation. Rather, the Chamber turned to address those (and other political and economic) factors only at the very end of its judgment in order to confirm the equitable nature of its delimitation line. Furthermore, it was only if that line was 'radically inequitable', or 'likely to entail catastrophic repercussions' for the coastal population, that a final adjustment would be made for such non-geographical factors. This high threshold in connection with fisheries arguments has been cited and applied by a number of more recent courts and tribunals. Only in one subsequent case (*Jan Mayen*) has the threshold been met in order to mandate adjustment of a single maritime boundary in order to ensure equitable access to fisheries resources.

Footnotes:

1 In a Separate Opinion, Judge Schwebel criticised this aspect of the judgment, commenting that the Chamber had not shown why the factors applied in the Bay of Fundy were 'determinative or even relevant'. He observed that the Chamber had failed to adopt an equivalent approach on the US side in relation to Massachusetts Bay (between Cape Cod and Cape Ann), and that such inconsistency suggested the artificiality of approach adopted by the Chamber to relevant coasts in the Bay of Fundy. Judge Schwebel considered that the Chamber should only have considered that part of the Canadian coast that 'actually fronts upon the Gulf of Maine' (he suggested Saint John as the limit, together with a closing line across to Brier Island). He argued that the remainder of the coasts of the Bay of Fundy, which faced each other rather than the Gulf, should be excluded. However, he observed that the identification of a coastline that 'faces' the Gulf was an inherently subjective exercise.

Consequently, he voted in favour of the Chamber's judgment because he was unable to conclude that it was necessarily wrong or inequitable.

2 The Chamber observed that Seal Island is 2.5 miles long, rises to a height of some 50 feet above sea level, and is inhabited all year round. It remarked also that the feature occupied a 'commanding position in the entry to the Gulf'.

3 Although there are a number of examples of separate continental shelf and fisheries boundaries around the world, all have been reached by agreement rather than delimited by a court or tribunal. See, e.g., Australia/Indonesia and Australia/PNG agreements and related discussion in Part A, Chapter 3, 'b. Novel negotiated outcomes' in section I, above.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 7 Guinea v. Guinea-Bissau (Award of the Arbitral Tribunal, 14 February 1985)

From: A Practitioner's Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):

Coastal states — Continental shelf — Delimitation — Straits — Territorial sea — UNCLOS (UN Convention on the Law of the Sea)

(p. 264) 7 *Guinea v. Guinea-Bissau* (Award of the Arbitral Tribunal, 14 February 1985)

Case Note: territorial sea, EEZ, and continental shelf delimitation—adjacent coastlines—relevance of 1866 land boundary and island sovereignty treaty between former colonial States (and accompanying map)—objective of an 'equitable solution'—relevance of 'other delimitations already made or still to be made in the region'—role of coastal and other islands—concave and convex coastlines—length of coastline following its general direction—relationship between equidistance and other delimitation methods—'cut-off' effect—angle-bisector method—economic considerations—proportionality test

Citation: *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, (1985) 77 *International Law Reports* 635

Institution: ad hoc arbitration, sitting in The Hague

Basis of jurisdiction: Special Agreement between Guinea and Guinea-Bissau, 18 February 1983

The Tribunal: Lachs (President), Mbaye (appointed by Guinea), Bedjaoui (appointed by Guinea-Bissau)

Applicable law: 'relevant rules of international law', including applicable treaties and customary international law

Areas delimited: territorial sea; EEZ; continental shelf

Technical expert appointed by the tribunal: Peter Beazley

I. Introduction and Context

This case concerned the delimitation of the maritime boundary between Guinea and Guinea-Bissau in the Atlantic Ocean. Guinea and Guinea-Bissau are adjacent States situated on the coast of West Africa, between Senegal (to the north) and Sierra Leone (to the south). The parties were agreed that their coastlines were (p. 265) homogenous and that a single physical continental shelf extended from their land territories. The seabed of the coast slopes down gently, at a rate of between 1 and 4 metres per km. Numerous offshore islands emerge at low tide and Guinea-Bissau can lose as much as 8,000 km² of land area at high tide. The coastline of Guinea-Bissau is characterized by a series of islands forming the Bijagos (or Bissagos) Archipelago, a number of which are inhabited. These islands are situated between 2M and 37M from the mainland and are never separated by more than 5M (often interspersed with reefs). The small Guinean island of Alcatraz is located further south, close to the terminal point of the land frontier. The geographical context of the delimitation is illustrated in Figure B7.1.

Each of the parties had formerly been under colonial administration. Guinea became independent from France on 2 October 1958. Guinea-Bissau proclaimed independence from Portugal on 24 September 1973. The land boundary between the parties was not in dispute, having been established by France and Portugal in a Convention dated 12 May 1886 ('the

1886 Convention'). The final part of that land boundary followed the thalweg of the Cajet (or Casset) River into its estuary, beyond which lay numerous small islands.

The final paragraph of Article I of the 1886 Convention (the full text of which is set out in "a. The First and Second Questions" in section III, below) provided that the islands situated between the mainland coast, the Cabo Roxo meridian, and a 'southern limit' formed primarily by the parallel of 10° 40' north latitude were Portuguese (see the area demarcated in Figure B7.1).

The maritime delimitation dispute dated back to 1958, when Portugal awarded an oil concession off Guinea's coast to a foreign company. This concession was later denounced by Guinea-Bissau in January 1975, shortly after its independence (para. 26). On 3 June 1964, Guinea published a decree establishing the outer limits of its territorial sea at 130M and its lateral limits along parallels of latitude—10°56' 42" N with Portuguese Guinea, and 9°03' 18" N with Sierra Leone. The following year, it extended its territorial sea limit to 200M (a claim that Portugal considered illegal). On 31 December 1974, Guinea-Bissau established its territorial sea limit at 150M.

Negotiations concerning the delimitation of a maritime boundary dated back to the 1970s. During the early negotiations, Guinea repeatedly proposed joint development between the parties in the disputed area. The parties acknowledged in the arbitration proceeding that the legal dispute between them had crystallized in January 1978, with the result that they could not rely on any conduct by either of them after that 'critical date' (para. 32). In May 1978, Guinea-Bissau established a 12M territorial sea and 200M EEZ from the entire limit outlined in the final paragraph of Article I of the 1886 Convention. After negotiations broke down in August 1978, events were characterized by new oil concessions, oil exploration, and fishing activities, which occasionally gave rise to protests and (p. 266)

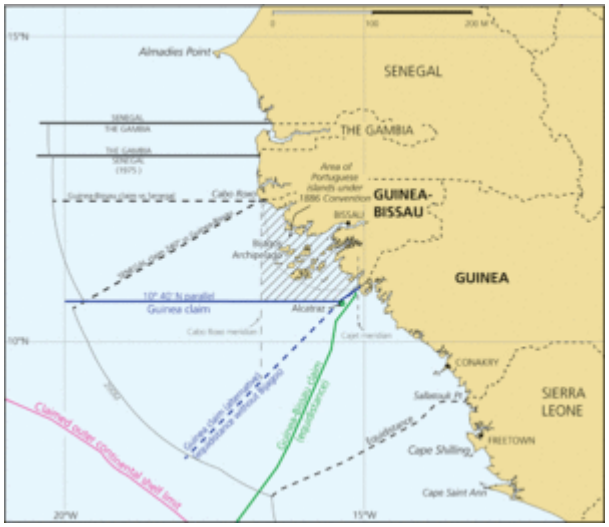

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Figure B7.1: *Guinea/Guinea Bissau*: regional setting and parties' claims.

(p. 267) the arrest of fishing vessels (para. 33). In July 1980, Guinea also reduced its territorial sea to 12M and declared a 200M EEZ.

In December 1982, a few days after the signature of UNCLOS, a bipartite commission met in Bissau with a view to examining the question of the maritime boundary. It agreed to 'consider the Convention of 12 May 1886 as the basic document to pursue the discussions'. However, the parties were unable to agree on the interpretation of the 1886 Convention and course of the maritime boundary. The commission process thus culminated in signature

by the parties of the Special Agreement on 18 February 1983, referring the dispute to arbitration (para. 36).

II. Questions Posed, Constitution of the Tribunal, and Applicable Law

Pursuant to Article 2 of the Special Agreement, the parties requested the Arbitral Tribunal to decide the following three questions 'according to the relevant rules of international law':

1. Did the Convention of 12 May 1886 between France and Portugal establish the maritime boundary between the respective possessions of those two States in West Africa? (the 'First Question')

2. What judicial effect can be attributed to the protocols and documents annexed to the Convention of 1886 for the interpretation of the aforesaid Convention? (the 'Second Question')

3. According to the answers given to the two above-mentioned questions, what is the course of the boundary between the maritime territories appertaining respectively to the Republic of Guinea-Bissau and the People's Revolutionary Republic of Guinea? (the 'Third Question').

Article 9(2) of the Special Agreement required the Arbitral Tribunal to designate one or more technical experts to assist in the preparation of a map demonstrating the course of the maritime boundary line.

As regards the 'relevant rules' for the purposes of Article 2, the tribunal stated that it was necessary to consider the sources of international law enumerated in paragraph 1 of Article 38 of the ICJ Statute (para. 38).

The Special Agreement established the basic procedures for the arbitration, including for the constitution of the tribunal. The tribunal comprised three arbitrators. Guinea appointed Mr Kéba Mbaye of Senegal. Guinea-Bissau appointed Mr Mohammed Bedjaoui of Algeria. The parties were unable to agree on a third (presiding) arbitrator. To resolve the deadlock, they signed an agreement providing that the presiding arbitrator would be appointed by common accord of the two appointed arbitrators after consultation by their respective appointing parties. (p. 268) Arbitrators Mbaye and Bedjaoui accordingly appointed Mr Manfred Lachs of Poland as President of the tribunal.

At the first session of the tribunal, it was agreed that it would follow the same rules of procedure as the ICJ (para. 9). The tribunal appointed Commander Peter Beazley as its technical expert pursuant to the Special Agreement. The parties filed simultaneous written memorials and counter-memorials, followed by eleven days of oral hearings in The Hague.

The tribunal observed that the 1886 Convention had remained in force between France and Portugal until the end of the colonial period and became binding between the parties by virtue of the principle of *uti possidetis*. The preamble to the Special Agreement recalled that, on 21 July 1964 in Cairo, the Heads of State and Heads of Government of the Organization of African Unity (OAU) had declared that all Member States pledged to 'respect the boundaries existing at the time they reached their independence'. The tribunal thus concluded that the 1886 Convention was applicable to Guinea and Guinea-Bissau (para. 40). The parties agreed that the interpretation of the 1886 Convention would be governed by Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 ('Vienna Convention'), even though neither was a signatory to that treaty (para. 41).

The tribunal determined that the territorial sea, EEZ, and continental shelf boundary between the parties must be delimited by a single line. In relation to the Third Question, the parties invoked, as 'relevant rules of international law', custom, judicial, and arbitral decisions and the relevant provisions both of the 1958 Geneva Conventions (although neither was a signatory) and UNCLOS (which was not yet in force, but which both parties commented was 'consistent with the evolution of international custom concerning the contemporary trends of the law of the sea' (paras 42 and 43).

III. Positions of the Parties and Summary of the Award

a. The First and Second Questions related to the 1886 Convention

Turning to the First Question asking whether the 1886 Convention had established the maritime boundary between the parties, the tribunal observed that this would turn upon an interpretation of the last paragraph of Article I. An English translation of Article I reads as follows:

> Shall belong to Portugal all islands located between the Cabo Roxo meridian, the coast and the southern limit represented by a line which will follow the thalweg of the Cajet River, and go in a southwesterly direction through the Pilots' Pass to reach 10°40' north latitude, which it will follow up to the Cabo Roxo meridian.

Guinea argued that this paragraph established a general maritime boundary between the parties, extending to the Cabo Roxo meridian. By contrast, Guinea-Bissau stated (p. 269) that the only purpose of the contested paragraph was to designate the islands belonging to Portugal and that the 1886 Convention therefore did not establish a maritime boundary (para. 46).

The tribunal observed that Article I defined 'a perimeter within which all the islands are declared to be Portuguese' (para. 47). It noted that the difference between the parties turned on the meaning given to the word 'limit' ('*limite*' in the original French and Portuguese texts). Guinea contended that the term was synonymous with 'boundary' ('*frontière*' in French, which also appeared in Article III of the 1886 Convention). Guinea-Bissau argued that the term had a less precise meaning (and said the fact that the 1886 Convention used both terms demonstrated that the reference in Article I to 'limit' was not intended to be a 'boundary'). The tribunal referred to the definitions of '*limite*' (the 'extreme part where a territory, a domain ends') and '*frontière*' (the 'limit which separates the territory of a State from that of a neighbouring State') contained in a French dictionary contemporaneous with the 1886 Convention and observed that 'the territory enclosed by a limit is not necessarily that of a State, and a limit is not necessarily a boundary' (para. 49).

Guinea pointed to the fact that 'Map number 1' attached to the 1886 Convention (which, according to Article I, indicated the course of the 'boundary separating the Portuguese possessions from the French possessions') indicated not only the land boundary, but also the entire perimeter described in the final paragraph. However, the tribunal remarked that 'the lines drawn on the map lose any probative value when one observes that on land they are drawn with dashes, whereas on the sea…they are dotted lines'. Consequently, Map 1 could not be considered conclusive (para. 54).

Turning to the broader text of the 1886 Convention, the tribunal contrasted 'the frequent use of the terms *possessions* and *territory*' with 'the complete absence of words *waters, sea, maritime or territorial sea*'. This led it to conclude that the object of the 1886 Convention had been the colonial land possessions of France and Portugal in West Africa. This provided 'presumptive evidence' as to the meaning of the 1886 Convention, but did not dispense with

the need to resort to other elements of treaty interpretation under the Vienna Convention (paras 56–7).

The tribunal observed that Article 31, paragraph 3(b) of the Vienna Convention requires consideration of 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. It remarked that 'none of the documents presented by the Parties has proven to the Tribunal that in the course of the colonial period France and Portugal considered the "southern limit" referred to in the final paragraph of Article I of the 1886 Convention as a general maritime boundary between their possessions' (para. 61). What is more, none of the colonial materials presented to the tribunal mentioned any water boundary, other than the thalweg of the Cajet River. Accordingly, the tribunal concluded that the southern limit had not been 'held (p. 270) to be a maritime boundary by law'. Indeed, no problem had arisen in the disputed area until the Portuguese oil concession of 1958. By virtue of that incident, the Portuguese Government, by granting the concession beyond the southern limit, and the French Government, by not protesting in the name of Guinea, had expressed their conviction that the 1886 Convention did not establish a maritime boundary (paras 62–3).

Turning to the period of decolonization, the tribunal noted from the legislative and administrative materials presented to it that neither of the parties had accepted the line referred to in the final paragraph of Article I of the 1986 Convention as the lateral limit of their waters. On the contrary, each had purported unilaterally to exercise maritime jurisdiction beyond that line (para. 64). In response to an assertion by Guinea that it had been ignorant both of the 1958 Portuguese oil concession and 1886 Convention, the tribunal remarked that 'if it is conceivable under certain circumstances that a recent foreign concession escape notice and that this be without consequence, it does not seem possible, in the present state of international law and international relations, to invoke against third States ignorance, over so many years, of a widely publicized boundary treaty, the effects of which can be observed on the ground' (para. 65).

The tribunal thus concluded that, until crystallization of the legal dispute between the parties in 1978, the States signatories to the 1886 Convention and their successor States had interpreted the final paragraph of Article I as not having established a maritime boundary (para. 67).

The tribunal turned briefly to address the Second Question, which required it to consider the preparatory work of the 1886 Convention, as permitted also by Article 32 of the Vienna Convention. Guinea considered that the protocols and documents annexed to the 1886 Convention, which included the *procès-verbal* of the Franco-Portuguese meetings that produced the treaty, confirmed that it established a general maritime boundary. The tribunal reviewed also the documents provided in 1887 to the French and Portuguese parliaments in preparation for their ratification of the 1886 Convention, which were supplied by the parties to the tribunal at its request during the arbitration proceeding. The tribunal noted that the negotiators had 'almost immediately rejected' a proposal to include territorial waters in the 1886 Convention. This lent even greater weight to the conclusion that France and Portugal never envisaged the treaty as covering anything beyond land boundaries. This presumption became 'a certainty' when the 1886 Convention was viewed against the backdrop of the Congress of Berlin of 1884–85, where the colonial powers had sought to avert conflict by defining the conditions of occupation of their coastal possessions in Africa, but without concerning themselves with territorial waters (para. 79). Furthermore, the 'southern limit', which passed the nearest island at a distance of more than 12M, 'would have extended the notion of territorial sea far beyond the concepts of the time' (para. 80).

(p. 271) The tribunal thus concluded that, in entering the 1886 Convention, France and Portugal had no intention of establishing a general maritime boundary between their possessions in Guinea. On the contrary, in the final paragraph of Article I, they had simply wished to indicate which islands would belong to Portugal. For the purposes of the Second Question, this conclusion was confirmed by the protocols and documents annexed to the 1886 Convention (paras 82–4).

b. The Third Question related to the course of the maritime boundary

Identification of an equitable maritime boundary

From these answers to the First and Second Questions, it followed that there was no boundary delimiting the territorial waters, EEZ, or continental shelf between the parties. Pursuant to the Third Question, it thus fell to the tribunal to draw a single line delimiting the maritime territories of the two States. The tribunal observed, with reference to the recently negotiated text of Articles 74(1) and 83(1) of UNCLOS, that the essential objective was to find an 'equitable solution'. Indeed, this was 'a rule of international law which is recognized by the Parties and which compels recognition by the Tribunal' (para. 88).

The tribunal stated that its task required recourse to factors, and the application of methods, that evolved from 'physical, mathematical, historical, political, economic or other facts' that were 'not restricted in number' because each case of delimitation 'is a *unicum*'. The factors to be considered resulted from the particular circumstances of the case and were 'not restricted to physical facts whether geographical, geological or geomorphological' (para. 89).

Guinea argued that the two States were adjacent. Guinea-Bissau, on the other hand, was of the opinion that parts of the coasts were opposite to each other. The tribunal remarked at the outset of the Award (para. 18) that the two States were adjacent, but found it unnecessary to 'linger' on the question. However, the tribunal noted that the maritime zones in question did not contain any 'unusual characteristics' and that the delimitation would be based on 'equitable and objective principles' (para. 91). For this purpose, it was necessary to ensure that, as far as possible, each State controlled the maritime territories 'opposite its coasts and in their vicinity' (para. 92).

The tribunal stated that 'a delimitation designed to obtain an equitable result cannot ignore the other delimitations already made or still to be made in the region'. The tribunal noted that it had been informed that Guinea-Bissau had an ongoing maritime delimitation dispute with Senegal in which Guinea-Bissau was said to be claiming a parallel of latitude as the maritime boundary, while Senegal was claiming a boundary along the azimuth of 240° (paras 93–4). To the south, Guinea had unilaterally fixed a line of delimitation along the parallel of latitude with Sierra Leone, but Sierra Leone had 'apparently not recognized' any such delimitation (paras 93–4).

(p. 272) The tribunal observed that the coastline abutting the disputed maritime area was marked by the presence of numerous islands. It distinguished between three types of islands for the purposes of the delimitation. First, there were 'coastal islands, which are separated from the continent by narrow sea channels or narrow watercourses and are often joined to it at low tide'. The tribunal held that such islands 'must be considered as forming an integral part of the continent'. Second, there were the Bijagos Islands, which were located between 2M and 37M from the continent and no two of which were further than 5M apart. The tribunal observed that these could be considered 'as being in the same territorial waters as each other and as being linked as those of the continent'. Third, there were 'the more southerly islands scattered over shallow areas', namely Poilao, Samba, Sene, and Alcatraz (see Figure B7.3), some of which could be taken into account for the establishment

of baselines and included in the territorial waters. The tribunal concluded that it was ‘above all’ the first and second types of island that were relevant to the delimitation (para. 95).

The tribunal noted that, in accordance with Article 76 of UNCLOS, the continental shelf could be extended beyond the 200M limit if the outer edge of the continental margin so allowed. The tribunal stated that it had received ‘contradictory information’ in this respect. Consequently, this consideration would have no effect on its reasoning (para. 96).

The parties were not in agreement on the method of defining the length of their relevant coastlines, including (or not) the numerous islands. Citing the *North Sea Continental Shelf* cases and the *Tunisia/Libya* case, the tribunal stated that what counted was ‘the length of the coastline following its general direction’. For this purpose, the coastal islands and Bijagos Islands referred to above would be taken into account, but not the ‘scattered islands’. As a result, the tribunal concluded that each country’s coastline was ‘about 154 miles long’ (para. 97).

Guinea-Bissau claimed a delimitation line based upon equidistance, calculated with reference to the low-water line and all of its islands, enclaving with a 2M limit the small Guinean island of Alcatraz that lay to the north of the line. By contrast, and consistent with the 1886 Convention, Guinea claimed a line principally based on a parallel of latitude out to the 200M limit. In the ‘impossible’ event that the equidistance method was adopted, Guinea proposed an adjusted equidistance line taking no account of the Bijagos Islands. Each party’s claim line, together with Guinea’s adjusted equidistance line, is illustrated in Figure B7.1.

Guinea rejected the equidistance method on the grounds that ‘its application to the Atlantic seaboard of Africa would result in exaggerated divergences or convergences and that for some States, including Guinea itself, this would lead to a cut-off effect or even enclavement’. By contrast, it argued that ‘a system of parallels of latitude would not produce these drawbacks, if only because parallels of latitude never meet’. It pointed out that such a delimitation method had already been (p. 273) applied to the north between The Gambia and Senegal. Guinea-Bissau argued that the imposition of a system of parallels would be inconsistent with the configuration of the coastline and would, in any event, be inapplicable from Liberia onwards because of the change in direction of the African coast (paras 100–1).

The tribunal held that the equidistance method was ‘just one among many’ and that there was ‘no obligation to use it or give it priority, even though it is recognized as having a certain intrinsic value because of its scientific character and the relative ease with which it can be applied’ (para. 102).

The tribunal observed that, when considered together, the coastline of Guinea and Guinea-Bissau was concave. This configuration was accentuated if Sierra Leone was also considered. The tribunal noted that, if the equidistance method were to be applied in such circumstances, exaggerated importance would be given to certain insignificant features of the coastline, producing ‘a cut-off effect which would satisfy no equitable principle’. Further, Guinea—as the middle country located between Guinea-Bissau and Sierra Leone on a concave coastline—would be enclaved and thus prevented from extending its maritime territory as far seaward as international law permits (paras 103–4).

Moving on to consider the ‘southern limit’ claimed by Guinea, the tribunal observed that this was ‘of a more equitable character than a line of equidistance’. It noted that, until 1958, this limit had not been breached by either France or Portugal during activities including the installation and maintenance of beacons and buoys, the laying of submarine cables and conduct of customs patrols. The tribunal concluded that, until drawing abreast of the island of Alcatraz, the ‘southern limit’ tended to achieve an equitable result (para. 106). Beyond Alcatraz, however, this limit could result in a cut-off effect and enclavement of Guinea-Bissau and, if the line delimiting the maritime boundary between Guinea-Bissau and

Senegal inclined south, a certain enclavement effect. The tribunal therefore resolved, in relation to the sector of the boundary beyond Alcatraz, to identify a method that did not have the drawbacks of equidistance or the ‘southern limit’ referred to in the 1886 Convention (para. 107).

The tribunal considered that a valid method consisted of ‘looking at the whole of West Africa and of seeking a solution which would take overall account of the shape of its coastline’. This would lead to a delimitation that would be ‘integrated into the present or future delimitations of the region as a whole’. For this purpose, the tribunal identified two systems that might provide an equitable result. The first would be based on the outer perimeter of the coasts and their islands, which could produce a ‘polygon with protruding angles’ along the convex West African coast. The second would consist of using ‘a maritime facade, and, for this purpose, selecting a line joining two coastal points on the continent’. The tribunal adopted a facade joining Almadies Point in Senegal and Cape Shilling in Sierra Leone, which (p. 274)

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Figure B7.2: *Guinea/Guinea Bissau*: tribunal’s award.

(p. 275) the tribunal considered suited to the overall configuration of the West African coastline (paras 108–10). The course of this facade is illustrated in Figure B7.2.

The tribunal concluded that its analysis opened the possibility of an equitable delimitation consisting of: first, the ‘southern limit’ of the 1886 Convention (i.e. the Pilot’s Pass from the mouth of the Cajet River and the parallel of 10°40’ north latitude) as far as the 12M territorial sea limit of Alcatraz; and, second, a line extending in a south-westerly direction perpendicular to the facade joining Almadies Point and Cape Shilling (para. 111). The course of this boundary line is illustrated in Figures B7.2 and B7.3.

Test of the equitableness of its proposed delimitation

Having arrived at this preliminary conclusion, the tribunal proceeded to consider three ‘other circumstances’ in order to verify the equitableness of its proposed result.

The first ‘other circumstance’ was the structure and nature of the continental shelf. The tribunal recalled the ruling of the ICJ in the *North Sea Continental Shelf* cases to the effect that any delimitation in accordance with equitable principles must, wherever possible, attribute to each party all those parts of the continental shelf that constitute a natural prolongation of its land territory. However, it noted that Article 76 of UNCLOS had given rise to a distance-based continental shelf entitlement, which reduced the scope of the rule of natural prolongation. In any event, the tribunal considered that the rule of natural prolongation could only be invoked where there was a separation of continental shelves. In

the present case, the continental shelf opposite the two Guineas was ‘one and the same’ and ‘must therefore be delimited as such’ (paras 113–17).

The second ‘other circumstance’ related to proportionality. The tribunal considered that proportionality with relation to the physical land mass of each State was not a relevant factor to the delimitation. The only relevant proportionality was that between the length of the coastline and the surface area of the maritime zone to be attributed to each State. In the present case, the tribunal had identified equal relevant coastlines between the two parties, with the result that neither could ‘claim any additional advantage’ with reference to the principle of proportionality (paras 118–20).

The third ‘other circumstance’ related to the parties’ respective economic interests, including maritime transport, fishing, and potential petroleum resources. The tribunal considered that it did not have ‘the power to compensate for the economic inequalities of the States concerned by modifying a delimitation which it considers is called for by objective and certain considerations’. The tribunal therefore dismissed economic circumstances as a relevant factor in the delimitation. Instead, it encouraged the parties to pursue ‘mutually advantageous cooperation’ to achieve the development of their countries. In relation to the parties’ claimed security (p. 276) interests, the tribunal observed that neither the EEZ nor the continental shelf are zones of sovereignty. It stated that, pursuant to its delimitation, each State would control ‘the maritime territories situated opposite its coasts and in their vicinity’. Consequently, the delimitation would not ‘prevent the exercise of its own right to development or compromise its security’ (paras 121–4).

In conclusion, the tribunal held that none of the additional circumstances invoked by the parties affected its proposed delimitation. Consequently, the tribunal upheld the line of delimitation set out at para. 111 of its Award (Figures B7.2 and B7.3).

IV. Technical Considerations

For its regional interpretation of the West African continent, the tribunal chose a small-scale French chart. It is not stated whether the two end-points of its line of delimitation were chosen off larger-scale charts, although that would lead to a more accurate result. Both parties had agreed on the WGS72 datum (an earlier version of the more modern WGS84 and for practical purposes the same). The parties had also agreed to use geodesic lines. However, the tribunal ultimately chose to use loxodromic lines because the orientation of both the general direction and the perpendicular had been defined on a Mercator chart, and a segment of the delimitation followed a parallel of latitude (which is a loxodrome by definition).[1]

As the boundary is based on regional coastal directions, the baselines of the parties had no part to play in the delimitation, apart from Point C of the boundary being located 12M from Alcatraz (see Figure B7.3).

As the end of the land boundary is defined by the thalweg of the Cajet River, the tribunal started the maritime delimitation where that thalweg intersected the meridian of 15°06’ 30" W rather than specifying a more precise latitude. This allowed the initial section of the boundary to move as the thalweg moves. A similar construction was used by the United States and Mexico in their Caribbean Rio Grande boundary;[2] similarly, the ICJ in *Nicaragua/ Honduras* started the maritime boundary at a point 3M at sea, requiring the parties to negotiate the initial sector.

By following the 10°40’ N parallel, the section of boundary between Points B and C passes 2M north of the Guinean island of Alcatraz, before turning south-westerly from Point C, situated 12M west of Alcatraz. The line thus follows the (p. 277)

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Figure B7.3: *Guinea/Guinea Bissau*: tribunal's award (detail).

(p. 278) northerly limit of Guinea's claim, but limits the territorial sea of Alcatraz on the northern side.

As the boundary does not follow equidistance, a 'grey area' inevitably results at 200M (see Figure B7.2), where an area of approximately 3,000km^2 south of the boundary lies within 200M of Guinea-Bissau. See also the further discussion of 'grey areas' in *Bangladesh/ Myanmar*.

The tribunal appointed Commander Peter Beazley as technical expert, although there is no technical report annexed to the Award (in contrast to the *Gulf of Maine* judgment, which annexed a technical report by Commander Beazley).

V. Significance of the Decision and its Contribution to International Law

The *Guinea/Guinea-Bissau* case is one of the first examples in modern international law of a maritime boundary dispute being settled by way of ad hoc arbitration and a rare modern example of a maritime boundary dispute being settled by a panel of three (as opposed to five) arbitrators.[3] The arbitration process proceeded with alacrity, lasting less than two years between signature of the Special Agreement and the issuance of the Award. The process survived intact notwithstanding a period of significant political upheaval in the region, including a *coup d'état* in Guinea in 1984.

The tribunal was composed of three sitting members of the ICJ, including one previous (Judge Lachs) and one future (Judge Bedjaoui) President of the Court. Notably, the third arbitrator, appointed by Guinea, was the sitting Senegalese judge on the court (Judge Mbaye). Senegal shares a maritime boundary with Guinea-Bissau and, as explained further below, had a clear interest in the outcome of the case.

The Award is notable for its breadth and flexibility as to the methodology to be adopted in single maritime boundary delimitation and the scope of relevant factors. As to methodology, the tribunal rejected any priority for the equidistance method, indicating that it was 'just one among many' possible methodologies. As to relevant factors, the tribunal indicated that they were 'not restricted in number' and could 'evolve from physical, mathematical, historical, political, economic or other facts'. The relevance of these aspects of the Award to the modern law is open to question in light of more recent decisions indicating a preference for the equidistance/relevant circumstances methodology and a preference for factors that are geographical in nature (particularly within 200M).

(p. 279) The Award is perhaps best known for its close attention to the regional context of the delimitation. The tribunal indicated that, in considering what would be an equitable result between Guinea and Guinea-Bissau, it could not ignore other delimitations already made or still to be made in the West African region. It paid particular attention to the outstanding dispute between Guinea-Bissau and Senegal. In rejecting Guinea's arguments based on a 'parallel of latitude' and the 1866 Convention, and instead opting for a

delimitation extending in a south-westerly direction, the tribunal adopted an approach that was similar to the Senegalese claim in the other pending dispute. From this perspective, Guinea's choice of Judge Mbaye as its arbitrator was a curious one.[4] In any event, the tribunal's focus on its perception of the regional context, which culminated in delimitation by way of a bisector calculated from a line drawn between the coasts of two third States, is open to serious question and has not been widely adopted in subsequent cases.

That said, the tribunal's endeavour to avoid any 'cut-off effect' to the prejudice of Guinea, in light of the concave coastline of the Guinea-Bissau/Guinea/Sierra Leone portion of the West African coast, was well- founded and consistent with a similar approach adopted by the court in the *North Sea Continental Shelf* cases in a broadly similar geographical context. The concave coastal configuration as between these three States rendered any delimitation based on pure equidistance inequitable because of the enclavement of Guinea that would likely follow. Figure B7.1 illustrates how equidistance-based delimitations with Guinea-Bissau (to the north) and Sierra Leone (to the south) would leave Guinea substantially disadvantaged as against its neighbours).

The tribunal's careful treatment of islands in the delimitation was notable and to be commended. The Award differentiates clearly between coastal islands and island groups, on the one hand, and more remote and isolated offshore features, on the other. This approach was to be replicated subsequently in, *inter alia*, the *Eritrea/Yemen* case. Equally prescient was the tribunal's observation to the effect that, in light of the new distance-based entitlement to continental shelf under Article 76 of UNCLOS, the role of physical natural prolongation in the delimitation process may be diminished in the future (as has indeed been the case).

While the tribunal's drawing of a line between two points located on the coastlines of third States in order to represent the relevant coastal front was open to criticism, (p. 280) the 'angle-bisector method' utilized in the Award was to be replicated in future cases such as *Nicaragua/Honduras*.

The tribunal's rejection of the parties' respective economic arguments was consistent with a long line of delimitation jurisprudence, both before and since the Award. However, the tribunal's recommendation of the pursuit of 'mutually advantageous cooperation' between the parties was noteworthy. In March 1986, the Presidents of Guinea and Guinea-Bissau met to review the tribunal's Award. Following the meeting, the parties issued a *communiqué* stating that they would cooperate in the development of offshore resources for the mutual benefit of both States. However, at the time of writing, there was no indication that the parties had carried out any significant bilateral cooperation with regard to the joint development of offshore resources.

The tribunal's boundary line does not give a full 12M territorial sea to Alcatraz—the perpendicular departed from the parallel 12M to the west of Alcatraz, but Alcatraz did not receive a full territorial sea entitlement to the north. Guinea did not receive more than its claimed parallel in this sector—unlike in *Nicaragua/Honduras*, where Honduras received an area it had not claimed south of the 15th parallel to reflect its territorial sea entitlement. Had Guinea claimed a full 12M territorial sea entitlement for Alcatraz, then, at least under the approach subsequently adopted in *Nicaragua/Honduras* and *Bangladesh/Myanmar*, it is likely that Alcatraz would have been awarded more maritime space to its north.

VI. Postscript to the 1985 Award

In 2009, both parties presented to the CLCS Preliminary Information on the limits of the continental shelf beyond 200M. On 25 September 2014, the Republics of Cabo Verde, The Gambia, Guinea-Bissau, Guinea, Mauritania, Senegal, and Sierra Leone submitted a joint submission to the CLCS on the outer limits of their continental shelves beyond 200M, pursuant to Article 76 of, and Article 4 of Annex II to, UNCLOS.[5] The outer limits contained

in the submission are shown in Figures B7.1 and B7.2. If this area of outer shelf is endorsed by the CLCS, the boundary established in the 1985 Award will extend along the same azimuth to the outer limit of the continental shelf, according to paragraph 3c of the tribunal's *dispositif*.[6]

(p. 281) The joint submission was made using a single set of documents and data prepared collectively and collaboratively by the seven submitting States.[7] In accordance with a 2010 Framework Agreement, the States had agreed to cooperate in the preparation of joint or separate submissions and had given their consent to the CLCS considering submissions covering areas still in dispute between them. The States parties to the Framework Agreement also agreed that the submission to, and recommendations of, the CLCS would not prejudice the positions of any of them in such disputes and would be without prejudice the future delimitation of maritime boundaries in outstanding disputed areas. The Framework Agreement and resulting joint CLCS submission provide an example of collaboration between coastal States in the presentation of their outer shelf claims under Article 76 of UNCLOS, another example being the joint submission by France, Ireland, Spain, and the United Kingdom.

Footnotes:

1 See also the discussion in *UK/France* about the use of loxodromes and geodesics.

2 Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary between United Mexican States and United States of America, 23 November 1970.

3 Another example of a maritime boundary dispute being settled by a panel of three arbitrators was the *Guinea-Bissau/Senegal* Award dated 31 July 1989. Part, B Chapter 9.

4 Guinea-Bissau's re-appointment of Judge Bedjaoui in the subsequent arbitration proceeding between Guinea-Bissau and Senegal, in which Guinea-Bissau was itself arguing for a 'parallel of latitude' boundary, was also curious given the tribunal's dismissal of Guinea's own similar parallel of latitude argument in the present case. Presumably, that factor was overridden in Guinea-Bissau's eyes by a perception of victory in the *Guinea/Guinea-Bissau* case, assisted by Judge Bedjaoui's participation. The arbitration agreement between Guinea-Bissau and Senegal was signed just a month after the Award.

5 Submission available on the CLCS website at <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_wa7_75_2014.htm>.

6 Paragraph 3c provides that the boundary delimited by the tribunal 'follows a loxodromic line on an azimuth of 236° from point C above to the outer limit of the maritime territories of each State as recognized under general international law'.

7 In accordance with UN General Assembly Resolution A/RES/63/111 of 5 December 2008, Norway assisted the seven States in preparing the joint submission by providing technical and financial assistance and advice.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 8 Libya v. Malta (Judgment of the International Court of Justice, 3 June 1985)

From: A Practitioner's Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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(p. 282) 8 *Libya v. Malta* (Judgment of the International Court of Justice, 3 June 1985)

Case Note: continental shelf delimitation—opposite coastlines—claims of third States—roles of natural prolongation and distance-based criteria within 200M—relationship between continental shelf and new concept of EEZ—provisional median line excluding small islet as base point—relevant circumstances—significant difference between lengths of relevant coasts—method of adjustment—simplified proportionality check

Citation: *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*), Judgment, 3 June 1985, *ICJ Reports* 1985, p. 13

Institution: ICJ

Basis of jurisdiction: Special Agreement between the Socialist People's Libyan Arab Jamahiriya and the Republic of Malta, 23 May 1976, ICJ Statute, Article 36(1)

The Court: *Judges* Elias (President), Sette-Camara (Vice-President), Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Schwebel, Jennings, de Lacharrière, Mbaye, Bedjaoui, *Judges ad hoc* Valticos (appointed by Malta), Jiménez de Aréchaga (appointed by Libya)

Applicable law: customary international law

Areas delimited: continental shelf (within 200M)

I. Introduction and Context

This case concerned delimitation of the continental shelf boundary between Libya and Malta in the Mediterranean Sea. Libya and Malta have opposing coastlines, with the south-east tip of Malta lying approximately 183M north of the nearest point on the coast of Libya.

Malta is a State made up of a group of four inhabited islands: Malta, Gozo, Comino, and Cominotto, and the uninhabited rock of Filfla. The Maltese islands (p. 283) extend for a distance of approximately 24M (or 44.5km). The offshore area is bounded by the coast of Tunisia and a number of small Italian islands to the west, the large Italian island of Sicily to the north, the mainland coast of Greece and a series of Greek islands to the east, and the coast of Libya to the south. As such, as the court remarked in its judgment, the islands are located in a semi-enclosed sea. Libya is a mainland State on the coast of North Africa encompassing some 1,775,500km² and with a Mediterranean coastline stretching more than 1,700km. The geographical context of the delimitation is illustrated in Figure B8.1.

By notification dated 19 July 1982, Libya and Malta notified the court of a Special Agreement providing for the submission of a dispute concerning the delimitation of the continental shelf between those two States. Article I of the Special Agreement set out the question that the court was requested to decide as follows:

> What principles and rules of international law are applicable to the delimitation of the area of the continental shelf which appertains to the Republic of Malta and the area of continental shelf which appertains to the Libyan Arab Republic, and how in practice such principles and rules can be applied by the two Parties in this

particular case in order that they may without difficulty delimit such areas by an agreement as provided in Article III (para. 2).

Article III of the Special Agreement provided that, following the court's final decision on this question, Libya and Malta would enter into negotiations for determining the area of their respective continental shelves and for concluding an agreement for that purpose 'in accordance with the decision of the Court'.

Neither party had at the time of the dispute (which pre-dated UNCLOS) proclaimed an EEZ. Malta had proclaimed a 25-mile exclusive fishing zone and had defined straight baselines for the measurement of its territorial sea, relying on the 1958 Convention on the Territorial Sea and the Contiguous Zone. Both parties had granted a number of petroleum exploration concessions extending into areas material to the case.

II. Positions of the Parties and Summary of the Judgment

a. Applicable law and scope of jurisdiction under the Special Agreement

The court observed that the parties were broadly in agreement as to the sources of the law applicable in the case. Malta was a party to the 1958 Geneva Convention on the Continental Shelf, but Libya was not, so the 1958 Convention was not applicable in relations between them. While both parties had recently signed UNCLOS, it had not yet entered into force and was therefore not yet operative as treaty law. The parties agreed, therefore, that the dispute was to be governed by customary international law. They also agreed that some of the provisions of UNCLOS constituted, to a certain extent, the expression of customary international (p. 284)

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Figure B8.1: *Libya/Malta*: regional setting.

(p. 285) law, although they disagreed about which UNCLOS provisions had that status (para. 26). In this regard and in the context of discussion of State practice, the court commented that 'it cannot be denied that the 1982 Convention is of major importance, having been adopted by an overwhelming majority of States' (para. 27).

The court observed that Article 83 of UNCLOS sets a goal to be achieved in delimitation—namely, an 'equitable solution'—but is silent as to the method to be followed to achieve it. Accordingly, 'it is left to States themselves, or to the courts, to endow this standard with specific content'. Nevertheless, both parties agreed that, whatever the status of Article 83, both the requirement of an 'equitable solution' and the application of 'equitable principles' formed part of the law to be applied (paras 28–9).

The parties had conflicting views about the scope of the court's jurisdiction under the Special Agreement. Malta contended that, in order to enable the parties to effect delimitation 'without difficulty' following the judgment for the purposes of Article III, the court should indicate a specific boundary line. Libya, on the other hand, maintained that the task of the court did not extend to the determination of the delimitation line. The court observed that it 'must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent'. It determined that its task necessarily entailed an indication of the delimitation method or methods which it considered resulted from the proper application of the appropriate rules and principles. Some such methods might require detailed articulation in order that the ultimate objective of an agreed delimitation reached 'without difficulty' was to be achieved. The court did not consider it was debarred by the terms of the Special Agreement from indicating a line. On the contrary, it concluded that it was not apparent how it might perform its task without at least indicating an approximate boundary line illustrated on a map (paras 18–19).

b. Request by Italy to intervene

Italy applied to the court for permission to intervene under Article 62 of the Statute. Both Libya and Malta opposed the application and, in doing so, indicated a preference for a restriction in the geographical scope of the delimitation judgment which the court was to give. In a Judgment of 21 March 1984, the court refused Italy's application, observing that, in its final judgment, it would 'make it clear that it is deciding only between the competing claims of Libya and Malta'. However, the court explained that it 'cannot wholly put aside the question of the legal interest of Italy as well as of other States of the Mediterranean region, and they will have to be taken into account'.[1]

(p. 286) The court accordingly confirmed in its final judgment that, by virtue of Article 59 of the Statute, its decision would have binding force only between the parties. However, it concluded that its delimitation decision must be 'limited in geographical scope so as to leave the claims of Italy unaffected, that is to say that the decision of the Court must be confined to the area in which, as the Court has been informed by Italy, that State has no claims to continental shelf rights' (para. 21).

Since Italy had, in the context of its application to intervene, expressed its claims by means of precise geographical coordinates, the court concluded that it would limit the area of its decision within the meridians 13°50' E and 15° 10' E (para. 22). These limits, which significantly restricted the extent of the boundary delimited by the court, are located at the eastern and western terminal points of the court's illustrative delimitation line (Figure B8.2).

c. The parties' respective arguments with regard to historic conduct

Malta stated that it had informed Libya of its intention to delimit its continental shelf by means of a median line in 1965, and that Libya had remained silent until it made a counter-proposal in 1973. Malta contended that this pattern of conduct could be viewed 'either as a cogent reflection of the equitable character of Malta's position or as evidence of acquiescence by Libya in Malta's position or as precluding Libya…from challenging the validity of Malta's position'. Malta also observed that certain Libyan concessions contained exemptions of the licences from the duty to carry out petroleum activities north of the median line. Malta concluded that 'by their conduct, the Parties have indicated that the median line is, to say the least, very relevant to the final determination of the boundary'.

Libya countered by arguing that Maltese petroleum concessions followed geomorphological features consistent with its own delimitation arguments and contended that Malta had

‘implicitly recognized’ the significance of the ‘rift zone’ area which Libya regarded as significant for the delimitation (para. 24).

The court concluded that it was ‘unable to discern any pattern of conduct on either side sufficiently unequivocal to constitute either acquiescence or any helpful indication of any view of either Party as to what would be equitable’. As a result, its decision would be based upon the submissions made by the parties in the proceedings as opposed to any historic conduct (para. 25).

d. Libya’s argument for delimitation based on natural prolongation

Overriding importance of distance as a basis for continental shelf entitlement within 200M and relationship with the overlapping EEZ

Citing the *North Sea Continental Shelf* cases, Libya claimed that the prolongation of its land territory into and under the sea was a ‘geological fact’ and that natural prolongation in the physical sense remained the ‘fundamental basis of legal title to (p. 287)

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Figure B8.2: *Libya/Malta*: judgment.

continental shelf areas’. Malta countered that, according to customary international law as reflected in Article 76 of UNCLOS, natural prolongation was no longer defined by reference to physical features, but by reference to a certain distance from the coasts. According to Malta, natural prolongation therefore only resumed significance beyond 200M from the coast, as States which possessed a (p. 288) more extensive physical natural prolongation beyond that distance enjoyed continental shelf rights to the edge of their continental margin (para. 30).

Malta relied on the genesis of the EEZ concept in UNCLOS as confirming the importance of the ‘distance principle’ in the law of the continental shelf within 200M. Libya pointed out that UNCLOS was not yet in force and was not binding on the parties. It contended that the ‘distance principle’ was not a rule of international law. That is, the continental shelf had not been ‘absorbed’ by the concept of the EEZ under international law. While the ‘distance criterion’ was applicable to the definition of the outer limit of the continental shelf, it was inappropriate for application in the Mediterranean (paras 31–2).

The court held that, even though the present case related to delimitation of the continental shelf, the principles and rules underlying the new EEZ concept could not be left out of

consideration. This was because the continental shelf and EEZ were ‘linked together in modern law’. It continued:

> Since the rights enjoyed by a State over its continental shelf would also be possessed by it over the sea-bed and subsoil of any exclusive economic zone which it might proclaim, one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone appertaining to that same State. This does not mean that the concept of the continental shelf has been absorbed by that of the exclusive economic zone; it does however signify that greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts (para. 33).

The court observed that, while the concepts of the continental shelf and EEZ are different and distinct, the rights which the EEZ entails over the seabed are defined by reference to the regime laid down for the continental shelf. Although there could be a continental shelf where there was no EEZ, there could not be an EEZ without a corresponding continental shelf. It followed that ‘the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone’. The court concluded:

> The concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf.

The court was thus unable to accept the Libyan argument that distance from the coast was not a relevant factor for the continental shelf delimitation (para. 34).

Rejection of Libya’s ‘rift zone’ argument

As part of its natural prolongation argument, Libya contended that the delimitation between Libya and Malta must follow the line of a ‘fundamental discontinuity’ between the continental shelf area adjacent to them. It submitted for this purpose that there was no overlapping shelf, but rather two distinct continental (p. 289) shelves separated by what it called the ‘rift zone’. That zone was located much closer to the Maltese islands than to the coast of Libya. It consisted of a series of deep troughs reaching over 1,000 metres in depth. The ‘rift zone’ and its salient features upon which Libya relied are illustrated in Figure B8.2. In the context of this Libyan argument, both parties furnished considerable expert evidence to the court.

In light of its conclusion about the dominance of distance as the basis for continental shelf entitlement within 200M, the court held there was ‘no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims’. Since the distance between the coasts of Libya and Malta was less than 400M, the so-called ‘rift zone’ could not act as a ‘natural boundary’ and prevent the southward extension of Malta’s juridical continental shelf (para. 39).

The court acknowledged that its past jurisprudence, not least the *North Sea Continental Shelf* cases, had recognized the relevance of geophysical characteristics in continental shelf delimitation. However, it held that such jurisprudence ‘belongs to the past’ in so far as seabed areas less than 200M from the coast are concerned because the modern law bases legal title over such seabed areas on distance, not the existence of physical natural prolongation (para. 40).

In an *obiter* comment, the court stated that Libya had failed to prove the 'fundamental discontinuity' upon which its argument relied in any event (para. 41).

The court therefore rejected Libya's 'rift zone' argument.

e. Rejection of Malta's assertion of a rule of equidistance

The court similarly rejected Malta's 'diametrically opposed' argument that the importance of distance as a basis of entitlement within 200M in modern law had conferred a 'primacy' upon equidistance as a method of delimitation. Malta argued that, as a starting point of the delimitation process, consideration must be given to a line based on equidistance (para. 42).

The court held that it was 'unable to accept that, even as a preliminary and provisional step toward the drawing of a delimitation line, the equidistance method is one which *must* be used'.[2] On the contrary, equidistance was not the only appropriate method of delimitation, even between opposite coasts. The application of equitable principles in the particular relevant circumstances may still require the adoption of another method, or combination of methods, of delimitation. The court observed that State practice in continental shelf delimitation fell short of proving the existence of a rule prescribing the use of equidistance, (p. 290) or indeed of any method, as 'obligatory'—even if the examples that had been presented by Malta constituted 'impressive evidence that the equidistance method can in many different situations yield an equitable result' (paras 43–4).

f. Other arguments advanced by the parties

Libya and Malta advanced a number of relevant circumstances for the purposes of the delimitation, each of which was rejected by the court.

First, Libya argued that the relevant geographical considerations included the landmass behind its coast. Libya asserted that a State with a greater landmass has a more intense natural prolongation. The court observed that landmass had never been regarded as a basis of entitlement to continental shelf rights. Further, Libya's proposition found no support in the practice of States, in jurisprudence, in doctrine, or in the work of the Third UN Conference on the Law of the Sea. The court noted that the distinguishing feature between a coastal state with continental shelf rights and a landlocked state without such rights was not their respective landmasses, but rather the existence of a maritime front (para. 49).

Second, Malta argued that economic factors should be taken into account, considering the absence of energy resources on the island of Malta, its requirements as an island-developing country, and its range of established fishing activity. The court did not agree that delimitation should be influenced by the 'relative economic position of the two States in question, in such a way that the area of continental shelf regarded as appertaining to the less rich of the two States would be somewhat increased in order to compensate for its inferiority in economic resources'. Such considerations were 'totally unrelated to the underlying intention of the applicable rules of international law'. The court noted, with reference to the *North Sea Continental Shelf* cases, that the natural resources of the continental shelf under delimitation 'so far as known or readily ascertainable' might well constitute relevant circumstances. However, the court observed that it had not been furnished by the parties with any indications on this point (para. 50).

Third, Malta argued that the 'equitable consideration' of security and defence interests confirmed the equidistance method of delimitation, which gave each party a comparable lateral control from its coasts. The court acknowledged that security considerations are not unrelated to the concept of the continental shelf, having been referred to in the seminal Truman Proclamation of 1945. However, it concluded that the delimitation finally

determined by the court was not so near the coast of either party as to make questions of security a particular consideration (para. 51).

Fourth, Libya argued that, as an island State, Malta should be treated no differently from an island politically linked with a mainland State. The court held that, as Malta was an independent State, the relationship of its coasts with the coasts of (p. 291) its neighbours was necessarily different from what it would be if it were a part of the territory of a mainland State. In other words, it might be that the maritime boundaries in the Mediterranean region would be different if the islands of Malta did not constitute an independent State (para. 53).

Fifth, Malta invoked the principle of equality of States as an argument in favour of the application of the equidistance method of delimitation, and as an objection to any adjustment based on length of coasts or other proportionality considerations. The court refuted this argument, as 'the existence of equal entitlement, *ipso jure* and *ab initio*, of coastal States, does not imply an equality of extent of shelf'. The principle of equality of States therefore had 'no particular role to play in the applicable law' (para. 54).

Sixth, the court remarked that Libya had attached 'great importance' to arguments based on proportionality. Under this head, the court noted Libya's argument that the application of equitable principles required that the delimitation should take account of the 'significant difference in lengths of the respective coastlines which face the area in which the delimitation is to be effected'. The court stated that 'to use the ratio of coastal lengths as of itself determinative of the seaward reach and area of continental shelf proper to each Party, is to go far beyond the use of proportionality as a test of equity'. Indeed, 'if such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration'. Further, the use of proportionality as a method of delimitation was not supported by the practice of States, nor in the public expression of their views at the Third UN Conference on the Law of the Sea, nor in the jurisprudence. However, the Court concluded that none of this meant that the significant difference in lengths of the Parties' respective coastlines was irrelevant in the delimitation process (para. 58). Accordingly, as described below, the court was to return to Libya's argument later in its judgment.

g. The court's approach: construction of a provisional equidistance line and adjustment for relevant circumstances

The court observed that 'the application of equitable principles is to be distinguished from a decision *ex aequo et bono*'. Therefore, 'the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability' (para. 45).

Against this backdrop, together with its earlier remarks about distance as the basis of continental shelf entitlement within 200M, the court had 'little doubt' about which method it must employ at the outset of the delimitation; namely, the construction of a median line 'by way of a provisional step in a process to be continued by other operations'. It noted that the equitable nature of the equidistance method was 'particularly pronounced' in cases concerning opposite coasts (para. 62).

(p. 292) The court emphasized that the median line was 'only provisional'. As the equidistance method was not the only method applicable to the dispute, and did not even have a presumption in its favour, the median line 'must be examined in the context of applying equitable principles to the relevant circumstances' (para. 63). The court thus proceeded to identify what those equitable principles and relevant circumstances were.

Base points

The court identified an ‘immediate qualification’ of the median line related to the base points from which it was to be constructed. The line proposed by Malta had been constructed from straight baselines connecting the main island to the uninhabited islet of Filfla. The court did not express any opinion on the legitimacy of Malta’s straight baselines. However, it determined that, for the purposes of delimitation, ‘the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect’ of certain islets, rocks, and minor coastal projections. The court concluded that it was equitable not to take account of Filfla in the calculation of the provisional median line (para. 64).

Lengths of coasts

The court recalled that it had already examined, and dismissed, a number of contentions in relation to relevant circumstances. However, there remained the ‘very marked difference in the lengths of the relevant coasts of the Parties’. The court distinguished between the relevance of coastal lengths as a relevant circumstance for delimitation, and the use of those lengths in assessing ratios of proportionality. The court observed that these two operations were ‘neither mutually exclusive, nor so closely identified with each other that one would necessarily render the other supererogatory’. The consideration of the comparability of the coastal lengths formed part of the process of determining an equitable boundary on the basis of an initial medial line, whereas the test of a reasonable degree of proportionality was to be applied to ‘check the equitableness of any line, whatever the method used to arrive at that line’ (para. 66).

The court proceeded to identify what were the relevant coasts of the parties. It recalled the limitations imposed on the extent of the judgment area by the claims of third States (notably, Italy). The relevant Libyan coast would therefore run from Ras Ajdir (the terminus of the frontier with Tunisia) to a point at the meridian 15º 10’ E (which the court identified as being close to Ras Zarruq). This coast was 192M in length. The relevant coast of Malta ran from Ras il-Wardija to Delimara Point, following its straight baselines, but again excluding the islet of Filfla. This coast was 24M in length. The court concluded that this difference was ‘so great as to justify the adjustment of the median line so as to attribute a larger shelf area to Libya’ (para. 68).

(p. 293) Geography of the region

The court determined that the ‘general geographical context’ in which the delimitation would have to be effected was also relevant. In particular, the delimitation was between a portion of the southern littoral and a portion of the northern littoral of the Central Mediterranean. In that setting, the Maltese islands constituted a ‘minor feature of the northern seaboard of the region’ and comprised a ‘very limited coastal segment’. The court concluded that this southward location of the coasts of the Maltese islands constituted a geographical feature which should be taken into account as a ‘pertinent circumstance’ (para. 69).

Resulting adjustment of the provisional median line

In light of all these circumstances, the court concluded that, in order to achieve an equitable solution, it was necessary to adjust the provisional median line so as to lie closer to the coasts of Malta. As the coasts of the parties were opposite each other, and the equidistance line between them lay broadly west to east, the adjustment could be achieved by transposing the line exactly northward (para. 71).

The court first determined what might be the ‘extreme limit’ of such a shift, examined against the wider geographical context. The court reasoned that Malta should not be left in a worse position than a hypothetical situation in which it formed part of Italian territory. Therefore, an equitable boundary between Libya and Malta, an independent country, must be south of the notional median line between Libya and Sicily (see Figure B8.2). That notional median line intersected with the meridian 15º10’E at approximately 34º36’N. The provisional equidistance line between Malta and Libya intersected the same meridian at approximately 34º12’N. Accordingly, a transposition northwards through 24’ of latitude of the Malta–Libya median line would be the extreme limit of any northward adjustment (para. 72).

The court considered that the distance between the coasts of Libya and Malta was such that there was room for a significant adjustment of the median line. It concluded that a boundary line representing a shift of around three-quarters of the distance between the two outer parameters—namely, the median line and the line 24’ north of it—achieved an equitable result. The court therefore transposed the median line northwards through 18’ of latitude (para. 73). This transposition is illustrated in Figure B8.2.

In light of its task under the Special Agreement, it would ultimately be for the parties and their experts to determine the exact position of the resulting line. Libya and Malta were subsequently to do so in a treaty signed in Valletta, Malta on 10 November 1986, which implemented the court’s judgment in full.[3](p. 294)

Proportionality check

The last step was to ensure a ‘reasonable degree of proportionality’ between the extent of the continental shelf areas appertaining to each State and the length of its coast, as per the *North Sea Continental Shelf* cases.

The court identified ‘practical difficulties’ that rendered any precise proportionality check unrealistic. In particular, the identification of the relevant coasts and the relevant areas was so much at large that ‘virtually any variant could be chosen, leading to widely different results’. Also, the judgment area had been limited by reason of the claims of third States (principally, Italy). Indeed, future delimitations with third States might overthrow the figures that could otherwise be used for the purposes of completing a proportionality check. At the same time, to base proportionality calculations on any wider area would involve an artificial prolongation of the delimitation line, which would be beyond the jurisdiction of the court.

The court stated that this did not mean that it was debarred from considering the equitableness of its delimitation from the viewpoint of the proportional relationship of coasts and continental shelf areas. It thus turned its attention to the extent of the shelf areas lying on each side of the line and concluded that there was ‘no evident disproportion’ in the areas of shelf attributed to each of the parties (para. 75). See also further discussion or proportionality in Section C, Chapter 3.

III. Technical Considerations

Technically, this case was straightforward. The court’s principles were implemented by the parties in their subsequent agreement of 10 November 1986, producing a line with 11 points.

The Maltese straight baseline was not used to determine base points for delimitation, as is customary, although it was used for the measurement of the coastal length (without Filfla). The omission of the small island of Filfla before calculating the provisional median line is an example of the subjective approach often adopted by the court in its selection of base points

when constructing provisional equidistance or median lines, although in this case the difference it makes is only about 1M in the west (see Figure B8.2).

In the analysis of potential adjustment of the median line, the court established the 100 per cent line as the Malta–Libya median line; for the 0 per cent line it drew an Italy–Libya median line, giving zero weight to Malta. This gave two lines 24’ apart that represented the extremes of any potential adjustment. The resulting shift of 18’ represented a 25 per cent weighting to Malta. This was reminiscent of the methodology established in *UK/France* for giving reduced weight to the Scilly Isles).

(p. 295) Libya’s ‘rift zone’ argument was rejected on legal grounds as being irrelevant within an area of overlapping 200M zones. The complexity of the geological data presented to the court and the lack of agreement between the parties’ experts may also have contributed to the court’s rejection of arguments based on natural prolongation within 200M in subsequent cases. In any case, this part of the Mediterranean can be considered as a single geomorphological continental shelf—and the decision in this case echoes those in *UK/France*, *Tunisia/Libya*, and *Gulf of Maine*, where the natural prolongation arguments were also rejected. See also the discussion about the same area of continental shelf in *Tunisia/Libya*.

IV. Significance of the Decision and its Contribution to International Law

The *Libya/Malta* case was the first time the court had been requested to delimit a continental shelf boundary (or, indeed, any maritime boundary) between opposite coasts. It did so at a defining moment in the evolution of the international law of maritime delimitation, just a few years after the signature of UNCLOS. While the Convention was not to enter into force for another nine years and was not part of the applicable law, it had been signed by each of Libya and Malta and was to play a central role in the resolution of the case.

This was most obvious in the court’s rejection of Libya’s argument that an alleged ‘fundamental discontinuity’ in the respective geophysical continental shelves of the parties should be a dominant factor in favour of Libya in the delimitation. The court relied on ‘new developments in the law’ to hold that, in areas within 200M of the coast, the geological and geomorphological characteristics of the shelf were ‘completely immaterial’ to its delimitation. A first ‘new development’ in this respect was Article 76 of UNCLOS, which the court considered declaratory of customary international law. Pursuant to that provision, legal entitlement to continental shelf areas within 200M is now based exclusively upon distance. As a result, the statement of the court in the *North Sea Continental Shelf* cases that geophysical factors were relevant in continental shelf delimitation was confined to history. Notably, however, the court left open the prospect of such factors remaining relevant to continental shelf delimitation beyond 200M from the coast.

A second ‘new development’ that contributed to the court’s rejection of Libya’s natural prolongation arguments was the recent development of the EEZ regime. Notably, the court recognized the EEZ as already forming part of customary law. Even though neither Libya nor Malta had yet declared any EEZ of its own, the court was acutely aware of the potential overlap in the future between continental shelf and EEZ entitlements within 200M of the coast. As a result, it determined that the modern law required that particular importance must be attributed to (p. 296) elements, such as distance from the coast, that are common to both concepts. This aspect of the judgment has been followed on multiple occasions since, particularly in the context of single maritime boundary delimitations.

The judgment also marked an important development toward the establishment of equidistance as a first step in the maritime delimitation process. The court observed that there was ‘impressive evidence that the equidistance method can in many different situations yield an equitable result’. But the court proceeded cautiously. It did not accept Malta’s argument that the equidistance method was an obligatory first step in the delimitation. It stressed that there was not even a presumption in favour of the equidistance method. The court nevertheless determined that it should construct a provisional equidistance line at the outset of the process, consistent with the fact that the basis of entitlement to continental shelf within 200M was distance from the coast.

The case also marked an early occasion on which the court identified a marked disparity in relevant coastal lengths (equating to a ratio of 8:1 in Libya’s favour) as a relevant circumstance in maritime delimitation between opposite coasts. The court also provided a clear explanation of the distinction between coastal lengths as a relevant circumstance and proportionality as a final check of the equitableness of a result.

The means by which the court adjusted the provisional median line in order to account for the identified relevant circumstances was controversial and drew criticism in several dissenting and separate opinions. Judge Sette-Camara likened the judgment in this respect to the ‘imaginary refashioning of geography’. Judge Schwebel sharply objected to the use of a notional Sicily–Libya median line as it imposed ‘a limit which affords no weight to Malta, while taking as the other extreme a limit which gives Libya full weight up to the median line between it and Malta’. Nevertheless, the identification by the court of a theoretical outer limit of adjustment of the provisional median line in favour of Libya bore some logic as a first step in calculating the extent of adjustment required. The court was also to undertake a first step to adjustment in the *Jan Mayen* case, albeit less controversially since the outer limit in that case was provided by the 200M limit of Greenland. Such an approach was impossible in the present case in light of the fact that Libya and Malta are separated by less than 200M of continental shelf.[4]

Footnotes:

1 *ICJ Reports* 1984, p. 24, paras 41, 43.

2 Emphasis in original.

3 IMB vol II, p. 1661.

4 For further discussion of the varying approaches taken by courts and tribunals to adjustment of provisional equidistance or median lines in order to reflect the presence of relevant circumstances, see Part C, Chapter 2, below.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 9 Guinea-Bissau v. Senegal (Arbitral Award, 31 July 1989)

From: A Practitioner’s Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):

Coastal states — Continental shelf — Delimitation — Straits — Territorial sea — UNCLOS (UN Convention on the Law of the Sea)

(p. 297) 9 *Guinea-Bissau v. Senegal* (Arbitral Award, 31 July 1989)

Case Note: 1960 Franco-Portuguese agreement constituted by exchange of letters—application of *uti possidetis* principle—State succession in relation to maritime delimitation—non-applicability to delimitation of principle of permanent sovereignty over natural resources—allegations of violation of internal law in adoption of agreement—non-publication and non-registration with United Nations—principle of intertemporal law—non-extension of agreement to EEZ—request to ICJ to declare inexistence or nullity of arbitral award

Citation: *Guinea-Bissau/Senegal*, Award, 31 July 1989, 83 *International Law Reports* 1

Institution: Arbitration Tribunal for the Determination of the Maritime Boundary

Basis of jurisdiction: Arbitration Agreement between the Republic of Senegal and the Republic of Guinea-Bissau, 12 March 1985

The tribunal: Barberis (President), Bedjaoui (appointed by Guinea-Bissau), Gros (appointed by Senegal)

Applicable law: 'norms of international law'

Area delimited: territorial sea, contiguous zone, continental shelf

I. Introduction and Context

Guinea-Bissau and Senegal are adjacent States situated on the Atlantic coast of West Africa. Guinea-Bissau's coast stretches from the boundary with Guinea in the south to Cape Roxo to the north and is marked by estuaries of waterways and an archipelago. Senegal's coast comprises two parts, the first extending from Cape Roxo to the southern boundary of Gambia (which is enclaved in Senegal, facing the Atlantic Ocean) and the second extending from Gambia's northern boundary to Senegal's boundary with Mauritania. The geographical context of the delimitation is illustrated in Figure B9.1.

(p. 298)

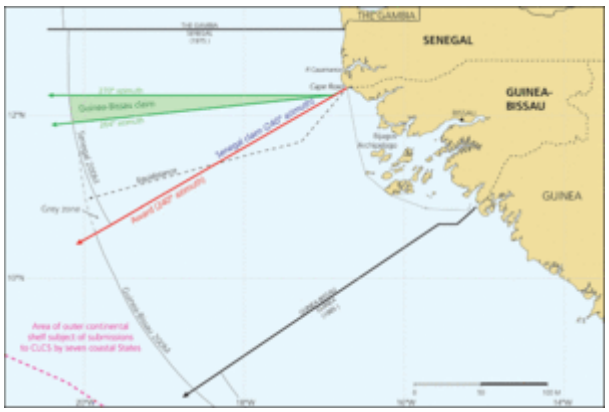

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Figure B9.1: *Guinea-Bissau/Senegal*: parties' claims and the tribunal's award.

(p. 299) The maritime delimitation dispute between the parties emerged after they had gained independence from the former colonial powers of France and Portugal. Senegal was a French overseas territory from 1946 until 1958, when it came to form an autonomous State within the *Communauté* then instituted by the French Constitution. Senegal gained independence as part of the Federation of Mali, which acceded to full sovereignty on 20 June 1960. Shortly afterwards, the Federation of Mali dissolved and Senegal was admitted to the United Nations as an independent State on 28 September 1960. Guinea-Bissau was under Portuguese administration until 24 September 1973, when it was proclaimed an independent State after a prolonged struggle for national liberation. Portugal recognized Guinea-Bissau as an independent State on 26 August 1974 and Guinea-Bissau was admitted to the United Nations on 17 December 1974. At independence, Guinea-Bissau declared *tabula rasa* (i.e. that it would inherit none of the obligations assumed by Portugal as its colonial predecessor: otherwise known as a 'clean slate'). However, like Senegal, Guinea-Bissau recognized the principle of the African *uti possidetis* proclaimed by the Organization of African Unity (and each reiterated that principle expressly in the arbitration—para. 31).

Before the parties' independence, France and Portugal concluded certain agreements on the delimitation of their respective possessions in West Africa. These included a convention signed in Paris on 12 May 1886, which established the land frontier between the colonial powers' respective possessions in Guinea-Bissau and Senegal and also disposed of the question of sovereignty over certain islands.[1] However, the parties agreed that the 1886 Convention did not define the maritime boundary between them.

In 1958, Portugal signed a contract granting an offshore oil concession, causing France to object. Following negotiations, on 26 April 1960, France and Portugal concluded an agreement (the '1960 Agreement') by way of an exchange of letters for the purpose of defining the maritime boundary between Senegal and the Portuguese territory of Guinea. In the exchange of letters, France proposed and Portugal agreed that:

> As far as the outer limit of the territorial sea, the boundary shall consist of a straight line drawn at 240° from the intersection of the prolongation of the land frontier and the low-water mark, represented for that purpose by the Cape Roxo lighthouse.
>
> As regards the contiguous zones and the continental shelf, the delimitation shall be constituted by the prolongation in a straight line, in the same direction, of the boundary of the territorial seas.(p. 300)

The 1960 Agreement was published in the Official Journal in France and in those of the *Communauté* and the Federation of Mali, but it was not published in the Official Journals of Portugal or its Province of Guinea. The 1960 Agreement was not registered with the Secretariat of the United Nations.

In 1977, Guinea-Bissau initiated negotiations with Senegal for the purposes of settling the maritime boundary between them. Guinea-Bissau contended that, at that time, it was not aware of the existence of the 1960 Agreement. Between 1978 and 1984, Senegal authorized the construction of drilling platforms in the disputed area, prompting protests from Guinea-Bissau. On 12 March 1985, the parties concluded an arbitration agreement (the 'Arbitration Agreement') for submission of the maritime boundary dispute to an arbitration tribunal. The Arbitration Agreement requested the tribunal to decide, 'in accordance with the norms of international law', the following questions:

1. Does the Agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?

2. In the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively?

The Arbitration Agreement required the tribunal's decision to 'include the drawing of a boundary line on a map'. To that end, the tribunal was empowered to appoint one or more technical experts (although, ultimately, it appears not to have done so).

With regard to procedure, the tribunal 'agreed to draw inspiration as far as possible from the rules of procedure of the International Court of Justice and to adopt supplementary procedural decisions as necessary' (para. 9).

II. Positions of the Parties and Summary of the Award

a. Positions of the parties

Guinea-Bissau argued that the 1960 Agreement could not be invoked against it by Senegal. Guinea-Bissau took the position that the 1960 Agreement was 'void and legally non-existent' and that the maritime delimitation between Senegal and Guinea-Bissau had thus never been determined. In support of its argument of non-opposability, Guinea-Bissau cited the principles of *uti possidetis juris*, permanent sovereignty over natural resources and self-determination. It cited also the non-publication of the 1960 Agreement. It argued that a maritime delimitation had to be effected *ex novo*; that the delimitation of the territorial seas should be made in accordance with the equidistance principle and in application of Article 15 of (p. 301) UNCLOS (at an azimuth of 247°); and that the delimitation of the continental shelf and EEZ should be based on an equitable solution, resulting in a maritime delimitation to be fixed between azimuths of 264° and 270° (the latter corresponding to a parallel of latitude).

Senegal, by contrast, maintained that the maritime boundary had been conclusively delimited through the 1960 Agreement, claiming this to have resulted in an agreement having the force of law. In Senegal's view, the maritime boundary was 'constituted by the line drawn on azimuth 240° from the lighthouse at Cape Roxo and by its prolongation in a straight line raised to the superjacent water-column'. Senegal argued further that the 1960 Agreement had been confirmed by the subsequent conduct of the parties, as well as by their colonial predecessors.

The parties' claim lines are illustrated in Figure B9.1.

b. The tribunal's analysis of Guinea-Bissau's opposition to the 1960 Agreement

The tribunal observed that the dispute concerned an agreement between two countries, of which the parties were the successor States. While Senegal asserted that succession operated for the 1960 Agreement, Guinea-Bissau maintained the contrary. The tribunal stated that:

> a successor State can invoke before a tribunal all grounds of claim or objection which could have been invoked by the State to which it has succeeded. Consequently, Guinea-Bissau, as a successor State, is entitled to invoke before the Tribunal all the grounds of nullity which could have been raised by Portugal regarding the 1960 Agreement (para. 33).

For the purposes of its argument that the 1960 Agreement did not have the force of law, Guinea-Bissau relied upon four principal themes: (1) grounds of non-existence and nullity; (2) grounds of non-opposability; (3) non-registration of the 1960 Agreement with the Secretariat of the United Nations; and (4) assertion of a 'right of verification or review'. The tribunal addressed each in turn.

Non-existence and nullity of the 1960 Agreement

The tribunal noted that, in light of the wording of the first question contained in the Arbitration Agreement, the 1960 Agreement was 'presumed to exist' (para. 36).

The first ground of nullity invoked by Guinea-Bissau was that the 1960 Agreement was incompatible with certain international legal norms of *jus cogens*. In particular, it cited the right of peoples to self-determination and the 'corollary' of the principle of permanent sovereignty over natural resources.

The tribunal noted that the principle of permanent sovereignty over natural resources was spelled out in resolutions 1803 (XVII) and 2158 (XXI) of the UN General Assembly. It observed that:(p. 302)

> The rule contained in these resolutions…guarantees to every State the right to exploit its own resources and recognizes the right of each of them to nationalize assets found on its territory which are being exploited by foreign enterprises (para. 38).

The tribunal observed that the application of the principle presupposed that the resources in question were located within the territory of the State invoking the principle. Accordingly, '[a]ny State claiming to have been deprived of part of its territory or natural resources must first demonstrate that they belonged to it'. The tribunal concluded that, since Guinea-Bissau had failed to demonstrate any pre-existing legal norm which had attributed the territory in question to Guinea-Bissau, the principle of permanent sovereignty over natural resources was not applicable (para. 39).

As an extension of its argument, Guinea-Bissau asserted that, once a process of liberation is initiated, the colonial State cannot conclude treaties relating to essential elements of the right of peoples. Guinea-Bissau argued that when the 1960 Agreement was concluded, the process of liberation had already been well underway. Indeed, by 1960, Senegal was already an autonomous State within the *Communauté*.

The tribunal rejected Guinea-Bissau's argument. It held that:

> A State born of a process of national liberation has the right to accept or to reject any treaties concluded by the colonial State after the initiation of that process. In this field, the newly-independent State enjoys a total and absolute freedom and there is no peremptory norm obliging it to declare null and void the treaties concluded during that period, or to reject them (para. 44).

Accordingly, Senegal had 'absolute freedom to accept or reject the 1960 Agreement'. As far as Guinea-Bissau was concerned, the tribunal noted that the struggle for national liberation from Portugal had been underway by 1960. It remarked on the Portuguese policy at the time to deny the existence of its colonies, to regard itself as a unitary State, and to represent its territories at the United Nations. In the tribunal's view, the issue was not whether the process of liberalization had begun or not by the time of the 1960 Agreement; rather, it was whether the activities whereby that process manifested itself had 'acquired an international impact' by that date. In this regard, the tribunal noted that the war of liberation in Portuguese Guinea only began in 1963, and that Guinea-Bissau would not take over its representation in the United Nations until 1973. Consequently, the tribunal concluded that 'the norm which limits the capacity of the State to conclude treaties upon the initiation of a process of liberation is not applicable to the situation which existed in 1960 in Portuguese Guinea' (Award, paras 46–52).

The second ground of nullity invoked by Guinea-Bissau was that, in signing the 1960 Agreement, both Portugal and France had breached norms of internal law of fundamental importance for the purposes of Article 46 of the VCLT. In particular, (p. 303) it argued that under the Portuguese Constitution in force at the time, Portugal could not alienate any territory without the consent of the National Assembly. Senegal objected on the basis that, *inter alia*, the 1960 Agreement had effected a territorial delimitation, not an alienation of territory.

The tribunal cited the principle of intertemporal law, whereby the law to be applied to a given situation must be the law in force at the time when it arose. The tribunal noted that in 1960 there was no precedent of a treaty being declared null and void because one of the contracting States had violated its own internal law in signing it. At the time, only a 'grave and manifest violation of internal law' could justify a treaty being declared null and void (paras 54–5). After examining the relevant Portuguese law and practice of the time, the tribunal rejected Guinea-Bissau's argument, observing that that there had been no mention in the 1960 Agreement, or during its negotiation, of any requirement of approval for the Agreement to take effect. Thus, 'the French Government had good reason to believe in all good faith that the treaty which had been signed was valid' (paras 58–9).

The tribunal determined that Guinea-Bissau had no standing to argue that France had also violated its internal law in concluding the 1960 Agreement: only Senegal could invoke such grounds of nullity (para. 60).

Uti possidetis and the non-opposability of the 1960 Agreement

Guinea-Bissau also argued that the 1960 Agreement, even if valid, could not be invoked against it. First, it asserted that the State succession principle of *uti possidetis* only concerned land frontiers and did not extend to maritime delimitations.

The tribunal observed the 'very special importance' that the principle of *uti possidetis* had played on the American continent during the nineteenth century. In Africa, it observed that the principle had taken on a broader meaning because it concerned both, first, the boundaries of countries gaining independence from the same colonial empire and, second, boundaries that had been established between the territories of different colonial powers, thus already possessing an international character. The tribunal observed that the parties were agreed that the boundary treaties signed during the colonial period continued to be valid as between the newly independent States. It recalled that the Organization of African

Unity, of which the parties were members, had pledged to respect the borders existing on the achievement of national independence (paras 61–2).

The tribunal considered that there was no reason to distinguish between delimitation lines related to the land, the waters of rivers and lakes, the sea, the subsoil, or the atmosphere. It observed, in particular, that the law of the sea had 'only taken shape in comparatively recent times', and that one could not therefore expect to find maritime delimitation precedents on the basis of *uti possidetis* dating back to (p. 304) the last century. Nor did the tribunal consider that there was any reason to differentiate between boundaries delimiting territory for all purposes from those related to some singular aspect of jurisdiction. The tribunal also noted that, in diplomatic exchanges, as well as in the *Guinea/Guinea-Bissau* case, Guinea-Bissau had accepted State succession in respect of maritime boundaries (paras 63–6).

Second, Guinea-Bissau returned to its argument that the process of liberation in Guinea-Bissau had already begun when the 1960 Agreement was made. In its view, the principle of *uti possidetis* could only be applied to treaties concluded 'a long time back' and not to treaties concluded shortly before independence. The tribunal, however, remarked that thirteen years had passed between the conclusion of the 1960 Agreement and the independence of Guinea-Bissau. It continued:

> The agreements relating to boundaries signed by a colonial State before the process of liberation had an international impact do not have to fulfil any special condition of antecedence for them to be validly invoked against the successor State (para. 68).

Guinea-Bissau also argued that the 1960 Agreement had not been published in Portugal, had not been known to Guinea-Bissau at the time of independence, and was consequently not opposable to it. The tribunal observed, however, that '[t]he Agreement of 26 April was not concluded in secret and, at the time of the independence of Guinea-Bissau (1973), it had already been the subject of some publication'. It held that '[t]he concepts of unpublished agreement and secret agreement are in no way synonymous'. Furthermore, any obligation of Portugal to publish the 1960 Agreement in Guinea was a matter exclusively for Portuguese internal law. Consequently, a failure to fulfil that obligation did not amount to non-compliance with international law and could not be invoked by a successor State as grounds for non-opposability (paras 72–5).

Failure to register the 1960 Agreement with the United Nations

Guinea-Bissau also argued that the 1960 Agreement could not be invoked against it because the instrument had not been registered with the Secretariat of the United Nations. The tribunal noted that, since it was not an organ of the United Nations, Article 102(2) of the UN Charter was not applicable.[2] Consequently, the non-registration of the 1960 Agreement did not constitute a valid reason to debar the parties from invoking it (para. 78).

Assertion of a 'right of verification or review'

Finally, Guinea-Bissau made a subsidiary argument that it had a 'right of verification or review' of the 1960 Agreement, because it was a treaty concluded under (p. 305) the regime of the 1958 Geneva Conventions and governed, by way of succession, the relations of a State which had never been a party to those conventions, but which was a party to UNCLOS. The tribunal rejected this argument on the basis that UNCLOS was not applicable to the dispute as it was not yet in force. Further, the tribunal remarked that 'there does not exist at present in positive international law any customary norm or any general principle of

law that would authorize States which have concluded a valid treaty concerning maritime delimitation, or their successors, to verify or review its equitable character' (para. 79).

c. The scope and application of the 1960 Agreement

The tribunal remarked that its analysis led to the conclusion that the 1960 Agreement was valid and could be opposed to Senegal and Guinea-Bissau (para. 80).

Senegal argued that the 1960 Agreement must be interpreted as applying also to the delimitation of the EEZ and must be interpreted taking into account the evolution of the law of the sea since its conclusion.

The tribunal observed that the EEZ concept had not existed in 1960 and had only recently been considered as forming part of general international law. It concluded that:

> In the light of the text, and of the applicable principles of intertemporal law, the Tribunal considers that the 1960 Agreement does not delimit those maritime spaces which did not exist at that date, whether they be termed 'exclusive economic zone', 'fishery zone' or whatever.

In contrast, the concepts of the territorial sea, the contiguous zone, and the continental shelf had all been in existence in 1960 and were explicitly referred to in the 1960 Agreement. With regard to the continental shelf, the tribunal noted that in 1960 there existed a 'dynamic' conception of the continental shelf, whereby the outer limit would depend on technological developments and consequently could move further and further seaward. For that reason, it concluded that the 1960 Agreement delimited the continental shelf between the parties 'over the whole extent of that maritime space as defined at present' (para. 85).

d. The tribunal's conclusion as to the course of the maritime boundary

The tribunal thus voted by two votes to one (with Arbitrator Bedjaoui dissenting) that the answer to the first question formulated in Article 2 of the Arbitration Agreement was that the 1960 Agreement had the force of law in the relations between the parties with regard solely to the areas mentioned in that Agreement, namely the territorial sea, the contiguous zone, and the continental shelf. Furthermore, the straight line drawn at 240° 'was a loxodromic line'. In light of its conclusion, the tribunal determined that it was not called upon to reply to the (p. 306) second question or to append any map showing the course of the boundary line (paras 87–8).[3]

The course of the maritime boundary delimited by the 1960 Agreement and thus confirmed by the tribunal is illustrated in Figure B9.1.

III. Challenge to the Award before the ICJ

Shortly following the Award, on 23 August 1989, Guinea-Bissau filed an application with the ICJ, requesting the court to declare that the Award was inexistent, null, and void. Guinea-Bissau based its application upon Article 36(2) of the ICJ Statute.

On 18 January 1990, in the context of its application, Guinea-Bissau submitted to the court a request for provisional measures under Article 41(1) of the ICJ Statute.[4] The request asked the court to direct each party to 'abstain in the whole of the disputed area from any act or action of any kind whatever, during the whole duration of the proceedings until the decision is given by the Court'.

The court declined to indicate any provisional measures because the request went beyond the scope of the dispute before the ICJ. That dispute related only to 'the existence and validity of the award' and not to 'the respective rights of the parties in the maritime areas in question'. The court determined that provisional measures must be 'such that they will no longer be required as such once the dispute…has been resolved by the Court's judgment on the merits of the case'. However, the parties' underlying disagreement (which related to fisheries rights in the EEZ) would not be resolved by the court's judgment (ICJ Provisional Measures Order, paras 24–7).

In its judgment on the merits,[5] the ICJ considered its jurisdiction in light of the fact that, when accepting the compulsory jurisdiction of the court, Senegal had excluded disputes 'in regard to which the parties have agreed to have recourse to some other method of settlement'. As the dispute concerned solely the validity of the Award, the court found no bar to its exercise of jurisdiction (ICJ Judgment, paras 23–5).

(p. 307) Guinea-Bissau's first complaint pertained to a declaration that President Barberis had appended to the Award, expressing his view that the reply given by the tribunal 'could have been more precise'. President Barberis maintained that the tribunal's partially negative answer to the first question posed by the Arbitration Agreement conferred on the tribunal a competence to reply in part to the second question, and enabled it specifically to delimit the EEZ and thereby 'settle the whole of the dispute'. However, the court did not find in the President's declaration any contradiction with the finding of the Award (ICJ Judgment, paras 31–2). Even if there had been a contradiction, the court continued:

> In agreeing to the Award, he definitively agreed to the decisions, which it incorporated, as to the extent of the maritime areas governed by the 1960 Agreement, and as to the Tribunal not being required to answer the second question in view of its answer to the first. As the practice of international tribunals shows, it sometimes happens that a member of a tribunal votes in favour of a decision of the tribunal even though he might individually have been inclined to prefer another solution (ICJ Judgment, para. 33).

Consequently, the ICJ concluded that there was no ground for invalidating the Award due to any lack of real majority (ICJ Judgment, para. 34).

Second, Guinea-Bissau complained that the tribunal had omitted to respond to the second question under the Arbitration Agreement and that it had failed to provide sufficient reasoning for that omission. The ICJ recognized that the structure of the Award was 'open to criticism' in that it did not in the operative part of the Award specify the tribunal's decision not to reply to the second question. However, it concluded that the tribunal had set out reasons that, while succinct, were clear and precise. The court accordingly dismissed Guinea-Bissau's second complaint (ICJ Judgment, paras 41, 43).

Third, Guinea-Bissau contended that the construction of the Arbitration Agreement required the tribunal to respond to the second question, regardless of the answer provided to the first. Citing the principle of *Kompetenz-Kompetenz*,[6] the ICJ noted that the tribunal was competent to interpret the competence conferred upon it by the Arbitration Agreement. It observed that only in the case of a 'manifest breach of the competence conferred on [the Tribunal] by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise its jurisdiction' could the court intervene (ICJ Judgment, paras 46–7). The court concluded that no such 'manifest breach' existed in the present case.

Article 2 of the Arbitration Agreement stated explicitly that 'in the event of a negative answer to the first question' a reply had to be given to the second question. The court noted that the parties could have used other formulations, had they wished for the second question to be answered irrespective of the reply (p. 308) given to the first (ICJ Judgment, paras 49–51).That interpretation was further confirmed when considering the initial stance

of the respective parties when negotiating the Arbitration Agreement: Senegal had proposed that the tribunal should decide solely on the validity of the 1960 Agreement, whereas Guinea had wanted the tribunal to be entrusted only with the task of drawing a maritime delimitation line. The final formulation thus appeared as a compromise. The parties had not reached any agreement as to what should happen in the event of an affirmative answer leading only to a partial delimitation. Consequently, the ICJ found that the tribunal had been correct in concluding that 'its mandate did include the making of a delimitation of all the maritime areas of the Parties', but that 'this fell to be done only under the second question and "in the event of a negative answer to the first question"' (ICJ Judgment, paras 53–5). The court concluded that 'the Tribunal could thus find, without manifest breach of its competence, that its answer to the first question was not a negative one, and that it was therefore not competent to answer the second question' (para. 60).

Finally, Guinea-Bissau invoked Article 9(2) of the Arbitration Agreement, contending that the tribunal was obliged to 'include the drawing of the boundary line on a map' and that the Award was null and void for having failed to do so without sufficient reason. The court found that the tribunal had sufficiently explained its decision to forego the drawing of the line on a map and held that, in the circumstances of the case, the absence of a map could not render the Award invalid in any event (ICJ Judgment, para. 64).

Despite having rejected all of Guinea-Bissau's submissions, the ICJ remarked that the Award had not brought about a complete delimitation of all the maritime areas pertaining to the parties. It observed, however, that that result was due to the wording of Article 2 of the Arbitration Agreement. It commented that it was 'highly desirable' that the outstanding elements of the dispute should be resolved as soon as possible (ICJ Judgment, paras 66, 68).[7]

IV. Technical Considerations

As this case concerned the applicability of the 1960 Agreement, there were no particularly complex technical issues arising. Given the outcome, the tribunal paid little attention to geographical, geological, and morphological data presented by the parties.

(p. 309) The 1960 Agreement defined an azimuth of 240° apparently based on a bisector of the general directions of the two States.[8] The tribunal concluded that the 'straight' line specified in the 1960 Agreement must be a loxodrome, ruling out a geodesic line 'because such a line would not satisfy the condition of following a direction of 240°' as it does not follow a constant angle (paras 86, 88).

As the Award does not follow equidistance, there is the potential for a 'grey zone' at 200M where the Guinea-Bissau 200M limit wraps around that of Senegal (see Figure B9.1). See also the discussion on grey zones in *Bangladesh v. India*.

In September 2014, seven coastal States including Guinea-Bissau and Senegal made a joint submission to the CLCS on the outer limits of the continental shelf beyond 200M.[9] The proposed outer limit is shown in Figure B9.1. Although the tribunal's Award might be assumed to continue the boundary between Guinea-Bissau and Senegal in a straight line to the outer edge of the continental shelf, this area remains to be delimited formally among the coastal States.

V. Significance of the Decision and its Contribution to International Law

The *Guinea-Bissau/Senegal* case is an early (and relatively little-cited) example of settlement of an international maritime boundary dispute by way of ad hoc arbitration. It is notable primarily for its confirmation of the application of the principles of *uti possidetis* and intertemporal law in the context of post-colonial maritime boundaries and for the post-

Award proceedings by which Guinea-Bissau attempted to have the ICJ declare the Award inexistent, null, and void.

In relation to the principle of *uti possidetis*, the tribunal noted the scarcity of maritime precedents in the context of nineteenth-century, post-colonial arrangements, observing that this was due to the fact that coastal States' maritime entitlements had only crystallized in law in the twentieth century. The tribunal did nevertheless note the important role played by the *uti possidetis* principle in the 1917 *Fonseca Bay* case,[10] where the Central American Court of Justice decided that the limits with the high seas established by the Crown of Castile remained relevant to contemporary claims made by El Salvador, Honduras, and Nicaragua.[11] The (p. 310) tribunal referred also to examples of succession to maritime boundaries after decolonization in Asia after the Second World War, noting that 'the geographical maps of Malaysia, Philippines and Brunei, for example, show as maritime boundaries lines the origins of which go back to the colonial era' (para. 64).

In relation to the principle of intertemporal law, whereby the law to be applied to a given situation must be the law in force at the time when it arose, the tribunal's determination that the 1960 Agreement did not extend to delimitation of the EEZ boundary is noteworthy. The law of the sea has developed considerably over the past seventy-five years, so courts and tribunals will proceed with caution so as not to over-extend the interpretation and application of historic agreements pre-dating such developments.

From a practical perspective, the *Guinea-Bissau/Senegal* case highlights the importance of the clear and precise formulation of the question(s) to be posed to any court or tribunal. The formulation of the questions posed to the tribunal had consequences that were probably unforeseen by at least one of the parties. For example, the wording of the first question referred to the tribunal led it to conclude that the 1960 Agreement was 'presumed to exist'. The wording of the questions was also determinative to the outcome of the post-Award challenge in the ICJ.[12]

The post-Award ICJ proceedings are an illustration of how Article 36(2) of the court's Statute can provide a jurisdictional basis for a State to challenge the validity of an arbitral award, including to establish its nullity in cases of 'manifest breach' of the competence conferred by an arbitration agreement. The ICJ's judgment confirms the specific nature and scope of such proceedings, which are very different from an appeal or application for revision.[13]

Footnotes:

1 See the *Guinea/Guinea-Bissau* case review (Part B, Chapter 7, above) for further discussion of the 1886 Convention.

2 Article 102(2) of the UN Charter provides: 'No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.'

3 President Barberis appended a declaration to the Award, which was to be the subject of Guinea-Bissau's subsequent application to the ICJ to declare the inexistence or nullity of the Award.

4 *Arbitral Award of 31 July 1989*, Provisional Measures, Order, 1990 ICJ 64 (2 March) ('ICJ Provisional Measures Order'). For further commentary on the provisional measures stage and the significance of this case from that perspective, see Evans, M. D., 'Provisional Measures: The Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) and Maritime Delimitation' (1993) 46 *Revue Hellenique de Droit International* 9.

[5] *Arbitral Award of 31 July 1989*, Judgment, 1991 ICJ 53 (12 November) ('ICJ Judgment').

[6] See *Nottebohm*, Preliminary Objections, Judgment, 1953 ICJ 111 (18 November) at p. 119.

[7] This issue had been submitted to the ICJ in a separate application filed by Guinea-Bissau on 12 March 1991. In the context of those proceedings, Guinea-Bissau and Senegal reached an agreement providing, *inter alia*, for the joint exploitation of a 'maritime zone situated between the 268° and 220° azimuths drawn from Cape Roxo' (ICJ Discontinuance Order, p. 425). Having reached this agreement, Guinea-Bissau and Senegal informed the court of their wish to discontinue the proceedings, whereupon the court ordered the case to be removed from the list.

[8] Charney, J. I. and Alexander, L. M., *International Maritime Boundaries*, Vol. I (Martinus Nijhoff, 1993), pp. 867–70.

[9] See <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_wa7_75_2014.htm> (accessed 12 January 2016).

[10] *Gulf of Fonseca* (*El Salvador v. Nicaragua*), Central American Court of Justice, Judgment (2 March 1917), (1917) 11 *American Journal of International Law* 674.

[11] The Central American Court's decision was subsequently (after the Award in the *Guinea-Bissau/Senegal* case) endorsed by a Chamber of the ICJ in 1992, which confirmed that 'the principle of the *uti possidetis juris* should apply to the waters of the Gulf as well as to the land': *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras: Nicaragua intervening*), Judgment, 1992 ICJ 351 (11 September). The ICJ Chamber found that the waters of the Gulf of Fonseca, other than the 3M maritime belts, were historic waters and subject to a joint sovereignty of the three coastal States. See, in particular, paras 386 and 404 of the judgment.

[12] For another case in which the formulation of the questions posed might influence the delimitation result, see the arbitration proceeding between Croatia and Slovenia, which was pending before an ad hoc tribunal at the time of writing. In that case, the parties' arbitration agreement requested the tribunal to determine, *inter alia*, 'Slovenia's junction to the High Sea'. For further details of that case, see <http://www.pcacases.com>.

[13] In this respect, the court cited its 1960 judgment in the case of the *Arbitral Award Made by the King of Spain on 23 December 1906* (*Honduras v. Nicaragua*), 1960 ICJ 192 (18 November), in which it determined that 'the Award is not subject to appeal and…the Court cannot approach the consideration of the objections raised by Nicaragua to the validity of the Award as a Court of Appeal. The Court is not called upon to pronounce on whether the arbitrator's decision was right or wrong' (p. 214).

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 10 Canada v. France (Award of the Arbitral Tribunal, 10 June 1992)

From: A Practitioner's Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):

Coastal states — Continental shelf — Islands and artificial islands — Delimitation — Territorial sea — UNCLOS (UN Convention on the Law of the Sea)

(p. 311) 10 *Canada v. France* (Award of the Arbitral Tribunal, 10 June 1992)

Case Note: delimitation of a single EEZ and continental shelf boundary—small offshore islands in relationship of 'adjacency' with nearby continental landmass—principles of sovereign equality of States and equal capacity of islands and mainland territories to generate maritime space—relevance of geography in determining method of delimitation—division of disputed area into two sectors—non-encroachment principle—marked disparity between relevant coastal lengths—proportionality test—no competence to delimit continental shelf beyond 200M in area where outer limit disputed—relevance of fisheries (no 'catastrophic repercussions')

Citation: *Case concerning Delimitation of Maritime Areas (St Pierre and Miquelon)* (*Canada v. France*), Decision, 10 June 1992, (1992) 95 *International Law Reports* 645

Institution: ad hoc Court of Arbitration for the Delimitation of Maritime Areas between Canada and France, constituted under the Arbitration Agreement of 30 March 1989

Basis of jurisdiction: Arbitration Agreement between Canada and France, 30 March 1989

The tribunal: Jimenez de Arechaga (President), Weil (appointed by France), Gotlieb (appointed by Canada), Arangio-Ruiz, Schachter

Applicable law: 'principles and rules of international law applicable in the matter'; customary international law

Areas delimited: EEZ; continental shelf (within 200M)

Technical expert appointed by the tribunal: Commander Peter Beazley

I. Introduction and Context

This case concerned the delimitation of the maritime boundary between Canada and St Pierre and Miquelon, a French '*collectivité territoriale*' in the north-eastern (p. 312) Atlantic Ocean. The French territory consisted of two main islands (St Pierre and Miquelon), together with a series of small islands, islets, and low-tide elevations. The French islands have a total area of 237 km², of which Miquelon makes up the vast majority. They are located less than 12M from the Canadian coast at the closest point and some 140M east of Cape Breton Island and Nova Scotia across the Cabot Strait. The tribunal observed that the islands lay within an area of 'marked concavity', framed exclusively by the Canadian coasts of Newfoundland and Labrador, and Nova Scotia.

The Atlantic Ocean lies to the east and south of the disputed area. The continental shelf within the area was agreed to be a 'geological continuum', although the precise location of the outer limits of the continental margin was not agreed. The tribunal observed that the continental margin off Newfoundland 'generally extends beyond 200 nautical miles from the coasts'. The geographical context of the delimitation is illustrated in Figure B10.1.

The dispute dated back to 1966, when Canada and France exchanged *notes verbales* and *aide-mémoires* stating their positions with regard to continental shelf delimitation following the issuance of hydrocarbon exploration permits by each party. Negotiations took place intermittently between 1967 and 1972, culminating in the preparation of a '*Relevé de Conclusions*' contemplating the acceptance by France of a reduced continental shelf area in return for certain economic concessions by Canada related to the exploration and exploitation of hydrocarbons in the region. The '*Relevé de Conclusions*' was never adopted by the parties.

In 1971, Canada declared the Gulf of St Lawrence an exclusive fishing zone in an attempt to end fishing by foreign fleets in the area. However, France had traditionally fished in those waters and, the following year, the parties signed an agreement on 'Mutual Fishing Relations' (the '1972 Agreement'), under which nationals of each party were granted access to the fishing zones of the other party subject only to measures of conservation such as the establishment of quotas. Article 8 of the 1972 Agreement determined a line that constituted the limit of Canadian territorial waters and the adjacent French fisheries zones, constituted primarily by an equidistance line consisting of 9 points, as illustrated in Figure B10.3. The maritime boundaries beyond those points continued to be disputed through 1976, when Canada announced a 200M fishery zone, and 1977, when France declared an 'economic zone' extending the same distance. As the two zones were overlapping, new rounds of negotiations took place, all of which were unsuccessful. In the mid 1980s, new disputes emerged as Canada accused France of fishing in excess of the quotas allowed under the 1972 Agreement.

In January 1987, the parties agreed to negotiate an arbitration agreement (the 'Arbitration Agreement') for the establishment of a third-party procedure to resolve the boundary dispute as well as further fisheries agreements to be applied during the proceedings. These agreements were finalized in 1989.(p. 313)

View full-sized figure

Figure B10.1: *Canada/France (St Pierre & Miquelon)*: regional setting and parties' claims. (p. 314)

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Figure B10.2: *Canada/France (St Pierre & Miquelon)*: tribunal's award.

(p. 315) Pursuant to the Arbitration Agreement, the parties appointed a five-member 'Court of Arbitration' (the 'tribunal'). Article 2.1 of the Arbitration Agreement provided:

> Ruling in accordance with the principles and rules of international law applicable in the matter, the Court is requested to carry out the delimitation as between the Parties of the maritime areas appertaining to France and of those appertaining to Canada. This delimitation shall be effected from point 1 and from point 9 of the delimitation referred to in Article 8 of the [1972 Agreement] and described in the Annex thereto. The Court shall establish a single delimitation which shall govern all rights and jurisdiction which the Parties may exercise under international law in these maritime areas.

The Arbitration Agreement also provided for the tribunal to designate a technical expert and set out a procedural framework and timetable for the arbitral proceeding.

II. Positions of the Parties and Summary of the Award

a. The tribunal's designation of the geographical area relevant to the dispute

The tribunal began by identifying the geographical area relevant to the delimitation process. Referring to the *Gulf of Maine* case and the *UK/France Continental Shelf* case, the tribunal observed that 'geographical features are at the heart of the delimitation process'. However, it continued that 'rules of international law, as well as equitable principles, must be applied to determine the relevance and weight of the geographical features' (para. 24).

Canada and France agreed that the relevant area was 'the geographical concavity formed by Newfoundland and Nova Scotia' (para. 26). However, while they agreed that there was a 'marked disparity' in the length of the relevant coasts, they did not agree on the identification of those coasts. Canada argued that its relevant coasts extended from Cape Race to Cape Canso, while France sought to exclude significant segments of the southern coast of Newfoundland (including the closing line across the Cabot Strait).

The tribunal observed that the coastlines that France wanted to exclude 'form the concavity of the Gulf approaches and all of them face the area where the delimitation is required, generating projections that meet and overlap, either laterally or in opposition'. In particular, the closing line across the Cabot Strait represented 'coastlines inside the Gulf which are in direct opposition to St Pierre and Miquelon and are less than 400 nautical miles away' (para. 29). However, the tribunal excluded the north and east coasts of the French

islands, together with the Canadian coastline behind them, on the basis that they did not ‘face on to the area in dispute’.(p. 316)

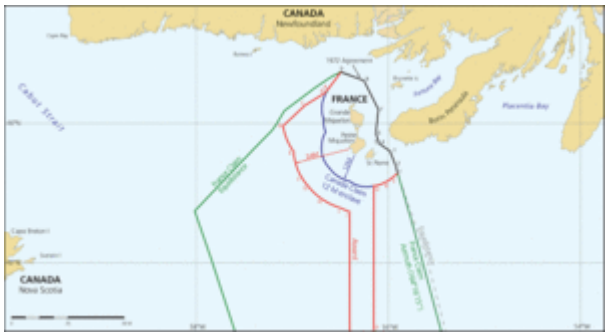

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Figure B10.3: *Canada/France (St Pierre & Miquelon)*: tribunal’s award (detail).

(p. 317) The tribunal identified the west and south coasts of St Pierre and Miquelon as the relevant French coasts, composed of two segments totalling 29.85M in length. It concluded that the relevant Canadian coasts facing the area of dispute were 455.6M in length. This gave a ratio of 15.3 to 1 in Canada’s favour (paras 31–3). The tribunal’s conclusions as to the parties’ relevant coasts are illustrated in Figure B10.2.

Another disputed matter of geography was the relationship between the parties’ coasts. Canada argued that the ‘close contiguity’ of the French islands to the south coast of Newfoundland created a relationship of adjacency, while France argued that the parties were in a relationship of partial oppositeness, particularly as regards Cape Breton Island. The tribunal held that the French islands were ‘laterally aligned with the south coast of Newfoundland, so that the prevailing and overall relationship is one of adjacency’. It cited also certain historical evidence, dating back to the early eighteenth century, confirming that the French islands had long been considered adjacent to Newfoundland (para. 35).

b. Delimitation of the EEZ/continental shelf

The applicable law and the principles or criteria invoked by the parties

The tribunal observed that the parties agreed on the ‘fundamental norm to be applied, which requires the delimitation to be effected in accordance with equitable principles, or equitable criteria, taking account of all the relevant circumstances, in order to achieve an equitable result’. It observed further that ‘the underlying premise of this fundamental norm is the emphasis on equity and the rejection of any obligatory method’ (para. 38). However, the parties disagreed on the principles and criteria that should govern the dispute.

France argued that because the delimitation was between two equal sovereign States, the French coastal projections must have the same legal value as the Canadian coastal projections. France claimed that St Pierre and Miquelon were entitled to a 200M maritime zone. France therefore requested a delimitation based on equidistance, proposing two lines that extended to the south-east and south-west from Points 1 and 9 of the 1972 Agreement line, beyond the Canadian 200M zone, ‘throughout the entire length of the maritime areas to which both parties may lay their claims’. In doing so, France requested that the delimitation should extend into areas of outer continental shelf. France’s proposed equidistance lines are illustrated in Figures B10.1 and B10.2.

France cited Article 6 of the 1958 Convention on the Continental Shelf, which had been ratified by both parties, in support of its submission that equidistance must be taken into account in determining the equitable character of the line to be drawn. However, the

tribunal refused to apply Article 6 because its task was to conduct an ‘all purpose delimitation’ extending to the water column (para. 40).

(p. 318) Canada argued for the delimitation of 12M enclaves around the French islands. Specifically, it requested delimitation by way of ‘arcs of circles circumscribed about points located on the low-water line of the coasts of the islands of St Pierre and Miquelon, so that each such arc has a radius of 12 nautical miles’. However, the tribunal distinguished the treatment of the Channel Islands (which had been similarly enclaved) in the *UK/France Continental Shelf* case, holding that the situation of those features was ‘substantially different from the present one, because of the proximity of the English coast’. The tribunal also observed that the Channel Islands had been ‘seen as an incidental feature in a delimitation between two mainland, and approximately commensurate, coasts’ (para. 42).

France relied on ‘two basic principles’: the principle of sovereign equality of and the principle of the equal capacity of islands and mainland countries to generate maritime areas. France noted that the Canadian proposal would deny the French islands any EEZ and continental shelf, thus relegating them to the status of ‘rocks which cannot sustain human habitation or economic life of their own’ under Article 121(3) of UNCLOS.

For its part, Canada invoked two principles or criteria that it said had been developed by judicial opinion: the principle of non-encroachment and ‘the equitable criterion defined as the need to take into account coastal lengths, so as to avoid disproportionate results’.

The tribunal remarked that the principle of non-encroachment had been introduced in the *North Sea Continental Shelf* cases. Canada explained that the principle of non-encroachment signifies that the delimitation must leave to a State the areas that constitute the natural prolongation or seaward extension of its coasts, so that the delimitation must avoid any cut-off effect of those prolongations or seaward extensions. It argued that the equidistance lines proposed by France would produce a cut-off effect as against the frontal projections of both Newfoundland (primarily) and Cape Breton Island.

Canada argued that the marked disparity between the parties’ coasts should be taken into account in deciding the method of delimitation. It argued further that such disparity required rejection of equidistance as the method of delimitation in the present case. The tribunal observed that, undoubtedly, the difference in length of the parties’ relevant coasts was an ‘important factor to take into account for an equitable delimitation, in order to avoid disproportionate results’. However, the tribunal rejected the Canadian theory of ‘relative reach’, holding that:

> the Court cannot accept the contention that particular segments of coast may have an increased or diminished projection depending on their length. The extent of the seaward projections will depend, in every case, on the geographical circumstances; for example, a particular coast, however short, may have a seaward projection as far as 200 miles, if there are no competing coasts that could require a curtailed reach (para. 45).(p. 319)

The tribunal also rejected Canada’s submission that St Pierre and Miquelon could generate no continental shelf of their own because they were ‘superimposed upon the Canadian continental shelf’. The tribunal referred to the *Gulf of Maine* case, where the ICJ Chamber had observed that the continental shelf of the eastern seaboard of North America is one physical shelf, and concluded that ‘each coastal segment has its share of shelf’. In any event, the tribunal observed that the physical structure of the seabed ceases to be important when the object is to establish a single, all-purpose, delimitation (paras 46–7). Referring to Article 121 of UNCLOS and the corresponding provisions of the 1958

Conventions, the tribunal found that there were ‘no grounds for contending that the extent of the maritime rights of an island depends on its political status’ (para. 49).

In a short section of its award entitled ‘Exaggeration in the claims of both Parties’, the tribunal noted certain fundamental contradictions in each party’s submissions. Specifically, it noted that Canada had denied, with its enclave proposal, any projection beyond the territorial sea for St Pierre and Miquelon, while France had denied, with its line of equidistance, any seaward projection to important segments of the Newfoundland coast. It concluded that neither ‘of the proposed solutions provides even a starting point for the delimitation’. Citing the *Gulf of Maine* case, it decided that it would ‘formulate its own solution independently of the proposals made by the Parties’ (paras 64–5).

The division of the area in two sectors and the rejection of equidistance in favour of delimitation based upon‘frontal projection’

The tribunal determined that, in order to reach an equitable result, it was necessary to examine separately two different sectors of the disputed maritime area. With regard to the first sector, labelled the ‘western seaward projection’ of St Pierre and Miquelon, the tribunal noted that it was ‘unavoidable that any seaward extension of the French coasts beyond their territorial sea would cause some degree of encroachment and cut off to the seaward projection towards the south from points located in the southern shore of Newfoundland’. Accordingly, the tribunal allowed France only a limited extension of the 12M enclave proposed by Canada, so as to allow some extension of French entitlement beyond the territorial sea, while limiting the encroachment caused to Canada’s coastal projection. The tribunal therefore concluded:

> A reasonable and equitable solution for the western sector would be to grant to Saint Pierre and Miquelon an additional twelve nautical miles from the limit of its territorial sea, for its exclusive economic zone.

The tribunal noted that this would coincide with the contiguous zone referred to in Article 33 of UNCLOS, which ‘grants to the coastal State jurisdiction to prevent infringement of its customs, fiscal, immigration or sanitary regulations’. The tribunal thus delimited to the west of St Miquelon by way of an equidistance (p. 320) line up to a point 24M from the French baseline, from which point the boundary continued along the 24M limit around the French islands until it met the southern sector (paras 67–9). The resulting delimitation in the western sector is illustrated in Figure B10.1.[1]

Turning to the southern sector, the tribunal noted that the geographical situation was ‘completely different’ because the French islands there had a ‘coastal opening towards the south which is unobstructed by any opposite or laterally aligned Canadian coast’. In that sector, France was therefore ‘entitled to a frontal seaward projection towards the south until it reaches the outer limit of 200 nautical miles’. On the other hand, such a projection ‘must not be allowed to encroach upon a parallel frontal projection of the adjacent segments of the Newfoundland southern coast’ (para. 70).

The tribunal continued:

> In order to achieve this result the projection towards the south must be measured by the breadth of the coastal opening of the French islands towards the south (para. 71).

The width of the southward French coastal projection would therefore be determined by reference to ‘the distance between the meridians passing through the easternmost point of St Pierre and the westernmost point of Miquelon’. This provided a 10.5M French corridor extending out to the 200M limit, as illustrated in Figure B10.2. The boundary was completed to the east by way of a short line along the territorial sea limit of Saint Pierre,

between the north-easterly termination point of the 200M corridor and Point 1 from the 1972 Agreement. The tribunal did not explain why this line should follow the 12M limit as opposed to the 24M arc delimited in the western sector.

Canada contended that, in determining the extent of French seaward extension to the south, account must be taken of the eastward projections of Nova Scotia and Cape Breton Island, located some 140M away. The tribunal considered Canada's objections 'not compelling' because 'geographically, the coasts of Nova Scotia have open oceanic spaces for an unobstructed seaward projection…in accordance with the tendency, remarked by Canada, for coasts to project frontally, in the direction in which they face' (paras 72–3).

c. Incompetency of the tribunal to delimit the continental shelf beyond 200M

Relying on Article 76 of UNCLOS, France claimed rights over the continental shelf beyond 200M in the disputed area, asserting that its shelf extended as far as the outer edge of the continental margin. It therefore requested the tribunal to (p. 321) prolong its lines of delimitation beyond 200M. Canada countered that the point at which France was making its claim may, in fact, lie beyond the edge of the continental margin as set out in Article 76.

The tribunal noted that this gave rise to a preliminary issue regarding its competence to pronounce on the parties' dispute as to whether or not the continental shelf extended beyond 200M in the relevant area. The tribunal noted that any decision recognizing or rejecting rights of the parties beyond 200M would 'constitute a pronouncement involving a delimitation, not between the Parties but between each of them and the international community [represented by the International Seabed Authority]'. The tribunal stated that it was not competent to carry out a delimitation affecting the rights of a party that was not before it. The tribunal further noted the impending establishment of the CLCS under Article 76(8) of UNCLOS for the purposes of establishing outer limits of the continental shelf (paras 77–9).

It followed that the tribunal was only competent to effect a delimitation up to 200M. It would thereby comply with its mandate under the Arbitration Agreement to establish a single boundary line that would apply both to the seabed and the superjacent waters (para. 82). Notably, as illustrated in Figures B10.2 and B10.4, the tribunal's delimitation includes lines joining the two southern meridians, along the French 200M limit.

d. Role of fisheries and mineral resources in the delimitation

Access to, and control of, fisheries resources in the disputed area were central to the delimitation dispute. Both parties emphasized the economic dependence of their respective nationals upon fishing in the disputed area, and both considered delimitation a critical factor in safeguarding the interests of their fishing communities. However, the tribunal observed that the parties were 'in essential agreement' that the criteria governing delimitation were to be found primarily in the geographical facts. Having decided on the delimitation in accordance with the geographical factors, the tribunal, recalling the *Gulf of Maine* case, observed that it was under an obligation to assure itself that the solution reached was 'not radically inequitable' as being 'likely to entail catastrophic repercussions for the livelihood and economic well-being' of the fishing populations of the parties (paras 83–4).

The tribunal held that the facts submitted to it indicated that the proposed delimitation would 'not have a radical impact on the existing pattern of fishing in the area' (para. 85). Importantly, both parties had stressed that the delimitation was without prejudice to their fishing rights, which would continue to be governed by the 1972 Agreement. The tribunal remarked that the fact that the parties had had differences in the past relating to quotas

and claims of overfishing did not deprive the 1972 Agreement of its ‘essential utility’. The tribunal concluded that it (p. 322)

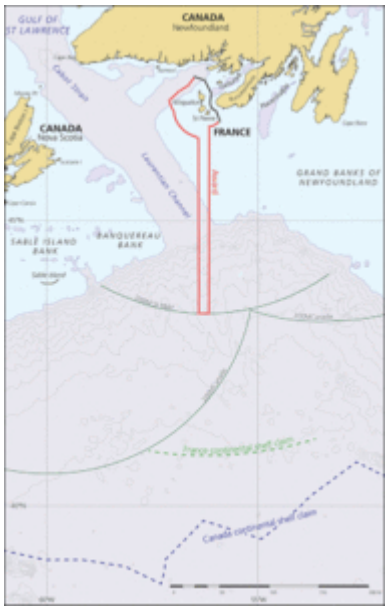

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Figure B10.4: *Canada/France (St Pierre & Miquelon)*: parties’ post-award outer continental shelf claims.

(p. 323) was ‘confident that by abiding in good faith with the 1972 Agreement, the parties will be able to manage and exploit satisfactorily the fishing resources of the area’ (para. 87).

The tribunal observed that its delimitation would have no adverse effects concerning navigation and other rights and duties of the parties, noting that they had underscored the importance attached to the principle of freedom of navigation, ‘a provision that undoubtedly represents customary international law as much as the institution of the 200 mile zone itself’ (para. 88).

In relation to mineral resources, the tribunal noted that exploration permits had been issued by both parties, but, after reciprocal protests, no drilling had been undertaken. The tribunal concluded that it had no reason to consider potential mineral resources as having a bearing on the delimitation (para. 89).

e. Application of the ‘test of proportionality’

As a final step in the delimitation, the Tribunal undertook a precise quantitative assessment of the proportionality between the relevant coasts and the relevant areas. The tribunal recalled that the ratio of relevant coastal frontages was 15.3 to 1 in Canada’s favour. The tribunal’s technical expert calculated the size of the relevant area to be approximately 63,000M^2, of which 59,434 would fall on the Canadian side of the delimited boundary and 3,617 would fall on the French side (see Figure B10.2). This produced a ratio of approximately 16.4:1. The tribunal concluded that there was ‘certainly no disproportion’ between the two ratios and that ‘the requirements of the test of proportionality, as an aspect of equity, have been satisfied’ (para. 93).

f. Dissenting opinions

The tribunal rendered its award on 10 June 1992 by a vote of three to two. The arbitrators appointed by France and Canada each submitted lengthy and substantive dissenting opinions that are worthy of separate note.

Prosper Weil (appointed by France) delivered an unusually blunt and withering dissenting opinion, indicating that he was 'at a loss to identify what principles and rules can have justified on a legal basis the delimitation which has been decided' (para. 1, Weil Dissenting Opinion). He continued: 'my essential reason for voting against the Decision is that the delimitation in the strange form of a mushroom which results therefrom does not seem to me a result achieved on the basis of law' (para. 2, Weil Dissenting Opinion). He objected most strongly to the delimitation in the southern sector (in what he termed the 'stem of the mushroom'), arguing that the adoption of a 'frontal projection' approach in that sector was flawed because it ignored the fact that coastal projection 'radiates in all directions, creating an oceanic envelope around the coastal façade' (para. 11, Weil Dissenting (p. 324) Opinion). He criticised the majority for paying lip service to the dominant role to be played by geography in delimitation, while 'avoiding all recourse to the geographical method par excellence, namely that of equidistance'. In a prescient passage given more recent jurisprudential developments, he indicated that he would have used equidistance as a starting point to the delimitation before considering necessary modifications, rather than an approach based on geographical fairness (para. 37, Weil Dissenting Opinion).

Allan Gotlieb (appointed by Canada) observed that the award had correctly refused to extend the line of delimitation beyond the French 200M limit, observing that the award thus left St Pierre and Miquelon with a maritime area that was 'entirely contained within Canada's 200 mile exclusive economic zone'. He remarked that this left the French maritime area 'totally zone-locked', with the result that 'a French claim to a continental shelf beyond its 200 mile limit therefore cannot arise'. He observed that any such claim 'would—miraculously—have to travel through—in some sort of dormant state—the Canadian 200 mile zone for a distance of some one hundred miles or so and then somehow revive itself so as to generate a claim to the physical shelf beyond the Canadian 200 mile zone at a distance of some 300 miles south' of St Pierre and Miquelon (para. 63, Gotlieb Dissenting Opinion). The question of whether or not so-called 'zone-locked' maritime states are able to claim outer continental shelf areas through, or beyond, the EEZs of more seaward neighbouring states has been hotly debated ever since the St *Pierre and Miquelon* case, and is one that remains in dispute between France and Canada to this day (see V. 'Developments since the Award' below).

III. Technical Considerations

The tribunal appointed Commander Peter Beazley as its technical expert, although there is no technical report appended to the Award (unlike in *Gulf of Maine*, where Commander Beazley produced a detailed report).

Although the Award has some unusual legal and geographic aspects, technically it is fairly straightforward.

In the *dispositif*, the points are assigned to the North American Datum and the lines are described as geodesics (although for a due north-south line there is no difference between a geodesic and a loxodrome).

For the proportionality calculations (see Figure B10.2), the tribunal chose all the Canadian coast that fronted onto the area in dispute, including straight lines across Placentia Bay and the Cabot Strait, the latter of which represented 'coastlines inside the Gulf which are in direct opposition to Saint Pierre and Miquelon'. (This contrasts with the treatment of the Karkinits'ka Gulf in the *Black Sea* case, where use of a bay closing line was rejected.) The tribunal, however, discounted the (p. 325) opposite Canadian coast behind the French

islands even though its projection extends beyond the islands. Comparable cases where the coasts behind islands have been counted include *Nicaragua/Colombia*.

For the definition of the relevant area, the tribunal ignored the 200M entitlement of Sable Island and defined the edge of the relevant area using the remaining 200M areas of the parties, which intersect where the 200M entitlement of Cape Breton Island meets with that from St Pierre and Miquelon (Figure B10.2). Measuring the Canadian 200M EEZ from Sable Island results in the French EEZ being totally enclosed within the Canadian EEZ and thus not fronting onto the high seas (Figures B10.2 and B10.4).

The significance of the outer continental shelf submissions to the CLCS made by both parties is discussed further below. Both submissions rely on the Gardiner sediment thickness formula under Article 76(4)(a)(i) of UNCLOS, and both are limited by the 350M constraint under Article 76(5) of UNCLOS; the difference between the claims shown in Figure B10.4 is that the Canadian constraint measured from Sable Island is much further seaward than that measured from St Pierre and Miquelon.

IV. Significance of the Decision and its Contribution to International Law

This was an unusual case involving delimitation between a group of small islands, on the one hand, and a large nearby continental State, on the other, that were in a relationship of coastal adjacency with regard to the majority of the disputed maritime area.

The 1992 award was the result of an ad hoc arbitration process that lasted just over three years from the date of signature of the Arbitration Agreement. As is common in such proceedings, and in contrast to cases before the ICJ, the parties determined by agreement between them the procedural framework, the timetable for the arbitration, and the appointment of a technical expert to assist the tribunal. The timetable provided for two rounds of simultaneous written pleadings, which were completed within two years of the Arbitration Agreement, followed shortly afterwards by an oral hearing. The resulting award, rendered by the majority of three out of five arbitrators, ran to just thirty pages. The expeditious nature of the proceeding, together with the brevity of the award, can be contrasted with the maritime delimitation cases before the ICJ summarized elsewhere in this work.

The award preceded the entry into force of UNCLOS by more than two years. Notably, while France argued for a boundary based on equidistance, it agreed with Canada that the delimitation must be effected ‘in accordance with equitable (p. 326) principles’. Such an approach, which had strong echoes of the ICJ’s 1969 judgment in the *North Sea Continental Shelf* cases, has been superseded by more recent UNCLOS jurisprudence establishing the three-stage methodology as the general starting point in single maritime boundary delimitation. While the tribunal rejected both France’s equidistance approach and Canada’s concavity approach as being ‘exaggerated’, its solution represented a form of compromise, providing a modified enclave solution in the western sector and a fuller French 200M maritime zone in the southern sector. In adopting its own delimitation approach in place of those presented by the parties, the tribunal awarded to France an area of maritime space that France had not even claimed, corresponding to the final stretch of the French 200M corridor, as illustrated in Figure B10.1.

The case provides an important precedent in the context of small islands situated adjacent to large continental landmasses and abutting open ocean areas. The recognition of full maritime entitlements for small, permanently inhabited island features under Article 121 of the Convention is to be welcomed. However, the narrow French 200M corridor accorded by the tribunal to the south of St Pierre and Miquelon has not been without controversy. It was a product of the majority’s strict interpretation and application of the concepts of frontal projection and non-encroachment. The strictly south-facing projection adopted as regards

the coastlines of the French islands and Newfoundland in the southern sector implicated a rejection of the concept of radial projection, to the disapproval of Arbitrator Weil as expressed in his dissenting opinion. The tribunal's approach in this respect contrasts with the subsequent recognition of the concept of radial projection in the *Barbados/Trinidad* and *Bangladesh/India* arbitrations. At the same time, Arbitrator Gotlieb found the tribunal's attempt to distinguish the treatment of the Channel Islands in the *UK/France Continental Shelf* case, and thus to avoid the adoption of an enclave solution around St Pierre and Miquelon, highly unconvincing.

Despite the controversy surrounding the majority's award, its prioritization of geographical circumstances in the context of a single all-purpose boundary delimitation provided a clear endorsement to the approach advocated by the ICJ Chamber eight years earlier in the *Gulf of Maine* case. That case, which related to the US/Canada boundary just to the south-west of the present delimitation, had a significant influence also on the tribunal's treatment of the parties' fishing arguments. The tribunal specifically adopted the ICJ Chamber's 'catastrophic repercussions' test as a final check of the equitable nature of a boundary that had been decided with reference to purely geographical factors. It concluded that the existence of a 1972 fishing agreement meant that the proposed delimitation would not have a 'radical impact on the existing pattern of fishing' in the disputed area. Of course, such a conclusion relied on the parties' good faith and perpetual performance of that agreement. Arbitrator Weil was again critical of the award from a practical perspective, observing that the delimited boundary was 'unsuited to coherent exploitation'.

(p. 327) The award marked an important milestone in the context of delimitation over continental shelf areas beyond 200M. Again, in this respect the fact that the award pre-dated the entry into force of UNCLOS (and the establishment of the Commission on the Limits of the Continental Shelf (CLCS)) is significant. The tribunal adopted a cautious approach (despite observing that the continental shelf of Newfoundland generally extended beyond 200M). It declined competence to delimit areas of continental shelf beyond 200M for fear of conducting a delimitation vis-à-vis a third party in the form of the 'international community', a role that it correctly ascribed to the CLCS. The ICJ was to adopt a similarly cautious approach (albeit on a merits rather than a jurisdictional basis) in the subsequent *Nicaragua/Colombia* case, where it rejected Nicaragua's request for a delimitation beyond 200M because Nicaragua had failed to establish (via the CLCS) that its continental shelf extended that far. These cases contrast with the more recent *Bangladesh/Myanmar* and *Bangladesh/India* cases, in which the parties agreed that the continental margin extended beyond 200M in the Bay of Bengal, thus allowing delimitation to proceed in the area notwithstanding the absence of any CLCS recommendation on the location of the outer limit.

V. Developments since the Award

In May 2009, France submitted preliminary information to the CLCS on the limits of the continental shelf beyond 200M from the baselines from which the breadth of the territorial sea is measured in respect of St Pierre and Miquelon.[2] This provoked a prompt protest by Canada in November 2009, which stated:

> The Government of Canada rejects any claims by the French Republic to any maritime area, including any areas of continental shelf, beyond the area awarded to the French Republic by the Court of Arbitration in the [1992 St Pierre and Miquelon case]. Consistent with the 1992 decision, the United Nations Convention on the Law the Sea and principles of international law, a claim by the French Republic to an area of extended continental shelf off of Saint-Pierre and Miquelon cannot arise.[3]

Canada followed this protest with its own full submission to the CLCS in December 2013, in respect of the Atlantic Ocean, including the entire area that (p. 328) is subject to French claims beyond the Canadian 200M limit.[4] On 16 April 2014, the French Republic submitted full information on the limits of the continental shelf beyond 200M from St Pierre and Miquelon to the CLCS,[5] which prompted a similar forthright response from Canada.

The outer limits claimed by Canada and France in their respective CLCS submissions are illustrated in Figure B10.4. Notably, any French outer shelf entitlement in the area will, at least in part, overlap with Canadian EEZ entitlement in the superjacent waters. Any French entitlement could therefore give rise to a so-called 'grey area', the nature of which was discussed subsequently in the *Bangladesh/Myanmar* and *Bangladesh/India* cases.

The question of whether or not a coastal State that is 'zone-locked' within the 200M EEZ limits of a neighbouring State can claim outer shelf areas, in the way that France is attempting to do with St Pierre and Miquelon, may be the subject of analysis by the ICJ in the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* (*Nicaragua v. Colombia*) case, which was pending at the time of writing.[6]

Footnotes:

1 Notably, the majority's delimitation in the western sector was criticised by the arbitrators appointed by both France (Weil) and Canada (Gottlieb) in their dissenting opinions.

2 'Informations préliminaires indicatives sur les limites extérieures du plateau continental, Saint-Pierre-et-Miquelon', 8 May 2009, available at <http://www.un.org/depts/los/clcs_new/submissions_files/preliminary/fra2009infos_preliminaires_saint_pierre_m.pdf>.

3 Note Verbale regarding the preliminary information filed by the French Republic in relation to Saint-Pierre-et-Miquelon, 9 November 2009, available at <http://www.un.org/depts/los/clcs_new/submissions_files/preliminary/can_re_fra_2009_e.pdf>.

4 Partial Submission of Canada to the Commission on the Limits of the Continental Shelf regarding its continental shelf in the Atlantic Ocean, 6 December 2013, Executive Summary, available at <http://www.un.org/depts/los/clcs_new/submissions_files/can70_13/es_can_en.pdf>.

5 Partial Submission to the Commission on the Limits of the Continental Shelf in respect of the area of Saint-Pierre-et-Miquelon, 14 April 2014, Executive Summary, available at <http://www.un.org/depts/los/clcs_new/submissions_files/submission_fra_72_2014.htm>.

6 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)* case, discussed further in Part, B Chapter 21.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 11 Denmark v. Norway (Judgment of the International Court of Justice, 14 June 1993)

From: A Practitioner's Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):

Coastal states — Continental shelf — Islands and artificial islands — Delimitation — Straits — Territorial sea — UNCLOS (UN Convention on the Law of the Sea)

(p. 329) 11 *Denmark v. Norway* (Judgment of the International Court of Justice, 14 June 1993)

Case Note: delimitation of single continental shelf and fishery zones boundary—opposite coastlines—claim to median line boundary on the basis of agreement and historic acceptance—methodology for delimitation in the absence of agreement—provisional drawing, as a first step, of a median line that may then be adjusted to ensure an equitable result—identification of 'special' and 'relevant' circumstances—disparity of lengths of relevant coasts—fisheries and access to fishery resources—population and socio-economic factors—relevance of agreement with a third party—varied adjustment of median line

Citation: *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark v. Norway*), Judgment, 14 June 1993, *ICJ Reports* 1993, p. 38

Institution: ICJ

Basis of jurisdiction: declarations made by the parties accepting the compulsory jurisdiction of the ICJ under Article 36(2) of the ICJ Statute

The court: *Judges* Jennings (President), Oda (Vice-President), Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar-Mawdsley, Weeramantry, Ranjeva, Ajibola, *Judge ad hoc* Fischer (appointed by Denmark)

Applicable law: 1958 Convention on the Continental Shelf (continental shelf delimitation); customary international law (fishery zones delimitation)

Areas delimited: continental shelf (within 200M); fishery zones

I. Introduction and Context

This case, which just pre-dated the entry into force of UNCLOS, concerned the delimitation of a maritime area located in the northern Atlantic Ocean, to the north of the Arctic Circle, between the east coast of Greenland and (p. 330) the island of Jan Mayen. The area lies to the north of Iceland and the Denmark Strait between Greenland and Iceland. The distance between Jan Mayen and the east coast of Greenland is around 250M. The waters off the northern part of the east coast of Greenland were permanently covered by compact ice, and navigation in the area of the delimitation was seasonally affected by drift ice. The geographical context of the delimitation is illustrated in Figure B11.1.

Greenland had, since 1953, been part of the Kingdom of Denmark, albeit subject to home rule. Jan Mayen had, since 1930, been integrated in the Kingdom of Norway as an 'inalienable part of the Realm'.

At the time of the dispute, the total population of Greenland was about 55,000. The fisheries sector in Greenland employed about one-quarter of the labour force, and accounted for approximately 80 per cent of total export earnings. The disputed area between the parties comprised an important summer fishing ground for capelin, the only fish which was commercially exploited in the area.

By contrast, Jan Mayen had no settled population. It was inhabited solely by around twenty-five technical and other staff, mainly employed at the island's meteorological station and coastal radio station. Norwegian activities in the disputed area had historically included

whaling, sealing, and fishing (carried out by vessels based in mainland Norway, not Jan Mayen).

The dispute arose out of the unilateral and coincident extensions by Denmark and Norway of the limits of their respective fisheries jurisdictions during the late 1970s and early 1980s, immediately prior to the adoption by UNCLOS of the concept of the exclusive economic zone. In August 1981, Denmark asserted fisheries jurisdiction over an area extending 200M off the east coast of Greenland. At the end of May 1980, Norway established a 200M fishery zone around Jan Mayen. The Norwegian Decree provided that the Norwegian fishery zone would not extend beyond the median line with Greenland. Therefore, between June 1980 and August 1981, the median line represented the *de facto* boundary between the areas of fisheries jurisdiction exercised by the parties.

On 16 August 1988, Denmark filed an application instituting proceedings against Norway at the ICJ, relying on declarations made by each of the parties accepting the compulsory jurisdiction of the court under Article 36(2) of its Statute. Since the ICJ included a judge of Norwegian nationality, but no judge of Danish nationality, Denmark appointed Mr Paul Henning Fischer as a judge ad hoc pursuant to Article 31(2) of the Statute.

Denmark's application requested the ICJ to 'decide, in accordance with international law, where a single line of delimitation shall be drawn between Denmark's and Norway's fishing zones and continental shelf areas in the waters between Greenland and Jan Mayen'.(p. 331)

View full-sized figure

Figure B11.1: *Denmark/Norway (Jan Mayen)*: parties' claims and relevant area.

(p. 332)

II. Positions of the Parties and Summary of the Judgment

a. The court's designation of three maritime areas relevant to the dispute

At the outset of its judgment, the court found it convenient to propose three maritime areas between Greenland and Jan Mayen which had featured prominently in the arguments of the parties (paras 18–21). Each of these areas is illustrated in Figure B11.1. First, there was the area bounded by the single 200M delimitation line claimed by Denmark and the two coincident median lines claimed by Norway. The court labelled this the 'area of overlapping claims'. It was enclosed to the north by the intersection of the delimitation lines proposed by the parties (point A), and to the south by a line representing the limit of the 200M EEZ claimed by Iceland (between points B–C–D).[1] Second, there was the area extending to the

west of the median line up to the 200M continental shelf and fisheries zone limit of Jan Mayen. The court labelled this the ‘area of overlapping potential entitlement’. Third, there was the area identified by Denmark as the ‘area relevant to the delimitation dispute’. This incorporated points G and H, which defined the extent of the Greenland coast relevant for the construction of an equidistance line, and points E and F, which defined the extent of the Jan Mayen coast relevant for the same purpose. As discussed below, these points were to be especially relevant when the court came to address the comparative coastal lengths of the parties. Denmark calculated the size of this ‘relevant area’ at approximately 230,000 km².

b. The 1965 Agreement and related arguments of historic agreement or acceptance by Denmark of coincident median line boundaries

In December 1965, Denmark and Norway concluded an agreement concerning the delimitation of the continental shelf between them (the ‘1965 Agreement’). Article 1 of that agreement provided that: ‘The boundary between those parts of the continental shelf over which Norway and Denmark respectively exercise sovereign rights shall be the median line.’ Article 2 then defined a series of straight lines between the mainland territories of Denmark and Norway ‘[i]n order that the principle set forth in Article 1 may be properly applied’.

A ‘principal contention’ of Norway in the case was that a median line continental shelf delimitation had already been established between Jan Mayen and Greenland by virtue of the 1965 Agreement and the 1958 Convention on the Continental Shelf, and that the parties’ fisheries practice represented a recognition of the same median line boundary in the exercise of fisheries jurisdiction (para. 22). On the basis of these arguments, Norway claimed the existence of coincident median line (p. 333) boundaries in relation to the continental shelf and fisheries zones (illustrated in Figure B11.1 by the line joining points A and D).

The court noted that it was clear that the 1965 Agreement contained no provision for the definition of a median line between Greenland and Jan Mayen (para. 24). While Norway contended that Article 1 of the 1965 Agreement was of general application between the parties, Denmark argued that it was specific to the mainland coasts of the Skagerrak and the North Sea and thus had no application to the present dispute.

The court determined that the use of the singular term ‘the boundary’ throughout Article 1 of the 1965 Agreement ‘must refer to the one boundary defined in Article 2’ (para. 26). The court concluded that this was confirmed by the context, object, and purpose of the 1965 Agreement. In particular, in 1965 both parties had been asserting continental shelf rights consistent with the 1958 Convention. Those rights were limited under Article 1 of that Convention to 200 metres in depth or the limit of exploitability. The waters between Greenland and Jan Mayen are substantially deeper, and had thus not been considered areas of continental shelf at the time of the 1965 Agreement. The court also observed that the limited scope of the 1965 Agreement had been confirmed by the subsequent practice of the parties (paras 28–9).

Norway further argued that the 1965 Agreement had confirmed that there were no ‘special circumstances’ requiring variance from a median line continental shelf boundary between Greenland and Jan Mayen for the purposes of Article 6(1) of the 1958 Convention.[2] The court rejected this argument as a result of its conclusion that the 1965 Agreement had not been intended to apply to the area between Greenland and Jan Mayen, and therefore could not constitute an agreement that there were no special circumstances in that area (para. 32).

Finally, Norway argued that the parties had, by their conduct, 'long recognized the applicability of a median line delimitation in their mutual relations' (para. 33). Norway referred to alleged 'public acts' and 'patterns of conduct' of the Danish Government, which it said constituted acquiescence in, or tacit recognition of, a median line boundary, or prevented Denmark from asserting claims beyond a median line boundary. The court rejected these arguments, in part relying upon evidence presented by Denmark that certain Danish legislation, upon which Norway relied, had not been intended to recognize the appropriateness of a median line boundary between Greenland and Jan Mayen. The court also noted that, in diplomatic exchanges, Denmark had indicated that such a boundary would be 'unacceptable' (para. 36).

In light of its conclusion that no median line boundary was already 'in place' between the parties, whether as a result of the 1965 Agreement or otherwise, the (p. 334) court proceeded to examine the law applicable to the delimitation outstanding between the parties.

c. The law applicable to the delimitation and associated questions about the task of the court

The parties were not agreed as to the nature of the task conferred on the court. Denmark requested the court to delimit a boundary between the parties, with precise coordinates. Norway submitted that the court should render a judgment declaratory as to the basis of delimitation, leaving the precise course of the boundary to be negotiated between the parties later (as in the *North Sea Continental Shelf* cases). Further, Denmark requested a 'single line of delimitation of the fishery zone and continental shelf area', while Norway contended that the median line should constitute coincident but distinct continental shelf and fisheries zone boundaries. Norway distinguished the case from the *Gulf of Maine*, where the parties had specifically requested the court to identify the course of a 'single maritime boundary' relating to the continental shelf and fisheries zones of Canada and the United States.

The court noted that the 1958 Convention on the Continental Shelf was binding on the parties and that it governed the continental shelf delimitation to be effected. By contrast, the delimitation of the parties' fishery zones boundary would be governed by customary international law. The court therefore resolved to 'examine separately the two strands of the applicable law' (para. 44). The court observed that it had never had occasion to apply the 1958 Convention in any previous delimitation case.

However, with reference to the judgment of the Court of Arbitration in the *UK/France Continental Shelf* case, the court observed that 'it must be difficult to find any material difference—at any rate in regard to delimitation between opposite coasts—between the effect of Article 6 [of the 1958 Convention] and the effect of the customary rule which also requires a delimitation based on equitable principles' (para. 46). Further, the court took note of Articles 74 and 83 of UNCLOS, to which both Denmark and Norway were signatories, but which neither had yet ratified and which was not yet in force. The court observed that the objective of an 'equitable solution' in those Articles reflected 'the requirements of customary law as regards the delimitation both of continental shelf and of exclusive economic zones' (para. 48).

d. The delimitation of the continental shelf and fishery zones

The court turned first to the delimitation of the continental shelf. It noted that this was governed by Article 6 of the 1958 Convention, and that the delimitation was between opposite coasts. Accordingly, it was appropriate to begin by taking provisionally the median line between the territorial sea baselines, and then (p. 335) enquiring whether 'special circumstances' required 'another boundary line' (para. 49). The court observed that customary law in the context of continental shelf delimitation between opposite coasts

likewise regarded the median line as a provisional line that may be adjusted in order to ensure an equitable result, as illustrated by the *Gulf of Maine* and *Libya/Malta* cases (paras 50–1).

Again with reference to the *Gulf of Maine* case, the court determined that the same methodology should be adopted under customary law with regard to the fishery zones boundary. Accordingly, it was proper to begin the process of delimitation of both the continental shelf and fishery zones by way of a median line provisionally drawn (para. 53).

The court observed that:

> the aim in each and every situation must be to achieve an 'equitable result'. From this standpoint, the 1958 Convention requires the investigation of any 'special circumstances'; the customary law based upon equitable principles on the other hand requires the investigation of 'relevant circumstances' (para. 54).

The court proceeded to acknowledge the close relationship that exists between 'special' and 'relevant' circumstances in international law:

> although it is a matter of categories which are different in origin and in name, there is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law, and this if only because they both are intended to enable the achievement of an equitable result. This must be especially true in the case of opposite coasts where, as has been seen, the tendency of customary law, like the terms of Article 6, has been to postulate the median line as leading *prima facie* to an equitable result. It cannot be surprising if an equidistance-special circumstances rule produces much the same result as an equitable principles-relevant circumstances rule in the case of opposite coasts, whether in the case of a delimitation of continental shelf, of fishery zone, or of an all-purpose single boundary (para. 56).

The court recalled the much-cited statement from its judgment in the *North Sea Continental Shelf* cases, to the effect that there was 'no legal limit' to the considerations which States may take into account for the purposes of effecting an equitable delimitation. It emphasized that, in that case, the court had been addressing 'the task of States in negotiation'. By contrast, its task here was to effect the delimitation itself. In those circumstances, the court was required to determine the relative weight to be accorded to different considerations, and to do so in a way that met the need, as expressed in the *Libya/Malta* case, for 'consistency and a degree of predictability' (para. 58).

Turning to the question of whether the circumstances of the case required adjustment of the provisional median line, the court noted that it would have to consider in greater detail the geographical context of the dispute (para. 59). While each party had brought various circumstances to the court's attention, neither had (p. 336) presented them in the context of the possible adjustment of a median line provisionally drawn. This was because Norway argued that the median line itself was the correct and equitable solution, while Denmark contended that the median line should not be used even provisionally. Nevertheless, Denmark did contend that the island of Jan Mayen itself fell within the concept of special circumstances, such that it should have no effect on Greenland's 200M continental shelf area (para. 60). For this purpose, Denmark referred to the fact that Jan Mayen was small in relation to the opposite coast of Greenland, and that it could not sustain human habitation or an economic life of its own for the purposes of Article 121(3) of UNCLOS.

The court observed that the ‘geophysical’ factor that had featured most prominently in Denmark’s argument, in regard to both continental shelf and fishery zone, was the disparity or disproportion between the lengths of the ‘relevant coasts’, defined by Denmark as the coasts lying between points E and F on the coast of Jan Mayen, and points G and H on the coast of Greenland. These coasts are illustrated in Figure B11.1. The straight-line distances between the points concerned were 54.8km and 504.3km, respectively (giving a ratio of 1:9.2). Measured along the territorial sea baselines between the points concerned, the distances were 57.8km and 524km, respectively (giving a ratio of 1:9.1) (para. 61). Denmark argued that, in the circumstances, the disparity between the two relevant coastal lengths was ‘obvious’. Norway, on the other hand, argued that such disparity was not a special circumstance and that arguments of proportionality were only a test of the equitableness of a result arrived at by other means.

The court remarked that: ‘*Prima facie*, a median line delimitation between opposite coasts results in general in an equitable solution, particularly if the coasts in question are nearly parallel’ (para. 64). It continued:

> There are however situations—and the present case is one such—in which the relationship between the length of the relevant coasts and the maritime areas generated by them by application of the equidistance method, is so disproportionate that it has been found necessary to take this circumstance into account in order to ensure an equitable solution. The frequent references in the case-law to the idea of proportionality—or disproportion—confirm the importance of the proposition that an equitable delimitation must, in such circumstances, take into account the disparity between the respective coastal lengths of the relevant area (para. 65).

The court determined that it was appropriate to treat as relevant the coasts between points E and F and points G and H in view of their role in generating the entirety of the median line provisionally drawn. In the present case, the difference in length of the relevant coasts was ‘striking’, and thus constituted a special circumstance within the meaning of Article 6 of the 1958 Convention (paras 67–8).

However, citing the *Libya/Malta* case, the court cautioned that ‘taking account of the disparity of coastal lengths does not mean a direct and mathematical (p. 337) application’. Further, the court noted that the coast of Jan Mayen generated potential title to maritime zones extending, in principle, up to a limit of 200M. It concluded that ‘to attribute to Norway merely the residual area left after giving full [i.e., 200M] effect to the eastern coast of Greenland would run wholly counter to the rights of Jan Mayen and also to the demands of equity’. Therefore, neither the median line claimed by Norway nor the full 200M line claimed by Denmark would represent an equitable result. Rather, the boundary line must be situated somewhere in between (paras 69–72).

The court turned to consider what other circumstances might also affect the delimitation. The first question was whether access to the resources of the disputed area constituted a factor relevant to the delimitation. The court noted that both parties had emphasized the importance of their respective interests in the fisheries resources of the area. It is observed that the principal exploited fishery was for capelin, which is a migratory species most commonly found in the disputed area during summer and autumn months. It noted that Norwegian records of capelin catches during the 1980s showed concentrations of stocks generally in the southern part of the area of overlapping claims (paras 72–3).

The court indicated that its task was to consider whether any adjustment of the median line, as a fishery zone boundary, would be required ‘to ensure equitable access to the capelin fishery resources for the vulnerable fishing communities concerned’. It concluded that, in the southern part of the disputed area, the median line was ‘too far to the west for Denmark to be assured of an equitable access to the capelin stock, since it would attribute to Norway

the whole of the area of overlapping claims'. For this reason, the median line must be adjusted eastwards (paras 75–6).

Each of the parties presented statistical and satellite image evidence of the extent to which the disputed area was affected by sea ice. Denmark in particular argued that the presence of ice off the Greenland coast significantly impacted its ability to fish close to its coast. The court acknowledged that perennial ice might 'significantly hinder access to the resources of the region, and thus constitute a special geographical feature of it'. However, in the present case, the seasonal migration of capelin to the southern part of the disputed area coincided with the summer retreat of the ice further north-westwards. The court was therefore satisfied that the ice did not 'materially affect access to migratory fishery resources' in that area (paras 77–8).

The court moved on to consider a number of 'population and socio-economic factors' that had been raised by Denmark. These included the disparity in population sizes of Greenland and Jan Mayen; the fact that fishing and fisheries constituted the 'mainstay' of the Greenland economy; the contrasting absence of Norwegian fishing communities on Jan Mayen; and the attachment of the coastal people of Greenland to their surrounding sea. The court remarked that 'the (p. 338) attribution of maritime areas to the territory of a State, which, by its nature, is destined to be permanent, is a legal process based solely on the possession by the territory concerned of a coastline'. Again citing the *Libya/Malta* case, where it had concluded that a delimitation should not be influenced by the relative economic position of the disputing States, the court concluded that such factors should not be taken into account in delimiting the maritime boundary (paras 79–80).

The court was satisfied that its proposed adjustment of the median line in Denmark's favour was not such as to make Norwegian security a countervailing relevant consideration in the case (para. 81).

In support of its claim up to the 200M limit from Greenland, Denmark contended that, in a previous delimitation agreement with Iceland, Norway had accepted that Jan Mayen's maritime zones should not cut into the 200M entitlement of Iceland. Norway contended that the agreement with Iceland was irrelevant since it represented a political concession in favour of a neighbour that was heavily dependent on fisheries and that enjoyed 'special relations' with Norway. The court observed that 'in the context of relations governed by treaties, it is always for the parties concerned to decide, by agreement, in what conditions their mutual relations can best be balanced'. Accordingly, the court concluded that the agreement between Norway and Iceland should not influence the delimitation in the present case (para. 86).

The court thus determined that the median line must be adjusted in Denmark's favour so that the maritime boundary would be drawn within the area of overlapping claims, between the median line and Denmark's 200M limit. The court observed that, to give only a broad indication of the manner in which the delimitation should be effected, and to leave the matter for the further agreement of the parties, as urged by Norway, would 'not be a complete discharge of its duty to determine the dispute'. The court thus resolved to define the delimitation line such that any outstanding questions would relate strictly to 'hydrographic technicalities' which the parties would, with the help of their experts, be able to resolve. The court thus proceeded to establish a delimitation line using the baselines and coordinates which the parties had employed in their pleadings and oral argument (para. 89).

The court observed that, in relation to the continental shelf, there was no requirement that the median line must be shifted eastwards consistently throughout its length. On the contrary, it was within the court's discretion to vary the extent of any such shift if necessary to arrive at an equitable result. In this regard, equitable access to the capelin fishery in the southern part of the area of overlapping claims required a more substantial adjustment of

the median line in that region. Accordingly, the court concluded that the delimitation line would run from point A in the north (representing the point of intersection of the median line and the Greenland 200M limit) to a point on the 200M limit of Iceland between points D and B. In order to make proper provision for equitable access to the capelin (p. 339) fishery, the area of overlapping claims would be divided into three zones, demarcated by the marked changes of direction in Greenland's 200M line (at points I and J) and the corresponding changes of direction in the median line (at points K and L). The three zones were thus divided by straight lines drawn between points I and K, and points J and L. From south to north, the court labelled the three zones thus demarcated as zone 1, zone 2, and zone 3 (paras 90–1).

Zone 1 corresponded to the principal capelin fishing area. In order to ensure equitable access to the fishery, the court designated point M, which was equidistant between points B and D on the Icelandic 200M limit, and drew a straight line from that point to point N so as to divide the zone into two equal parts. As regards zones 2 and 3, where the marked disparity in coastal lengths was the only special circumstance, the court determined that an equal division would give too great a weight to that circumstance. It thus concluded that equity would be met by dividing zone 2 by way of a straight line between point N and point O (which was two-thirds of the distance from point I to point K) and by dividing zone 3 by way of a straight line between point O and point A. This would result in a smaller adjustment to the median line in zones 2 and 3 than in zone 1, given the absence of the capelin fishery as a relevant circumstance in those zones (para. 92).

Each of the points identified by the court for this purpose, together with the resulting adjusted median line boundary, is illustrated in Figure B11.2.

III. Technical Considerations

In this case, the court adopted a novel approach to adjusting a provisional median line. The court decided that a median line boundary would not properly reflect the 9:1 disproportion in the parties' relevant coastal lengths. Even though allocating a full 200M zone to Greenland may seem proportionate from a mathematical perspective, this did not make such a result equitable in law.

The area of overlapping claims lay between the median line and the Greenland 200M limit. The court divided the area into three sectors, defined by inflexion points in the 200M limit and median line. The court also decided that the extent of the shift to the median line should vary along its length in order to ensure equitable access to the capelin fishery. The southern sector was divided equally by area in light of the predominance of the fishery there, with the other sectors being divided equitably such that the final line ended at Point A. The court considered that to divide the whole area equally would give too much weight to the coastal length disparity. In the end, the court divided the area of overlapping claims in the ratio 1:1.25 in Norway's favour.

The final result was a line that started at strict equidistance in the north (Point A) and was progressively rotated until, in the south, the shift was 34M. This compares (p. 340)

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Figure B11.2: *Denmark/Norway (Jan Mayen)*: court's judgment.

(p. 341) with *Libya/Malta*, where the coastal length ratio was similar, but the shift was only 18M.

This is the only case to date where a median line has been subject to a variable adjustment.

IV. Significance of the Decision and its Contribution to International Law

The *Jan Mayen* judgment represents an important step in the development and harmonization of modern international law related to the joint delimitation of continental shelf and water-column boundaries. In particular, it illustrates that, even when the delimitation of the continental shelf and water-column is subject to different formal legal approaches, the practical methodology of delimitation and the final result are highly likely to be the same.

Like the *Gulf of Maine* case decided nine years beforehand, the *Jan Mayen* case concerned the delimitation of continental shelf and fishery zone boundaries. However, unlike the *Gulf of Maine*, the parties in *Jan Mayen* did not specifically ask the court to delimit a single boundary. Therefore, the court was required to address the delimitation of each boundary separately. Uniquely among modern cases of maritime delimitation, the case required a delimitation employing 'two strands of applicable law', the first being the 1958 Convention on the Continental Shelf[3] and the second being customary international law.

While the 1958 Convention required delimitation of the continental shelf utilizing the 'equidistance/special circumstances' approach, customary international law required delimitation of the fishery zones utilizing the 'equitable principles–relevant circumstances' approach. However, noting the identical wording of Articles 73 and 84 of UNCLOS (which had yet to enter into force), the court stated that customary law required the pursuit of an equitable solution in the delimitation of both boundaries. Further, both customary law and the 1958 Convention required the delimitation to be effected first by the drawing of a provisional median line before then considering whether that line must be adjusted to reflect special or relevant circumstances. In light of all this, the court remarked that it was hardly surprising that the delimitation of the shelf and fishery zones should end up at the same result, particularly in the case of opposite coasts.

Like the *Libya/Malta* case, the disparity in the relevant coastal lengths of the parties was substantial and clearly therefore constituted a special circumstance. Notably, (p. 342) the court identified the relevant coasts for this purpose with reference to straight lines drawn between the territorial sea base points on each coastline that generated the provisional median line. This contrasts with the more orthodox approach adopted in the modern jurisprudence of identifying relevant coasts with reference to those coasts that face (or abut) the area of delimitation by way of a 'radial projection' (see, for example, *Barbados/ Trinidad, Black Sea*; and *Bangladesh/India*).

The court's conclusion that the provisional median line must also be adjusted in order to ensure 'equitable access' to fisheries in the southern part of the disputed area is unique in modern maritime boundary delimitation. This feature of the case is all the more notable since the adjustment for fisheries was applied to the continental shelf boundary as well as the fisheries one. The circumstances of the case in this respect were exceptional, given the overwhelming reliance of the Greenland coastal communities and economy on the seasonal capelin fishery, in contrast to the absence of any permanent fishing community on Jan Mayen. Another influential factor, perhaps, was the absence of any hydrocarbon or other seabed resource exploitation in the disputed area. The circumstances were notably different from those in the earlier *Gulf of Maine* case, where the court refused to treat fisheries as a special circumstance. This aspect of the *Jan Mayen* judgment has been relied upon subsequently by a number of States in seeking to secure adjustment of a provisional equidistance line to ensure access to fisheries resources. Invariably to date, those arguments have failed on the facts and evidence presented. In the absence of extreme circumstances such as those established in the *Jan Mayen* case, international courts and tribunals will not consider access to fisheries resources to constitute a special circumstance requiring adjustment in the delimitation of single maritime boundaries over the EEZ and continental shelf.

A final notable feature of this case was the variable adjustment of the provisional median line throughout the length of the boundary. This reflected the fact that, while coastal length disparity constituted a special circumstance throughout the delimitation area, fisheries access constituted a special circumstance only in the southern part of the area.

Footnotes:

1 The parties agreed that the 200M limit claimed by Iceland was the southern limit of the area to be delimited by the court.

2 Both Denmark and Norway were parties to the 1958 Convention.

3 This was the first (and only) case in which the court considered delimitation of the continental shelf pursuant to the 1958 Convention on the Continental Shelf.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 12 Eritrea v. Yemen (Award of the Arbitral Tribunal in the Second Stage of the Proceedings, Phase II: Maritime Delimitation, 17 December 1999)

From: A Practitioner’s Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):

Coastal states — Continental shelf — Islands and artificial islands — Delimitation — Straits — Territorial sea — UNCLOS (UN Convention on the Law of the Sea)

(p. 343) 12 *Eritrea v. Yemen* (Award of the Arbitral Tribunal in the Second Stage of the Proceedings, Phase II: Maritime Delimitation, 17 December 1999)

Case Note: Territorial sea, EEZ, and continental shelf delimitation—parallel coastlines—identification of base points for construction of median line—distinction between 'mid sea' islands and 'fringing' islands that are 'integral to the coast'—rejection of lines of delimitation advanced on fisheries grounds—preservation of traditional artisanal fishing regime—joint obligations in respect of shared hydrocarbon resources—interests of third States—proportionality test

Citation: *Eritrea/Yemen*, Award of the Arbitral Tribunal in the Second Stage (Maritime Delimitation), Award, 17 December 1999, (1999) 119 *International Law Reports* 417

Institution: ad hoc arbitration (the tribunal appointed the PCA as its registry for administration purposes), sitting in London

Basis of jurisdiction: Arbitration Agreement between the Government of the State of Eritrea and the Government of the Republic of Yemen, 3 October 1996

The Arbitral Tribunal: Jennings (President), Schwebel and Higgins (appointed by Eritrea), Highet and El-Kosheri (appointed by Yemen)

Applicable law: the Arbitration Agreement required the tribunal to take into account its Award on Sovereignty (at Phase I of the arbitration), UNCLOS, and 'any other pertinent factor'

Areas delimited: territorial sea, EEZ, continental shelf (within 200M)

Expert in geodesy: appointed by the tribunal Ieltje Anna Elma, geodetic engineer, Head of the Geodesy and Tides Department of the Hydrographic Service of the Royal Netherlands Navy, appointed to assist with technical aspects of the maritime delimitation(p. 344)

I. Introduction and Context

This case concerned a combined island sovereignty and maritime boundary dispute in the Red Sea between Eritrea and Yemen. The sovereignty dispute principally concerned the Mohabbakah Islands, the Haycock Islands, the Zuqar-Hanish Islands, the island of Jabal al-Tayr, and the Zubayr island group (see locations in Figure B12.1).

View full-sized figure

Figure B12.1: *Eritrea/Yemen*: geographical setting.

(p. 345) The Red Sea is a seawater inlet of the Indian Ocean which lies between Africa and Asia. It is connected to the Indian Ocean in the south through the Bab-el-Mandeb Strait and to the Mediterranean Sea in the north through the Suez Canal. The area of delimitation was located on a major international shipping route.

As illustrated in Figure B12.1, the mainland coastlines of Eritrea and Yemen face one another across the Red Sea. Those mainland coastlines are separated by up to 125M in the north and as little as 20M in the south. A significant feature of the area of delimitation was the existence of a series of islands, islets, and island groups. These include, in the north, the Dahlak islands (located just off the mainland coast of Eritrea) and, further south, Jabal al-Tayr, the Zubayr island group, and the Zuqar-Hanish Islands (all of which are located closer to the middle of the Red Sea).

The dispute dates back to the decline of the Ottoman Empire leading up to the First World War and colonial activities in the region by Italy and Great Britain during the late nineteenth and early twentieth centuries. Following the Second World War, the 1947 Treaty of Peace provided for the transfer of former Italian territorial possessions in Eritrea to Ethiopia. The Yemen Arab Republic was established in 1962 and Eritrea became independent of Ethiopia in 1991. In 1995, the territorial and maritime dispute flared up when Eritrean military occupied Greater Hanish Island, together with some of the small surrounding islands, and the Yemeni military occupied Zuqar Island. The dispute was of particular significance not only due to the Arab-African dimension, but also because of the disputed islands' location in what had become 'one of the most important and busiest seaways in the world' since the opening of the Suez Canal in 1869 (Phase I, para. 93).

Following the 1995 hostilities, the UN Secretary-General advised Eritrea and Yemen to invite the French Government to 'contribute to the seeking of a peaceful settlement of the dispute between them in the Red Sea'. Following mediation efforts by the French Government, Eritrea and Yemen entered into an Agreement on Principles in Paris on 21 May 1996 (the 'Agreement on Principles') in which they 'renounced recourse to force against each other', and undertook to 'settle their dispute on questions of territorial sovereignty and of delimitation of maritime boundaries peacefully.' Soon afterwards, on 3

October 1996, Eritrea and Yemen entered into an Arbitration Agreement (the 'Arbitration Agreement') providing for settlement of the dispute by way of ad hoc arbitration.(p. 346)

II. Positions of the Parties and Summary of the Awards

a. Procedural considerations: two-stage arbitration process; determination of scope of dispute; additional hearings requested by tribunal to address questions arising out of certain offshore petroleum contracts

The Arbitration Agreement required a five-member ad hoc tribunal to resolve the dispute in two stages (Article 2.1 of the Arbitration Agreement). Phase I would result in an award on territorial sovereignty and on 'the definition of the scope of the dispute' (Article 2.2 of the Arbitration Agreement). Phase II would delimit the maritime boundary, taking into account the tribunal's decision on sovereignty in Phase I, UNCLOS, and 'any other pertinent factor' (Article 2.3 of the Arbitration Agreement).

Eritrea and Yemen disagreed about the scope of the arbitration dispute. Yemen contended that the dispute was confined to sovereignty over Greater Hanish Island. Eritrea, on the other hand, argued that sovereignty over all the islands of the Zuqar-Hanish chain, the Haycocks and the Mohabbakahs, and the islands of Jabal al-Tayr and the Zubayr group was in dispute (Phase I, para. 84). The tribunal noted the 'specification of the first stage' in the text of the Arbitration Agreement and the fact that Yemen had provided full argument in support of its claim to sovereignty over Jabal al-Tayr and the Zubayr group (Phase I, para. 89). It concluded that it would make an award on sovereignty in respect of 'all the islands and islets with respect to which the Parties have put forward conflicting claims'.

In Phase I, following the close of its principal hearings on the island sovereignty dispute, the tribunal took the unusual step of calling for 'renewed hearings to be devoted solely to Red Sea petroleum contracts and concessions' (Phase I, para. 390). It noted that 'neither party on its own motion [had] pleaded, described, or relied upon oil contracts and concessions'. It noted that the significance of these agreements was, *inter alia*, to determine whether there 'may be any *effectivités* arising out of or associated with those contracts and concessions' (Phase I, para. 391). Following a full analysis of the pleadings and evidence submitted in response to the tribunal's questions, the tribunal concluded that:

> The offshore petroleum contracts entered into by Yemen, and by Ethiopia and Eritrea, fail to establish or significantly strengthen the claims of either party to sovereignty over the disputed islands (Phase I, para. 437).

Nevertheless, as a notable precursor to the maritime delimitation to be undertaken in Phase II of the proceeding, the tribunal added:

> Those contracts however lend a measure of support to a median line between the opposite coasts of Eritrea and Yemen, drawn without regard to the islands, dividing the respective jurisdiction of the parties (Phase I, para. 438).

(p. 347) b. Sovereignty over disputed islands

In its Phase I award of 9 October 1998, the tribunal resolved the island sovereignty dispute. The tribunal concluded that the Mohabbakahs must be regarded as Eritrean by virtue of their location within 12M of the Eritrean mainland coast and in the absence of any clear title shown by Yemen. While it noted that High Islet was 12.72M from the Eritrean territorial sea baseline, it held that the Mohabbakahs had 'always been considered as one

group, sharing the same legal destiny' and that the feature was 'certainly also appurtenant to the African coast' (Phase I, para. 475).

The tribunal also awarded sovereignty over the Haycock Islands to Eritrea. The tribunal saw little doubt that the Ottoman Empire's historical African coast administration 'would have extended to the Mohabbakahs and the Haycocks'. It also cited the so-called 'portico doctrine', by virtue of which islands off a particular coast would be under the jurisdiction of the nearest coastal authority failing a clearly established title to the contrary (Phase I, para. 477). The tribunal determined that the Eritrean claim to the Haycock Islands was further supported by evidence in relation to petroleum agreements (Phase I, para. 481). In light of their treatment historically as the 'easternmost limit of African-coast jurisdiction', the tribunal concluded that sovereignty over South West Rocks was also to be attributed to Eritrea (Phase I, para. 483).

In relation to the Zuqar-Hanish Group, the tribunal concluded that neither party had presented a convincing case on the basis of historical title or historical evidence. Accordingly, the tribunal stated that its decision 'must be based to an important extent upon what seems to have been the position…in the last decade or so' leading up to the arbitration proceedings (Phase I, para. 503). The tribunal conducted a weighing exercise of a number of different *effectivités* pleaded by the parties, including in respect of the construction and maintenance of lighthouses (Phase I, para. 492), naval patrols (Phase I, paras 493–7), and petroleum activities (Phase I, paras 497–503). The tribunal concluded that Yemen had 'more to show by way of presence and display of authority' (Phase I, para. 507) and that 'the weight of the evidence supports Yemen's assertions of the exercise of the functions of state authority' (Phase I, para. 508).[1] It therefore concluded that the Zuqar-Hanish group was subject to the sovereignty of Yemen.

Finally, with regard to Jabal al-Tayr and the Zubayr group, the tribunal noted the existence of 'little evidence on either side of actual or persistent activities on and (p. 348) around these islands' (Phase I, para. 523). It considered the relative merits of the parties' evidence of the exercise of governmental authority. The tribunal accorded some weight to Yemen's offer to install new lights in the lighthouses on the Abu Ali and Jabal al-Tayr islands at a 1989 London conference about lighthouses (Phase I, paras 513 and 514). The tribunal's decision was further influenced by two petroleum agreements concluded by the Yemeni Government that encompassed the islands. Noting that 'in view of their isolated location and inhospitable character, probably little evidence will suffice' (Phase I, para. 523), the tribunal concluded that these island groups were subject to the sovereignty of Yemen.

c. Perpetuation of the 'traditional fishing regime'

In making its award on sovereignty, the tribunal highlighted its awareness that:

> Western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law (Phase I, para. 525).

The tribunal then noted that Yemeni sovereignty over Jebel al-Tayr and the Hanish-Zuqar and Zubayr groups of islands:

> is not inimical to, but rather entails, the perpetuation of the traditional fishing regime in the region.

The tribunal continued:

> Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men (Phase I, para. 526).

As explained further below, this aspect of the Phase I Award on sovereignty was to play a central role in the Phase II proceeding relating to delimitation of the maritime boundary.

d. Delimitation of the maritime boundary

The tribunal rendered its award on maritime delimitation ('Phase II Award') on 17 December 1999, just over fourteen months after its Phase I Award on sovereignty.

The applicable law

Under Article 2 of the Arbitration Agreement, in determining the maritime boundaries, the tribunal was required to take into account three factors: its opinion on questions of territorial sovereignty, UNCLOS, and 'any other pertinent factor'.

The tribunal noted that the requirement to take into account the provisions of UNCLOS was important as Eritrea was not yet a party to the Convention. It (p. 349) noted also that, while there was no reference in the Arbitration Agreement to the customary law of the sea, many of the relevant elements of customary law were incorporated in the provisions of UNCLOS.

As for the reference to 'any other pertinent factor', the tribunal considered that this was a broad concept, including 'various factors that are generally recognized as being relevant to the process of delimitation such as proportionality, non-encroachment, the presence of islands, and any other factors that might affect the equities of the particular situation' (Phase II, para. 130).

Delimitation of a single all-purpose median line calculated from the low-water mark

Both parties claimed a boundary constructed using the equidistance method, albeit based on different points of departure and resulting in very different lines. In particular, the parties took very different approaches to the treatment of their respective islands and island groups in the construction of the median line. Yemen advanced a median line of its own, while Eritrea proposed both a coastal median line and a 'historic median line' respecting the historic practice of the parties. The parties' respective median line claims are depicted in Figures B12.2 and B12.3.

The tribunal noted that it was a 'generally accepted view, as is evidenced in both the writings of commentators and in the jurisprudence, that between coasts that are opposite to each other the median or equidistance line normally provides an equitable boundary' (Phase II, para. 131). Accordingly, the tribunal determined that the maritime boundary would be a 'single all-purpose boundary' that should, as far as practicable, be a median line between the opposite mainland coastlines (Phase II, para. 132).

The tribunal observed that the mainland-to-mainland median line was 'already familiar to both Parties', referring back to its Phase I Award, where it had noted that the offshore petroleum practice of the parties lent 'support to a median line between the opposite coasts…drawn without regard to the islands'. However, the tribunal emphasized that the determination of an all-purpose single international boundary required careful consideration of the possible effects of islands upon the boundary (Phase II, para. 132).

Yemen argued that the tribunal should, along the Eritrean coast, measure the median line boundary from the high-water line instead of the low-water line. It based its argument on the domestic legislative definition of the territorial sea of Eritrea, which defined Eritrea's territorial waters as 'extending from the extremity of the seaboard at maximum annual high-tide'. The tribunal rejected Yemen's argument, observing that Article 5 of UNCLOS

laid down ‘the use of the low-water line’ as the general international rule (Phase II, para. 135).(p. 350)

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Figure B12.2: *Eritrea/Yemen*: Eritrea’s claim and proposed joint resource areas.

Northern and southern extremities of the boundary

With regard to the northern and southern extremities of the maritime boundary, the tribunal noted that it had neither the competence nor the authority ‘to decide on any of the boundaries between either of the two Parties and neighbouring States’. Its boundary line would therefore, at the northern and southern extremities, ‘avoid trespassing upon an area where other claims might fall’ (Phase II, (p. 351)

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Figure B12.3: Eritrea/Yemen: Yemen’s claim.

para. 136). The tribunal proceeded to determine northern and southern end-points that were ‘well short’ of any point that might be disputed by any third State, in particular the

Kingdom of Saudi Arabia in the north and Djibouti in the south (Phase II, paras 44–6 and 164). The northern and southern end-points are illustrated in Figure B12.4.

The tribunal proceeded to delimit a single median line defined by a series of geodesic lines joining twenty-nine points from north to south. In doing so, the (p. 352)

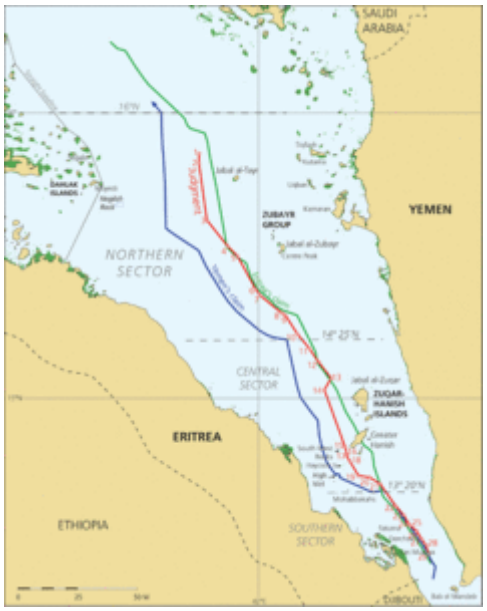

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Figure B12.4: Eritrea/Yemen: tribunal's judgment.

tribunal acknowledged the existence of three distinct sectors of the boundary: the 'northernmost stretch' (in the vicinity of the Dalak and Zubayr island groups and Jabal al-Tayr), the 'middle stretch' (in the vicinity of the Zuqar-Hanish and Mohabbakah island groups, High Island, the Haycocks, and South West Rocks), and a southern sector (where, in contrast to the other two sectors, there were no mid-sea islands).(p. 353)

Delimitation in the northern, middle, and southern sectors of the boundary

The 'northernmost stretch'

The difference between the parties' respective median lines was most pronounced in the northern sector of the boundary. This was because Yemen argued that Jabal al-Tayr and the Zubayr island group, which had been awarded to Yemen in Phase I, should be given full effect, while Eritrea argued that they should be given no effect (Phase II, para. 115).

The tribunal observed that, in the northern stretch of the boundary, the delimitation was between the parties' respective EEZs and continental shelves, with the result that Articles 74 and 83 of UNCLOS applied. The tribunal continued that the requirement of an 'equitable result' under those Articles 'directly raises the question of the effect to be allowed to mid-sea islands which, by virtue of their mid-sea position, and if allowed full effect, can obviously produce a disproportionate effect' (Phase II, para. 117).

The tribunal thus distinguished the role of the Eritrean Dahlak islands, the largest of which have a considerable population, from the Yemeni mid-sea islands. It observed that, in contrast to the mid-sea islands, the parties were agreed that the Dahlak islands formed an 'integral part of the Eritrean mainland coast'. Consequently, the sea between the Dahlak islands and the mainland was composed of Eritrean internal waters (Phase II, paras 118, 139). The tribunal thus concluded that the outermost of the Dahlak islands should constitute base points for construction of the median line.

Eritrea proposed using a feature called the ‘Negileh Rock’ reef as a base point. As illustrated in Figure B12.1, that feature lies at the outermost tip of the Dahlak group. Yemen objected because, on British Admiralty Chart 171, this feature was shown as a (submerged) reef. The tribunal observed, with reference to Article 6 of UNCLOS, that a ‘reef that is not also a low-tide elevation appears to be out of the question as a base point’ (Phase II, para. 143). The tribunal also noted Article 7(4) in relation to straight baselines and commented that, by claiming a straight baseline system, Eritrea had foreclosed ‘any right to employ a reef that is not proud of the water at low-tide as a baseline of the territorial sea’ (Phase II, para. 145). The tribunal thus concluded that the western base points of Eritrea in this sector would instead be constituted by the low-water line of certain outer Dahlak islets (Phase II, para. 146).

Turning to the Yemeni mid-sea islands of Jabal al-Tayr and the Zubayr group, the tribunal noted that they did not form part of Yemen’s mainland coast. Moreover, their ‘barren and inhospitable nature and their position well out to sea’ meant that they should have no role in the computation of the median boundary line (Phase II, paras 147 and 148). The tribunal observed that its decision in this respect was confirmed by the fact that the mid-sea islands would still enjoy a full territorial sea of 12M, even on their western side (Phase II, para. 119).

(p. 354) The tribunal decided to use, as Yemeni base points in this sector of the boundary, a number of islands along the Yemeni mainland coast which the tribunal considered a ‘fringe system’ for the purposes of Article 7 of UNCLOS—even though Yemen had not made any such claim. These base points encompassed the westernmost extremity of the relatively large and inhabited island of Kamaran, certain small islands in its vicinity, and the islets of Kutama and Uqban (Phase II, paras 150 and 151). These features and the resultant ‘mainland-coastal median, or equidistance, line’ are illustrated in Figure B12.4.

The ‘middle stretch’

The ‘middle stretch’ began at the point where the median line boundary of the ‘northernmost stretch’ encountered the area of possible influence of the Zuqar-Hanish island group. Following the Phase I Award, this area was formed by a narrow stretch of sea between, on the Yemeni side, the Zuqar-Hanish group and, on the Eritrean side, the islands of the Mohabbakahs, High Island, the Haycocks, and South West Rocks. As illustrated in Figure B12.5, the territorial seas of the Zuqar and Hanish islands overlap with those of the Haycocks and South West Rocks.

In this sector, the Yemeni median line was calculated between the Eritrean mainland coast and the Zuqar-Hanish group, thus leaving the Eritrean Haycock islands and South West Rocks (which Yemen described as nothing more than ‘navigational hazards’) enclaved within Yemen’s territorial seas (Phase II, paras 16, 17, 122–5). Eritrea objected to Yemen’s proposed enclaves, which would have deprived the Haycocks and South West Rocks of any territorial sea of their own, and insisted upon a median line delimitation pursuant to Article 15 of UNCLOS taking full account of its island features (Phase II, paras 24–6).

The tribunal held that it had ‘little difficulty in preferring the Eritrean argument’ (Phase II, para. 125). It noted that the Yemeni line would leave the Haycocks and South West Rocks isolated outside and beyond the Eritrean territorial sea. It recalled Article 121(2) of UNCLOS and observed that:

> there is no doubt that an island, however small, and even rocks provided they are indeed islands proud of the water at high-tide, are capable of generating a territorial sea of up to 12 miles.

It followed that:

> a chain of islands which are less than 24 miles apart can generate a continuous band of territorial sea. This is the situation of the Eritrean islands out to, and including the South West Rocks (Phase II, para. 155).

The tribunal noted that the resultant median line delimitation also had the advantage of avoiding the need for 'awkward enclaves in the vicinity of a major international shipping route' (Phase II, paras 125, 155). The tribunal considered that there were no factors requiring adjustment of the median line by reason of any (p. 355)

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Figure B12.5: *Eritrea/Yemen*: parties' claims and judgment (central sector detail).

(p. 356) historic title or other special circumstances, for the purposes of Article 15 of UNCLOS (Phase II, para. 158).

The resultant simple median line between the territorial seas of the parties in the 'middle stretch' is illustrated in Figures B12.4 and B12.5.

The tribunal considered that the median line joining the northernmost and middle stretches (i.e. between turning points 13 and 15) had to be diverted to the west around the Zuqar-Hanish group in order to respect the territorial seas of those islands (Phase II, para. 160). This part of the boundary was delimited using simplified geodesic lines (see further discussion in 'III. Technical Considerations', below).

The southern sector

In the southern sector, the tribunal observed that 'there were only differences of detail between the Yemen and Eritrea lines because there were no mid-sea islands to complicate the problem' (Phase II, para. 127). In that sector, the tribunal determined that 'the international boundary line resumes as a median line controlled by the two mainland coasts'. The tribunal joined turning point 20 (the southernmost turning point in the 'middle stretch') with turning point 21 (the first point on the resumed coastal median line) by way of a geodesic line. The tribunal noted that the controlling Eritrean base points of the median line were seaward of the Eritrean Bay of Assab, which was integral to the Eritrean coast and composed of internal waters (Phase II, paras 127 and 163).

The southern sector of the boundary is illustrated in Figure B12.4.

Proportionality

The tribunal observed that proportionality had been 'argued strenuously and ingeniously by both Parties'. It noted further that 'both were in agreement with the warning in the *UK/France Continental Shelf* case that this is a test of equitableness and not a method of delimitation, and that what had to be avoided was a manifest disproportionality resulting from the line selected'. There was, however, 'strong disagreement about the measurement

of the length of their respective coasts and the significance of that measurement when it was made' (Phase II, para. 39).

The tribunal noted that the relevant test was 'disproportion rather than any general principle of proportionality' (Phase II, para. 165). It concluded that there was 'no doubt that the "general direction" of the coast means that the calculation of the Eritrean coastal length should follow the outer circumference of the Dahlak group of islands', even though Eritrea had made no such argument (Phase II, para. 166). The tribunal considered the relevant part of the Eritrean coast opposite to that of Yemen as 'ceasing where the general direction of that coast meets a line drawn from what seems to be the northern terminus of the Yemen land frontier at right angles with the general direction of the Yemen coast' (Phase II, para. 167).

The tribunal proceeded, through its expert in geodesy, to calculate the ratio of the lengths of the relevant coasts, measured by reference to their general direction, and (p. 357) the ratio between the water areas it had attributed to the parties. Those calculations indicated that the ratio of the coasts concerned was 387,026 metres (Yemen) to 507,110 metres (Eritrea), or 1:1.31. The ratio of the relevant water areas was 25,535 square kilometres (Yemen) to 27,944 square kilometres (Eritrea) or 1:1.09. On the basis of these figures, the tribunal concluded that its line of delimitation resulted in no disproportion (Phase II, para. 168).

Rejection of delimitation based on fishing or fisheries; perpetuation of traditional artisanal fishing regime

A central focus of the Phase II Award was the tribunal's treatment of the parties' fisheries arguments and analysis of the content and scope of the 'traditional fishing regime of free access and enjoyment' that had been identified in Phase I of the arbitration.

Fishing rejected as a factor relevant to the delimitation

The tribunal observed that 'each Party made much of fishing, including both the past history and the present situation'. It identified five principal subjects to which the parties had directed their arguments and supporting evidence: (1) fishing in general; (2) the location of fishing areas; (3) the economic dependency of the parties on fishing; (4) consumption of fish by the populations of the parties; and (5) the effect of fishing practices on the lines of delimitation proposed by the parties (Phase II, para. 48). The tribunal addressed each in turn, noting that, collectively, the parties' arguments 'were essentially directed to establishing that the delimitation advanced by each Party would respect existing historical practices, would not have a catastrophic effect on local fishermen or population, would not have a generally negative effect on the economy (or future plans) of the other Party, and would not have a deleterious effect on the diet and health of the population of the other Party'.

As a general matter, the tribunal observed that the evidence advanced by the parties had 'to a very large extent been contradictory and confusing' (Phase II, para. 61).

In relation to 'fishing in general', Eritrea submitted that its fishing industry had been substantial before the civil war in Ethiopia and had been, second only to Egypt, the most important regional fishing economy. Yemen argued that its nationals had 'long dominated fishing activities in the Red Sea', while Eritrea's fishing activities had been 'largely concentrated on fishing close inshore' (Phase II, paras 52–3). The tribunal concluded that 'fishing in general is an important activity for both sides of the Red Sea coast', as had been confirmed by the tribunal's finding in Phase I of the arbitration in connection with the traditional fishing regime (Phase II, paras 62–3).

In relation to the ‘location of fishing areas’, Eritrea claimed that, in contrast to its fishermen, Yemeni fishermen had ‘hardly, if at all, relied on the deep-water fishing grounds’ in the vicinity of a number of the mid-sea islands. Yemen, by contrast, (p. 358) submitted witness statements in which its fishermen stated that they had fished the waters in question for a long time (Phase II, paras 56–7). The tribunal concluded that there was ‘abundant historical data indicating that fishermen from both the eastern and western coasts of the Red Sea freely undertook activities, including fishing and selling their catch on the local markets, regardless of their national political affiliation or their place of habitual domicile’. The tribunal observed that this reflected ‘deeply-rooted and common social and legal traditions that had prevailed for centuries among these populations’. The tribunal thus concluded that its concern was for the maintenance of the traditional fishing regime ‘in the region as a whole’ (Phase II, paras 66–8).

In relation to ‘economic dependency on fishing’, Eritrea acknowledged that it did not claim present economic dependency on fishing, as such, but highlighted the prospects for significant future development of the Eritrean fisheries as being both ‘promising and important’. Yemen argued that its fishermen had always depended on the Red Sea fisheries, which had long constituted an important part of Yemen’s overall national economy (Phase II, paras 54–5). The tribunal concluded that it was ‘not possible or necessary’ to reach a conclusion that either party was ‘economically dependent on fishing to such an extent as to suggest any particular line of delimitation’ (Phase II, para. 64).

In relation to ‘consumption of fish by the population’, Eritrea argued that its coastal population consumed substantial amounts of fish and that efforts were taking place to increase the availability of fresh fish for the general Eritrean population. Yemen maintained that its coastal population was far more reliant upon consumption of fish than Eritrea’s population (Phase II, para. 58). Faced with this contrasting evidence, the tribunal concluded that it could find ‘no significant reason on these grounds for accepting—or rejecting—the arguments of either party as to the line of delimitation’ (Phase II, para. 71).

Finally, in relation to the ‘effect of fishing practices on the lines of delimitation’, Eritrea argued that its ‘historic median line’ would not displace or adversely affect Yemen’s fishing activity, whereas the Yemeni median line proposal would deprive Eritrean fishermen of valuable fishery areas. By contrast, Yemen maintained that its median line would ‘correctly reflect historical practices’ (Phase II, paras 59–60). The tribunal concluded that neither party had ‘succeeded in demonstrating that the line of delimitation proposed by the other would produce a catastrophic or inequitable effect on the fishing activity of its nationals or detrimental effects on fishing communities and economic dislocation of its nationals’. Consequently, it was not possible for the tribunal to accept or reject the line of delimitation proposed by either party on fisheries grounds (Phase II, paras 72–3).

The tribunal thus held that fishing and fisheries could have ‘no significant effect’ on its ‘determination of the delimitation that would be appropriate under international law in order to produce an equitable solution’ (Phase II, para. 74).(p. 359)

Elaboration upon the ‘traditional fishing regime’ preserved at Phase I of the arbitration

Alongside its ‘historic median line’ delimitation submission in Phase II of the arbitration, Eritrea argued that the tribunal’s Phase I award in respect of the perpetuation of the traditional fishing regime required ‘the establishment of joint resource zones’ around the Yemeni islands attributed to the sovereignty of Yemen at Phase I. As illustrated in Figure B12.2, Eritrea advanced a series of ‘joint resource boxes’ in a variety of shapes and sizes. The tribunal observed that Eritrea appeared to have advanced a flexible set of suggestions, based on its concern that it ‘wanted to be able to tell its fishermen precisely where they might fish’. Yemen, on the other hand, argued that the tribunal’s Phase I Award with regard to the traditional fishing regime constituted *res judicata* and should not have any impact on the delimitation of the maritime boundary. Yemen took the view that it was for Yemen, in the

exercise of its sovereignty over the islands and their surrounding waters, to ensure the preservation of the traditional fishing regime (Phase II, paras 27–9, 89, 90, 110).

The tribunal seized the opportunity of the parties' submissions to elaborate on the legal and practical effect of the 'traditional fishing regime' in the Red Sea, the perpetuation of which it had required in its Phase I Award, and its relationship to the maritime boundary. It recalled that it had based its Phase I decision on a respect for 'deeply rooted common legal traditions, which prevailed during several centuries among the populations of both coasts of the Red Sea'. The tribunal noted '[t]he basic Islamic concept by virtue of which all humans are "stewards of God" on earth, with an inherent right to sustain their nutritional needs through fishing from coast to coast with free access to fish on either side and to trade the surplus'. Although the immediate beneficiaries of this legal concept were the fishermen themselves, it applied equally to States in their mutual relations (Phase II, paras 92–3).

The tribunal concluded that the 'special factors' that gave rise to the traditional regime 'constituted a local tradition entitled to the respect and protection of the law'. There was 'no reason to import into the Red Sea the western legal fiction—which is in any event losing its importance—whereby all legal rights, even those in reality held by individuals, were deemed to be those of the State'. Accordingly, the traditional fishing regime would entitle 'both Eritrean and Yemeni fishermen to engage in artisanal fishing' around the islands. The tribunal explained that the term 'artisanal fishing' was used in contrast to 'industrial fishing'. It noted that a 1995 FAO Fisheries Infrastructure Development Project Report had observed that the artisanal vessels and their gear used in the region were simple, normally consisting of canoes fitted with small outboard engines or small boats with inboard engines, in each case employing hand lines, gill nets, or long lines. The tribunal did not 'exclude improvements in powering the small boats, in the techniques of navigations, communication or in the techniques of fishing' (Phase II, paras 95, 101, 103–6).

(p. 360) The tribunal declared that 'certain associated rights' must be recognized in order to make the entitlements accruing under the traditional regime 'real and not merely theoretical'. These rights included 'free passage for artisanal fishermen' between the islands and each of the parties' mainland coasts, as well as the 'entitlement to enter the relevant ports, and to sell and market the fish there'. The tribunal acknowledged that the exercise of such individual rights would necessarily impinge upon the parties' (and, in particular, Yemen's) sovereign rights otherwise to regulate and control areas under their jurisdiction (Phase II, para. 107).

The tribunal noted that the parties would be 'free to make mutually agreed regulations' for the protection of the traditional fishing regime. By its very nature, the tribunal observed that the traditional regime was not qualified by the maritime zones specified under UNCLOS (Phase II, paras 108–9).

Further joint obligations in respect of shared hydrocarbon resources

Picking up on the tribunal's comment in its Phase I Award that the offshore petroleum contracts of the parties lent 'a measure of support to a median line', in Phase II Eritrea argued that those contracts supported its proposed 'historic median line' boundary (Phase II, para. 79).

The tribunal held that the fact that the median line was its 'fundamental point of departure' in the delimitation did not mean that the maritime boundary should be drawn without regard to the Red Sea islands whose sovereignty it had determined in Phase I, nor did it mean that the boundary should track Eritrea's 'historic median line' (Phase II, para. 83).

The tribunal proceeded to recall the court's observation in the *North Sea Continental Shelf* cases to the effect that joint exploitation of hydrocarbon resources in disputed areas might be 'particularly appropriate when it is a question of preserving the unity of a deposit'. The tribunal observed that 'in the last thirty years there has grown up a significant body of cooperative State practice in the exploitation of resources that straddle maritime boundaries'. The tribunal observed that such practice had 'particular pertinence' in the Red Sea, where Eritrea and Yemen face one another across a relatively narrow compass and enjoy a 'long and largely beneficent history of intermingling' (Phase II, paras 84–5).

The tribunal concluded that, having regard to the boundary established by its Award, the parties were 'bound to inform one another and to consult one another on any oil and gas and other mineral resources that may be discovered that straddle the single maritime boundary between them or that lie in its immediate vicinity'. Thus, they 'should give every consideration to the shared or joint or unitised exploitation of any such resources' (Phase II, para. 86).

(p. 361) III. Technical Considerations

The tribunal followed what is now a standard (and commendable) practice among arbitral tribunals (but not yet in the ICJ) of publicly appointing a technical expert—in this case a geodesist from the Royal Netherlands Navy.

Despite this case being largely about delimitation between island features, the status and relative size of the islands did not feature heavily in the tribunal's analysis. The mid-sea Zuqar-Hanish islands were ignored for the purposes of drawing the equidistance line, although there was no discussion of their entitlement (or not) to maritime zones beyond the territorial sea under Article 121(3) of UNCLOS.

The tribunal distinguished between coastal and non-coastal islands for the purposes of drawing the median line. The Eritrean straight baseline (which had not been objected to by Yemen) was accepted by the tribunal as valid, but the intermediate points were not used for drawing the median line; in fact, a small unnamed islet lying east of Segala was used as a base point, even though it lay seaward of the Eritrean straight baseline and had presumably not been considered by Eritrea as a valid base point for the straight baseline.

The tribunal adopted an equivalent approach to the Yemeni fringing islands and treated them as if Yemen had used them for a straight baseline system.

Regarding the final line, this was a median line between the base points identified by the tribunal and becomes a strict median line south of Point 15, where it threads its way between the small islands. The only exception is the section between Points 14 and 15, where the tribunal adopted a 'neater and more convenient solution'. At Point 14, Yemen's Zuqar is allocated a full 12M territorial sea; this reduces to only about 9M west of Zuqar before rejoining a strict median line at Point 15 (see Figure B12.5). Contrast the similar situation in *Nicaragua/Honduras*, where the small islands were allocated a full territorial sea except where the islands were less than 24M apart.

IV. Significance of the Decision and its Contribution to International Law

The *Eritrea/Yemen* case provides a leading modern example of the successful use of ad hoc international arbitration, by agreement following UN intervention and third-State mediation, in order to bring to an end a serious territorial conflict between two neighbouring countries.

The Phase II Award confirms the generally accepted view in modern international law and State practice that the median or equidistance line provides an appropriate (p. 362) starting point for any maritime boundary delimitation between opposite coasts. Only in exceptional circumstances (such as, perhaps, the delimitation of outer continental shelf areas that constitute natural prolongation from only one of the two States) will international law reject such an equidistance-based approach as a starting point in opposite coast delimitation.

The Phase II Award's treatment of islands warrants particular attention. First, the tribunal rejected Yemen's attempt to enclave a number of very small Eritrean islands on the Yemeni side of the boundary and outside Eritrea's territorial sea. Yemen attempted to downplay the status of those features by describing them as mere 'navigational hazards'. The tribunal, however, confirmed that, no matter how small and insignificant the features, they were entitled to generate a 12M territorial sea of their own pursuant to Article 121 of UNCLOS. This effectively prevented any question of enclaving given the proximity of the features to other Eritrean islands.

Second, the tribunal distinguished clearly between 'fringing islands', which formed an integral part of the parties' respective mainland coasts, and more remote 'mid-sea' islands. Whereas the former constituted legitimate base points for the construction of the median line, the latter did not, particularly given their 'barren and inhospitable nature'. Consequently, a number of small Yemeni mid-sea islands located just on the Yemeni side of the median line were discounted completely in the delimitation. Notably, the tribunal identified a series of 'fringing islands' along the mainland coast of Yemen, even though neither party had identified them as such. Those islands were accordingly given full weight.

The *Eritrea/Yemen* Phase II Award is perhaps best known for its treatment of fishing. There was no doubt that fish constituted a major natural resource in the disputed area and that there was a long history of fishing activity by the coastal populations of each State. Following 'hot on the heels' of the court's judgment in the *Jan Mayen* case (where, for the first time, a provisional median line had been adjusted substantially to ensure access to fisheries resources), each party expended substantial time and effort on advancing fishing arguments in an attempt to influence the final boundary line. Adopting the court's high threshold in the *Gulf of Maine* case, the tribunal rejected each party's argument because neither had 'succeeded in demonstrating that the line of delimitation proposed by the other would produce a catastrophic or inequitable effect'. As in *Gulf of Maine* (and in contrast to *Jan Mayen*), there was no compelling evidence that the population of one party was substantially more reliant on the fisheries resources of the disputed area than the population of the other party. Consequently, fishing and fisheries played no part in the tribunal's delimitation.

However, as in *Gulf of Maine* (and in the *Barbados/Trinidad* case that was to follow), the tribunal nevertheless ensured an outcome to the delimitation that would not unduly disrupt fishing activities in the disputed area. It did so by way of (p. 363) its recognition of the existence of a 'traditional fishing regime in the region'. The tribunal's *dispositif* in its Phase I Award had required the parties to perpetuate that regime notwithstanding its award of sovereignty, so as to ensure 'free access and enjoyment for the fishermen of both Eritrea and Yemen'. Its Phase II Award elaborated substantially on the nature and practical implications of that regime. It also required that the traditional fishing regime should perpetuate notwithstanding the award on maritime delimitation. Thus, Eritrea effectively secured the 'joint resource zones' around Yemen's islands that it had requested in the Phase II proceeding.

Two factors were central to the tribunal's decision about perpetuation of the traditional fishing regime. The first was the long history of mutual fishing activities that had been 'exercised continuously through the ages'. That long history was rooted in local and Islamic traditions that had been shared for centuries by all of the relevant populations on the Red Sea. The second was the artisanal nature of the fishery. The tribunal was at pains to stress that the perpetuated regime would not extend to industrial fishing activities by either party. As such, the regime was founded in the rights of the individual fishermen concerned, and was to be 'preserved for their benefit'.

Importantly, and uniquely for an international maritime boundary adjudication, the tribunal recognized that perpetuation of the traditional fishing regime would necessitate restriction of the parties' sovereign rights throughout the relevant area and, in particular, in their territorial seas.

The Phase II Award also concluded that the parties were under an obligation to consult each other with regard to the exploitation of petroleum resources in the region. In doing so, the tribunal went substantially further on this subject than any court or tribunal before or since. Specifically, the tribunal observed that the parties were 'bound to inform one another and to consult one another on any oil and gas and other mineral resources that may be discovered that straddle the single maritime boundary…or that lie in its immediate vicinity'. The tribunal also observed that the parties should 'give every consideration to the shared or joint or unitised exploitation of any such resources'. These aspects of the Award (which were not included in its *dispositif*) appear to have flowed from the particular geography and narrowness of the Red Sea and the consequent proximity of the parties, together with the 'long and largely beneficent history of intermingling' between the trading communities concerned.

Footnotes:

1 The tribunal found particularly decisive an expedition and a campsite made under the aegis of the Yemeni Government, a Yemeni air landing site together with a flight schedule, as well as a planned tourist joint venture between a Yemeni company and certain German nationals (Phase I, para. 507).

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 13 Qatar v. Bahrain (Judgment of the International Court of Justice (Merits), 16 March 2001)

From: A Practitioner's Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):

Fisheries — Coastal states — Continental shelf — Islands and artificial islands — Delimitation — Straits — Territorial sea — Boundaries

(p. 364) 13 *Qatar v. Bahrain* (Judgment of the International Court of Justice (Merits), 16 March 2001)

Case Note: delimitation of territorial sea, EEZ, and continental shelf boundaries—opposite and adjacent coastlines—objection to jurisdiction—disputed islands—challenge to authenticity of evidence—identification of base points for construction of equidistance line—role of islands and low-tide elevations in maritime delimitation—sovereignty over low-tide elevations—claim to archipelagic status—historic pearling banks

Citation: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar v. Bahrain*), Merits, Judgment, 16 March 2001, *ICJ Reports* 2001, p. 40

Institution: ICJ

Basis of jurisdiction: ad hoc exchange of letters/agreed minutes

The Court: *Judges* Guillaume (President), Shi (Vice-President), Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, *Judges ad hoc* Torres Bernández (appointed by Qatar[1]), Fortier (appointed by Bahrain)

Applicable law: customary international law

Areas delimited: territorial sea; EEZ;[2] continental shelf (within 200M)(p. 365)

I. Introduction and Context

This case concerned delimitation of the maritime boundary between Qatar and Bahrain in the southern part of the Arabian/Persian Gulf ('the Gulf'). The Qatar peninsula projects northward into the Gulf. Bahrain is located to the west of Qatar. It is composed of a principal island (also called al-Awal Island), together with a number of smaller islands, islets, and shoals situated off the eastern and western coasts of the principal island. The geographical context of the delimitation within the Gulf is illustrated in Figure B13.1.

The dispute combined land sovereignty and maritime delimitation aspects. The principal land sovereignty aspects concerned: first, the Hawar Islands, which are located immediately off the west coast of Qatar and at a distance of approximately 10M south-east of Bahrain; and, second, Zubarah, which is located on the north-west coast of the Qatar peninsula, opposite the main island of Bahrain. The location of the Hawar Islands and Zubarah is illustrated in Figures B13.1 and B13.2.

The land sovereignty and maritime delimitation dispute dated back many years. It came to the fore in the 1930s when the Rulers of Bahrain and Qatar (both of which were at that time British protectorates) awarded a number of overlapping oil concessions. In July 1936, the British India Office (which had responsibility for relations with the protected States in the Gulf) informed Bahrain that, on the evidence then available, Hawar appeared to belong to the Sheikh of Bahrain. The British Government confirmed its decision in a communication to the Rulers of Bahrain and Qatar on 11 July 1939. The dispute relating to Zubarah ignited when Qatar attempted to impose taxation on its inhabitants in 1937. In June 1944, the

British Political Agent, acting as mediator in that dispute, secured the agreement of the Rulers of Bahrain and Qatar to reinstate the status quo *ante*.

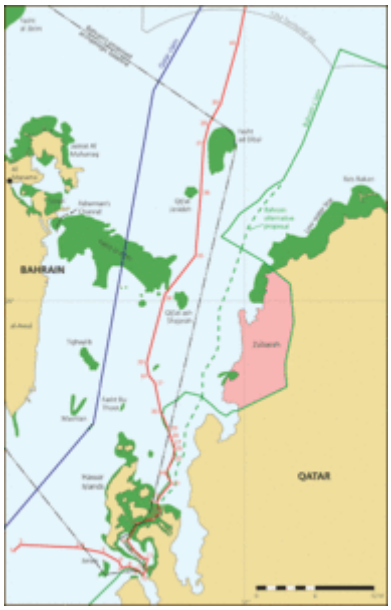
In May 1946, the Bahrain Petroleum Company Ltd sought permission to drill in certain areas of the continental shelf between Bahrain and Qatar. The British Government decided that this permission could not be granted until there had been a division of the seabed between Bahrain and Qatar. It studied the matter and, on 23 December 1947, the British Political Agent in Bahrain sent the Rulers of Qatar and Bahrain two identical letters stating that, *inter alia*:

> 2. I am, therefore, to forward herewith for Your Excellency's information a copy of a map showing the line…which, His Majesty's Government considers, divides in accordance with equitable principles the sea-bed aforesaid. This is a median line based generally on the configuration of the coastline of the Bahrain main island and the peninsula of Qatar.
>
> 3. With the exceptions noted below His Majesty's Government will, in future, regard all the sea-bed lying to the west of this line as being under the sovereignty (p. 366)

View full-sized figure

Figure B13.1: *Qatar/Bahrain*: regional setting.

(p. 367)



View full-sized figure

Figure B13.2: *Qatar/Bahrain*: judgment (detail).

(p. 368) of [the Sheikh of Bahrain] and all the seabed lying to the East of it as being under the sovereignty of [the Sheikh of Qatar]. This decision covers the sea-bed only and not the waters above it and is without prejudice to existing navigation rights.[3]

The dispute between Qatar and Bahrain continued following the 23 December 1947 letters. In 1971, the two States ceased to be British protectorates. Beginning in 1976, the King of Saudi Arabia conducted mediation (or 'good offices') of the dispute, pursuant to an agreement between the Emirs of Qatar and Bahrain. A set of 'Principles for the Framework for Reaching a Settlement' was agreed during a tripartite meeting in March 1983, pursuant to which a Tripartite Committee was later established. In December 1987, the King of Saudi Arabia put forward certain proposals that were accepted by the Emirs in two exchanges of letters. He also announced that the States had accepted that the matter should be referred to arbitration. Following the first meeting of the Tripartite Committee in January 1998, Qatar and Bahrain agreed that each of them would draft a special agreement referring the dispute to the ICJ. The two States were unable subsequently to agree the text of a special agreement. The Tripartite Committee held its last meeting in December 1988.

At a meeting of the Cooperation Council of Arab States of the Gulf in December 1990, Qatar announced that it was ready to accept a formula (the so-called 'Bahraini formula') that had been proposed by the Heir Apparent of Bahrain to the Heir Apparent of Qatar at a meeting in October 1988. That formula stated that:

> The Parties request the Court to decide any matter of territorial right or other title or interest which may be a matter of difference between them; and to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters.

Following Qatar's announcement at the December 1990 meeting, the Foreign Ministers of Qatar, Bahrain, and Saudi Arabia signed 'Minutes' recording that King Fahd of Saudi Arabia would continue 'good offices' until May 1991. Again, Qatar and Bahrain were unable to resolve the dispute within that framework.

On 8 July 1991, Qatar filed an Application instituting proceedings against Bahrain at the court in respect of certain disputes between the two States relating to:

> sovereignty over the Hawar islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah, and the delimitation of the maritime areas of the two States.

Qatar contended that the court had jurisdiction over the dispute by virtue of the two 'agreements' of December 1987 and December 1990, and that the scope of the court's jurisdiction was defined by the 'Bahraini formula'.(p. 369)

II. Positions of the Parties and Summary of the Judgment

a. Procedural issues: challenge to jurisdiction

By letters addressed to the Registrar of the Court on 14 July 1991 and 18 August 1991, Bahrain contested the basis of jurisdiction invoked by Qatar in its Application. Following an agreement between the parties concerning procedure, the President of the Court determined that questions of jurisdiction and admissibility would be addressed first, prior to any examination of the merits. In other words, the proceeding would be bifurcated.

Following two rounds of written pleadings on jurisdiction and admissibility and an oral hearing, the court issued a preliminary judgment on 1 July 1994 finding that the December 1987 exchanges of letters and the December 1990 'Minutes' constituted international agreements creating rights and obligations for the parties.[4] Pursuant to those binding agreements, the parties had undertaken to submit to the court the whole of the dispute between them, as circumscribed by the Bahraini formula. The court noted that it had before it only an Application from Qatar setting out that State's specific claims in connection with that formula. The court therefore declared that it would afford the parties the opportunity to submit to it the whole of the dispute.

On 30 November 1994, Qatar accordingly filed a document at the Registry of the court declaring that it was submitting to the court 'the whole of the dispute'. Bahrain indicated that this could not create jurisdiction or effect a valid submission in the absence of its consent. In a second preliminary judgment on 15 February 1995, the court dismissed Bahrain's objection.[5] The court held that it had jurisdiction over the whole dispute and that the Application of Qatar, as formulated on 30 November 1994, was admissible. The court proceeded to set a timetable for a written and oral proceeding on the merits.

b. Resolution of the land sovereignty dispute

In its judgment on the merits of 16 March 2001, pursuant to the well-established principle that the 'land dominates the sea',[6] the court first resolved the land sovereignty dispute.

In relation to Zubarah, the court concluded that it could not accept Bahrain's claim to sovereignty. It referred in particular to three sources of historical evidence. The first was an agreement signed by Great Britain with the Chiefs of Bahrain and (p. 370) Qatar in 1868. This followed hostilities on the Qatar peninsula during which the towns of Doha and Wakrah had been destroyed by the combined forces of Bahrain and Abu Dhabi. The court concluded that this agreement demonstrated that 'any attempt by Bahrain to pursue its claims to Zubarah through military action at sea would not be tolerated by the British' (para. 84). Second, the court referred to two treaties entered between Great Britain and the Ottoman Empire in 1913 and 1914, which demonstrated that Great Britain and the Ottoman Empire 'did not recognize Bahrain's sovereignty over the peninsula, including Zubarah' (para. 90) and 'did not contemplate any authority over the peninsula other than that of Qatar' (para. 91).Third, the court cited British colonial correspondence from 1937 demonstrating that the British Government considered that Zubarah 'belonged to the Sheikh of Qatar' (para. 94). The court therefore concluded that the Sheikh of Qatar had gradually consolidated his

authority over Zubarah since 1868, and that Qatar therefore had sovereignty over that area (para. 97).

Moving onto the Hawar Islands, the court held that the 11 July 1939 decision by the British Government that the Hawar Islands belonged to Bahrain had binding legal effect (para. 146). This was because, in an exchange of letters leading up to the decision, Bahrain and Qatar had consented to the British Government settling their dispute over the Hawar Islands (para. 139). Furthermore, the British Government had made its decision following the submission of extensive arguments and supporting evidence by each party. The court therefore concluded that Bahrain had sovereignty over the Hawar Islands (para. 147).

Finally, in relation to the small island of Janan, the court concluded that Qatar had sovereignty based upon a 1947 British interpretation of the July 1939 decision relating to the Hawar Islands. That interpretation indicated that 'Janan Island is not regarded as being included in the islands of the Hawar group', and that, accordingly, the British Government did not recognize the Sheikh of Bahrain as having sovereign rights over it (paras 164–5).

The proceeding was tarnished by a remarkable episode involving eighty-two documents on which Qatar had relied in its Memorial for purposes of asserting sovereignty over, in particular, the Hawar Islands. Bahrain successfully challenged the authenticity of those documents, demonstrating that they did not constitute the historic evidence that Qatar had claimed. Qatar thereupon abandoned reliance on the documents in the later part of the proceeding, found in its claim to the Hawar Islands on an entirely new argument. The court made no mention of this episode in its judgment. However, ad hoc Judge Fortier, who had been appointed by Bahrain, issued a separate opinion labelling the incident 'extraordinary' and 'unprecedented', and expressing 'regret' that the court had decided to remain silent about it in the judgment.[7](p. 371)

c. Delimitation of the maritime boundary

The applicable law and the division of the disputed area into two 'sectors'

The court noted that Bahrain had ratified UNCLOS, but Qatar was only a signatory to UNCLOS. Further, neither Bahrain nor Qatar was a party to the 1958 Geneva Conventions on the Law of the Sea. As a result, customary international law was the applicable law (para. 167).

The court noted also that, under the terms of the 'Bahraini formula', the parties had requested the court 'to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters'. Further, each party had requested the court to draw a single maritime boundary (para. 168). The court observed that the single maritime boundary between Qatar and Bahrain would consist of a territorial sea boundary in the southern part of the delimitation area, where the coasts were in a relationship of oppositeness, and a continental shelf and EEZ boundary in the northern part of the delimitation area, where the coasts were 'rather comparable to adjacent coasts' (para. 170). Consistent with the submissions of the parties, the court therefore divided the delimitation between a southern and northern sector. In the southern sector of overlapping territorial sea claims, the parties enjoyed full territorial sovereignty. In the northern sector, they enjoyed more limited sovereign rights and functional jurisdiction over the continental shelf and EEZ.

The court observed that 'the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and…finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various—partially coincident—zones of maritime jurisdiction appertaining to them' (para. 173). The court cited the *Gulf of Maine* case as authority for the proposition that, in the case of coincident

maritime zones, a delimitation should be carried out by reference to criteria that are 'equally suitable to the division of either of them'.[8]

Delimitation of the territorial sea in the 'southern sector' and Bahrain's claim to archipelagic status and use of straight baselines

The parties agreed that the provisions of Article 15 of UNCLOS relating to the delimitation of territorial sea boundaries formed part of customary international law (para. 175). The court noted that Article 15 is 'virtually identical' to Article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone. It observed that Article 15 is often referred to as setting out the 'equidistance/special circumstances' rule (para. 176). The court continued: (p. 372)

> The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances.

Neither Qatar nor Bahrain had previously produced official maps or charts identifying their territorial sea baselines. They had provided the court only with approximate base points to be used for the determination of the maritime boundary. The court therefore had first to determine the relevant coasts of the parties, from which it would determine the location of the baselines and the pertinent base points for construction of the equidistance line (para. 178).

Qatar argued also that the equidistance line should be calculated with reference to the high-water line. It submitted that this was necessary in order to achieve an equitable delimitation, given that the low-water line was 'precarious' and 'subjective' as compared with the 'relatively invariable' high-water line (para. 179). The court rejected Qatar's argument, noting that 'under applicable rules of international law the normal baseline for measuring [the breadth of the territorial sea] is the low-water line along the coast' (para. 184). It cited Article 5 of UNCLOS for this purpose.

Qatar argued that the equidistance line should be drawn with reference principally to mainland base points. It stated that the majority of the islands, islets, rocks, reefs, and low-tide elevations in the area should therefore be ignored for the construction of the equidistance line, noting that the majority of those features were very small and uninhabited (or uninhabitable) and that low-tide elevations have a different 'legal characterization' from island features.

Bahrain argued that it was a '*de facto* archipelago' comprising multiple maritime features. It contended that it would be a distortion of reality and a refashioning of geography to reduce Bahrain to a number of so-called 'principal' islands for the purposes of delimitation. All of the maritime features over which Bahrain had sovereignty should therefore be capable of providing base points for drawing the equidistance line. Bahrain argued that, as a '*de facto* archipelagic State', it was entitled to draw archipelagic baselines between its outermost islands and drying reefs under Article 47 of UNCLOS. It said that it had been constrained from declaring its archipelagic status by an undertaking not to modify the status quo during Saudi Arabia's mediation of the dispute. Bahrain therefore proposed an alternative claim line in the delimitation based upon its archipelagic status (see Figure B13.2). Bahrain calculated that line with reference to intermediate points on its archipelagic baseline. Qatar countered that Article 47 did not form customary international law and was not opposable to it. It also stated that Bahrain had never before claimed archipelagic status and that Bahrain would have difficulty in proving that it met the relevant requirements under Part IV of UNCLOS in any event (paras 181–2).

(p. 373) The court observed that Bahrain had not made its claim to archipelagic status one of its formal submissions in the case, and that the court was therefore not requested to take a position on the issue. It cautioned, however, that the binding force of its delimitation should not be 'put in issue' by the unilateral decision of Bahrain to declare itself an archipelagic State (para. 183).

In connection with Bahrain's attempted use of straight baselines, the court observed that the method of straight baselines was 'an exception' to the normal rules for the determination of baselines. The method should be applied 'restrictively' and only if a number of specific conditions were met. Such conditions were, primarily, that either the coastline is deeply indented and cut into, or there is a fringe of islands along the coast in its immediate vicinity (para. 212). Bahrain contended that the features off the coast of its main islands could be assimilated to a fringe of islands which constituted a whole with the mainland. The court rejected this contention. It noted that the islands concerned were 'relatively small in number'. Further, in the case of Bahrain, the method of straight baselines could only be applicable if it had declared itself to be an archipelagic State under Part IV of UNCLOS. Bahrain had not done so. Accordingly, Bahrain was not entitled to apply the method of straight baselines (paras 214–15).[9]

Citing the *North Sea Continental Shelf* cases, the court held that 'it is…the terrestrial territorial situation that must be taken as a starting point for the determination of the maritime rights of a coastal State'. It continued:

> In accordance with Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, which reflects customary international law, islands, regardless of their size, …enjoy the same status, and therefore generate the same maritime rights, as other land territory (para. 185).

The court proceeded to analyze a number of features whose effect upon the territorial sea equidistance line was disputed between the parties.

The first such feature was Fasht al Azm (see Figure B13.2). Qatar argued that Fasht al Azm was a low-tide elevation that had always been separated from Sitrah Island by a 'fisherman's channel' that was navigable even at low tide, but which had been filled during reclamation works by Bahrain in 1982. Bahrain disputed the existence of any permanently navigable channel and claimed that Fasht al Azm formed part of Sitrah Island (para. 189). Each State submitted expert reports in support of its position. The court concluded that it was unable to establish whether a permanent passage had existed before the 1982 reclamation works (para. 190). Consequently, for the purposes of constructing its provisional equidistance line, the court drew two alternative lines: the first regarded Fasht al Azm (p. 374) as forming part of Sitrah Island; the second did not. The court was to return to the treatment of Fasht al Azm when considering what 'special circumstances' were applicable in the territorial sea.

Two additional features whose role in the territorial sea delimitation was disputed between the parties were Qit'at Jarādah and Fasht ad Dibal. These are situated to the north-east of Fasht al Azm, as illustrated on Figure B13.2. The court noted that, in December 1947, the British Government had described these features as 'shoals' that 'should not be considered to be islands having territorial waters' (para. 191).

Qatar observed that Qit'at Jarādah had always been reflected on nautical charts as being a low-tide elevation. Bahrain, however, contested otherwise and referred to a number of eyewitness reports indicating that it remained dry at high tide. Bahrain commissioned an expert report which concluded that it was permanently above water and thus an island.

Qatar presented an expert report in response, which concluded only that the Bahraini report 'did not provide a basis for a definitive determination' (paras 192–4).

The court recalled the definition of an 'island' under Article 121(1) of UNCLOS. It noted that Qatar's experts did not maintain that Qit'at Jarādah was definitively a low-tide elevation. It concluded, therefore, that Qit'at Jarādah was 'an island which should as such be taken into consideration for the drawing of the equidistance line' (para. 195). The court therefore was obliged to turn to the question of sovereignty over the feature. It observed that Qit'at Jarādah was, according to Bahrain's expert, just 12 x 4 metres at high tide (and 600 x 75 metres at low tide). Its altitude was just 0.4 metres at high tide. It held that, in light of this, the simple construction of a navigational beacon by Bahrain on the feature was an act performed *à titre de souverain* that was sufficient to confirm Bahrain's claim to sovereignty over Qit'at Jarādah (para. 197).[10]

By contrast to Qit'at Jarādah, both parties agreed that Fasht ad Dibal constituted a low-tide elevation. Qatar argued that, as such, it could not be appropriated as territory. Bahrain disputed this, contending that low-tide elevations could, as a matter of international law, be acquired like any other land territory. The court recalled the definition of a 'low-tide elevation' under Article 13(1) of UNCLOS. It noted that a low-tide elevation has no territorial sea of its own when situated at a distance beyond the breadth of the territorial sea from the mainland or an island (para. 201). Fasht ad Dibal, however, was a low-tide elevation situated within the territorial sea limits of both Qatar and Bahrain. As such, the court observed:(p. 375)

> When a low-tide elevation is situated within the overlapping area of the territorial sea of two States, whether with opposite or with adjacent coasts, both States in principle are entitled to use its low-water line for the measuring of the breadth of their territorial sea. The same low-tide elevation then forms part of the coastal configuration of the two States. That is so even if the low-tide elevation is nearer to the coast of one State than that of the other…For delimitation purposes the competing rights derived by both coastal States from the relevant provisions of the law of the sea would by necessity seem to neutralise each other (para. 202).

The court noted that international treaty law is silent on the question of whether low-tide elevations can be considered to be 'territory'. Nor was the court aware of a uniform State practice which might have given rise to a customary rule (para. 205). However, the difference in effects which the law of the sea attributed to islands and low-tide elevations was 'considerable'. The court was therefore not satisfied that low-tide elevations could, from the viewpoint of the acquisition of territory, be 'fully assimilated with islands or other land territory' (para. 206).

Consequently, the court concluded that 'there is no ground for recognising the right of Bahrain to use as a baseline the low-water line of those low-tide elevations which are situated in the zone of overlapping claims, or for recognising Qatar as having such a right'. The court accordingly held that, for the purposes of drawing the equidistance line, such low-tide elevations must be disregarded (para. 209).

The court concluded that each maritime feature in the disputed area would have its own effect for the determination of the base points from which the equidistance line would be measured. The only exception was the low-tide elevations situated in the overlapping zone of territorial seas, which would be disregarded in drawing the line (para. 216).

Moving to the question of whether there were any 'special circumstances' that required adjustment of the provisional equidistance line, the court turned first to the question of Fasht al Azm. The court noted that, 'if Fasht al Azm were to be regarded as part of the island of Sitrah, it would not be appropriate to take the equidistance line as the maritime boundary since, in view of the fact that less than 20 per cent of the surface of this island is

permanently above water, this would place the boundary disproportionately close to Qatar's mainland coast'. On the other hand, if Fasht al Azm were to be regarded as a low-tide elevation, the court observed that the equidistance line 'would brush Fasht al Azm, and for this reason would also be an inappropriate delimitation line'. The court concluded that 'there are thus special circumstances which justify choosing a delimitation line passing between Fasht al Azm and Qit'at ash Shajarah' (para. 218).

Moving on to Qit'at Jarādah, the court noted that this was 'a very small island, uninhabited and without any vegetation', and that it was 'situated about midway between the main island of Bahrain and the Qatar peninsula'. Consequently, if its low-water line were to be used as a base point for the construction of the (p. 376) equidistance line, and if this line were to be taken as the delimitation line, 'a disproportionate effect would be given to an insignificant maritime feature'. The court recalled that, in similar situations in the past, it had been led to eliminate such disproportionate effect of small islands.[11] The court concluded that Qit'at Jarādah constituted a special circumstance requiring the delimitation of a boundary that passed immediately to the east of that feature (para. 219), along a course between Qit'at Jarādah and the low-tide elevation of Fasht ad Dibal (which would thus be situated in the territorial sea of Qatar) (para. 220).

Finally, in the region of the Hawar Islands, the court considered it appropriate, in accordance with common practice, to 'simplify what would otherwise be a very complex delimitation line'. It did so in a way that left the remaining low-tide elevations in the area entirely on one side of the maritime boundary or the other.

The resulting adjusted equidistance line boundary in the southern sector is illustrated in Figure B13.2. The court observed that the boundary thus adopted left Qatar's maritime zones north and south of the Hawar Islands connected only by a narrow and shallow channel that was little suited to navigation. The court emphasised that, as Bahrain was not entitled to adopt straight baselines, the waters between the Hawar Islands and the remainder of Bahrain constituted territorial sea, in which Qatari vessels would enjoy rights of innocent passage accorded by customary international law (para. 223).

Delimitation of the EEZ and continental shelf in the 'northern sector'

Citing its judgment in the *Jan Mayen* case,[12] the court determined that it would delimit the EEZ and continental shelf boundary between the parties by, first, provisionally drawing an equidistance line and, second, considering whether there were any circumstances that must lead to an adjustment of that line (para. 230). The court noted that:

> …the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated (para. 231).

Bahrain claimed that there existed a number of pearling banks, located to the north of Qatar (shown in Figure B13.3), which had appertained to Bahrain since time immemorial and that constituted a special circumstance. Qatar did not deny that the Ruler of Bahrain had exercised personal jurisdiction over the Bahraini fishermen who had historically operated in the area, but claimed that the fisheries concerned had always been considered as common to all Gulf tribes. The court (p. 377)

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Figure B13.3: *Qatar/Bahrain*: the parties' claims and judgment.

(p. 378) noted that the pearling industry had ceased to exist 'a considerable time ago'. Further, documentary evidence dating from 1903 indicated that, at that time, the British considered that the pearl banks were the common property of the local Arabs, and that the Chief of Bahrain had no right to regulate diving operations there. There had, in any event, never been any 'exclusive quasi-territorial right to the fishing grounds themselves or to the superjacent waters'. The court therefore concluded that the existence of the pearling banks, although predominantly exploited in the past by Bahraini fishermen, did not constitute a circumstance requiring adjustment of the equidistance line (para. 236).

Qatar argued that the court should delimit the single maritime boundary with due regard to the seabed dividing line that had been established by the decision of the British Government communicated in the 23 December 1947 letters. The court noted, however, that neither of the parties had accepted the British Government's decision as legally binding. Further, the decision had only concerned the division of the seabed, whereas the present delimitation combined the continental shelf and the EEZ. Accordingly, the 1947 line could not have direct relevance to the delimitation (paras 239–40).

The court dismissed Qatar's argument based upon a significant disparity between the coastal lengths of the parties because that argument relied upon Qatar exercising sovereignty over the Hawar Islands (which it did not). Accordingly, the disparity in coastal lengths was not such as to necessitate any adjustment of the equidistance line (para. 243).

Finally, the court noted the presence in the northern sector of Fasht al Jarim, which was situated partly in the territorial sea of Bahrain. As such, the feature could be used as baseline to measure Bahrain's territorial sea, continental shelf, and EEZ (para. 245). The court noted that the parties' coasts were in a relationship of adjacency in the northern sector and that, if Fasht al Jarim was given full effect, it would distort the boundary and have a disproportionate effect (para. 247). Further, such a distortion would be magnified given that Fasht al Jarim was located well out to sea and that most (if not all) of the feature was submerged at high tide. Therefore, considerations of equity required that Fasht al Jarim should have no effect in determining the boundary in the northern sector (para. 248).

The resulting adjusted equidistance line in the northern sector is illustrated in Figure B13.3.

III. Technical Considerations

As is usual in ICJ cases, there is no technical report annexed to the judgment, nor any discussion of the technical detail. However, the judgment is technically sound; the coordinates cited in the judgment are referred to WGS84 and the lines are (p. 379) defined as geodesics, except for loxodromes that connect to the tripoints to the north and south.

This case is notable for its treatment of complex island and other offshore features. While there is a clear legal difference between an island (above high tide, i.e. dry all the time) and a low-tide elevation (covered at high water, but dry at low water), technically they can be hard to distinguish. The parties did not agree on the status of some of the features. For example, the court, faced with contradictory evidence, was unable to determine whether Fasht al Azm was connected to Sitrah and thus represented its low-water line. It contented itself by drawing the line to pass east of that feature's eastern limit. The same applied to the tiny island of Qit'at Jarādah, which was determined to be of Bahraini sovereignty but was disregarded as a base point in the drawing of the equidistance line. Fasht ad Dibal was agreed by both parties to be a low-tide elevation. The court determined as such that it could not be appropriated as territory and sovereignty was decided depending on which side of the final line it fell. Fasht al Jarim, a large low-tide elevation clearly within the Bahraini territorial sea, was likewise ignored; using it as a base point would have added an extra 550km^2 to Bahrain's maritime space, as illustrated in Figure B13.3.

The court presented a detailed discussion of relevant coastlines and base points, though without specifying them in detail. Sketch maps 3 and 4 of the judgment, however, do depict the equidistance lines and show the control lines indicating which base points have been used.

The court's treatment of the Bahraini 'straight' baseline is curious as Bahrain only referred to *de facto* archipelagic baselines connecting its outermost islands (Article 47 UNCLOS), whereas the court reviewed them on the basis of Article 7 UNCLOS, with its references to indented coasts and fringing islands. Although the majority of the 151 coastal States have, as of 2015, declared straight (seventy-three States) or archipelagic (twenty States) baselines, intermediate points along such baselines have never been used in any award, and very seldom in State practice.

IV. Significance of the Decision and its Contribution to International Law

The court's 2001 judgment in the *Qatar/Bahrain* case was its first in a maritime delimitation case for almost eight years. The court resumed where it had left off in *Jan Mayen*, citing that case in confirming the methodology to be used for the delimitation of the territorial sea, continental shelf, and EEZ.

In the territorial sea, the court confirmed that Article 15 of UNCLOS reflected customary international law and embodied the so-called 'equidistance/special circumstances' rule. The court observed that this rule was closely related to the (p. 380) 'equitable principles/ relevant circumstances' rule that had been developed since the 1958 Conventions with regard to the delimitation of the continental shelf and EEZ. In effect, the court confirmed that the two rules operate in the same way. In delimiting each area, the court therefore began by drawing a provisional equidistance line before assessing whether there were any circumstances that required adjustment of that line in order to obtain an equitable result. Notably, the court identified the need to obtain an 'equitable result' even in connection with the territorial sea delimitation, notwithstanding the absence of that term from Article 15 of UNCLOS.

The court divided the area of delimitation into two sectors, which it proceeded to delimit separately—a southern sector consisting mainly of overlapping territorial sea (where the relevant coasts were in a relationship of oppositeness) and a northern sector, consisting of overlapping continental shelf and EEZ areas (where the relevant coasts were in a relationship of something akin to adjacency). This approach lends itself well to any situation where the coastal relationship between two States changes over the course of a lengthy maritime boundary.

The delimitation aspect of the *Qatar/Bahrain* judgment is perhaps best known for its treatment of islands, islets, shoals, and low-tide elevations and other small maritime features. This remains the most important practical aspect of the case today. The area of delimitation was littered with small features, particularly within the territorial sea areas. The size of many of those features changed substantially between high and low tide. The court decided to use all qualifying territorial sea base points in the construction of the provisional equidistance line, before assessing whether any of the features constituted special or relevant circumstances requiring adjustment of that line in order to achieve an equitable result.

The only features that were discounted altogether in construction of the provisional equidistance line were the 'overlapping' low-tide elevations (i.e. low-tide elevations located within the overlapping territorial seas of the two States). The court observed that the competing rights of the two States over such features 'neutralized' each other. This was because, as a matter of international law, low-tide elevations could not be assimilated with islands or other land territory from the viewpoint of the acquisition of sovereignty. Accordingly, the court did not grant Bahrain's claim to sovereignty over the low-tide elevation of Fasht ad Dibal. Instead, Bahrain's ultimate sovereignty over the feature followed from the fact that it was located on the Bahraini side of the maritime boundary delimited by the court. The court was to adopt the same approach in its 2008 judgment in the *Malaysia/Singapore* case related to sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge. In that case, the court concluded that sovereignty over South Ledge, as a low-tide elevation, will belong to the State in the territorial waters of which it is located following delimitation of the maritime (p. 381) boundary between the two States.[13] In short, in the case of disputed low-tide elevations located in overlapping territorial seas, the adage 'the land dominates the sea' is effectively reversed—it is sea that dominates the low-tide elevation.

The court identified two Bahraini features as constituting special circumstances by virtue of their 'disproportionate' effect. In relation to Qit'at Jarādah, the court simply delimited a boundary that followed the narrow channel between the small island and the Qatari low-tide elevation of Fasht ad Dibal (thus giving it limited effect). In relation to Fasht al Jarim, the court disregarded it altogether given the distortion that would otherwise follow from its small size and location. The distortion was magnified by the fact that Fasht al Jarim lies in an area where the two States are in a relationship of quasi adjacency. The extent of the distortion is illustrated in Figure B13.3, which contrasts the final delimited boundary with an equidistance line giving Fasht ad Jarim full effect.

The court's observations about Bahrain's attempt to use straight territorial sea baselines in the delimitation are notable. The court confirmed that the system of straight baselines should only be used exceptionally and restrictively, primarily in situations of either (1) deeply indented coastlines or (2) fringing islands in the immediate vicinity of the coast. The court's approach is consistent with the straight baseline requirements of UNCLOS and customary international law. However, it contrasts with modern State practice around the world. Of the seventy-three straight baseline systems in use around the world in 2015, a

large proportion probably fall foul of the applicable rules and would be unlikely to survive scrutiny by an international court or tribunal in a maritime delimitation case.

The *Qatar/Bahrain* case is unfortunately infamous for the incident of the eighty-two forged documents on which Qatar relied in advancing aspects of its sovereignty claims. When Bahrain uncovered the forgeries after the first round of written pleadings, Qatar hastily abandoned the forged documents and changed its sovereignty argument. The fact that the court chose to avoid any mention of the episode in its judgment is, perhaps, a clear indication of the macro-political, diplomatic, and forward-looking considerations that can weigh heavily on the principal judicial organ of the United Nations. Ad hoc or Annex VII arbitral tribunals may feel less restrained in exposing and admonishing such conduct. It was left to Bahrain's ad hoc appointee, Judge Fortier, to recount the 'extraordinary' and 'unprecedented' episode in his separate opinion, thereby illustrating an important role that non-permanent judges can play when sitting on permanent international courts such as the ICJ.

Footnotes:

1 Replacing Judge Ruda, who died on 7 July 1994.

2 Note that neither State has (as at December 2015) claimed an EEZ (Bahrain ratified UNCLOS in 1985, Qatar in 2002, after the judgment). Qatar's legislation refers to exclusive rights in the area adjacent to the territorial sea. Both parties in their submissions referred to the 'continental shelf and superjacent waters'. Despite this, the court referred to the delimitation as relating to the continental shelf and EEZ (para. 170).

3 For a fuller recital of the 23 December 1947 letters, see para. 61 of the judgment of the court. The line proposed by the British Government in 1947 is illustrated in Figure B13.1.

4 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, ICJ Reports 1994, pp. 1–12.

5 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, ICJ Reports 1995, p. 6.

6 *North Sea Continental Shelf* cases, para. 96.

7 Separate Opinion of Judge Fortier, paras 1–11.

8 For a review and analysis of *Gulf of Maine*, see Part, B Chapter 6 below.

9 This aspect of the court's judgment is curious given that Bahrain did not propose to utilize a straight baseline in the determination; it proposed to use an archipelagic baseline.

10 The court cited the *Legal Status of Eastern Greenland* case, which noted that 'in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim.' PCIJ, Series A/B, No. 53, p. 46.

11 The court cited for this purpose the *North Sea Continental Shelf* cases and *Libya/Malta*.

12 See Section B, Chapter 11 above.

13 *Malaysia/Singapore*, paras 291–9.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 14 Newfoundland and Labrador v. Nova Scotia (Awards of the Tribunal in the First and Second Phases of an Arbitration Concerning Portions of the Limits of the Parties' Respective Offshore Areas, Dated 17 May 2001 and 26 March 2002 Respectively)

From: A Practitioner's Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):

Coastal states — Continental shelf — Islands and artificial islands — Delimitation — Straits — Territorial sea

(p. 382) 14 *Newfoundland and Labrador v. Nova Scotia* (Awards of the Tribunal in the First and Second Phases of an Arbitration Concerning Portions of the Limits of the Parties' Respective Offshore Areas, Dated 17 May 2001 and 26 March 2002 Respectively)

Case Note: delimitation of offshore areas between Canadian provinces for purposes of domestic legislation—treatment of parties 'as if they were States'— absence of delimitation agreement between the parties—equidistance/relevant circumstances approach—opposite and adjacent coasts—predominance of geography (cut-off effect; non-encroachment; disparity in coastal lengths) in the hierarchy of relevant circumstances––treatment of small islands—access to resources as a relevant circumstance—historic conduct (oil concession practice; non-objection to use of small features as base points)—continuation of delimitation beyond 200M

Citations: *Arbitration between Newfoundland and Labrador and Nova Scotia*, Award of the Tribunal in the First Phase, 17 May 2001, (2002) 128 *International Law Reports* 435; *Arbitration between Newfoundland and Labrador and Nova Scotia*, Award of the Tribunal in the Second Phase, 26 March 2002, (2002) 128 *International Law Reports* 504

Institution: Ad hoc tribunal

Basis of jurisdiction: Canadian legislation (Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act; the Canada-Newfoundland Atlantic Accord Implementation Act)

(p. 383)

The tribunal: La Forest (Chairperson), Legault, and Crawford[1]

Technical expert appointed by the tribunal: David Gray

Applicable law: 'principles of international law governing maritime boundary delimitation'; 1958 Convention on the Continental Shelf.[2]

Area delimited: continental shelf (within and beyond 200M)

I. Introduction and Context

This case concerned a dispute between two Canadian provinces (the Province of Nova Scotia and the Province of Newfoundland and Labrador ('Newfoundland')) over the boundary between their respective 'offshore areas' for the purposes of certain Canadian legislation.

The parties' maritime boundary discussions dated back to the early 1960s and their disagreement dated back to the early 1970s. Their discussions ceased in 1973 and the dispute only re-emerged following the award of the Court of Arbitration in the *St Pierre and Miquelon* case.[3] Following that award, the Federal Minister of Energy, Mines, and Resources raised with the provincial ministers the need 'to address the issue of the determination of the offshore interprovincial boundary'. Shortly after the communication by Newfoundland of its claim line in November 1997, the Federal Minister of Natural Resources registered the existence of a dispute which, if not resolved promptly by

negotiations, would be referred to arbitration pursuant to the applicable Canadian legislation. On 31 May 2000, the Minister communicated his decision to refer the dispute to arbitration. He proceeded to define Terms of Reference setting out the constitution of the tribunal and the procedure for the arbitration.

In view of Nova Scotia's view that the boundary had already been agreed between the parties, the Terms of Reference provided for a two-phase arbitration. Article 3 described the mandate of the tribunal as follows:

> 3.1 Applying the principles of international law governing maritime boundary delimitation with such modification as the circumstances require, the Tribunal shall determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia, as if the parties were States subject to the same rights and obligations as the Government of Canada at all relevant times.
>
> (p. 384) 3.2 The Tribunal shall, in accordance with Article 3.1 above, determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia in two phases.
>
> (i) In the first phase, the Tribunal shall determine whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement.
>
> (ii) In the second phase, the Tribunal shall determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined.

The delimitation was between the island of Newfoundland, on the one hand, and Cape Breton and the south-east portion of Nova Scotia's mainland, on the other. To the west, the delimitation began in the Gulf of St Lawrence and ran eastwards through the Cabot Strait into the open Atlantic Ocean.[4] The boundary to be delimited was, at all points, beyond 12M from the parties' respective coastlines. The coasts of the parties in the area are indented by numerous bays and have many small islands and islets lying off them. The continental shelf in the area was agreed to be a continuum, with the 200 metre isobath located generally about 120M off the coast and extending off Newfoundland to a distance of nearly 250M from the coast.

The geographical context of the delimitation is illustrated in Figure B14.1.

II. First Phase: No Delimitation by Agreement

During the first phase of the arbitration, Nova Scotia argued that a maritime boundary had already been agreed between the premiers of the parties in a 1964 joint statement (the '1964 Joint Statement') and subsequently delineated in a 1972 communiqué (the '1972 Communiqué'), which was unsigned. It submitted that the terms of that agreement had been confirmed by the subsequent conduct of the parties, including their offshore oil permit practice.

Newfoundland argued that no delimitation agreement existed between the parties and that there was no evidence of any intent on the part of Newfoundland to be legally bound by any agreement or to follow any particular line. It argued that the 1964 Joint Statement was a broad proposal which, without federal and provincial legislation, could not have been, and was not, intended to be legally binding.

The tribunal considered the requirements under international law for a binding agreement on maritime boundaries. It observed that the dispute concerned areas beyond 12M and related to the mineral resources of the seabed. It noted that (p. 385)

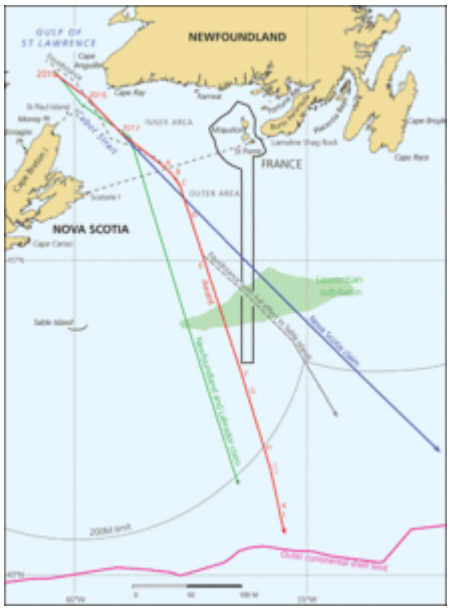

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Figure B14.1: *Newfoundland/Nova Scotia*: parties' claims and tribunal's award.

Canada had ratified the 1958 Continental Shelf Convention (the '1958 Convention') without any reservations and had not yet ratified UNCLOS. Thus, as a matter of international law, it concluded that 'the governing provision, *prima facie* at least', was Article 6 of the 1958 Convention (First Phase, para. 3.11). The tribunal observed that 'the fact that two States are *ad idem* on a boundary, i.e., that (p. 386) they have the same view as to its existence or location, while it may be legally relevant, is not enough to constitute an agreement on the boundary for the purposes of [Article 6 of the 1958 Convention] or Article 83(4) of UNCLOS. It is necessary that their common attitude should have been expressed in an agreement which is binding on them under international law'. In other words, that agreement must be embodied in a treaty (First Phase, para. 3.13).

No specific requirements 'of form' existed for a treaty to exist; what mattered was the intention of the parties to be bound by the agreement under international law (First Phase, para. 3.15). Nevertheless, while form was not decisive, the tribunal observed that:

> The absence of a signed document, especially on a matter of importance such as the determination of an international boundary; the use of language which is vague or which does not appear to embody any immediate commitment; a shared understanding between the parties to negotiations that their in principle agreement is to be embodied in some later formal document or is to be subject to some subsequent process of implementation in order to become binding—such factors may together or separately lead to the conclusion that a statement does not constitute a binding agreement under international law (First Phase, para. 3.18).

The tribunal also noted, with reference to Article 7 of the VCLT, that the status and powers of the negotiators may also be indicative of an intention to enter into treaty relations (First Phase, para. 3.19).

The tribunal reviewed the text of the 1964 Joint Statement and 1972 Communiqué, together with the surrounding circumstances of those instruments and the subsequent practice of the parties. With regard to evidence of subsequent practice, it observed that:

> although such evidence is not inadmissible, its probative value will often be limited. It is not enough to show that parties acted consistently with a document claimed by one of them to have the status of a binding agreement, since that may be explicable on other grounds. It would be necessary to show that the conduct was referable to the treaty and was adopted because of the obligations contained in it (First Phase, para. 6.3).

The tribunal did not find it necessary to analyze the parties' oil permit practice in the First Phase, citing the *Tunisia/Libya* case as authority for the proposition that oil licensing activity may, if it produces a relatively concordant situation on the ground, be relevant in terms of an eventual delimitation. For present purposes, it was sufficient that there was 'no unequivocal indication that [the Parties' oil permit practice] was referable to an earlier agreement on boundaries' (First Phase, para. 6.8).

The tribunal concluded that 'the documentary record looked at as a whole does not disclose the existence of an agreement resolving the offshore boundaries of Newfoundland and Labrador and Nova Scotia' (First Phase, para. 7.1). In particular, the 1964 Joint Statement contained a clear appreciation that the parties' (p. 387) provincial claims required further action by both the provinces and the Federal Government in order to give the boundaries legal effect. The tribunal equated this to the requirement for ratification of certain treaties at international law. Further, the boundaries advanced by the 1964 Joint Statement had been 'described and illustrated with a lack of precision and attention to detail that were hardly consistent with an intent to enter into a final and binding agreement' (First Phase, para. 7.2). The terms of the 1964 Joint Statement were 'more consistent with a political, provisional or tentative agreement, which may lead to a formal agreement' (First Phase, para. 7.3). As for the 1972 Communiqué, this was also of a conditional character and, if anything, the parties' conduct subsequent to it showed the absence of any binding agreement (First Phase, para. 7.5).

The tribunal found it 'striking' that neither party had, in subsequent communications, invoked the existence of binding earlier agreements or formally protested at departures from them (First Phase, para. 7.6).

Accordingly, the tribunal concluded in the First Phase that 'the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has not been resolved by agreement' (First Phase, final para. (unnumbered)).

III. Second Phase: Determination of the Line Dividing the Parties' Respective Offshore Areas

a. Positions of the parties

The parties were in agreement that the starting point for the delimitation in the Second Phase was the 'fundamental norm' of customary international law. To Nova Scotia, this required the application of equitable principles, taking into account all the relevant circumstances, in order to achieve an equitable result. Despite the tribunal's rejection of its arguments based on the conduct of the parties in the First Phase, Nova Scotia continued to rely on such conduct in the Second Phase. It argued that the parties' maritime entitlements were derived from a negotiated domestic arrangement. Even if it did not give rise to an estoppel, Nova Scotia submitted that the parties' conduct since the early 1960s supported the equitable character of its proposed boundary line. Nova Scotia relied in particular upon oil permit practice for this purpose. It also argued that the tribunal would be closing its eyes to reality if it failed to take the potential hydrocarbon resources into account in

delimiting the boundary. Whether or not courts or tribunals had done so expressly in the past, it said they had certainly done so in fact.

Newfoundland argued that the conduct of the parties or the incidence of natural resources were irrelevant to the delimitation of the boundary. Instead, it submitted (p. 388) that geographical factors were of fundamental importance because sovereignty over the coast was the basis of title. Citing the award of the Court of Arbitration in the *St Pierre and Miquelon* case, Newfoundland relied heavily on the 'principle of non-encroachment' and the importance of avoiding any 'cut-off effect' on the seaward extension of either party. It also cited a disparity of coastal lengths in support of a claim line which, based upon the approach adopted by the ICJ Chamber in the *Gulf of Maine* case, was formed by a series of bisectors constructed over the inner sections of the boundary combined with a perpendicular drawn seawards from a 'closing line' between Scatarie Island and Lamaline Shag Rock. Newfoundland argued that the tribunal could not award offshore areas to Nova Scotia to the east of the *St Pierre and Miquelon* corridor without disregarding the reasoning of the Court of Arbitration in that case.

Notwithstanding the tribunal's Award in the First Phase, both parties considered (although for different reasons) that Article 6 of the 1958 Convention was inapplicable in the Second Phase. They also agreed that the tribunal was not required to begin the delimitation by adopting, even provisionally, an equidistance line.

The respective claim lines of the parties are illustrated in Figure B14.1. As the figure illustrates, each of the claim lines was substantially at variance with a strict equidistance line.

For the purposes of confirming the equitableness of their respective claim lines, the parties presented very different proportionality models. Newfoundland concluded that the ratio of relevant coastal lengths was more than 2:1 in its favour, while Nova Scotia considered that the ratio was 1:0.94 in Nova Scotia's favour. Nova Scotia proposed an expansive 'relevant area', constructed by reference to maximum entitlements under Article 76 of UNCLOS and applied according to a system of radial projection from the coast. Newfoundland, by contrast, proposed a restrictive 'relevant area', constructed by drawing lines perpendicular to the general direction of the coast from Cape Race and Cape Canso, out to the 200M limit, but excluding areas beyond 200M to the outer edge of the continental margin. The parties' respective submissions as to the relevant coasts and the relevant area are illustrated in Figure B14.2.

b. Applicable law and competence to delimit beyond 200M

The tribunal was not persuaded by Nova Scotia's contention that the basis of title, for the purposes of the delimitation, was to be treated as distinct from that of the continental shelf at international law. While the domestic rights of the parties in their respective offshore areas were different from the legal institution of the continental shelf, the tribunal was bound by its Terms of Reference, Article 3.1 of which dictated 'unambiguously' the law to be applied to the facts of the case. The tribunal observed that Canada's rights in respect of the continental shelf arose (p. 389)

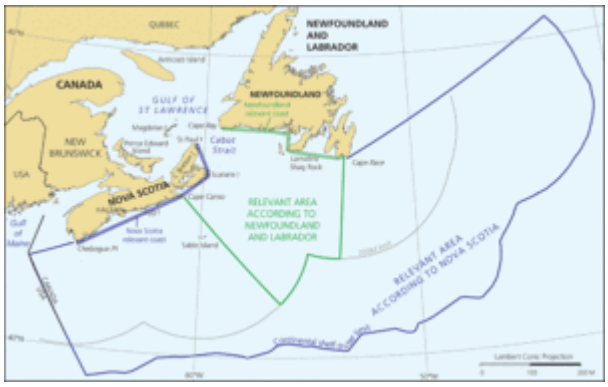

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Figure B14.2: *Newfoundland/Nova Scotia*: parties' relevant areas and tribunal's relevant coasts.

(p. 390) not from domestic law, but from its legal basis of title under international law (Second Phase, paras 2.14 and 2.15).

The tribunal was similarly unpersuaded by the parties' respective arguments about the inapplicability of Article 6 of the 1958 Convention, to which Canada was a party. The tribunal did not consider it material that the offshore areas of the parties were defined by reference to the 'continental margin' (including beyond 200M), in terms borrowed from Article 76 of UNCLOS rather than the 1958 Convention. Nor could the term 'principles of international law' in the Terms of Reference refer exclusively to customary international law. The tribunal accordingly determined that it must apply Article 6 of the 1958 Convention and the developments under customary international law that had been associated with the interpretation and application of that provision (Second Phase, paras 2.19–2.25, 2.35).

The tribunal contrasted the language of Article 6 of the 1958 Convention with Article 83 of UNCLOS, but noted that this contrast had been 'attenuated by subsequent practice and case law'. Accordingly, the 'special circumstances' of Article 6 were not very different from the 'relevant circumstances' of Article 83, while the underlying aim of achieving an equitable result, which was 'the focus of Article 83 and customary international law', had 'tended to suffuse the consideration of Article 6'. The tribunal noted that, in the application of Article 83 and customary international law, courts and tribunals had 'normally begun by considering an equidistance line and adjusting that line in accordance with relevant considerations in each case'. The tribunal considered that the applicability of the 1958 Convention reinforced the case for commencing with an equidistance line (Second Phase, paras 2.27–2.28).

The tribunal noted that Canadian legislation defined the parties' 'offshore areas' as extending to the outer edge of the continental margin, incorporating the provisions of Article 76 of UNCLOS (i.e. potentially extending beyond 200M). It observed that the parties accepted that the tribunal had jurisdiction to determine a boundary line out that far. However, the tribunal noted that no international tribunal had previously delimited to the outer edge of the continental shelf as between adjacent States. While it did not have the competence or the mandate to delineate the outer limit of the continental shelf, it noted that 'a continental shelf wider than 200 nautical miles from the territorial sea baselines probably exists through most, if not all, of the area seaward of these two provinces'. The parties were in agreement to this effect and the tribunal's own technical expert produced an illustrative map showing Canada's possible claim to continental shelf beyond 200M (Second Phase, paras 2.29–2.30, 2.32).[5] The tribunal recalled the finding of the Court of Arbitration in the *St Pierre and Miquelon* case that it had no (p. 391) jurisdiction to delimit the continental shelf between France and Canada beyond 200M because such delimitation would impinge the legal position of the 'international community' as a third party,

represented by the CLCS. However, the tribunal distinguished the present case since there was ‘no question of any decision that could be opposable to any international processes for the determination of the outer edge of the Canadian continental shelf’. The tribunal was simply required to specify the offshore areas of the two parties *inter se* for the purposes of Canadian legislation, which it could do by providing that the line should not extend beyond the outer limit of the continental margin as determined in accordance with international law (Second Phase, para. 2.31).

c. Nova Scotia’s claim based on the conduct of the parties and access to resources

Before addressing the geography of the region, the tribunal examined Nova Scotia’s arguments based upon the conduct of the parties and access to resources.

The tribunal observed that parties in past maritime boundary cases had often advanced arguments based upon delimitation by conduct, but ‘more often than not’ such arguments had been rejected: ‘either because the conduct did not relate to the area in question, or was merely unilateral, or was performed vis-à-vis a third party, or was an exercise in self-restraint to avoid aggravating the dispute, or was equivocal’. In order to establish that a boundary had been established through conduct, the tribunal held that Nova Scotia must demonstrate an ‘unequivocal pattern of conduct’ as between the parties. It observed that the boundary line established by reference to State conduct in the *Tunisia/Libya* case ‘was not just a question of the appearance on the map of a line established by paper acts such as permits, but the consolidation of the line in practice by conduct referable to it, including the discovery of exploitable fields’ (Second Phase, para. 3.5).

By contrast, in the present case, although there had been some seismic exploration and other activity in the inner part of the disputed area, such activity had been limited. The tribunal commented that it was ‘difficult to accept that seismic activity, of itself, could give rise to a situation analogous to that in *Tunisia/Libya*, and anyway there is no evidence that there was seismic activity in the critical areas close to the equidistance line’. It concluded that the parties’ conduct had not been ‘sufficiently clear, sustained and consistent’ to warrant any particular boundary line. The only relevant aspect of the parties’ conduct had been the historic failure of Newfoundland to protest the use of St Paul Island as a base point (Second Phase, paras 3.9–3.10).

As for the outer area, the tribunal noted that there had been ‘a degree of concordant practice’ between the parties, but this was ‘neither complete nor, in its context, did it reflect a clear consensus of the Parties as to where any boundary should be drawn’ (Second Phase, para. 3.13). The tribunal observed in particular (p. 392) that there was no evidence of any reliance having been placed on provincial permits as the legal basis for ‘actual expenditure’ in the disputed area and that no wells had been drilled under oil permits in the vicinity of Nova Scotia’s proposed boundary line. The tribunal concluded that the limited conduct evidenced by Nova Scotia could not be converted into the acceptance of a boundary. Nor could Newfoundland’s practice in relation to Nova Scotia’s claim line sustain any claim of acquiescence or demonstrate that the parties regarded that claim line as equitable (Second Phase, paras 3.14, 3.18).

In relation to the likely existence and location of hydrocarbon resources in the disputed area, the tribunal recalled that it was well settled that a court engaged in maritime delimitation may not take account of the relative wealth or natural resources of the States concerned or their peoples. However, access to resources in the zone to be delimited may nevertheless be relevant in two different ways: first, where a particular delimitation may entail ‘catastrophic repercussions’; and, second, having regard ‘to the natural resources of the area in question so far as known or readily ascertainable’. The tribunal considered that ‘the effect of any proposed line on the allocation of resources is…a matter it can properly take into account among other factors’ (Second Phase, para. 3.21). It observed specifically

that each party's claim line allocated to it the greater part of the Laurentian sub-basin, which both considered to be an area of hydrocarbon potential (see Figure B14.1). Accordingly, the impact of any delimitation on access to that resource was a 'potentially relevant factor in the present case' (Second Phase, para. 3.22). However, the tribunal concluded that 'the incidence of the line on potential resources is only one factor to be taken into account, among others, in assessing the overall equitableness of the delimitation', and that 'no information is available to it which would suggest that the line it will award is inequitable to either Party on this ground—and certainly not to the extent of justifying any further adjustment' (Second Phase, para. 3.23).

d. Analysis of the geographical context and delimitation of the maritime boundary

Relevant coasts and relevant areas

The tribunal divided the delimitation area into three sectors: (1) the Gulf of St Lawrence; (2) an 'inner area' located between closing lines drawn across each end of the Cabot Strait; and (3) an 'outer area' located between the south-eastern closing line of the Cabot Strait and the outer edge of the continental margin. It commented that the distinction between the inner and outer areas was not only a matter of descriptive geography, but also corresponded to the transition between the area where the parties' coasts were 'essentially opposite', and an area where they were 'rather comparable to adjacent coasts'. The tribunal distinguished the geographical situation from that existing in *Gulf of Maine* because, *inter alia*, (p. 393) the closing line to the inner area did not coincide with the general direction of the parties' coasts. The tribunal considered that this spoke against adoption of the perpendicular methodology followed by the Chamber in that case (Second Phase, paras 4.2–4.6).

Turning to the parties' contrasting submissions about relevant coasts and relevant area, the tribunal observed that they gave 'an unmistakable odour of the pre-cooked'. It concluded that it could accept neither of them. The tribunal stated that it would treat as relevant any coast of either party that affected or might potentially affect the delimitation. This involved 'a practical judgment, not a merely geometrical concept', and needed to have regard to the zone to be delimited and respective claim lines of the parties. The tribunal considered that Nova Scotia's relevant coast should extend to Egg Island, just east of Halifax (see Figure B14.2). When compared with Newfoundland's definition of its relevant coast, this would give a relevant coast ratio of 1:1.38 in favour of Newfoundland (Second Phase, paras 4.20–1).

The tribunal observed:

> The definition of relevant coasts and relevant area is, generally, intended to help judicial bodies determine which coasts may actually affect the course of the dividing line, to narrow the geographical focus to the area where the delimitation is to take place, and to fix the bounds within which a proportionality test, if appropriate in the circumstances of a particular case, is to be applied (Second Phase, para. 4.22).

In the present case, the tribunal considered that it was unnecessary to define a relevant area because: as would be explained, it did not consider it appropriate to apply a proportionality test; there was no need to define any lateral limits within which to confine the delimitation; and, as the tribunal proposed to begin with a provisional equidistance line, the area of the delimitation would be self-evident and required no further definition. Such area clearly lay within an area of convergence and overlap generated by the relevant coasts that had been defined by the tribunal (Second Phase, paras 4.23–4.24).

Treatment of islands

The tribunal noted the existence of a number of islands in the delimitation area, several of which (notably Sable Island in the Atlantic Ocean and St Paul Island in Cabot Strait) Newfoundland considered should be given no effect.

The tribunal first addressed the situation of St Pierre and Miquelon and its 1992 delimitation with Canada. Newfoundland argued that the maritime area allocated to France had been ‘carved out’ of an area that would otherwise belong to it, and that such a situation must be taken into account as a relevant circumstance. The tribunal disagreed, holding that it was ‘aware of no principle whereby Newfoundland and Labrador, or Nova Scotia, should be “compensated” in this delimitation for what it “lost”, or might hypothetically lose, in another’ (Second Phase, para. 4.28).

(p. 394) As for St Paul Island, which had never supported human habitation without support from outside and had an area of less than 5km², Newfoundland considered that its use would have a disproportionate effect in the delimitation. The tribunal observed that, in the context of a provisional equidistance line drawn from opposite coasts, it was ‘unusual for no effect to be given to an island’. It commented that it would have been inclined to give the island half effect had Newfoundland not expressly accepted the feature as a base point for the purposes of delimitation during earlier inter-provincial discussions. Consequently, based on that historic conduct, St Paul Island would be given full effect (Second Phase, para. 4.31).

Turning finally to Sable Island, which formed part of Nova Scotia, lying about 88M from its mainland and with an area of 33km², Newfoundland argued that the use of such a feature in the construction of a provisional equidistance line would be tantamount to refashioning geography. Unlike St Paul Island, the tribunal observed no unequivocal evidence that Newfoundland had ever accepted the use of Sable Island as a base point. Moreover, in the context of adjacent coast delimitation extending out to the open sea, it noted that ‘a relatively minor feature such as Sable Island is capable of having major effects’. The tribunal concluded that it ‘is clearly a “special” or “relevant” circumstance which needs to be taken into account’ (Second Phase, paras 4.32–4.36).

Construction of the provisional equidistance line and consideration of circumstances requiring its adjustment

Having rejected the approaches proposed by the parties, the tribunal turned to consider what practical method of delimitation would assure an equitable result in the circumstances of the case. It considered this choice ‘not difficult to determine’. Since the parties were to be treated as being bound by Article 6 of the 1958 Convention, it was appropriate to begin with the construction of a provisional equidistance line and then to determine whether it required adjustment in the light of special circumstances. The tribunal noted that its approach ‘would have been precisely the same in applying customary international law or Article 83 of [UNCLOS]’ (Second Phase, para. 5.2).

The tribunal proceeded to effect the delimitation separately within the inner area, outer area, and Gulf of St Lawrence, in that order. In the inner area, the tribunal constructed a provisional equidistance line using all of the islands and rocks in the area as base points. It rejected Newfoundland’s arguments that the equidistance line produced a cut-off effect to its detriment or was inequitable due to a difference in coastal lengths. It noted that Newfoundland had never raised any objection to a conditional median line in the past. It concluded that a simplified equidistance line boundary therefore reflected the geographical circumstances and conduct of the parties in the inner area (Second Phase, paras 5.4–5.8).

(p. 395) Turning to the outer area, the tribunal recalled that it had already reviewed the conduct of the parties in that area and concluded that the parties' oil permit practice in particular should be discounted because it was: 'equivocal and uncertain'; 'limited in extent'; not clearly concordant; and unsupported by sufficient evidence of reliance on licences awarded at provincial level. Accordingly, the delimitation in the outer area would be decided exclusively on grounds of the relevant coastal geography (Second Phase, paras 5.11–5.12).

The tribunal noted that the parties' coasts in the outer area stood in a relationship of increasing adjacency. It again considered it appropriate to start by drawing a provisional equidistance line. The tribunal noted that the equidistance line came under the control of base points on Sable Island 88M south of mainland Nova Scotia, and that Sable Island's base points proceeded to deflect the equidistance line to the east for a distance of 106M before it again came under the control of the mainland coast of Newfoundland (Second Phase, paras 5.9–5.10). The tribunal determined that:

> Having regard to its remote location and to the very substantial disproportionate effect this small, unpopulated island would have on the delimitation if it were given full effect, the Tribunal will initially consider an adjustment of the provisional equidistance line so as to give Sable Island half effect (Second Phase, paras 5.9–5.13).

The tribunal then turned to address whether such an adjusted provisional equidistance line would produce an inequitable result between the parties. It noted that 'another significant concern relates to the cut-off effect that the provisional line has on the southwest coast of Newfoundland'. Although giving half effect to Sable Island reduced the cut-off effect, the tribunal considered that further adjustment was required. It was not persuaded by Nova Scotia's argument that the cut-off effect became irrelevant as the distance from the coast increased. In addition, the tribunal considered that a further adjustment of the equidistance line would accommodate in a reasonable way the disparity in the lengths of the parties' coasts. In order to incorporate these factors, the tribunal adjusted the equidistance line further by giving no effect whatever to Sable Island (Second Phase, para. 5.15).

Turning to the Gulf of St Lawrence and having regard to historic conduct in this sector, the tribunal effected the delimitation by way of a short straight line joining two turning points previously identified by the parties (Second Phase, para. 5.16).

The tribunal considered finally the possibility of confirming the equity of the delimitation line by reference to a 'proportionality test'. It observed that it was not the inevitable or even the most frequent practice of the ICJ or arbitral tribunals to apply such a test. In particular, it remarked that, in cases where relative lengths of coasts had already been treated as a relevant circumstance (*Gulf of Maine, Libya/Malta, Jan Mayen*), the court had not applied any such test for reasons that appeared to relate, *inter alia*, to the fact that proportionality had already been (p. 396) taken into account. Further, the tribunal observed the 'imprecision' and 'impressionism' involved in identifying a relevant area for the purpose of any proportionality test, as shown by the 'extreme difference' in the parties' respective positions. Accordingly, the tribunal considered that 'the test may be more contrived than constructive in some instances'. It thus declined to apply any proportionality test (Second Phase, paras 5.17–5.19).

The offshore boundary delimited by the tribunal is illustrated in Figure B14.1. The tribunal commented that, should the outer limits of the continental margin extend beyond its final identified point (labelled 'L'), the course of the delimitation beyond that point would follow

an azimuth ‘to its point of intersection with the outer limit of the continental margin’ (Second Phase, para. 6.5).

IV. Technical Considerations

The tribunal appointed a technical expert, David Gray (formerly of the Canadian Hydrographic Service), whose detailed report is appended to the Award. There are no major technical issues with the Award.

The tribunal divided the offshore area into three areas: an inner area corresponding to the regional concavity extending to the closing line drawn between Scatarie Island and Lamaline Shag Rock; an outer area extending to the outer limit of the continental shelf; and an area within the Gulf of St Lawrence. Point A of the award lies on the closing line, but is equidistant from Ramea and Scatarie Islands. Accordingly, as noted by the tribunal, Point A lies about 12M west of the mid-point of the closing line.

The outer limit of the continental shelf had not been finally delineated, but the parties were in general agreement that there was a continental margin beyond 200M throughout the area. The Award was open-ended (the final defined point L being 60M beyond the 200M limit) and continued along a defined azimuth to the outer limit of the continental margin, wherever that may be defined in the future. The tribunal made no distinction in the delimitation between the continental shelf within and beyond 200M, considering it as a single entity.

V. Significance of the Decision and its Contribution to International Law

The *Newfoundland and Labrador/Nova Scotia* arbitration, while a *sui generis* case arising out of an inter-provincial Canadian dispute, has made a significant contribution to the development of the international law jurisprudence on maritime boundary delimitation. The tribunal’s mandate to apply ‘the principles of (p. 397) international law governing maritime boundary delimitation’ led it to consider and apply the previous jurisprudence of the ICJ and arbitral tribunals and, ultimately, to strive for the achievement of ‘the equitable result that is the overarching objective of all maritime delimitations, whether under customary or conventional international law’. Notably, the tribunal commented that it would have taken an identical approach to the delimitation whether applying Article 6 of the 1958 Convention, Article 83 of UNCLOS, or customary international law.

The Award in the Second Phase provides an example of the adoption of the equidistance/relevant circumstances approach to delimitation even in circumstances where both parties had argued against the use of any equidistance-based method. The tribunal observed that an equidistance line now provides ‘the starting point in most cases’.

The case also provides an example of a tribunal constructing a true equidistance line at the first stage of the delimitation process, before consideration of adjustment for relevant circumstances, such as the presence and disproportionate effect of small islands. This approach contrasts with other (largely more recent) cases, such as *Black Sea, Nicaragua/Colombia*, and *Bangladesh/Myanmar*, where no effect at all was given to island features even in the construction of the provisional equidistance line.[6]

The *Newfoundland and Labrador/Nova Scotia* arbitration is well known as being the first case where a court or tribunal undertook delimitation beyond 200M, into areas of outer continental shelf. The tribunal was content to do so because it considered that an outer continental shelf ‘probably exists’ in the disputed area (a consideration that was to be echoed in the later *Bay of Bengal* cases) and, unlike in the *St Pierre and Miquelon* case, it was a national rather than an international tribunal whose decision would not be opposable

to any international delineation process. Accordingly, the tribunal delimited the offshore boundary ‘to its point of intersection with the outer limit of the continental margin’.

The Award in the First Phase provides guidance as to the high threshold to be met in order to demonstrate the existence of a delimitation agreement in international law, absent a signed treaty. It also demonstrates that evidence of subsequent State practice may have limited probative value, since such practice will often be explicable on grounds other than the acceptance of a binding agreement. The tribunal re-examined the relevance of State conduct again in the Second Phase, noting the extent of oil concession practice required in order to influence the delimitation of a maritime boundary. The tribunal’s remarks about the absence of any drilled oil wells or other expensive hydrocarbon activity in the vicinity of the line that Nova Scotia claimed on the basis of historic conduct was particularly (p. 398) notable. Only in respect of the historic acceptance of one small island as a base point (St Paul Island) was the parties’ conduct held to be relevant to the delimitation.

The tribunal’s comments to the effect that the existence and allocation of natural resources in the disputed area may be a relevant factor in delimitation, so far as such resources are ‘known or readily ascertainable’, reflects the approach adopted in the earlier *North Sea Continental Shelf* and *Libya/Malta* cases. While such factors do not (absent the type of exceptional circumstances seen in the *Jan Mayen* case) constitute ‘relevant circumstances’ requiring adjustment of a provisional equidistance line, they may form part of an overall assessment of the equitableness of a proposed delimitation line. The tribunal’s conclusions in this regard may have been influenced by the fact that the *raison d’être* of the delimitation was the division of hydrocarbon entitlements between the parties pursuant to Canadian domestic law.

The tribunal took a sceptical approach to the identification of the relevant area and the application of any final ‘proportionality check’. It noted the extreme positions taken by each party in identifying the relevant area, along with the subjectivity and ‘vagaries’ inherent in the application of any proportionality test. Ultimately, it decided to engage in neither exercise. It justified its decision by saying that it had already taken into account an element of proportionality in treating the disparity in coastal lengths as a relevant circumstance requiring adjustment of the equidistance line. However, the mere fact that coastal length disparity had been treated as a relevant circumstance did not prevent the ICJ from undertaking a final proportionality check in the *Nicaragua/Colombia* case, nor the Annex VII UNCLOS Tribunal from doing so in the *Barbados/Trinidad* case. Furthermore, it is difficult to see how the fact that a disparity of coastal lengths has been applied as a relevant circumstance should mandate against the application of a final proportionality check; such disparity (or the lack of it) may be viewed very differently when compared with the division of the relevant area by a given delimitation line.

The Award in the Second Phase provides an example of adjustment of a provisional equidistance line to reflect a series of relevant geographical circumstances: namely, the perceived cut-off effect of the equidistance line on Newfoundland’s coastal projection and the disparity in the parties’ relevant coastal lengths. The tribunal’s treatment of Sable Island is noteworthy as reflecting a ‘purist’ approach to the equidistance/relevant circumstances method of delimitation. In contrast to the more recent cases identified below, the tribunal gave the island full effect in the first stage of the delimitation process, but identified its disproportionate impact as a relevant circumstance to be taken into account in adjusting the provisional equidistance line at the second stage. Further, having decided to give Sable Island half effect due to its disproportionate impact, the tribunal diminished the island’s effect further when adjusting the boundary to account for the remaining relevant (p. 399) geographical circumstances. As a result, Sable Island was ultimately given no effect in the construction of the boundary. The course of the adjusted equidistance line continued to the outer limit of the continental margin in light of the tribunal’s conclusion

that the relevant circumstances applied just as much beyond 200M as they did within 200M.

Finally, the Award in the Second Phase is notable in that the tribunal refused to allow the outcome of the *St Pierre and Miquelon* case to influence the delimitation because it knew of no principle of law whereby a State should be 'compensated' in one delimitation for what it may have 'lost' in another nearby delimitation.

Footnotes:

1 The constitution and membership of the tribunal was set out in Terms of Reference handed down by the Federal Minister of Natural Resources after consultation with the parties.

2 Canada ratified the 1958 Convention on the Continental Shelf with effect from 6 February 1970.

3 See Part B, Chapter 10.

4 For the purposes of the delimitation, since the parties were to be treated as independent States, the tribunal considered the Gulf to be an enclosed sea (Second Phase, para. 4.2).

5 The technical expert's map forms Figure 3 in the Award of the tribunal in the Second Phase.

6 See further discussion of this topic in Part C, Chapter 1.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 15 Cameroon v. Nigeria: Equatorial Guinea intervening (Judgment of the International Court of Justice, 10 October 2002)

From: A Practitioner’s Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):

Coastal states — Continental shelf — Islands and artificial islands — Delimitation — Straits — Territorial sea

(p. 400) 15 *Cameroon v. Nigeria: Equatorial Guinea intervening* (Judgment of the International Court of Justice, 10 October 2002)

Case Note: delimitation of territorial sea, EEZ, and continental shelf boundaries—associated territorial sovereignty and land boundary dispute—objections to jurisdiction—treaty-based delimitation over initial leg of boundary—equidistance/relevant circumstances approach over second leg of boundary—identification of base points for construction of equidistance line—relevant circumstances—oil concession practice—third State interests

Citation: *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria: Equatorial Guinea intervening*), Judgment, *ICJ Reports* 2002, p. 303

Institution: ICJ

Basis of jurisdiction: ICJ Statute, Article 36(2)

The court: *Judges* Guillaume (President), Shi (Vice-President), Oda, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, *Judges ad hoc* Mbaye (appointed by Cameroon), Ajibola (appointed by Nigeria)

Applicable law: UNCLOS[1]

Areas delimited: territorial sea; EEZ; continental shelf (within 200M)

I. Introduction and Context

This case concerned the delimitation of the land and maritime boundary between Cameroon and Nigeria. Cameroon and Nigeria are situated on the west coast of Africa. Their land boundary dispute extended from Lake Chad in the north to the (p. 401) Bakassi Peninsula in the south and they have adjacent coastlines abutting the Gulf of Guinea. The maritime areas in dispute along the eastern flank of the Niger Delta were highly prospective for oil and gas and there had been extensive oil activity on both the Nigerian and Cameroonian sides. However, overlapping oil concession blocks in the disputed area had restricted exploration and production.

Prior to the case, Nigeria engaged in extensive maritime negotiations with its other neighbours. It agreed a boundary with Equatorial Guinea in 2000, largely based on oil practice. Further south, in the Gulf of Guinea, following failure to agree on a single maritime boundary, Nigeria and São Tomé and Príncipe created a joint development zone in 2001, with the Nigeria–São Tomé and Principe median line as its northern limit.

The littoral coastline of the Gulf of Guinea, which is concave in character, is bounded by other States, in particular Equatorial Guinea, whose Bioko Island lies less than 20M offshore Cameroon's coast. The regional context of the delimitation is illustrated in Figure B15.1.

The land boundary dispute dated back to the nineteenth and early twentieth centuries, to the then-European colonial powers' partitioning of Africa. That history was reflected in a number of conventions and treaties, diplomatic exchanges, maps, and other historic documents. The maritime boundary dispute was of more recent origin, primarily post-dating the independence of the parties. Nigeria and Cameroon established a joint boundary commission which, on 14 August 1970, at the conclusion of a meeting held at Yaoundé,

adopted the so-called ‘Yaoundé I Declaration’. Pursuant to that instrument, the parties decided that the delimitation of the boundaries would be carried out ‘in three stages’, the first being ‘the delimitation of the maritime boundary’. On 4 April 1971, the parties adopted a second declaration at Yaoundé (the so-called ‘Yaoundé II Declaration’) whereby they agreed to regard as their maritime boundary, ‘as far as the 3-nautical-mile limit’, a line running from a ‘point 1’ to a ‘point 12’, which they had drawn and signed on British Admiralty Chart No. 3433 annexed to that declaration. Four years later, on 1 June 1975, the Heads of State of Cameroon and Nigeria signed an agreement at Maroua for the partial delimitation of the maritime boundary between the two States (the so-called ‘Maroua Declaration’). By this declaration they agreed to extend the line of their maritime boundary by way of a series of points running from ‘point 12’ to a point designated as ‘point G’. The parties marked up British Admiralty Chart No. 3433 accordingly.

On 29 March 1994, Cameroon instituted proceedings before the ICJ against Nigeria concerning the dispute relating to sovereignty over the Bakassi Peninsula. At the same time, Cameroon requested that, as the delimitation of the maritime boundary between the parties ‘remained a partial one’, the court determine the course of that boundary ‘beyond the line fixed in 1975’. Cameroon’s Application to the ICJ relied on the declarations made by the parties accepting the jurisdiction (p. 402)

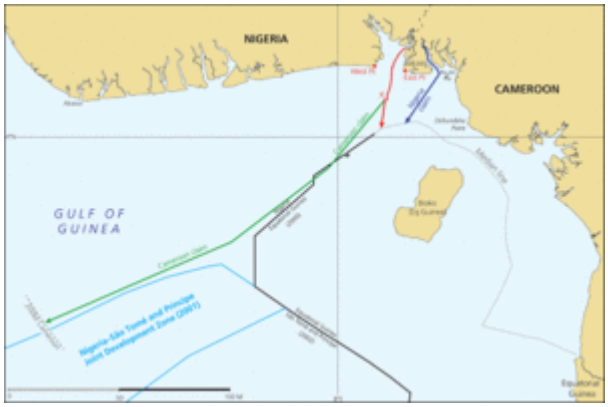

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Figure B15.1: *Cameroon/Nigeria*: regional setting and parties’ claims.

(p. 403) of the court under Article 36(2) of the ICJ Statute. On 6 June 1994, Cameroon filed an Additional Application, extending the scope of its initial Application regarding the land boundary up to the Lake Chad region.

II. Positions of the Parties and Summary of the Judgment

a. Preliminary issues: provisional measures, jurisdiction, and admissibility and intervention by Equatorial Guinea

By a letter dated 10 February 1996, Cameroon requested provisional measures under Article 41 of the ICJ Statute after ‘serious armed incidents’ had taken place between Cameroonian and Nigerian forces in the Bakassi Peninsula. By an order of 15 March 1996, the court indicated certain provisional measures, directing both parties, *inter alia*, to ensure that no action of any kind, and particularly no action by their armed forces, be taken that might prejudice the rights of the other in respect of whatever judgment the court may render in the case.

On 13 December 1995, Nigeria raised a number of preliminary objections to the jurisdiction of the court and the admissibility of Cameroon’s Application. In its seventh preliminary objection, Nigeria contended that there was no legal dispute concerning the delimitation of the maritime boundary which at the time was appropriate for resolution by the court. Nigeria argued: first, that no determination of the maritime boundary was possible prior to the determination of title in respect of the Bakassi Peninsula; and second, that even if the

question of sovereignty over the Bakassi Peninsula was determined, the issues of maritime delimitation would not be admissible in the absence of prior negotiations between the parties with a view to effecting a delimitation 'by agreement on the basis of international law'.

In a judgment on preliminary objections of 11 June 1998, the court found that it had jurisdiction and that Cameroon's requests were admissible. It dismissed Nigeria's first argument above on the ground that it was within the court's discretion to order the issues in a way that would allow it to deal substantively with both of them (first, the determination of title over the Bakassi Peninsula and, subsequently, the maritime boundary) (1998 Judgment, para. 106). The court also dismissed Nigeria's second argument above on the basis that its jurisdiction was based on Article 36(2) of the ICJ Statute, which does not contain any jurisdictional condition relating to prior negotiations (1998 Judgment, para. 109).

Nigeria's eighth preliminary objection was 'that the question of maritime delimitation necessarily involves the rights and interests of third States and is to that extent inadmissible'. The court held that this objection did 'not possess, in the circumstances of the case, an exclusively preliminary character' and thus determined that it would address this argument in its subsequent judgment on the merits (1998 Judgment, para. 117).

(p. 404) On 28 October 1998, Nigeria submitted a request for interpretation of the June 1998 judgment requesting that the court limit the scope of the case to the dispute raised in Cameroon's original Application. On 25 March 1999, the court decided that Nigeria's request was inadmissible because entertaining Nigeria's submission would call into question the effect of its 1998 preliminary judgment as *res judicata* since it had already authorized Cameroon to present additional claims in that judgment (1999 Interpretation Judgment, para. 16).

Equatorial Guinea requested a copy of the Memorial filed by Cameroon and certain maps produced to the court by the parties. Having consulted with the parties in accordance with Article 53(1) of its Rules and having received no objection from them, the court provided the relevant documents. On 30 June 1999, Equatorial Guinea applied for permission to intervene in the case pursuant to Article 62 of the ICJ Statute in order, *inter alia*, to 'inform the Court of the nature of the legal rights and interests of Equatorial Guinea that could be affected by the Court's decision'. Equatorial Guinea specifically indicated that it did not seek to become a party to the case and that neither of the parties had objected to its intervention. By order of 21 October 1999, the court decided unanimously to allow Equatorial Guinea to intervene.

The court rendered its judgment on the merits of the land and maritime dispute on 10 October 2002.

b. The court's judgment in relation to the parties' land boundary dispute

In its judgment, the court first addressed the parties' land boundary dispute. The court identified the three different sectors of the land boundary in dispute between the parties—the Lake Chad area, the boundary from Lake Chad to the Bakassi Peninsula, and the question of sovereignty over the Bakassi Peninsula itself. The parties disagreed about the extent of any existing land boundary between them, particularly around Lake Chad and the Bakassi Peninsula. Cameroon relied on various historic agreements and other legal instruments as having delimited the entire land boundary. Nigeria denied the existence of any delimited land boundary in the Lake Chad area and instead presented arguments based

primarily upon periods of long occupation and *effectivités*, constituting what it called a 'historical consolidation of title', and the co-existent acquiescence of Cameroon.

The court determined that a series of bilateral treaties and other instruments entered into variously by France, Germany, and Great Britain during the colonial era had fixed the land boundary. Any subsequent Nigerian *effectivités* were therefore to be evaluated as acts *contra legem* (or 'contrary to the law'). It rejected Nigeria's historical consolidation theory as 'highly controversial' and pointed out that this theory 'cannot replace the established modes of acquisition of title under international law' (paras 64–5). It held that the evidence demonstrated no acquiescence by Cameroon in the abandonment of its title in the Lake Chad (p. 405) area and that, accordingly, preference should be given to Cameroon as the holder of conventional legal title (para. 70).

As for the land boundary from Lake Chad to the Bakassi Peninsula, the court noted that the parties agreed that it had already been delimited by four colonial instruments. The court therefore focused on resolving certain disagreements between the parties about the interpretation or application of those instruments in connection with seventeen points located along the land boundary (paras 82–6). The court addressed each of those seventeen points in turn.

As regards the Bakassi Peninsula, Cameroon based its title upon a 1913 agreement between Great Britain and Germany. Nigeria contended that Bakassi's purported transfer from Great Britain to Germany pursuant to that agreement was invalid pursuant to the principle of *nemo dat quod non habet* because Great Britain had not been entitled to cede the territory at that time. The court found that the 1913 agreement was valid and applicable in its entirety. It concluded that, pursuant to the colonial title passed by the 1913 agreement and later acquired by Cameroon by virtue of succession, sovereignty over the peninsula lay with Cameroon. This was unaffected by the fact that substantial numbers of Nigerian nationals had been resident in Bakassi, and effectively administered by Nigeria, since 1968. The court determined that Cameroon's legal title must take preference over the more recent *effectivités* of Nigeria. Moreover, the court found no evidence of any abandonment of legal title by Cameroon. On the contrary, Cameroon had, *inter alia*, granted hydrocarbon licences over Bakassi (and the adjacent offshore area) and protested Nigerian military action in 1994, while Nigeria had recognized Cameroon's title clearly and publicly in the 1960s and 1970s (paras 195–225).

Having thus determined the land boundary between the parties and the question of sovereignty over Bakassi, the court proceeded to address the maritime boundary.

c. Delimitation of the maritime boundary

Outstanding questions relating to jurisdiction, admissibility, and third State interests

Nigeria claimed that the court should refuse to carry out in whole or in part the delimitation requested by Cameroon, first, because the delimitation affected areas claimed by third States and, second, because the 'requirement of prior negotiations' had not been satisfied.

Returning to its eighth preliminary objection, which the court had deferred to the merits in its 1998 judgment, Nigeria argued that the delimitation requested by Cameroon beyond 'point G' affected areas claimed by third States (namely, Equatorial Guinea and São Tomé and Príncipe) and was to that extent inadmissible and beyond the court's jurisdiction. Nigeria maintained in particular that the maritime boundary claimed by Cameroon encroached on areas claimed by (p. 406) Equatorial Guinea. Nigeria asserted that the court could not in its judgment draw a delimitation line beyond the tripoint equidistant from Cameroon, Nigeria, and Equatorial Guinea.[2] Cameroon rejected Nigeria's arguments on the

basis that any delimitation by the court between the parties could not affect third States, since the judgment would be *res inter alios acta* for all such States.

The court observed that its jurisdiction was founded on the consent of the parties. The court, therefore, could not decide upon the legal rights of third States not parties to the proceedings. Although Equatorial Guinea had requested, and been granted, permission to intervene, it was not a party to the proceeding. São Tomé and Príncipe had chosen not to intervene on any basis. The court had no jurisdiction to fix a tripoint with a non-party and could not rule on Cameroon's claims in so far as they might affect the rights of such a non-party (para. 238).

Nigeria also submitted that Articles 74(1) and 83(1) of UNCLOS required that the parties first attempt to resolve a maritime boundary dispute by negotiation. Nigeria accepted that, to the extent that the dispute related to the maritime boundary around 'point G' and the areas of overlapping hydrocarbon licences, the negotiation requirement had been fulfilled. However, Nigeria maintained that the waters to the south of 'point G' had never been the subject of any negotiation (and, indeed, that it had not even known that Cameroon was claiming such waters until it received Cameroon's Memorial in the proceeding). Nigeria thus argued that Cameroon's claims to such areas were inadmissible. Cameroon submitted that the court had already rejected Nigeria's argument in its 1998 judgment on preliminary objections. Cameroon also rejected Nigeria's factual account, arguing that the entire maritime boundary had been the subject of intense negotiations between the parties.

The court recalled (and reaffirmed) that, in its 1998 judgment, it had found that negotiations between the parties concerning the entire maritime delimitation—up to 'point G' and beyond—were conducted as far back as the 1970s. UNCLOS Articles 74 and 83 neither required that delimitation negotiations be successful nor that the proceedings be suspended pending new negotiations in the event that a party altered its claim (para. 244).

As to the negotiations with Equatorial Guinea and São Tomé and Príncipe, the court did not find that drawing a maritime boundary between Cameroon and Nigeria presupposed that simultaneous negotiations between all four States had taken place. The court was therefore in a position to proceed to the delimitation of the maritime boundary between Cameroon and Nigeria as long as the rights of Equatorial Guinea and São Tomé and Príncipe were not affected (para. 245).(p. 407)

Delimitation of the maritime boundary up to 'point G'

The court turned next to Cameroon's request for the tracing of a precise line of delimitation up to 'point G'.[3]

Cameroon claimed that the delimitation in this sector should be based mainly on three international legal instruments: (1) an Anglo-German Agreement of 11 March 1913; (2) the Yaoundé II Declaration of 4 April 1971 (with the appended Chart 3433); and (3) the Maroua Declaration of 1 June 1975. Specifically, it submitted that the 1913 Agreement had fixed the starting point of the maritime boundary and had provided that 'the boundary shall follow the centre of the navigable channel of the Akwayafe River as far as the 3-mile limit of territorial jurisdiction'. Cameroon submitted that the Yaoundé II Declaration had later adopted a 'compromise line' consisting of twelve numbered points, and that the binding nature of this line had subsequently been confirmed by the Maroua Declaration. Cameroon maintained that the Maroua Declaration had also resulted in an agreed delimitation up to 'point G', and that the signing of that instrument by the Heads of State of Nigeria and Cameroon had expressed the consent of the two States to be bound by that treaty without any requirement for subsequent ratification. Cameroon noted that the partial maritime

boundary established by the Maroua Declaration had been notified to the Secretariat of the United Nations and reproduced in a number of leading publications.

Nigeria denied the existence of an agreed maritime boundary up to ‘point G’ (and denied also the existence of two separate sectors of the maritime boundary on either side of that point). It maintained that the court must conduct the whole delimitation exercise between the parties *de novo*. Nonetheless, Nigeria did advance specific arguments regarding the area up to ‘point G’. Based on its claim to sovereignty over the Bakassi Peninsula, Nigeria contended that the maritime boundary should commence in the Rio del Rey and run down the median line toward the open sea, as indicated in Figure B15.2. Since the court found that sovereignty over the Bakassi Peninsula lay with Cameroon, the court concluded that it was unnecessary to deal with this argument. Nigeria further contended that, even if Cameroon’s claim to the Bakassi Peninsula were valid, the maritime boundary should take into account the oil wells and other installations existing on each side of the line established by the parties’ respective oil practice and should not change the status quo in this respect. Nigeria argued that the Yaoundé II Declaration was not a binding agreement, but rather merely the record of a meeting, and challenged the validity of the Maroua Declaration also due to the (p. 408)

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Figure B15.2: *Cameroon/Nigeria*: detail of judgment.

(p. 409) absence of a ratification process that it said had been required by its constitution at the time.

The court began its analysis by recalling that it had already found that territorial title to the Bakassi Peninsula lay with Cameroon. As a result, the maritime boundary between Cameroon and Nigeria lay to the west of the Bakassi Peninsula and the maritime boundary between the parties was ‘anchored’ to the mainland in accordance with the terms of the 1913 Anglo-German Agreement (para. 261).

The court observed that the Yaoundé II Declaration had been called into question on a number of occasions by Nigeria after its signature. However, it was unnecessary to determine the status of the Declaration in isolation since the line described within it had been confirmed subsequently by the parties in the Maroua Declaration. The court considered that the Maroua Declaration constituted an international agreement concluded between States in written form and tracing a boundary; it was thus governed by international law and constituted a treaty in the sense of the VCLT. The court observed that, while in international treaty practice a two-step procedure consisting of signature and

ratification was common, there were also cases where a treaty entered into force immediately upon signature. The Maroua Declaration had been one such case (paras 262–4).

As regards Nigeria's argument that ratification of the Maroua Declaration had been required by its domestic constitutional rules at the time, the court rejected it, citing the applicable international rules set out at Articles 7(2) and 46 of the VCLT. It stated that there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in the domestic law of other States (paras 265–6).

The court concluded that the Maroua and Yaoundé II Declarations had to be considered as binding and as establishing a legal obligation on Nigeria. It followed that it was unnecessary to address Nigeria's argument regarding the parties' oil practice in the sector up to 'point G'. Therefore, the maritime boundary between Cameroon and Nigeria up to and including 'point G' had been established by treaty by virtue of the 1913 Anglo-German Agreement, the Yaoundé II Declaration, and the Maroua Declaration (para. 268). The boundary thus delimited by the court up to 'point G' is illustrated in Figure B15.2.

Delimitation of the maritime boundary beyond 'point G'

The court next addressed the maritime boundary beyond 'point G'. In this segment of the boundary, it was common ground between the parties that no maritime boundary had been agreed previously.

Cameroon claimed that this was a classic case of maritime delimitation between States with adjacent coasts. It argued that the law on the delimitation of maritime boundaries is dominated by the fundamental principle that any delimitation must (p. 410) lead to an equitable solution. It observed that there was no single method of maritime delimitation; the choice of method would depend on the circumstances specific to each case. It observed that, if a strict equidistance line were drawn, it would be left with practically no EEZ or continental shelf, despite the fact that, in its view, it had a longer relevant coastline than Nigeria. It argued that the 'relevant area' consisted of that part of the Gulf of Guinea bounded by a straight line running from Akasso in Nigeria to Cap Lopez in Gabon (see Figure B15.3). Within the area, Cameroon proposed what it called an 'equitable line', subtended by 'projection lines' connecting points on the relevant coasts, discounted by 'non-pertinent' sections that corresponded to the influence of the Equatorial Guinea and Gabon coasts and thus respecting the proportionality of the coastal lengths in the relevant area. The court noted that a number of those points were situated on the coasts of third States. The construction of Cameroon's claim line is illustrated in Figure B15.3.

Cameroon submitted that its claim line represented an equidistance line adjusted to take account of a number of relevant circumstances (all of which were of a geographical nature). Those relevant circumstances comprised: the overall situation in the Gulf of Guinea as between Nigeria, Cameroon, and Equatorial Guinea; Cameroon's legal right to a continental shelf representing the frontal projection of its coasts; the general configuration of the parties' coasts and, in particular, the concavity of Cameroon's coastline (which, Cameroon argued, created a virtual 'enclavement' of Cameroon); the relative lengths of the coastlines involved; and the presence of Bioko Island opposite the coast of Cameroon.

Nigeria agreed that it was appropriate to determine a single maritime boundary, but it rejected Cameroon's proposed line. Nigeria challenged both the line's construction and the 'equitableness' of its result. Nigeria's criticism was directed primarily to five points: the actual nature of the line (which it described as pre-empting any delimitation between Nigeria, on the one hand, and Equatorial Guinea and São Tomé and Príncipe, on the other); the relevant coasts used in its construction (which it maintained should extend only between Akasso and Debundsha Point, which marked the beginning of the blocking effect of Bioko Island); the line's treatment of Bioko Island (which formed part of an independent third State possessing its own maritime areas on which the court was not entitled to

encroach); the definition of the area relevant to the delimitation (which it said must be enclosed by the relevant coasts); and the method followed in the construction of the line.

Nigeria further argued that the parties' oil concession practice, which it said had led to the establishment of *de facto* lines, should play a very important role in establishing the maritime boundary. It contended that, within the area to be delimited, the court could not redistribute the oil concessions established by the practice of Nigeria, Cameroon, and Equatorial Guinea. It stated that billions of (p. 411)

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Figure B15.3: *Cameroon/Nigeria*: parties' claim lines (including Cameroon's 'projection lines').

dollars had been invested in those concessions. Nigeria stated that the court must therefore respect the configuration of the existing concessions in its determination of the maritime boundary, particularly as Cameroon had never disputed those concessions until the present proceedings. Cameroon, by contrast, argued that the (p. 412) concessions cited by Nigeria had been granted after crystallization of the dispute and were being presented by Nigeria as a *fait accompli*.

The court noted that, in its intervention, Equatorial Guinea requested that the boundary to be fixed by the court should not encroach upon a median line constructed between its own coasts and those of Cameroon and Nigeria, which Equatorial Guinea regarded as 'a reasonable expression of its legal rights and interests'. Equatorial Guinea observed that Cameroon's claim line encroached upon the median line between Equatorial Guinea and Nigeria and failed to take account of the three States' oil practice. Equatorial Guinea also contended that Cameroon's line would result in the enclavement of Bioko Island (para. 284).

Applicable law and methodology

The court began its analysis by observing that the maritime areas on whose delimitation it was to rule beyond 'point G' lay outside the respective territorial sea limits of the two States. It noted that both Cameroon and Nigeria were parties to UNCLOS, Articles 74 and 83 of which were therefore applicable. The court noted also that the parties had agreed that the delimitation should be effected by a single line (paras 285–6).

Citing its earlier decisions in the *Qatar/Bahrain, Gulf of Maine*, and *Libya/Malta* cases, the court stated that it had set out on various occasions what the applicable criteria, principles, and rules of delimitation were when a line covering several zones of coincident jurisdictions was to be determined. These were expressed in 'the so-called equitable principles/relevant circumstances method'. The court continued:

> This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an 'equitable result'.

The court observed that it would apply the same method in the instant case (paras 286–90).

Base points

The court stated that, as an initial matter, it must define the relevant coastlines of the parties by reference to which the location of the base points to be used in construction of the equidistance line would be determined. Rejecting Cameroon's argument, it held that the maritime boundary between the parties could only be determined by reference to points located on their respective coastlines, not on the coastlines of third States. The court observed that the presence of Bioko Island made itself felt from Debundsha Point, at the point where the Cameroon coast turns south-south-east (see Figure B15.1). Bioko formed a constituent part of a third State, Equatorial Guinea. The part of the Cameroon coastline beyond (p. 413) Debundsha Point could not therefore be treated as facing Nigeria and was thus not relevant to the delimitation (paras 290–1).

Moving on to construct the provisional equidistance line, the court recalled that it had decided that the equidistance line could not be extended beyond a point where it might affect the rights of Equatorial Guinea. The court determined that the land-based anchorage points to be used in the construction of the equidistance line were West Point and East Point, as determined on the 1994 edition of British Admiralty Chart 3433 (see Figure B15.2). Given the configuration of the coastlines and the limited area within which the court had jurisdiction to effect the delimitation, no other base points were necessary for the construction of the provisional equidistance line (para. 292).

Relevant circumstances

The court then considered whether there were circumstances necessitating adjustment of the equidistance line in order to achieve an equitable result. Citing the *North Sea Continental Shelf* cases, the court declared that:

> The geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation.…Although certain geographical peculiarities of maritime areas to be delimited may be taken into account by the Court, this is solely as relevant circumstances, for the purpose, if necessary, of adjusting or shifting the provisional delimitation line (para. 295).

Turning to Cameroon's argument about the concavity of the coastline, the court recalled that this might be a circumstance relevant to delimitation. However, this could only be so when the concavity 'lies within the area to be delimited'. The court noted that the sectors of the coastline that it had identified as relevant to the present delimitation 'exhibit no particular concavity'.[4] Therefore, the court concluded that the configuration of the coastlines was not a circumstance requiring adjustment of the equidistance line (para. 297).

Turning to Cameroon's contentions about Bioko Island, the court accepted that islands had sometimes been taken into account as relevant circumstances when they lay within the zone to be delimited and fall under the sovereignty of one of the parties. However, Bioko Island was subject to the sovereignty of Equatorial Guinea, a State that was not a party to the proceedings. Consequently, the effect of Bioko Island on the seaward projection of the Cameroonian coastal front was an issue between Cameroon and Equatorial Guinea and was not relevant to the delimitation before the court. The court did not therefore regard the presence of (p. 414) Bioko Island as a circumstance that would justify adjustment of the equidistance line (para. 299).

Finally, turning to Cameroon's argument about the disparity between coastal lengths, the court again acknowledged that this could constitute a relevant circumstance where the difference in length was substantial. However, the court observed that whichever coastline of Nigeria was to be regarded as relevant, the relevant coastline of Cameroon as determined by the court was not longer. There was therefore no reason to shift the equidistance line in favour of Cameroon on this ground (para. 301).

Oil practice of the parties

Before determining the delimitation line, the court addressed Nigeria's argument about the role to be played by the parties' respective oil practice. The court noted that both the court and arbitral tribunals had had occasion to deal with the role of oil practice in maritime delimitation disputes. It concluded:

> Overall, it follows from the jurisprudence that, although the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account.

In the present case, the court found that there had been no agreement between the parties regarding their respective oil concessions. Consequently, their oil practice was not a factor to be taken into account in the delimitation (para. 304).

Conclusion and identification of 'point X'

The court accordingly concluded that the equidistance line represented an equitable result for the delimitation beyond 'point G', in the area in respect of which it had jurisdiction. The court noted, however, that 'point G', which had been determined by the parties in the Maroua Declaration, did not lie on the equidistance line, but rather to the east of that line. The court determined that from 'point G' the delimitation line should directly join the equidistance line at a point with coordinates 8°21'20" longitude east and 4°17'00" latitude north, which it labelled 'point X' (see Figure B15.2).[5] The boundary would then turn at 'point X' and continue southwards along the equidistance line.

However, the court cautioned that the equidistance line that it had adopted could not be extended very far because it had already stated that it could take no decision (p. 415) that might affect the rights of Equatorial Guinea. In these circumstances, the court considered that it could do nothing more than indicate the general direction of the boundary from 'point X' along a loxodrome having an azimuth of 187°52'27" (para. 307).

The maritime boundary as delimited by the court is illustrated in Figure B15.2.

Cameroon's claims against Nigeria in respect of certain boundary incidents

Cameroon made a number of additional claims seeking to engage Nigeria's State responsibility at international law (and Nigeria made a number of counterclaims along similar lines). In particular, Cameroon argued that Nigeria had violated the court's provisional measures order of 15 March 1996 and had made repeated incursions along the land and maritime boundary, a number of which had caused casualties on the Cameroonian side.

The court found that neither of the parties had sufficiently proven the facts that it alleged, or their imputability to the other party. It was therefore unable to uphold any of the claims and counterclaims concerned (para. 324).

III. Technical Considerations

Although the court retained a technical expert to assist it, as is usual with the ICJ there is no technical report annexed to the judgment and the identity of the expert was not made public.

After the judgment a Cameroon-Nigeria Mixed Commission ('CNMC') was established under the auspices of the United Nations to resolve several outstanding technical issues. Its work started with areas of the land boundary and then addressed the maritime boundary.

The final maritime boundary was a simple equidistance line based on two base points: one on either side due to the geometry of the two convex headlands. In this respect, it is similar to the final Atlantic leg of the *UK/France* boundary. The two base points and equidistance Point X form an approximate equilateral triangle, thus providing a stable solution. The equidistance line was not adjusted for any relevant circumstances. The final leg, south of Point X, was defined as a loxodrome of bearing 187°52'27" rather than a geodesic.

There were, however, two major technical deficiencies with the judgment: the positioning of equidistant Point X, which proved not to be equidistant; and the lack of a specified map datum that left the precise position of the boundary unclear.

Point X was defined as a point equidistant from West Point on the Nigerian coast and East Point on the Bakassi Peninsula (coordinates for both were provided by (p. 416) the court). In fact, when the distances are measured, X to West Point is 28.95km (15.63M) and X to East Point is 29.22km (15.78M). This places Point X 315m west of a strict equidistance point, in Cameroon's favour. While this does not seem a large difference (e.g. the difference between the loxodrome and geodesic in UK-France was 4M, or over 7,000 metres), it was sufficient to place one of the producing Nigerian platforms (Bogi) on the Cameroonian side of the line.

All the coordinates cited by the court, and those of the earlier Yaoundé and Maroua agreements (which were repeated in the *dispositif*) were referred to British Admiralty chart 3433 (1994 edition). This chart, however, does not have a defined datum and contains a cautionary note: 'The differences between satellite-derived positions [i.e. WGS84] and positions on this chart cannot be determined…and may be significant to navigation.' To address this problem, the CNMC visited many of the charted oil platforms in the Gulf of Guinea and other similar man-made features and determined their positions relative to WGS84 using a GPS. From this they were able to determine parameters to convert the chart and hence all of the boundary coordinates to WGS84. The CNMC did not visit the two control points at East and West Points, or indeed any natural features, that would have given a more accurate and definitive position for Point X and the ensuing azimuth.

A further complexity is that contemporaneous satellite data showed that the coastline at East Point had receded by about 700m compared to the older survey data on chart 3433. If

this point had been resurveyed at the time of the judgment, it would have moved Point X further east, in Nigeria's favour.

At the time of writing, it is understood that discussions are continuing between Cameroon and Nigeria concerning the Bogi Platform and several straddling fields, with a view to potential joint development.

IV. Significance of the Decision and its Contribution to International Law

Nearly 8.5 years elapsed between Cameroon's application to the court and the final judgment in the *Cameroon/Nigeria* case. Although slightly shorter than the ten years that elapsed in the *Qatar/Bahrain* case between Qatar's application and the court's final judgment, this contrasts with the period of just over three years that elapsed between the arbitration agreement and the second (and final) award of the ad hoc arbitral tribunal in the *Eritrea/Yemen* case. All three cases were decided between 1999 and 2002 and concerned complex disputes over both land territory and maritime boundaries. This contrast illustrates the relative expediency with which arbitration proceedings can be conducted in such disputes as compared with proceedings before the court, particularly when both parties desire a rapid resolution.

(p. 417) An important factor in the relative delay in the *Cameroon/Nigeria* proceeding was the number of substantive issues that the court was obliged to address prior to the merits, not least Nigeria's multiple objections to jurisdiction and admissibility (which the court considered separately as a preliminary issue) and Equatorial Guinea's subsequent application to intervene.

As in other disputes combining land sovereignty and maritime delimitation elements, the court first resolved the land sovereignty questions. As in the earlier *Qatar/Bahrain* and *Eritrea/Yemen* cases, the resolution of the land sovereignty dispute had a major impact on the maritime delimitation, particularly as regards the award of the Bakassi Peninsula to Cameroon. This had the effect of neutralizing many of Nigeria's delimitation arguments, which were based on an assumption of Nigerian sovereignty over that area.

On the substance, the first notable aspect of the *Cameroon/Nigeria* judgment is the confirmation of the primacy accorded to treaty-based delimitations (or, in simple terms, delimitations reached by agreement) under international law. The court conducted a careful assessment of the colonial and post-colonial evidence. It concluded that, for the purposes of the relevant provisions of the VCLT, a binding international agreement existed between the parties in relation to the maritime boundary up to 'point G'. As a result, it was unnecessary for the court to consider other delimitation methodologies up to that point (which extended both within and just beyond the territorial sea limits of the parties) or Nigeria's argument based on oil concession practice close to the coast.

Beyond 'point G', in the area of overlapping EEZ and continental shelf entitlements, no delimitation agreement existed between the parties. The court delimited a single boundary utilizing the 'so-called equitable principles/relevant circumstances method', which it noted was 'very similar to the equidistance/special circumstances method applicable in the delimitation of the territorial sea'. It identified this method as following a two-stage approach: first, draw an equidistance line; second, consider whether any relevant circumstances require adjustment of that line in order to achieve the 'equitable result' mandated by Articles 74 and 83 of UNCLOS. This aspect of the court's judgment was a clear precursor to the three-stage approach (which adds a 'proportionality test' as a final step), elaborated by the ICJ just over six years later in the *Black Sea* case.

Two aspects of the court's construction of the provisional equidistance line warrant particular attention:

- First, it was constructed using just one base point on the coastline of each State, located on either side of the Calabar Estuary (albeit some 14M apart, thus providing a stable solution from a technical perspective). This fact did not discourage the court from utilizing an equidistance approach. This contrasts with the later case of *Nicaragua/Honduras*, where the existence of one dominant (p. 418) base point on either side of a highly unstable river mouth led the court to reject the equidistance approach as unreliable, with the result that the ICJ utilized a bisector approach in that case.
- Second, the court emphasized the importance of constructing a provisional equidistance line that was faithful to the geography of the relevant area. It stressed that the geographical configuration of the area 'is a given', and that the presence of 'certain geographical peculiarities' or 'incidental features' was to be taken into account only at the second stage of the process, in the context of potential relevant circumstances requiring adjustment of the provisional line. This aspect of the court's judgment was faithful to the *Gulf of Maine* Chamber's focus on the use of 'geometrical methods' in single boundary delimitations. However, it can be contrasted with more recent jurisprudence (from the *Black Sea* case onwards) in which courts and tribunals have adopted a more subjective approach to the identification of base points in their construction of the provisional equidistance line, thus discounting certain 'geographical peculiarities' and 'incidental features' at the very first stage of the delimitation process.

Notwithstanding the long list of geographical relevant circumstances argued by Cameroon, it is notable that the court ultimately rejected all of Cameroon's arguments and adopted an unadjusted equidistance line boundary beyond 'point G'. The court's rejection of Cameroon's arguments based upon Bioko Island (on the basis that it formed the territory of a third State) and the concavity of the coastline (on the basis that there was no such concavity within the relevant area) warrant particular attention. This is one of only two cases where a strict and unadjusted equidistance line has been adopted by a court or tribunal (the other being *Guyana/Suriname*).

The court's analysis (and disposal) of Nigeria's argument about the role of oil concession practice in the delimitation provides a useful indication of the high threshold to be met by such arguments. Following a detailed review of the jurisprudence, the court concluded that 'oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line'. Rather, oil concession activity would only play a role where there was 'an express or tacit agreement between the parties' on the siting of those concessions, indicating 'a consensus on the maritime areas to which they were entitled'.[6] No such agreement was evidenced on the facts of this case. This approach, which is more cautious than the approach adopted by the court in the earlier *Tunisia/Libya* case, has been followed in a number of subsequent cases that have similarly rejected delimitation arguments based upon oil concession practice.

(p. 419) A final notable aspect of this case related to the obvious interests of a third State (namely, Equatorial Guinea, particularly via its Bioko Island) in the delimitation and the consequences of those interests on the court's line of delimitation. Equatorial Guinea succeeded (without objection from Nigeria or Cameroon) in intervening in the proceeding under Article 62 of the ICJ Statute. In doing so, although it did not become a party to the proceeding or submit to the jurisdiction of the court, it was able to inform the court at length of the rights and interests that it considered could be affected by the court's decision. In deference to those rights and interests, the court decided that it would not

extend its provisional equidistance line beyond a point where it might affect the rights of Equatorial Guinea, and that it could ‘do no more than indicate the general direction’ of the boundary beyond ‘point X’ by way of a loxodrome. The court also determined that the coastline of Bioko Island, as a constituent part of a third State, could be considered neither a relevant coast nor a relevant circumstance in the delimitation, and thus rejected Cameroon’s arguments in that respect.[7]

Footnotes:

1 Cameroon ratified UNCLOS on 19 November 1985; Nigeria ratified UNCLOS on 14 August 1986.

2 The relationship between the tripoint and Cameroon’s claim in the present case is illustrated in Figure B15.2.

3 According to Cameroon, the maritime boundary between Cameroon and Nigeria was divided into two sectors. The first extended from the mouth of the Akwayafe River to ‘point G’, while the second extended seaward beyond ‘point G’. The court adopted this approach in its judgment, splitting its analysis between the delimitation up to ‘point G’ and beyond ‘point G’.

4 The court observed that the concavity of Cameroon’s coastline only became apparent in the sector where it faced Bioko Island, which the court had already excluded as part of Cameroon’s relevant coast.

5 The exact coordinates of ‘point X’ were adjusted after the judgment, as discussed in ‘III. Technical Considerations’.

6 Indeed, subsequent cases have required the evidence of such an agreement to be ‘compelling’—see *Nicaragua/Honduras*; *Peru/Chile*.

7 Notably, the coastline of Bioko Island was therefore also excluded from the ICJ’s assessment of Cameroon’s coastal concavity/cut-off argument. This can be contrasted with the *Bay of Bengal* cases, where Bangladesh secured equidistance line adjustments for reasons of concavity/cut-off with reference to the configuration of the bay as a whole. Thus, in those cases, although ITLOS and the Annex VII tribunal did not say so explicitly, it is clear that the coastlines of third States (i.e. India in the *Bangladesh/Myanmar* case and Myanmar in the *Bangladesh/India* case) did play a role in the delimitations. Indeed, as also shown by the *North Sea* cases, adjustment for coastal concavity by definition requires at least three States to be involved.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 16 Barbados v. Trinidad and Tobago (Award of the Arbitral Tribunal, 11 April 2006)

From: A Practitioner's Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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(p. 420) 16 *Barbados v. Trinidad and Tobago* (Award of the Arbitral Tribunal, 11 April 2006)

Case Note: EEZ and continental shelf delimitation—prerequisites of jurisdiction under Part XV of UNCLOS—jurisdiction over outer shelf delimitation—lack of jurisdiction to impose EEZ fisheries regime—'two-step' delimitation methodology ('equidistance/relevant circumstances' rule)—absence of 'catastrophic repercussions' requiring adjustment of provisional equidistance line for fisheries purposes—identification of relevant coasts and equidistance line base points for archipelagic State—coastal length and non-encroachment as relevant circumstances in the eastern sector—identification of turning point in adjusted equidistance line—proportionality check—duty to negotiate in good faith a fisheries access agreement within the EEZ based on commitment made by Agent in the proceeding

Citation: *Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them* (*Barbados v. Trinidad and Tobago*), Decision, 11 April 2006, (2006) 139 *International Law Reports* 449

Institution: PCA, The Hague (acting as registry)

Basis of jurisdiction: Article 287(3) UNCLOS; Annex VII to UNCLOS

The tribunal: Schwebel (President), Brownlie (appointed by Trinidad and Tobago), Lowe (appointed by Barbados), Orrego Vicuña, Watts

Hydrographer appointed by the tribunal: David Gray

Applicable law: UNCLOS[1] (Article 293)

Areas delimited: EEZ; continental shelf(p. 421)

I. Introduction and Context

The islands of Trinidad and Tobago, which are a little over 7M apart, lie off the north-eastern coast of South America. The single island State of Barbados lies 116M north-east of Tobago. To the west of Barbados and the north of Trinidad lies a chain of rugged volcanic islands known collectively as the Windward Islands (of which Grenada is the closest to Trinidad and St Lucia is the closest to Barbados). Barbados has a surface area of 441km² and, at the time of the proceeding, had a population of approximately 272,000. It is made up of a series of coral terraces resting on a sedimentary base. Trinidad and Tobago collectively have a surface area of 5,128km² and, at the time of the proceeding, had a population of more than 1.25 million.

Trinidad and Tobago has declared itself an 'archipelagic state' pursuant to UNCLOS. To its south-east lie the mainland coasts of Venezuela, Guyana, and Suriname. The geographical context of the delimitation is illustrated in Figure B16.1.

The parties had conducted negotiations concerning the use of resources (principally fisheries and hydrocarbons) in the maritime space between them over some three decades since the 1970s. Barbados legislated to claim its EEZ in 1978, while Trinidad and Tobago legislated to claim its own EEZ and archipelagic status in 1986. Between 1988 and 2004, Trinidad and Tobago arrested a number of Barbadians off the coast of Tobago, accusing them of illegal fishing in its EEZ.

In 1990, Trinidad and Tobago concluded a delimitation treaty with Venezuela (the '1990 Trinidad-Venezuela Agreement'), the course of which passed onto the Barbadian side of the median line between Barbados and Trinidad and Tobago. Later the same year, Barbados and Trinidad and Tobago concluded a fishing agreement (the '1990 Fishing Agreement') regulating, *inter alia*, the harvesting of fisheries by Barbadians in Trinidad and Tobago's EEZ. In 2003, Barbados and Guyana signed an EEZ Cooperation Treaty concerning the exercise of jurisdiction in a small area of bilateral overlap within each of their 200M limits, beyond the EEZ limits of other States (including, notably, Trinidad and Tobago). The course of the boundary delimited by the 1990 Trinidad-Venezuela Agreement and the location of the Barbados/Guyana EEZ cooperation zone are illustrated in Figure B16.1.

Between 2000 and 2003, the parties conducted several rounds of delimitation and fisheries negotiations. In February 2004, Trinidad and Tobago again arrested Barbadian fisherfolk off the coast of Tobago. In a meeting held a few days later, Barbados contended that the Prime Minister of Trinidad and Tobago described the parties' maritime boundary dispute as 'intractable'. Barbados moved to commence the arbitration proceeding immediately following that meeting. Neither party had made any declaration under Article 287 of UNCLOS, with the result that it referred the proceedings to arbitration under Annex VII. The Permanent Court of (p. 422)

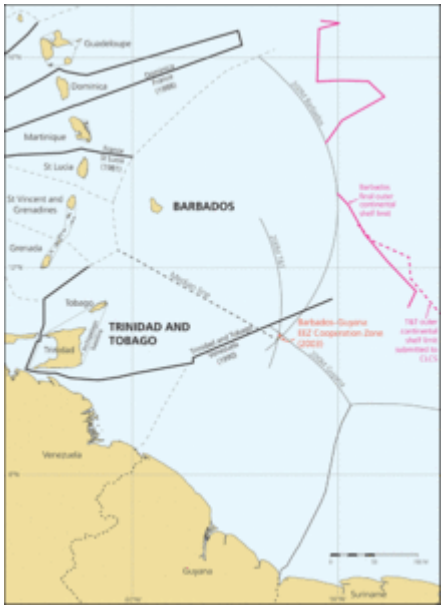

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Figure B16.1: *Barbados/Trinidad & Tobago*: regional setting.

Arbitration agreed to serve as Registry for the proceedings following a joint approach from the parties. Following consultations with the parties, the tribunal refused a request by Guyana to be provided with copies of the parties' pleadings.

In its Notice of Arbitration and Statement of Claim, Barbados claimed a single maritime boundary line delimiting the EEZ and continental shelf, composed of a (p. 423) median line adjusted so as to give effect to a special circumstance constituted by the 'established traditional artisanal fishing activity of Barbadian fisherfolk'.

II. Position of the Parties and Summary of the Judgment

a. Jurisdiction and admissibility

Each party raised challenges to aspects of the tribunal's jurisdiction over the dispute.

Trinidad and Tobago argued that the tribunal had no jurisdiction to hear Barbados's claims because two pre-conditions for jurisdiction under UNCLOS were absent: namely, the existence of a dispute and an 'exchange of views' regarding settlement by negotiation or other peaceful means. Trinidad and Tobago asserted that negotiations were ongoing and remained at an early stage when Barbados initiated the arbitration. It submitted that the negotiations referred to at Articles 74 and 83 of UNCLOS were different from (and must precede) the 'exchange of views' required by Article 283(1) of UNCLOS.[2] It argued that the 'exchange of views' must post-date the crystallization of a dispute. It also challenged the jurisdiction of the tribunal to award Barbadian fisherfolk access rights within the Trinidadian EEZ.

Barbados argued that the tribunal had no jurisdiction over Trinidad and Tobago's claim for delimitation in areas of outer continental shelf beyond 200M. It submitted that Trinidad and Tobago had at no point in negotiations put forward any claims to outer shelf areas, nor had it raised the issue of delimitation in such areas. It also maintained that any delimitation of outer shelf areas as proposed by Trinidad and Tobago would violate both Barbados's EEZ rights under Part V of UNCLOS and the rights of the international community as safeguarded by the CLCS.

The tribunal observed that, as UNCLOS parties who had made no choice of dispute settlement procedure under Article 287, each was deemed to have accepted Annex VII arbitration. Further, in the absence of any declaration under Article 298, each party had agreed that disputes concerning the interpretation and application of UNCLOS could be settled via that method (paras 191–2).

The tribunal noted that, between July 2000 and November 2003, the parties had held nine rounds of negotiations devoted to delimitation and fisheries. Those negotiations had been unsuccessful. The tribunal considered that a dispute clearly existed about the interpretation or application of Articles 74 and 83 of UNCLOS (p. 424) that had not been settled within a reasonable period of time. As a result, Articles 74(2) and 83(2) required the parties to resort to the dispute resolution procedures provided for in Part XV of UNCLOS (paras 194–7, 200).

The tribunal observed that Part XV brought into play the obligation under Article 283(1) to 'proceed expeditiously to an exchange of views' regarding peaceful settlement of the dispute. The tribunal remarked that Article 283(1) 'does not readily fit the circumstances to which Articles 74 and 83 give rise, nor does it sit easily alongside the realities of what is involved in "negotiations"'. In the context of delimitation, Part XV was not the first step in the process, but rather one that followed negotiations that had already taken place (in the present case, over several years) pursuant to Articles 74 and 83. The tribunal concluded that Article 283(1) could not reasonably be interpreted as requiring the parties to embark upon a new 'exchange of views' after the failure of several years of negotiations. Any such requirement would negate the 'unilateral right' to invoke compulsory dispute resolution under Part XV, 'especially since in the case of a delimitation dispute the other State involved could make a declaration of the kind envisaged in Article 298(1)(a)(i) so as to opt out of the arbitration process' (paras 201–4). Accordingly, the tribunal concluded that Barbados had complied with the requirements of UNCLOS for the unilateral submission of the dispute to arbitration under Annex VII (para. 211).

As regards Barbados's objection, the tribunal considered that the outer continental shelf was included within the scope of the continental shelf delimitation dispute that had been submitted to arbitration. The outer shelf delimitation therefore fell within its jurisdiction.

The tribunal remarked that ‘there is in law only a single “continental shelf” rather than an inner continental shelf and a separate extended or outer continental shelf’ (paras 213–14).

The tribunal upheld Trinidad and Tobago’s objection to the effect that its jurisdiction did not extend to imposing a fisheries regime in waters forming part of Trinidad and Tobago’s EEZ. Such questions did not form part of the delimitation dispute; nor could the establishment of a fisheries regime be regarded as a ‘lesser form of relief’ falling within the scope of Barbados’s request for a single boundary line. The tribunal did, however, have jurisdiction to consider the possible impact upon a prospective delimitation line of Barbadian fishing activity (paras 215–17).

b. Applicable law

At the outset of its legal analysis, the tribunal recalled the provisions of Articles 74(1), 83(1), and 293 of UNCLOS. It noted that the ‘apparently simple and imprecise’ delimitation formula set out at Articles 74(1) and 83(1) ‘allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that (p. 425) the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules’. It emphasized that, alongside UNCLOS and applicable treaty instruments, ‘customary law also has a particular role that, together with judicial and arbitral decisions, helps to shape the considerations that apply to any process of delimitation’ (paras 222–3).

c. The delimitation process

The tribunal proceeded to give an overview of the evolution of the delimitation jurisprudence since the 1969 *North Sea Continental Shelf* cases. It noted that, at that time, when the continental shelf was the ‘principal national maritime area beyond the territorial sea’, State entitlement had been based upon the concept of natural prolongation. Subsequently, however, the emergence and consolidation of the EEZ meant that, within 200M of the coast, a ‘new approach was introduced, based upon distance from the coast’. The tribunal observed that this had resulted in a harmonization of the EEZ and continental shelf delimitation regimes, and that consequently the ‘quest for neutral criteria of a geographical character prevailed in the end over area-specific criteria such as the distribution of fish stocks, with a very few exceptions’ (paras 224–8).

As regards the role of equity under Articles 74 and 83, the tribunal stated that ‘equitable considerations *per se* are an imprecise concept in the light of the need for stability and certainty in the outcome of the legal process’. Consequently, recent jurisprudence had searched for ‘predictable, objectively-determined criteria for delimitation, as opposed to subjective findings lacking precise legal or methodological bases’ (para. 230).

The identification of relevant coasts abutting upon the areas to be delimited was one such objective criterion. Another was the principle of equidistance as a method of delimitation applicable in certain geographical circumstances. The tribunal continued that ‘the search for an approach that would accommodate both the need for predictability and stability within the rule of law and the need for flexibility in the outcome that would meet the requirements of equity’ had resulted in the identification of a variety of criteria and methods of delimitation whose appropriateness would depend upon the specific circumstances of each case (paras 231–3).

The tribunal noted that, with very few exceptions, State practice had overwhelmingly resorted to the establishment of single maritime boundary lines, and that courts and tribunals had endorsed this practice in the jurisprudence (para. 235).

The tribunal observed that ‘to the extent that a coast is abutting on the area of overlapping claims, it is bound to have a strong influence on the delimitation, an influence which results not only from the general direction of the coast but also from its radial projection in the area in question’. It further observed that, in the context of coastal lengths, the principle of proportionality had been used in the jurisprudence as (p. 426) ‘a final check upon the equity of the tentative delimitation’ to ensure that the result was not tainted by ‘some form of gross disproportion’ (paras 238–40).

As for resource-related criteria such as fisheries and hydrocarbons, the tribunal remarked that these had been ‘treated more cautiously by the decisions of international courts and tribunals’, which had not generally applied them as a relevant circumstance (para. 241).

The tribunal concluded its analysis by observing that the determination of the delimitation line normally followed a two-step approach. First, a provisional line of equidistance would serve as a ‘practical starting point’. Second, the provisional line would be examined in the light of relevant circumstances, which were case specific, so as to determine whether it was necessary to adjust the line in order to achieve an equitable result (para. 242).

The tribunal returned briefly to the two-step approach later in its award, observing that the equidistance/relevant circumstances method discussed in previous cases in the context of territorial sea delimitation was a ‘very similar process’ to the approach taken to EEZ and continental shelf delimitation under Articles 74 and 83 of UNCLOS, due to the common need to ensure an equitable result. It observed that, while no method of delimitation could be considered compulsory, ‘the need to avoid subjective determinations requires that the method used start with a measure of certainty that equidistance positively ensures, subject to its subsequent correction if justified. A different method would require a well-founded justification and neither of the Parties has asked for an alternative method’ (paras 305–6).

d. The delimitation effected in the three sectors of the boundary

Each party had agreed to the construction of a provisional equidistance line as a first step in the delimitation. The tribunal proceeded to divide the area of delimitation into three segments: a ‘western’ (or ‘Caribbean’) sector, extending from the tri-point with St Vincent and the Grenadines, where Barbados argued for adjustment of the equidistance line as a result of its fishing activities off the coast of Tobago; a ‘central’ sector, where the parties agreed on the course of an equidistance line boundary; and an ‘eastern’ (or ‘Atlantic’) sector, extending up to (and potentially beyond) the parties’ 200M limits, where Trinidad and Tobago cited a number of relevant circumstances requiring adjustment of the equidistance line. The parties’ respective claim lines are illustrated in Figure B16.2.

The ‘western’ (or ‘Caribbean’) sector

Barbados based its argument for adjustment of the equidistance line in this sector on ‘three core factual submissions’: first, that there was a centuries-old history of artisanal fishing by Barbadian fisherfolk in the waters off Tobago; second, that Barbadian fisherfolk were dependent today on seasonal fishing in the areas claimed off Tobago such that any deprivation of such fishing would have ‘catastrophic repercussions’; (p. 427)

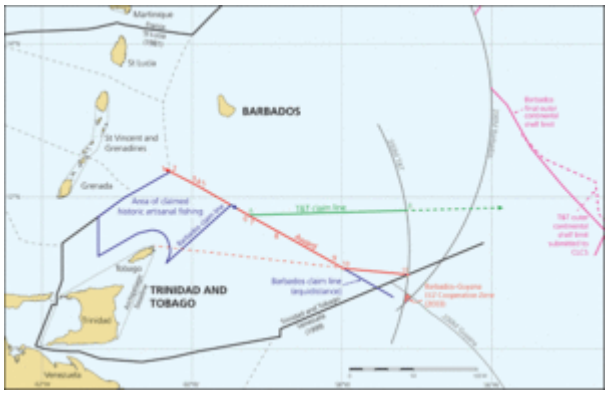

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Figure B16.2: *Barbados/Trinidad & Tobago*: parties' claims and award.

(p. 428) and, third, that the fisherfolk of Trinidad and Tobago did not fish in the area claimed by Barbados. In support of its submissions, Barbados presented an array of historic, political, cultural, and scientific evidence, together with sixteen supporting affidavits. Barbados submitted that the evidence demonstrated the existence of 'acquired rights' in areas previously forming the high seas, that such rights had not been extinguished by UNCLOS, and that, in the absence of a regime of access, those rights should constitute a special circumstance requiring adjustment of the boundary. In the absence of such adjustment, Barbados argued that the tribunal should award a fisheries access regime to Barbadian fisherfolk within Trinidad and Tobago's EEZ.

Trinidad and Tobago rejected the Barbadian argument. Relying in part upon contemporaneous Barbadian commentary, it submitted that Barbadian fishing off Tobago was 'of recent origin and highly commercial', and that Barbados had exaggerated the economic importance of its flying-fish fishery generally, and of the fishery off Tobago, while understating the significance of Trinidad and Tobago's own fishing activities. It argued also that fishing by Barbadian nationals in former high seas areas could not give rise to sovereign rights at international law, nor could its denial of access of Barbadian fisherfolk to its EEZ necessitate any adjustment of the equidistance line. It emphasized that adjustment of the equidistance line would transfer not only fishery resources, but also potentially significant oil and gas resources to Barbados. Finally, it argued that, prior to the arbitration, Barbados had repeatedly and officially recognized that the waters concerned to the north of the equidistance line were part of the Trinidad and Tobago EEZ.

Following a review of all the evidence, the tribunal concluded that none of the 'three core factual submissions' of Barbados had been proved (para. 265).

As to the first core submission, the evidence of Barbadian fishing off Tobago prior to the 1980s was 'fragmentary and inconclusive'. The tribunal commented that the contemporaneous reports of Barbadian officials 'must be given substantial weight, and more weight than affidavits written after this dispute arose and for litigious purposes'. Consequently, the fishing activities undertaken by Barbadian fisherfolk off Tobago could not give rise to any acquired right nor, *a fortiori*, require any adjustment of the equidistance line (para. 266). As to the second core submission, Barbados had failed to show that any denial of access to the waters in issue would have 'catastrophic repercussions'. The tribunal acknowledged that certain communities in Barbados were heavily dependent on fishing, that some 190 Barbadian ice boats could not fish off Tobago as they had previously, and that this deprivation was both 'profoundly significant' for the populations concerned and 'felt in the economy of Barbados'. However, it held that 'injury does not equate with catastrophe'; nor was injury in the course of economic relations a sufficient legal ground to adjust a boundary (para. 267). As to the third core submission, the evidence that the fisherfolk of

Trinidad and Tobago did not fish in the areas claimed by Barbados was 'not conclusive' (para. 268).

(p. 429) The tribunal commented further that, even if Barbados had established one or all of its core factual submissions, it did not follow that, as a matter of law, an adjustment must be made to the equidistance line. It continued: 'determining an international maritime boundary between two States on the basis of traditional fishing on the high seas by nationals of one of those States is altogether exceptional', referring to the 'singular circumstances' of the ICJ's judgment in the *Jan Mayen* case (para. 269).

Finally, the tribunal found 'further confirmation' of its conclusions in the historic recognition by Barbados, including under the 1990 Fishing Agreement, that its fisherfolk were fishing in Trinidad and Tobago's EEZ and that, to the extent that they did so without the permission of Trinidad and Tobago, they were subject to lawful arrest (para. 270).

The tribunal accordingly concluded that the equidistance line would not be subject to any adjustment in the 'western' (or 'Caribbean') sector.

As regards Barbados's alternative submission, the tribunal had already established that it lacked jurisdiction to impose a fisheries regime in waters forming part of Trinidad and Tobago's EEZ. It distinguished the *Eritrea/Yemen* case, upon which Barbados had relied, on the basis that the *compromis* in that case had explicitly requested the tribunal to rule on the basis of 'historic titles' and to decide on the scope of that dispute. The *Eritrea/Yemen* tribunal's finding of a pre-existent traditional fishing regime, including a right of access, was therefore 'readily understandable'. Moreover, that finding was 'very different from saying that a Tribunal has an inherent power to *create* a right of access by way of a remedy in a delimitation dispute' (para. 279).

Notwithstanding these findings, the tribunal considered it appropriate to 'draw attention to certain matters that are necessarily entailed by the boundary line that it has drawn'. With reference to Article 63(1) of UNCLOS, it observed that the parties were under a duty 'to agree upon the measures necessary to coordinate and ensure the conservation and development' of the flying-fish stocks off Tobago. Both parties had emphasized before the tribunal their willingness to find a reasonable solution to the dispute over fisheries access. In particular, the tribunal noted that the Attorney General of Trinidad and Tobago stated on the last day of the hearing:

> I say again in peremptory fashion that we are still prepared to negotiate a fisheries access agreement with Barbados (paras 284–7).

The tribunal recalled that 'it is well established that commitments made by Agents of States before international tribunals bind the State, which is thenceforth under a legal obligation to act in conformity with the commitments so made'.[3] (p. 430) Accordingly, Trinidad and Tobago had 'assumed an obligation in the terms stated above'. Accordingly, Trinidad and Tobago was:

> obliged to negotiate in good faith an agreement with Barbados that would give Barbados access to fisheries within the EEZ of Trinidad and Tobago, subject to the limitations and conditions spelled out in that agreement and to the right and duty of Trinidad and Tobago to conserve and manage the living resources within its jurisdiction (paras 291–2).

Importantly, the tribunal repeated this obligation in its *dispositif* (para. 385).

The ‘central’ sector

In the central part of the boundary, the tribunal observed that there existed a short segment of about 16M in which the parties had not argued for any adjustment of the provisional equidistance line. Accordingly, the tribunal held that the equidistance line was agreed in this sector (para. 294).

The ‘eastern’ (or ‘Atlantic’) sector

Trinidad and Tobago submitted that the delimitation in the Atlantic sector involved a vast ocean where the coasts of the parties were in a relationship of adjacency rather than oppositeness. Consequently, it argued that equidistance was not the appropriate method for delimitation in this sector. Barbados countered that the coasts of the parties were at all times in a relationship of oppositeness and that the equidistance line provided an equitable result in this sector, particularly because all of the base points for its construction in Trinidad and Tobago lay on the coast of Tobago. As a result, Barbados asserted that the island of Trinidad had no influence on the delimitation. The tribunal observed that, whether the coasts were opposite or adjacent, the applicable law was the same since Articles 74 and 83 of UNCLOS do not distinguish between opposite and adjacent coasts. It determined that the distinction had ‘no weight’ where the delimitation was concerned with vast ocean areas. This did not, however, mean that the equidistance line was absolute and not subject to adjustment. The tribunal accordingly turned to address the specific circumstances raised by Trinidad and Tobago that might require adjustment of the equidistance line in order to achieve an equitable solution in the eastern sector (paras 316–18).

Trinidad and Tobago raised three principal relevant circumstances that in its view justified adjustment of the equidistance line: first, the projection of the relevant coasts and the avoidance of any cut-off effect or encroachment; second, proportionality; and, third, the regional implications of the delimitation. The tribunal examined each in turn.

As to the first, Trinidad and Tobago maintained that its coasts projected eastward into the Atlantic Ocean such that an equidistance line boundary would cut off its maritime projection, contrary to the principle of non-encroachment. Barbados, by contrast, submitted that the coast of Trinidad did not abut the disputed area because it faced south-east. It further maintained that there was no question of any (p. 431) cut-off effect given that the equidistance line would extend more than 190M from Trinidad and Tobago, until it met the tri-point with Guyana.

The parties differed over what were the relevant coasts for the purposes of the delimitation in the east. Barbados argued that the relevant coast of Trinidad and Tobago was restricted to the area on Tobago that lay between the base points used for construction of the equidistance line. Trinidad and Tobago, on the other hand, argued that its entire eastward-facing coastal frontage was relevant for this purpose, resulting in a coastal ratio in its favour of 8.2:1. Citing ICJ jurisprudence, the tribunal held that it had ‘no difficulty’ in concluding that a disparity in the relative lengths of coastal frontages may require an adjustment of the provisional equidistance line. It rejected Barbados’s contention that the relevant coastal frontages should flow from the location of base points because the influence of coastlines upon delimitation resulted from their significance in attaining an equitable and reasonable outcome, which was a ‘much broader consideration’. It considered that what mattered was whether coastal frontages ‘abut as a whole upon the disputed area by a radial or directional presence’. In this regard, the island of Trinidad had a ‘not insignificant coastal frontage which clearly abuts upon the disputed area’. The tribunal observed that the orientation of the Trinidadian coastline was determined by the coast of Trinidad itself, not by the south-easterly-facing archipelagic baseline of Trinidad and Tobago. The tribunal concluded that the ‘broad coastal frontages’ of both Tobago and Trinidad, as well as the resulting disparity in coastal lengths between the parties,

constituted relevant circumstances to be taken into account in the adjustment of the equidistance line (paras 327–34).

As for the second circumstance invoked by Trinidad and Tobago (proportionality), the tribunal observed that this was a relevant circumstance to be taken into consideration in reviewing the equity of a tentative delimitation. In other words, it served as a 'final test to ensure that equitableness is not contradicted by a disproportionate result'. The tribunal thus held that it would undertake that check only after having taken into account the other relevant circumstances (paras 337–8).

As for the third invoked relevant circumstance (regional considerations), Trinidad and Tobago argued that the tribunal could not ignore other delimitations in the region. It argued that other agreements in the region (namely, the 1990 Trinidad-Venezuela Agreement and the delimitation agreement between France (Guadeloupe and Martinique) and Dominica—each of which is illustrated in Figure B16.1[4]) had departed from equidistance in order to avoid a cut-off effect. Specifically, Trinidad and Tobago stated that the 1990 Trinidad-Venezuela (p. 432) Agreement had been designed to allow Venezuela access to the Atlantic ('*salida al Atlántico*') that equidistance would have denied.

The tribunal ruled out 'any effect, influence or relevance' of the agreement between France and Dominica because it had 'no connection at all to the present dispute, direct or indirect' (para. 344). As for the 1990 Trinidad-Venezuela Agreement, the tribunal observed that Barbados could not be required to 'compensate' Trinidad and Tobago for the concession it had made to Venezuela in that agreement, which was 'quite evidently *res inter alios acta*'. However, the tribunal considered itself bound to take into account the 1990 Trinidad-Venezuela Agreement because it represented the limit of Trinidad and Tobago's maritime claims. Consequently, the tribunal would not delimit any boundary beyond that line (paras 346–8).

Acquiescence and estoppel

Barbados contended that Trinidad and Tobago was prevented from claiming an adjustment of the equidistance line to the north because it had consistently recognized and acquiesced in Barbadian exercises of sovereignty in the area since 1978. In particular, Barbados pointed to seismic surveys, oil concessions, and Coast Guard patrols. It relied also upon its 1978 legislation, which had indicated that, in the absence of agreement with a neighbouring State, the EEZ boundary would be an equidistance line. Trinidad and Tobago challenged the significance and extent of the activities cited by Barbados.

The tribunal concluded that the Barbadian activities were 'not of determinative legal significance'. In particular, they did not 'offer sufficient evidence to establish estoppel or acquiescence on the part of Trinidad and Tobago'; particularly in the absence of express or tacit agreement between the parties (paras 363–5).

Trinidad and Tobago's claim to an outer continental shelf

The tribunal next observed that Trinidad and Tobago had justified its claim principally on the ground of an entitlement to continental shelf out to the continental margin, as defined by Article 76 of UNCLOS. Trinidad and Tobago had asserted that its rights to continental shelf beyond 200M could not be 'trumped' by Barbados's EEZ area.

The tribunal recalled that it had found jurisdiction to delimit continental shelf areas beyond 200M. However, it held that 'the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nm' (para. 368).

The adjustment of the equidistance line

Having thus identified relevant circumstances requiring adjustment of the equidistance line in the eastern (or Atlantic) sector of the boundary, the tribunal turned (p. 433) to the question of what was the appropriate turning point from which the boundary would depart from equidistance. Trinidad and Tobago proposed a turning point at 'Point A' (see Figure B16.2), which it explained as 'the last point on the equidistance line which is controlled by points on the south-west coast of Barbados', thus separating the opposite coast delimitation from the adjacent coast delimitation. Trinidad and Tobago proposed an adjustment along a constant azimuth of 88° up to its EEZ outer limit ('Point B' on Figure B16.2).

The tribunal recalled that it had found no justification for distinguishing between opposite and adjacent coasts in the present case. Furthermore, Trinidad and Tobago's Point A was situated 'far north of any relevant coastal frontage'; the projection of the coastal frontages of Trinidad and Tobago became relevant to the delimitation 'much further southeast' (paras 355, 357). Consequently, the tribunal rejected Point A as a turning point.

Nevertheless, the tribunal determined that the adjustment of the equidistance line must be sufficient to give 'a meaningful influence' to Trinidad and Tobago's lengthy coastal frontage abutting directly on the disputed area. The tribunal commented that 'there are no magic formulas' for the determination of where precisely an equidistance line adjustment should take place. Rather, the question was to be determined by way of a discretion exercised within the limits of the applicable law. The tribunal concluded that the appropriate turning point was to be located 'where the provisional equidistance line meets the geodetic line that joins (a) the archipelagic baseline turning point on Little Tobago Island with (b) the point of intersection of Trinidad and Tobago's southern maritime boundary with its 200 nm EEZ limit'. This point, identified by the tribunal as 'point 10' and illustrated in Figure B16.2, gave effect to the presence of the coastal frontages of Trinidad and Tobago, thus taking into account the relevant circumstance that had been identified for adjustment of the equidistance line. From this turning point, the boundary would proceed in a straight line to its terminal point, the location of which the tribunal identified at the point of intersection of Trinidad and Tobago's southern maritime boundary (formed by the 1990 Trinidad-Venezuela Agreement) with its 200M limit. The tribunal remarked that, in effecting this adjustment, it had been mindful that, as far as possible, there should be no cut-off effects arising from the delimitation, and that the line as drawn avoided the encroachment that would result from an unadjusted equidistance line (paras 372–5).

The tribunal turned finally to its 'proportionality check', which it identified as being intended so as to avoid any 'gross disproportion in the outcome of the delimitation' (para. 376). The tribunal was satisfied that its adjustment to give effect to the relevant coastal frontages was not disproportionate, as would have been the case if the frontages had been projected 'straight out to the east' (para. 379). Consequently, it concluded that its adjusted equidistance line represented an equitable solution for the purposes of Articles 74 and 83 of UNCLOS.

(p. 434) The single maritime boundary thus delimited by the tribunal is illustrated in Figure B16.2.

III. Technical Considerations

The tribunal appointed an expert hydrographer (David Gray) before the oral hearings. The parties' respective experts exchanged data on base points with the tribunal's expert and agreed a strict equidistance line, making the tribunal's task and that of its expert easier.

In calculating coastal lengths and directions of projections, the tribunal made it clear that only the actual coastlines rather than the archipelagic baseline were relevant. Barbados had maintained that the archipelago projected to the south-east, away from the delimitation area, as a result of which it said that the median line did not encroach upon Trinidad and Tobago's coastal projection.

The equidistance line was constructed using the turning points on the Trinidad and Tobago archipelagic baseline (which are located on physical features), but not the intermediate points. The adjustment of the provisional line to take into account the longer coastal frontages of Trinidad and Tobago was achieved pragmatically by bending the line where it intersected the straight line drawn between Tobago and the point where Trinidad and Tobago's 200M limit met its agreed boundary with Venezuela (see Figure B16.2).

As the line terminates at the junction of Trinidad and Tobago's 200M limit with its continental shelf boundary with Venezuela, as between Barbados and Trinidad and Tobago there is no maritime boundary beyond 200M. The tribunal, therefore, did not need to deal with the relationship between EEZ and continental shelf rights in the area beyond 200M.

The tribunal considered the 8.2:1 ratio of coastal lengths to be a relevant circumstance requiring adjustment of the equidistance line, but did not carry out a mathematical proportionality test at the final stage. Instead, it noted that proportionality 'is a broader concept against which the Tribunal can test the position resulting from the provisional application of the line that it has drawn, so as to avoid gross disproportion in the outcome of the delimitation'.

IV. Significance of the Decision and its Contribution to International Law

The *Barbados/Trinidad and Tobago* case was the first maritime delimitation dispute resolved by way of arbitration under Annex VII to UNCLOS. The entire (p. 435) proceeding lasted just over two years between the Barbadian Notice of Arbitration and the tribunal's Award, providing another example of the expeditiousness with which arbitration proceedings can be completed if effectively managed.

The Award, which was rendered by a tribunal composed of five of the world's leading public international lawyers at the time, provides valuable guidance on three important issues of jurisdiction that had been disputed between the parties. First, the tribunal rejected an argument that Article 283(1) of UNCLOS required the parties to open a fresh round of discussions (or an 'exchange of views') following the breakdown of delimitation negotiations conducted under Articles 74 and 83 of UNCLOS. The tribunal thus held that Barbados was entitled to commence proceedings immediately once the delimitation negotiations had broken down. Otherwise, the tribunal considered that Barbados's unilateral right to invoke compulsory dispute resolution under Part XV of UNCLOS could have been negated, particularly given the right of an UNCLOS party at any time to make a declaration under Article 298(1)(a)(i) opting out of binding dispute resolution. This aspect of the tribunal's analysis was prescient given that, less than three years after the Award, Trinidad and Tobago made such a declaration under Article 298(1)(a)(i), thus forestalling any future unilateral delimitation proceedings against it.

Second, the tribunal accepted jurisdiction to delimit areas beyond 200M, if necessary, as part of its competence to delimit the continental shelf boundary. This was the first delimitation case between two UNCLOS parties to make such a finding. As the tribunal noted, 'there is in law only a single continental shelf', with the result that jurisdiction over a continental shelf dispute can extend beyond 200M where circumstances require. Ultimately,

the tribunal did not delimit any boundary beyond 200M as the parties had no overlapping entitlements in that area.

Third, the tribunal determined that it had no jurisdiction to impose a regime of access by Barbadian fishermen to fisheries located in areas forming part of the Trinidad and Tobago EEZ. This was because Article 297(3)(a) of UNCLOS stipulates that a coastal State is not obliged to submit to the jurisdiction of an Annex VII tribunal any dispute relating to its sovereign rights with regard to the living resources in the EEZ. The tribunal distinguished the *Eritrea/Yemen* case on the basis that the ad hoc *compromis* establishing jurisdiction in that case had specifically required the tribunal to decide on territorial sovereignty 'the basis, in particular, of historic titles' and to 'decide on the definition of the scope of the dispute'.

On the merits, the Award contains a concise overview of the evolution of delimitation law and jurisprudence between 1969 and 2006. The tribunal noted the important contribution to be played by the jurisprudence of international courts and tribunals, together with learned commentators, in supplementing the (p. 436) 'simple and imprecise formula' set out at Articles 74(1) and 83(1) of UNCLOS. The tribunal's analysis of the switch to distance in place of physical prolongation as the basis of entitlement within 200M is particularly notable. Consequently, the tribunal indicated that delimitation within such areas would normally start with reference to a provisional equidistance line before considering the application of relevant circumstances. The tribunal constructed the equidistance line using turning points on the Trinidad and Tobago archipelagic baseline that corresponded to physical coastal features, rather than intermediate points on that baseline.

The tribunal's analysis of the central role to be played in the delimitation by the parties' respective coasts is another notable aspect of the Award, particularly as regards the identification of 'relevant coasts' and the discounting of straight baselines for this purpose. The tribunal's focus on the coasts identified as 'abutting' (or facing) the delimitation area and the respective lengths of those coasts is characteristic of the dominance of coastal geography in modern single boundary delimitation. Particularly striking were the tribunal's comments about the 'radial' (as opposed to unidirectional) nature of the coasts' projections into the delimitation area, which allowed the tribunal to treat the entire eastward- and south-eastward-facing coasts of Trinidad and Tobago as part of that State's relevant coast.[5] The tribunal rejected the proposition that the only relevant coasts were those short segments contributing base points to the provisional equidistance line. It also rejected the contention that the length or direction of an archipelagic baseline should be relevant to delimitation, commenting that 'the orientation of coastlines is determined by the coasts and not by baselines'.

As for the (relatively minor) adjustment made to the provisional equidistance line to reflect the relevant circumstances created by the long Trinidadian coast, the tribunal made clear that this resulted from an exercise of discretion (albeit exercised within the law), rather than any particular formula. This is reflective of the fact that those courts and tribunals that have adjusted provisional equidistance or median lines have not followed any uniform practice or methodology in doing so.[6]

The tribunal's rejection of Barbados's arguments about fishing as a relevant circumstance demonstrate the high evidential and legal threshold imposed upon such arguments in modern single boundary delimitation. Barbados submitted (p. 437) extensive evidence about the nature, extent, and significance of the flying-fish fishery off Tobago, but nevertheless the tribunal determined that the circumstances were not sufficiently 'exceptional' to warrant adjustment of the provisional equidistance line for this purpose. The *Jan Mayen* case remains the only example in modern jurisprudence of adjustment of a provisional line in order to accommodate the fishing activity of one party. Nevertheless, the tribunal found an alternative basis to accommodate the Barbadian fishing activity, holding

that a commitment made by the Agent of Trinidad and Tobago at the final hearing in the arbitration had created a binding obligation to agree a fishing access agreement following the Award.

V. Postscript to the 2006 Award

On 8 May 2008, Barbados lodged a submission with the CLCS pursuant to Article 76(8) of UNCLOS on the limits of its continental shelf beyond 200M.[7]

In response, Trinidad and Tobago sent a *note verbale*[8] to the UN Secretary-General rejecting that the award had determined the parties' respective outer shelf entitlements and arguing that the award had not addressed the area beyond 200M.[9] Trinidad and Tobago also stated that it intended to make its own CLCS submission and indicated that there would be 'areas of potential overlapping entitlements in respect of the continental shelf beyond 200M with certain neighbouring coastal States, including Barbados'.[10] Trinidad and Tobago stated that it would have no objection to Barbados's submission, but reserved all its rights in respect of its own submission.[11] Finally, Trinidad and Tobago asserted that, should Barbados object to its future submission, it would consider this to create a dispute in respect of all of the area of overlapping entitlement between Trinidad and Tobago and Barbados.[12]

On 12 May 2009, Trinidad and Tobago transmitted its submission to the CLCS.[13] Trinidad and Tobago indicated that there was no outstanding dispute with Barbados as the 2006 Award had established the maritime boundary up to 200M and the tribunal had exercised no jurisdiction beyond that limit in areas of (p. 438) outer shelf covered by the submission. It is difficult to reconcile the latter point with the tribunal's determination that the outer continental shelf was included within the scope of the dispute between the parties and thus did fall within its jurisdiction. In any event, given that, in light of the Award, Trinidad and Tobago's 200M limit falls exclusively within the 200M limits of other coastal States, there are similarities between the Trinidad and Tobago submission and that of St Pierre and Miquelon (France), which is similarly 'zone-locked' by Canada's EEZ. The question of whether States in such a situation enjoy any outer shelf entitlement at all is yet to be finally resolved.

On 15 April 2010, the CLCS adopted its recommendations on Barbados's 2008 submission[14] and, on 13 April 2012, they adopted a second recommendation based on a revised submission due to changes by Barbados to one of the foot of slope points.[15]

At the time of writing, the CLCS has not reviewed Trinidad and Tobago's submission. The revised outer limits recommended by the CLCS to Barbados and the limits submitted by Trinidad and Tobago are illustrated in Figures B16.1 and B16.2.

Footnotes:

1 Trinidad and Tobago ratified UNCLOS on 25 April 1986; Barbados ratified UNCLOS on 12 October 1993.

2 Article 283(1) provides: 'When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.'

3 In this respect, the tribunal cited the *Lac Lanoux Arbitration* (*France v. Spain*), 24 ILR p. 101 (1957), at p. 128.

[4] Figure B16.1 also shows the equidistance lines between the States concerned, and thus the cut-off effect that Trinidad and Tobago maintained had been averted by the agreements.

[5] In reaching this conclusion, the tribunal followed the approach advocated by Prosper Weil in the *Canada v. France (St Pierre and Miquelon)* arbitration. At paragraph 11 of his dissenting opinion in that case, he observed that: 'A maritime projection defined by a certain distance from the coast is not effected only in a direction perpendicular to the general direction of the coastline and over the breadth of that coastline. It radiates in all directions, creating an envelope of ocean around the coastal front. In a word, it is radial'.

[6] See further discussion about the different approaches adopted by courts and tribunals to the adjustment of provisional equidistance lines in Part C, Chapter 3, below.

[7] CLCS.10.2008.LOS, <http://www.un.org/Depts/los/clcs_new/submissions_files/brb08/clcs10_2008e.pdf>.

[8] See <http://www.un.org/Depts/los/clcs_new/submissions_files/brb08/tto_aug2008.pdf>.

[9] Ibid, paras 2 and 3.

[10] Ibid, para. 4.

[11] Ibid, para. 4.

[12] Ibid, para. 6. Suriname and Venezuela also submitted (separate) *notes verbales* stating that Barbados's submission and any resulting recommendations by the CLCS were without prejudice to Barbados's delimitation with those States and any submissions those States may later make.

[13] See <http://www.un.org/Depts/los/clcs_new/submissions_files/tto49_09/tto2009executive_summary.pdf>.

[14] Recommendations of the Commission on the Limits of the Continental Shelf in regard to the revised Submission made by Barbados on 8 May 2008, <http://www.un.org/depts/los/clcs_new/submissions_files/brb08/brb08_summary_recommendations.pdf>.

[15] Recommendations of the Commission on the Limits of the Continental Shelf in regard to the revised Submission made by Barbados on 25 July 2011, <http://www.un.org/depts/los/clcs_new/submissions_files/brb_10rev2011/brb_10rev2011_summary_recommendations.pdf>.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 17 Guyana v. Suriname (Award of the Arbitral Tribunal, 17 September 2007)

From: A Practitioner's Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):

Coastal states — Continental shelf — Delimitation — Straits — Territorial sea — UNCLOS (UN Convention on the Law of the Sea)

(p. 439) 17 *Guyana v. Suriname* (Award of the Arbitral Tribunal, 17 September 2007)

Case Note: Delimitation of territorial sea, EEZ, and continental shelf boundaries—adjacent coastlines—role of equidistance—objections to jurisdiction and admissibility—navigation and security as 'special circumstances'—acquiescence and estoppel—exploitation of hydrocarbons in disputed area—duty to enter into provisional arrangements under UNCLOS Articles 74(3) and 83(3)—obligation to settle maritime boundary disputes by peaceful means

Citation: *Guyana v. Suriname*, Award, 17 September 2007, (2007) 139 *International Law Reports* 566

Institution: PCA, The Hague

Basis of jurisdiction: UNCLOS Part XV Section 2[1]

The tribunal: Nelson (President), Franck (appointed by Guyana), Smit (appointed by Suriname), Hossain, Shearer

Hydrographer appointed by the tribunal: David Gray

Applicable law: UNCLOS (Article 293)

Areas delimited: territorial sea; EEZ; continental shelf (up to 200M)

I. Introduction and Context

Guyana and Suriname are located on the north-eastern coast of South America, facing the Atlantic Ocean. Their coastlines are adjacent, separated by the Corentyne River, the west bank of which forms the land boundary between the two countries and which is navigable inland for about 50 miles.

(p. 440) Efforts to establish a border between the states pre-dated their independence (Guyana from the United Kingdom in 1966, and Suriname from the Netherlands in 1975). In 1936, the British and Dutch members of a mixed boundary commission identified a point on the west bank of the Corentyne River between British Guyana and Suriname ('1936 Point/Point 61') as the northern limit of the land boundary and concluded that the maritime boundary should run for three miles from that agreed point along an azimuth 10° east of true north (N 10° E) out to what was then the territorial sea limit. However, a draft treaty prepared by the United Kingdom reflecting the commission's conclusions was never adopted. Subsequent attempts by the United Kingdom and the Netherlands to agree a maritime delimitation treaty were unsuccessful.

Guyana and Suriname each granted a series of hydrocarbon concessions in the disputed area from around 1957 onwards. Each also claimed to have issued fishing licences, and to have undertaken maritime patrols, in the disputed area since at least 1977. In 1998, Guyana issued a concession for oil exploration to CGX Resources Inc., a Canadian company. Following seismic surveying by CGX over the entire concession area in 1999, Suriname demanded that Guyana cease all exploration activities in the disputed area, particularly to the east of the 10° line. In June 2000, an oil rig and service vessels engaged in drilling operations on behalf of CGX Resources were ordered to leave the disputed area by two Surinamese naval vessels (paras 150–1) (the so-called 'CGX incident') (see Figure B17.1).

The CGX incident prompted further discussions on the maritime boundary between Guyana and Suriname, but the two sides failed to reach agreement.

On 24 February 2004, in view of the lack of progress in negotiations, Guyana initiated arbitration proceedings under Part XV, Section 2 of UNCLOS (para.156). Guyana claimed that 'the single maritime boundary which divides the territorial seas and maritime jurisdictions of Guyana and Suriname follows a line [34° east of] true north for a distance of 200 nautical miles'. It further claimed that Suriname had violated UNCLOS, specifically Articles 74(3) and 83(3), by its conduct in the CGX incident. It claimed that Suriname's conduct also violated the UN Charter and general international law standards on the use of armed force, and requested the tribunal to award compensation of no less than US$33,851,776 for the injury caused (para. 157).

II. Positions of the Parties and Summary of the Award

a. Procedural issues: Suriname's objections to jurisdiction and admissibility; access to documents

Suriname made a series of preliminary objections on jurisdiction and admissibility. Suriname requested bifurcation of the proceeding so that its objections could be (p. 441)

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Figure B17.1: *Guyana/Suriname*: parties' claims and tribunal's award.

dealt with as a preliminary matter. The tribunal rejected Suriname's request on 18 July 2005 on the basis that, because the facts and arguments in support of Suriname's objections were 'in significant measure the same as the facts and arguments on which the merits of the case depend', it was procedurally inappropriate to rule on the preliminary objections first.

Suriname's objection to jurisdiction centred upon an argument that there was no agreement in relation to the 1936 Point/Point 61, and that the dispute resolution provisions of UNCLOS did not vest the tribunal with jurisdiction to determine (p. 442) land sovereignty issues (para. 176). Suriname accepted, however, that if there was an agreed boundary in the territorial sea, then the 1936 Point/Point 61 would be an adequate starting point and the tribunal would have jurisdiction over Guyana's boundary claim. The tribunal determined

that its findings had no consequence for the parties' land boundary, and therefore concluded that Suriname's jurisdictional objection did not arise (para. 308).

In response to a request by Guyana to adopt an order requiring both parties to refrain from interference with each other's attempts to obtain documents from non-parties, the tribunal appointed an independent expert to oversee access to certain archives in the Netherlands Ministry of Foreign Affairs. That expert proceeded to issue a number of recommendations that were subsequently adopted by the tribunal requiring Suriname to grant Guyana access to certain documents and allowing redaction by Suriname of certain documents.

b. Delimitation of the territorial sea

Guyana claimed that the territorial sea boundary should follow a 'historical equidistance line' along an azimuth of N34°E from the 1936 Point/Point 61 up to the twelve-mile limit (para. 288). Alternatively, Guyana argued that the conduct of the parties since 1966 constituted a special circumstance justifying adjustment to the equidistance line.

Suriname claimed that the territorial sea boundary should follow an azimuth of N 10° E from the 1936 Point/Point 61, which it said had come to be accepted historically 'through tacit or *de facto* agreement, acquiescence or estoppel'. Suriname also stated that its need to control and supervise shipping traffic in the approaches to the Corentyne River, which is under its sovereignty, constituted a special circumstance under Article 15 of UNCLOS. This was disputed by Guyana. Although it conceded that the Netherlands had been historically concerned to retain sovereignty over the navigable approaches of the Corentyne River in order to facilitate its administration of shipping activities, Guyana submitted that such considerations had diminished in importance by the 1960s. In any event, Guyana argued that they could not justify any variation of the equidistance line beyond three miles.

Suriname maintained that the N 10° E line should be extended up to the modern 12M territorial sea limit pursuant to the doctrine of intertemporal law. For this purpose, Suriname relied upon the 1978 judgment of the ICJ in the *Aegean Sea Continental Shelf* case, where the court had held that a Greek reservation to the 1928 General Act must be interpreted 'in accordance with the rules of international law as they exist today, and not as they existed in 1931'.[2]

(p. 443) The tribunal noted that UNCLOS Article 15 'places primacy on the median line as the delimitation line between the territorial seas of opposite or adjacent States' (para. 296). In the absence of any evidence of historic title for the purposes of Article 15, the tribunal focused attention on whether there were any special circumstances that might justify a departure from the median line (paras 297–8). The tribunal noted that international courts and tribunals have not been constrained by a finite list of special circumstances. Claims of special circumstances were therefore to be assessed 'on a case-by-case basis, with reference to international jurisprudence and state practice' (paras 302–3). It cited the commentary accompanying the International Law Commission's proposals on territorial sea delimitation[3] for the proposition that navigational interests could constitute special circumstances (para. 301), and endorsed the *Beagle Channel* arbitral tribunal's statement that factors such as 'convenience, navigability, and the desirability of enabling each party so far as possible to navigate in its own waters' should be taken into account in the delimitation (para. 305).[4]

The tribunal concluded that the evidence before it demonstrated an 'established practice of navigation' (para. 306) and 'Suriname's control over the approaches to the Corentyne River' (para. 313). Together, these constituted special circumstances requiring adjustment of the median line over the first three miles of the boundary (para. 306). The tribunal thus determined that the N 10° E line would form the first leg of the territorial sea boundary,

from the 1936 Point/Point 61 up to three miles (para. 307). This first leg of the boundary is the line between points 1 and 2 in Figure B17.2.

The tribunal then turned to delimit the remainder of the territorial sea boundary, following the parties' extension of their territorial seas from 3M to 12M (in 1977 and 1978, respectively). The tribunal noted that 'the question of whether and how, in the absence of an agreement to do so, a delimitation should be extended from the previous limit of territorial seas to a newly established limit, does not appear to have engaged the attention of States, courts or commentators' (para. 311).

The tribunal was unpersuaded by Suriname's intertemporal law argument to the effect that the N 10° E line should be extended up to the modern 12M limit. The tribunal observed that the relevance of navigational considerations and Surinamese control over the approaches to the Corentyne River diminished seaward of 3M (para. 314). The tribunal therefore interposed a 'gradual transition' from the 3M to the 12M points, by way of a straight line drawn across the shortest distance between the seaward terminus of the N 10° E line and the starting point of the line delimiting the parties' EEZs and continental shelves (para. 323). The second leg of (p. 444)

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Figure B17.2: *Guyana/Suriname*: parties' claims and tribunal's award (inshore section).

the territorial sea boundary delimited by the tribunal is the line between points 2 and 3 in Figure B17.2.

c. Delimitation of the EEZ/continental shelf

Guyana and Suriname agreed that the tribunal should delimit a single maritime boundary over the EEZ and continental shelf. Guyana argued for delimitation by (p. 445) way of what it called the 'equitable principles/relevant circumstances rule'. It submitted that its 'historical equidistance line' along an azimuth of N 34° E reflected the parties' historical acceptance of equidistance. Guyana contended that the relevant coasts for the purposes of the delimitation were the coastlines between the outermost points along the baseline controlling the direction of the equidistance line out to 200M.

Suriname rejected an equidistance-based approach and argued that the single maritime boundary should instead be delimited by way of a bisector drawn between the parties' coastal fronts. It argued that the resulting extension of its N 10° E line reflected the 'geographical reality' of the parties' coastal relationship. In contrast to Guyana, Suriname

argued that the relevant coasts for the delimitation were the coasts that faced onto, or abutted, the area to be delimited.

The tribunal acknowledged that delimitation of a single maritime boundary over EEZ and continental shelf areas would avoid the 'difficult practical problems that could arise were one party to have rights over the water column and the other rights over the seabed and subsoil below that water column' (para. 334). The tribunal adopted a two-stage approach to delimitation of the single maritime boundary: (1) draw a provisional equidistance line; and (2) consider whether there are any special circumstances requiring adjustment of that line in order to achieve an equitable solution (para. 335). The tribunal noted that this approach reflects the modern jurisprudence of arbitral tribunals and the ICJ in relation to the delimitation of both opposite and adjacent coasts (paras 335–40).[5]

The tribunal agreed with Guyana's argument that the relevant coasts were those that generated the complete course of the provisional equidistance line out to 200M. The tribunal considered this approach 'logical and appropriate' (para. 352).

The parties agreed that coastal geography was of 'fundamental importance', but each argued that different geographical features should influence the delimitation. Suriname argued that a 'cut-off effect' was caused by what it described as its concave coastline and Guyana's convex coastline, with the result that the equidistance line violated the principle of non-encroachment. Guyana claimed that it was prejudiced by a purported 'hypersensitivity of the provisional equidistance line'. In particular, it highlighted the effects on the equidistance line of the Surinamese headland at Hermina Bank.

The tribunal observed that the area of delimitation presented no 'geographical peculiarities'. Accordingly, it rejected Suriname's use of a bisector-based methodology (para. 372). It noted that the parties had agreed that the coastal geography in the disputed area was 'unremarkable' (para. 375). It concluded that the (p. 446) geographical configuration of the relevant coastlines did not justify any adjustment of the provisional equidistance line in order to achieve an equitable solution (para. 377).

Guyana argued that the historic conduct of the parties was relevant to the delimitation. It took the position that the parties' oil concession practice, dating back nearly fifty years, reflected a *de facto* pattern of acceptance of its proposed N 34° E line. The tribunal noted, however, that the maritime delimitation jurisprudence reveals a 'marked reluctance of international courts and tribunals to accord significance to the oil practice of the parties in the determination of the delimitation line' (para. 390). It cited the conclusion of the ICJ in the *Cameroon/Nigeria* case that 'oil concessions and oil wells are not themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account.'[6] The tribunal concluded that there was no evidence of any agreement between the parties on oil activity and that, accordingly, such practice could not be taken into account in the delimitation of the maritime boundary (para. 390).

The tribunal concluded that there were no relevant circumstances requiring adjustment of the provisional equidistance line (para. 392). The tribunal 'checked the relevant coastal lengths for proportionality' and observed that the ratio of relevant areas (51:49) was nearly the same as the ratio of coastal frontages (54:46).

The tribunal accordingly determined that the single maritime boundary up to 200M would follow the course of an unadjusted equidistance line. The resulting boundary is illustrated in Figure B17.1.

d. The CGX incident/UNCLOS Articles 74(3) and 83(3)

The tribunal moved on to address Guyana's claims that the CGX incident and subsequent actions by Suriname had violated Suriname's obligation under UNCLOS, the UN Charter, and general international law, giving rise to an action in damages.

Suriname raised five jurisdictional and admissibility objections to Guyana's claims. First, it claimed that the tribunal could not adjudicate alleged violations of the UN Charter or customary international law. The tribunal rejected this argument with reference to UNCLOS Article 293 and the observations of the International Tribunal for the Law of the Sea in the *Saiga* case about the applicability of the international law on the use of force to UNCLOS disputes (para. 406).[7] Second, Suriname claimed that since Guyana had not, prior to initiating the arbitration, (p. 447) informed Suriname of any alleged breach of UNCLOS, Guyana had failed in its obligation to 'exchange views' under Article 283. The tribunal rejected this argument because the CGX incident was 'incidental to the real dispute between the Parties' (para. 410). Third, it argued that Guyana's claims related to a coastal state's enforcement of sovereign rights with regard to non-living resources, and thus fell outside the scope of arbitration under Part XV of UNCLOS. The tribunal rejected this argument because its jurisdiction was limited only by 'the automatic limitations set out in [Article 297(3)(a)] and the optional limitations specified in Article 298' of UNCLOS, neither of which applied in this case (paras 413–16). Fourth, Suriname claimed that Guyana's conduct evidenced a lack of good faith and clean hands. The tribunal noted that the ICJ has declined to consider the application of the clean hands doctrine on multiple occasions and has never relied on it to bar admissibility of a claim (para. 418). The tribunal concluded that Guyana's conduct did not, in any event, satisfy the requirements of the clean hands doctrine (para. 421). Fifth, Suriname claimed that an incident engaging state responsibility in a disputed area rendered inadmissible any claim for reparations for violating UNCLOS and international law. The tribunal, citing the Eritrea-Ethiopia Claims Commission and the ICJ in *Cameroon/Nigeria*, rejected this objection because such an approach would significantly weaken the fundamental rule of international law prohibiting the use of force (paras 423–4).

Following extensive reference to the testimony of witnesses to the CGX incident (paras 432–8), the tribunal concluded that the conduct of Suriname amounted to an explicit threat of the use of force in contravention of UNCLOS, Article 2(4) of the UN Charter, and general international law (para. 439). The tribunal rejected Suriname's arguments that its conduct constituted reasonable and proportionate law-enforcement measures or lawful countermeasures. The tribunal observed that it is a well-established principle of international law that countermeasures may not involve the use of force (paras 441–6). However, in respect of the remedies sought by Guyana, the tribunal concluded that Guyana's request for an order precluding Suriname from resorting to further threats of force was sufficiently addressed by the tribunal's delimitation decision (para. 450). Further, the tribunal observed that Guyana had failed to prove its alleged damages, and that its claim for compensation should therefore be rejected on that ground also (para. 452).

Guyana and Suriname each claimed that the other had breached its obligations under UNCLOS Articles 74(3) and 83(3) to make every effort pending a final delimitation to enter into provisional arrangements of a practical nature and not to jeopardize or hamper the reaching of the final agreement. The tribunal observed that these two obligations 'simultaneously attempt to promote and limit activities in a disputed maritime area' (para. 459). It proceeded to analyze each obligation in turn.

The tribunal stated that the obligation to make every effort to enter into provisional arrangements was designed 'to promote interim regimes and practical (p. 448) measures that could pave the way for provisional utilization of disputed areas pending delimitation' (para. 460). It observed that the obligation included a duty to negotiate in good faith in pursuit of such objectives (para. 461). The tribunal concluded that Suriname's

conduct, particularly in relation to the CGX incident, had violated that obligation (para. 474). The tribunal concluded that Guyana had also violated that obligation by not seeking to engage Suriname in discussions concerning its exploratory drilling programme (para. 477).

Finally, the tribunal took up the issue whether either of the parties had breached its concomitant duty under Articles 74(3) and 83(3) to make every effort not to jeopardize or hamper the reaching of a final agreement. Consistent with jurisprudence on interim measures, particularly the *Aegean Sea* case,[8] the tribunal distinguished between 'activities of the kind that lead to permanent physical damage, such as exploitation of oil and gas reserves, and those that do not, such as seismic exploration' (para. 467). While the former would generally violate international law, the latter would not. Guyana's licensing programme fell into the former category (para. 477). Suriname's threat of force in response to Guyana's exploratory drilling also violated that provision (para. 484). The tribunal accordingly declared that both parties had violated their obligations under Articles 74(3) and 83(3) (but issued no other remedy).

III. Technical Considerations

The technical aspects of this case have been handled in an exemplary manner. As is customary, both parties appointed technical experts to provide advice and cartographic input; in addition, the tribunal appointed its own expert hydrographer.[9] Unusually in such cases, Guyana also submitted a separate report from an independent technical expert who was cross-examined as a witness during the oral proceedings.

The report of the tribunal's hydrographer is appended to the award and provides a detailed analysis of the methodology used for the selection of base points and the construction of the final equidistance line. The final line is precisely specified as a series of geodesic lines referred to WGS84. In addition, he arranged a site visit to resolve a dispute over the terminus of the land boundary.

The baselines for both States were taken from the low-water lines drawn on large-scale charts. The tribunal noted that the distance between the high- and low-water (p. 449) lines was as much as 3M. Guyana disputed one of Suriname's base points (S14) on Vissers Bank (see Figure B17.1), which it maintained was derived from an inaccurate chart produced since the commencement of the proceedings, also claiming that other charts and satellite imagery did not show it. The tribunal was not convinced by this argument and accepted Suriname's chart and base point.

The calculation of the provisional equidistance line presented no technical problems and there were no special or relevant circumstances that would justify an adjustment other than that based on historic conduct of the parties in the near-shore section. Because of the broad concavity formed by the two parties' coastlines, the equidistance line uses ten base points extending about 100M on each side of the land boundary terminus such that no one base point unduly influences the course of the line. The equidistance line therefore has a stable base—this is fairly unusual in cases of coastal adjacency.

IV. Significance of the Decision and its Contribution to International Law

The *Guyana/Suriname* case was the second maritime delimitation arbitral proceeding under Part XV of UNCLOS. Like the award in the earlier *Barbados/Trinidad & Tobago* case, the *Guyana/Suriname* award demonstrates the utility of Part XV of UNCLOS as a means of settling maritime delimitation disputes. The tribunal resolved the delimitation of territorial sea, EEZ, and continental shelf areas extending up to 200M—as well as related allegations of violation of UNCLOS, the UN Charter, and general international law—within a little over

three-and-a-half years. In doing so, the tribunal determined sovereignty over disputed maritime space extending over 31,600 square kilometres.

In its delimitation of the territorial sea boundary, the award confirms the 'primacy' of equidistance-based delimitation. This primacy is well established under Article 15 of UNCLOS and was to be reiterated just a few weeks later by the ICJ in its judgment in the *Nicaragua/Honduras* case (see Chapter 18).

The tribunal found two special circumstances requiring adjustment of the median line in the territorial sea: 'established practice of navigation' and 'Suriname's control over the approaches to the Corentyne River'. Both were founded in part upon the historic conduct of the parties. However, the tribunal also highlighted the contemporary importance of such factors in the administration of sovereignty by coastal states: 'in an age of increased security and safety concerns regarding international boundaries, certainly navigational concerns have been imbued with greater significance'. This aspect of the award represents a relatively rare modern example of a tribunal identifying non-geographical special circumstances in maritime delimitation.

(p. 450) In its delimitation of the EEZ and the continental shelf boundary, the award similarly confirms the existence of a 'presumption in favour of equidistance', whether the coasts of the states involved are in a relationship of oppositeness or adjacency. In terms that echo the ICJ's judgment in *Gulf of Maine*, the award also confirms the legal and practical advantages of adopting single maritime boundary delimitation over EEZ and continental shelf areas. As a matter of practice, divergent EEZ and continental shelf boundaries can only operate effectively where the neighbouring states have put in place a detailed legal regime for the exercise of co-existing jurisdiction between them.[10]

In contrast to its approach to the territorial sea boundary, the tribunal focused largely upon 'neutral criteria of a geographic character' when considering whether any special circumstances should lead to adjustment of the equidistance line in the EEZ and continental shelf. This approach accords with modern maritime delimitation jurisprudence, as does the tribunal's finding that the parties' historic oil practice was irrelevant in the absence of evidence of any long-term *modus vivendi* or agreement regarding such practice.

The tribunal identified the relevant coasts between Guyana and Suriname as those that 'generate the complete course of the provisional equidistance line'. The tribunal rejected Suriname's submission that the relevant coasts were those that 'face on to or abut the area to be delimited'. In doing so, the tribunal implicitly rejected the approach adopted less than twelve months earlier in the *Barbados/Trinidad and Tobago* award. In that case, the UNCLOS tribunal concluded that 'what matters is whether [coastal frontages] abut as a whole upon the disputed area by a radial or directional presence relevant to the delimitation, not whether they contribute base points to the drawing of an equidistance line'.[11]

The parties did not invite the tribunal to delimit their maritime areas beyond 200M. Each expressly reserved its rights under Article 76(4) of UNCLOS. Therefore, the tribunal's delimitation ends at the point that is equidistant from the 200M limit of the EEZs of Guyana and Suriname (referred to in the award as 'point 20'). Subsequent to the award, Suriname made a submission to the CLCS in December 2008. Guyana provided preliminary information to the CLCS indicative of its own outer continental shelf limits beyond 200M in May 2009, followed by a full submission in September 2011.[12] On 30 March 2011, the (p. 451) CLCS issued its recommendation in connection with Suriname's submission, confirming the legal entitlement of Suriname to delineate its continental shelf beyond 200M.[13] In accordance with the CLCS's mandate, its recommendation is without prejudice to delimitation. Therefore, as and when the CLCS issues a recommendation in connection

with Guyana's submission, the two states will need to resolve the outstanding delimitation of the outer continental shelf extending beyond 'point 20'.

The tribunal's finding that it could adjudicate claims of alleged violations of the UN Charter and general international law in the context of a delimitation dispute underscores the broad nature of arbitral jurisdiction conferred under Part XV of UNCLOS. Although the tribunal dismissed Guyana's claim for damages in respect of Suriname's unlawful threat of the use of force, it did leave open the possibility of successful damages claims in future maritime delimitation disputes if such damages are sufficiently 'proven'.

The award includes a detailed analysis of the extent of neighbouring States' obligations under UNCLOS Articles 74(3) and 83(3) pending delimitation of EEZ or continental shelf boundaries. The award's *dicta* about the distinction between exploratory drilling and other activities that cause a physical change to the marine environment (which it found impermissible) and seismic exploration (which it found permissible) are significant. The tribunal was at pains to emphasize that '[not] all exploratory activity should be frozen in a disputed area in the absence of a provisional arrangement'. Modern seismic exploration techniques can provide coastal states with an effective means of assessing the potential natural resources of the continental shelf. Such techniques can inform a state of those parts of a disputed area that are potentially rich in natural resources. Unilateral seismic exploration could, therefore, in some circumstances, significantly alter the status quo as regards the comparative levels of knowledge of two neighbouring states about the value of all (or part) of a disputed area. Such an imbalance in knowledge between two states could, in some cases, make a final, equitable delimitation agreement more difficult to obtain. Seismic exploration by one coastal state might also interfere with another coastal state's exclusive and inherent sovereign rights over the resources of its continental shelf, as set out in UNCLOS Article 77.

The tribunal observed that Suriname could have invoked compulsory dispute resolution under Part XV of UNCLOS and sought provisional measures to put an end to Guyana's drilling activities in the disputed area. The tribunal thereby provided guidance to any coastal state that is faced with unilateral drilling by a neighbour in a disputed area. However, according to the tribunal's analysis, (p. 452) consistent with the earlier *Aegean Sea* case, provisional measures would not be available in the case of seismic exploration by a neighbour that did not involve drilling. The continued distinction between seismic exploration and drilling appears artificial. Also, any form of seismic work will often have the effect of aggravating a dispute.[14]

Footnotes:

1 Guyana ratified UNCLOS on 16 November 1993; Suriname ratified UNCLOS on 9 July 1998.

2 *Aegean Sea Continental Shelf case (Greece v. Turkey)*, Judgment, ICJ Reports 1978, p. 3, at p. 33, para. 80.

3 See [1952] 2 *YB International Law Commission* 33, UN Doc. A/CN.4/53.

4 *Beagle Channel (Argentina v. Chile)*, 52 ILR 93 (1977). For a review and analysis of the case, see Part, B Chapter 2 above.

5 See further Part A II 'The Standard Methodology' above.

6 *Cameroon/Nigeria*, para. 304. For a review and analysis of the case, see Section B, Chapter 15 above.

[7] *M/V 'Saiga' (No. 2)* (*St Vincent v. Guinea*), 1999 ITLOS Rep. 7.

[8] *Aegean Sea Continental Shelf* case (*Greece v. Turkey*), Order, 1978 ICJ Rep. 3, para. 30.

[9] The tribunal also appointed a separate independent expert to help with the retrieval of archival documents from the Netherlands' Foreign Ministry archives, to which Guyana had been denied access by Suriname.

[10] For examples of such consensual arrangements, see Part A, Chapter 3, 'b. Novel negotiated outcomes…' in section I, above.

[11] *Barbados/Trinidad and Tobago*, para. 331. This approach reflects the majority view and was endorsed more recently by the Annex VII tribunal in the *Bangladesh/India* case. It is more consistent with the broad principle that coastal geography should play a dominant role in delimitation. Nevertheless, the approach taken by the *Guyana/Suriname* tribunal had been adopted in the earlier *Jan Mayen* case.

[12] Trinidad and Tobago also filed a submission to the CLCS in respect of the same area in May 2009.

[13] For further information, see <http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm>.

[14] For a recent example of provisional measures being prescribed under UNCLOS to suspend certain oil-drilling activities in a disputed area, see the *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire)* (Order for Provisional Measures) (Special Chamber of the International Tribunal for the Law of the Sea), Case No. 23, 25 April 2015, summarized in Part C, Chapter 3, (4)(a) below. The merits phase of that delimitation dispute is ongoing at the time of writing.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 18 Nicaragua v. Honduras (Judgment of the International Court of Justice, 8 October 2007)

From: A Practitioner’s Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):

Coastal states — Delimitation — Straits — Territorial sea — UNCLOS (UN Convention on the Law of the Sea)

(p. 453) 18 *Nicaragua v. Honduras* (Judgment of the International Court of Justice, 8 October 2007)

Case Note: Territorial sea, EEZ, and continental shelf delimitation—convex and highly unstable adjacent coastlines—disputed islands—*uti possidetis juris* principle—traditional maritime boundary—bisector methodology—interests of third States

Citation: *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua v. Honduras*), Judgment, 8 October 2007, *ICJ Reports* 2007, p. 659

Institution: ICJ

Basis of jurisdiction: American Treaty on Pacific Settlement (Pact of Bogotá), Article XXXI; ICJ Statute, Article 36(2)

The court: *Judges* Higgins (President), Al-Khasawneh (Vice-President), Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, *Judges ad hoc* Torres Bernárdez (appointed by Honduras), Gaja (appointed by Nicaragua)

Applicable law: UNCLOS[1] (Article 293)

Areas delimited: territorial sea; EEZ; continental shelf (within 200M)

I. Introduction and Context

This case concerned delimitation of the maritime boundary between Nicaragua and Honduras in the Caribbean Sea. Nicaragua and Honduras have adjacent coastlines, separated by the River Coco, and are located in the south-western (p. 454) part of the Caribbean Sea.[2] The area is partially enclosed to the north and east by the islands of the West Indies, and bounded to the south and west by the South and Central American landmass. The geographical context is illustrated in Figure B18.1.

The coastline on either side of the land boundary abutting the Caribbean Sea is markedly convex in shape, roughly forming a right angle that juts out to sea. The River Coco is the longest river of the Central American isthmus. Its mouth is a typical delta, which forms a protrusion of the coastline, forming Cape Gracias a Dios. The coast in the region of Cape Gracias a Dios is highly unstable. It is characterized by long stretching sandy barrier islands or spits, which are the product of continuous accretion of river sediment. Those islands and spits migrate constantly, leading the court to conclude that 'both the delta of the River Coco and even the coastline north and south of it show a very active morpho-dynamism' (para. 32).

Efforts by Nicaragua and Honduras to settle their land boundary date back to the mid nineteenth century. In 1906, King Alfonso XIII of Spain handed down an arbitral award identifying the extreme eastern limit of the land boundary at the mouth of the River Coco. Following a challenge to the award by Nicaragua, the parties were referred to mediation by the Council of the Organization of American States (OAS) and ultimately agreed, in 1958, to submit their dispute relating to the award to the ICJ. The ICJ found that the arbitral award was valid and binding.[3] The Inter-American Peace Committee subsequently established a Mixed Commission to oversee implementation of the arbitral award. The Mixed Commission determined that the land boundary would begin at the mouth of the River Coco, at 14° 59.8'[4] N latitude and 83° 08.9' W longitude.

Bilateral negotiations related to delimitation of the maritime boundary started in 1977. Between 1979 and 1982, Honduras dispatched a number of diplomatic notes to Nicaragua protesting arrests by Nicaragua of Honduran fishing vessels to the north of the 15th parallel. Honduras stated in one of those notes that the 15th parallel had been 'traditionally recognised by both countries to be the dividing line in the Atlantic Ocean'. In response, Nicaragua stated that 'Nicaragua (p. 455)

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Figure B18.1: *Nicaragua/Honduras*: regional context.

(p. 456) has not recognized any maritime frontier with Honduras in the Caribbean Sea'. Incidences of fishing arrests and associated diplomatic exchanges continued into the 1990s.

On 2 August 1986, Honduras concluded a maritime boundary treaty with Colombia in the Caribbean Sea, the western part being defined along the parallel of 14° 59' 8".[4] Nicaragua protested by way of a diplomatic note sent on 8 September 1986.

In 1996, the parties established an ad hoc Commission to negotiate an interim agreement for a provisional common fishing zone. Honduras proposed a zone extending 3M on either side of the 15th parallel; Nicaragua proposed a zone between the 15th and 17th parallels. Each side rejected the other's proposal.

Nicaragua claimed that further negotiations between the parties 'became impossible' on 28 November 1999, when Nicaragua learned of Honduras's decision to ratify its 1986 treaty with Colombia. Nicaragua instituted proceedings against Honduras before the Central American Court of Justice the following day. In its 2001 judgment, that court concluded that, by ratifying its 1986 treaty with Colombia, Honduras had infringed the 'territorial patrimony of Central America', contrary to the Tegucigalpa Protocol to the Charter of the OAS.

On 8 December 1999, Nicaragua filed a parallel application instituting proceedings against Honduras and the ICJ in respect of the maritime delimitation dispute. Nicaragua requested the court to:

> …*determine* the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras, in accordance with equitable principles and relevant circumstances recognised by general international law as applicable to such a delimitation of a single maritime boundary.

II. Positions of the Parties and Summary of the Award

a. Procedural issues: admissibility of claims relating to sovereignty over islands in the disputed area; requests by third States for copies of pleadings and other related documents

During the oral proceedings, Nicaragua for the first time requested the court to decide which State exercised sovereignty over a number of small islands located in the disputed area, to the north of the 15th parallel. The relevant features are illustrated in Figure B18.2.

The court observed that no claim relating to sovereignty over the islands had been presented in Nicaragua's application or in the parties' written pleadings. The court identified the critical question, therefore, as being whether the new claim 'can be (p. 457)

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Figure B18.2: *Nicaragua/Honduras*: court's judgment.

(p. 458) considered as included in the original claim in substance' (para. 110).[5] The court noted that, dating back to the *North Sea Continental Shelf* cases, it had emphasized the principle that 'the land dominates the sea' (para. 113). Accordingly, in order to complete its task of delimiting the maritime boundary, the court would first have to determine which State had sovereignty over the islands located in the disputed area. Thus, the new claim relating to sovereignty was implicit in, and arose directly out of, Nicaragua's application. The new claim was accordingly admissible (paras 114–15).

Colombia (by letter of 22 May 2001), Jamaica (by letter of 6 May 2003), and El Salvador (by letter of 31 August 2004) requested to be furnished with copies of the pleadings and documents submitted by the parties. Having ascertained the views of the parties, the court decided to grant the requests of Colombia and Jamaica, but not to grant the request of El Salvador (para. 9).

b. The 'critical date'

The court explained the significance of the 'critical date' in relation to the maritime boundary and land sovereignty aspects of the dispute as follows:

> In the context of a maritime delimitation dispute more of a dispute related to sovereignty over land, the significance of a critical date lies in distinguishing between those acts performed *à titre de souverain* which are in principle relevant for the purpose of assessing and validating *effectivés*, and those acts occurring after such critical date, which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute,

could have taken those actions strictly with the aim of buttressing those claims (para. 117).

The court distinguished between two different critical dates: first related to the attribution of sovereignty over the islands; the second related to the issue of maritime delimitation. The court noted that Nicaragua had only laid claim to title over the islands north of the 15th parallel for the first time in its Memorial of 21 March 2001. Therefore, the critical date in relation to that aspect of the dispute was 2001. By contrast, the maritime boundary dispute had crystallized earlier, in 1982, upon the exchange of diplomatic notes in which Honduras cited the existence of a traditional boundary along the 15th parallel and Nicaragua denied the existence of any such boundary[6] (paras 126–31).(p. 459)

c. Sovereignty over islands in the disputed area

The four principal disputed island features were Bobel Cay, Savanna Cay, Port Royal Cay, and South Cay. All were located beyond the territorial sea limits of Nicaragua and Honduras, and to the south of Nicaragua's proposed maritime boundary line. The parties agreed that each was above water at high tide, and thus constituted an island for the purposes of Article 121 of UNCLOS. Each party confirmed to the court that it did not claim for the islands any maritime areas beyond a territorial sea. In relation to a fifth feature, Logwood Cay, the parties disputed whether or not it remained above water at high tide. In light of the 'uncertainty' presented by the available evidence, the court declared that it was 'not in a position' to make a determinative finding of sovereignty over that feature (para. 144).[7] Given the geomorphological instability and constantly changing conditions in the mouth of the River Coco, the court declined to make any finding as to sovereignty over certain islands in that area (para. 145).The court observed that the principle of *uti possidetis juris* may, in principle, apply to offshore possessions (para. 156). However, following close analysis of the evidence presented, the court concluded that the principle was inapplicable to the four disputed features, which were small islands located considerably offshore. The court found no evidence of relevant colonial *effectivités*, remarking that the islands 'lacked any particular economic or strategic significance' (para. 166).

Turning to post-colonial *effectivités*, the court accorded legal significance to Honduran exercises of criminal and civil law enforcement activity, immigration control, fisheries regulation, and limited public works. The court concluded that the *effectivités* invoked by Honduras evidenced an 'intention and will to act as sovereign' and constituted a 'modest but real display of authority' over the four islands.[8] The court further noted that the Honduran activities concerned could be 'assumed to have come to the knowledge of Nicaragua and did not elicit any protest on the part of the latter'. By contrast, with regard to Nicaragua, the court found no proof of intention or will to act as sovereign and no proof of any actual exercise or display of authority (para. 208).

Therefore, the court concluded that Honduras had sovereignty over the four disputed islands on the basis of post-colonial *effectivités* (para. 227).(p. 460)

d. Delimitation of the maritime boundary

Nicaragua claimed that, because of the 'particular characteristics' of the coastal geography around Cape Gracias a Dios, an equidistance-based delimitation was technically 'not feasible'. Nicaragua instead proposed a method of delimitation consisting of 'the bisector of the angle produced by constructing lines based upon the respective coastal frontages and producing extensions of these lines'. Nicaragua calculated its proposed bisector by

reference to lines reflecting the general direction of the Nicaraguan coast and the general direction of the Honduran coast.

Honduras agreed that an equidistance-based delimitation was inappropriate in the circumstances of the case. Honduras claimed the existence of a 'traditional maritime boundary', which had its origins 'in the principle of *uti possidetis juris* and which was firmly rooted in the practice of both Honduras and Nicaragua and confirmed by the practice of third States'. It placed particular emphasis on oil concession activity, fisheries licences, and naval patrols in the disputed area, and argued that the parties had reached a 'tacit understanding' about the course of the maritime boundary, which constituted an 'agreement' delimiting a single maritime boundary for the purposes of Articles 15, 74, and 83 of UNCLOS. Honduras maintained that the location of the tacitly agreed boundary had been confirmed by the practice of third-party States, and that the delimitation of maritime boundaries using lines of latitude and longitude constituted a 'regional practice'.

Nicaragua responded that the principle of *uti possidetis juris* had 'nothing to do with maritime matters', and rejected Honduras's arguments of tacit agreement, acquiescence, and recognition resulting from long-established practice. It stated that there was no settled boundary and that Honduras had not claimed the existence of a boundary along the 15th parallel until 1982, whereupon Nicaragua had promptly rejected that claim.

The court observed that the principle of *uti possidetis juris* might, in certain circumstances, such as in connection with historic bays and territorial seas, play a role in maritime delimitation. However, Honduras had made 'no persuasive case' as to why the principle should apply in the present case. Honduras had merely asserted that the Spanish Crown tended to use parallels and meridians to draw jurisdictional divisions, without presenting any evidence that Spain had done so in this particular case (para. 232). The court thus rejected Honduras's claim based upon a 'traditional maritime boundary'.

The court similarly rejected Honduras's claims of a maritime boundary based upon 'tacit agreement'. It noted that:

> Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed.…Even if there had been a provisional line found convenient for a period of time, this is to be distinguished from an international boundary (para. 253).(p. 461)

The court observed that although the 15th parallel appeared to have had 'some relevance' in the conduct of the parties (such as in connection with certain oil concessions and fisheries regulation), the conduct concerned had spanned a short period of time and was 'not sufficient' to conclude that there was a legally established maritime boundary (para. 256). Of particular significance was a 1982 diplomatic note from the Foreign Minister of Honduras, which had concurred with the Nicaraguan Foreign Ministry that the maritime boundary had not been legally delimited. There had, therefore, been no tacit agreement in 1982 and, *a fortiori*, there was no such agreement later (para. 258).

The court observed that the equidistance method is 'widely used in the practice of maritime delimitation', in particular 'because of its scientific character and the relative ease with which it can be applied'. However, the court continued: 'the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate' (para. 272).

The court noted that neither party had, as its main argument, called for an equidistance-based delimitation. Nicaragua, in its pleadings, presented a 'fan' of equidistance lines based on a variety of historical satellite images to demonstrate the instability of the coast. Honduras had, at the close of its oral argument, presented a provisional equidistance line constructed from a pair of base points fixed at the low-water line of the easternmost limits of the mainland of Honduras and Nicaragua, at Cape Gracias a Dios. Honduras had identified those base points using a recent satellite photograph (para. 276). The court observed that the Cape was a 'sharply convex territorial projection abutting a concave coastline on either side to the north and south-west'. Consequently, the two base points assumed 'a considerable dominance' in constructing the equidistance line and, given the close proximity of the base points to each other, 'any variation or error in situating them would become disproportionately magnified in the resulting equidistance line'. Further, the large volumes of sediment deposited from the River Coco caused the coastline around the Cape to exhibit 'a very active morpho-dynamism', with the result that continued accretion at the Cape 'might render any equidistance line so constructed today arbitrary and unreasonable in the near future' (para. 277). The court added that these geographical and geological difficulties were further exacerbated by the absence of viable base points claimed or accepted by the parties themselves at Cape Gracias a Dios (para. 278). Indeed, the parties were even in disagreement as to which of them had title over the unstable islands forming the mouth of the River Coco.[9]

(p. 462) In light of all this, the court concluded that 'in the current case it is impossible to identify base points and construct a provisional line for the single maritime boundary' (para. 280). Turning to Article 15 of UNCLOS, the court continued:

> Nothing in the wording of Article 15 suggests that geomorphological problems are *per se* precluded from being 'special circumstances' within the meaning of the exception, nor that such 'special circumstances' may only be used as a corrective element to a line already drawn.

The court noted that the text of Article 15 is 'virtually identical' to the text of Article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone. The court observed that the genesis of the text of Article 12 demonstrated that it had been envisaged in the 1950s that a special configuration of the coast might require something other than an equidistance-based approach to territorial sea delimitation. The court concluded that it found itself 'within the exception provided for in Article 15 of UNCLOS, namely facing special circumstances in which it cannot apply the equidistance principle' (para. 281).

The court thus proceeded to consider possible alternative methods of delimitation of the single maritime boundary. It noted that the use of a bisector line—the line formed by bisecting the angle created by the linear approximations of coastlines—has proved to be a viable substitute method in certain circumstances where equidistance is not possible or appropriate. Indeed, in instances where individual base points are inherently unstable, the bisector method could be seen as an approximation of the equidistance method (para. 287).

In order to 'be faithful to the actual geographical situation', the court observed that the method of delimitation should seek a solution by reference to the States' 'relevant coasts'. The Court compared the equidistance and bisector methods of delimitation in the following terms:

> The equidistance method approximates the relationship between two Parties' relevant coasts by taking account of the relationships between designated pairs of base points. The bisector method comparatively seeks to approximate the relevant coastal relationships, but does so on the basis of the macro-geography of a coastline as represented by a line drawn between two points on the coast. Thus, where the

bisector method is to be applied, care must be taken to avoid ‘completely refashioning nature’ (*North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p. 49, para. 91) (para. 289).

Nicaragua maintained that the relevant coastal front of each party was constituted by its entire Caribbean coastline. Honduras, by contrast, maintained that the relevant coastal front for the delimitation ran ‘from Cape Falso in the north, and then south-westerly to Laguna Wano in a configuration that focuses exclusively on the nearly symmetrical projection of Cape Gracias a Dios’ (para. 293). The parties’ respective positions are illustrated in Figure B18.3.(p. 463)

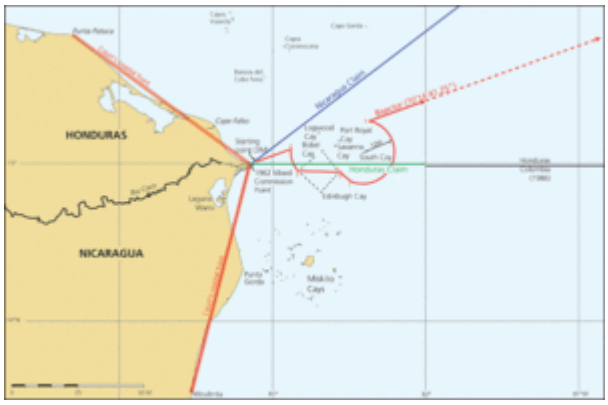

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Figure B18.3: *Nicaragua/Honduras*: parties’ claims.

(p. 464) The court observed that Nicaragua’s proposed relevant coasts would ‘cut off’ a significant portion of Honduran territory to the north of its line, and thus would give significant weight to Honduran territory that was far removed from the area to be delimited (para. 295). Whilst Honduras’s proposed relevant coasts from Cape Falso to Punta Gorda did face the disputed area, they presented ‘quite a short façade (some 100 km) from which to reflect a coastal front more than 100M out to sea, especially taking into account how quickly to the northwest the Honduran coast turns away from the area to be delimited after Cape Falso’ (para. 296) (see Figure B18.3).

The court concluded that the front extending from Punta Patuca to Wouhnta would avoid the problem of cutting off Honduran territory and at the same time provide a coastal facade of sufficient length to account properly for the coastal configuration in the disputed area. The court therefore adopted these fronts as the relevant coasts for the purposes of drawing the bisector (para. 298). The resulting bisector boundary line follows an azimuth of 70° 14’ 41.24", starting at the Mixed Commission’s point established in 1962. The relevant coasts and bisector boundary as delimited by the court are illustrated in Figure B18.2.

The court turned to the question of delimitation around the islands located just north and south of the 15th parallel. Honduras argued that each should be accorded a 12M territorial sea, except where this would overlap with the territorial sea of the other party. Nicaragua argued that the islands should be enclaved within a 3M territorial sea, in order to prevent the court from giving Honduras a ‘disproportionate amount of the maritime areas in dispute’. The court acknowledged that Honduras had the right, under Article 3 of UNCLOS, to declare a 12M territorial sea and accordingly declared that the islands would be accorded such a territorial sea, subject to any overlap with the territorial sea of the nearby Nicaraguan island, Edinburgh Cay (para. 32).

The court observed that drawing a provisional equidistance line for the territorial sea delimitation between the opposite-facing islands of Nicaragua's Edinburgh Cay and Honduras's Bobel and South Cays was unproblematic. Further, there were no legally relevant 'special circumstances' in the area that would warrant adjusting the provisional median line (para. 304). Accordingly, the court delimited an equidistance line boundary between the islands connecting with the 12M enclave line, the course of which is illustrated in Figure B18.2.[10](p. 465)

e. Starting-point and endpoint of the maritime boundary

Nicaragua noted that, since the Mixed Boundary Commission had determined the starting point of the land boundary in 1962, the mouth of the River Coco had moved more than 1 mile north and east due to the accretion of sediments. Consequently, the point plotted by the Commission was now located approximately 1 mile landwards from the actual mouth of the river. Nicaragua stated that such instability would continue in the 'predictable future', and proposed that the starting point of the maritime boundary should be set 3M out to sea from the actual mouth of the river, at a point located on its bisector line.

For broadly the same reasons, Honduras accepted[11] a starting point 3M seaward from the starting point established by the Mixed Boundary Commission, located on its 15th parallel line.

The court noted the parties' mutual preference for a starting point located 3M seaward from the mouth of the River Coco, and their mutual intention to agree a negotiated solution for the first 3M (para. 307). The court recalled judicial practice to the effect that maritime delimitations may begin at some distance out to sea in cases where there is an uncertain land boundary terminus, citing the *Guinea v. Guinea-Bissau* case as an example.[12] The court accordingly set the starting point of the maritime boundary at a point located 3M out to sea from the point identified by the Mixed Commission in 1962, along the azimuth of the court's bisector line. The remaining 3M of the boundary would be left to be negotiated by the parties (para. 311).

In connection with the endpoint of the maritime boundary, the court recalled that it would not rule on an issue when in order to do so the rights of a third party that is not before it have first to be determined (para. 312).[13] The court noted, *inter alia*, the joint development area established by Jamaica and Colombia pursuant to their 1993 bilateral treaty (see Figures B18.1 and B18.3). The court resolved not to draw any delimitation line that might prejudice the rights of those States (para. 317). Accordingly, the court declared that the maritime boundary between Nicaragua and Honduras extends beyond the 82nd meridian until it reaches the area where the rights of certain third States may be affected. However, the court stated that in no case may its boundary line be interpreted as extending more than (p. 466) 200M, since any claim of continental shelf rights beyond 200M must be made in accordance with Article 76 of UNCLOS and reviewed by the CLCS. Notably, neither party had mentioned any delimitation beyond 200M in its submissions to the court.

III. Technical Considerations

The calculation of the equidistance line in this case was especially problematic. Not only was the coast sharply convex such that the nearest base points for the construction of the equidistance line could only be at the land boundary terminus, but these points were extremely unstable due to the active sedimentation at the mouth of the river. Both parties presented historical data, including historical satellite images dating back to 1972, aerial photography, and archive charts that demonstrated this instability.

Construction of a bisector is not in itself difficult provided the coastal directions are specified. In this case, the court followed the method advocated by Nicaragua, but redefined the coastal lengths and directions used. In particular, the court criticised Nicaragua's proposed coastal front for Honduras running from Cape Gracias a Dios to the Guatemalan border, as it would cut off a significant portion of Honduran territory lying north of this line (see Figure B18.3).

The quotation of the angle of the bisector to a precision of 0.01 seconds is technically spurious. This equates to a difference of 2cm at 200M. As a comparison, charting accuracy is usually quoted to 0.2mm at chart scale, or for a 1:100,000 chart this would be an accuracy of 20 metres or approximately 1 second, giving a precision for a bisector of about 1 second.

In the area of overlapping 12M territorial seas, a small section of the award is defined as a median line between Nicaragua's Edinburgh Cay and the three southernmost Honduran cays, Bobel, Port Royal, and South. As all of these cays are similar in size and distance from the mainland, a strict median line was the appropriate technical solution. Notably in this area Honduras gained areas south of the 15th parallel[14] which it had never claimed. This contrasts with the Award in *Guinea/Guinea-Bissau* where the territorial sea of the Guinean Island of Alcatraz was restricted to the parallel of Guinea's claim line and Guinea did not claim a 12M territorial sea around the feature.

(p. 467) The 12M enclave for the small islands was calculated using single points for the islands themselves. There are extensive charted reefs surrounding these cays, especially to the north-east, such that the cays have not been awarded a full 12M territorial sea as measured from the charted edge of the reef as allowed under Article 6 of UNCLOS.

As is customary in ICJ cases, the identity of the court's expert is not public knowledge, and there is no technical report annexed to the judgment. The coordinates are not referred to any datum, although the attached (illustrative) sketch-maps are referred to WGS84. The type of line is not specified, but as identical coordinates are specified in the *dispositif* for different parts of the line it must be assumed to be a loxodrome.

IV. Significance of the Decision and its Contribution to International Law

The *Nicaragua/Honduras* case is a leading modern example of the rejection of an equidistance/special circumstances approach to maritime delimitation in favour of an alternative methodology that was better suited to the highly unusual geographical and geomorphological context of the case. The court's judgment is particularly notable in this respect since it followed a series of cases, stretching back more than a decade, in which both the court and arbitral tribunals had embraced the equidistance/relevant circumstances approach and the drawing of a provisional equidistance line as the first step in the delimitation of single-purpose maritime boundaries. Consistent with that jurisprudence, less than a month before the court's judgment, the UNCLOS arbitral tribunal in the *Guyana/Suriname* case noted the 'primacy' of equidistance lines in the delimitation of territorial seas under Article 15 of UNCLOS, and the 'clear role' accorded to equidistance in the delimitation of EEZ and continental shelf areas.

The court observed the presence of a number of geographical and geomorphological features that were to contribute to its ultimate conclusion that the equidistance/relevant circumstances approach was ill-suited to the case. These included:

- the ‘sharply convex’ coastline in the vicinity of the parties’ land boundary at Cape Gracias a Dios, as a result of which two base points (one on either side of the mouth of the River Coco) would have dominated the construction of any equidistance line;
- the close proximity of those two base points to each other, as a result of which any variation or error in their location would have a substantial and disproportionate effect upon the course of the equidistance line;
- the consistent accretion of sediment in the area around the mouth of the River Coco, which caused repeated and significant shifts in the location of islands (p. 468) immediately off the mainland coast. This ‘very active morpho-dynamism’, as the court described it, raised the prospect of major (and unpredictable) shifts in the location of the base points over time, with consequent radical changes in the course of any equidistance line. In short, the two identifiable base points were ‘inherently unstable’;
- the absence of viable base points claimed or accepted by the parties themselves in the vicinity of Cape Gracias a Dios; and
- the dispute between the parties over title over the islands located at the mouth of the River Coco.

These factors combined to create a unique physical context for the delimitation. In particular, it was the ‘impossibility’ of identifying reliable base points in order to construct a provisional equidistance line that led the court to conclude that alternative methodologies must be utilized for the delimitation.

In the territorial sea, the court held that these geographical and geomorphological factors combined to create a ‘special circumstance’ for the purposes of Article 15 of UNCLOS that required the delimitation of something other than an equidistance-based boundary. Notably, the court referred back to the 1958 Convention on the Territorial Sea and Contiguous Zone, together with the discussions that had preceded that Convention, before concluding that the special configuration of a coastline can, in appropriate circumstances, require the delimitation of a territorial sea boundary without reference to a provisional equidistance line.

The alternative methodology of delimitation identified by the court was the adoption of a bisector line. A leading consideration was the court’s recognition that the bisector line represented an ‘approximation’ of an equidistance line, based as it was upon the macro-geography of the disputed area and, in particular, the relationship between the parties’ relevant coasts. In the absence of stable base points for the construction of an equidistance line, the bisector methodology therefore provided a reliable substitute. Indeed, the bisector line represents a simplified equidistance line, or an equidistance line drawn using simplified coasts. In an area where very small offshore islands were remote from the mainland and not considered to be fringing, this method is effectively a mainland–mainland equidistance solution.

The court’s judgment therefore confirms the primacy of equidistance-based methodologies in modern maritime boundary delimitation, even in situations where the geography and geomorphology makes an equidistance/relevant circumstances approach practically unworkable.

The court noted that it had previously resorted to bisector lines as a geometrical means of achieving an ‘equal division’ in areas of overlapping and converging coastal protections. The court referred specifically to *Gulf of Maine* and *Tunisia/Libya*, in which it had used bisectors as a means of approximating equidistance in (p. 469) situations where segments of a boundary began at points located other than on the equidistance line. It referred also to *Guinea/Guinea-Bissau*, where it had drawn a perpendicular (the bisector of a 180° angle) in order to approximate the general direction of the West African coast, adjusted to start at the end of the territorial sea delimitation. However, the *Nicaragua/Honduras* case represents the first time that the court has used a bisector line to delimit the majority of a single maritime boundary.

The court’s approach to the question of what was the ‘critical date’ is notable in that it identified separate dates in respect of, first, the island sovereignty dispute and, second, the maritime boundary dispute. This is logical, particularly in a situation where the history of the two disputes was so different, with the result that the disputes had crystallized almost twenty years apart.

This was the latest in a growing line of cases in which the disputing parties’ arguments based on alleged non-geographical factors were dismissed due to a lack of sufficient evidence. Thus, in respect of the maritime boundary, the court rejected Honduras’s submissions based upon the principle of *uti possidetis juris* and its associated assertion of the existence of a ‘traditional maritime boundary’. In respect of Honduras’s claims of a ‘tacit agreement’ between the parties as to the location of the boundary, the court held that the evidence of any such agreement must be ‘compelling’. The court thereby imposed a high threshold on arguments of tacit boundary agreement. The ‘compelling evidence’ test has been repeated subsequently in the *Bangladesh/Myanmar* and *Peru/Chile* cases, analyzed below.

Finally, as a matter of legal strategy, it is striking that neither party presented any arguments related to sovereignty over the disputed islands until the oral stage of the proceeding. This is surprising, not least given the location of the disputed islands within the area of delimitation and the well-known edict that ‘the land dominates the sea’. The legal arguments in support of each party’s claim line could only have been enhanced by the existence of sovereignty over the features concerned. It is possible that Honduras felt constrained in this respect by its 1986 boundary treaty with Colombia. One result of this was that, pursuant to the court’s judgment, Honduras acquired maritime space south of the 15th parallel in the vicinity of the disputed islands that it had not even claimed during the proceeding.

As a postscript, it is notable that, on 10 June 2010, Honduras applied for permission to intervene in the then-pending territorial and maritime dispute between Nicaragua and Colombia. Honduras asserted the existence of certain rights and interests to the north of the 15th parallel under its 1986 treaty with Colombia, and argued that the 2007 judgment of the court had not settled the entire Caribbean Sea boundary between Nicaragua and Honduras, and only extended as far as the 82nd meridian. The court rejected Honduras’s application to intervene on the basis that its 2007 judgment had definitively settled the (p. 470) maritime boundary between Nicaragua and Honduras, which was therefore *res judicata*. Further, the 1986 treaty did not confer any legal rights or duties on Nicaragua as a third party. Accordingly, Honduras had failed to demonstrate the existence of an interest of a legal nature which may be affected by the court’s decision, for the purposes of Article 62 of the ICJ Statute.[15]

Footnotes:

[1] Nicaragua ratified UNCLOS on 3 May 2000; Honduras ratified UNCLOS on 5 October 1993.

[2] Nicaragua and Honduras also face the Pacific Ocean, in the Gulf of Fonseca. For analysis of the gulf's legal status as a historic bay and its consequences for the littoral States' maritime entitlements, see *Case Concerning Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua Intervening)*, judgment of 11 September 1992.

[3] See *Arbitral Award Made by the King of Spain on 23 December 1906*, Judgment, ICJ Reports 1960.

[4] There has been some confusion over these coordinates being quoted in degrees, minutes, and decimal minutes. As cited this refers to 14° 59.8', i.e. equivalent to 14 degrees, 59 minutes and 48 seconds. The agreement between Colombia and Honduras ostensibly along the same parallel refers to 14° 59' 8", i.e. 14 degrees, 59 minutes and 8 seconds, which is 40" (approximately 1,200 metres) further south. For convenience, this is referred to as the 15th parallel.

[5] In identifying this legal test of admissibility of the new claim, the court referred to its earlier judgment in *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, ICJ Reports 1992.

[6] In determining when the maritime delimitation dispute had crystallized, the court applied the well-established definition of a 'dispute' at international law, as set down by the Permanent Court of International Justice in 1924: '[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons' (*Mavrommatis Palestine Concessions*, Judgment, No. 2, 1924, PCIJ, Series A, No. 2, p. 11).

[7] The Court cited *Qatar/Bahrain* for the proposition that low-tide elevations are not territory in the same sense as islands. For a review and analysis of that case, see Part, B Chapter 13 above.

[8] The court applied the well-established principle that modest acts of State sovereignty over remote land territory can constitute legally decisive *effectivités*, as applied by the Permanent Court of International Justice in *Legal Status of Eastern Greenland*, Judgment, 1933, PCIJ, Series A/B, No. 53, p. 46.

[9] In this case, the Honduran claim was based on the King of Spain's 1906 arbitral award concerning the course of the land boundary along the thalweg of the River Coco. The parties disputed the extent to which this award applied to new islands forming in or at the mouth of the river.

[10] Judge Koroma, in his separate opinion, and Judge ad hoc Gaja, in his declaration, each noted that the court thus awarded Honduras sovereignty over maritime space located to the south of its own claim line.

[11] Honduras initially proposed a starting point 12M offshore in its Counter-Memorial, but accepted Nicaragua's proposal of 3M in its Rejoinder.

[12] For a review and analysis of the *Guinea/Guinea-Bissau* case, see Part B Chapter 7 above. Also as an example of state practice—the United States-Mexico treaty delimiting their maritime boundary in the Caribbean Sea from the mouth of the Rio Grande. Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary between the United Mexican States and the United States of America, 23 November 1970.

13 The court cited for this principle its judgment in *Monetary Gold removed from Rome in 1943*, ICJ Reports 1954.

14 Honduras's claim was actually for the parallel of 14° 59.8' N (in decimal minutes—equivalent to 15° 59' 48" N). Note that, due to a misunderstanding or a transcription error, the treaty between Honduras and Colombia, which is supposed to be the same parallel, is defined as 14° 59' 8" N (where the decimal minutes have been transcribed as seconds). The simplified term '15th' parallel was used throughout the case for convenience.

15 See further analysis of the *Nicaragua/Colombia* case, Part, B Chapter 21, below.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 19 Romania v. Ukraine (Judgment of the International Court of Justice, 3 February 2009)

From: A Practitioner's Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):

Coastal states — Continental shelf — Delimitation — Straits — Territorial sea — UNCLOS (UN Convention on the Law of the Sea)

(p. 471) 19 *Romania v. Ukraine* (Judgment of the International Court of Justice, 3 February 2009)

Case Note: EEZ and continental shelf delimitation—relevance of pre-UNCLOS and 2003 agreements to delimitation under Articles 74 and 83—three-stage delimitation methodology—relevant coasts—relevant maritime area—selection of base points for construction of provisional equidistance line—treatment of man-made dyke/harbour works—treatment of small island not forming part of 'coastal configuration'—absence of relevant circumstances requiring adjustment of equidistance line—test of disproportionality

Citation: *Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*), Judgment, *ICJ Reports* 2009, p. 61

Institution: ICJ

Basis of jurisdiction: 'Additional Agreement' concluded with reference to Article 2 of the 1997 Treaty on the Relations of Good Neighbourliness and Co-operation between Romania and Ukraine; ICJ Statute, Article 36(1)

The court: *Judges* Higgins (President), Al-Khasawneh (Vice-Present), Ranjeva, Shi, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judges ad hoc* Cot (appointed by Romania) and Oxman (appointed by Ukraine)

Applicable law: UNCLOS[1] (Article 293)

Areas delimited: EEZ; continental shelf (within 200M)

I. Introduction and Context

This case concerned the delimitation of the continental shelf and EEZ boundary between Romania and Ukraine in the north-western part of the Black Sea. The (p. 472) Black Sea is an enclosed sea connected with the Mediterranean by the Straits of the Dardanelles, the Sea of Marmara, and the Bosphorus. The Black Sea has a surface area of some 432,000km^2. It consists entirely of the territorial seas and EEZs of the coastal States which border it (thus comprising no area of high seas or continental shelf beyond 200M).

In the north-western part of the Black Sea, approximately 20M offshore and to the east of the Danube delta, is situated a small Ukrainian feature called Serpents' Island, which is above water at high tide and has a surface area of approximately 0.17km^2 (see Figures B19.1 and B19.2).

The parties' common land boundary follows the Danube River to the Black Sea and their coasts are adjacent in the nearshore section, becoming opposite as the Crimean peninsula comes into play further offshore. The parties' territorial sea boundary was agreed in 1949. To the south, Ukraine (as part of the USSR) agreed its boundary with Turkey in 1978 (although the western end of the boundary and the potential tri-point with Romania remains to be decided); Romania is yet to agree its boundary with Bulgaria.

The geographical context of the dispute is illustrated in Figures B19.1 and B19.2.

On 2 June 1997, Romania and Ukraine concluded the Treaty on Good Neighbourliness and Co-operation ('1997 Treaty') and an accompanying 'Additional Agreement', pursuant to

which they agreed to negotiate an agreement on the delimitation of the continental shelf and the EEZs in the Black Sea.[2] Paragraph 4(h) of the Additional Agreement provided that:

> If these negotiations shall not determine the conclusion of the above-mentioned agreement in a reasonable period of time, but not later than 2 years since their initiation, the Government of Romania and the Government of Ukraine have agreed that the problem of delimitation of the continental shelf and the exclusive economic zones shall be solved by the UN International Court of Justice, at the request of any of the parties, provided that the [1997 Treaty] has entered into force…

Between January 1998 and September 2004, the parties held twenty-four rounds of negotiations (and ten rounds of technical expert discussions) on the delimitation, but no agreement was reached.

On 16 September 2004, Romania filed an application instituting proceedings before the ICJ on the basis of paragraph 4(h) of the Additional Agreement. Romania requested the court 'to draw in accordance with the international law, and specifically the criteria laid down in Article 4 of the Additional Agreement, a (p. 473)

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Figure B19.1: *Romania/Ukraine*: regional setting and parties' claims.

single maritime boundary between the continental shelf and the exclusive economic zones of the two States in the Black Sea'.

Pursuant to Article 63 of the ICJ Statute and Article 43 of the ICJ Rules (as amended in 2005), the court instructed the Registrar to notify all UNCLOS parties, including the European Community, about the proceeding.(p. 474)

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Figure B19.2: *Romania/Ukraine*: parties' claims and court's judgment (detail).

(p. 475)

II. Positions of the Parties and Summary of the Judgment

a. Procedural Issues: Scope of Jurisdiction

The parties were in agreement that the applicable conditions for jurisdiction under the Additional Agreement and the ICJ Statute were satisfied. They differed, however, as to the exact scope of the jurisdiction conferred upon the court.

The court considered that it must interpret paragraph 4(h) of the Additional Agreement in light of the object and purpose of that Agreement and its context. It observed that, by virtue of the 1997 Treaty and Additional Agreement, the parties had intended that all boundary issues between them 'be resolved in a comprehensive way'. The court concluded that, while it had no jurisdiction to delimit the territorial seas of the parties, nothing hindered it from exercising its jurisdiction so that a segment of the boundary was between, on the one hand, the EEZ and the continental shelf of one party and, on the other hand, the territorial sea of the other party at its seaward limit (paras 27–30).

b. Applicable Law

The court observed that, since both Romania and Ukraine were parties to UNCLOS, Articles 74 and 83 of UNCLOS were relevant for the delimitation of the EEZ and the continental shelf, respectively (para. 31).

Romania argued that certain '*procès-verbaux*' that had been concluded between Romania and the USSR in 1949, 1963, and 1974 constituted legally binding agreements, for the purposes of Articles 74(4) and 83(4) of UNCLOS, which thus established the initial segment of the maritime boundary.[3] Romania contended that another such binding agreement was the Treaty between Romania and Ukraine on the Romanian-Ukrainian State Border Régime, Collaboration and Mutual Assistance on Border Matters (the '2003 State Border Régime Treaty'), which had delimited the maritime boundary up to the point of intersection between Romania's territorial sea limit and a 12M arc drawn around Serpents' Island.

Romania further argued that the 1997 Treaty and the Additional Agreement contained a legal commitment according to which, in exchange for Romania confirming Ukraine's sovereignty over Serpents' Island, Ukraine had accepted certain delimitation principles. In particular, Romania stated that, under paragraph 4 of the Additional Agreement, Ukraine had accepted 'the principle stated in article 121 of [UNCLOS]'. Romania submitted that this indicated that the parties (p. 476) had agreed that Serpents' Island could have no effect in the continental shelf and EEZ delimitation between them.

Ukraine contended that the court must decide the dispute in accordance with international law, as laid down in Article 38(1) of its Statute. In the present case, it maintained that the applicable body of law comprised principally the provisions of UNCLOS, together with certain specific rules established in the court's jurisprudence. In relation to the Additional Agreement, the parties had not agreed that the principles enunciated therein should apply before the court. Ukraine submitted that the *procès-verbaux* were not agreements delimiting the EEZ and continental shelf, and thus fell outside Articles 74(4) and 83(4) of UNCLOS.

The court held that, in delimiting the single maritime boundary, it would take into account the agreements in force between the parties. However, it noted that whether the *procès-verbaux* constituted agreements within the meaning of Articles 74 and 83 of UNCLOS would depend on whether those agreements had established the initial segment of the maritime boundary. The court would consider that issue later in its judgment (para. 40).

The court determined that the *chapeau* to paragraph 4 of the Additional Agreement made clear that the principles listed therein were intended to be taken into account in the parties' delimitation negotiations, but did not constitute the law to be applied by the court. The principles of maritime delimitation to be applied by the court were those set out at Articles 74(1) and 83(1) of UNCLOS. The court noted that a declaration made by Romania when signing and ratifying UNCLOS, to the effect that uninhabited islands without economic life could have no effect on delimitation between mainland coasts, could have no bearing on the court's interpretation of UNCLOS. This was because, under Article 310 of UNCLOS, such declarations could not purport to exclude or modify the legal effect of UNCLOS in its application to the declaring State (para. 41).

c. Relevance of Existing Agreements Between the Parties

The parties disagreed as to whether there already existed an agreed maritime boundary around Serpents' Island for all purposes. They therefore also disagreed on the starting point of the delimitation to be effected by the court.

Romania asserted that the *procès-verbaux* (which it said were binding on Ukraine by way of succession), together with other agreements and associated sketch maps, had established the first part of the maritime boundary as following a 12M arc 'surrounding' Serpents' Island, up to a point ('Point X') lying to the east of the island. Ukraine disagreed, pointing out that neither the *procès-verbaux* nor any other agreed text constituted continental shelf or EEZ delimitation agreements, nor had they identified the status of the waters to the south of the 12M arc around Serpents' Island (beyond the Romanian territorial sea limit). Ukraine submitted (p. 477) that the historic sketch maps cited by Romania were unreliable and without substantial legal value.

The court observed that the 1949 *procès-verbal* had described the State border line between the USSR and Romania as extending from the mainland coast to a point intersecting with the 12M arc around Serpents' Island, and thereafter continuing 'on the exterior margin of the maritime boundary zone of 12 miles, leaving Serpents' Island on the side of the USSR'. It observed also that an accompanying sketch map showed the line extending for 'about 5 miles' along the arc. Subsequent agreements between the parties had not materially varied this description. The court held that the wording of the 1949

procès-verbal did not support the existence of an agreed boundary extending to Point X, or to any point lying to the east of Serpents' Island. It noted that none of the contemporaneous maps (the details of which were different) arrived anywhere near that point. Furthermore, agreements about 'State borders' did not easily apply beyond areas of territorial sea. The court thus concluded that the 1949 agreement was that the boundary would follow the 12M arc around Serpents' Island without any end-point being specified. It held that, by contrast, the 2003 State Border Régime Treaty had identified the end-point of the 'State border' between the parties as lying at the point of intersection where the territorial sea boundary of Romania met that of Ukraine. The court would refer to this point as 'Point 1' (the location of which is illustrated in Figures B19.2 and B19.3 (paras 57–66).

The court then turned to the question of whether there existed an agreed line dividing the territorial sea of Ukraine and the continental shelf and the EEZ of Romania, as contended by Romania. The court noted that its task was not to make findings of fact, but rather to interpret the relevant historic agreements alongside the associated sketch maps (para. 68). The court pointed out that, according to State practice, if States intended that their agreed territorial sea boundaries should later serve also to delimit continental shelf or EEZ areas, they would be expected to conclude a new agreement to that effect (para. 69).

The court noted that the 1949 instruments made no reference to the EEZ or continental shelf; indeed, neither State had claimed a continental shelf at that time, while the concept of an EEZ was 'still some long years away'. Moreover, the 1997 Additional Agreement, which had put in place a process for arriving at an EEZ and continental shelf boundary between the parties, had made no reference to the existence of any agreement (para. 70). As for certain post-1949 maps proffered by Romania, they evidenced neither any new agreement or estoppel, nor any historic intention to delimit beyond the territorial sea. The USSR's recognition that its State border followed the outer limits of its territorial sea around Serpents' Island did not signify that it had given up any entitlements to maritime areas beyond that zone. The court thus concluded that there was no prior agreement in force between Romania and Ukraine delimiting areas of EEZ and continental shelf (paras 72–6).(p. 478)

View full-sized figure

Figure B19.3: *Romania/Ukraine*: court's judgment.

d. Relevant Coasts

With reference to its previous jurisprudence, the court recalled the principle that ‘the land dominates the sea through the projection of the coasts or the coastal fronts’. Accordingly, the court proceeded to identify the coasts of the parties that generated their continental shelf and EEZ rights; namely, those coasts the (p. 479) projections of which overlapped in the Black Sea. These would constitute the parties’ respective relevant coasts (para. 77).

In relation to Romania, the parties were agreed that the whole Romanian coast (including, notably, a length of south-facing coastline west of the Sacalin Peninsula) was relevant for the purposes of the delimitation. The court observed that the whole coast of Romania abutted the area to be delimited. Taking the ‘general direction of its coast’, the length of the relevant coast of Romania was approximately 248km (paras 80–8).

In relation to Ukraine, the parties were in less agreement. Romania asserted that the Ukrainian coast was characterized by deep indentations and reverses in course. It argued that a substantial (630km) section of the Ukrainian coastline did not project on the disputed area, or have any relationship of adjacency or oppositeness with the Romanian coast, with the result that it was irrelevant to the delimitation. It calculated Ukraine’s relevant coastal length at 388.14km. By contrast, Ukraine contested that its entire Black Sea coastline up to Cape Sarych generated entitlement to a continental shelf and EEZ in the disputed area. Accordingly, that entire coast (together with Serpents’ Island) was relevant to the delimitation. Including the gulfs and sinuosities, Ukraine calculated its relevant coastal length at 1,058km.

The court recalled that, in order to be relevant, a coast ‘must generate projections which overlap with projections from the coast of the other party’. The court was therefore unable to accept Ukraine’s contention that the coasts of Karkinits’ka Gulf formed part of its relevant coast. It remarked that the coasts of that gulf faced each other and that their submarine extension could not overlap with the extensions of Romania’s coast. Nor did those coasts project into the area to be delimited. On this basis, the court excluded the coasts of Karkinits’ka Gulf (together with the coastlines of Yahorlyts’ka Gulf and Dnieper Firth) from consideration. The court also excluded from consideration any perceived ‘closing line’ of the Karkinits’ka Gulf for the same reason (paras 99–100).

As for the remaining sectors of the Ukrainian coast, the Court noted that the north-western part of the Black Sea in its widest part measures slightly more than 200M and its extent from north to south does not exceed 200M. As a result, it held that Ukraine’s south-facing coast generated projections that overlap with the maritime projections of the Romanian coast. Therefore, the court concluded those south-facing sectors of the Ukrainian coast should form part of Ukraine’s relevant coast. As for Serpents’ Island, the court observed that its coast was so short as to make no real difference (paras 101–2).

The court accordingly calculated the length of Ukraine’s relevant coast at approximately 705km. This resulted in a ratio of the relevant coastal lengths of Romania and Ukraine of approximately 1:2.8 in favour of Ukraine (paras 103–4). The parties’ relevant coasts as determined by the court are illustrated in Figure B19.4.(p. 480)

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Figure B19.4: *Romania/Ukraine*: relevant coasts and areas.

e. Relevant Maritime Area

The court observed that the legal concept of the 'relevant area' had to be taken into account as part of the methodology of maritime delimitation. First, it may include certain maritime spaces and exclude others which were not germane to the case at hand. Second, it was pertinent, in the final phase of the delimitation, to check for (p. 481) 'significant disproportionality' between the allocation of maritime areas and the lengths of respective coasts (para. 110).

The court held that, in light of its decision about the relevant coasts, the area lying immediately south of Ukraine's coast, but excluding the waters of Karkinits'ka Gulf, fell within the relevant area. As for the southern limit of the relevant area, the court found it appropriate to include two triangles of maritime space in which entitlements of third parties potentially came into play. The triangle in the south-west lies between the hypothetical equidistance line between Romania and Bulgaria and a straight line connecting their land boundary terminus with the potential tri-point with Turkey; the south-eastern triangle south of the Crimean peninsula had been excluded by Ukraine as being subject to a prior delimitation between Ukraine (former USSR) and Turkey. The court decided to include the triangles within the relevant area because their inclusion merely for the purpose of identifying areas of approximate overlapping entitlement between the parties could not prejudice third-party interests (paras 113–14). The relevant area identified by the court is illustrated in Figure B19.4.

f. Delimitation Methodology

The court then turned to address questions of methodology under Articles 74 and 83 of UNCLOS. It stated that, when called upon to delimit the continental shelf or EEZ, or to draw a single delimitation line, it proceeds in 'defined stages'. First, it said, 'the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place'. As regards delimitation between adjacent coasts, the court observed that 'an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case'. As regards delimitation between opposite coasts, it observed that 'the

provisional delimitation line will consist of a median line between the two coasts' (para. 116).

The court continued:

> Equidistance and median lines are to be constructed from the most appropriate points on the coasts of the two States concerned, with particular attention being paid to those protuberant coastal points situated nearest to the area to the [sic.] delimited (para. 117).

Accordingly, the court began by drawing a provisional equidistance line between the adjacent coasts of the parties, which then continued as a median line between their opposite coasts.

At the second stage of the delimitation process, the court said it would 'consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result', as required by Articles 74 and 83 (para. 120).

(p. 482) At the third and final stage, the court said it would 'verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line'. This final stage would confirm that 'no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths' (para. 122).

g. Establishment of the Provisional Equidistance Line

Romania contended that the base points for constructing the provisional equidistance line should include the seaward end of Sulina Dyke, which had been among the relevant points notified by Romania to the United Nations for its straight baseline under Article 16 of UNCLOS for measuring the breadth of its territorial sea. In contrast, Romania considered that Serpents' Island should not be used as a base point because this would result in an inordinate distortion of the coastline. It submitted that Serpents' Island was a rock incapable of sustaining human habitation or economic life of its own, with the result that it had no EEZ or continental shelf pursuant to Article 121(3) of UNCLOS. It pointed out that when Ukraine notified the United Nations of the coordinates of its territorial sea baselines, it made no reference to Serpents' Island.

Ukraine contended that the base points for constructing the provisional equidistance line were situated on the baselines of each of the parties from which the breadth of their territorial seas were measured. Thus, the base points would include both Sulina Dyke and Serpents' Island. Ukraine observed, however, that the use of a point at the seaward tip of Sulina Dyke had a huge effect on the equidistance line, and that it would violate equitable principles for such a man-made feature to be given full effect, while Serpents' Island, a natural feature, was ignored.

The court noted that, in order to draw a provisional delimitation line that took due account of geography, it needed to 'identify the appropriate points on the Parties' relevant coasts which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines' (para. 127).

The court observed that the parties' coasts were adjacent over the initial part of the boundary and became opposite further seaward. The same base points on the Romanian coast would generate both the equidistance line and the median line. The Ukrainian coast, on the other hand, consisted of two portions, one adjacent to the Romanian coast and the other opposite to it. Therefore, the Ukrainian base points would need to be defined separately. The court noted the need also to identify the 'turning-point on the equidistance

line where the effects of adjacency (p. 483) give way to those of the coasts on the opposite side, resulting in a change in the direction of the line' (para. 128).

On the Romanian coast, the court began by considering the Sacalin Peninsula. Ukraine had questioned the significance of that peninsula by describing it as a spit of sand. The court observed that the peninsula formed part of the Romanian mainland and was permanently uncovered at high tide. It concluded that the peninsula should therefore be used as a base point for construction of the provisional equidistance line (para. 129).[4]

Turning to Sulina Dyke, the court noted that, according to Articles 57 and 76 of UNCLOS, the breadth of the EEZ and continental shelf is measured from the baselines from which the territorial sea is measured. Article 11 of UNCLOS establishes that:

> For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works.

Therefore, in order to decide whether the seaward end of Sulina Dyke could serve as a base point, the court first had to consider whether the dyke could be regarded as 'permanent harbour works which form an integral part of the harbour system' (para. 132).

The permanent nature of Sulina Dyke was not in question. As for whether the structure could be described as 'harbour works' that form 'an integral part of the harbour system', the court noted that this term is defined in neither the 1958 Territorial Sea Convention nor UNCLOS. It remarked that such facilities 'are generally installations which allow ships to be harboured, maintained or repaired and which permit or facilitate the embarkation and disembarkation of passengers and the loading or unloading of goods'. However, the court noted that the functions of a dyke are different from those of a port, and that Sulina Dyke may be of use in protecting shipping destined for the mouth of the Danube. It analyzed the *travaux préparatoires* of Article 8 of the 1958 Territorial Sea Convention and a question raised by the ILC about man-made structures of 'excessive length' in its 1956 report to the General Assembly. It concluded that Article 11 of UNCLOS did not preclude a restrictive interpretation of the concept of harbour works so as to avoid or mitigate the problem identified by the ILC. This may be particularly true where, as here, the question was one of delimitation extending beyond the territorial sea (paras 133–4).

The court considered the relevance of Romania's notification to the United Nations under Article 16 of UNCLOS, in which Romania had used the seaward (p. 484) end of Sulina Dyke as a base point for drawing its territorial sea baseline. That choice had not been contested by Ukraine. The court held that:

> the issue of determining the baseline for the purpose of measuring the breadth of the continental shelf and the [EEZ] and the issue of identifying base points for drawing an equidistant/median line for the purpose of delimiting the continental shelf and the [EEZ] between adjacent/opposite States are two different issues.

In the first case, the court observed that the coastal State can determine the relevant base points in conformity with UNCLOS. In the second case, the court should not base itself solely on the choice of base points made by the coastal State. Rather, the court must 'select base points by reference to the physical geography of the relevant coasts' (paras 135–7).

The court remarked that 'no convincing evidence' had been presented that Sulina Dyke served any direct purpose in port activities. The court was therefore not satisfied that the seaward end of the dyke was a proper base point for the purposes of construction of a provisional equidistance line delimiting the continental shelf and EEZ. By contrast, the landward end of the dyke had the advantage of not giving greater importance to an

installation than to the physical geography of the landmass. The court thus decided to use the landward end only of Sulina Dyke as a base point (paras 138–40).

As to Ukraine's base points, the court used the south-eastern tip of Tsyganka Island, which it viewed as 'the counterpart of the landward end of Sulina Dyke on the Romanian side' and the most prominent point on the Ukrainian coast in this area of adjacency between the parties (paras 142–3). On the section of Ukraine's coast opposite to Romania's coast, the court selected Cape Tarkhankut, which it identified as 'the most seaward point facing Romania's coast on the Crimean coast' and Cape Khersones, another point on the Crimean coast where 'the land protrudes into the sea' (paras 146–7).

The court then turned to consider the relevance of Serpents' Island as a base point. Citing the *Eritrea/Yemen* case, the court observed that there had been instances when coastal islands, particularly clusters of fringe islands, had been considered part of a State's coast for the purposes of identifying base points. However, it considered that Serpents' Island was not one of a cluster of fringe islands constituting the coast of Ukraine because it lies alone and some 20M away from the mainland. To count Serpents' Island as a relevant part of the coast would amount to 'a judicial refashioning of geography'. Therefore, the court concluded that Serpents' Island could not be taken to form part of Ukraine's coastal configuration and would not be used for the construction of the provisional equidistance line (para. 149).

The court proceeded to draw the provisional delimitation line between the Romanian and Ukrainian coasts using its selected base points. In doing so, it identified the turning point at 'Point B' (which became Point 4 in the *dispositif*), (p. 485) where the first base point on Ukraine's opposite (Crimean) coast came into effect (para. 156). The location of the court's selected base points and its resultant equidistance line is illustrated in Figure B19.3.

h. Relevant Circumstances

The court proceeded to consider whether there were any factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an 'equitable result'. Citing its judgment in the *North Sea Continental Shelf* cases, it observed that such factors were usually referred to in the court's jurisprudence as 'relevant circumstances'. The court explained that their function was 'to verify that the provisional equidistance line, drawn by the geometrical method from the determined base points on the coasts of the Parties is not, in light of the particular circumstances of the case, perceived as inequitable' (para. 155).

While Romania had argued that its provisional equidistance line achieved an equitable result, Ukraine submitted that there were relevant circumstances, specifically its much longer coastline, calling for an adjustment of its provisional equidistance line in the direction of the Romanian coast. The parties' resulting claim lines are illustrated in Figure B19.3.

The first circumstance addressed by the court was the disparity between the lengths of the parties' coasts abutting on the delimitation area. Ukraine argued that such disparity was expressive of the geographical predominance of Ukraine in the relevant area and necessitated an adjustment of the provisional equidistance line in its favour. The court remarked that:

> Where disparities in the lengths of coasts are particularly marked, the Court may choose to treat that fact of geography as a relevant circumstance that would require some adjustments to the provisional equidistance line to be made (para. 164).

In the present case, however, the court saw no such marked disparities between the parties' relevant coasts. It further noted that a good portion of the Ukrainian relevant coast projected into the same area as other segments of the Ukrainian coast (para. 168).

The court then turned to Romania's contention that the Black Sea's status as an enclosed sea, together with the need not to depart dramatically from the equidistance methods previously used in delimitation agreements in the area, constituted a relevant circumstance. The court remarked that its choice of an equidistance-based method had not been dictated by the fact that the same method had been used in other Black Sea delimitations. It concluded that, while it would bear in mind the existing delimitations between, first, Turkey and Bulgaria and, second, Turkey and Ukraine when considering the end-point of the boundary, neither the existing delimitation agreements in the area nor the enclosed nature of the Black Sea called for adjustment to the provisional equidistance line (paras 174, 177–8).

(p. 486) The court proceeded to consider whether the presence of Serpents' island constituted a relevant circumstance calling for adjustment of the provisional equidistance line (which, as explained above, had been drawn without reference to the feature). Romania maintained that Serpents' Island was a rock incapable, in its natural form, of sustaining human habitation or economic life of its own under Article 121(3) of UNCLOS. Romania highlighted the fact that the feature was a rocky formation devoid of natural water sources and virtually devoid of vegetation and fauna. Romania submitted that '[t]he presence of some individuals…because they have to perform official duties such as maintaining a lighthouse, does not amount to sustained human habitation'. Romania accordingly argued that Serpents' Island should not be given any effect beyond 12M. Ukraine countered that Serpents' Island was indisputably an island under Article 121(2) of UNCLOS: it had permanent structures, including a lighthouse and accommodation, and was continuously inhabited, albeit by border police and seasonal scientific staff on rotation. It maintained that, in any event, Article 121(3) was irrelevant because it is concerned with questions of entitlement rather than delimitation.

The court noted that, given its geographical location within the relevant area, any continental shelf and EEZ entitlements potentially generated by Serpents' Island could not possibly project further than the entitlements generated by Ukraine's mainland coast. This was because the entire relevant area was located within 200M of the Ukrainian mainland. In light of this, the court concluded that Serpents' Island did not call for any adjustment of the provisional equidistance line and it did not need to consider whether the feature fell within Articles 121(2) or (3) of UNCLOS. Serpents' Island would therefore have no effect on the delimitation, other than in connection with the 12M arc of its territorial sea (paras 187–8).

Ukraine also claimed that certain State activities in the relevant area, such as hydrocarbon licensing and fisheries regulation, constituted a relevant circumstance. Ukraine argued that, while its own historical conduct was consistent with its claim line, Romania's historical conduct (or lack of it) was fundamentally inconsistent with its own claim line. The court noted that Ukraine was not arguing for the existence of any tacit agreement or *modus vivendi* between the parties as regards their single maritime boundary. In those circumstances, the court did not see any role in the delimitation for the State activities invoked by Ukraine. Quoting the arbitral tribunal in the *Barbados/Trinidad and Tobago* case, the court observed that international courts and tribunals had not generally applied resource-related criteria as a relevant circumstance. With regard to fisheries, Ukraine had submitted no evidence that any delimitation line would be 'likely to entail catastrophic repercussions' for the purposes of the test laid out in *Gulf of Maine* (paras 197–8).

Both Romania and Ukraine argued that the delimitation line proposed by the other party would result in a cut-off of their maritime entitlements. The court held (p. 487) that, while the delimitation lines proposed by the parties (particularly in their first segments) each significantly curtailed the EEZ and continental shelf entitlement of the other, the provisional equidistance line drawn by the court avoided such a drawback. The court considered that its line allowed the adjacent coasts of the parties 'to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way'. Accordingly, there was no reason to adjust the provisional equidistance line on this ground (para. 201).

The court reached a similar conclusion with regard to the parties' arguments about security. The court concluded that, while legitimate security considerations 'may play a role in determining the final delimitation line', in the present case the provisional equidistance line fully respected the legitimate security interests of both parties.

i. The line of Delimitation and the Disproportionality Test

Having found no circumstance requiring adjustment of the equidistance line, the court proceeded to describe the delimitation line. The court fixed the starting point (Point 1) at the meeting point of the territorial seas of the parties, as established by Article 1 of the 2003 State Border Régime Treaty. The line would then follow the 12M arc around Serpents' Island until it intersected with the line equidistant from Romania's and Ukraine's adjacent coasts (Point 2). From there, it would follow that equidistance line until it became affected by base points located on the opposite coasts of Romania and Ukraine. From this turning point, the delimitation line would run along the line equidistant from the parties' opposite coasts, in a southerly direction until a point beyond which the interests of third States may be affected (paras 206, 209).

The court finally turned to the third and final stage of the delimitation: namely, a final check to ensure that the delimitation line resulting from the first two stages did not lead to any 'significant disproportionality' between the parties' respective coastal lengths and the apportionment of the relevant area. The court noted that its check could only be approximate, not least because international law imposed no clear requirements as to the technique for assessing coastal lengths. In the present case, the court had measured the coasts according to their general direction, resulting in a coastal length ratio of approximately 1:2.8 in favour of Ukraine. The division of the relevant area, as delimited by the court's equidistance line, was approximately 1:2.1 in favour of Ukraine. The court did not consider that this suggested any significant disproportionality such that its delimitation line would require alteration (paras 210–16).

The course of the maritime boundary thus delimited by the court is illustrated in Figure B19.3.

(p. 488) III. Technical Considerations

As is usual with the ICJ, the identity of its appointed technical expert is not on the public record, and there is no annexed report. However, the judgment is well illustrated, featuring nine maps.

The final equidistance line is a simple one, with three base points on the Ukrainian coast (two on the opposite coast of Crimea) and two on the Romanian coast. The final segment is defined with a geodetic azimuth, although the other sections are not specified. The coordinates are referred to WGS84, although both parties had used the local (Pulkovo) datum throughout their pleadings.

The main technical consideration, as discussed above, concerns the application of the 'geometrically objective' equidistance method when the initial choice of base points was subjective. Although base points on Serpents' Island and Sulina Dyke were excluded, the court never showed their effect on the equidistance line. A further curiosity is that, having decided to use the Sacalin Peninsula, the court only used a base point where it joined the mainland coast.

The court's treatment of relevant coasts, areas and proportionality has become a model for future cases. The main technical issue was the treatment of the Karkinits'ka Gulf, where the court discounted both inward facing coasts and the closing line, which arguably could be considered as a projection of the land mass behind. This contrasts with the treatment in earlier cases of the Cabot Strait in *Canada v. France* (St Pierre and Miquelon), and the Bay of Fundy in the *Gulf of Maine* case, where the closing line was considered to represent the coastlines inside the gulf.

IV. Significance of the Decision and its Contribution to International Law

Less than four-and-a-half years elapsed between Romania's application and the court's judgment, making this the fastest delimitation case in the history of the ICJ to date.

In a passage that has been frequently cited, the judgment sets out clearly the so-called 'three-stage approach' as a standard methodology for EEZ and continental shelf delimitation under modern international law. Pursuant to that methodology: first, the court establishes a provisional line using methods that are geometrically objective; second, the court considers whether there are any relevant circumstances that require adjustment of the provisional line in order to achieve an equitable result; and third, the court undertakes a final check to ensure that the line does not (p. 489) lead to an inequitable result by reason of a 'significant disproportionality' between the ratio of respective coastal lengths and the ratio of maritime areas apportioned by the delimitation line. In relation to the first stage, the court indicated that the provisional line will always consist of a median line in delimitations between opposite coasts, and will generally consist of an equidistance line in delimitations between adjacent coasts 'unless there are compelling reasons that make this unfeasible'. The court cited its judgment of less than two years previously in the *Nicaragua/Honduras* case as an example of such an exceptional situation where 'compelling reasons' had indicated against the use of an equidistance line at the first stage.

The court's approach to the selection of base points for construction of the provisional equidistance line warrants attention. Despite its statement that the first stage of the delimitation process must use methods that are 'geometrically objective', the court proceeded to adopt an inherently subjective approach to the selection of base points. First, the court selected mainland base points for each party that marked 'a significant change in the direction of the coast'. This approach is different from drawing a strict equidistance line using geometry and on the basis of purely objective data. Second, the court excluded a significant geographical feature (Serpents' Island) as a base point in the construction of the provisional equidistance line. As a result, the court's provisional equidistance line was substantially at variance with a strict equidistance line; the court only turned to address Serpents' Island as a potential relevant circumstance at the second stage of the delimitation process. In this respect, the court's approach was quite different from its approach in the *Qatar/Bahrain* case, where it addressed the smaller island features of Qit'at Jarādah (in the territorial sea) and the low-tide elevation Fasht al Jarim (in the EEZ and continental shelf) as special circumstances warranting adjustment of a provisional equidistance line drawn with reference to those features.

The court's decision to exclude the 7.5km-long Sulina Dyke as a base point was also notable. The court referred to, *inter alia*, the *travaux préparatoires* of UNCLOS as justification for interpreting restrictively the concept of 'harbour works' under Article 11 of UNCLOS so as to 'avoid or mitigate the problem of excessive length'. The court was unperturbed by the fact that the Ukrainian side had used Sulina Dyke (a Romanian feature) as a base point in constructing its proposed equidistance line. The court vindicated its decision to exclude the dyke (and its selective approach generally to the identification of base points) by observing that the determination of a baseline for measuring the breadth of the continental shelf and EEZ is quite different from the identification of base points for drawing an equidistance line in delimitation.

The parties engaged in extensive argument about whether Serpents' Island constituted a fully fledged island generating full continental shelf and EEZ (p. 490) entitlements under Article 121(2) of UNCLOS, as opposed to a rock generating only a 12M territorial sea under Article 121(3) of UNCLOS. The court decided that it did not need to address this question given that the entire delimitation area fell within the EEZ and continental shelf generated by the parties' mainland coasts. As a result, at the time of writing the court has still to give any extensive practical guidance on the interpretation and application of Article 121 to specific features.[5]

The court rejected a series of 'relevant circumstances' proposed by Ukraine for the purposes of adjustment of the provisional equidistance line. The judgment thus provides one of several modern examples illustrating the burden that must be met by States arguing for adjustment of an equidistance or median line. Particularly notable was the court's rejection of a coastal length ratio of 2.8 to 1 as a relevant circumstance on the basis that the disparity was not sufficiently 'marked'. This contrasts with the smaller disparity of 1.38 to 1 that the ICJ Chamber saw as significant in the *Gulf of Maine* case. The distinction appears to relate to the unusual coastal configuration of the Gulf of Maine, where the US coastline is dominant on two of the three sides of the Gulf, thus making the coastal length disparity more of a relevant circumstance in that case.

Another point of distinction between the present case and *Gulf of Maine* was the court's approach to identifying the parties' relevant coasts. In particular, the court disregarded the entire Ukrainian coastline within the Karkinits'ka Gulf on the basis that it did not project into the disputed area. This contrasts with the ICJ Chamber's treatment of the Bay of Fundy in *Gulf of Maine*. The court's approach to the Karkinits'ka Gulf, especially its refusal even to include a closing line in calculating the relevant Ukrainian coast, is difficult to sustain given that the back portion of the Gulf (and, equally, any closing line) clearly does project into the disputed area.[6]

Finally, this case serves to illustrate the challenges associated with demonstrating the existence of an agreed EEZ or continental shelf boundary based upon historic treaties focused on delimitation of the territorial sea. The court's indication that it would expect to see the conclusion of a new treaty in order to apply or extend an existing territorial sea boundary to the continental shelf or EEZ areas provides important practical guidance to States that have only delimited territorial sea boundaries with their neighbours.

Footnotes:

1 Romania ratified UNCLOS on 17 December 1996; Ukraine ratified UNCLOS on 26 July 1999.

2 The 1997 Treaty entered into force on 22 October 1997.

[3] Articles 74(4) (and 83(4)) of UNCLOS provide: ‘Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone [the continental shelf] shall be determined in accordance with the provisions of the agreement.’

[4] Notably, however, the court did not then use Sacalin Peninsula as a base point (see Figure B19.2).

[5] This question will likely be addressed by the Annex VII arbitral tribunal at the merits stage of the *Philippines/China* proceeding, which was pending at the time of writing.

[6] The court’s approach contrasts in this respect even with the alternative, more restrictive, approach proposed in respect of the Bay of Fundy by Judge Schwebel in his Separate Opinion in the *Gulf of Maine* case. See discussion in Part B, chapter 6 (including its fn. 1), above.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 20 Bangladesh v. Myanmar (Judgment of the International Tribunal for the Law of the Sea, 14 March 2012)

From: A Practitioner’s Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):

Coastal states — Islands and artificial islands — Delimitation — Straits — Territorial sea — UNCLOS (UN Convention on the Law of the Sea)

(p. 491) 20 *Bangladesh v. Myanmar* (Judgment of the International Tribunal for the Law of the Sea, 14 March 2012)

Case Note: territorial sea, EEZ, and continental shelf delimitation—arguments of actual or tacit agreement or estoppel in the territorial sea—treatment of small Bangladeshi island located close to the Myanmar coast—concave coast—relevance of natural prolongation within and beyond 200M—delimitation of continental shelf beyond 200M—'grey area' of overlapping EEZ and continental shelf entitlements

Citation: *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar* (*Bangladesh v. Myanmar*), Case No. 16, Judgment, 14 March 2012

Institution: ITLOS

Basis of jurisdiction: UNCLOS, Articles 287 and Article 288(1); ITLOS Statute, Article 21

The tribunal: *Judges* Jesus (President), Türk (Vice-President) Marotta Rangel, Yankov, Nelson, Chandrasekhara Rao, Akl, Wolfrum, Treves, Ndiaye, Cot, Lucky, Pawlak, Yanai, Kateka, Hoffmann, Gao, Bouguetaia, Golitsyn, Paik; *Judges ad hoc* Mensah (appointed by Bangladesh), Oxman (appointed by Myanmar)

Applicable law: UNCLOS (Article 293)

Areas delimited: territorial sea; EEZ; continental shelf (within and beyond 200M)

I. Introduction and Context

Bangladesh and Myanmar (formerly Burma) are States with adjacent coasts in the Bay of Bengal. The Bay of Bengal covers approximately 2.2 million km². It is (p. 492) situated in the north-eastern Indian Ocean and is bordered by Sri Lanka, India, Bangladesh, and Myanmar. The last part of the land boundary between the two States follows the Naaf River, terminating at an agreed point at its mouth. The geographical context of the delimitation is illustrated in Figure B20.1.

An important feature in the delimitation was St Martin's Island, which forms part of Bangladesh but sits approximately 4.5M from the mainland coast of Myanmar (and within the territorial seas of both States). The island had a surface area of approximately 8km² and, according to Bangladesh, a permanent population of about 7,000 people. Its location is illustrated in Figure B20.2. Another important feature was the so-called 'Bengal depositional system'; a thick layer of sedimentary rocks some 14 to 22km deep originating in the Himalayas and the Tibetan Plateau, which has accumulated over several thousand years and covers the entire floor of the Bay of Bengal.

Bangladesh and Myanmar ratified UNCLOS in 2001 and 1996, respectively.[1] The two States engaged in a series of maritime boundary negotiations between 1974 and 1986, and again between 2008 and 2010. In 1974 and 2008, these negotiations resulted in signature by the States' respective heads of delegation of two sets of 'Agreed Minutes'. In addition, in 1979, Bangladesh proposed a line of delimitation in the EEZ and continental shelf, referred to as the 'Friendship Line'. According to Bangladesh, Myanmar's conduct in the disputed area had been in accordance with this proposed boundary. From 2005, however, Myanmar offered a number of hydrocarbon concession blocks in the area between the Friendship Line and the equidistance line as defined by Myanmar. Bangladesh considered that these

activities seriously prejudiced its sovereign rights in areas that it claimed as its EEZ and continental shelf.

In light of these developments, on 8 October 2009, Bangladesh decided to submit the delimitation dispute to an arbitral tribunal, in accordance with UNCLOS Part XV and Annex VII. On 4 November 2009, Myanmar responded, proposing that the dispute should instead be submitted to the ITLOS and made a declaration under Article 297 of UNCLOS for this purpose. Bangladesh accepted Myanmar's proposal and made a similar declaration under Article 297 of UNCLOS.[2]

Meanwhile, on 16 December 2008, Myanmar dispatched to the Commission on the Limits of the Continental Shelf (the 'CLCS') a submission related to areas of continental shelf beyond 200M in the disputed area.[3] Bangladesh insisted that Myanmar's claims to such outer shelf areas were not in accordance with (p. 493)

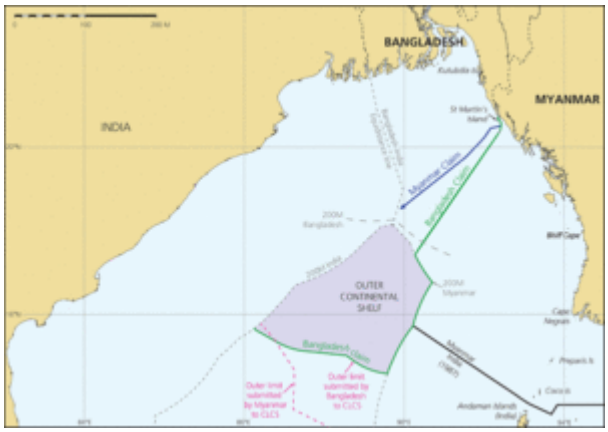

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Figure B20.1: *Bangladesh/Myanmar*: regional setting and parties' claims.

(p. 494)

View full-sized figure

Figure B20.2: *Bangladesh/Myanmar*: parties' claims and tribunal's judgment in the territorial sea.

UNCLOS. On 25 February 2011, Bangladesh made its own submission to the CLCS claiming areas of continental shelf beyond 200M in the disputed area.[4] Myanmar responded, reminding the CLCS of the unresolved disputes and stating (p. 495) that, in its view, Bangladesh's rights over the continental shelf did not even extend as far as 200M.[5]

The parties agreed that the tribunal had jurisdiction to delimit their maritime boundary throughout the area of dispute: namely, throughout the territorial sea, EEZ, and continental shelf. Pursuant to Article 23 of the ITLOS Statute, the tribunal was to decide the dispute in accordance with Article 293 of UNCLOS, which requires application of UNCLOS 'and other rules of international law not incompatible with [UNCLOS]'.

II. Positions of the Parties and Summary of the Judgment

a. Delimitation of the territorial sea

The tribunal first addressed the issue of whether the parties had in fact already delimited their territorial sea boundary by agreement. Bangladesh argued that the Agreed Minutes were binding and that the territorial sea boundary had thereby been agreed in 1974 and reaffirmed in 2008. Myanmar considered that the Agreed Minutes were nothing more than conditional agreements and were not intended to create binding obligations or constitute a treaty. It stated that its negotiating delegation had no authority to enter into a treaty and emphasized that its delegation had made clear during negotiations that its government would not sign and ratify a treaty unless it resolved the entire delimitation dispute.

The tribunal concluded that, although agreed minutes can in some situations give rise to binding treaty obligations, there were no grounds to consider that the parties had entered into a delimitation treaty by signing the Agreed Minutes of 1974 and 2008. This conclusion was supported by the conditional language of the Agreed Minutes and their surrounding circumstances, which displayed no intent to create legal obligations (paras 90–9). The tribunal recalled the judgment of the ICJ in the *Nicaragua/Honduras* case, which observed that the establishment of a permanent maritime boundary was 'a matter of grave importance and agreement is not easily to be presumed'. Further, the head of the Burmese delegation who had signed the 1974 Agreed Minutes was not an official who could engage his country without producing 'full powers', which he had not done, with the result that he did not have the authority to enter into a treaty for the purposes of Article 7 of the Vienna Convention on the Law of Treaties. Further, the fact that the parties had not submitted the Agreed Minutes to the procedures required by their respective constitutions for adoption of treaty obligations was an additional indication that the Agreed Minutes were not intended to be legally binding.

(p. 496) Bangladesh also contended that the parties had conducted themselves in accordance with the agreed delimitation for over three decades, demonstrating the existence of a tacit or *de facto* agreement as to the territorial sea boundary. It submitted, *inter alia*, affidavits relating to fishing, naval, and aerial activities in support of its argument. Myanmar refuted the argument, contending that it had never acquiesced in any delimitation in the territorial sea and criticised Bangladesh's affidavit evidence as self-serving and unreliable. The tribunal, again citing the judgment of the ICJ in *Nicaragua/Honduras*, held that the affidavit evidence relied upon by Bangladesh was insufficient to evidence the existence of an agreed boundary in the territorial sea. Further, in a 2008 *note verbale*, the Myanmar Ministry of Foreign Affairs had stated to the Bangladesh Ministry of Foreign Affairs that the parties had 'yet to delimit a maritime boundary'. In the absence of 'compelling' evidence, the tribunal concluded that there was no tacit or *de facto* territorial sea boundary between the two States (paras 112–18).

Relying on the judgment of the ICJ in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*,[6] Bangladesh also argued that Myanmar was estopped from claiming that the 1974 Agreed Minutes were anything other than valid and binding. The tribunal observed that, in international law, a situation of estoppel exists 'when a State, by its conduct, has created the appearance of a particular situation and another State, relying on such conduct in good faith, has acted, or abstained from an action to its detriment. The effect of the notion of estoppel is that a State is precluded, by its conduct, from asserting that it did not agree to, or recognize, a certain situation'. The tribunal concluded that the evidence submitted by Bangladesh provided no indication that Myanmar's conduct had caused Bangladesh to change its position to its detriment or suffer any prejudice. The tribunal accordingly rejected Bangladesh's estoppel argument (paras 124–5).

The tribunal thus concluded that there was no 'agreement' in relation to the territorial sea boundary for the purposes of Article 15 of UNCLOS. It thus proceeded to delimit that boundary. With reference to the text of Article 15, the tribunal observed that 'before the equidistance principle is applied, consideration should be given to the possible existence of historic title or other special circumstances' (para. 129).

Neither party invoked the existence of any historic title in the disputed area. However, Myanmar argued that St Martin's Island, a small Bangladeshi feature located close to the mainland coast of Myanmar, constituted a special circumstance. Myanmar maintained that granting the island full effect throughout the territorial sea delimitation would lead to a 'considerable distortion' with regard to the general configuration of the coastline. Relying on jurisprudence and State practice, Myanmar asserted that 'small or medium-size islands are usually totally (p. 497) ignored' and that the 'predominant tendency' was to give no or little effect to such features. It proposed a median line where the coasts were opposite (about 10M apart) and reduced weight to the island beyond so that it had a 6M semi-enclave. Bangladesh disputed Myanmar's account of jurisprudence and State practice. It highlighted the size and population of the island and its proximity to the Bangladesh coast, stating that it formed an integral part of its coastline and, in the alternative to its argument based on the Agreed Minutes, proposed a strict median line throughout the territorial sea.

The tribunal noted, while St Martin's Island is located in front of Myanmar's mainland coast, it is also as close to Bangladesh's mainland coast, lying within the 12M territorial sea limit from the mainland. The tribunal observed that most of the cases and State practice referred to by Myanmar concerned delimitation of the EEZ or continental shelf, and were thus 'not directly relevant to the delimitation of the territorial sea'. The tribunal considered that St Martin's Island was a 'significant maritime feature by virtue of its size and population and the extent of economic and other activities' and that, as a consequence, there were 'no compelling reasons' to treat it as a special circumstance or that prevented the tribunal from giving the island full effect in drawing the territorial sea boundary (paras 149–52).

The tribunal thus delimited an equidistance line boundary in the territorial sea, giving full effect to St Martin's Island.[7] The resulting territorial sea boundary (which up to point 8 followed the course of the strict median line proposed by Bangladesh as an alternative claim in the territorial sea) is illustrated in Figure B20.2. The tribunal observed that, beyond 'point 8', the territorial sea of St Martin's Island began to meet the EEZ and continental shelf of Myanmar. The tribunal held that Bangladesh 'has the right to a 12M territorial sea around St Martin's Island in the area where such territorial sea no longer overlaps with Myanmar's territorial sea' (paras 168–9).

b. Delimitation of the exclusive economic zone and continental shelf

The parties each requested the tribunal to draw a single maritime boundary over the EEZ and continental shelf.

Citing the well-established principle that 'the land dominates the sea', the tribunal started by identifying the relevant coasts of the parties. The parties presented very different arguments in this respect. The tribunal noted that 'for a coast to be considered as relevant in maritime delimitation it must generate projections which overlap with those of the coast of another party' (para. 198). The tribunal considered that the entire coast of Bangladesh met this requirement, as did the (p. 498) coast of Myanmar between the land boundary on the Naaf River and Cape Negrais. However, to avoid difficulties that would otherwise be caused by the 'sinuosity of the coast', the tribunal concluded that each State's relevant coast should be broken down into two straight lines. The two resultant straight lines comprising Bangladesh's and Myanmar's relevant coasts are illustrated in Figure B20.3. These lines resulted in a ratio of coastal lengths of approximately 1:1.42 in favour of Myanmar.

The parties disagreed as to the appropriate method of delimitation. Bangladesh claimed that equidistance would not produce the equitable result required by UNCLOS due to the concavity of the coast in the Bay of Bengal and the resultant 'cut-off effect'. Instead, with reference to the *Tunisia/Libya, Gulf of Maine, Guinea/ Guinea-Bissau*, and *Nicaragua/ Honduras* cases, it proposed delimitation using an angle-bisector method. Myanmar argued that, contrary to the recently decided *Nicaragua/Honduras* case, there was no circumstance that rendered 'unfeasible' the use of the equidistance method in the present case. It thus proposed an unadjusted equidistance line boundary (paras 208–24). The parties' respective proposed EEZ and continental shelf delimitation lines are illustrated in Figure B20.3.

Following a lengthy review of the jurisprudence dating back to the *North Sea Continental Shelf* cases, the tribunal concluded that the method to be followed should be one that, under the prevailing geographic realities and the particular circumstances of each case, can lead to an equitable result. It observed that 'jurisprudence has developed in favour of the equidistance/relevant circumstances method', which had been adopted by international courts and tribunals in 'the majority' of cases. Accordingly, the equidistance/relevant circumstances method would be used in this case. The delimitation would thus follow a three-stage approach. As a first stage, the tribunal would construct a provisional equidistance line 'based on the geography of the Parties' coasts and mathematical calculations'; as a second stage, it would determine whether there were any 'relevant circumstances' requiring adjustment of the provisional equidistance line in order to achieve an equitable result; and at the third stage, the tribunal would check whether the line, as adjusted, resulted in any 'significant disproportion' between the ratio of the respective coastal lengths and the ratio of the relevant maritime areas allocated to each party (paras 225–40).

The tribunal thus proceeded to the selection of base points for the construction of the provisional equidistance line. It declared that it was 'not obliged, when called upon to delimit the maritime boundary between the parties to the dispute, to accept base points indicated by either or both of them'. Instead, citing the recent *Romania v. Ukraine* case, the tribunal considered that it could establish its own base points, on the basis of the geographical facts of the case (para. 264).

A particular issue of dispute between the parties was whether or not St Martin's Island could be used as a base point for the provisional equidistance line. (p. 499)

View full-sized figure

Figure B20.3: *Bangladesh/Myanmar*: parties' claims and tribunal's judgment.

(p. 500) Bangladesh argued that it must be, both because it was a significant coastal feature that indisputably generated continental shelf and EEZ of its own and because, in the construction of a provisional equidistance line, all coastal features should be included. Myanmar disagreed. The tribunal concluded that, given its location immediately in front of the Myanmar mainland, using St Martin's Island as a base point would result in a line that blocked the seaward projection from Myanmar's coast. This would result in an 'unwarranted distortion of the delimitation line, and amount to a judicial refashioning of geography'. The tribunal accordingly excluded St Martin's Island as a base point and proceeded to construct a provisional equidistance line using two base points on Bangladesh's coast and four on Myanmar's coast (paras 264–6). The course of the resulting provisional equidistance line beyond the 12M limit of St Martin's Island follows the course of the Myanmar claim line, as illustrated in Figure B20.3.

Bangladesh argued that three relevant geographical and geological circumstances required adjustment of the provisional equidistance line: the concavity of its coastline and its resultant 'cut-off' effect; the need to give full weight to St Martin's Island; and the Bengal depositional system, which comprised 'both the landmass of Bangladesh and its uninterrupted geological prolongation into and throughout the Bay of Bengal'. By contrast, Myanmar argued that there were no relevant circumstances requiring adjustment of the provisional equidistance line.

The tribunal observed that the coast of Bangladesh, seen as a whole, is 'manifestly concave'. It noted also that the provisional equidistance line produced a 'cut-off' effect on the maritime projection of Bangladesh into the Bay of Bengal and would thus not produce an equitable result. Accordingly, this relevant circumstance would require an adjustment of the line in favour of Bangladesh (paras 290–7).

As regards St Martin's Island, the tribunal noted that it is an important feature susceptible to be considered as a relevant circumstance. However, it observed that, because of its location, giving effect to St Martin's Island in the delimitation of the EEZ and the continental shelf 'would result in a line blocking the seaward projection from Myanmar's coast in a manner that would cause an unwarranted distortion of the delimitation line'. Further, it noted that the distorting effect of an island on an equidistance line can increase substantially as the line moves beyond 12M from the coast. The tribunal therefore

concluded that St Martin's Island was not a relevant circumstance and would be given no effect in the delimitation beyond 12M (paras 318–19).

As regards the Bengal depositional system, the tribunal did not consider it relevant to the delimitation of the EEZ and continental shelf within 200M. It held that:

> the location and direction of the single maritime boundary applicable to both the seabed and subsoil and to the superjacent waters within the 200M limit are to be determined on the basis of geography of the coasts of the Parties in relation to each (p. 501) other and not on the geology or geomorphology of the seabed of the delimitation area (para. 322).

The tribunal proceeded to consider how to effect adjustment of the provisional equidistance line so as to reflect the relevant circumstance of concavity of the Bangladeshi coast. It noted that this concavity produced a 'pronounced cut-off effect on the southward maritime projection of Bangladesh's coast that continues throughout much of the delimitation area' (para. 323). It thus determined that the adjustment would begin 'where the equidistance line begins to cut off the southward projection of the coast of Bangladesh' (para. 331). The tribunal labelled this location 'point X'. It determined that the direction of any plausible adjustment of the provisional equidistance line would not differ substantially from a geodetic line starting at an azimuth of 215°. It observed that any significant shift in the angle of that azimuth would result in a cut-off effect on the projection of the coast of one party or the other (para. 334). The resultant adjusted equidistance line boundary from point X is illustrated in Figure B20.3.

c. Delimitation of the continental shelf beyond 200M

In principle, Myanmar did not dispute that the tribunal had jurisdiction to delimit the continental shelf beyond 200M nautical miles. However, it did question whether the tribunal should exercise such jurisdiction on the facts of the case. It asserted that the delimitation beyond 200M 'might prejudice the rights of third parties and also those relating to the international seabed area'. Also, it argued that a 'necessary precondition' of any delimitation beyond 200M was that the CLCS must have already made recommendations as to the outer limits of the continental shelf in the area. Bangladesh countered that the tribunal clearly had jurisdiction to delimit the entire continental shelf boundary. As far as third States were concerned, Bangladesh said that the tribunal's judgment would be *res inter alios acta*. Bangladesh saw no conflict between the delimitation role of the tribunal and the delineation role of the CLCS.

The tribunal observed that Article 76 of UNCLOS 'embodies the concept of a single continental shelf'. With regard to the rights of third parties, the tribunal agreed with Bangladesh that its decision would have no binding force except between Myanmar and Bangladesh. It noted also that, as was evident from the parties' respective CLCS submissions, the disputed area was situated far from the deep seabed and thus any delimitation would not prejudice the rights of the international community (paras 360–8).

As regards the relationship between delimitation and delineation, the tribunal noted that:

> there is a clear distinction between the delimitation of the continental shelf under article 83 and the delineation of its outer limits under article 76. Under the latter (p. 502) article, the [CLCS] is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to delimitation of maritime boundaries. The function of settling disputes with respect to delimitation of

> maritime boundaries is entrusted to dispute settlement procedures under article 83 and Part XV of [UNCLOS] (para. 376).

Further:

> Just as the functions of the [CLCS] are without prejudice to the question of delimitation of the continental shelf between States…so the exercise by international courts and tribunals of their jurisdiction regarding the delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the exercise by the [CLCS] of its functions related to the delineation of the outer limits of the continental shelf (para. 379).

The tribunal noted that, following Bangladesh's notification of a dispute, the CLCS had deferred its consideration of each of the Myanmar and Bangladesh outer shelf submissions pursuant to paragraph 5(a) of Annex I to its Rules of Procedure. Accordingly, if the tribunal declined to delimit the continental shelf beyond 200M, the delineation of the outer limits of the shelf may remain unresolved. This would 'not be conducive to the efficient operation of [UNCLOS]'. The tribunal thus concluded that, in order to fulfil its responsibilities under Part XV, Section 2 of UNCLOS, it had an 'obligation to adjudicate the dispute and to delimit the continental shelf between the Parties beyond 200M'. This would be without prejudice to the subsequent establishment of the outer limits of the continental shelf in the Bay of Bengal (paras 387–94).

As regards the question of whether the parties could be said to have overlapping entitlements requiring delimitation beyond 200M pending recommendations by the CLCS, the tribunal noted the distinction between entitlement to shelf areas beyond 200M and the delineation of outer limits. It observed that, unlike the delineation process, entitlement to continental shelf does not depend on any procedural requirements. Therefore, the fact that outer limits had not yet been established did not imply that the tribunal must refrain from determining the existence of entitlement over the shelf beyond 200M and delimiting the boundary between the parties (paras 406–10).

In the present case, the parties were agreed on the geological and geomorphological data related to the Bay of Bengal. However, each argued that it alone was entitled to the entire area of outer continental shelf. In particular, Bangladesh argued that, unlike Bangladesh, Myanmar had no entitlement to continental shelf beyond 200M because its land territory had no 'natural prolongation' into the Bay of Bengal. This was because a fundamental geological and geomorphological 'discontinuity' existed between the Myanmar landmass and the seabed beyond 200M. Consequently, as shown in Figure B20.3, Bangladesh argued that the outer segment of the maritime boundary must follow the 200M limit of (p. 503) Myanmar. Myanmar argued that the physical extent of the continental margin in the Bay of Bengal meant that it was entitled to a continental shelf beyond 200M. In Myanmar's view, the undisputed physical extent of the continental margin rendered Bangladesh's discontinuity argument 'irrelevant'.

The tribunal noted that, under Article 76(1) of UNCLOS, the continental shelf of a coastal State can extend either to the outer edge of the continental margin or to a distance of 200M. It rejected the notion that natural prolongation is, of itself, a separate and independent requirement for continental shelf entitlement beyond 200M. Rather, it held that the reference to natural prolongation in Article 76(1) should be understood in light of the subsequent provisions defining the continental shelf and the continental margin. Consequently, entitlement to continental shelf beyond 200M should be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with

Article 76(4). On this basis, the tribunal rejected Bangladesh's argument that Myanmar was not entitled to a continental shelf beyond 200M (paras 428–38).

The tribunal commented that it 'would have been hesitant to proceed with the delimitation of the area beyond 200M had it concluded that there was a significant uncertainty as to the existence of a continental margin in the area in question'. However, the Bay of Bengal presented a 'unique situation' because of the thick layer of sedimentary rocks covering practically the entire sea floor. As a result, the tribunal was satisfied that there was a continuous and substantial layer of sedimentary rocks extending from Myanmar's coast to the area beyond 200M. As a result, it concluded that both Bangladesh and Myanmar had entitlements to a continental shelf beyond 200M (paras 443–9). Accordingly, it proceeded to delimit the boundary between those entitlements.

The tribunal declared that 'the delimitation method to be employed in the present case for the continental shelf beyond 200 nautical miles should not differ from that within 200 nm'. Accordingly, the equidistance/relevant circumstances method would apply (para. 455).

As regards the question of relevant circumstances beyond 200M, Bangladesh argued that these must include the geology and geomorphology of the seabed and subsoil because entitlement beyond 200M depends entirely on natural prolongation. It argued that it had 'the most natural prolongation into the Bay of Bengal'. Bangladesh also argued that the concavity of its coast and resultant cut-off also had a continuing effect beyond 200M. Myanmar submitted that there were no relevant circumstances requiring a shift of the provisional equidistance line in the area beyond 200M.

The tribunal rejected Bangladesh's 'most natural prolongation' argument because it had already determined that natural prolongation was not an 'independent basis for entitlement' under Article 76 of UNCLOS. However, the concavity of the (p. 504) Bangladesh coast was a relevant circumstance that had a continuing effect beyond 200M. Accordingly, the adjusted equidistance line already delimited within 200M would continue in the same direction beyond the 200M limit of Bangladesh until it reached the area where the rights of third States (namely, India) might be affected (paras 460–2).

The course of the maritime boundary thus delimited by the tribunal beyond 200M is illustrated in Figure B20.3.

d. The 'grey area'

The tribunal noted that its adjusted equidistance line delimitation gave rise to an area of maritime space located beyond 200M from Bangladesh but within 200M of Myanmar, yet on the Bangladesh side of the delimitation line. In this area, the delimitation would leave part of Bangladesh's continental shelf overlapping Myanmar's EEZ. The parties referred to this as the 'grey area'. Its location is illustrated in Figure B20.3.

The tribunal noted that, in the area beyond Bangladesh's EEZ but within Myanmar's EEZ, the maritime boundary delimited the parties' rights with regard to the continental shelf, but did not otherwise limit Myanmar's EEZ rights with regard to the water column. It observed that, pursuant to numerous provisions of UNCLOS, each coastal State must 'exercise its rights and perform its duties with due regard to the rights and duties of the other'. It concluded that it was for the parties to determine the measures they considered appropriate for this purpose, whether in the form of specific agreements, cooperative arrangements, or otherwise (paras 474–6).

e. ‘Disproportionality test’

As a third and final step in the delimitation process, the tribunal proceeded to consider the ‘disproportionality test’. The tribunal had already determined the parties’ relevant coastal lengths for this purpose (see (b) ‘Delimitation of the EEZ and continental shelf’). It noted that the ‘relevant area’ was that resulting from the projections of the relevant coasts into the disputed area. The fact that a third party might claim the same area did not prevent its inclusion for the purposes of the disproportionality test (paras 489–96). The resulting relevant area covered approximately 283,471km² and is illustrated in Figure B20.3.

The tribunal noted that the disproportionality test did not require ‘mathematical precision’ (para. 477). It observed that ratios in favour of Myanmar of 1:1.42 (in respect of relevant coasts) and 1:1.54 (in respect of allocation of the relevant area) did not display any ‘significant disproportion’ in the allocation of maritime areas relative to the respective lengths of their coasts. Accordingly, no further shift of the adjusted equidistance line was required in order to ensure an equitable solution (paras 498–9).

(p. 505) The maritime boundary thus delimited by the tribunal is illustrated in Figure B20.3.

III. Technical Considerations

The tribunal’s equidistance line (and also that proposed by Myanmar), which ignored St Martin’s Island beyond the territorial sea, uses two base points on the Bangladesh coast and four base points on the Myanmar coast. The second of the Bangladesh base points (marked μ2 in Figure B20.2) does not come into effect until 180M from the land boundary terminus. Bangladesh challenged the second base point identified on its coast (marked β2 in Figure B20.2) on the ground that it was highly unstable on the delta coast (drawing an analogy with the *Nicaragua/Honduras* case). However, the tribunal dismissed Bangladesh’s argument and proceeded to use point β2 in constructing its provisional line.

This case was notable for the proposal by Bangladesh of a bisector solution using the main coasts of each party, thereby compensating for the concavity. The tribunal rejected this approach as it considered that there were no reasons why an equidistance line could not be drawn, but adopted the Bangladeshi bisector direction (215° azimuth) for its adjusted equidistance line.

The territorial sea delimitation followed a strict median line measured from the low-water line of both parties. Both parties had proposed similar lines in the area between St Martin’s Island and the Myanmar mainland, which in fact also conformed approximately to the line proposed in the Agreed Minutes rejected by the tribunal. A number of small low-tide elevations were ignored by the tribunal and the final judgment bisects the low-tide elevation at Sitaparokia Patches (see Figure B20.2). Despite evidence of recent coastal changes in the mouth of the Naaf River, both parties relied on the same British Admiralty chart in the territorial sea.

The tribunal measured the relevant coastlines along their general directions, as is now customary. The Bangladesh coastal length included both the north-south section and the east-west section along the delta. The closing line across the Meghna Estuary was counted as part of the coastal length. This differs from the treatment of the Karkinits’ka Gulf in the *Black Sea* case, where neither the inward-facing coasts nor the bay closing line was included in the court’s coastal length calculation. The relevant area was drawn as a right-angled box that also included an area to the west of the Bangladesh–India equidistance line that was claimed by India at the time.

This was the first major case to address directly the delimitation of the outer continental shelf. Both parties had made similar submissions to the CLCS on the basis of the thick sediment in the Bay of Bengal. Bangladesh presented extensive (p. 506) geological evidence, but the tribunal decided that both parties could demonstrate natural prolongation into the Bay and the detailed geological and geomorphological evidence was thus disregarded for delimitation purposes, even in the area beyond 200M.

IV. Significance of the Judgment and its Contribution to International Law

Some eighteen years after the entry into force of UNCLOS, the *Bangladesh/Myanmar* judgment represented the first foray of the International Tribunal for the Law of the Sea into the field of maritime boundary delimitation. The tribunal took less than 2.5 years to determine the case and, in doing so, demonstrated that it offers a feasible third option for the resolution of maritime boundary disputes, alongside the ICJ and Annex VII arbitration.[8]

The territorial sea delimitation was notable for its treatment of St Martin's Island, a significant Bangladesh feature located close to the Myanmar coast. This aspect of the judgment confirms the tendency in modern territorial sea boundary delimitation to give full effect to any significant island features (an exception being, for example, the small uninhabited Qit'at Jarādah, which was given limited effect in the *Qatar/Bahrain* case). The tribunal also recognized the right of Bangladesh to maintain a 12M territorial sea limit around St Martin's Island throughout the area in which it overlapped with the EEZ and continental shelf of Myanmar (i.e. beyond 'point 8'). In doing so, the tribunal replicated the approach taken by the court in relation to Serpents' Island in the *Black Sea* case and, later, in *Nicaragua/Colombia* in relation to Quitasueño.

The tribunal's treatment of St Martin's Island was equally notable in the EEZ and continental shelf delimitation. The tribunal confirmed the application of the equidistance/relevant circumstances method to that delimitation but proceeded, as a first step, to construct a provisional equidistance line that discounted St Martin's Island as a base point. It did so notwithstanding its determination that the provisional equidistance line should be 'based on the geography of the Parties' coasts and mathematical calculations'. The tribunal's approach, which again echoed the court's equivalent treatment of Serpents' Island in the *Black Sea* case, represents a significant departure from objectivity in the construction of a provisional equidistance line. A purely geographical, mathematical, and objective construct would have acknowledged St Martin's Island as a base point at the first stage of the delimitation before, at the second stage, considering whether it (p. 507) qualified as a relevant circumstance such as to require adjustment of the line in order to achieve an equitable result. By adopting a subjective approach to the construction of the provisional equidistance line, the tribunal followed a line of recent cases that had demonstrated a similar tendency toward judicial creativity at the very first stage of an equidistance-based delimitation.[9]

Having discounted St Martin's Island as a base point in the construction of the provisional equidistance line, the tribunal considered whether the feature constituted a relevant circumstance requiring adjustment of the line at the second stage. This exercise only served to highlight the incongruity of the tribunal's approach with a strict equidistance/relevant circumstance methodology, which would have addressed any disproportionate effect of the island feature at the second stage of the delimitation rather than excluding it at the first stage.

As regards the delimitation of the continental shelf beyond 200M, the tribunal followed the decision of the UNCLOS Annex VII arbitral tribunal in the *Barbados/Trinidad and Tobago* case. Furthermore, in declaring that the principles used for the delimitation of the continental shelf up to 200M should (at least in this case) apply also to that part of the continental shelf beyond 200M, the tribunal rejected the notion that the physical geology or geomorphology of the seabed in such areas should be determinative to delimitation.[10]

The tribunal's identification of the concavity of the Bangladeshi coast in the Bay of Bengal as a relevant circumstance echoes the ICJ's treatment of the German coast in the *North Sea Continental Shelf* cases. However, in contrast to the *North Sea Continental Shelf* cases, the tribunal treated concavity as a circumstance requiring adjustment of a provisional equidistance line rather than a circumstance requiring rejection of an equidistance-based approach. This difference is consistent with the fact that, as observed by the ICJ in *Libya/Malta*, the modern law of the sea bases continental shelf entitlement within 200M upon distance rather than natural prolongation.

A substantial portion (almost a third) of the judgment was dedicated to the delimitation of the continental shelf beyond 200M. It is this aspect of the judgment that is most ground-breaking and remarkable. The judgment includes an erudite articulation of the distinction between the delimitation of continental shelf boundaries and the delineation of continental shelf limits. The tribunal's decision to proceed with the delimitation beyond 200M without awaiting any recommendation by the CLCS resulted from the lack of any 'significant uncertainty' as to the existence of a continental margin in the Bay of Bengal. (p. 508) As illustrated by the ICJ's judgment just a few months later in the *Nicaragua/Colombia* case, such an approach will likely not be replicated in many other contexts where the existence of a continental margin beyond 200M is more open to doubt. Indeed, the tribunal identified the Bay of Bengal as presenting a 'unique situation' in this respect.

Other aspects of the tribunal's approach to the delimitation beyond 200M are open to controversy. First, the tribunal's rejection of the Bangladeshi argument that natural prolongation constitutes a necessary requirement of continental shelf entitlement beyond 200M appears to sit uneasily with the plain text of Article 76(1) of UNCLOS, which provides that the continental shelf of a coastal State extends throughout the natural prolongation of 'its' land territory. Consequently, the tribunal's rejection of Bangladesh's 'significant geological discontinuity' argument is open to question. Second, the tribunal's holding that the equidistance/relevant circumstances methodology should apply to the delimitation of continental shelf boundaries beyond 200M appears to ignore the fact that, at the 200M limit, the basis of entitlement switches from distance to physical geology and geomorphology. However, as discussed in Part C, Chapter 4, below, this aspect of the judgment appears to have arisen out of the fact that both Bangladesh and Myanmar had entitlements to continental shelf beyond 200M.[11] Third, the tribunal purported to apply the equidistance/relevant circumstances methodology without actually constructing any provisional equidistance line at all in the area beyond 200M.

Finally, the judgment provides a valuable source of guidance about the so-called 'grey area' of overlapping EEZ and continental shelf entitlement, particularly in connection with the desirability of coastal States entering into appropriate cooperative arrangements so as to manage their respective sovereign rights over the resources of the seabed and water column.

Footnotes:

[1] Bangladesh ratified UNCLOS on 27 July 2001; Myanmar ratified UNCLOS on 21 May 1996.

[2] Documents available at <http://www.itlos.org/index.php?id=108#c513> (accessed on 2 November 2015).

[3] The submission of Myanmar is available at <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mmr.htm> (accessed on 2 November 2015).

[4] The submission of Bangladesh is available at <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_bgd_55_2011.htm> (accessed on 2 November 2015).

[5] See <http://www.un.org/Depts/los/clcs_new/submissions_files/bgd55_11/mmr_nv_un_001_08_04_2011.pdf> (accessed on 12 January 2016).

[6] Merits, Judgment, ICJ Reports 1962, p. 6, at p. 32.

[7] Judges ad hoc Mensah and Oxman observed that this line was 'essentially the same as that contemplated by the Agreed Minutes of 23 November 1974'. See *Joint Declaration of Judges ad hoc Mensah and Oxman*, para. 2.

[8] The respective advantages and disadvantages of these three fora for third-party resolution of maritime boundary disputes are identified in Part C, Chapter 3, section III, below.

[9] See, in particular, the *Black Sea* case, analyzed above. See also discussion of this tendency (and its potential implications) in Part C, Chapter 1, below.

[10] See discussion of the extent to which the physical geology or geomorphology of the seabed might nevertheless remain pertinent to outer shelf delimitation in Part C, Chapter 4, below.

[11] For further discussion of the implications of the *Bangladesh/Myanmar* judgment on outer shelf delimitation methodology, see A. G. Oude Elferink, *ITLOS's Approach to the Delimitation of the Continental Shelf beyond 200 Nautical Miles in the Bangladesh/Myanmar Case: Theoretical and Practical Difficulties (2013)*. ITLOS's Approach to the Delimitation of the Continental Shelf beyond 200 Nautical Miles in the Bangladesh/Myanmar Case: Theoretical and Practical Difficulties. In Rüdiger Wolfrum, Maja Seršic & Trpimir M. Šošic (Eds.), *Contemporary Developments in International Law – Essays in Honour of Budislav Vukas* (pp. 230–49) (20 p.). Leiden/Boston.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 21 Nicaragua v. Colombia (Judgment of the International Court of Justice, 19 November 2012)

From: A Practitioner’s Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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(p. 509) 21 *Nicaragua v. Colombia* (Judgment of the International Court of Justice, 19 November 2012)

Case Note: Sovereignty over maritime features—*uti possidetis juris* principle—*effectivités*—Nicaragua's claim for delimitation of a continental shelf beyond 200M of its coast (but within 200M of Colombia)—Article 76 of UNCLOS—EEZ and continental shelf delimitation—three-stage delimitation methodology—relevant coasts—relevant maritime area—entitlements generated by maritime features—relevant circumstances requiring adjustment of a provisional median line—interests of third States—proportionality test

Citation: *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*), Judgment, *ICJ Reports* 2012, p. 624

Institution: ICJ

Basis of jurisdiction: American Treaty on Pacific Settlement (Pact of Bogotá), Article XXXI; ICJ Statute, Article 36(2)

The Court: *Judges* Tomka (President), Sepúlveda-Amor (Vice-President), Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Sebutinde; *Judges ad hoc* Mensah (appointed by Nicaragua),[1] Cot (appointed by Colombia).[2]

Applicable law: customary international law[3]

Areas delimited: territorial sea; EEZ; continental shelf (within 200M)(p. 510)

I. Introduction and Context

This case concerned a dispute between Nicaragua and Colombia before the ICJ over title to territory and maritime boundary delimitation in the Caribbean Sea.

The Caribbean Sea is partially enclosed to the north and east by the islands of the West Indies. It is bounded to the south and west by the South and Central American landmass. The east coast of Nicaragua projects eastwards into the Caribbean Sea, with a number of Nicaraguan islands located off its east mainland coast. Colombia is located to the east of Nicaragua and its north mainland coast projects north-westwards into the Caribbean Sea. The islands of San Andrés, Providencia, and Santa Catalina are situated about 125M to the east of the Nicaraguan coast and approximately 380M from Colombia's mainland. The geographical context of the dispute is illustrated in Figure B21.1.

The dispute combined land sovereignty and maritime delimitation aspects. The land sovereignty dispute concerned the islands of San Andrés (population over 70,000), Providencia (population 5,000), and Santa Catalina and a number of other maritime features in the Caribbean Sea. These maritime features are Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Quitasueño, Serranilla, and Bajo Nuevo. Their location is illustrated in Figure B21.1. The maritime delimitation dispute concerned the course of the maritime boundary between Nicaragua and Colombia in the Caribbean Sea.

Nicaragua and Colombia had long attempted to settle their dispute in the Caribbean Sea. In 1928, they signed the Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua (the '1928 Treaty') in order to 'put an end to the territorial dispute between them'. Pursuant to Article 1 of the 1928 Treaty, Nicaragua recognized Colombia's sovereignty 'over the islands of San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago'. In 1930, the

parties signed a protocol stating that the San Andrés Archipelago does not extend west of the 82nd meridian (the '1930 Protocol') (see Figure B21.1).

In 1969, Nicaragua issued a number of oil exploration concessions and reconnaissance permits covering maritime zones to the east of the 82nd meridian. Colombia protested, claiming that the 1928 Treaty had established the 82nd meridian as the western boundary of the San Andrés Archipelago. Nicaragua, however, claimed that the reference to the 82nd meridian was to establish the limit of the San Andrés Archipelago, not a maritime boundary between the two countries. Nicaragua argued that the areas concerned were part of its continental shelf and that the concessions had, therefore, been granted in accordance with international law. Colombia replied by making a formal declaration of sovereignty over the maritime areas located east of the 82nd meridian.(p. 511)

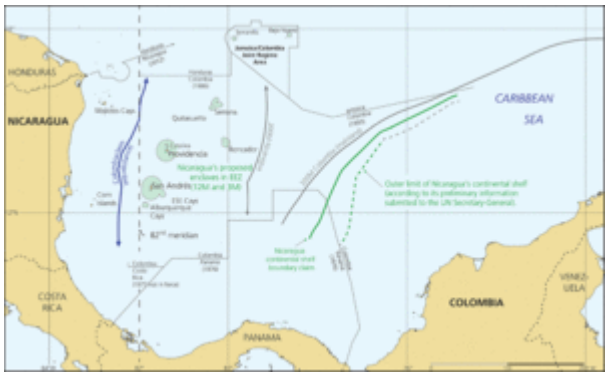

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Figure B21.1: *Nicaragua/Colombia*: regional setting and parties' claims.

(p. 512) In July 1979, the Sandinista Government came to power in Nicaragua. A few months later, Nicaragua declared the 1928 Treaty null and invalid. Colombia rejected the Nicaraguan declaration 'as an unfounded claim that was historically incorrect', which 'breached the most elementary principles of public international law'. Subsequent Nicaraguan administrations maintained their position as to the invalidity of the 1928 Treaty and the meaning of that treaty's reference to the 82nd meridian.

On 6 December 2001, Nicaragua filed an application instituting proceedings against Colombia at the ICJ with regard to 'a group of related legal issues subsisting' between the two States 'concerning title to territory and maritime delimitation' in the Caribbean Sea. Nicaragua founded the court's jurisdiction on the compromissory clause in Article XXXI of the 1948 American Treaty of Pacific Settlement (the 'Pact of Bogotá') and on both parties' respective Optional Clause Declarations under Article 36 of the Statute of the Permanent Court of International Justice.

The claim lines advanced by Nicaragua and Colombia in the proceeding are illustrated in Figure B21.1.

The court issued four judgments in the case: the judgment on preliminary objections of 13 December 2007 (the 'Judgment on Preliminary Objections');[4] the two judgments of 4 May 2011, on Costa Rica's and Honduras's applications for permission to intervene under Article 62 of the ICJ Statute; and the judgment on the merits of 19 November 2012 (the 'Judgment on the Merits').

II. Positions of the Parties and Summary of the Judgments

a. Procedural issues: challenge to jurisdiction

The parties disagreed as to whether a dispute existed between them or as to the subject matter thereof (Judgment on Preliminary Objections, para. 33). Colombia claimed that the matters in issue had been settled by the 1928 Treaty (Judgment on Preliminary Objections, para. 37). This, according to Colombia, prevented the court from having jurisdiction under Article VI of the Pact of Bogotá, or Article 36 of the PCIJ Statute. Nicaragua, on the other hand, contended that the validity and the meaning of the 1928 Treaty were precisely some of the matters in dispute.

The court recalled that Nicaragua had advanced the lack of validity of the 1928 Treaty for the first time in 1980. On that basis, it concluded that the 1928 Treaty was valid and in force on the date of the conclusion of the Pact of Bogotá in 1948. (p. 513) The court noted that this was the relevant date for the purposes of deciding on the jurisdiction of the court under Article VI of the Pact of Bogotá (Judgment on Preliminary Objections, paras 79–81). Moreover, the court held that, even if the 1928 Treaty had been terminated, the principle of the 'objectivization of boundaries' would have prevented this termination from having any effect on Colombia's sovereignty over San Andrés, Providencia, and Santa Catalina. Specifically, with reference to its 1994 judgment in the *Libya/Chad* territorial dispute, the court recalled that 'it is a principle of international law that a territorial régime established by treaty "achieves a permanence which the treaty itself does not necessarily enjoy" and the continued existence of that régime is not dependent upon the continuing life of the treaty under which the régime is agreed'. Judgment on Preliminary Objections, para. 89).[5]

The court concluded, therefore, that the 1928 Treaty had settled the question of Colombia's sovereignty over the islands of San Andrés, Providencia, and Santa Catalina. As such, the court partially upheld Colombia's first preliminary objection (Judgment on Preliminary Objections, para. 90). However, contrary to Colombia's position, the court found that the 1928 Treaty did not settle matters concerning the sovereignty over the rest of the disputed maritime features (Judgment on Preliminary Objections, para. 90). The court also rejected Colombia's argument that the Treaty could be interpreted as effecting a maritime delimitation between the parties (Judgment on Preliminary Objections, para. 115). On that basis, the court held that it had jurisdiction to decide on these two issues (Judgment on Preliminary Objections, paras 97 and 120).

b. Third-party applications for permission to intervene in the proceedings

Costa Rica's attempted intervention

On 25 February 2010, Costa Rica applied to intervene in the proceeding. The court rejected this application in a judgment issued on 4 May 2011 ('Costa Rica's Intervention Judgment').[6]

Costa Rica wished to inform the court of the nature of Costa Rica's legal rights and interests in the southern part of the disputed area. It sought to ensure that the court's decision regarding the maritime boundary between Nicaragua and Colombia did not affect those rights and interests. Costa Rica contended that the southern limit of Nicaragua's claims and the southern end-point of the Nicaragua-Colombia boundary might encroach on Costa Rica's maritime space. (p. 514) It maintained that the court would need to take into account information of the extent of Costa Rica's interests provided by way of intervention.

Colombia did not object to Costa Rica's application. Nicaragua, however, claimed that Costa Rica had failed to demonstrate a legal interest in the proceeding. According to Nicaragua, Costa Rica had, instead, presented itself as a party to a maritime boundary dispute with Nicaragua.

The court recalled that the parties had agreed that any boundary between them should stop well short of the area in which Costa Rica's rights could be affected (Costa Rica's Intervention Judgment, para. 88). The court also stated that, when drawing a line delimiting the area between Colombia and Nicaragua, it would end the line before it reached an area in which the legal interests of third States might be involved (Costa Rica's Intervention Judgment, para. 89).

In light of the above, the court concluded that Costa Rica had not demonstrated that it had an interest of a legal nature that could be affected by the decision of the court and accordingly rejected Costa Rica's application.

Honduras's attempted intervention

On 10 June 2010, Honduras applied to intervene in the proceeding. The court rejected this application in a judgment rendered on 4 May 2011 ('Honduras's Intervention Judgment').[7]

Honduras requested permission to intervene as a party ostensibly in order to achieve a final settlement of its dispute with Nicaragua. In the alternative, Honduras sought to intervene as a non-party to inform the court of, and to protect, its interests of a legal nature that could be affected by the decision of the court. Honduras maintained that the 1986 Maritime Delimitation Treaty between Honduras and Colombia (the '1986 Treaty') recognized that the area north of the 15th parallel and east of the 82nd meridian involved Honduras's legitimate rights and interests of a legal nature. According to Honduras, these interests were not addressed in the court's 2007 judgment in the *Nicaragua/Honduras* case. Honduras maintained that the 2007 judgment neither determined the end-point of the boundary between Honduras and Nicaragua nor specified that the end-point would lie on the azimuth of the bisector boundary line drawn by the court. Honduras argued that, in the present proceeding, the court would inevitably have to decide whether the 1986 Treaty was in force and whether it accorded rights to Colombia in the area disputed between Colombia and Nicaragua.

(p. 515) Colombia did not object to Honduras's Application for Permission to Intervene. Nicaragua opposed Honduras's intervention, arguing that Honduras's application challenged the *res judicata* character of the *Nicaragua/Honduras* judgment and failed to identify any interest of a legal nature that could be affected by the decision of the court, as required by Article 62 of the ICJ Statute.

The court noted that the *Nicaragua/Honduras* judgment had established a bisector line with a defined azimuth, which is to continue as a straight line until the point where third States' rights are affected. It noted also that there was no question of the end-point of the boundary being left open, so Honduras could not dispute that the *Nicaragua/Honduras* judgment had established a complete and final boundary (Honduras's Intervention Judgment, paras 63–5).

The court stated that the 1986 Treaty could not impose any obligations or confer any rights upon third States. The court observed that the *Nicaragua/Honduras* judgment had not relied on the 1986 Treaty and it would not do so in the present case (Honduras's Intervention Judgment, paras 71–3). The court added that the boundary between Nicaragua and Colombia would be determined pursuant to the parties' coastline and maritime features. Accordingly, the court concluded that Honduras had failed to demonstrate that it

had an interest of a legal nature that could be affected by the decision of the court and rejected Honduras's application (Honduras's Intervention Judgment, para. 75).

c. Sovereignty over islands in the disputed area

On 19 November 2012, the court rendered its Judgment on the Merits. The court first identified the area and remaining maritime features in dispute (namely, Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Quitasueño, Serranilla, and Bajo Nuevo) (Judgment on the Merits, paras 18–24). The location of each disputed feature is illustrated in Figure B21.1.

Before addressing questions of sovereignty, the court had to determine whether the maritime features in dispute were capable of appropriation. Referring to its judgment in *Qatar/Bahrain*, the court recalled that 'islands, however small, are capable of appropriation', while 'low-tide elevations cannot be appropriated' (Judgment on the Merits, para. 26). The parties agreed that all of the maritime features except Quitasueño remained above water at high tide and thus constituted islands capable of appropriation (Judgment on the Merits, para. 27).

As regards Quitasueño, Nicaragua argued that it was a shoal that was permanently submerged at high tide. In support of its argument, Nicaragua invoked a survey prepared in 1937 by an official of the Colombian Foreign Ministry. Nicaragua also referred to an exchange of diplomatic notes in 1972 between Colombia and the United States, in which the United States express its opinion that Quitasueño was 'permanently submerged at high tide'. Nicaragua also referred to various charts of (p. 516)

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Figure B21.2: Photograph of Quitasueño (QS 32) showing solid feature (rock) above high tide.

Note: Photograph from Colombian Rejoinder. Malintoppi, L., Modes of Acquisition of Sovereignty over Islands, London International Boundary Conference (2013).

the Caribbean, none of which showed the presence of any islands at Quitasueño. Colombia relied on two surveys, one prepared by the Colombian Navy in September 2008 and another prepared by an international expert in February 2010 for the purposes of the proceeding (the '2010 Survey'). The 2010 Survey identified fifty-four features within Quitasueño (referred to as QS 1 to QS 54), of which it said thirty-four were above water at high tide and twenty formed low-tide elevations. Nicaragua disputed the tide model used in the 2010 Survey, but acknowledged that QS 32 remained above water at high tide. Nevertheless,

Nicaragua contended that QS 32 was a piece of ‘coral debris’ and thus not ‘naturally formed’ for the purposes of Article 121 of UNCLOS.

The court held that the contemporary evidence was critical to the question of the status of Quitasueño, and that the 2010 Survey was ‘by far the most important’ of that evidence. It noted that, no matter which tidal model was used, QS 32 had been shown to remain above water at high tide. It dismissed Nicaragua’s argument about the coral composition of the feature, citing photographic evidence showing that QS 32 was composed of solid material, not loose debris.

Accordingly, the court concluded that QS 32 was capable of appropriation. As regards the other maritime features at Quitasueño, the court concluded that the evidence did not establish that any of them constituted an island at international (p. 517) law, although both Nicaragua’s tide model and the photographic evidence showed them to be low-tide elevations (Judgment on the Merits, paras 28–38).

In addressing the question of sovereignty over the disputed features, the court referred first to the 1928 Treaty, which accorded Colombia sovereignty over ‘San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago’. However, the court considered that neither the 1928 Treaty nor its historical records were conclusive as to the composition of the San Andrés Archipelago (Judgment on the Merits, paras 52, 55).

The court held that the principle of *uti possidetis juris* afforded ‘inadequate assistance in determining sovereignty over the maritime features in dispute between Nicaragua and Colombia because nothing clearly indicates whether these features were attributed to the colonial provinces of Nicaragua or of Colombia prior to or upon independence’ from Spain (Judgment on the Merits, para. 65). With regard to *effectivités*, however, the court found that, whereas there was no evidence of activities *à titre de souverain* on the part of Nicaragua, Colombia had, for many decades, consistently carried out sovereign activities over the maritime features in dispute. Colombia’s activities *à titre de souverain* included public administration, enactment of legislation, regulation of economic activities, public works, law enforcement measures, naval visits, and search and rescue operations (Judgment on the Merits, paras 82–3). Moreover, Colombia’s exercise of sovereign authority was public and had not been objected to by Nicaragua prior to the crystallization of the dispute in 1969. The court found that all this provided ‘very strong support for Colombia’s claim of sovereignty over the maritime features in dispute’ (Judgment on the Merits, para. 84).

The court further noted that, while not being evidence of sovereignty, Nicaragua’s failure to object to certain aspects of the Loubet Award of 11 September 1900 (by which the President of France had found Colombian sovereignty over Albuquerque and at least some of the other islands in dispute), the practice of third States, and numerous maps (none of which showed the disputed features as Nicaraguan) afforded further support to Colombia’s claim (Judgment on the Merits, paras 85–102).

In light of all this, the court concluded that Colombia had sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana, and Serranilla (Judgment on the Merits, para. 103).

d. Nicaragua’s claim for delimitation of a continental shelf extending beyond 200M

The court then examined the admissibility of a new claim submitted by Nicaragua in the second round of written submissions in the case. In its application and (p. 518) memorial, Nicaragua had requested the court to determine a ‘single maritime boundary’ between Nicaragua’s and Colombia’s continental shelf areas and EEZ, in the form of a median line between the mainland coasts of the two States. By contrast, in its second round submission,

which post-dated the Judgment on Preliminary Objections, Nicaragua requested the court to define ‘a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties’. This new claim was based on Nicaragua’s assertion that its continental margin for the purposes of Article 76 of UNCLOS extends beyond 200M from its coast and into areas within 200M of Colombia’s mainland coast. Contrary to Colombia’s position, the court concluded that Nicaragua’s new claim did not transform the subject matter of the dispute and was therefore admissible (Judgment on the Merits, paras 108–12).

The court then considered whether it was in a position to determine the continental shelf boundary newly requested by Nicaragua. It noted that, since Colombia is not a State party to UNCLOS, the law applicable was customary international law (Judgment on the Merits, para. 114). The court also observed that the definition of the continental shelf set out in Article 76(1) of UNCLOS forms part of customary international law (Judgment on the Merits, para. 118).

The court noted that the jurisprudence referred to by Nicaragua in support of its new delimitation claim ‘involve[d] no case in which a court or a tribunal was requested to determine the outer limits of a continental shelf beyond 200M’ (Judgment on the Merits, para. 125). After distinguishing the *Bangladesh/Myanmar* case as arising out of the ‘unique situation’ in the Bay of Bengal, the court cited its statement in the *Nicaragua/Honduras* case that ‘any claim of continental shelf rights beyond 200 miles [by a State Party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf’ (the ‘CLCS’) (Judgment on the Merits, para. 126).[8] The court explained that ‘the fact that Colombia is not a party [to UNCLOS] does not relieve Nicaragua of its obligations under Article 76 of that Convention’ (Judgment on the Merits, para. 126).

Colombia argued that Nicaragua had not established any entitlement to an outer continental shelf and observed that Nicaragua had to date provided the CLCS with only ‘preliminary information’, as opposed to a full submission (Judgment on the Merits, para. 127). The court concluded that Nicaragua had not established that it had ‘a continental margin that extends far enough to overlap with Colombia’s 200-nautical-mile entitlement to the continental shelf, measured from Colombia’s mainland coast’ (Judgment on the Merits, para. 129). The court accordingly (p. 519) concluded that Nicaragua’s new claim contained in its final written submission could not be upheld (Judgment on the Merits, para. 131).

e. Delimitation of the maritime boundary within 200M

The court noted that Nicaragua’s maritime entitlements extending to 200M from its mainland coast and adjacent islands overlapped with the entitlements generated by the islands over which the court had held that Colombia has sovereignty. The court concluded, therefore, that it was called upon to effect a delimitation between these overlapping entitlements (Judgment on the Merits, paras 132–6).

Citing its judgment in the *Qatar/Bahrain* case, the court held that the principles of maritime delimitation enshrined in Articles 74 and 83 of UNCLOS and the legal regime of islands set out in Article 121 of UNCLOS reflect customary international law, and were, therefore, applicable (Judgment on the Merits, paras 137–9).

Relevant coasts

Quoting its judgment in the *Black Sea* case, the court recalled that ‘[t]he title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts’.[9] Accordingly, the court began the delimitation by determining the relevant coasts of the

parties. The court defined them as ‘those coasts the projections of which overlap’ (Judgment on the Merits, para. 141).

The court determined that the Nicaraguan relevant coast was its entire east mainland coast, except for a short stretch near Punta de Perlas that faces due south (Judgment on the Merits, para. 145).[10] Colombia’s relevant coast was confined to its islands in the Caribbean Sea, as its mainland did not generate any entitlements overlapping with Nicaragua’s 200M entitlements (Judgment on the Merits, paras 151–2). Given the extensive area of overlapping entitlements to both the east and west of the Colombian islands, the court considered that the entire coastline of these islands was to be taken into account. The lengths of the relevant coasts were 531km for Nicaragua and 65km for Colombia, a ratio of 1:8.2 in favour of Nicaragua (Judgment on the Merits, para. 153). The relevant coasts as identified by the court are illustrated in Figure B21.2.(p. 520)

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Figure B21.3: *Nicaragua/Colombia*: court’s judgment.

(p. 521)

Relevant maritime area

The court then considered the relevant maritime area. It defined it as ‘that part of the maritime space in which the potential entitlements of the parties overlap’. In the present case, the court decided that the relevant area extended from the Nicaraguan coast to a line in the east 200M from Nicaragua’s territorial sea baselines (Judgment on the Merits, para. 159).

The court reserved that during the final stage of delimitation it would be necessary to maintain an awareness of the rights of third States—Jamaica, Honduras, Panama, and Costa Rica—to the north and south of the relevant maritime area, and related boundaries established through bilateral agreements or adjudication. The parties agreed, and the court confirmed, that the relevant area of overlapping entitlements did not extend beyond such established boundaries (Judgment on the Merits, paras 162–3).

The court also excluded the Colombia-Jamaica ‘Joint Regime Area’ from the relevant area. Bajo Nuevo fell outside Nicaragua’s 200M maritime limit. Although Serranilla did not, it was excluded owing to potential Jamaican entitlements in the area. The court noted that neither party had contended otherwise (Judgment on the Merits, para. 163).

The relevant maritime area is illustrated in Figure B21.2. It consisted of approximately 209,280 square kilometres of maritime space (Judgment on the Merits, para. 166).

Entitlements generated by the maritime features

The parties agreed that San Andrés, Providencia, and Santa Catalina were entitled to a territorial sea, EEZ, and continental shelf capable of extending 200M in each direction (Judgment on the Merits, para. 168). The parties differed, however, as to the entitlements generated by the other maritime features: Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla, Bajo Nuevo, and Quitasueño. Colombia maintained that all except Quitasueño were capable of sustaining human habitation or economic life for the purposes of Article 121 of UNCLOS, but Nicaragua disputed this.

The court decided that it was not called upon to determine the entitlements that Serranilla and Bajo Nuevo generated because they fell outside the relevant area (Judgment on the Merits, para. 175).

Citing its judgment on the merits in *Qatar/Bahrain*, the court found that Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, and Quitasueño were each entitled to a territorial sea of 12M, irrespective of their size or whether they fell within the exception stated in Article 121(3) of UNCLOS (Judgment on the Merits, paras 176, 182).

(p. 522) The court observed that, in accordance with long-established principles of customary international law, a coastal State possesses sovereignty over the seabed and water column of its territorial sea. By contrast, States do not possess sovereignty over the continental shelf and EEZ areas. The court noted that the territorial sea of a State may be restricted where it overlaps with the territorial sea of another State or the presence of a historic agreed boundary. However, it noted also that '[t]he Court has never restricted the right of a State to establish a territorial sea of 12M around an island on the basis of an overlap with the continental shelf and exclusive economic zone entitlements of another State'. On that basis, the court rejected Nicaragua's submission that an equitable solution required drawing a 3M enclave around Alburquerque Cays, East-Southeast Cays, Roncador, and Serrana. The court also noted that it was not necessary to determine the status of these islands, as the entitlements they generated would entirely overlap with the continental shelf and EEZ entitlements of San Andrés, Providencia, and Santa Catalina (Judgment on the Merits, paras 177–80).

With regard to Quitasueño, as both parties agreed that QS 32 was a rock incapable of sustaining human habitation or economic life of its own, the court concluded that it generated no entitlement to a continental shelf or EEZ. However, by virtue of Article 13 of UNCLOS (which reflected customary international law), Colombia was entitled to use low-tide elevations within 12M of QS 32 to increase the breadth of its territorial sea (Judgment on the Merits, paras 182–3).

Method of delimitation

Nicaragua argued that the geographical context of the delimitation was such that it would not be appropriate for the court to follow an equidistance-based approach. Nicaragua argued that the process of constructing a provisional equidistance line between its mainland coast and the west-facing coasts of the Colombian islands would be 'wholly artificial' given that, *inter alia*, the coast of the islands was less than one-twentieth the length of the mainland coast and a provisional equidistance line would completely disregard the substantial part of the relevant area situated to the east of the Colombian islands. Citing the treatment of the Channel Islands in the *UK/France Continental Shelf* case as a precedent, Nicaragua submitted that the appropriate methodology to adopt was to enclave

the Colombian islands in an area otherwise forming Nicaraguan EEZ and continental shelf. This was resisted by Colombia, which advocated an equidistance-based delimitation.

The court recalled that the methodology that it normally employs when called upon to undertake EEZ and continental shelf delimitations involves proceeding in three stages: first, construct a provisional equidistance or median line using 'methods that are geometrically objective and appropriate for the geography of the area' and the 'most appropriate base points on the coasts of the Parties'; second, consider whether there are any relevant circumstances which may call for an (p. 523) adjustment of the provisional equidistance/median line (or the employment of other techniques, such as construction of an enclave around isolated islands) so as to achieve an equitable result; and, third, conduct a 'disproportionality test' to assess whether the parties' respective shares of the relevant area are markedly disproportionate to their respective relevant coasts (Judgment on the Merits, paras 190–3).

The court observed that, unlike in the *Nicaragua/Honduras* case, this was not a situation in which the construction of a provisional median line was 'not feasible'. The Nicaraguan coast and Colombian islands were in a relationship of oppositeness and the construction of a provisional median line would be straightforward. The factors raised by Nicaragua, such as the unusual circumstance that a large part of the relevant area was located to the east of the Colombian islands and hence behind the Colombian baseline, did not justify disregarding the entire methodology. Rather, they would be taken into account in the second stage of the delimitation process. As for the *UK/France Continental Shelf* case, that award had been 'rendered in 1977 and thus some time before the Court established the methodology which it now employs in cases of maritime delimitation'. Furthermore, it had been concerned with a 'quite different geographical context' in which the Court of Arbitration had employed enclavement in conjunction with the construction of a provisional equidistance/median line (Judgment on the Merits, paras 195–8).

Determination of base points and construction of provisional median line

Citing its judgment in the *Black Sea* case, the court proceeded to select the base points that it considered appropriate to construct its provisional median line. The base points selected by the court and the resultant provisional median line are illustrated in Figure B21.3. The court considered that Quitasueño and Serrana should not contribute to the drawing of the provisional median line. According to the court, placing base points on these 'very small maritime features' would have an effect 'which would be out of all proportion to [their] size and importance' and would distort 'the relevant geography' (Judgment on the Merits, para. 202).

Relevant circumstances for the adjustment of the provisional median line

The court then turned to address a number of circumstances that had been raised by the parties for the purposes of achieving an equitable solution in the delimitation. For Nicaragua, these factors necessitated a 'complete break with the provisional median line' and the substitution of enclaves around the Colombian islands. By contrast, Colombia argued that the provisional median line afforded an equitable solution and therefore required no adjustment.

The court dismissed, as irrelevant or negligible circumstances in the delimitation, the previous conduct of the parties, access to natural resources, security and law enforcement, and delimitations effected under bilateral agreements with third States (Judgment on the Merits, paras 217–28).(p. 524)

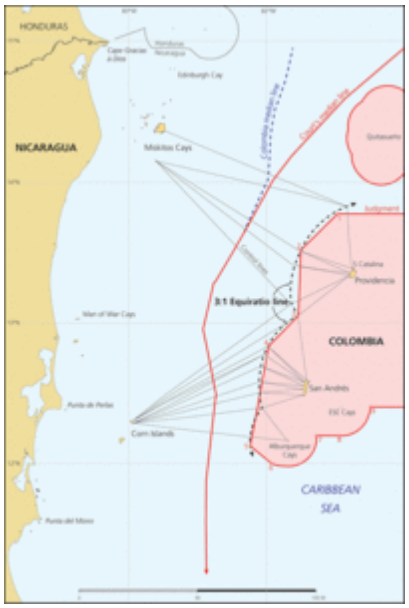

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Figure B21.4: *Nicaragua/Colombia*: construction of the equiratio line.

(p. 525) However, the court considered that two relevant circumstances were present that required adjustment of the provisional median line in order to achieve an equitable solution: first, the substantial disparity in the lengths of the parties' relevant coasts; and, second, the overall geographical context of the dispute involving a series of small and dispersed Colombian islands facing the continuous coastline of Nicaragua (Judgment on the Merits, paras 208–16, 229).

The disparity between the parties' relevant coastal lengths was approximately 1:8.2 in favour of Nicaragua. Relying on its judgments in *Libya/Malta* and *Jan Mayen*,[11] the court held that this 'substantial disparity' required an adjustment of the provisional median line, especially given the overlapping maritime areas to the east of the Colombian islands (Judgment on the Merits, para. 211).

Regarding the overall geographical context, the court noted that the effect of the provisional line was to cut off Nicaragua from three-quarters of the maritime area into which its coast projects. The court noted that this cut-off effect, caused 'by a few small islands which are many nautical miles apart', required adjustment of the provisional median line to ensure an equitable result (Judgment on the Merits, para. 215). At the same time, the court noted that the adjusted line should not cut off Colombia from the EEZ and continental shelf entitlements generated by its islands in the area to their east. The court considered that any enclavement, as requested by Nicaragua, would have just that effect. The court also observed that enclavement would have 'unfortunate consequences for the orderly management of maritime resources, policing and the public order of the oceans in general' (Judgment on the Merits, paras 216, 230).

In adjusting the provisional median line, the court distinguished between the part of the relevant area involving opposite coasts, between Nicaragua and the main Colombian islands, and the 'more complex' part to the east of those islands (Judgment on the Merits, para. 232). In the first area, the court considered that the disparity in coastal lengths was 'so marked as to justify a significant shift' in the provisional median line, although not such as to cut across the 12M territorial sea of the Colombian islands. The court concluded that an adjustment using a 3:1 weighting ratio between the Nicaraguan and Colombian base points would achieve an equitable result. This was implemented by constructing a line each

point on which is three times as far from the Nicaraguan base points as it is from the Colombian base points (see Figure B21.3).

With regard to the ‘more complex’ area, the court noted that to extend the delimitation line north of point 1 or south of point 5 would still leave Colombia with a disproportionately large share of the relevant area (Judgment on the Merits, (p. 526) para. 236). As a result, the court decided to continue the boundary line out to Nicaragua’s 200M limit using ‘lines of latitude’ (i.e. parallels), as shown in Figure B21.2.[12]

Finally, the court addressed the entitlements of Quitasueño and Serrana, which fell on the Nicaraguan side of the proposed boundary line. In light of their size and remote situation, and the disproportionate effect they would otherwise have on the boundary, the court considered that the use of enclaves was the most equitable solution. The court found it unnecessary to determine whether Serrana fell within Article 121(3) of UNCLOS. Owing to its small size, remoteness, and other characteristics, the court concluded that an equitable result required that the boundary followed the 12M limit around Serrana Cay and other cays in its vicinity (Judgment on the Merits, para. 238).

Disproportionality test

The court emphasized that the disproportionality test is not designed to create a strictly proportional result, but to ensure that there is not ‘a significant disproportionality so gross as to “taint” the result and render it inequitable’. This assessment can only be made in light of the circumstances of the particular case, not by reference to ‘any mathematical formula’ (Judgment on the Merits, para. 242).

The adjusted line had the effect of dividing the relevant area at a ratio of approximately 1:3.44 in Nicaragua’s favour, while the ratio of relevant coasts was 1:8.2 in Nicaragua’s favour (Judgment on the Merits, para. 243). Noting the desirability of ensuring that neither of the parties suffered any ‘cut-off’ effect, that the main Colombian islands should not be divided into separate areas, and that the delimitation ‘must take into account the need of contributing to the public order of the oceans’, the court concluded that the result achieved did not entail such disproportion as to create an inequitable result. Accordingly, the maritime boundary arrived at via the second step of the delimitation process required no further adjustment in the third step (Judgment on the Merits, paras 244, 247).

The maritime boundary delimited by the court is illustrated in Figures B21.2 and B21.3.(p. 527)

III. Technical Considerations

The feature called Quitasueño was the subject of much debate. Nicaragua maintained that it was totally submerged, relying, *inter alia*, on published Colombian charts and historical reports. Colombia submitted two surveys of Quitasueño (and the other cays) and identified over fifty features that were exposed at some stage of the tide. Nicaragua criticised the global tidal model used for the survey calculations and maintained that the one rock above high water, QS 32, was only coral rubble. The court determined that QS 32 was an island in the sense of Article 121(1) of UNCLOS and accorded it (along with all the low-tide elevations that fell within 12M of Quitasueño) a full 12M territorial sea. This confirmed the entitlement of ‘rocks’, however small, to a full 12M territorial sea. Despite this, Quitasueño was omitted in the drawing of the provisional equidistance line at the first stage of delimitation rather than being treated as a special circumstance in the second stage.

As the relevant area extended east of the Colombian islands, the court decided that the entirety of the islands’ coastlines (as opposed to just that portion that faced Nicaragua) should be used in calculating the lengths of the parties’ relevant coasts. The resultant

coastal length ratio was 1:8.2 in Nicaragua's favour. The division of the relevant area in a ratio of 1:3.4 was not seen as disproportionate and thus led to no adjustment.

The court adopted a novel method for the adjustment of the median line by using the *equiratio* technique.[13] This is calculated in a similar way to equidistance, but defines a line where every point is, for example, three times as far from state A as it is from state B. The effect in this case was to produce a line that gave half-weight to the islands. The nature of the *equiratio* method is that it produces a line that can be highly curved. The court simplified this weighted line by drawing straight lines across the curvature, which had the effect of reducing the weight given to the islands still further (see Figure B21.2). The choice of parallels of latitude for the 'corridor' extending eastwards from San Andrés and Providencia echoes the longer corridor delimited in the *St Pierre and Miquelon (France v. Canada)* case. The choice of parallels is a practical solution, but does not reflect the geometry of the coastlines in the area, which run slightly east of north. These lines of latitude are an artefact of the cartographic process. The final delimitation is a mixture of different line types: geodesics from points 1 to 6 to the west of the Colombian islands; 12M arcs around the enclaves; and loxodromes along the parallels of latitude. In (p. 528) addition, the eastern boundary of the relevant area between points A and B is defined by 200M arcs from Nicaragua's baselines.

The court did not define precisely the end-points A and B, which lie on the Nicaragua 200M limit, as at the time Nicaragua had not deposited coordinates of its territorial sea base points with the United Nations. It later did so in October 2013.

A final notable point is that the judgment allocates areas to Colombia that lie west of the 82nd meridian, which was the limit of its original historical claims in the area (although its strict equidistance line as submitted to the court lay well to the west of that meridian).

IV. Significance of the Decision and its Contribution to International Law

This case is significant both for its endorsement of the three-stage methodology normally applied by courts and tribunals in modern maritime delimitation disputes and for the peculiarities of the application of that methodology to the unusual geographical context with which the court was faced. The case was also notable for its treatment of Nicaragua's request for continental shelf delimitation beyond 200M of its coast. The proceeding was both substantively and procedurally complex, with the result that almost eleven years passed between the filing of Nicaragua's initial application and the rendering of the court's final judgment.

The court adopted a resolute promotion of the three-stage methodology (equidistance/relevant circumstances/disproportionality test) in circumstances where the appropriateness of that methodology was, perhaps, not readily apparent. In doing so, the court confirmed the primacy of that methodology in modern international law.[14] The court also confirmed the inherent flexibility and adaptability of that methodology. In particular, it pointed out that the various geographical irregularities highlighted by Nicaragua (in particular, the fact that the relevant area extended to the east of the Colombian islands and, thus, on the 'wrong side' of the median line) could be addressed as 'relevant circumstances' at the second stage of the delimitation process. These aspects of the judgment demonstrate the exceptional nature of the geographical circumstances that led to the court's rejection of the three-stage methodology in the *Nicaragua/Honduras* case.

(p. 529) The judgment was, however, notable in confirming the modern trend (since the *Black Sea* case, in particular) of rejecting an objective approach at the first stage of the delimitation process. Notwithstanding its observation that this first stage should involve 'methods that are geometrically objective', the court adopted an inherently subjective approach by selecting what were the 'appropriate' base points to use in constructing the

provisional median line. In doing so, the court decided to exclude the small Colombian islands at Quitasueño and Serrana as base points because of the perceived disproportionate effect that they would have on the provisional median line. Such factors could instead have been addressed as 'relevant circumstances' in the second stage of delimitation, i.e. by way of adjustment of a provisional median line constructed by geometrically objective methods.

The judgment confirms the dominant role played by geography in the identification of 'relevant circumstances' at the second stage of the delimitation process. As has become commonplace in modern EEZ and continental shelf delimitation adjudications, the court rejected a series of arguments advanced by the parties about relevant circumstances of a non-geographical nature. The court found that the historic conduct of the parties and the question of equitable access to natural resources in the relevant area were not 'so exceptional' on the facts and evidence as to amount to a relevant circumstance requiring adjustment of the median line. The court also denied any relevance to the numerous bilateral delimitation agreements into which Colombia had entered with third States in the Caribbean Sea region, explaining that such treaties could not be allowed to confer rights on Colombia to the prejudice of Nicaragua.

Notably, however, the court did observe that the delimitation 'must take into account the need of contributing to the public order of the oceans'. To this extent, non-geographical factors were relevant to the delimitation. This was particularly so in the court's rejection of Nicaragua's attempt to enclave the small Colombian islands, a number of which have significant human populations. As a result, the enclavement approach was adopted only in connection with the tiny and remote features of Quitasueño and Serrana, which have no population.

The two geographical relevant circumstances relied upon by the court for its adjustment of the provisional median line are worthy of attention. The first involved a novel application of the so-called 'cut-off' principle and arose out of the location of the small Colombian islands in relation to the easterly projection of Nicaragua's opposite mainland coast. The court noted that the islands cut Nicaragua off from 'some three-quarters of the area into which its coast projects'. This was the first occasion on which the court has been called to adjust a provisional median line in such circumstances. The second relevant circumstance involved a substantial disparity in coastal lengths similar to the disparity in the *Libya/Malta* and *Jan Mayen* cases. However, it is notable that the court calculated the relevant Colombian coastal length by reference to the entire coastlines of the Colombian (p. 530) islands in light of the fact that the area of overlapping entitlements extended both east and west of those islands.

This was the latest in a long line of cases in which the third stage in the delimitation process (namely, the so-called disproportionality test) led to no adjustment to the boundary arrived at following the first two stages. The court observed that 'considerable caution' had been displayed in previous cases and concluded that a division of the relevant areas of approximately 1:3.44 in Nicaragua's favour in circumstances where the ratio of relevant coasts was approximately 1:8.2 did not entail 'such disproportionality as to create an inequitable result'.

The court's approach to evidence played an important role, particularly in connection with its assessment of the legal status of Quitasueño. The court undertook a relatively detailed and forensic analysis of the evidence advanced by the parties, according particular weight to contemporary scientific evidence advanced by Colombia demonstrating that the feature remained above water at high tide. The court also dismissed some of the parties' arguments for lack of evidence, particularly in connection with access to natural resources. This is

indicative of the modern tendency of the court to engage in a more rigorous analysis of scientific and other evidence than was traditionally the case.

Finally, the court's decision not to entertain Nicaragua's request to delimit areas of continental shelf located beyond 200M of its coast warrants attention. This decision stood in contrast with the willingness of ITLOS to undertake such a delimitation exercise in the *Bangladesh/Mayanmar* case. The court reached its decision on the basis that Nicaragua had not established that it had a continental margin extending far enough to overlap with Colombia's 200M continental shelf entitlement. In particular, it noted that Nicaragua had not yet completed a full submission to the Commission on the Limits of the Continental Shelf ('CLCS'), unlike each of Bangladesh and Myanmar at the time of their ITLOS case. Furthermore, the court distinguished the Bay of Bengal as presenting a 'unique situation', as had been acknowledged during the negotiation of UNCLOS, as result of which it had not been difficult for ITLOS to conclude in that case that areas beyond 200M constituted continental shelf requiring delimitation.

This aspect of the judgment may have significant implications for future unilateral attempts by States to have international courts or tribunals delimit continental shelf areas beyond 200M, since it would appear to require the vast majority of States to complete the CLCS process before seeking any third-party delimitation of such areas. The approach taken by the court in this respect contrasted with that taken in the *Bangladesh/Myanmar* case, where ITLOS noted that the function of the CLCS in recommending the outer limits of the continental shelf and the function of tribunals in delimiting continental shelf boundaries are without prejudice to each other.(p. 531)

V. Postscript to the 2012 Judgment

On 27 November 2012, just eight days after the court's judgment, Colombia denounced the Pact of Bogotá.

On 16 September 2013, Nicaragua instituted new proceedings against Colombia with regard to 'the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia'.[15]

Nicaragua requested the court to determine '[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in [the Judgment on the Merits]'. Nicaragua also requested the court to indicate '[t]he principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200M from Nicaragua's coast'.

On 14 August 2014, Colombia filed preliminary objections, claiming that the court was without jurisdiction. Colombia argued that Nicaragua's application was filed ten months after Colombia's denouncement of the Pact of Bogotá and that the court's 2012 judgment did not provide the court with a 'continuing jurisdiction' to determine the dispute. Colombia also posited that the claims raised by Nicaragua were barred by the principle of *res judicata*, that the application was an improper attempt to appeal or revise the 2012 judgment, and that the application could not be considered by the court because the CLCS had not yet made a recommendation concerning the limits of any extended continental shelf. A hearing on Colombia's preliminary objections took place in October 2015.

On 26 November 2013, Nicaragua filed a further application instituting yet another proceeding against Colombia, relating to alleged violations of 'Nicaragua's sovereign rights and maritime zones' declared by the court's Judgment on the Merits and 'the threat of the use of force by Colombia in order to implement these violations'.[16] Nicaragua requests the court to adjudge and declare that Colombia is (p. 532) in breach of, *inter alia*, its obligation not to use or threaten to use force under Article 2(4) of the UN Charter and its obligation not to violate Nicaragua's maritime zones as delimited in the Judgment on the Merits.

On 19 December 2014, Colombia filed preliminary objections to jurisdiction, referring again to Colombia's denunciation of the Pact of Bogotá. Colombia argued also, *inter alia*, that there was no dispute over the matters raised in the application on the date it was filed, that the court has no 'inherent jurisdiction' upon which Nicaragua can rely, and that the court has no post-adjudicative enforcement jurisdiction. A hearing on Colombia's preliminary objections took place in September 2015.[17]

Footnotes:

1 Replacing Gaja, who was elected as a Member of the Court. Gaja had previously replaced Bedjaoui, who resigned on 2 May 2006.

2 Replacing Fortier, who resigned on 7 September 2010.

3 Nicaragua ratified the UN Convention on the Law of the Sea on 3 May 2000; Colombia is not a State party to UNCLOS.

4 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2007, p. 832.

5 Citing *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports 1994, p. 37, paras 72–3.

6 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application for Permission to Intervene, Judgment, ICJ Reports 2011, p. 348.

7 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application for Permission to Intervene, Judgment, ICJ Reports 2011, p. 420.

8 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, ICJ Reports 2007, p. 659, para. 319.

9 *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, ICJ Reports 2009, p. 89, para. 77.

10 The relevant coast also included the east-facing coasts of islands fringing Nicaragua's mainland coast. The west-facing coasts were not included as they are parallel to the mainland coast (Judgment on the Merits, para. 145).

11 The court noted that the parties' coastal length ratio was similar to those which it considered required adjustment of the provisional line in the *Libya/Malta* and *Jan Mayen* cases.

12 First, from the extreme northern point of the weighted line, the court drew a parallel of latitude east until it reached the 200M limit from the baselines from which the territorial sea of Nicaragua is measured. Second, from the southern point of the adjusted line, the boundary runs south-east until it intersects the 12M envelope of arcs around South Cay of Alburquerque Cays (point 6), and follows that arc until it intersects with the parallel passing through the southernmost point of the 12M envelope of arcs around East-Southeast Cays (point 7). The boundary line follows that parallel until it reaches the southernmost point of the 12M envelope of arcs around East-Southeast Cays (point 8), and continues along that envelope of arcs until its most eastward point (point 9). The boundary then

follows the parallel of latitude until it reaches the 200M limit from Nicaragua's baselines (Judgment on the Merits, para. 237).

13 The *equiratio* method was devised by Admiral Langeraar of the Dutch Hydrographic Service in 1985 as a method to produce an infinitely variable adjustment to equidistance. This is the first time it has been used by any court or tribunal.

14 Indeed, the decision to apply the three-stage methodology, and thus to start the delimitation process by constructing a provisional median line, was not without controversy among the members of the court. For example, Judge Abraham remarked that 'it is obvious that the construction of a provisional median line as a starting point for the delimitation is not only highly inappropriate in this case, but that it is even virtually impossible': Separate Opinion of Judge Abraham, para. 24.

15 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Application of the Republic of Nicaragua Instituting Proceedings, available at <http://www.icj-cij.org/docket/files/154/17532.pdf>.

16 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*. See ICJ Press Release of 27 November 2013, available at <http://www.icj-cij.org/docket/files/155/17806.pdf>. Application Instituting Proceedings, available at <http://www.icj-cij.org/docket/files/155/17978.pdf>.

17 The court's decision on jurisdiction in both new cases is awaited at the time of writing.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 22 Peru v. Chile (Judgment of the International Court of Justice, 27 January 2014)

From: A Practitioner’s Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):

Coastal states — Delimitation — Straits — Territorial sea — UNCLOS (UN Convention on the Law of the Sea)

(p. 533) 22 *Peru v. Chile* (Judgment of the International Court of Justice, 27 January 2014)

Case Note: treaty interpretation—maritime boundary established by evidence of 'tacit agreement' by the 1950s—seaward extent of tacitly agreed boundary—all-purpose nature of tacitly agreed boundary—relevant practice of the parties—relevance of contemporaneous fishing activity—starting point of tacitly agreed boundary—three-stage delimitation methodology beyond end-point of tacitly agreed boundary—construction of equidistance line from 80M out to Chilean 200M limit—final leg of boundary along Chilean 200M limit to intersection with Peruvian 200M limit—'broad assessment of disproportionality'

Citation: *Maritime Dispute* (*Peru v. Chile*), Judgment, 27 January 2014 (not yet reported in ICJ Reports)

Institution: ICJ

Basis of jurisdiction: American Treaty on Pacific Settlement (Pact of Bogotá), Article XXXI; ICJ Statute, Article 36(2)

The Court: *Judges* Tomka (President), Sepúlveda-Amor (Vice-President), Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Sebutinde, Bhandari, *Judges ad hoc* Guillaume (appointed by Peru), Orrego Vicuña (appointed by Chile)

Applicable law: customary international law[1]

Areas delimited: territorial sea; EEZ; continental shelf (within 200M)(p. 534)

I. Introduction and Context

This case concerned a dispute between Peru and Chile in relation to the course of their maritime boundary in the South Pacific Ocean. The coastlines of Peru and Chile are adjacent. Peru lies to the north of Chile and its coast runs in a northwesterly direction from the starting point of the land boundary between the parties. Chile's coast generally follows a north-south orientation. The coasts of both Peru and Chile in the area extending from the land boundary are mostly uncomplicated and relatively smooth, with no distinct promontories or other distinguishing features. The geographical context of the delimitation is illustrated in Figure B22.1.

Peru and Chile are both former Spanish colonies. Chile became independent in 1818 and Peru in 1821. In 1929, the parties concluded the Treaty for the Settlement of the Dispute regarding Tacna and Arica (the '1929 Treaty'), which established the land boundary between them and provided for the creation of a Mixed Commission of Limits to determine and mark the agreed land boundary. In its 1930 Final Act, the Mixed Commission recorded the precise locations of eighty boundary markers that it had placed on the ground to demarcate the land boundary.

In 1947, both parties unilaterally proclaimed certain maritime rights extending 200M from their coasts (in what were collectively known as the '1947 Proclamations'). The 200M claims were further set out by Chile in a 1947 Declaration and Peru in a 1947 Decree. In 1952, Chile and Peru, together with Ecuador, signed a Declaration during the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific, held in Santiago de Chile. This Declaration (the '1952 Declaration'), along with three other instruments adopted the same year, was registered with the UN Secretariat in 1976.[2] Chile, Peru, and Ecuador negotiated eight further instruments in 1954 and 1967, to which the

parties referred in their pleadings, including the 1954 Special Maritime Frontier Zone Agreement (the '1954 Agreement'), which was registered with the UN Secretariat in 2004.[3]

Peru instituted proceedings against Chile in the ICJ on 16 January 2008 in respect of a dispute concerning, on the one hand, 'the delimitation of the boundary between the maritime zones of the two States in the Pacific Ocean' and, on the other, the recognition in favour of Peru of a 'maritime zone lying within 200 nautical miles of Peru's coast, and thus appertaining to Peru, but which Chile considers to be part of the high seas' (Application, para. 1). In its Application, Peru requested the court to:(p. 535)

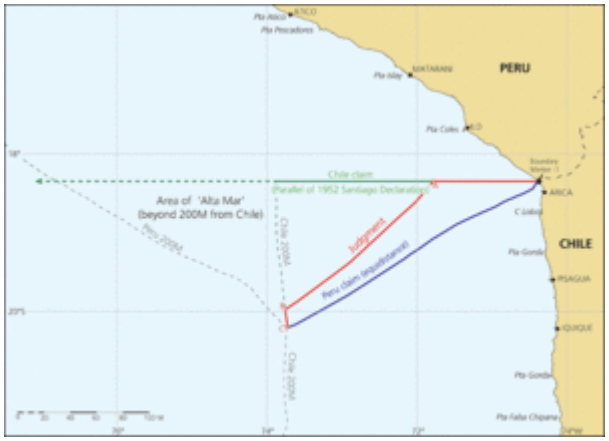

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Figure B22.1: Peru/Chile: parties' claims and court's judgment.

(p. 536)

> determine the course of the boundary between the maritime zones of the two States in accordance with international law…and to adjudge and declare that Peru possesses exclusive sovereign rights in the maritime area situated within the limit of 200 nautical miles from its coast but outside Chile's exclusive economic zone or continental shelf (Application, para. 13).

II. Positions of the Parties and Summary of the Judgment

Peru argued that no prior agreed maritime boundary existed between the two countries and, in its Application, requested the court to plot a boundary line using the equidistance method in order to achieve an equitable result. In its written and oral pleadings, however, Peru instead sought a declaration in respect of the location of the maritime boundary, without requesting the court to determine its coordinates.

Chile contended that the 1952 Declaration had established an international maritime boundary along the parallel of latitude passing through the starting point of the parties' land boundary and extending to a minimum of 200M. It further relied on several agreements and subsequent practice as evidence of that boundary.

The course of the maritime boundaries claimed by Peru and Chile, respectively, together with the maritime area in which Peru sought a declaration of exclusive sovereign rights outside Chile's EEZ and continental shelf, are illustrated in Figure B22.1.[4]

a. Existence of a maritime boundary

In order to settle the dispute, the court had first to determine whether an agreed maritime boundary existed between the parties. For this purpose, the court examined the 1947

Proclamations, the 1952 Declaration, various agreements concluded in 1952 and 1954, as well as the practice of the parties subsequent to the 1952 Declaration.

The 1947 Proclamations

The parties explained that the 1945 Proclamations by the United States of America related to the continental shelf and coastal fisheries in certain parts of the high seas had placed pressure on the commercial exploitation of fisheries off their Pacific coasts, thus motivating their own 1947 Proclamations.

Chile argued that the 1947 Proclamations provided both 'antecedents' to the 1952 Declaration and circumstances of the conclusion of the 1952 Declaration for the purposes of Article 32 of the VCLT. Peru observed that the 1947 Proclamations (p. 537) made no reference to international boundaries and argued that they could not constitute circumstances relevant to the 1952 Declaration under the VCLT since they pre-dated the 1952 Declaration by five years.

The court noted that the parties were in agreement that the 1947 Proclamations did not themselves establish an international maritime boundary (para. 39). The court examined whether the 1947 Proclamations provided evidence of an understanding of the parties regarding the future delimitation of the maritime boundary. Chile's 1947 Declaration provided for the establishment of protective zones for whaling and deep sea fisheries, the perimeter of which would be formed by its coast and the 'mathematical parallel projected into the sea at a distance of 200 nautical miles'. According to Peru's 1947 Decree, Peru would exercise control and protection in a maritime zone situated 'between the coast and an imaginary parallel line to it' at a distance of 200M.

The court noted the apparent use of the *tracé parallèle* method to describe the relevant maritime zones in the 1947 Proclamations. However, it concluded that this feature alone was 'not sufficient to evidence a clear intention of the Parties that their eventual maritime boundary would be a parallel' (para. 40). It further held that the 'conditional language' of the 1947 Proclamations, as well as their 'provisional nature', precluded an interpretation of them as reflecting any shared understanding of maritime boundary between the parties (para. 43).

The 1952 Declaration

Chile considered that the 1952 Declaration had been a treaty from its inception. Peru rejected this, arguing that it had been conceived merely as a proclamation of the international maritime policy of the three States parties. However, Peru accepted that it later acquired the status of a treaty following ratification by Chile and Ecuador and registration with the UN Secretariat pursuant to Article 102 of the UN Charter.

Pursuant to paragraph II of the 1952 Declaration, Chile, Ecuador, and Peru proclaimed that they each possessed 'exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts'. Paragraph IV then states:

> In the case of island territories, the zone of 200 nautical miles shall apply to the entire coast of the island or group of islands. If an island or group of islands belonging to one of the countries making the declaration is situated less than 200 nautical miles from the general maritime zone belonging to another of those countries, the maritime zone of the island or group of islands shall be limited by the parallel at the point at which the land frontier of the States concerned reaches the sea.

Peru asserted that the 1952 Declaration lacked the characteristics of a boundary agreement. Chile disagreed, pointing out that a treaty effecting a boundary delimitation can take any form.

(p. 538) Chile argued that paragraph IV of the 1952 Declaration necessarily assumed a general maritime delimitation between Peru and Chile extending to 200M along the parallel of latitude passing through the starting point of the land boundary. It relied upon the minutes of the conference at which the 1952 Declaration had been agreed, highlighting in particular an exchange in which all three States had consented to an understanding that the boundary line of the jurisdictional zone of each country was formed by the parallel from the point at which their land borders touched the sea. Chile argued that such an understanding constituted an 'agreement relating to the conclusion' of the 1952 Declaration within the meaning of Article 31(2)(a) of the VCLT.

Peru argued that the 1952 Declaration addressed only seaward and not lateral boundaries. It observed that paragraph IV referred only to the entitlements generated by certain islands and not to the entitlements generated by continental coasts. Peru contested that the minutes relied upon by Chile did not form any recorded agreement, but could only amount to *travaux préparatoires*. According to Peru, the object and purpose of the 1952 Declaration was not the division of fishing grounds between its States parties, but the creation of a zone functioning 'as a single biological unit' designed to address the threat posed by foreign whaling.

The court stated that it must analyze the terms of the 1952 Declaration in accordance with the customary international law of treaty interpretation, as reflected in Articles 31 and 32 of the VCLT (para. 57). It observed that the 1952 Declaration made no express reference to the delimitation of maritime boundaries, although it did contain 'certain elements which are relevant to the issue of maritime delimitation' (para. 58). It observed that paragraph IV resolved a 'specific issue' related to 'insular zones'. It held that the ordinary meaning of paragraph IV, read in its context, only established the parties' agreement concerning the limits between certain insular maritime zones and those zones generated by the continental coasts which abut such insular maritime zones (paras 61–2).

Turning to the object and purpose of the 1952 Declaration, the court observed that its Preamble 'focuses on the conservation and protection of the necessary natural resources for the subsistence and economic development of the peoples of Chile, Ecuador and Peru, through the extension of the maritime zones adjacent to their coasts'. The court rejected Chile's reliance on the minutes because they had merely summarized the discussions that led up to adoption of the 1952 Declaration, and were thus better categorized as *travaux préparatoires* constituting supplementary means of interpretation, for the purposes of the VCLT as argued by Chile. While the court did not need in principle to resort to such supplementary means of interpretation, it indicated that they confirmed its conclusion that the 1952 Declaration 'did not effect a general maritime delimitation' (paras 63–8).

(p. 539) Nevertheless, the court noted that 'various factors' related to the 1952 Declaration, such as a Chilean proposal during the negotiations that the parties adopt a general delimitation along lateral lines and the text of paragraph IV, suggested that 'there might have been some sort of shared understanding among the States parties of a more general nature concerning their maritime boundaries' (para. 69). This provided important context to the court's subsequent findings in relation to the 1954 Agreement, set out below.

The 1954 Agreement

The court proceeded to examine the 1954 Agreement, concluded between Chile, Ecuador, and Peru regarding unintentional violations of the maritime frontier ('*la frontera maritima*') by small fishing vessels. Article 1 of the 1954 Agreement established a special zone 'at a distance of 12 nautical miles from the coast, extending to a breadth of 10 nautical miles on

either side of the parallel which constitutes the maritime boundary between the two countries'.

Chile argued that the 'basic predicate' of the 1954 Agreement was that the three States 'already had lateral boundaries, or "frontiers", in place between them'. Peru, by contrast, contended that the 1954 Agreement: (1) was applicable only to Peru's northern boundary with Ecuador; (2) was not seen by Chile as being 'of major importance' given the delay in its ratification (1967) and UN registration (2004) of the instrument; and (3) had a 'very special and temporary purpose'.

The court dismissed Peru's first two contentions. It observed that there was 'nothing at all in the terms of the [1954 Agreement] which would limit it only to the Ecuador-Peru maritime boundary'. That Agreement had been negotiated, signed, and ratified by all three States concerned. Once ratified by Chile, the 1954 Agreement had become binding on it, regardless of any delay. As for Peru's third contention, the court agreed that the operative terms of the 1954 Agreement were 'narrow and specific'. However, it observed that the terms of the 1954 Agreement acknowledged 'in a binding international agreement that a maritime boundary already exists' (para. 90).

The court noted that the 1954 Agreement did not indicate when and by what means the maritime boundary had been agreed. Therefore, the parties' acknowledgement of its existence could only reflect 'a tacit agreement which they had reached earlier'. The court recalled its earlier observation that certain elements of the 1947 Proclamations and 1952 Declaration suggested an 'evolving understanding' about the parties' maritime boundaries. It recalled also its recognition in the *Nicaragua/Honduras* case that '[t]he establishment of a permanent maritime boundary is a matter of grave importance' and that '[e]vidence of a tacit legal agreement must be compelling'.[5]

(p. 540) The court concluded that:

> In this case, the Court has before it an Agreement which makes clear that the maritime boundary along the parallel already existed between the Parties. The 1954 Agreement is decisive in this respect. That Agreement cements the tacit agreement (para. 91).

The court noted, however, that the 1954 Agreement gave no indication of the nature of the maritime boundary, nor its extent, except that it made clear that the boundary extended beyond 12M from the coast (para. 92).

The court found that certain lighthouse arrangements subsequently made during 1968 and 1969, pursuant to which the parties undertook to carry out 'an on-site study for the installation of leading marks visible from the sea to materialise the parallel of the maritime frontier originating at Boundary Marker number one (No. 1)', had also proceeded on the basis that a maritime boundary extending along the parallel from the land boundary already existed. Again, while not indicating the extent and nature of the maritime boundary, those arrangements had given effect to it 'for a specific purpose' (para. 99).

b. Nature and extent of the tacitly agreed maritime boundary

The court stated that the tacit agreement between the parties relating to their maritime boundary 'must be understood in the context of' the 1947 Proclamations and the 1952 Declaration. Since those instruments expressed claims to the seabed and the waters above the seabed and their resources, without drawing any distinction between those maritime spaces, the court concluded that the tacitly agreed boundary was 'an all-purpose one' (para. 102).

As regards the extent of the boundary established by tacit agreement, the court referred to the practice of the parties before and after the 1954 Agreement, as well as to developments in the law of the sea at that time. It recalled that the purpose of the 1954 Agreement was narrow and specific, related to the establishment of a zone of tolerance for fishing activity operated by small vessels. Accordingly, the boundary along a parallel of latitude must extend at least to the distance where such activity took place at the time (para. 103). The court therefore turned to examine the evidence of that activity.

The court noted a statement by the Peruvian representative at the 1958 UN Conference on the Law of the Sea indicating that the 'biological limit' of the fisheries resources in the region was at a distance of 80 to 100M from shore in the summer, and 200 to 250M in the winter. Peru, in submissions not challenged by Chile, referred to the decision of the parties to proclaim 200M zones in 1952 due to the 'enormous whaling and fishing potential' of the region. The court also noted the statement of the Peruvian representative at the 1958 Conference that 'species such as tunny and barrilete were mostly caught 20 to 80 miles from the coast; the (p. 541) same anchovetas of the coastal waters sometimes went 60 or more miles away; and the cachalot and whales were usually to be found more than 100 miles off' (paras 105–6).

Turning to FAO fisheries statistics cited by Chile, the court noted that the species making up the bulk of the annual fish catch of Peru and Chile in the 1950s were generally found within 60M of the coast. While the FAO statistics also provided some information about the parties' whaling activities, they gave no indication of where those catches occurred (paras 107–8). The court 'did not see as of great significance' the parties' knowledge of the likely possible extent of fishery resources out to 200M, nor the extent of their fishing in later years, because the principal maritime activity undertaken by the parties' coastal populations in the early 1950s was 'fishing undertaken by small vessels'. As regards the more distant waters, the parties' emphasis in this period had been on the exclusion of foreign long-distance fleets from those waters (paras 109–10).

The court recalled that the all-purpose nature of the maritime boundary meant that evidence concerning fisheries activity, in itself, could not be determinative of the extent of that boundary. Nevertheless, it concluded that such activity provided 'some support for the view that the Parties, at the time when they acknowledged the existence of an agreed maritime boundary between them, were unlikely to have considered that it extended all the way to the 200 nautical-mile limit' (para. 111).

In response to a question from the court, both parties recognized that the 200M claims made in the 1952 Declaration did not correspond to the international law of that time and were not enforceable against third parties. Against that backdrop, and on the basis of fishing practices of the 1950s as established by the court, the ICJ considered that 'the evidence at its disposal does not allow it to conclude that the agreed maritime boundary along the parallel extended beyond 80 nautical miles from its starting-point' (para. 117). The relationship of that 80M limit (at 'Point A') to the parties' 1950s fishing ports of Arica and Ilo is illustrated in Figure B22.2.

In light of its 'tentative conclusion' based on the parties' 1950s fishing activities, the court proceeded to examine further elements of practice of the parties, for the most part subsequent to 1954, that may be of relevance to the extent of the tacitly agreed boundary. It did so while remarking that its 'primary concern' should be with the practice of the parties during the 1950s, since its enquiries related to establishing the extent of the boundary acknowledged at that time. It concluded, *inter alia*, that the parties' legislative practice, certain 1970s negotiations with Bolivia, and the parties' positions at the Third UN Conference on the Law of the Sea were of no assistance to determining the extent of the maritime boundary acknowledged in 1954. It observed also that, until the mid 1980s, all of the parties' maritime enforcement activities took place within 60M of the coast (para. 128).

The court considered that certain Chilean arrests of Peruvian fishing vessels south (p. 542) of the parallel of the 1950s provided support to Chile's position in the delimitation, to the extent that such arrests were met without protest by Peru (para. 147).

The court reviewed a 1986 memorandum sent by the Peruvian Ambassador to the Chilean Ministry of Foreign Affairs requesting that 'immediate attention' be given to the 'formal and definitive delimitation of the maritime spaces', together with a *communiqué* in response from the Chilean Foreign Ministry to the effect that the Minister 'took note' of the memorandum and indicating that 'studies in this matter shall be carried out in due time'. The court observed that Peru had not followed up the matter subsequently. The court considered that the 1986 documents acknowledged that there was a maritime boundary, but gave no information about its extent. However, it concluded, without elaboration, that the 1986 correspondence did 'reduce in a major way the significance of the practice of the Parties' after that date (para. 142).

The court concluded that the parties' post-1950s practice did not lead it to change its tentative conclusion that the tacitly agreed maritime boundary did not extend beyond 80M. Accordingly, based on 'an assessment of the entirety of the relevant evidence presented to it', the court concluded 'that the agreed maritime boundary between the Parties extended to a distance of 80 nautical miles along the parallel from its starting-point' (paras 149, 151).

c. The court's delimitation of the maritime boundary

Both parties agreed that their land boundary had been settled by the 1929 Treaty. However, they disagreed on the exact starting point of the land boundary at the coast. Chile considered that the land boundary started from Boundary Marker No. 1, as established by the Mixed Commission of Limits. Peru argued that Boundary Marker No. 1 was not intended to mark the start of the agreed land boundary, not least because it was located 200 metres inland from the coast. The court observed that 'a considerable number of the arguments presented by the Parties concerned an issue which is clearly not before it, namely, the location of the starting point of the land boundary' (para. 163).

The court considered that the 1968–69 lighthouse arrangements between the parties were indicative of a mutual understanding about the course of the existing maritime frontier running through Boundary Marker No. 1. Those arrangements therefore served as 'compelling evidence' that the agreed maritime boundary followed the parallel that passed through Boundary Marker No. 1. It therefore concluded that 'the starting-point of the maritime boundary between the Parties is the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line' (paras 169, 174, 176).

In light of the court's earlier conclusion that the tacitly agreed boundary extended 80M from the starting point (to a point identified by the court as Point A—see (p. 543) Figure B22.2), the court's final task was to delimit the remainder of the boundary beyond 80M. The court proceeded on the basis of Articles 74(1) and 83(1) of UNCLOS, which reflected customary international law, and the three-stage test 'usually' employed by the court in seeking an equitable solution (paras 179–80). Peru proposed delimitation by way of a straightforward equidistance line, while Chile advanced no arguments on this matter.

The court described the situation as 'unusual' as compared to previous cases in the sense that the starting point for the delimitation exercise was located 80M from the closest point on the Chilean coast and about 45M from the closest point on the Peruvian coast (para. 183). At the first stage, the court constructed a provisional equidistance line, starting at Point A, by selecting appropriate base points. For this purpose, only those points on the Peruvian coast which were more than 80M from Point A could be matched with points at an equivalent distance on the Chilean coast. Accordingly, in order to determine the relevant base points on the Peruvian coast, the court drew a circle with an 80M radius from Point A (para. 185). The equidistance line extended out to a distance of 200M from the Chilean

coast, to Point B (para. 186). The ‘equidistance line’ thus constructed by the court is illustrated in Figure B22.2.

As the Peruvian 200M entitlement extended beyond Point B (given the exclusion of a Peruvian base point within 80M of Point A), the court concluded that the final segment of the maritime boundary should proceed southwards along the Chilean 200M limit from Point B to Point C, where the 200M limits of the parties’ maritime entitlements intersect (para. 190). This final segment is also illustrated in Figure B22.2.

The court observed that no relevant circumstances appeared in the record before the court. Accordingly, at the second stage of the delimitation process, there was no basis for adjusting the provisional equidistance line (para. 191).

Finally, in examining whether the result achieved was significantly disproportionate in relation to the lengths of the relevant coasts and the division of the relevant area, the court recalled its previous jurisprudence that the object of delimitation was to achieve an equitable result, not an equal apportionment of maritime areas. As the presence of an agreed boundary running along a parallel of latitude for 80M would make the calculation of the relevant coastal length and coastal areas ‘difficult, if not impossible’, the court did not carry out a precise calculation of ratios. Instead, it undertook a ‘broad assessment of disproportionality’. The court concluded that ‘no significant disproportion is evident, such as would call into question the equitable nature of the provisional equidistance line’ (paras 192–4).

The maritime boundary delimited by the court is illustrated in Figure B22.2.

Peru had not requested the court to determine the precise geographical coordinates of the maritime boundary. The court therefore left this task to the parties, (p. 544) indicating that it ‘expects that the Parties will determine these coordinates in accordance with the present Judgment, in the spirit of good neighbourliness’ (para. 197).

III. Technical Considerations

The court produced a novel ‘displaced equidistance line’ as part of its compromise solution. Normally an equidistance line is drawn using the nearest base points on each coastline, but in this instance the court started the line at a point that was not equidistant (indeed, Point A was located 37M from the closest point on the equidistance line). The court constructed the line by ignoring any Peruvian coast that fell within a circle of radius 80M drawn from Point A (see Figure B22.2). This amounted to discounting 120M of the Peruvian coast. By ignoring the closest Peruvian coast, the so-called equidistance line was shifted substantially in Chile’s favour.

Having done this, the court drew an equidistance line that used base points along the Chilean coastline as far as the last contributing base point at Pisagua, some 75M from the land boundary terminus, and only one base point on the Peruvian side at Punta Islay, some 127M distant.

An oddity is the final leg from Points B to C, which generates a small area of Peruvian EEZ that overlaps the Chilean EEZ. A simpler and more practical solution could have been achieved by connecting Point A directly to Point C (which is the true equidistance point at the parties’ respective 200M limits).

Other cases where the equidistance line has been shifted to accommodate a starting point that was not equidistant include: *Gulf of Maine*, where a bisector was moved to an agreed start point; *Cameroon/Nigeria*, where a short line of latitude connected the end of the agreed territorial sea boundary to the equidistance line boundary in the EEZ; and both *Guyana/Suriname* and *Bangladesh/India*, where the land boundary terminus was connected

(via a point on the 3M limit in the former case) to an equidistant point on the territorial sea limit.

IV. Significance of the Decision and its Contribution to International Law

This is the first decision by the ICJ recognizing the existence of a maritime boundary established by ‘compelling’ evidence of a tacit agreement between the coastal States. In previous cases such as *Nicaragua/Honduras* and *Bangladesh/Myanmar*, States had sought unsuccessfully to rely on physical acts, such as the (p. 545)

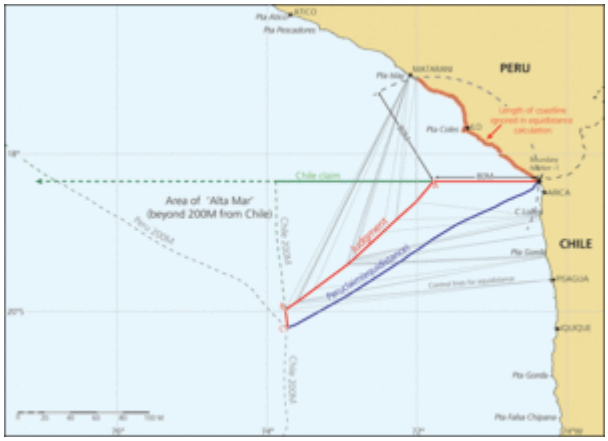

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Figure B22.2: *Peru/Chile*: construction of the court’s displaced equidistance line.

(p. 546) granting of oil concessions, fishing, or coastguard activity in order to establish the existence of a tacit maritime boundary agreement.[6]

The approach and rationale adopted by the court in dismissing Chile’s argument that the 1952 Declaration established an international maritime boundary was orthodox and represents a good example of the application of the VCLT and customary rules of treaty interpretation to the context of maritime delimitation.

In finding the existence of a tacitly agreed boundary, the court referred to its decision in the *Nicaragua/Honduras* case that ‘evidence of a tacit legal agreement must be compelling’.[7] The ‘compelling’ evidence identified by the court took the form of a 1954 treaty between Peru, Chile, and a third party (Ecuador) establishing a maritime frontier fisheries zone. That treaty acknowledged the existence of a prior maritime boundary agreement, without identifying its nature or extent. The decision therefore indicates that States wishing to argue the existence of a tacitly agreed maritime boundary may be more likely to succeed if some mention of the boundary exists in a contemporaneous treaty instrument. The court also established the all-purpose nature of the tacitly agreed maritime boundary with reference to contemporaneous instruments in the form of the 1947 Proclamations and the 1952 Declaration.

The court’s decision that the tacitly agreed maritime boundary extended only up to 80M warrants particular attention. This outcome, which resulted in a delimitation representing a form of compromise between Peru’s and Chile’s claims before the court, had been requested by neither party. Furthermore, it was not without controversy, being reached by a majority of just ten votes to six. The court acknowledged, following cases such as *Gulf of Maine*, that the all-purpose nature of the maritime boundary meant that ‘evidence concerning fisheries activity, in itself, cannot be determinative of the extent of that boundary’. However, the principal evidence ultimately relied upon by the court in identifying the 80M limit related to the parties’ 1950s fishing practices.[8] The court relied heavily upon FAO statistics and statements made by the Peruvian delegate to the 1958 UN

Conference on the Law of the Sea as to the limits of local fishing activities to conclude that it was unable to determine that the agreed maritime boundary extended beyond 80M.

(p. 547) This conclusion appears inconsistent with some of the other evidence before the court. That evidence demonstrated, first, that at the relevant time the parties each claimed 'exclusive sovereignty and jurisdiction' over maritime space extending 200M from their coasts and, second, a contemporaneous awareness of fisheries resources and existence of some fishing (particularly whaling) activity by the parties well beyond 80M. While the court did not say so, it might be inferred that its unwillingness to extend the tacitly agreed boundary beyond 80M arose out of a perceived absence of 'compelling evidence' that the boundary was intended to extend any further.

In this respect, the partial dissent of President Tomka is notable. He considered that the fisheries practice of the parties under the 1954 Agreement was not relevant in determining the extent of the maritime boundary at a time when the parties 'openly and publicly claimed maritime zones extending at least to 200 nautical miles'. He considered that the court's termination of the tacitly agreed boundary at 80M was 'counter to the intention of the Parties when the evidence is appreciated as a whole' (Declaration of President Tomka, para. 4). He noted also that Article 1 of the 1954 Agreement referred to 'the parallel, which constitutes the maritime boundary [as opposed to part of the maritime boundary] between the two countries'.[9]

The court's conclusion that the tacitly agreed maritime boundary should not extend beyond the parties' 'enforcement capacity' at the time is also subject to question, given the evidence on the record about the seizure by Peru of the Onassis whaling fleet in 1954 at a point located 126M off its coast. Again, the court may not have considered this evidence sufficiently 'compelling' to demonstrate a tacit agreement as to the location of the boundary up to that point.

When it came to identifying the starting point of the tacitly agreed maritime boundary, the court again reverted to the test of 'compelling evidence', finding that the 1968–69 lighthouse arrangements provided such evidence that the boundary passed through Boundary Marker No. 1.

The delimitation beyond Point A is a unique example of a purportedly equidistance-based delimitation starting from a point located far out to sea that is not at all equidistant from the parties' respective baselines. The court indicated that an equidistance-based solution was appropriate over this part of the boundary in the absence of 'compelling reasons preventing that'. While the court confirmed its established three-stage methodology in delimiting the boundary between Point A and Point B, as Figure B22.2 shows, the so-called equidistance line drawn by the (p. 548) court was significantly at variance from the true equidistance line. This was because of the court's exclusion of all Peruvian base points located less than 80M from Point A. The simplified disproportionality analysis conducted by the court at the third stage of the delimitation was also necessarily at variance with its more detailed approach in other cases, given the difficulty in calculating the length of the parties' relevant coasts and the extent of the relevant area.

Footnotes:

1 Chile ratified UNCLOS on 25 August 1997; Peru was not a State party to UNCLOS at the material time.

2 UNTS, Vol. 1106, pp. 301, 315, 323, and 331.

3 UNTS, Vol. 2274, p. 527.

[4] The continental shelf does not extend beyond 200M in the disputed area.

[5] *Nicaragua/Honduras*, para. 253.

[6] *Nicaragua/Honduras*, paras 237–58; *Bangladesh/Myanmar*, paras 100–18. In *Tunisia/Libya*, the court considered a *de facto* line acted on by the parties in the granting of oil concessions as relevant to the choice of the delimitation method to be used, while expressly noting that it was not making a finding of tacit agreement between the parties. *Tunisia/Libya*, para. 118.

[7] *Nicaragua/Honduras*, para. 253. This test was repeated by ITLOS in *Bangladesh/Myanmar*, paras 100–18.

[8] The reliance on fishing practices to determine the extent of the tacitly agreed boundary can be contrasted with the restrictive approach generally taken to fisheries as a relevant circumstance calling for the adjustment of a provisional equidistance line: see, e.g., the *Gulf of Maine* and *Barbados/Trinidad and Tobago* cases, reviewed in Part B, Chapters 6 and 16, above.

[9] Judges Xue, Gaja, Bhandari, and Judge ad hoc Orrego Vicuña also appended a joint dissenting opinion, concluding that the 1952 Declaration indicated a maritime boundary of 200M between the parties, and together with the 1955 Protocol and the 1968 Agreement, provided a solid legal basis for the existence of a maritime boundary that extended along the parallel of latitude for 200M.

Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 23 Bangladesh v. India (Award of the Arbitral Tribunal, 7 July 2014)

From: A Practitioner’s Guide to Maritime Boundary Delimitation
Stephen Fietta, Robin Cleverly

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Subject(s):

Coastal states — Continental shelf — Delimitation — Straits — Territorial sea — UNCLOS (UN Convention on the Law of the Sea)

(p. 549) 23 *Bangladesh v. India* (Award of the Arbitral Tribunal, 7 July 2014)

Case Note: territorial sea, EEZ, and continental shelf delimitation—terminus of land boundary—use of low-tide elevations as base points for construction of equidistance line—coastal instability—concave coast and 'cut-off' effect—special circumstances within the territorial sea—relevant circumstances within the EEZ and continental shelf—resulting adjustments of equidistance line—delimitation of continental shelf beyond 200M—disproportionality check—'grey area' of overlapping EEZ and continental shelf entitlements

Citation: *Bay of Bengal Maritime Boundary* (*Bangladesh v. India*), Award, 7 July 2014

Institution: PCA (acting as registry)

Basis of jurisdiction: UNCLOS, Article 287; UNCLOS, Annex VII

The tribunal: Wolfrum (President), Mensah (appointed by Bangladesh), Rao (appointed by India), Shearer, Cot

Hydrographer appointed by the tribunal: Mr David Gray

Applicable law: UNCLOS[1]

Areas delimited: territorial sea; EEZ; continental shelf (within and beyond 200M)

I. Introduction and Context

This case concerned a dispute between Bangladesh and India over the location of the land boundary terminus and delimitation of the maritime boundary between them in the Bay of Bengal. The Bay of Bengal is an area of approximately 2.2 million km² situated in the north-eastern Indian Ocean. The mainland coasts (p. 550) of Bangladesh and India are adjacent on either side of their land boundary terminus. India has sovereignty over the Andaman and Nicobar Islands, which lie in the south-east corner of the Bay of Bengal, off the coast of Myanmar. Bangladesh sits in a concavity at the northern limit of the Bay of Bengal, between India and Myanmar. The maritime boundary between Bangladesh and Myanmar was delimited by ITLOS in its judgment of 14 March 2012 (see Part B, Chapter 20, above), up to the area where the rights of India might be affected. The present case therefore completed Bangladesh's maritime boundary delimitations in the Bay of Bengal.

The coastlines of Bangladesh and India in the area where their land boundary meets the Bay of Bengal are highly indented and unstable, with several major river channels flowing into the sea. A small maritime feature, named New Moore Island by India and South Talpatty by Bangladesh (the ongoing existence and legal classification of which was disputed between the parties), had been formed in the area following a cyclone in 1970. The sea floor in the Bay of Bengal is covered in a thick layer of sedimentary rocks and the continental shelf (for the purposes of Article 76 of UNCLOS) was recognized as extending beyond 200M in the region pending confirmation of the limits by the CLCS. The geographical context of the delimitation is illustrated in Figure B23.1.

The dispute originated from the partition of British India into the two States of India and Pakistan in 1947, by which the newly formed province of East Bengal became part of Pakistan, while the newly formed province of West Bengal remained part of India. On 13 August 1947, the Bengal Boundary Commission, chaired by Sir Cyril Radcliffe, submitted a report on the demarcation of the boundaries between East Bengal and West Bengal (the

'Radcliffe Award'). The report included a map delineating the boundary in its Annexure B (the 'Radcliffe Map').

On 26 March 1971, Bangladesh declared its independence from Pakistan and succeeded to the territory of East Bengal. Between 1974 and 2009, Bangladesh and India held eleven rounds of negotiations concerning the delimitation of the maritime boundary, but failed to reach any agreement. On 8 October 2009, Bangladesh submitted the delimitation dispute to an arbitral tribunal in accordance with Part XV of UNCLOS. While Bangladesh was amenable to transferring the dispute to ITLOS (as occurred in the *Bangladesh/Myanmar* case, which Bangladesh commenced on the same day), India was not. The tribunal was accordingly constituted to settle the dispute in accordance with Annex VII to UNCLOS.

On 11 May 2009, India made a partial submission to the CLCS claiming areas of continental shelf beyond 200M in the disputed area.[2] Bangladesh objected to the (p. 551)

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Figure B23.1: *Bangladesh/India*: regional setting and parties' claims.

(p. 552) Indian submission in a *note verbale* dated 29 November 2009.[3] On 25 February 2011, Bangladesh filed its own submission with the CLCS.[4] India responded in a *note verbale* dated 20 June 2011, not objecting to consideration of the submission, but stating that Bangladesh's straight baselines did not comply with Article 7 of UNCLOS.[5] The CLCS deferred consideration of each of the parties' submissions by way of decisions in 2010 and 2011, respectively.

In October 2013, the tribunal, together with its expert and representatives from both parties and the registry, conducted a five-day site visit to India and Bangladesh (including a viewing of all of the base points proposed by the parties in the delimitation).

The parties agreed that the tribunal had jurisdiction to delimit their entire maritime boundary: namely, throughout the territorial sea, EEZ, and continental shelf, both within and beyond 200M. Recalling the ITLOS judgment in the *Bangladesh/Myanmar* case, the tribunal noted the clear distinction in UNCLOS between the delimitation of the continental shelf under Article 83 and the delineation of its outer limits under Article 76. It observed the complementary relationship between delimitation dispute settlement procedures under Part XV of UNCLOS and outer shelf delineation procedures involving the CLCS under Article 76 of UNCLOS. It noted also that, in light of the deferral by the CLCS of the outer shelf delineation process in the Bay of Bengal, 'inaction by this Tribunal would in practice

leave the Parties in a position in which they would likely be unable to benefit fully from their rights over the continental shelf' (paras 80–2).

II. Positions of the Parties and Summary of the Judgment

a. Identification of the land boundary terminus and starting point of the maritime boundary

The parties agreed that the tribunal should determine the location of their land boundary by application of the Radcliffe Award of 1947, which had adopted in that area a pre-partition district boundary following 'the midstream of the main channel for the time being' of certain rivers. The parties disagreed on where precisely this located the land boundary terminus. In particular, they disagreed over which map or (p. 553) maps had greatest evidentiary value in identifying the land boundary terminus. India relied on the Radcliffe Map (reproduced below) as identifying the 'main channel' and transferred this as a fluid boundary onto the channel as depicted on a modern map; Bangladesh relied on the 1931 printing of British Admiralty Chart 859, which was based on a survey conducted in or before 1879. India also submitted a modern satellite image of the estuary where the land boundary terminus was located. Bangladesh argued that modern satellite imagery would disregard the contemporaneous charts available at the time of the Radcliffe Award and could not be used to identify the 'main channel' as it had existed in 1947. Bangladesh referred to an award of the Indo-Pakistan Boundary Disputes Tribunal (the so-called 'Bagge Award'), which had been constituted shortly following the Radcliffe Award, as confirming that the land boundary terminus had been fixed as at 1947.

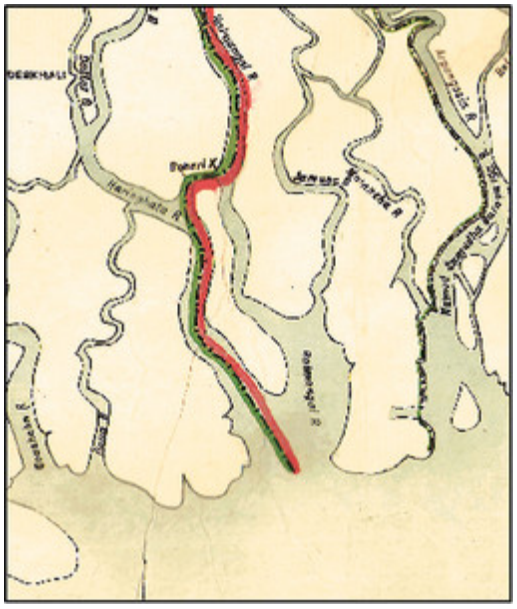

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Figure B23.2: Extract of the estuary area from the original Radcliffe award map (Bangladesh/India award p. 32).

(p. 554) The tribunal held that the Bagge Award had established clearly that the determination of the 'midstream of the main channel' must be as it was in 1947 at the time of the Radcliffe Award, and not as it might have become later. A subsequent exchange of letters between civil servants of the Governments of Pakistan and India in 1951 did not alter this position, since that exchange did not constitute a subsequent agreement about the interpretation of the Radcliffe Award within the meaning of Article 31(3)(a) of the VCLT (paras 163–9).

The tribunal declared that it would ‘locate the land boundary terminus as it was decided in 1947 on the basis of the available information at the time and supplemented by more recent information as to the situation at [that] critical date’ (para. 171). The tribunal did not consider that British Admiralty Chart 859, based as it was on surveys conducted many years previously in an area of unstable coastline, provided a reliable ‘photograph’ of the estuary as it existed in 1947. As for the Radcliffe Map, the tribunal noted that this had been compiled from a survey conducted in 1915–16 and lacked the precision of most nautical charts. However, Sir Cyril Radcliffe had ‘found the map reliable enough to use and incorporate into his award’ and the absence of data such as river depths did not mean that this information had been unavailable to those who drew the map. The tribunal concluded that ‘it may therefore be assumed that the end of the black dash-dot-dash line indicates the mainstream of the main channel’ (paras 182–5).

In transposing the Radcliffe Map into a modern chart, the tribunal assumed that it had used the Indian Datum. Consequently, the tribunal and its technical expert plotted the terminus of the black dash-dot-dash line to WGS84 coordinates of 21° 38’ 40.2" N, 89° 09’ 20.0" E. The tribunal concluded that this point was ‘on the closing line as it would have been drawn in 1947’ (para. 187).

The closing line and the land boundary terminus thus identified by the tribunal are illustrated in Figure B23.2. The tribunal remarked that the difference between the closing line and the present shoreline represents erosion that has taken place since the 1915–16 survey.

b. Delimitation of the territorial sea

The tribunal began its assessment of the territorial sea delimitation by addressing the manner in which base points should be ‘selected’.[6] Bangladesh challenged several of India’s proposed base points. In particular, Bangladesh claimed that South Talpatty/New Moore Island, which had not been visible during the October 2013 site visit, had permanently disappeared below the surface by the early (p. 555)

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Figure B23.3: *Bangladesh/India*: land boundary terminus and delimitation of the territorial sea.

(p. 556) 1990s and that, even if it did exist as a low-tide elevation, it was located on the Bangladesh side of any conceivable boundary. It also submitted that the feature was ‘far too insignificant’ and unstable to be used as a base point. India argued that there was extensive State practice to support the use of base points located on the low-water line of low-tide elevations for the purposes of delimitation. It observed that New Moore Island was depicted as a low-tide elevation on modern charts, that this was confirmed by satellite imagery, and that the feature would have been visible during the site visit had the timing and weather permitted.

The tribunal held that it was required to ‘choose base points that are appropriate in reference to the time of the delimitation, i.e. the date of its Award’. Accordingly, Bangladesh’s argument that the instability of the coastline should be a major factor weighing against the use of a provisional equidistance line, particularly in view of the potential effect of climate change and sea level rise in the Bay of Bengal, was irrelevant. Citing the ICJ’s 2009 judgment in the *Black Sea* case, the tribunal determined that it was concerned with the ‘physical reality at the time of the delimitation’ and that maritime delimitations, like land boundaries, ‘must be stable and definitive to ensure a peaceful relationship between the States concerned in the long term’. This was ‘all the more essential when the exploration and exploitation of the resources of the continental shelf are at stake’, given the important investments required for such activity (paras 212–18). Consequently:

> In the view of the Tribunal, neither the prospect of climate change nor its possible effects can jeopardise the large number of settled maritime boundaries throughout the world. This applies equally to maritime boundaries agreed between States and to those established through international adjudication (para. 217).

The tribunal thus stated that it would determine the appropriate base points ‘by reference to the physical geography at the time of the delimitation and to the low-water line of the relevant coasts’. In doing so, it would avail itself of the most reliable evidence, resulting from the latest surveys and incorporated in the most recent large-scale charts officially recognized by the Parties (paras 223–4).[7]

In its Memorial, citing the ICJ’s judgment in *Nicaragua/Honduras*, Bangladesh argued that, given the instability of the coastline, the identification of base points was not feasible and that the construction of a provisional equidistance line was therefore not an appropriate delimitation method under Article 15 of UNCLOS. Bangladesh proposed instead the use of a 180° angle bisector. However, following the ITLOS judgment in *Bangladesh/Myanmar* rejecting a similar argument, Bangladesh refined its position in its Reply and proposed a provisional equidistance line as an alternative to its bisector. Nevertheless, Bangladesh maintained that the coastal instability of the Bengal Delta and the concavity of the coast (p. 557) constituted special circumstances requiring adjustment of the equidistance line in its favour. India argued that recent international jurisprudence had moved away from an expansive understanding of ‘special circumstances’ and instead favoured the use of equidistance in the territorial sea. Only for ‘compelling reasons’, none of which was present in the Bay of Bengal, could the equidistance method be abandoned in favour of a bisector. In the absence of any special circumstances, India proposed an unadjusted equidistance line boundary in the territorial sea. The parties’ respective claim lines are illustrated in Figure B23.2.

The tribunal noted that, as Bangladesh’s revised submission showed, it was possible to identify appropriate base points on the basis of which an equidistance line could be constructed. It thus decided to proceed by way of identification of the base points and construction of an equidistance line. Given the need to focus on the ‘physical reality at the

time of the delimitation', it was unnecessary to consider whether future coastal instability could qualify as a special circumstance (paras 248–9).

The tribunal turned to examine the role of low-tide elevations as base points in the construction of an equidistance line. It observed that, while Article 13 of UNCLOS deals with the use of such elevations in measuring the breadth of the territorial sea, it does not address their use in maritime delimitation. It declared that 'base points located on low-tide elevations do not fit the criteria elaborated by the International Court of Justice in the *Black Sea* case', recalling the court's holding in that case that equidistance lines 'are to be constructed from the most appropriate points on the coasts'. The tribunal recalled that the site visit had not confirmed whether South Talpatty/New Moore Island was permanently submerged or constituted a low-tide elevation. In any event, it held that the feature was not suitable as a base point for delimitation purposes because it 'could in no way be considered as situated on the coastline, much less as a "protuberant coastal point"'. The tribunal thus concluded that three of India's proposed territorial sea base points were not acceptable, while another one of India's and one of Bangladesh's proposed base points required relocation to the actual low-water line (paras 259–69).

The tribunal rejected Bangladesh's argument based on concavity as a special circumstance in the territorial sea. It concluded that, within the 12M limit, the concavity of the coastline of the Bay of Bengal did not produce a significant cut-off warranting adjustment of the equidistance line. However, the tribunal noted that the land boundary terminus was not situated on the equidistance line. The need to connect the land boundary terminus to the equidistance line thus constituted a special circumstance. The tribunal compared the situation to the *Guyana/Suriname* case and accordingly applied a gradual transition by drawing a geodesic line from the land boundary terminus to a point (Prov-2/Delim-2) situated 12M to the south on the equidistance line (paras 272–6). Because the territorial sea limit is (p. 558) measured using the many low-tide elevations, this second delimitation point lies about 2.5M inside the territorial sea.

The adjusted equidistance line constituting the territorial sea boundary, from the land boundary terminus to the 12M limit, is illustrated in Figure B23.2.[8]

c. Identification of the 'relevant coasts' and 'relevant area' for delimitation beyond the territorial sea

Moving on to the delimitation beyond the territorial sea, the tribunal first identified the relevant coasts and the relevant area. The parties were broadly in agreement with regard to the length of Bangladesh's relevant coast. In particular, they were agreed that the entire coastline of Bangladesh was relevant to the delimitation. The tribunal observed that the 'relevance of any segment of the coast of a Party depends upon the identification of the projections generated by that coast' (para. 279). It concluded that the relevant coastline would be composed of two segments: the first extending from the land boundary terminus with India to the lighthouse on Kutubdia Island; and the second extending from the lighthouse on Kutubdia Island to Bangladesh's land boundary terminus with Myanmar. The total length of Bangladesh's relevant coastline was 418.6km.

The parties differed significantly as to which segments of the Indian coastline were relevant. Bangladesh rejected India's submission that its relevant coastline stopped at Devi Point. Bangladesh argued that the relevant Indian coast continued in a south-westerly direction to Sandy Point on the basis that the projection of this additional coast overlapped with the projection beyond 200M of the Bangladesh coast. In keeping with its view that there is in law a 'single continental shelf', the tribunal saw no basis for distinguishing between projections within and beyond 200M when identifying relevant coasts for delimitation. Noting the ability of coastal frontages to project by way of a 'radial or directional presence', the tribunal had 'no difficulty' in determining that the Indian coast up to Sandy Point generated a projection overlapping with that of Bangladesh and was

therefore relevant to the delimitation. The tribunal concluded also that the western coasts of the northern part of the Andaman Island chain also formed part of India's relevant coast. The total length of India's relevant coast was therefore 803.7km (paras 299–305).

As for the relevant area, the tribunal observed that this was bounded by: (1) the delimitation line between Bangladesh and Myanmar; (2) the 200M limits of (p. 559) Myanmar and India; (3) the limit of Bangladesh's pending submission to the CLCS; and (4) a straight line drawn from the intersection of Bangladesh's CLCS submission with India's 200M limit to Sandy Point on the Indian coast. This relevant area equated to approximately 406,833 km².

The relevant coasts of the parties and relevant area as defined by the tribunal are illustrated in Figure B23.3.

d. Delimitation of the EEZ and continental shelf within 200M

Methodology

The parties agreed that Articles 74(1) and 83(1) of UNCLOS governed the delimitation of the EEZ and continental shelf within 200M. Bangladesh submitted that there was no presumption in favour of equidistance in international jurisprudence, arguing instead (citing the *Guinea/Guinea-Bissau, Gulf of Maine*, and *Nicaragua/Honduras* cases in support) for the application of the angle-bisector method of delimitation. India argued that the jurisprudence had developed in favour of equidistance, that an equidistance line should therefore be applied at the first stage in the delimitation process, and that the *Nicaragua/Honduras* case was readily distinguishable from the present situation.

The tribunal observed that, alongside the equitable result mandated by UNCLOS, 'transparency and the predictability of the delimitation process as a whole are additional objectives to be achieved in the process'. It continued that international case law on delimitation constituted 'a source of international law under article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 73 and 83 of the Convention' (para. 339).

The tribunal noted that the equidistance/relevant circumstances and angle-bisector methods of delimitation are each 'based upon geometric techniques'. However, it considered that the three-stage equidistance/relevant circumstances method was 'more transparent' because it 'clearly separated the steps to be taken'. In particular, 'the identification of a provisional equidistance line is based on geometrically objective criteria, while at the same time account is taken of the geography of the area through the selection of appropriate base points. By contrast, depicting the relevant coasts as straight lines under the angle-bisector method involves subjective considerations' (para. 343). For these reasons, the tribunal concluded that the equidistance/relevant circumstances method was preferable unless, to use the words of the court in *Nicaragua/Honduras*, there are 'factors which make the application of the equidistance method inappropriate'. This was not the case here. In particular, the argument of Bangladesh that the coastal configuration of the Bay of Bengal rendered the identification of base points impractical or unreliable was 'not sustainable' (paras 345–6).(p. 560)

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Figure B23.4: *Bangladesh/India*: tribunal's relevant coasts, areas, and provisional equidistance line.

(p. 561) Selection of base points and construction of the provisional equidistance line

As with the territorial sea delimitation, the tribunal determined that it must assess the appropriateness of the base points chosen by the parties or choose different base points of its own (para. 353). The tribunal proceeded to make a selection of appropriate base points representing a blend of those proposed by Bangladesh and India, together with a number identified by the tribunal itself. In particular, referring back to the discussion in the territorial sea part of its Award, the tribunal excluded base points that were 'located on detached low-tide elevations'. The selected base points and resulting provisional equidistance line beyond 12M are illustrated in Figures B23.3 and B23.4.

Relevant circumstances

Bangladesh argued that two relevant circumstances existed requiring adjustment of the provisional equidistance line. First, relying on *Nicaragua/Honduras*, it claimed that the coastline of the Bengal Delta was highly unstable and would inevitably change the location of the base points over time. It argued that these changes were accelerating with sea-level rise. Second, Bangladesh argued that the geographical configuration of the delimitation represented a 'concavity [of the Bangladeshi coast] within a concavity [of the broader Bay of Bengal]', resulting in a cut-off effect to the prejudice of Bangladesh. It submitted that, in order to remedy the effects of this 'double concavity', the tribunal should adopt an angle-bisector method in the delimitation or, alternatively, undertake a substantial adjustment to the provisional equidistance line. Bangladesh also submitted that any delimitation that would deny its rights in the outer continental shelf would be manifestly inequitable. In a separate submission, Bangladesh argued that its people depended heavily on fish from the Bay of Bengal, which would exacerbate the inequitableness of any equidistance line delimitation.

India proposed an unadjusted equidistance line delimitation. It disputed both Bangladesh's factual assertions regarding coastal instability and the legal relevance of any such instability to the delimitation process. It argued that any concavity on the Bangladeshi coast had been addressed already in the *Bangladesh/Myanmar* delimitation and was, in any event, balanced with a comparable concavity on the Indian coast. In the absence of gross

inequality, India considered that treating concavity as a relevant circumstance would amount to ‘refashioning nature’.

The tribunal acknowledged that the Bangladeshi coastline was unstable, but did not consider this to be a relevant circumstance justifying adjustment of the provisional equidistance line because ‘only the present geophysical conditions are of relevance’. Consequently, ‘future changes of the coast, including those resulting from climate change, cannot be taken into account in adjusting a provisional equidistance line’ (para. 399).(p. 562)

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Figure B23.5: *Bangladesh/India*: relevant coasts, areas, and the tribunal’s award.

(p. 563) Turning to Bangladesh’s second argument, the tribunal observed that, in the absence of a cut-off effect, concavity alone did not constitute a relevant circumstance. It held that ‘the existence of a cut-off effect should be established on an objective basis and in a transparent manner’, whether that effect was present within 200M or beyond in the areas of outer continental shelf. The tribunal noted that, as a result of the concavity of the coast, the provisional equidistance line produced a ‘cut-off effect’ on the seaward projections of the west- and south-facing coasts of Bangladesh. It highlighted that the inequity of the equidistance line between the parties became increasingly severe as the line moved further from the coast. The tribunal’s assessment of whether or not to adjust the line would be unaffected by the ITLOS judgment in *Bangladesh/Myanmar*, which was *res inter alios acta*. In order to warrant adjustment of the provisional equidistance line, a cut-off effect must, first, prevent a State from extending its maritime boundary as far seaward as international law permits and, second, prevent the achievement of an equitable solution. The tribunal concluded that each of these criteria was met in the present case. Accordingly, the provisional equidistance line ‘must be adjusted in order to avoid an unreasonable cut-off effect to the detriment of Bangladesh’ (paras 402–21).

Finally, in relation to Bangladesh’s argument about the dependency of its people on fishing in the Bay of Bengal, the tribunal concluded that Bangladesh had not submitted sufficient evidence of its dependence on fishing in the area to justify any adjustment of the provisional equidistance line on that basis (para. 424).

e. Delimitation of the continental shelf beyond 200M

Turning to the delimitation beyond 200M, the tribunal noted that the parties agreed that they both had entitlements to continental shelf beyond 200M in the Bay of Bengal and that both had made submissions to the CLCS. Following the rejection of a similar argument by ITLOS in *Bangladesh/Myanmar*, Bangladesh withdrew its initial argument that the continental shelf beyond 200M was geologically the ‘most natural prolongation’ of its coast. However, relying on the *Bangladesh/Myanmar* judgment, it submitted that the concavity of its coast constituted a relevant circumstance in the delimitation beyond 200M. Without adjustment of the equidistance line in this area, Bangladesh asserted that it would be cut off from its potential continental shelf entitlement and left only a small triangle of outer

shelf terminating 140M short of the outer limits claimed in its CLCS submission. India maintained that the boundary beyond 200M should continue along its proposed equidistance line.

The tribunal noted that it and the parties agreed that 'there is a single continental shelf'. It held that the appropriate method for delimiting the continental shelf was the same, irrespective of whether the area to be delimited lies within or beyond 200M. Accordingly, it would use the equidistance/relevant circumstances method (p. 564) in the delimitation beyond 200M, as it had within 200M (para. 465). The tribunal rejected Bangladesh's proposed delimitation line because it 'would lead to a significant cut-off to the detriment of India's entitlement to the area beyond 200nm'. It pointed out that 'international jurisprudence on the delimitation of the continental shelf does not recognise a general right of coastal States to the maximum reach of their entitlements, irrespective of the geographical situation and the rights of other coastal States' (para. 469).

As with the remainder of the boundary, the tribunal began its delimitation beyond 200M by identifying the appropriate base points for construction of the provisional equidistance line. These included an additional base point identified by both parties on the Indian coast (at Devi Point), which had effect only beyond 200M and generated a final change in the course of the equidistance line before it met the Bangladesh-Myanmar boundary (paras 459–64) (see Figures B23.3 and B23.4).

Turning to relevant circumstances beyond 200M, the tribunal considered that any failure to adjust a provisional equidistance line would 'provide no redress to Bangladesh from the cut-off resulting from the concavity of its coast' (para. 470). In particular, the south-facing coast of Bangladesh was given 'insufficient weight' by the provisional equidistance line. As a result, the tribunal concluded that the line must be adjusted beyond (as well as within) 200M (paras 474–5).

f. Adjustment of the provisional equidistance line within and beyond 200M and application of the 'disproportionality test'

Bangladesh submitted that, within 200M of the coast, the boundary should follow an azimuth of 180° extending south from the land boundary terminus, whether as an angle bisector or by way of an adjustment to the equidistance line. It argued that the angle bisector could be constructed between lines identifying the general directions of each coast (as in *Nicaragua/Honduras*) or as a perpendicular drawn to a straight line depicting the general direction of the coast (as in *Guinea/Guinea-Bissau*). It considered that this would provide it with a meaningful outlet to the 200M limit and corresponding access to its 'entitlement' in the outer continental shelf. Beyond 200M, in order to avoid any highly prejudicial cut-off from its continental shelf entitlement, Bangladesh submitted that its 180° line should turn to follow an azimuth of 215°, parallel to the Bangladesh-Myanmar delimitation line. Bangladesh argued that its claim line would be consistent with the *Bangladesh/Myanmar* judgment and easy to administer.

India argued that the boundary should be an unadjusted equidistance line, both within and beyond 200M. It submitted that this would be consistent with the *Bangladesh/Myanmar* judgment (which did not bind India), which had similarly adopted a continuous line either side of the 200M limit. India included a small adjustment of the boundary at its terminus, in order to coincide with the (p. 565) Bangladesh-Myanmar boundary. Each of the parties' claim lines is illustrated in Figure B23.4.

The tribunal determined that, consistent with the concept of a single continental shelf, any adjustment to the provisional equidistance line within 200M should extend into the area beyond 200M. It thus deferred its assessment of the adjustment required until after its decision about delimitation beyond 200M (para. 437). When it came to that assessment, the tribunal held that its adjustment 'should seek to ameliorate excessive negative

consequences the provisional equidistance line would have for Bangladesh in the areas within and beyond 200nm', in a way that did not infringe upon the rights of third States (para. 477).

The tribunal decided that, from a point on the provisional equidistance line identified as point 'Prov-3', the equidistance line would be adjusted to a geodetic line with an initial azimuth of 177° 30' 00", until the line met the maritime boundary between Bangladesh and Myanmar. This created a straight boundary line running from point 'Prov-3' through the 200M limit. The tribunal observed that its delimitation line 'avoids turning points and would thus be simple to implement and administer by the Parties' (paras 478–80).

Turning finally to the 'disproportionality test', which constituted the third step of the equitable/relevant circumstances methodology, the tribunal observed that the ratio between the lengths of the relevant coasts of the parties was 1:1.92 in favour of India, while its delimitation line allocated the relevant area in a ratio of approximately 1:2.81 in favour of India. It concluded that this ratio did not produce any 'significant disproportion' requiring alteration of the adjusted equidistance line to ensure an equitable solution (paras 495–6).

The boundary line thus delimited by the tribunal is illustrated in Figure B23.4.

g. The 'grey area'

The tribunal observed that its delimitation line gave rise to an area on the Bangladesh side of the boundary that lies beyond 200M from Bangladesh but within 200M from India. It observed that a similar area had resulted from the ITLOS judgment in *Bangladesh/Myanmar*. It commented that such a 'grey area' was a 'practical consequence of the delimitation process' and would arise whenever relevant circumstances called for a boundary other than the equidistance line at or beyond the 200M limit (para. 498).[9]

(p. 566) Since the tribunal was empowered only to delimit overlapping entitlements, the only effect of its boundary within the 'grey area' would be with regard to the continental shelf. India's separate EEZ rights in the superjacent waters would be unaffected. The tribunal noted that, pursuant to Article 56(3) of UNCLOS, rights with regard to the seabed and subsoil in the EEZ are to be exercised in accordance with the regime for the continental shelf. Accordingly, within the 'grey area', the tribunal's boundary would delimit 'only the Parties' sovereign rights to explore the continental shelf and to exploit the "mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species" as set out in article 77 of the Convention' (paras 503–5).

The tribunal continued by noting that:

> the grey area it has described overlaps in part with the grey area described in *Bangladesh/Myanmar*. The present delimitation does not prejudice the rights of India *vis-a-vis* Myanmar in respect of the water column in the area where the exclusive economic zone claims of India and Myanmar overlap (para. 506).

The tribunal recalled that several UNCLOS provisions relating to the EEZ and continental shelf called for States to exercise their rights and perform their duties with due regard to the rights and duties of other States. It concluded that it was 'for the Parties to determine the measures they consider appropriate in this respect' (paras 507–8).

The 'grey area' created by the tribunal's delimitation, together with its overlap with the 'grey area' created in the *Bangladesh/Myanmar* judgment, is illustrated in Figure B23.5.

III. Technical Considerations

The tribunal attached the technical report of its technical expert, Mr Gray, as an appendix to the Award.

The tribunal's use of the 1947 Radcliffe Map to define the land boundary terminus and hence the start of the maritime delimitation was a pragmatic solution. The tribunal rejected the use of the 1931 nautical chart proposed by Bangladesh based on 1879 bathymetric surveys, preferring the Radcliffe Map which was based on 1915–16 land surveys. The final location of the land boundary terminus is practically identical to the starting point of the provisional equidistance line (see Figure B23.2).

The tribunal defined the land boundary terminus using the Radcliffe Map to a considerable degree of precision. The map itself was at a small scale of approximately 1:500,000 (and noted by Radcliffe himself to be only illustrative). (The tribunal stated that the plotting precision on such a scale map is 1/100th of an (p. 567)

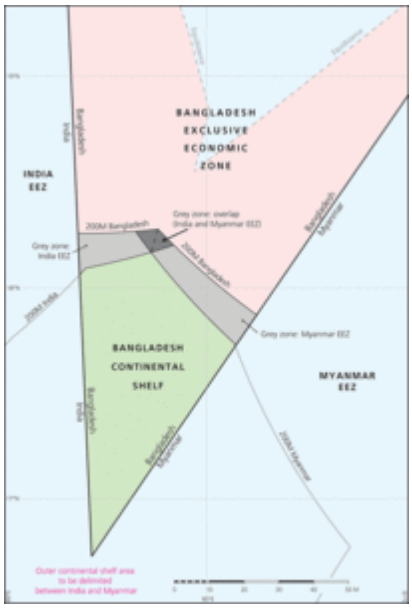

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Figure B23.6: *Bangladesh/India*: grey zones (detail).

(p. 568) inch, which is equivalent to ±128m (which is about ±4"). Despite this, the tribunal quoted the coordinates to a precision of 01" (or ±3m)). As a comparison, the width of the black dot-dash line as drawn on the Radcliffe map is about 400m.

The tribunal assumed that the Radcliffe Map was referred to the Indian Datum (Everest spheroid) and used published parameters from the IHO for conversion to WGS84, providing a position that can easily be transferred to a modern chart.

The tribunal re-evaluated all the base points proposed by the parties, rejecting those positioned on isolated low-tide elevations (while acknowledging that such points can be used for measuring the territorial sea under Article 13 of UNCLOS). The base points selected by the tribunal are all on the low-water line of major islands or the mainlands. The tribunal may have been influenced by the site visit, during which none of the low-tide features was visible.

The equidistance line through the territorial sea is controlled by one base point on either side (see Figure B23.2). The tribunal calculated the second point on the line (Dev Pt 2) exactly 12M from the land boundary terminus. This point is situated 2.5M inside the territorial sea limit, which is measured using the low-tide elevations seaward of the base points. As the land boundary terminus did not coincide with the start of the equidistance

line, the tribunal simply connected it to Dev Pt 2 with a straight line. This follows the technical approach applied in *Guyana/Suriname*.

The tribunal drew the provisional equidistance line through the territorial sea and EEZ until it intersected the Bangladesh–Myanmar boundary in the outer continental shelf beyond 200M. The terminal point was reached by continuing the equidistance line to the first turning point beyond the Bangladesh–Myanmar geodesic boundary and calculating the intersection. By contrast, ITLOS in *Bangladesh/Myanmar* only drew its equidistance line as far as the 200M limit, even though the final boundary extended beyond 200M.

The tribunal adjusted its provisional equidistance line to avoid a cut-off of Bangladesh's coastal projections into the Bay of Bengal. The resultant boundary effectively mirrors that on the Myanmar side, producing a symmetrical result.

The adjustment of the provisional equidistance line was substantial. By using a single geodesic line beyond DP-3, the final line no longer has any relationship with the coastline or other aspect of regional geography. This is in contrast, for example, to *Nicaragua/Colombia*, where a major adjustment to equidistance was done with a weighted median line.

The relevant coasts of the parties were measured, as is customary, by drawing straight lines representing their general directions. In both cases, these coastal fronts change direction (see Figure B23.3). On the Indian side, the relevant coast extends to Sandy Point, which lies 160M south-west of Devi Point—the last base point that influences the equidistance line. The relevant area was calculated using these coastal (p. 569) fronts and did not include maritime spaces situated landward of the straight lines. By contrast, in *Black Sea*, the relevant area extended to the actual coastline.

As on the Myanmar side, the Award produces a so-called 'grey zone' where Bangladesh's EEZ limit falls within that of India. Although this can potentially occur whenever the outer portion of a boundary is not equidistant, the geometry of this 'grey zone' is unusual. Normally a 'grey zone' will occur as a wrap-around (as in *Gulf of Maine* or *Guinea-Guinea-Bissau*), but in this case the Bangladesh 200M limit is about 7M short of India's, even though the boundary continues into the outer shelf. In a broadly comparable situation, in *St Pierre and Miquelon*, the French EEZ is enclosed by Canada's EEZ, but there the boundary explicitly closes along the 200M arc measured from St Pierre. As a result, the award in that case does not appear to contemplate a continental shelf boundary beyond the French 200M limit.[10]

IV. Significance of the Judgment and its Contribution to International Law

The Award of the UNCLOS tribunal in the *Bangladesh/India* case complements the judgment of ITLOS rendered just over two years beforehand in *Bangladesh/Myanmar*. Bangladesh commenced the two cases on the same day in 2008. Three members of the UNCLOS tribunal had sat also on the ITLOS case (and the Award mirrors the ITLOS judgment in multiple respects). While the ITLOS proceeding lasted less than three years, the Annex VII arbitration proceeding lasted almost five years (in large part due to the longer timetable agreed by Bangladesh and India in the arbitration).

A notable procedural aspect of the *Bangladesh/India* case was the tribunal's decision to conduct a five-day site visit to the delimitation area, including a viewing of all the base points proposed by the parties. While the visit was apparently not, of itself, determinative of any part of the case, the tribunal did remark in its Award that certain features ultimately rejected as base points had not been visible during the visit. Given the complex logistics

and practicalities concerned, a site visit is more likely to be feasible in a case before an arbitration tribunal than a case before a seventeen-member ICJ panel.

Unusually for an UNCLOS arbitration, the tribunal's jurisdiction extended (by specific consent of the parties) to identification of the land boundary terminus. The Award relies heavily on a contemporaneous (1947) map for the purpose of interpreting and applying the applicable post-colonial land boundary instrument.

(p. 570) In the delimitation itself, the Award includes noteworthy passages about the selection of appropriate base points for the construction of equidistance lines throughout the territorial sea, EEZ, and continental shelf. It continues the modern trend, started by the ICJ in the *Black Sea* case, of allowing for the subjective selection of the 'most appropriate' base points, as opposed to the construction of a pure equidistance line based upon objective criteria, at the first stage of the delimitation process. Particularly important in the present case was the treatment of low-tide elevations, which the tribunal rejected altogether as qualifying base points. In this respect, the Award goes further than previous jurisprudence (in particular, the *Qatar/Bahrain* case, where the court excluded only those low-tide elevations located in areas of overlapping territorial sea entitlement).

The tribunal's conclusions about the irrelevance of coastal instability, climate change, and sea-level rise for the purposes of identifying the appropriate delimitation methodologies, base points, and relevant circumstances are also notable. The tribunal observed that 'only the present geophysical conditions are of relevance'. Accordingly, the fact that the configuration of the coast may be altered in future by climate change or other factors was disregarded for all purposes in the delimitation process. The tribunal remarked that such an approach was essential to ensure that maritime boundaries remained stable and definitive in the long term. In light of the rapid erosion of the coastline in the Bay of Bengal, the tribunal paid particular regard to the latest surveys and large-scale charts officially recognized by the parties in identifying what were the appropriate base points as at the date of the Award.

The Award cements the preferential status accorded to equidistance-based delimitation methodologies in modern international law. The tribunal rejected Bangladesh's attempts to equate the situation in the Bay of Bengal with that encountered by the ICJ in the *Nicaragua/Honduras* case, noting that it was possible to identify appropriate base points on the basis of which an equidistance line could be constructed throughout the territorial sea, EEZ, and continental shelf. The tribunal considered that the three-stage equidistance/relevant circumstances method was preferable to an angle-bisector method because it clearly separated out the steps to be taken and was thus 'more transparent' and less 'subjective'.

The tribunal's assessment of special circumstances in the territorial sea and relevant circumstances in the EEZ and continental shelf is also worthy of attention. The tribunal commented that the general configuration of the coast in the Bay of Bengal was not relevant to the delimitation of the 'narrow belt of the territorial sea'. As a result, the concavity and cut-off that affected Bangladesh in the area as a whole necessitated adjustment of the equidistance line only beyond the territorial sea.

The part of the Award addressing the continental shelf delimitation beyond 200M builds upon the foundations laid two years earlier by the *Bangladesh/Myanmar* judgment. By the end of the proceeding, both parties had made claims to (p. 571) continental shelf beyond 200M at the CLCS. Each party agreed that the other had entitlements to continental shelf beyond 200M, and that a 'single continental shelf' existed throughout the disputed area. In these circumstances, as in *Bangladesh/Myanmar*, the tribunal determined that the methodology for delimitation beyond 200M remained the same as within 200M (i.e. the equidistance/relevant circumstances method). It remains to be seen whether a court or tribunal would adopt the same methodology in a case where only one State's natural prolongation extends beyond 200M for the purposes of Article 76 of UNCLOS. Notably, the

projection of an additional part of the Indian coast into disputed areas of shelf beyond 200M materially increased India's relevant coastal length for the purpose of the delimitation.

The adjusted equidistance line delimitation, when combined with the *Bangladesh/Myanmar* delimitation, accords Bangladesh substantial continental shelf beyond its 200M limit in the Bay of Bengal. However, the tribunal rejected the notion that coastal States have a right to the 'maximum reach' of their entitlements, irrespective of the rights of their neighbours. As a result, the Bangladeshi continental shelf ends some 115M short of the outer limit claimed by Bangladesh in its CLCS submission.

As with the *Bangladesh/Myanmar* judgment, the tribunal's delimitation creates a 'grey area' of overlapping EEZ and continental shelf areas between the parties. The tribunal noted that this left Bangladesh with sovereign rights to explore the shelf and exploit its resources, while India retained its sovereign rights in the superjacent waters. It highlighted the parties' respective obligations under UNCLOS to exercise their rights and perform their duties with due regard to the rights of the other and trusted in them to implement the necessary measures in this respect. Within the 'grey area', the Award leaves an area of overlapping EEZ entitlements to be delimited between India and Myanmar above the outer continental shelf of Bangladesh. The Award also leaves a substantial area of continental shelf to be delimited between India and Myanmar, beyond the Bangladeshi shelf, up to the outer limit of the continental shelf in the Bay of Bengal.

The tribunal commented that its adjusted equidistance line boundary, which is straight along the vast majority of its length, would be simple to implement and administer by the parties. However, such considerations do not constitute a relevant circumstance as such in maritime delimitation, nor did the tribunal suggest otherwise.

Finally, it is notable that India appointed its own national and former senior public international law adviser to the Indian Government, Dr P. S. Rao, as its arbitrator in the proceeding. Dr Rao, who is without doubt a pre-eminent international lawyer, departed from the majority decision of the tribunal. The risk of such a dissent is generally increased whenever a party appoints its own national to an international tribunal, particularly in arbitration proceedings.(p. 572)

Footnotes:

1 Bangladesh ratified UNCLOS on 27 July 2001; India ratified UNCLOS on 29 June 1995.

2 'Partial submission of India to the Commission on the Limits of the Continental Shelf', 11 May 2009, available at <http://www.un.org/depts/los/clcs_new/submissions_files/ind48_09/ind2009executive_summary.pdf>.

3 '*Note Verbale* from the Permanent Mission of Bangladesh to the Secretary-General of the United Nations', No. PMBNY-UNCLOS/2009-3135 (29 October 2009), available at <http://www.un.org/depts/los/clcs_new/submissions_files/ind48_09/bgd_re_ind_clcs48_2009e.pdf>.

4 'Submission of Bangladesh to the Commission on the Limits of the Continental Shelf', 25 February 2011, available at <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_bgd_55_2011.htm>.

5 '*Note Verbale* from the Permanent Mission of India to the Secretary-General of the United Nations', available at <http://www.un.org/depts/los/clcs_new/submissions_files/bgd55_11/ind_nv_un_001_20_06_2011.pdf>.

6 The parties agreed not to rely on their straight baselines established for the purposes of establishing their respective territorial sea outer limits. Instead, they identified base points specifically for the purposes of the delimitation.

7 The charts concerned were submitted to the tribunal during the proceedings and extracts of them are included in the Award.

8 The disputed feature of New Moore Island/South Talpatty lies entirely on the Indian side of this line.

9 India's appointed arbitrator, Dr Pemmaraju Sreenivasa Rao, dissented from the majority's Award in respect of, *inter alia*, the adjustment of the provisional equidistance line and the creation of a 'grey area'. He considered that entitlement to the EEZ should take priority over entitlement to the continental shelf beyond 200M. He proposed a more limited adjustment of the provisional equidistance line. However, it is notable that even Dr Rao's proposed boundary created a 'grey area' of Bangladeshi continental shelf within India's EEZ.

10 See Part B, Chapter 10.

Part C Future Challenges, 1 The Creeping Subjectivity of Base-Point Selection: A Lurch toward a ‘Four-Stage Approach’ (or a Return to Equitable Principles)?

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(p. 575) 1 The Creeping Subjectivity of Base-Point Selection: A Lurch toward a ‘Four-Stage Approach’ (or a Return to Equitable Principles)?

I. The Challenge

This subsection examines the perceptible move of international courts and tribunals, starting with the *Black Sea* case, toward the subjective selection of base points for construction of a provisional equidistance line. In doing so, they have moved away from the ‘geometrically objective’ exercise that those same courts and tribunals have identified as being central to the first stage of the so-called three-stage approach. Pursuant to that approach, subjectivity should only enter into the delimitation process at the second (relevant circumstances) and third (disproportionality) stages. So the question arises, are courts and tribunals being faithful to the three-stage process and its underlying rationale? Or has there been a lurch towards a four-stage process, whereby the court or tribunal reflects upon what are the ‘appropriate’ base points for construction of a provisional equidistance line, before proceeding to construct that line? Could it even be said that the level of subjectivity employed by some recent courts and tribunals augurs a decisive move away from equidistance and a return to delimitation through the application of equitable principles?

II. Context of the Problem

As explained in Part A (and tracked through the analysis in Part B) of this book, the modern jurisprudence has identified the three-stage approach as the preferred methodology for maritime delimitation within 200M, to be applied in the absence of particular geographical circumstances rendering it ‘inappropriate’. That methodology was first articulated in clear terms by the ICJ in the *Black Sea* case, in the context of a single EEZ and continental shelf delimitation, and has been repeated (p. 576) many times since. As the court explained, the first stage of the process requires the establishment of a provisional delimitation line using methods that are ‘geometrically objective’; which, in the context of opposite coasts, invariably requires the construction of a median line and, in the context of adjacent coasts, normally requires the construction of an equidistance line.

The underlying rationale of the three-stage process and, in particular, of the construction of a provisional median or equidistance line at the first stage, is clear. It has been explained many times in the modern jurisprudence. First, as remarked in *Libya/Malta*, the use of equidistance is a natural consequence of the adoption of distance-based entitlements within 200M under UNCLOS. Second, it reflects the dominant role played by coastal geography in the delimitation process, emphasized consistently since *Gulf of Maine*. Third, it satisfies the need for ‘stability and certainty’, and for ‘predictable, objectively-determined criteria for delimitation, as opposed to subjective findings lacking precise legal or methodological bases’, identified by the tribunal in *Barbados/Trinidad*. Fourth, it meets the related objective of ‘transparency’ in the delimitation process, highlighted by the tribunal in *Bangladesh/India*.

ITLOS accordingly observed in *Bangladesh/Myanmar* that the construction of a provisional equidistance line is ‘based on the geography of the Parties’ coasts and mathematical calculations’. In other words, as the *Bangladesh/India* tribunal pointed out, it involves the application of ‘geometric techniques’. If applied ‘mathematically’ and ‘geometrically’, these techniques should require no subjectivity or discretion at all; on the contrary, they should flow precisely from the geographical configuration of the delimitation area. In the words of Article 15 of UNCLOS (for the territorial sea), the median or equidistance line is drawn

‘equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured’.[1] In short, neither the source treaty provisions nor the jurisprudence contemplate any subjectivity in the first stage of the delimitation process.

Notwithstanding the clear theory and motivations behind the use of a provisional equidistance line at the first stage of the delimitation process, the practice of international courts and tribunals in the construction of such provisional lines has been decidedly mixed. In the majority of the earlier cases analyzed in Part B which utilized provisional equidistance lines, those lines were pure equidistance lines, objectively constructed on the basis of geometric techniques. Thus, for example, in *Gulf of Maine*, the provisional median line between the opposite coasts of the United States and Canada was constructed without disregarding Seal Island. The ICJ Chamber only turned to consider discounting that island at the (p. 577) second stage of its analysis, concluding that it should be given half effect. In *Qatar/Bahrain*, which concerned delimitation of an area littered with small islands, the ICJ emphasized that the ‘terrestrial territorial situation’ must be taken as the starting point in the delimitation process. Accordingly, the court concluded that every maritime feature in the delimitation area should be used in the construction of the provisional equidistance line, to the exclusion only of low-tide elevations situated in the overlapping territorial seas. Therefore, the court turned to consider the disproportionate impact of tiny island features only in the context of possible adjustment of the provisional line, at the second stage of the delimitation process. Similarly, in *Newfoundland/Nova Scotia*, the tribunal constructed its provisional equidistance line using all of the islands and rocks in the disputed area, only turning to consider the distorting effect of Sable Island at the second stage.[2]

Before *Black Sea*, the cases where courts and tribunals decided to discount small features at the first stage of the delimitation process were an exception to the norm. In *Libya/Malta*, the ICJ discounted the small uninhabited island of Filfla in the construction of its provisional median line, so as to eliminate its ‘disproportionate effect’. The court made no attempt to distinguish the situation from that faced by the Chamber in *Gulf of Maine*, and it is difficult to conceive of any compelling distinction that should have required a different approach. More understandable, perhaps, was the *Eritrea/Yemen* tribunal’s decision to exclude the mid-sea islands of Jabal al-Tayr and the Zubayr group from construction of its median line, given those islands’ position ‘well out to sea’ and the resulting manifest distortion that they would have caused in the course of the line.[3]

The ICJ’s judgment in *Black Sea* has marked a notable shift toward discounting island features (indeed, in some cases, substantial island features) in the very first stage of the delimitation process. Notwithstanding its acknowledgement that a provisional equidistance line must be ‘geometrically objective’, the court proceeded to observe that it could be constructed ‘from the most appropriate points on the coasts…with particular attention being paid to those protuberant coastal points situated nearest to the area to the [*sic*.] delimited’.[4] In doing so, the court signalled that the use of subjective judgment in considering the ‘appropriateness’ of base points was entirely legitimate (indeed, positively encouraged) at the first stage of the delimitation process. It proceeded to ignore both Serpents’ Island and Sulina Dyke in the construction of its provisional equidistance line, which the (p. 578) court described as being drawn between those base points that it considered represented ‘a significant change in the direction of the coast’.

Following the lead set by the ICJ, in *Bangladesh/Myanmar* ITLOS decided that it was required to ‘select’ appropriate base points for construction of the equidistance line at the first stage of the three-stage delimitation process. This led it to exclude base points on St Martin’s Island (an island of 8 km² in area and with a population of some 7,000 people) in its construction of the provisional line. Similarly, in *Nicaragua/Colombia*, the court decided to exclude the tiny island features of Quitasueño and Serrana as base points in the construction of its provisional line. In *Bangladesh/India*, the tribunal again engaged in a

process of ‘selection’ of appropriate base points, concluding that it should exclude those that were located on ‘detached low-tide elevations’.

In *Black Sea, Bangladesh/Myanmar*, and *Nicaragua/Colombia*, the role that the excluded islands might have on the delimitation line was only considered at the second stage of the process, in the context of an assessment of relevant circumstances mandating adjustment of the provisional line. In the first two cases, it was decided that the island features did not constitute relevant circumstances requiring adjustment of the provisional line. In *Nicaragua/Colombia*, the court similarly decided that Quitasueño and Serrana should have no effect on the delimitation line, instead constructing 12M enclaves around each of the features.

Finally, in *Peru/Chile*, which involved unusual circumstances requiring construction of an equidistance line starting well out to sea, the court decided to ignore a 120M[5] stretch of the Peruvian coast in constructing the line. As a result, as Figure B22.2 in Part B illustrates, the so-called ‘equidistance line’ portion of the boundary was not an equidistance line at all.

Notably, in none of these cases has the court or tribunal charged with the delimitation made any final adjustment of its delimitation line at the third stage of the delimitation process, by reason of any perceived ‘disproportionality’.

The sum effect of the decisions since *Black Sea* has been the engagement of substantial judicial or arbitral discretion at each of the three stages of the delimitation process. As a result, the predictability, transparency, and simplicity of the equidistance-based approach have been put into doubt. Indeed, rather than applying their purported three-stage approach, it seems that courts and tribunals have started utilizing a four-stage approach to delimitation, namely: first, select the appropriate base points for construction of a provisional line; second, construct the provisional line (which may or may not be a technically precise equidistance line); third, consider whether any adjustment is required by reason of relevant (p. 579) circumstances, in order to achieve an equitable result; and, fourth, check for any marked disproportionality.

It might even be argued that the level of subjectivity in the process is now such that delimitation is, effectively, more heavily reliant on subjective ‘equitable principles’ than at any time in the modern history of maritime delimitation. So is there any future for true objectivity and strict equidistance within the three-stage approach?

III. A Possible Way Forward

If stability, predictability, and consistency of the delimitation process, which has been so universally advocated by courts and tribunals throughout the modern jurisprudence, are to be upheld, then something has to give. It is not, after all, credible for a court or tribunal to pay lip service to the importance of an objective and a geometric first step in the delimitation process, only to embark immediately on a subjective analysis of which base points may be ‘appropriate’ or ‘inappropriate’. Either the first step in the delimitation process should be re-categorized as requiring a subjective selection of the appropriate base points for construction of the provisional line (which may or may not be an equidistance line), or geometric objectivity should continue to prevail through the construction of a true equidistance line prior to the interjection of more subjective elements at the second and third stages of the process.

The objectivity attached to the first part of the three-stage delimitation process has consistently been held out as its principal advantage over other, more subjective and malleable, methods of delimitation. If constructed in a technically precise manner, an equidistance line is not vulnerable to the subjective whims associated with most other delimitation methods. In particular, by definition, a technically precise equidistance line is faithful to the geography of the delimitation area (with all of its idiosyncrasies). It is submitted that the construction of an equidistance line can never be accused of entailing a

‘judicial refashioning of geography’, as asserted in the *Black Sea* and *Bangladesh/Myanmar* cases as a justification for moving to a more subjective approach from the outset. On the contrary, a true equidistance line is, by definition, dictated by the particular geography of the delimitation area.

Indeed, a technically precise equidistance line is not only faithful to geography; it also provides a necessary starting point in evaluating the potential impact of islands and other small features or ‘irregularities’ on any given delimitation. Until the precise equidistance line has been compared with a line ignoring the idiosyncrasies concerned, it is difficult to assess whether that feature might play an ‘excessive’, ‘disproportionate’, or ‘distorting’ effect. To the extent that such effects are present, of course, they can be abated in the second stage of the process by, for example, (p. 580) giving the idiosyncratic feature limited or no effect (as happened in respect of multiple small features in *Qatar/Bahrain*). Even in the most extreme cases of distortion (such as that involving Jabal al-Tayr in *Eritrea/Yemen*), there is much to be said for starting with a technically precise provisional equidistance line, so as to identify the extent of any distortion and with a view to making substantial adjustment so as to address that distortion at the second stage of the process, in order to arrive at an equitable result.

None of this should be taken as challenging the essential equitableness of the delimitations finally arrived at in cases like *Libya/Malta*, *Black Sea*, *Bangladesh/Myanmar*, and *Nicaragua/Colombia*. It is more a question of ensuring that the mandated equitable result is achieved by way of a transparent approach that remains faithful to the terms and rationale of an equidistance/relevant circumstances methodology; in the same way as was achieved in cases like *Gulf of Maine*, *Qatar/Bahrain*, *Newfoundland/Nova Scotia*, and others. For example, it has been observed that, had ITLOS constructed a provisional equidistance line giving full effect to St Martin’s Island in *Bangladesh/Myanmar*, that line would have been much closer to the final boundary than the provisional line actually constructed by ITLOS ignoring the island (see Figure C1.1).[6]

Of course, if courts and tribunals were to revert to considering the effect of islands and other features only at the second stage of the delimitation process, they would need to be ready to make substantial adjustments to the provisional line in some cases, so as to ensure that the final result is equitable. Such adjustments may require more than according the features reduced weight. For example, the creation of an enclave or semi-enclave around a small feature might be required, as happened in *Nicaragua/Colombia* and *Bangladesh/Myanmar*; and some distorting features may need to be discounted altogether. But such solutions should be no less achievable by way of strict adherence to the equidistance/relevant circumstances methodology than otherwise.

Adherence to a ‘geometrically objective’ first step in the delimitation process might also have the consequence of increasing the frequency of cases where an incremental approach is required to adjust for relevant circumstances at the second stage of the process. This is because, for example, a significant initial adjustment may be required to a provisional equidistance line to account for the distortive effect of an island feature (e.g. St Martin’s Island), before considering whether further relevant circumstances (e.g. coastal concavity/cut-off effect) require additional adjustment so as to produce an equitable result. Again, such an incremental approach to the assessment of relevant circumstances should not be problematic, (p. 581)

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Figure C1.1: *Bangladesh/Myanmar*: the strict equidistance line using St Martin's Island.

and has already been adopted in multiple other cases in the jurisprudence. For example, in *Jan Mayen* the ICJ undertook one adjustment of the provisional median line to account for coastal disparity and a second to account for fisheries in the southern part of the delimitation area. Similarly, in *Newfoundland/Nova Scotia*, the tribunal undertook one adjustment of the provisional equidistance line to account for the disproportionate effect of Sable Island and a second to abate the cut-off effect that the line would otherwise have on the coast of Newfoundland.

Of course, adjustment for relevant circumstances at the second stage of the delimitation process is not the only basis on which a court or tribunal might introduce subjective corrections of a technically precise equidistance line in order to achieve an equitable result. They retain the ability to make a final adjustment at the third stage of the process so as to avoid 'any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line'.[7] As observed in Part A above and discussed further in Chapter 3 of Part C, below, despite the fact that (p. 582) the disproportionality test is now well established as the final stage of the delimitation process, no court or tribunal has to date made any adjustment to a boundary line on disproportionality grounds. It may be that a strict adherence to equidistance at the first step of the delimitation process would have no impact on the role of disproportionality, given the propensity of courts and tribunals to be thorough in their assessment of relevant circumstances at the second stage (and their reluctance to acknowledge a need to make further adjustments for disproportionality at the third stage). However, even if it did lead to some final adjustments for disproportionality, the making of such a subjective correction at the final stage of the delimitation would be more faithful to the terms and rationale of the three-stage methodology than the subjective selection of base points at the first stage.[8]

All in all, it is clear that strict adherence to the construction of an equidistance line as the first step in the three-stage methodology should not prejudice the ability of courts and tribunals to arrive at an equitable result in any given delimitation. To the extent that it requires a more thorough assessment of relevant circumstances at the second stage of the process, or even adjustments for disproportionality at the third stage, this is preferable to the use of subjective short-cuts and deviations from equidistance at the first stage of the process. With the adoption of technically precise equidistance lines and a thorough and systematic approach to adjustments at the second and (if necessary) third stages of the

process, there is reason to be confident that the future of the geometrically objective equidistance-based delimitation methodology is secure.

IV. Conclusion

The recent trend in the delimitation jurisprudence away from the use of ‘geometrically objective’ criteria for the construction of provisional equidistance lines is regrettable. It departs both from the proper technical method for construction of an equidistance line and from the underlying rationale for using equidistance as the first stage in the delimitation process. In providing for the discounting of geographical features (what is more, of features that generate their own EEZ and continental shelf pursuant to UNCLOS) in the construction even of a provisional equidistance line, it amounts to a ‘judicial refashioning of geography’. In encouraging consideration of certain geographical features only at the second stage of the process, by way of possible adjustment of a non-equidistant provisional equidistance line, it turns the equidistance/relevant circumstances approach on its head. All in all, it constitutes a manifest departure from the three-stage process that it purports to uphold. This has, in effect, resulted in an inherently subjective (p. 583) four-stage process, the net result of which is arguably a lurch toward an equitable principles-based approach to delimitation.

It is to be hoped that courts and tribunals will return to the construction of objective, technically precise equidistance lines as the opening stage in the delimitation process, and thereby a faithful adherence to the three-stage process. While such a move back to the approach generally employed before the *Black Sea* case may make little or no difference to the equitable solution ultimately reached, it will safeguard the stability and certainty that is critical to any equidistance-based delimitation approach. Further, in the words of the court in *Libya/Malta*, it will ensure that the role of equity remains ‘within and not beyond the law’.

Footnotes:

1 Article 6 of the 1958 CCS employs virtually identical language with regard to delimitation of the continental shelf.

2 For other cases during the 1990s and early 2000s in which objective and geometric equidistance lines were constructed at the first stage in the process, without any subjective identification of appropriate base points, see *Jan Mayen* and *Cameroon/Nigeria*.

3 Indeed, as the map in Figure B12.1 in Part B shows, Jabal al-Tayr is located virtually at the mid-point between the opposite coasts of Eritrea and Yemen in the Red Sea.

4 *Black Sea*, para. 117.

5 i.e. all of the Peruvian coast within 80M of the parties’ land boundary terminus.

6 A. G. Oude Elferink, *ITLOS’s Approach to the Delimitation of the Continental Shelf beyond 200 Nautical Miles in the Bangladesh/Myanmar Case: Theoretical and Practical Difficulties* (2013). Op cit, see p. 508.

7 *Black Sea*, para. 122.

8 The question of whether the proportionality principle should retain its role as a discrete third stage in the delimitation process is examined in a Part, C Chapter 3 below.

Part C Future Challenges, 2 The Inconsistent Approach of Courts and Tribunals in the Adjustment of Provisional Equidistance Lines to Accommodate Geographical Relevant Circumstances

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(p. 584) 2 The Inconsistent Approach of Courts and Tribunals in the Adjustment of Provisional Equidistance Lines to Accommodate Geographical Relevant Circumstances

I. The Challenge

As discussed throughout this work, the standard (three-stage) methodology for the delimitation of maritime boundaries under the modern law is now well established and employed in the majority of third-party dispute resolution situations. However, uncertainty still exists around the application of that methodology in the specific circumstances of any particular case. Part of the uncertainty, related to the subjective selection of base points at the first stage of the process, has been addressed in the preceding chapter. A separate source of uncertainty relates to the adjustment of a provisional equidistance or median line at the second stage of the process, once it has been determined that some adjustment is required for one or more geographical relevant circumstances.[1] The approaches taken by courts and tribunals to the question of how to effect any adjustment have differed widely, sometimes in geographical situations that appear quite similar. This has given rise to perceptions of inconsistency from one case to the next.

This chapter compares and contrasts some of the approaches that have been adopted to adjustment of provisional equidistance lines across the jurisprudence, and addresses the question of whether greater consistency might be achieved in the future. While a significant element of subjectivity and discretion will inevitably, or (p. 585) indeed must, remain in many situations of adjustment of provisional lines, might the extent of such subjectivity be tempered by more uniformity of approach?

II. Context of the Problem

The maritime delimitation jurisprudence reviewed in Part B above is replete with examples of situations where some adjustment of a provisional equidistance line was deemed necessary in order to accommodate geographical relevant circumstances and achieve the equitable solution mandated by international law. Examples have included adjustments:

- to accord ‘half weight’ to small islands or island groups in *UK/France* and *Gulf of Maine* (or ‘zero weight’ to features deemed more distortive in *Qatar/Bahrain, Eritrea/Yemen*, and the *Bay of Bengal* cases);
- to prevent encroachment and cut-off of coastal projection in *Newfoundland/Nova Scotia, Barbados/Trinidad, Nicaragua/Colombia*, and the *Bay of Bengal* cases; and
- to reflect marked disparities in coastal lengths in *Gulf of Maine, Libya/Malta, Jan Mayen, Barbados/Trinidad*, and *Nicaragua/Colombia*.

However, the way in which the court or tribunal has gone about making the adjustments concerned has not always been reflective of the approach taken in other, seemingly comparable, cases. In the context of small islands and island groups, there has been marked inconsistency of approach towards the question of whether such features should be used as base points in the construction of the provisional equidistance line. This phenomenon has already been examined in the previous chapter. There is also an element of subjectivity inherent in any consideration of the weight to be given to small islands and island groups.

In the context of encroachment and cut-off, in *Barbados/Trinidad* and *Bangladesh/Myanmar* the Annex VII tribunal and ITLOS (respectively) explained the rationale underlying their adjustments. By contrast, in *Bangladesh/India*, the tribunal gave no explanation as to why it had chosen 'Prov-3' as the point from which to commence its adjustment of the provisional line. Nor did the tribunal explain how it calculated the final azimuth of the line. Given the importance of the location of the turning point in the direction of the azimuth in defining the boundary (not to mention the time and effort spent by the parties in formulating their positions on such issues), these omissions were surprising and regrettable.[2]

(p. 586) More strikingly, in the context of marked disparities in coastal lengths, the court in *Gulf of Maine* (ICJ Chamber), *Libya/Malta*, *Jan Mayen*, and *Nicaragua/Colombia* adopted completely different (and contrasting) approaches to the question of how to adjust provisional median lines. Each of those cases arose in the context of delimitations between opposite coasts.[3] All except *Gulf of Maine* involved significant adjustments to the provisional line in favour of a party with a substantially greater coastal length. In *Gulf of Maine*, the Chamber adopted a distinctly mathematical approach, adjusting the median line in the exact proportion of the disparity (i.e. at a ratio of 1:1.38). In *Libya/Malta*, the court adjusted the Libya-Malta median line with reference to the 'extreme limit' represented by the Libya-Italy (Sicily) median line, on the basis that Malta should not be left in a worse position than a hypothetical situation in which it formed part of Italian territory. In *Jan Mayen*, the court adjusted the median line with reference to an alternative extreme limit in the form of the Denmark (Greenland) 200M limit, on the basis that the adjustment in favour of Greenland could not extend beyond that point. In *Nicaragua/Colombia*, the court observed that there were 'various techniques' that might be employed to adjust the provisional line and proceeded to adopt the equiratio technique, whereby the base points located on the opposite Nicaraguan and Colombian islands should be accorded different weights (i.e. a weighting of one to each Colombian base point and three to each Nicaraguan base point).

In none of these cases did the court explain why it had adopted any one approach in preference to the others. Rather, it appears to have assumed that it was entitled to exercise discretion as to which approach was appropriate to the circumstances of the case, without having to give many (or any) reasons. As a result of the absence of any explanations, it is unclear whether methods used in some cases (such as the equiratio method) were even considered in other cases (such as *Libya/Malta*).

The practical differences between the four approaches adopted across the *Gulf of Maine*, *Libya/Malta*, *Jan Mayen*, and *Nicaragua/Colombia* can be substantial. First, of course, the *Libya/Malta* and *Jan Mayen* approaches are only workable in particular situations (namely, where there is a proximate third State (akin to Italy in *Libya/Malta*) or where the two States are separated by more than 200M but less than 400M of maritime space (as in *Jan Mayen*)). Second, even in situations where each approach is theoretically possible, their results can be dramatically different.

The illustrations below show how each of the four approaches would apply in different hypothetical delimitations between opposite countries, State A and State B. In each scenario, the ratio of relevant coastal lengths between the two States is 5 (p. 587)

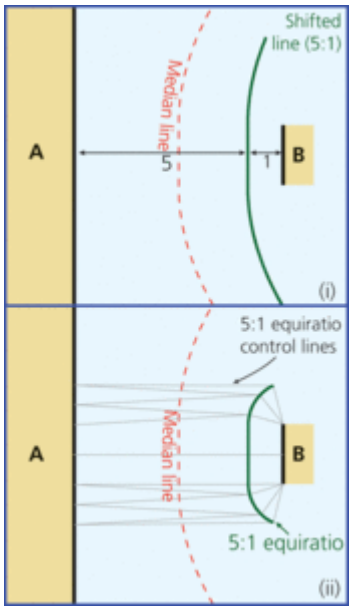

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Figure C2.1: Comparison of a simple proportional shift (i) with an equiratio calculation (ii).

to 1 in State A's favour. It is clear that adjusting the median line in the simple mathematical proportion of that coastal length disparity (Figure C2.1(i)) would have a dramatic (and most probably inequitable) effect on the boundary, in favour of State A. Indeed, the effect is far more dramatic than that seen in the *Libya/Malta, Jan Mayen*, and *Nicaragua/Colombia* cases, each of which involved larger coastal disparities of 8 or 9 to 1, but less dramatic adjustments of the equidistance line. However, the application of this method is at least objective and consistent, regardless of the distance between States A and B (or any third State). The equiratio line (Figure C2.1(ii)), which is constructed with a weighting of five to each State A base point and one to each State B base point, is (like the simple mathematical approach) objective and consistent (and, again, probably inequitable). Of course, to the extent that either of these methodologies of adjustment fails to give an equitable result, the weightings between the respective lines or base points can be varied in each of the simple proportional and equiratio methods—as happened in the *Nicaragua/Colombia* case, where the court transposed a coastal disparity ratio of 8.2 to 1 into a base point weighting ratio of 3 to 1 for its equiratio calculation.

By contrast to the first two approaches, the location of the adjusted *Libya/Malta*-style line (Figure C2.2(iii) and (iv)), which is halfway between the State A-State B median line and the State A-State C median line in each scenario, is highly dependent on the proximity of State C 'behind' State B. As such, it is dependent (p. 588)

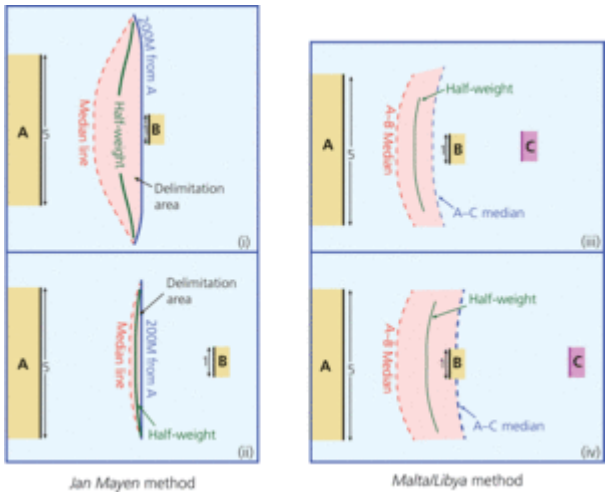

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Figure C2.2: Two further methods used for adjustment of a median line to allow for disparity in coastal length.

***Note*: In the *Jan Mayen* approach at (i) and (ii) above, the delimitation area is circumscribed by the 200M limit from the longer State and the median line. While in scenario (i) the half-weight line arguably gives an equitable result (the geometry is similar to that in the *Jan Mayen* case itself), in scenario (ii) State B is further away, leaving virtually no room for adjustment of the median line.**

on the geography and location of a State that is not a party to the dispute and not even located in the area of delimitation. In the fourth approach, the location of the *Jan Mayen*-style line (also Figure C2.2(i) and (ii)) is highly dependent on the distance between the opposite coasts of States A and B in each of the two scenarios. As such, the proximity of the delimitation line to State B is dependent on the distance between it and State A: at a distance of close to 200M, the adjustment to the median line is substantial (to the advantage of State A, thereby reflecting its significantly longer coast); at a distance of close to 400M, the adjustment becomes nugatory (to the disadvantage of State A, thereby failing to reflect its significantly longer coast).

In the *Malta/Libya* approach at Figure C2.2 (iii) and (iv), the median with distant third State C is taken into account and State B is awarded a proportion of the difference between the medians between, first, States A and C and, second, States A and B. Scenario (iii) represents a geometry similar to that present in *Malta/Libya*. As State C moves further away (scenario (iv)), however, this method starts to break (p. 589) down as the adjusted line (in this example a half-weight line) moves ever closer to the coast of State B.

As both of these examples are highly sensitive to the particular geography (and geometry) in each case, it is readily apparent that neither of them is suitable as a general method for adjustment of a provisional median line in cases of material coastal length disparity.

III. A Possible Way Forward

So can anything be done to introduce more objectivity, consistency, and predictability into the adjustment process? Is this even desirable, or is judicial subjectivity and discretion preferable to the application of hard and fast rules in determining what equates to an equitable solution?

It is true that, in the words of the *Barbados/Trinidad and Tobago* tribunal, there are ‘no magic formulas’ for determining the location and extent of any equidistance line adjustment. Some degree of discretion will always be necessary. Nevertheless, it is also true that such discretion must be exercised, in the words of the court in *Libya/Malta*, ‘within and not beyond the law’. The more transparency, consistency, and predictability that can be

incorporated into the second stage of the delimitation process, the safer will be the prospects of delimitation remaining within the bounds of a coherent legal process.

It is useful to distinguish again between each of the three categories of case identified above, because each raises very different issues in the jurisprudence related to adjustment of provisional equidistance lines.

In the first category (distorting effect of islands and other small features), putting aside the separate issue of selection of appropriate base points addressed in a previous subsection, an element of discretion is inherent in considering the weighting to be accorded to the features concerned; in other words, in considering whether to accord them full, partial, or no weight. As explained in Part A of this book, the jurisprudence indicates that factors of size, status, and distance from the mainland, together with the extent of spatial distortion of the equidistance line, can impact heavily in deciding the question of weight. Once that decision has been made, the implementation of the adjustment should be straightforward. For example, in the case of half effect, the equidistance line constructed with reference to the feature will be compared with a line constructed without reference to it, and the boundary will consist of a line constructed midway between the two. This approach was first employed in the *UK/France* case, was subsequently adopted in *Gulf of Maine* and *Newfoundland/Nova Scotia*, and remains relatively uncontentious.

(p. 590) In the second category (prevention of encroachment and cut-off of coastal projection), an element of discretion is again inherent in deciding what are the relevant coasts and the relevant coastal projections (particularly as most coasts will project ‘radially’ into the delimitation area). However, courts and tribunals should be at pains to explain the rationale underpinning any resultant adjustments to the provisional line—both as regards the point from which the adjustment takes effect, and the extent of the adjustment. At the very least, in *Bangladesh/India*, the Annex VII tribunal should have confirmed that its adjustment from point ‘Prov-3’ would: first, in the words of the *Barbados/Trinidad* tribunal, give effect to the relevant coastal frontages of Bangladesh; second, in the words of ITLOS in *Bangladesh/Myanmar*, take effect where the equidistance line ‘begins to cut off the southward projection of the coast of Bangladesh’; and, third, adopt an angle that would avoid cut-off of the coastal projections of both States.

The third category (marked disparity in coastal lengths between opposite coasts) is more complex, given the variety of adjustment approaches adopted in the jurisprudence. Of the four identified above, the *Libya/Malta* approach is the hardest to justify, and was the subject of unusually strong dissents by Judges Oda and Schwebel for, *inter alia*, failing to treat Malta as an independent State and giving undue weight to the interests of a third State (Italy). Judge Schwebel, in particular, emphasized the absence of any cogent link between the relevant circumstance identified by the court and its adjustment of the provisional median line:

> What the Court fails to explain, or even imply, is how it proceeds from its allegedly relevant circumstances to the particular line which is 18’ north of the Maltese/Libyan median line. That is to say, the Court offers no objective, verifiable link between the circumstances it regards as relevant and the determination of the line which it regards as equitable. Presumably that is because no such link exists. The Court simply does not begin to show that the circumstances which it does see as relevant dictate the adjustment it makes…

Just as, for example, the coastline of Bioko Island (part of Equatorial Guinea) was considered irrelevant to the delimitation line in *Cameroon/Nigeria*, the coastline of Myanmar was considered irrelevant to the delimitation in *Bangladesh/India*, and interests of Venezuela were considered irrelevant to the delimitation in *Barbados/Trinidad*, so the coastline of Italy should have played no part in determining the maritime boundary solution

between Libya and Malta. The fact that Malta was a comparatively small island State sandwiched between the coasts of two substantial continental States should have made little or no difference. It is difficult to conceive of any coherent reason why the location of that boundary, to the south of Malta, should have been dictated by the proximity of the non-party, Italy, to Malta's north and well outside the delimitation area.

The *Jan Mayen* adjustment approach is more justifiable as a matter of principle as it does not rely on the location of interests of third States. Rather, it is dictated (p. 591) exclusively by the geographical location and coastal relationship between the parties. However, as indicated above, it suffers from its own inherent weakness because it is only workable in situations where the opposite coasts are between 200M and 400M apart. Even then, it will become more extreme (and thus, likely, inequitable) in effect as that distance approaches 200M (and will have virtually no effect as that distance approaches 400M). As such, it is not an approach that is well suited to the majority of delimitation situations even between opposite coasts.

This leaves the two more easily applied adjustment approaches adopted in *Gulf of Maine* and *Nicaragua/Colombia*. Of these, the *Gulf of Maine* approach obviously has the benefit of predictability and mathematical certainty, together with relative simplicity. It was perhaps well suited to the (fairly unusual) circumstances of that case, which required only a modest adjustment for what was only a modest coastal length disparity (at a ratio of just 1.38 to 1). However, simple mathematical adjustments are poorly suited to the situations of more substantial disparity that were present in *Libya/Malta, Jan Mayen*, and *Nicaragua/Colombia*. The adoption of a mathematical approach in those cases, so as to transpose coastal length ratios of 8 or 9 to 1 to adjustment of the provisional median line, would have led to far more substantial adjustments than were witnessed in those cases. The *Gulf of Maine* approach is also objectionable by virtue of its own ostensible benefits in the sense that, as multiple courts and tribunals have emphasized, maritime delimitation is not an exercise in mathematical precision. Thus, the court emphasized in *Jan Mayen* that adjustments of the median line should not be by means of a 'direct and mathematical application', but should often be more modest in nature.[4] Any strict mathematical approach would be inconsistent both with the concept of an 'equitable solution' (which, by definition, safeguards a role for equity in the delimitation process, albeit within the law) and the vagaries inherent in the identification of relevant coasts.

The equiratio approach utilized by the court in *Nicaragua/Colombia* does not suffer from a number of the faults or disadvantages identified above in connection with the other three approaches. Whilst it is perceived as being more complex, it is an approach that any competent technical expert should have no difficulty implementing in situations of coastal disparity between opposite coasts. As the court itself recognized in *Nicaragua/Colombia*, it can result in a line which has 'a curved shape with a large number of turning points' which, if left untouched, 'may create difficulties in its practical application'.[5] As illustrated in Figure C2.3, that curved shape becomes particularly exaggerated as the distance between the (p. 592)

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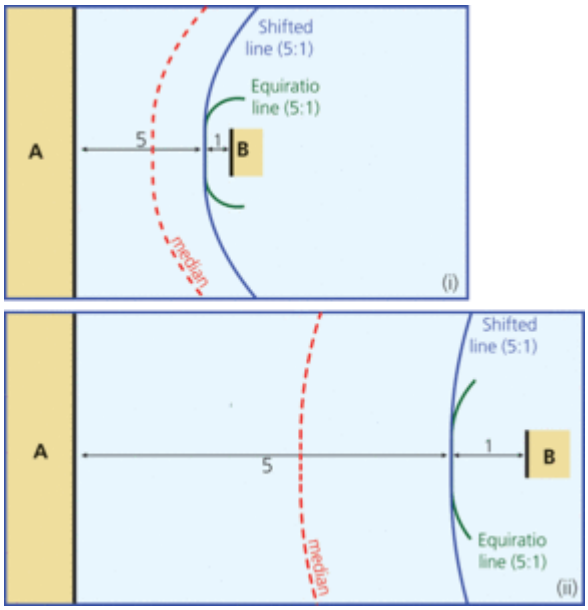

Figure C2.3: Comparison of a simple proportional shift with an equiratio technique as separation distance changes.

disparate opposite coasts decreases, such that it can have a quasi-enclaving effect on a small island coastline.

As occurred in *Nicaragua/Colombia*, such deficiencies in the equiratio method can to an extent be addressed by reducing the number of turning points and connecting them by geodetic lines, producing a simplified weighted delimitation line. Ultimately, however, the equitableness (or not) of any equiratio line (or any simple mathematical adjustment line) will turn upon the ratio to be used in its construction. Thus, in *Nicaragua/Colombia*, the coastal disparity ratio of 8.2 to 1 was transposed to a base point weighting ratio of 3 to 1 in the construction of the equiratio line.

Such transposition from an 8.2 to 1 coastal disparity to an equiratio ratio of 3 to 1 clearly required a substantial element of subjectivity and discretion on the part of the court. By way of illustration, application of the equiratio approach in *Libya/Malta* would have required a weighting ratio of just 3 to 2 in the construction of the line in order to arrive at the court's solution in that case, despite the existence of an equivalent coastal disparity ratio of 8 to 1. Therefore, it is clear that the equiratio approach (and the similar simple mathematical adjustment approach), while technically precise and predictable at first glance, can be highly subjective once it comes to deciding on the ratio to be used in constructing the equiratio line (or in otherwise adjusting the provisional median line).(p. 593)

IV. Conclusion

The second stage of the delimitation process, entailing consideration of whether adjustment of a provisional line is mandated by relevant circumstances and, if so, the extent of the adjustment required to achieve an equitable solution, is inherently subjective. In both the analysis of possible relevant circumstances and the assessment of any adjustment, courts and tribunals will need to employ an element of discretion. However, as with any legally accountable administrative or judicial decision-making process, that discretion must be exercised within the confines of the law. In particular, in the delimitation context, courts and tribunals have repeatedly emphasized that the process should 'display consistency and a degree of predictability'. It also needs to be consistent with fundamental principles of

international law, such as that of the sovereign equality of States (whether large or small, continental or insular), as reflected in Article 2(1) of the UN Charter.

The approaches adopted by courts and tribunals in the adjustment of provisional equidistance lines have been diverse and not always well reasoned. This is unfortunate, given that such adjustments invariably lie at the very heart of any given delimitation decision and have the greatest practical impact on the States concerned. It is to be hoped that courts and tribunals will try harder to reach consensus in their deliberations on these important issues so that they can provide as much reasoning as possible to their decisions and more consistency to their approaches. This will provide greater consistency, predictability, and transparency in the delimitation process and might, in turn, facilitate the realization of more regular delimitation agreements without the need for third-party dispute resolution.

Nowhere are the inconsistencies more apparent than in the context of delimitation between opposite coasts with disparate coastal lengths. Some of the adjustment decisions adopted in the jurisprudence—particularly those dictated by the location or proximity of third States outside the delimitation area—are hard to reconcile with basic principles of international law. Others appear very case-specific and difficult to extend across multiple delimitation scenarios. It is clear that there is no single objective methodology for adjustment of a provisional median line that suits every situation. Indeed, in many situations it is inevitable that there will be a substantial degree of subjectivity in determining the extent and methodology of any adjustment. Nevertheless, it is to be hoped also that courts and tribunals will strive to achieve greater harmonization and transparency in their approaches, providing more explanation of why a given methodology and adjustment is considered suitable (or unsuitable) in the circumstances in order to achieve an equitable result.

Footnotes:

1 The uncertainty is less prevalent in those (comparatively rarer) situations of adjustment for non-geographical relevant circumstances, so that topic is not addressed here.

2 These omissions were all the more surprising given the tribunal's comment about the importance of 'transparency' in the delimitation process.

3 As Churchill and Lowe observe, coastal length disparity is a relevant circumstance 'especially (perhaps only) in the case of opposite coasts': Churchill, R. R. and Lowe, A. V., *The Law of the Sea* (3rd edn, Manchester University Press, 1999).

4 Similarly, courts and tribunals have emphasized that the disproportionality check undertaken at the third stage of the delimitation process is 'not a mathematical exercise' and does not require 'mathematical precision'.

5 *Nicaragua/Colombia*, para. 235.

Part C Future Challenges, 3 Relevant Coasts, Relevant Areas, and Proportionality: Variances of Approach and a More Discrete Role for Proportionality in the Delimitation Process?

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(p. 594) 3 Relevant Coasts, Relevant Areas, and Proportionality: Variances of Approach and a More Discrete Role for Proportionality in the Delimitation Process?

I. The Challenge

Courts and tribunals have taken some markedly different approaches to the identification of relevant coasts and relevant areas, both in framing the context of the dispute and in presenting (or rebutting) arguments for the adjustment of a provisional delimitation line. As a result, the parties to many disputes have devoted substantial efforts to presenting their views about the relevant coasts and relevant areas in each case, to suit their specific situation and case objectives and thereby maximize the prospects of 'success'. This chapter discusses some of the most common issues in dispute, the different approaches taken, and the solutions adopted by courts and tribunals in identifying relevant coasts and areas.

One of the principal reasons why relevant coasts and relevant areas are so hotly disputed is that they are central to the third stage of the standard delimitation methodology, in which a provisional delimitation result is checked for 'marked' or 'gross' disproportionality. Notwithstanding the substantial arguments often exchanged, however, no court or tribunal has to date been persuaded to adjust a delimitation line to avoid a perceived disproportionality. Part III of this chapter revisits the origins of the proportionality principle and asks whether the role of the principle could usefully be revised so as to make it more relevant in maritime delimitation.(p. 595)

II. Context of the Problem in Relation to the Identification of Relevant Coasts and Relevant Areas in Delimitation

a. Relevant coasts

There are few delimitation cases where the selection of the relevant coast has not been a point of contention between the parties. In most cases, each party attempts to allocate to itself as long a relevant coast as possible (while trying to minimize the proportion of relevant area allocated to it). In doing so—and in commensurately attempting to allocate to its opponent as short a relevant coast as possible—the party aims to demonstrate the existence of a relevant circumstance (in the form of a marked disparity in coastal length) or to bolster its argument about the proportionality (or not) of a given delimitation result.

In the context of such arguments, different issues have arisen, approaches been taken, and solutions been found, depending on the particular geographical characteristics. Questions that commonly arise include:

- What part of any given coast is relevant?
- Should closing lines be included across bays, gulfs, river mouths, or otherwise?
- Can the location of base points used for the construction of the provisional equidistance line determine what is the relevant coast? and
- Once the relevant coast has been identified, how will it be measured?

Each of these questions will be addressed in turn in the following paragraphs.

The usual approach is to include in the relevant coast those segments of coastline that generate overlapping claims in the area to be delimited.[1] Therefore, coastlines that face away from the delimitation area are generally excluded from the relevant coast. For

example, in *Black Sea*, the Ukrainian coast to the east of Point Sarych was ignored as it faced away from the delimitation area.[2]

Consistent with this approach, a relevant coast does not necessarily need to be continuous. For example, the ICJ excluded the coastline of the Karkinits'ka Gulf altogether from Ukraine's relevant coast in *Romania/Ukraine*. Less controversially, perhaps, the ICJ excluded a short stretch of the Nicaraguan coast west of Punta de Perlas in *Nicaragua/Colombia* as the coastline concerned faced southwards, away from the delimitation area.[3]

(p. 596) The treatment of bays, gulfs, and river mouths has not been consistent in the jurisprudence. In *Gulf of Maine*, the ICJ Chamber closed the Bay of Fundy with a 24M line that was included as part of Canada's relevant coast. Similarly, in *St Pierre and Miquelon*, the tribunal used a closing line across the Cabot Strait in order to represent Canadian coastlines located inside the Gulf of St Lawrence that were in direct opposition to the French islands and less than 400M away. In the *Bay of Bengal* cases, the relevant coast similarly included a straight line across the Meghna Estuary, which line corresponded to the general direction of the Bangladeshi coast. Arguably an outlier in the jurisprudence was the *Black Sea* case, where the court excluded the coastline (and closing line) of the Karkinits'ka Gulf altogether from Ukraine's relevant coast. It did so on the basis that the coastlines of the Gulf did not project into the delimitation area (even though the back portion of the Gulf clearly did so project).[4]

Particular issues can arise where segments of coastline are prevented from projecting throughout the delimitation area because they are located 'behind' the coastline (normally islands) of the opposing State. In *Nicaragua/Colombia*, for example, the small Colombian islands of San Andrés and Providencia were located within 200M of Nicaragua, but more than 200M from the Colombian mainland. The court treated the entire coastline of the islands as being relevant, rather than just the portion directly facing Nicaragua, on the basis that they projected into the delimitation area as a whole. Similarly, the court treated the entire east-facing coastline of Nicaragua as relevant, despite the fact that much of its projection was limited by the proximity of the Colombian islands. In *St Pierre and Miquelon*, by contrast, the tribunal excluded a stretch of Canadian coastline some 200km long because it was located 'behind' the French islands. In contrast to the situation in *Nicaragua/Colombia*, the French islands were located very close (about 20km or 11M) to that Canadian coastline and the only delimitation undertaken by the tribunal was on the seaward side of the islands (as opposed to between the Canadian coastline concerned and the islands). Nevertheless, it is clearly arguable that the Canadian coastline projected into the delimitation area, and thus should have been treated as part of the relevant coast.

In some cases, courts and tribunals have equated the relevant coasts with those portions that extend between the base points used to generate the equidistance or median line. In both *Jan Mayen*[5] and *Guyana/Suriname*,[6] the relevant coasts were limited to those sections that generated the 'complete course' of the equidistance line. In *Jan Mayen*, the northernmost and southernmost base points on the Greenland coast coincided with significant changes in the coastal direction away (p. 597) from the delimitation area, at Points G and H.[7] Therefore, the end result was little or no different from that which would have been achieved using the standard approach of identifying coastlines projecting into the delimitation area. In *Guyana/Suriname*, by contrast, the last controlling points on either side were each about 100M from the land boundary terminus, the coasts of each party continuing in both directions in more or less a straight line.

An equidistance line is controlled by the closest base points on each coast—a factor that is wholly objective and dependent on the coastal geography. This can render reference to base points unsuitable when considering what should or should not constitute relevant coasts. In *Romania/Ukraine*, for example, the last Romanian base point to affect the median line was on the Sacalin Peninsula, only about one-fifth (36km) of the way along its coast, while all

186km of the coast was accepted by both parties and the court as being relevant to the delimitation. In *Cameroon/Nigeria*, the coastal geography dictated that only one base point was needed on either side of the Calabar Estuary, those points being just 25km apart. None of the rest of the coasts of the parties contributed any base points.[8]

Once the relevant coast has been identified, how should it be measured? In technical terms, the length of a coast is a classic mathematical paradox and there is no correct answer. The length depends on the scale of measurement: as the scale gets larger, the coast becomes more detailed, more sinuous and therefore longer. If a theoretical ruler was used to measure a stretch of coastline, the smaller the ruler the more sinuosities would be measured and the longer the coastline would become.

Figure C3.1 shows a complex and indented coastline filtered to show the effects of measurement using filters of different lengths. The original coastline data in the illustration (which is not itself highly detailed) has a length of 2,200km. When filtered using a 1M filter (the red line), the length becomes 770km; when using a 12M filter (the blue line), it becomes 346km; and when using a 200M filter (the green line), it becomes 315km. If the original coastline was based on large-scale mapping, its length would likely be nearer 5,000km. A straight line coastal front is similar to the 200M green line and measures 312km. Thus, the same stretch of coast measured in different ways has lengths that differ by a factor of seven. The greater the sinuosity of the coast, the greater the difference becomes.

To avoid this uncertainty, coastal lengths are generally calculated using simplified coastal fronts where the coastline is approximated to one or more straight lines. Examples of this approach are the *Bay of Bengal* cases, where the coasts of (p. 598)

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Figure C3.1: Measuring the length of the coastline with different filters.

Bangladesh, India, and Myanmar were all simplified to straight lines (four segments on the India side and two each on the Bangladesh and Myanmar sides) that followed the general directions of the coast and accommodated significant changes in direction. The straight lines thus drawn lie in part at sea, and in part over land (as would be expected from averaging the coast using a straight line—see Figure C3.2 below).[9]

Nevertheless, in some cases courts and tribunals continue to measure coastal lengths with reference to the sinuosities of the coast. In *Tunisia/Libya*, the court referred to measurements of the coastal length along both the sinuosities and as straight line coastal fronts, proceeding to calculate both sets of ratios.[10] In *Romania/Ukraine*, the parties expressed coastal lengths according to various measures: using the sinuosities, straight

baselines, and along straight-line coastal fronts. The court modified the relevant coasts and calculated their lengths using the sinuosities.[11] (p. 599)

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Figure C3.2: The general directions of the coast and the relevant areas in the *Bay of Bengal* cases.

There was a similar outcome in *Nicaragua/Colombia*, where both parties measured the Nicaraguan coast using straight-line measurements of 453km, but the court's measurement, despite saying 'using the general direction', was longer (some 531km), indicating that it had paid more regard to the sinuosities of the coast.[12]

Straight-line coastal fronts are not to be confused with artificial constructs such as straight or, especially, archipelagic baselines. In identifying the length of a relevant coast for delimitation purposes, even in the context of an archipelago, it is the lengths of the physical coastlines that are key. Thus, for example, in *Barbados/Trinidad*, the tribunal rejected a Trinidadian argument that its coastal lengths should be calculated with reference to its archipelagic baseline, focusing instead on the physical coastline.[13]

b. Relevant area

The concept of 'relevant area' extends from the relevant coasts to the limit of the overlap of the States' entitlements. It can include areas that are not germane to the case in hand:[14] for example, areas of territorial sea in a continental shelf (p. 600) delimitation. The relevant area covers the overall maritime spaces involved in the delimitation and is not the same as the area of overlapping claims.[15]

As the use of the relevant area is in the final disproportionality check, and given also the inherent vagaries in the concept, its measurement is approximate and inherently imprecise. However, the technical measurement of the relevant area is relatively simple and does not suffer from the geometrical difficulties of measuring coastal length. The identification of relevant areas across a number of cases has nevertheless raised a number of questions.

One such question is the extent to which the relevant area should include maritime space located within straight or archipelagic baselines. This was a particular issue in *Tunisia/Libya*, where the court was required to delimit the continental shelf starting at the outer limit of the parties' territorial seas. While the coast of Libya was relatively straight and unremarkable, Tunisia had adopted a system of straight baselines around the Kerkennah Islands that had enclosed large areas of 'internal waters'. Tunisia argued that these internal waters (and all territorial seas) should be excluded from the relevant area, thereby weighting the proportionality calculation in its favour. The court held that 'since it is a question of proportionality, the only absolute requirement of equity is that one should compare like with like'. Accordingly, it concluded that 'if the shelf areas below the low-water mark of the relevant coasts of Libya are compared with those around the relevant coasts of Tunisia, the resultant comparison will…make it possible to determine the

equitable character of a line of delimitation'.[16] Accordingly, as illustrated in Figure C3.3, the court included all of the Tunisian internal waters as part of its proportionality analysis.

The *Bay of Bengal* cases used an unusual (and perhaps illogical) approach to the definition of the relevant area. In both cases, the relevant coasts were measured by drawing straight-line coastal fronts that, in simplifying the coasts, were drawn partly over land and partly over water. The relevant area was then measured seaward of these straight-line coastal fronts, thus including some areas of land and excluding some areas of water (Figure C3.2). The ICJ used a similar approach in *Romania/Ukraine*, but there the relevant area was specifically measured to the coastline (as the ICJ had calculated the relevant coast with reference to its sinuosities rather than straight lines).

In the *Bay of Bengal* cases, which concerned delimitation of outer shelf areas, the relevant areas included areas of continental shelf beyond 200M and no distinction was drawn in the proportionality analysis between the different zones. However, where the delimitation is restricted to maritime zones within 200M, any areas beyond 200M from either State will generally be excluded from the relevant area. (p. 601)

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Figure C3.3: The relevant area as determined by the court in *Tunisia/Libya*.

Thus, in *Romania/Ukraine*, a small area was excluded as being more than 200M from Romania. An exception was *Jan Mayen*, where the parties were more than 200M apart, but the ICJ nevertheless extended the 'area relevant to the delimitation dispute' to include areas beyond the overlapping 200M limits. However, it is notable that the court did not conduct a proportionality analysis (in the sense undertaken at the culmination of the three-stage delimitation approach), instead focusing on the extent of an adjustment of the median line to reflect, *inter alia*, a marked disparity in coastal lengths. Therefore, the role of the 'relevant area' in that case was more circumscribed.

The treatment of third State claims has also not been consistent in the identification of relevant areas. In *Tunisia/Libya*, the court defined the relevant area with a northern and eastern limit and included areas potentially pertaining to third States (Italy and Malta—Figure C3.3). The court, however, emphasized that the claims of such third States would not be prejudged by its decision.[17]

Similarly, the relevant area in *Bangladesh/Myanmar* included areas claimed by (and subsequently awarded to) India (Figure C3.2 above). By contrast, in the subsequent *Bangladesh/India* case, the area earlier awarded to Myanmar was consciously (p. 602) excluded. This was because Bangladesh could no longer claim entitlements in that area. The court accorded precisely the same treatment in *Nicaragua/Colombia*, where it excluded from the relevant area, first, the maritime space to the north of the boundary delimited a few years earlier in the *Nicaragua/Honduras* case and, second, maritime space that was already subject to boundary agreements between Colombia and third States (Panama,

Jamaica, and Costa Rica), pursuant to which Colombia had relinquished any entitlement beyond the boundary lines concerned.[18]

III. The Proportionality Paradox and a Possible Revised Role for the Principle

a. The origins of the proportionality principle

The proportionality principle as applied in maritime delimitation stems from the *North Sea* cases. In that case, the Court faced a particular problem: namely, the need to abate the cut-off of the coastal projection of a State (West Germany) that was sandwiched between two other States (the Netherlands and Denmark) on a markedly concave coastline. The court considered that it would be inequitable for three States with broadly similar coastal lengths to be allocated markedly different maritime spaces simply as a result of that coastal configuration. Taking an estimate of the relevant coasts and areas in that case, West Germany had approximately 33 per cent of the relevant North Sea coastline of the three States combined, but stood to receive only 17 per cent of the area in the event of an equidistance-based delimitation.

It was in this context that the court determined that a 'final factor' to be taken into account in the negotiation of the maritime boundary was 'the element of a *reasonable degree of proportionality* which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines…'.[19] After the completion of the parties' negotiations following the judgment, West Germany's allocation of the area at issue was increased to 25 per cent,[20] giving it access to the continental shelf median line with the United Kingdom.

(p. 603) The principle was revisited less than ten years later in *UK/France*, where the Court of Arbitration made clear that it did not consider the proportionality criterion 'one for application in all cases'. On the contrary, it observed that 'it was the particular geographical situation of three adjoining States situated on a concave coast which gave relevance to that criterion in [the *North Sea*] cases'.[21] Further, the Court of Arbitration observed that 'it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor'.[22]

The court went further in *Tunisia/Libya*, identifying for the first time a relevant area and calculating ratios of coastal lengths and areas. This elevated the proportionality test from a subjective evaluation of equity to a quantitative test, requiring the precise measurement of relevant coastal lengths and areas. However, in that case the complexities of the geography —especially the large areas of Tunisian internal waters (see Figure C3.3)—were not conducive to the strict application of proportionality[23] (and equidistance was not even considered as a starting point). In his dissenting opinion, Judge Gros criticised the court for effectively elevating proportionality to a method of delimitation, contrary to the holdings in the *North Sea* and *UK/France* cases.[24]

More recently (and in particular since *Romania/Ukraine*), the proportionality principle (or, more precisely, the disproportionality test) has been identified as the final stage in the 'three-stage process' of delimitation.[25] As such, its role has become magnified, standing separate and distinct from the assessment of special or relevant circumstances at the second stage of the delimitation process. Despite the repeated assertions of courts or tribunals that the disproportionality test is not to be applied mathematically, many recent judgments and awards have contained precise measurements of relevant coastal lengths, relevant areas, and the corresponding ratios as part of a disproportionality test. In particular, the decisions in *Romania/Ukraine*, *Bangladesh/Myanmar*, and *Bangladesh/India* all contain clear descriptions and illustrations of the relevant coasts, relevant areas, and precise proportionality calculations as a final check of equidistance-based delimitations.

Nevertheless, it is notable that in none of the cases has the final check led to any adjustment of the boundary.[26](p. 604)

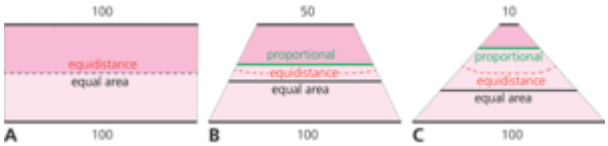

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Figure C3.4: Schematic representations of coastal length proportionality for opposite coasts (trapezium).

b. The geometry of proportionality

Mathematically, the strict application of a proportionality test will often be problematic in delimitation, even as a matter of theory. It is a tenet of basic mathematics that lines have a square relationship with areas. A square of side 2 has 4 times the area of a square of side 1. The mathematical application of proportionality will only work in theory if one of the dimensions of the area is the same. This might be the case where adjacent coasts with dissimilar coastal lengths face the open sea. In that situation, each coast projects the same 200M to its EEZ limit and, as a result, their respective maritime areas (in a perfect rectangle situation) will be in direct proportion to their coastal lengths. Such a solution may well be equitable. However, such a perfect proportionality scenario will rarely (if ever) arise in practice, particularly in the case of delimitation between opposite coasts.

Figure C3.4 shows schematically the situation of two opposite coasts with differing coastal length ratios, with the relevant areas defined by connecting the extremes of the relevant coasts. Figure A shows a simple situation where the States have identical coastal lengths. The equidistance line neatly divides the rectangular relevant area into two equal areas. Figures B and C show the relevant area defined by connecting the extremes of the two States' respective relevant coasts, thus forming trapezia; B with a 2:1 coastal length ratio and C with a 10:1 coastal length ratio (not unlike the geometry in *Jan Mayen* and *Libya/Malta*). Here, the equidistance line naturally awards a larger area to the State with the longer coast: to divide the area equally between the two States, the delimitation line has to move downwards, whereas a strictly 'proportionate' delimitation would require the line to move upwards towards the smaller State. Case C, where the coasts are in a ratio 10:1, shows the line producing strict proportionality as being approximately the same as a one-quarter line based on distance.

(p. 605)

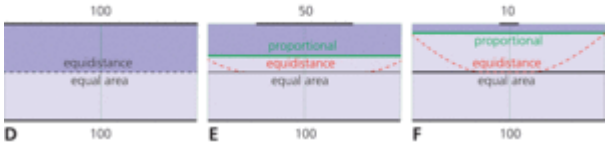

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Figure C3.5: Schematic representations of coastal length proportionality for opposite coasts (rectangle).

Figure C3.5 shows the same coastal length relationships, but with the relevant area extended to make a rectangular shape (as the court effectively did in *Jan Mayen*). Figure D is identical to Figure A above. In Figures E and F, the linear and area relationships are the same: in the 2:1 scenario in E, the strictly 'proportionate' line is located one-third of the

distance between the two States; in the 10:1 scenario in F, the ‘proportionate’ line is located just one-eleventh of the distance between the two States.

Similar arguments were used by Malta in *Libya/Malta*, which has broadly the same geometry as Figures C3.4 and C3.5 (with a coastal length ratio of 8:1 in Libya’s favour). Malta argued that, because of the trapezium shape of the relevant area, the strict equidistance line already gave Libya a greater share of the relevant area.[27]

In summary, therefore, the extent of adjustment required of an equidistance line between opposite coasts in order to achieve a strictly ‘proportionate’ solution (from a mathematical perspective) will turn heavily on the precise shape and dimensions of the relevant area. Further, if the relevant area is defined as a trapezium, a strict equidistance line automatically allocates a larger area to the longer State. For these and other reasons, discussed below, it is highly questionable whether the proportionality principle has any place in delimitation between opposite coasts.

c. Use by courts and tribunals—statistics

A number of recent judgments and awards have produced clear and unambiguous definitions of the relevant areas and relevant coastal lengths, usually helpfully illustrated. Clear examples are *Romania/Ukraine* and the *Bay of Bengal* cases. However, an assessment of the application of the proportionality principle in the modern jurisprudence more generally illustrates that there is very rarely an intimate correlation between ratios of relevant coastal lengths and relevant areas and (p. 606)

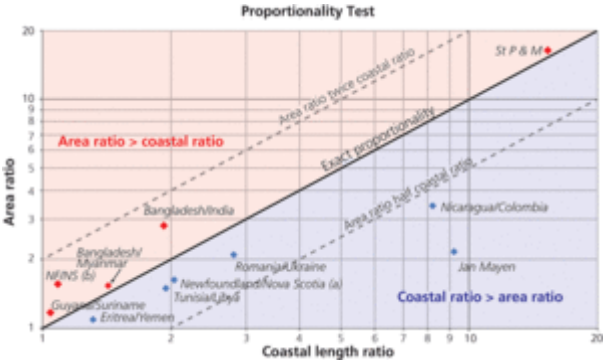

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Figure C3.6: Graph showing the correlation between coastal length ratios and coastal area ratios.

Note: Measurements are taken from the relevant judgment or award, apart from *Jan Mayen* which is the authors’ calculation using the court’s area and coastal lengths. The Award in *Newfoundland/Nova Scotia* had two calculations: (a) using the Nova Scotia version of the relevant area; and (b) using the Newfoundland version (both appear on the graph).

that, in some cases (particularly those of significant disparity in coastal lengths), the correlation is non-existent.

Figure C3.6 shows the results of proportionality calculations as carried out by international courts and tribunals (or based on their findings). Cases of near-perfect proportionality would plot on or near the solid line (for example, *Guyana/Suriname, Bangladesh/Myanmar*, and *St Pierre and Miquelon*); points plotting in the upper half (red) are where the area ratio is greater than the coastal length ratio, so the State with the longer coastal length has a greater area than would be due under strict proportionality. Conversely, in the lower half (blue), the States concerned have been allocated less area than would be due under strict proportionality. It is evident that the most extreme disproportions have arisen in cases of

substantial coastal length disparity between opposite coasts (i.e. *Jan Mayen* and *Nicaragua/Colombia*).[28]

d. (In)applicability of the proportionality principle

As discussed above, the early discussion of the proportionality principle in the *North Sea* and *UK/France* cases emphasized that it was not always applicable in (p. 607) maritime delimitation, being identified rather as a means to resolve the specific problem of cut-off effects between adjacent States. Therefore, in *Newfoundland/Nova Scotia*, the tribunal observed that 'it is not the inevitable or even the most frequent practice of the International Court of Justice or arbitral tribunals to apply the so-called proportionality test'.[29] The tribunal observed, in particular, that in cases where coastal length disparity had been a relevant circumstance in delimitation (*Gulf of Maine, Libya/Malta*, and *Jan Mayen*), at that time the court had not applied the proportionality test at all.[30] Thus, before the 'institutionalization' of the proportionality check in the *Romania/Ukraine* judgment, numerous jurists and commentators expressed doubts as to whether the proportionality principle was even applicable in opposite coast delimitations.[31]

Certainly, the origins of the proportionality principle, focused as they were on the need to abate the cut-off effect caused by the configuration of certain adjacent coasts, indicate that the principle should play no role in opposite coast delimitation. After all, opposite coasts pose very different problems. Often, the overall coastal lengths will broadly be in balance, as in *UK/France* and *Eritrea/Yemen*. Here, the median line will produce an approximately equal division and other factors (for example, according limited or no weight to small islands) provide a reliable basis for adjustment. In opposite coast situations of substantial coastal length disparity (*Malta/Libya, Jan Mayen, Nicaragua/Colombia*), this will generally be treated as a relevant circumstance requiring adjustment to a provisional line, without any need for a further adjustment for proportionality. As demonstrated by the graph in Figure C3.6, in such cases the level of adjustment will generally be more modest than would be required by any application of strict proportionality.

None of this affects the rationale for continued application of the proportionality principle in adjacent coast situations where, due to the particular (convex or concave) coastal configuration, the equidistance line has the effect of cutting off a length of coast from its projection into maritime space. In such cases, the relationship between the coastal projection and maritime entitlement must be ensured by way of adjustment to the equidistance line, and the proportionality principle serves as a useful cross-check for the equitableness of such adjustment. It is for this reason that Professor Bowett commented in his seminal work, *The Legal Régime of Islands in International Law*, that 'it would seem that the proportionality factor might only be applied, or be meaningful, in the case of adjacent States (not "opposite") where the existence of a markedly concave or convex coastline will (p. 608) produce a cut-off effect if the equidistance principle is applied: that is to say, will allocate to one State shelf areas which in fact lie in front of, and are a prolongation of, the land territory of another'.[32]

Of course, in order for the proportionality principle to work effectively in such situations, it is necessary to define the relevant coasts and area with as much objectivity and predictability as possible (in relation to which, see Section II). But in any event, it is not proportionality (or disproportionality) itself which is the factor requiring adjustment of the equidistance line; rather, it is the relevant circumstances of encroachment and cut-off that are the primary consideration. Questions of proportionality (or disproportionality) enter into consideration only in determining the equitableness of any given adjustment for those relevant circumstances. Therefore, for example, in its adjacent coast case delimitation in

Cameroon/Nigeria, the court did not address proportionality; it did not have to because it rejected Cameroon's arguments about cut-off and encroachment.

IV. Conclusion: Returning the Proportionality Principle to its Roots in the *North Sea* Cases

The original rationale for the proportionality principle, as set out in the *North Sea* and subsequent cases, was the premise that States with approximately equal coasts should not be accorded grossly different continental shelf areas merely as a result of irregular (in particular, concave or convex) coastal configurations. It is submitted that, with its elevation to the third and final part of the three-stage methodology, the roots of the proportionality principle are in danger of being forgotten. Consequently, courts and tribunals have been left grappling with the principle in opposite coast and other situations to which the principle is ill-suited and, practically speaking, the principle has been left in danger of becoming a practical irrelevance.

It is submitted that proportionality should revert to its origins as a criterion to be applied only in circumstances where adjustment of a provisional equidistance line is necessary between adjacent coasts in order to address the cut-off effect produced by a markedly concave or convex coastline. This would restore proportionality to a meaningful status in the delimitation process. Simultaneously, it would avoid the substantial uncertainties that surround proportionality as a universal 'final check' on delimitation. For example, if a delimitation fails the proportionality check, is the court or tribunal obliged to return to the second stage of delimitation and (p. 609) make a fresh adjustment to the provisional equidistance line? If it did not, that would render the check pointless; if it did, that might improperly elevate the check to become the 'dominant principle of delimitation'.[33]

The proportionality test as a generic third stage in the delimitation process seems to fail in a number of respects. It is legally and technically unsound: coastal length is not a legal basis for entitlement; equity does not imply equality; and, as discussed above, the identification of relevant coasts and areas can be highly subjective. This has led parties to spend substantial time and effort arguing issues related to relevant coasts and areas 'strenuously and ingeniously',[34] but, ultimately, fruitlessly. In a brief dismissal of lengthy arguments on proportionality presented by the parties, the tribunal in *Nova Scotia v. Newfoundland* drew no conclusions from them beyond the fact that they demonstrate 'the vagaries associated with the definition of relevant areas and the use of a proportionality test'.[35]

The key issue for proportionality, then, is the avoidance of cut-off. It is therefore well suited to application in circumstances present in the *North Sea* and *Bay of Bengal* cases. In such situations, it is submitted that the proportionality test should be integrated into the second stage of the delimitation process, as part of the assessment of relevant circumstances, especially that of cut-off, and the computation of equidistance line adjustments so as to achieve an equitable solution. For the reasons identified earlier in this chapter, and again faithful to its origins in the *North Sea* cases, in assessing the length of relevant coastlines for the purposes of the proportionality test, it is submitted that such coastlines should be measured 'according to their general direction'[36]—i.e. along one or more straight lines, as in the *Bay of Bengal* cases.

Footnotes:

1 See, e.g., discussion in *Barbados/Trinidad, Black Sea, Nicaragua/Colombia*, and the *Bay of Bengal* cases Part B, Chapters 16, 19, 20, 23.

[2] See Figure B19.3 in Part B, above.

[3] See Figure B21.2 in Part B, above.

[4] *Romania/Ukraine*, para. 100.

[5] *Jan Mayen*, para. 67.

[6] *Guyana/Suriname*, para. 352.

[7] See Figure B11.1 in Part B, above.

[8] Ultimately, the court rejected Cameroon's claim to a longer relevant coast, observing that 'whichever coastline of Nigeria is regarded as relevant, the relevant coastline of Cameroon is not longer than that of Nigeria': *Cameroon/Nigeria*, para. 301.

[9] For an earlier example of the straight-line approach, see *Gulf of Maine*.

[10] *Tunisia/Libya*, para. 131.

[11] The straight-line coastal fronts are 185km for Romania and 439km for Ukraine (ratio 1:2.4). The court's measurements are 248km for Romania and 705km for Ukraine (ratio 1:2.8).

[12] *Nicaragua/Colombia*, paras 144–5.

[13] *Barbados/Trinidad*, para. 334.

[14] *Romania/Ukraine*, para. 110.

[15] For further analysis of the relationship between the relevant area and the area of overlapping claims, see Figure A2.8 and related discussion in Part A above.

[16] *Tunisia/Libya*, para. 104.

[17] *Tunisia/Libya*, para. 75.

[18] See Figure B21.3 in Part B, above. Notably, the ICJ's judgment allocated maritime areas to Nicaragua that had previously been the subject of the Colombian agreements (to which Nicaragua was not party).

[19] *North Sea Continental Shelf*, para. 98.

[20] It is difficult to conduct a precise disproportionality test with three States, and the court did not attempt to undertake one in its judgment. However, the coastal lengths of the three States are 234km, 278km, and 338km (28, 33, and 40 per cent) in the order Denmark, Germany, and the Netherlands. Using equidistance, the allocated areas would be 54,900km², 24,900km², and 63,600km² (38, 17, and 44 per cent); following negotiations, the areas attributed were 48,300km², 36,500km², and 58,700km² (34, 25, and 41 per cent), in the same order (calculations by the authors).

[21] *UK/France*, para. 99.

[22] *UK/France*, para. 101.

[23] Evans, M. D., *Relevant Circumstances and Maritime Delimitation* (Clarendon Press, 1989), p. 227.

[24] Gros, dissenting opinion, para. 17.

[25] See discussion of the three-stage approach generally in Part A of this book.

[26] This is despite some fairly significant differences between ratios of relevant coasts and apportionment of the relevant area. For example, in *Nicaragua/Colombia*, the court remarked that its delimitation line had the effect of dividing the relevant area at a ratio of approximately 1:3.44 in Nicaragua's favour, while the ratio of relevant coasts was 1:8.2 in

Nicaragua's favour, and yet it concluded that this did not entail such disproportion as to create an inequitable result requiring further adjustment.

27 Malta Counter-Memorial, paras 244–5.

28 In *Libya/Malta*, which also concerned substantial coastal length disparity, the court identified 'practical difficulties' that rendered any precise proportionality check unrealistic.

29 *Newfoundland/Nova Scotia*, Second Phase, para. 5.17.

30 This practice has subsequently changed, with the adoption of the formalized three-stage approach: see, e.g., *Nicaragua/Colombia*, where the court undertook a proportionality check notwithstanding having already made adjustments to the delimitation line for coastal length disparity.

31 *Libya/Malta*: separate opinion of Judge Valticos; dissenting opinions of Judges Oda and Schwebel (the latter citing also the writings of Professor Derek Bowett).

32 Bowett, D. W., *The Legal Régime of Islands in International Law* (Martinus Nijhoff, 1979), p. 164.

33 *Canada v. France*, Weil dissenting opinion, para. 25.

34 *Eritrea v. Yemen*, para. 39.

35 *Nova Scotia v. Newfoundland and Labrador*, para. 5.19.

36 *North Sea Continental Shelf* cases, para. 98 and *dispositif*.

Part C Future Challenges, 4 Delimitation of the Outer Continental Shelf: Questions of Delineation and Methodology

From: A Practitioner’s Guide to Maritime Boundary Delimitation
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(p. 610) 4 Delimitation of the Outer Continental Shelf: Questions of Delineation and Methodology

I. The Challenges

This chapter considers two challenges arising in connection with the delimitation of continental shelf claims beyond 200M, namely:

(1) How can the relationship between delimitation of outer shelf entitlements under Article 83 of UNCLOS and delineation of outer limits by the CLCS under Article 76 of UNCLOS be managed so as to minimize the risk of a deadlock where neither process can proceed pending completion of the other?

(2) Do geological and geomorphological factors have any role to play in the delimitation of overlapping shelf entitlement beyond 200M and, if so, what is that role?

II. Context of the Problem

As explained in Part A of this book, Article 76 of UNCLOS transformed the legal basis of coastal State entitlement to sovereign rights over the continental shelf. Henceforth, State entitlement would be based upon distance within 200M of the coast and upon physical natural prolongation in areas beyond 200M from the coast. The advent of Article 76, and in particular of distance as the sole basis of shelf entitlement within 200M, heralded major consequences in continental shelf delimitation: in particular, a decisive move towards equidistance as a presumptive starting point in the delimitation of overlapping entitlements within 200M. As the ICJ commented in its 1985 *Libya/Malta* judgment, the attribution of relevance to geophysical or geological factors in shelf delimitation 'now belongs to the past, in (p. 611) so far as seabed areas less than 200 miles from the coast are concerned'.[1] However, as David Colson observed in his seminal 2003 article in the *American Journal of International Law*, the court 'expressly left open the possibility that international law might deem geological and geomorphological factors relevant to delimitation on the outer continental shelf'.[2]

Certainly, nothing in Article 83 of UNCLOS prohibits the possibility of geological and geomorphological factors playing a role in delimitation beyond 200M. After all, Article 83 is silent as to the methodology to be used in continental shelf delimitation; it focuses exclusively on the objective of achieving an 'equitable solution'. Moreover, Article 83 makes no distinction between continental shelf areas within and beyond 200M, with the result that it leaves open the possibility of different methodologies or considerations applying beyond the 200M threshold. This led Colson to speculate in his article about the 're-emergence of the physical features of the seabed and seafloor as relevant factors in a delimitation of the outer continental shelf'.[3]

The conceptual basis for geology and geomorphology constituting relevant circumstances in shelf delimitation beyond 200M is clear. After all, if such factors are determinative of entitlement within shelf areas beyond 200M, why should they not also be determinative (or at least relevant) in the delimitation of overlapping claims in those areas? However, the decisions of the ITLOS and Annex VII tribunals in the *Bay of Bengal* cases (*Bangladesh/Myanmar* and *Bangladesh/India*, respectively) have cast doubt over whether international law recognizes the geological and geomorphological characteristics of the seabed as a relevant consideration in delimitation beyond 200M. In each of those cases, the delimitation lines arrived at beyond 200M were unaffected by such physical factors. Instead, they were

determined by reference to the same equidistance/relevant circumstances methodology and considerations that had applied to the delimitation within 200M.

As also explained in Part A of this book, Article 76 of UNCLOS sets out a clear (and mandatory) process by which coastal States must establish the outer limits of their continental shelf rights beyond 200M. In particular, it provides for the delineation of such outer limits by the CLCS, following presentation of a legal and technical submission by the relevant coastal State. Only once the CLCS has made its recommendations as to the outer limits of the shelf will the coastal State be in a position to establish shelf limits beyond 200M that are final and binding on the international community. Also, until the CLCS has made its recommendations (p. 612) confirming the existence of outer shelf rights beyond 200M, an international court or tribunal may refuse to delimit such areas on the basis that State entitlement has not yet been established (as happened, for example, in the *St Pierre and Miquelon* and *Nicaragua/Colombia* cases, discussed in Part B).

Importantly, however, the CLCS will not consider the submission where an unresolved land or maritime dispute exists, unless all States parties to the dispute have given their consent. This can give rise to a clear risk of 'deadlock' under the Convention in connection with continental shelf entitlements beyond 200M and the delimitation of overlapping entitlements. This is because the CLCS may be unable to consider a submission pending delimitation or other agreement, while a court or tribunal may be unwilling to delimit because no entitlement beyond 200M has been established. As ITLOS commented in *Bangladesh/Myanmar*, such a situation would not be conducive to the efficient operation of UNCLOS as it will leave both delimitation and delineation questions unresolved, potentially indefinitely.

III. Some Possible Solutions

a. Minimizing the risk of deadlock in delineation and delimitation processes beyond 200M

Two contrasting situations can be distinguished whenever assessing the risk of deadlock in the delineation and delimitation process, as follows:

(1) *Cases where it is established that both States have continental shelf entitlement beyond 200M*—in such situations, the court or a tribunal will proceed to delimit the outer shelf boundary and there will be no risk of deadlock. This will certainly be the situation where the outer shelf entitlement of each State has been endorsed by way of a recommendation of the CLCS. As demonstrated in the *Bay of Bengal* cases, this will also be the situation absent a CLCS recommendation where the court or tribunal concludes that there is no doubt that both States qualify for an outer shelf entitlement in the delimitation area. This was straightforwardly the case in *Bangladesh/India*, where each State recognized that the other enjoyed some shelf entitlement beyond 200M in the Bay of Bengal. In *Bangladesh/Myanmar*, ITLOS reached the same conclusion despite Bangladesh's argument that Myanmar lacked 'natural prolongation' beyond 200M because it was satisfied that Myanmar would nevertheless be able to satisfy the sedimentary thickness formula for outer shelf entitlement under Article 76(4)(a)(i) of the Convention. It is questionable, however, whether any court or tribunal faced with a similar situation outside the Bay of Bengal will proceed to delimit absent a CLCS recommendation because, as both ITLOS itself and the ICJ (in the subsequent *Nicaragua/Colombia* case) (p. 613) acknowledged, the Bay of Bengal presents a 'unique situation' from a geological and geomorphological perspective.

(2) *Cases where one or both States has failed to establish its continental shelf entitlement beyond 200M or such entitlement is disputed*—in such instances, the practice of international courts and tribunals (principally, *St Pierre and Miquelon* and *Nicaragua/Colombia*) indicates a marked reluctance to engage in delimitation pending confirmation from the CLCS that one or both States has an outer shelf entitlement in the area concerned. In the event of an objection based on the existence of a dispute, however, the CLCS will defer consideration on the question of the outer limit. Notably, at the time of writing, this is precisely the situation in the outer shelf areas contested by Canada and France in the north-west Atlantic Ocean and by Nicaragua and Colombia in the Caribbean Sea. [4] Absent some form of agreement between the disputing States or a willingness by a court or tribunal to delimit notwithstanding the absence of any CLCS recommendation, the result will be deadlock.

In order for courts or tribunals to proceed to delimit notwithstanding some lingering uncertainty or dispute about the existence of outer shelf entitlements, they would need to build on the precedent set by the *Bangladesh/Myanmar* case. Arguably, the Bay of Bengal does not present such a 'unique situation' as to prohibit the adoption of a similar approach in other cases involving outer shelf delimitation between adjacent States, particularly where one single physical shelf extends beyond 200M of the coasts of each State. For example, in *Newfoundland/Nova Scotia*, the tribunal was content to extend the delimitation beyond 200M because it considered that an outer shelf 'probably exists' in the north-west Atlantic Ocean (albeit, as a domestic delimitation decision, this conclusion was not opposable to any other State or the international community).

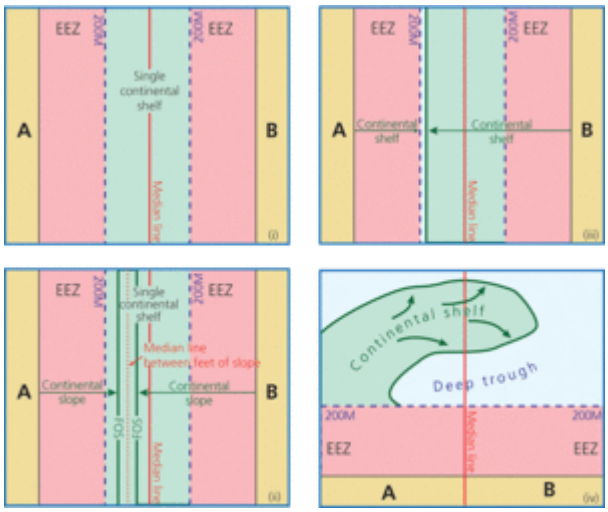
Furthermore, in some situations, little or no prejudice would result from a delimitation from the 200M limit by way of an azimuth extending 'to the edge of the continental margin, to be established in accordance with international law' (or some other equivalent formula). After all, in the event that one or both States subsequently failed to establish any outer shelf entitlement, whether before the CLCS or otherwise, the delimitation would end at the 200M limit. Indeed, it is clear that such a solution would not prejudice any delineation process before the CLCS. As ITLOS stated in *Bangladesh/Myanmar*, 'the exercise by international courts and tribunals of their jurisdiction regarding the delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the (p. 614) exercise by the [CLCS] of its functions related to the delineation of the outer limits of the continental shelf'.[5]

The technique of delimiting by way of a fixed azimuth beyond a particular point, subject to the exact extent of the boundary being confirmed later by reference to some other contingency, is commonly used in comparable situations involving potential entitlements of third States. Thus, for example, in *Bangladesh/Myanmar*, ITLOS determined that the boundary would extend along the geodetic line at an azimuth of 215° 'until it reaches the area where the rights of third States may be affected'. The end-point of the boundary thus remained unsettled until the subsequent *Bangladesh/India* award. Along similar lines, the end-point of an adjacent coast continental shelf boundary might remain unsettled until a subsequent recommendation of the CLCS or some other establishment of an outer limit.

Such an approach is, however, impractical in the case of outer shelf delimitation between opposite coasts. Here, the very existence of a continental margin beyond 200M on one or both sides of the coastal divide may be open to serious doubt. In the event that there is no margin beyond 200M on one or both sides, there may be no continental shelf boundary to delimit between the two States (or the boundary may extend along the 200M limit of one of them). In such a situation, it is impossible for a court or tribunal to delimit a shelf boundary absent confirmation of the existence and location of the respective outer limits of the opposing States.[6] Here, a deadlock might be harder to avoid, absent compelling evidence establishing the outer limits of the opposite coasts (or the existence of one continuous shelf

between them). One option might be for one of the States to limit its CLCS submission so as not to claim outer shelf beyond the 200M limit of the opposite State, which should avoid deadlock arising at the CLCS if the other State claims no shelf beyond 200M (see illustration of scenario (iii) in Figure C4.1). However, in the absence of a solution like this that avoids deadlock arising in the CLCS process, in this opposite coast situation there will be an overriding need for the States concerned to reach agreement on a way forward (in respect of which, see discussion in Part, A Chapter 3 ‘Practical Considerations’ above of the options available).

An example where the affected coastal States have agreed outer-shelf boundaries provisionally, pending acknowledgment by the CLCS that the area delimited falls within the limits of national jurisdiction, is the so-called ‘banana hole’ agreement(p. 615)



View full-sized figure

Figure C4.1: Outer shelf delimitation scenarios.

between Faroe Islands (Denmark), Iceland, and Norway.[7] The agreement relates to an enclosed area of outer shelf in the north Atlantic. The States parties agreed a three-way division of the outer shelf area ‘based on the shared view that the whole area concerned consists of continuous continental shelf’. If the CLCS later determines that any part of the delimited space forms part of the deep seabed (or the ‘Area’, as defined by Article 1 of UNCLOS), the parties agreed to establish the outer limits of the shelf in accordance with Article 76(8) of UNCLOS, without otherwise affecting the boundary delimited.

b. The role of geological and geomorphological factors in delimitation beyond 200M

In *Bangladesh/Myanmar*, ITLOS determined that the delimitation method to be employed in the continental shelf delimitation beyond 200M ‘should not differ’ from that within 200M. Accordingly, the equidistance/relevant circumstances method continued to apply in the delimitation of the outer shelf (even though ITLOS did not draw any equidistance line beyond 200M). In *Bangladesh/India*, the Annex VII tribunal observed that it and the parties agreed that ‘there is a single (p. 616) continental shelf’. The tribunal considered that ‘the appropriate method for delimiting the continental shelf remains the same, irrespective of whether the area to be delimited lies within or beyond 200[M]’. Accordingly, the tribunal adopted the same equidistance/relevant circumstances method that it had used within 200M.[8] In both cases, the same relevant circumstance (i.e. the concavity of the Bangladesh coast and resultant cut-off effect) thus mandated adjustment of the equidistance line both within and beyond 200M. In neither case were geological or geomorphological factors considered relevant to the delimitation result; indeed, ITLOS expressly excluded them in *Bangladesh/Myanmar* on the basis that natural prolongation was not an ‘independent basis

for entitlement' under Article 76 of UNCLOS, so Bangladesh could not benefit from having the 'most natural prolongation'.

Does this mean that Colson was mistaken when he predicted in 2003 that 'geological and geomorphological factors will re-emerge in the law of maritime delimitation of the outer continental shelf'? It is submitted that he was not, for a number of reasons.

First, the *Bangladesh/Myanmar* and *Bangladesh/India* decisions are potentially distinguishable because they each arose out of the 'unique situation' prevailing in the Bay of Bengal. Indeed, it would appear that both ITLOS and the Annex VII tribunal were acutely aware of the specific circumstances that were present when determining the methodology that would be applicable to the delimitation beyond 200M. Thus, ITLOS deliberately avoided making any statement of general principle in respect of outer shelf delimitation methodology, commenting that the method to be employed '*in the present case*' should not differ within and beyond 200M, and that the equidistance/relevant circumstances method '*can*, and *does in this case*, permit resolution also beyond 200nm of the problem of the cut-off effect'.[9] Each of these holdings was discernibly case-specific. Similarly, in *Bangladesh/India*, the tribunal's (remarkably brief) discussion of delimitation methodology beyond 200M began with the observation that the case concerned 'a single continental shelf'.

Each of the *Bay of Bengal* cases concerned delimitation between adjacent coasts. The situation can be very different in the context of outer shelf delimitation between opposite coasts, where there may be no 'single continental shelf', but rather two, separate and distinct, continental shelves projecting from opposite landmasses. In such a situation, geological and geomorphological factors might be central to the delimitation, whether it be between two States with opposing limits (p. 617) beyond 200M (in which case Colson posited the notion of 'an equidistant line based on the respective foot of each continental slope') or between one State with outer shelf entitlement and another State without. Each of these situations is illustrated in scenarios (ii) and (iii) in Figure C4.1.

The 2004 delimitation between Australia and New Zealand provides a leading example of an outer shelf delimitation in part based on geological and geomorphological factors. This is particularly evident in that section of the boundary between the opposite coasts of New Zealand's North Island and Australia's Norfolk Island, where the boundary extends along the 200M limit of the Australian island, but well beyond 200M from the New Zealand coast. In a press release issued on the day of the treaty, the Australian Minister of Foreign Affairs confirmed that the delimitation had left the outer shelf of the area under New Zealand jurisdiction because 'the natural prolongation from New Zealand's North Island…is more obvious than that from Australia's Norfolk Island'. As a result, the boundary is located far away from any equidistance line.[10]

In the context of outer shelf delimitation between opposite coasts, a situation in which an equidistance-based approach stands out as being both equitable and consistent with the basis of entitlement under Article 76 is where the coasts are separated by one continuous physical shelf—in other words, by a 'single continental shelf' equivalent to that observed by the Annex VII tribunal in *Bangladesh/India*. In such a situation, illustrated in scenario (i) in Figure C4.1, both States share overlapping entitlements over the same physical shelf area. Examples of negotiated equidistance-based boundaries fitting this model are the United States/Mexico outer shelf boundary in the Gulf of Mexico.[11] In such a situation, jurisprudence and State practice reject any notion that one State should be able to gain advantage in the delimitation through arguments of 'stronger' or 'most' natural prolongation. As a result, in these cases geological and geomorphological factors will

generally not constitute a relevant circumstance capable of adjusting a provisional equidistance line.

The distinction between these three, quite different, outer shelf delimitation scenarios between opposite coasts is illustrated in Figure C4.1. Scenario (i) illustrates the case where a ‘single continental shelf’ exists between the two States. (p. 618) In this situation, the standard equidistance-based methodology is most appropriate. Scenario (ii) illustrates the case of two States with opposing limits beyond 200M across a strait that is approximately 500M to 600M wide. In this situation, there are two opposing physical shelves and a coast-to-coast equidistance line may bear little or no relation to the comparative shelf entitlements of the two parties. Here, Colson’s posited ‘equidistant line based on the respective foot of each continental slope’ approach might form the basis of an equitable delimitation consistent with the comparative shelf entitlements. Scenario (iii) illustrates the case where one State (State A) enjoys substantial natural prolongation (and thus outer shelf entitlement), while the other (State B) does not. In this situation, equidistance should have little or no role (and the boundary may extend up to, or even within, the 200M limit of State B). In each of scenarios (ii) and (iii), it is clear that geological and geomorphological evidence may have a significant role to play in the delimitation.

In the case of adjacent coasts, geological and geomorphological evidence may retain a role where, in contrast to the *Bay of Bengal* cases, the outer shelf delimitation does not relate to a shared ‘single continental shelf’ over which both States enjoy natural prolongation. For example, State A may enjoy a clear outer shelf entitlement through uninterrupted natural prolongation beyond 200M, while neighbouring State B does not because of the existence of a deep trough just off its coast (leaving it unable to fulfil either of the bases for outer shelf entitlement under Article 76(4) of the Convention).[12] In such a situation, geological and geomorphological evidence should have a role to play so as to safeguard State A’s outer shelf rights (and may mandate the boundary running in part along the 200M limit of State B).[13] This situation is illustrated in scenario (iv).

IV. Conclusion

The above analysis attempts to chart a course through the dual challenges of deadlock and methodology that exist in the context of outer shelf delimitation. Clearly, as the *Bay of Bengal* cases show, delimitation tribunals can have an important role to play in ensuring the operability of the UNCLOS architecture so as to avoid deadlock as between the delineation and delimitation processes. Following that cautious start, it is submitted that delimitation courts and tribunals might be able to take a more proactive role in delimitation cases that might (p. 619) otherwise become paralyzed by objections at the CLCS, without prejudicing any subsequent delineation process.

As regards methodology, it seems clear (and State practice confirms) that geology and geomorphology should play a role in the delimitation of continental shelf boundaries beyond 200M, particularly between opposite coasts. To this extent, Colson was right in 2003 to augur the ‘re-emergence of the physical features of the seabed and seafloor as relevant facts in a delimitation of the outer continental shelf’. Indeed, such was the clear expectation of the ICJ at the time of its *Libya/Malta* judgment. Between adjacent coasts, situations might also arise where geology or geomorphology is relevant (even highly relevant) due to the existence of one State’s exclusive outer shelf rights within a given area beyond 200M. Not every adjacent coast delimitation beyond 200M will involve overlapping entitlements, as existed in each of the *Bay of Bengal* cases.

In cases where overlapping entitlements do exist, the *Bangladesh/Myanmar* judgment indicates that geology and geomorphology should not constitute a relevant circumstance, and that arguments of ‘most’ or ‘stronger’ natural prolongation should be rejected. It is submitted that this question is still open to legitimate debate. In particular, the apparent ITLOS holding that the concepts of natural prolongation and non-encroachment remain

unrelated beyond 200M appears to sit uneasily with the text of, and basis of entitlement under, Article 76 of UNCLOS and the holdings of the ICJ in the *North Sea Continental Shelf* and *Libya/Malta* cases. It sits uneasily also with some State practice in the form of the 2004 Australia/New Zealand delimitation treaty, where the boundary beyond 200M deviated substantially to New Zealand's advantage because of its 'more obvious' natural prolongation.

What is clear, however, is that if geology and geomorphology are to play a role in arguments of non-encroachment beyond 200M, the quality of the underlying expert and other evidence will be paramount, particularly in any court or arbitration setting.

None of this is to say that geology or geomorphology should become dominant, or even form the basis of an entirely separate methodology, in the delimitation of continental shelf areas beyond 200M. As Colson himself commented, the potential relevance of geomorphological or geological facts does not 'operate to the exclusion of other relevant facts in the delimitation of the outer continental shelf'.[14] Rather, such factors should 'work together with the other facts in the case, perhaps prominently or perhaps not, depending on the circumstances, to (p. 620) achieve an equitable solution'.[15] However, it appears obvious that the use of a provisional equidistance line as a first step in the delimitation process may be inappropriate in a significantly higher proportion of situations than is the case with delimitations within 200M of the coast. Such is the consequence of the metamorphosis from a distance-based entitlement to a seabed-based one at the 200M limit.

In his 2013 critique of *Bangladesh/Myanmar*, Professor Dr Alex Oude Elferink posited that a sensible approach in some outer shelf delimitations might be to 'move directly to the stage of balancing all relevant circumstances', consistent with the ICJ's 1969 judgment in the *North Sea* cases.[16] While the law has moved on in a number of respects since 1969, and while equidistance will often have a role to play in outer shelf delimitations, Oude Elferink's proposal will merit serious consideration in some outstanding outer shelf delimitations.

Footnotes:

1 *Libya/Malta*, para. 40.

2 Colson, D. A., 'The Delimitation of the Outer Continental Shelf Between Neighboring States' (2003) 97 *AJIL*, pp. 91–107 at p. 100.

3 Ibid., p. 92.

4 For example, Colombia (alongside Costa Rica and Panama) has issued a 'strong objection' to Nicaragua's outer shelf submission in the Caribbean Sea, asserting in a Presidential letter to the UN Secretary-General that the submission constitutes 'a clear threat to regional peace and security'. Colombia (unlike Costa Rica and Panama) is not a party to UNCLOS.

5 *Bangladesh/Myanmar*, para. 379.

6 This is arguably the situation in the second *Nicaragua/Colombia* case, which is pending before the ICJ at the time of writing. As the ICJ held in the first case, unless Nicaragua is able to establish that it has a continental margin extending far enough to overlap with the 200M limit of Colombia's opposite mainland coast, it will be impossible for the court to delimit the boundary between the two. See further discussion and illustrations in Part B, Chapter 21, above.

7 Agreed Minutes on the Delimitation of the Continental Shelf beyond 200 Nautical Miles between the Faroe Islands, Iceland and Norway in the Southern Part of the Banana Hole of

the Northeast Atlantic, <https://www.regjeringen.no/en/dokumenter/Agreed-Minutes/id446839/> (accessed 1 November 2015).

8 The *Newfoundland/Nova Scotia* tribunal reached a virtually identical conclusion to the *Bangladesh/India* tribunal in the context of the single Canadian shelf extending into the north-west Atlantic Ocean.

9 *Bangladesh/Myanmar*, para. 455 (emphasis added).

10 Australia–New Zealand treaty, IMB, Vol V Report 5–26 3759–3778, Vol VI Report 5–26 (Add. 1) 4300. For an alternative approach, where the delimiting States agreed, in effect, that the relevant area of delimitation would be defined according to subsequent recommendations of the CLCS and then allocated according to a specific (53:47) apportionment between them, see the Agreed Minutes on the Delimitation of the Continental Shelf beyond 200 Nautical Miles between Greenland and Iceland in the Irminger Sea signed and concluded in Reykjavík and Copenhagen on 16 January 2013. See also discussion of that case in Kunoy, B., 'Agreed Minutes on the Delimitation of the Continental Shelf beyond 200 Nautical Miles between Greenland and Iceland in the Irminger Sea' (2013) *Chinese Journal of International Law*, Vol 12, pp. 125–42.

11 USA–Mexico treaty, IMB, Vol IV Report 1–5 (2) 2621–2633.

12 This situation would contrast with *Bangladesh/Myanmar*, where ITLOS was satisfied that there was a continuous and substantial layer of sedimentary rocks extending from Myanmar's coast to the area beyond 200M: see case analysis in Part, B Chapter 20.

13 For further support for the concept that a 'marked discontinuity' on the seabed might constitute a relevant circumstance in delimitation beyond 200M, see Crawford, J., Brownlie's Principles of Public International Law, (Oxford University Press, 2012), p. 292.

14 Ibid., p. 103.

15 Ibid., p. 107. Indeed, this is precisely what happened in the Australia/New Zealand example, where the deviation from equidistance around Norfolk Island was justified also by its comparatively small geographical size in comparison with the opposing New Zealand landmass.

16 Oude Elferink, A. G., 'ITLOS's Approach to the Delimitation of the Continental Shelf beyond 200 Nautical Miles in the Bangladesh/Myanmar Case: Theoretical and Practical Difficulties' (2013) in: R. Wolfrum, M. Seršić and T, Šošić (eds) Contemporary Developments in International Law *Liber Amicorum Budislav Vukas* (Martinus Nijhoff Publishers, 2016), in press.

Annex I Technical Glossary

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Stephen Fietta, Robin Cleverly

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(p. 621) Annex I Technical Glossary

Adjacent coasts

The coasts lying either side of the land boundary between two adjoining States.

Coasts of States that are not adjoining, or opposite, can be considered comparable to adjacent coasts when they generally face in the same direction. As the last base points on adjacent coasts can control the equidistance line for long distances and can be very close together, the situation of adjacency may be considered a relevant circumstance requiring adjustment of a provisional equidistance line.

See also 'opposite coasts'.

Area

The area of seabed and subsoil beyond the limits of coastal States' juridical continental shelves and hence beyond their national jurisdiction. The Area and its resources are the common heritage of mankind, and are controlled on behalf of mankind as a whole by the International Seabed Authority. See Part XI of UNCLOS.

Artificial island

A feature above high water artificially constructed of rock, gravel, sand, concrete, or other materials. Extensive artificial islands have been constructed offshore Dubai (e.g. the 'World' and 'Palms') and in the Maldives for housing purposes; others are used for airports (e.g. Hong Kong) or oil developments (e.g. in Alaska). Man-made islands and other off-shore installations do not possess the status of islands and are not entitled to a territorial sea or other maritime zones. However, artificial islands that form part of a harbour work can be used as part of the territorial sea baseline.

Azimuth

The direction or bearing of a line. Azimuths are usually measured in degrees from due north, so an azimuth of 180° is due south, an azimuth of 270° is due west, etc. Some azimuths are expressed as an angle from a starting direction, for example West 20° South would be equivalent to a bearing of 250°. Subdivisions of a degree can be expressed in minutes and seconds, or as decimal degrees. Loxodromes, or rhumb

lines, have a constant azimuth throughout; geodesics vary along their length and are defined with a starting azimuth.

Baseline

The line from which the breadth of the territorial sea, contiguous zone, exclusive economic zone, and, in some cases, the continental shelf are measured. Base points used for drawing an equidistance line will be located on the baseline.

Baseline, archipelagic

Archipelagic baselines are straight lines joining the outermost points of the outermost islands and drying reefs of an archipelagic State (UNCLOS, Article 4). They enclose archipelagic waters and are used as the baseline for measuring the territorial sea. They are usually discounted for delimitation purposes.

Baseline, normal

The low-water line along the coast (including the coasts of islands) as marked on large-scale charts officially recognized by the coastal State. The normal baseline also includes low-tide elevations, closing lines across rivers and bays, reefs, harbour works, and roadsteads (UNCLOS, Articles 5, 6, 9, 10, 11, 12, 13).

(p. 622) *Baseline, straight*

Straight baselines are a system of straight lines joining points on the low-water line where the coastline is deeply indented and cut into, where there is a fringe of islands along the coast in its immediate vicinity, or where the coastline is highly unstable due to the presence of a delta or other natural conditions (UNCLOS, Article 7). They must not depart from the general direction of the coast. Internal waters lie landward of the baseline. They are usually discounted for delimitation purposes.

Base point

A point on the coast or territorial sea baseline used to measure the territorial sea limit or to construct an equidistance line. They are situated on the most salient, most seaward, parts of the coast. Selection of appropriate base points is normally the first stage in delimitation.

Bay

A well-marked indentation in the coast whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast (UNCLOS, Article 10). The area of the indentation must be greater than that of the semi-circle whose diameter is a line drawn across its mouth. A closing line, no longer than 24M, may be drawn across its mouth from which the breadth of the territorial sea may be measured.

Chart

A chart, or nautical chart, is specially designed to meet the needs of marine navigation. It depicts such information as depths of water, nature of the seabed, configuration and nature of the coast, and dangers and aids to navigation, in a standardized format. To avoid confusion, metric charts (depths and heights in metres) have a standard colour palette with land areas in buff/yellow; imperial charts (depths in fathoms, heights in feet) have land coloured grey. ‘Large-scale charts officially recognised by the coastal State’ provide the usual source for the definition of the territorial sea baseline (UNCLOS, Article 5).

Continental shelf

The area of seabed and subsoil beyond the territorial sea out to 200M or to the edge of the continental margin, if further, where the coastal State has sovereign rights for the exploitation of, principally, oil, gas, and minerals. See Part VI of UNCLOS. The outer edge of the continental margin beyond 200M is defined by a complex set of rules in Article 76 of UNCLOS and overseen by the Commission on the Limits of the Continental Shelf.

Datum, geodetic (map or horizontal)

A geodetic datum is a reference system for the measurement of positions on the Earth's surface. It refers the coordinates to a particular mathematical model of the Earth—or ellipsoid—with a defined point of origin. Datums can be local (i.e. defined for a particular area) or global (i.e. universally applicable). Virtually all modern charts and positions, and all those that use GPS positioning technology, are now referred to a global datum—most commonly WGS84. It is important to note that, unless the datum is specified, a set of coordinates is not unique. Differences between datums may be as much as several hundred metres for a point with the same coordinates. Coordinates can be easily converted from one datum to another by using specialist software. Problems can arise when datums are not fully specified in delimitation judgments or treaties (e.g. *Cameroon/Nigeria*).

Datum, vertical

The tidal level to which a depth or height is referred. Water depths on nautical charts are referred to a chart datum, normally lowest astronomical tide (LAT) which is the lowest level to which the tide will fall under normal atmospheric conditions.

See also 'low-water line', 'high-water line'.

Envelopes of arc

Maritime limits are drawn using the envelopes of arc technique. Here, an arc of specified radius (e.g. 12M for territorial sea or 200M for EEZ) is drawn from each point on the baseline to form a limit consisting of a series of arcs. In practice, only the most seaward base points are used.

(p. 623) *Equidistance line*

A line every point of which is equidistant from the nearest base points of two opposite or adjacent States. Article 15 of UNCLOS refers to equidistance lines being drawn from the nearest points on the baselines from which the territorial sea is measured, but this is not always the case in practice and, in any event, some parts of the baseline may be discounted or given reduced weight, especially in adjusting an equidistance line. It is usual to refer to the 'median line' in the case of opposite coasts and the 'equidistance line' in the case of adjacent coasts, although their technical construction is the same and this distinction is not made in UNCLOS.

Exclusive economic zone (EEZ)

A coastal State has sovereign rights for the exploitation of living and non-living resources of the water column, seabed, and its subsoil within its EEZ. The EEZ lies beyond the territorial sea and shall not extend beyond 200M from the territorial sea baselines. See Part V of UNCLOS.

Geodesic line

A geodesic line (sometimes 'geodetic') is the shortest distance between two points on the curved surface of the Earth. It is one of two methods (the other being the loxodrome) for defining a straight line. Many delimitation treaties and judgments specify that the line segments should be geodesics. A geodesic line has the property of being curved toward the poles on a standard Mercator projection chart and has an

azimuth that varies continuously along its length. Geodesic lines can be defined either by specifying both end-points, or by specifying a starting point and an azimuth.

See also ‘loxodrome’.

High-water line

The line along the coast where the water reaches at high tide, above which the land is permanently dry. Its main application for law of the sea purposes is to define an island, which is above water at high tide (see ‘island’). Most charts use mean high water springs (MHWS) for the high-water line.

Internal waters

Waters on the landward side of the territorial sea baseline. These include rivers, bays, and harbours, together with marine areas landward of straight baselines. Internal waters fall under the same jurisdiction as adjacent land areas. They are not subject to the UNCLOS regime.

Island

A naturally formed area of land, surrounded by water, which is above water at high tide and is said to be ‘dry’. An island is entitled to claim a full suite of maritime zones, unless it is classified as a ‘rock’ (a sub-category of island that ‘cannot sustain human habitation or economic life’ of its own), in which case it is entitled only to a territorial sea and contiguous zone (UNCLOS, Article 121). Islands can play an important part in delimitation and are often given reduced weight by courts and tribunals, whether in the construction of a provisional equidistance line or as a special or relevant circumstance.

Lowest astronomical tide (LAT)

The lowest level to which the tide will fall under normal meteorological conditions. The IHO has recommended that lowest astronomical tide be used as chart datum and most modern charts follow this practice.

Low-tide elevation (LTE)

A naturally formed area of land which is surrounded by and above water at low tide, but is submerged at high tide (UNCLOS, Article 13). LTEs are often referred to as ‘drying features’. If a LTE is situated within 12M of the mainland or an island, its low-water line may be used as part of the baseline for measuring the territorial sea. LTEs cannot be assimilated as territory and fall under State sovereignty only when they are located within territorial waters. LTEs that are detached from the coastline are usually not used as base points for delimitation.(p. 624)

Low-water line

The line along a coast to which the sea recedes at low water. It is used as the normal baseline for measuring the breadth of the territorial sea and other maritime zones. It represents the most seaward part of land territory. The area between low water and high water covers and uncovers during the tidal cycle and is coloured green on a standard metric nautical chart.

Loxodrome (or ‘rhumb line’)

A straight line on a Mercator chart, where it has a constant azimuth. A loxodrome is one of two technical methods (the other being the geodesic) used to define straight-line segments of a territorial sea baseline or a boundary. A loxodrome will generally differ from a geodesic line constructed between the same two points (because the geodesic will curve toward the poles). The amount of difference is a function of the

length of line, its azimuth, and the latitude. The two will coincide when due north-south, or along the Equator. See also ‘geodesic line’ and ‘projection’.

Mean high water springs (MHWS)

The average height of spring tides over the tidal cycle. It is commonly used as the datum for measuring heights above sea level on nautical charts, and for defining the high-water line.

Median line

See ‘Equidistance line’

Nautical mile (M)

A unit of distance used primarily in navigation (and delimitation). The international nautical mile of 1,852 metres (1.852 km or equivalent to 1.15 statute miles) has been adopted by the International Hydrographic Organization. For practical purposes, it is equal to one minute of latitude or one sea mile. On a nautical chart, distances can be measured using the latitude scale on the side of the chart. Note that a minute of longitude varies with latitude (decreasing to zero at the Earth’s poles).

Opposite coasts

The geographical relationship between the coasts of two States that face each other across an area of maritime space. See also ‘adjacent coasts’.

Projection

The cartographic representation of the Earth’s curved surface onto a planar surface or map. The most commonly used projection for maritime areas is Mercator. This has the property that lines of latitude and longitude are straight and at right angles. Lines with constant bearing or loxodromes appear straight on a Mercator chart; geodesics appear curved.

Proportionality

The proportionality (or disproportionality) test is often applied in the final stage of delimitation to check that the ratio of the maritime areas allocated by a proposed boundary to each State and the ratio of their relevant coastal lengths are not in any ‘marked’ or ‘gross’ disproportion.

Relevant area

The area to be delimited, bounded by the relevant coasts and the outer limit of the parties’ maritime entitlements. It covers the whole maritime area in question, not just the area of overlapping claims. The relevant area is used in the final stage of delimitation, in the disproportionality test, to check there is no ‘marked’ or ‘gross’ disproportion between the ratio of the lengths of the relevant coasts and the ratio of the maritime areas allocated to each State.

Relevant coasts

The coastlines that generate the rights of two or more coastal States to the continental shelf and EEZ, the projections of which overlap in the area being delimited between them. Relevant coasts are used as a point of reference in several stages of the delimitation process: first, to identify the area of overlapping claims; second, to determine whether any disparity in their lengths should be treated as a relevant circumstance; and, third, in the disproportionality test. Lengths of relevant

coasts are normally measured along their general directions rather than following all the sinuosities.(p. 625)

Rock

A rock is a sub-category of an island (UNCLOS, Article 121(3)). It is entitled to a full territorial sea and contiguous zone, but those which cannot sustain human habitation or economic life of their own have no EEZ or continental shelf.

Rhumb line

See ‘Loxodrome’

Territorial sea

A belt of water of a defined breadth, but not exceeding 12 nautical miles[1] measured seaward from the baseline. The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea (UNCLOS, Article 4). This is drawn using the ‘envelopes of arc’ technique. The coastal State’s sovereignty extends beyond its land territory and internal waters to the territorial sea, the air space above it, and its seabed and subsoil. This sovereignty is exercised subject to the Convention and to other rules of international law. See Part II of UNCLOS.

Tide

The periodic rise and fall of the surface of the sea due principally to the gravitational attraction of the Moon and Sun. See also ‘lowest astronomical tide’, ‘low-water line’, and ‘high-water line’.

Footnotes:

1 Not all States claim a 12M territorial sea. See Admiralty Annual Notices to Mariners No. 12 for a complete list of state claims or the DOALOS website: <http://www.ukho.gov.uk/ProductsandServices/MartimeSafety/AnnualNm/12.pdf> and <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf> (accessed 12 January 2016).

Annex II Treaty Instruments

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(p. 626) Annex II Treaty Instruments

I. 1945 Statute of the International Court of Justice

Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the

International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Article 62

1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

2. It shall be for the Court to decide upon this request.

(p. 627) II. 1945 Truman Proclamation

Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf

Adopted in Washington, USA on 28 September 1945

Whereas the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and

Whereas its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date and;

Whereas recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and

Whereas it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the

coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources;

Now therefore. I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, subject to jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the Sate concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 28th day of September, in the year of our Lord nineteen hundred and forty-five, and of the Independence of the United States of America the one hundred and seventieth. Harry. S. Truman, 33rd President of the United States.

III. 1958 Convention on the Continental Shelf

Article 1

For the purpose of these articles, the term ‘continental shelf’ is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Article 6

1. 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 (p. 628) which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

2. 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.

3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a

particular date, and reference should be made to fixed permanent identifiable points on the land.

IV. 1958 Convention on the Territorial Sea and the Contiguous Zone

Article 12

1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

2. The line of delimitation between the territorial seas of two States lying opposite to each other or adjacent to each other shall be marked on large-scale charts officially recognized by the coastal States.

V. 1969 Vienna Convention on the Law of Treaties

Article 31—General rule of interpretation

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

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32—Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

(p. 629) VI. 1982 United Nations Convention on the Law of the Sea ('UNCLOS')

Part II: Territorial Sea and Contiguous Zone

Article 2—Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.

3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

Article 3—Breadth of the territorial sea

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

Article 4—Outer limit of the territorial sea

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Article 5—Normal baseline

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Article 6—Reefs

In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State.

Article 7—Straight baselines

1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of

the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention.

3. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

4. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition.

5. Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.

6. The system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.

Article 8—Internal waters

1. Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

2. Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

(p. 630) Article 9—Mouth of rivers

If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks.

Article 10—Bays

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of this Convention, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 nautical miles, a straight baseline of 24 nautical miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions do not apply to so-called 'historic' bays, or in any case where the system of straight baselines provided for in article 7 is applied.

Article 11—Ports

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works.

Article 12—Roadsteads

Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea.

Article 13—Low-tide elevations

1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

Article 15—Delimitation of the territorial sea between States with opposite or adjacent coasts

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

Article 33—Contiguous zone

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

(p. 631) (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Part IV: Archipelagic States

Article 47—Archipelagic baselines

1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.

2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.

3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

4. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.

5. The system of such baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.

6. If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.

7. For the purpose of computing the ratio of water to land under paragraph l, land areas may include waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau.

8. The baselines drawn in accordance with this article shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted.

9. The archipelagic State shall give due publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.

Part V: Exclusive Economic Zone

Article 55—Specific legal regime of the exclusive economic zone

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Article 56—Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

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 waters superjacent to the seabed and of the seabed and its subsoil, 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 protection and preservation of the marine environment;

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

(p. 632) 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 seabed and subsoil shall be exercised in accordance with Part VI.

Article 57—Breadth of the exclusive economic zone

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 74—Delimitation of the exclusive economic zone between States with opposite or adjacent coasts

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

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 cooperation, 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 exclusive economic zone shall be determined in accordance with the provisions of that agreement.

Part VI: Continental Shelf

Article 76—Definition of the continental shelf

1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.

3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

(a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or

(ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

4. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

5. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.

(p. 633) 6. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

7. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

8. The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto.

9. The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.

Article 77—Rights of the coastal State over the continental shelf

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

Article 78—Legal status of the superjacent waters and air space and the rights and freedoms of other States

1. The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters.

2. The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention.

Article 81—Drilling on the continental shelf

The coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.

Article 83—Delimitation of the continental shelf between States with opposite or adjacent coasts

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

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 cooperation, 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.

(p. 634) Part VII: High Seas

Article 87—Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

(a) freedom of navigation;

(b) freedom of overflight;

(c) freedom to lay submarine cables and pipelines, subject to Part VI;

(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;

(e) freedom of fishing, subject to the conditions laid down in section 2;

(f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Article 88—Reservation of the high seas for peaceful purposes

The high seas shall be reserved for peaceful purposes.

Part VIII: Regime of islands

Article 121—Regime of islands

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

2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.

3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Part XI: The Area

Article 136—Common heritage of mankind

The Area and its resources are the common heritage of mankind.

Article 137—Legal status of the Area and its resources

1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.

2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority.

3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.

Part XV—Settlement of Disputes

Article 279—Obligation to settle disputes by peaceful means

States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

Article 280—Settlement of disputes by any peaceful means chosen by the parties

Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.

(p. 635) Article 281—Procedure where no settlement has been reached by the parties

1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

Article 283—Obligation to exchange views

1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Article 284—Conciliation

1. A State Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, section 1, or another conciliation procedure.

2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure.

3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.

4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.

Article 286—Application of procedures under this section

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Article 287—Choice of procedure

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;

(b) the International Court of Justice;

(c) an arbitral tribunal constituted in accordance with Annex VII;

(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.

3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.

6. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.

(p. 636) 7. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.

8. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

Article 288—Jurisdiction

1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

2. A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.

3. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith.

4. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

Article 290—Provisional measures

1. If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.

3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.

4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other States Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures.

5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

Article 293—Applicable law

1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

2. Paragraph l does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case ex aequo et bono, if the parties so agree.

Article 296—Finality and binding force of decisions

1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.

2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

(p. 637) Article 297—Limitations on applicability of section 2

…

3.

(a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

Article 298—Optional exceptions to applicability of section 2

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

(a)

(i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;

(ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;

(iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;

(b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;

(c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.

2. A State Party which has made a declaration under paragraph 1 may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention.

3. A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in this Convention as against another State Party, without the consent of that party.

4. If one of the States Parties has made a declaration under paragraph 1(a), any other State Party may submit any dispute falling within an excepted category against the declarant party to the procedure specified in such declaration.

5. A new declaration, or the withdrawal of a declaration, does not in any way affect proceedings pending before a court or tribunal in accordance with this article, unless the parties otherwise agree.

6. Declarations and notices of withdrawal of declarations under this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

(p. 638) VII. UNCLOS Annex VII. Arbitration

Article 1—Institution of proceedings

Subject to the provisions of Part XV, any party to a dispute may submit the dispute to the arbitral procedure provided for in this Annex by written notification addressed to the other party or parties to the dispute. The notification shall be accompanied by a statement of the claim and the grounds on which it is based.

Article 3—Constitution of arbitral tribunal

For the purpose of proceedings under this Annex, the arbitral tribunal shall, unless the parties otherwise agree, be constituted as follows:

(a) Subject to subparagraph (g), the arbitral tribunal shall consist of five members.

(b) The party instituting the proceedings shall appoint one member to be chosen preferably from the list referred to in article 2 of this Annex, who may be its national. The appointment shall be included in the notification referred to in article l of this Annex.

(c) The other party to the dispute shall, within 30 days of receipt of the notification referred to in article l of this Annex, appoint one member to be chosen preferably from the list, who may be its national. If the appointment is not made within that period, the party instituting the proceedings may, within two weeks of the expiration of that period, request that the appointment be made in accordance with subparagraph (e).

(d) The other three members shall be appointed by agreement between the parties. They shall be chosen preferably from the list and shall be nationals of third States unless the parties otherwise agree. The parties to the dispute shall appoint the President of the arbitral tribunal from among those three members. If, within 60 days of receipt of the notification referred to in article l of this Annex, the parties are unable to reach agreement on the appointment of one or more of the members of the tribunal to be appointed by agreement, or on the appointment of the President, the remaining appointment or appointments shall be made in accordance with subparagraph (e), at the request of a party to the dispute. Such request shall be made within two weeks of the expiration of the aforementioned 60-day period.

(e) Unless the parties agree that any appointment under subparagraphs (c) and (d) be made by a person or a third State chosen by the parties, the President of the International Tribunal for the Law of the Sea shall make the necessary appointments. If the President is unable to act under this subparagraph or is a national of one of the parties to the dispute, the appointment shall be made by the next senior member of the International Tribunal for the Law of the Sea who is available and is not a national of one of the parties. The appointments referred to in this subparagraph shall be made from the list referred to in article 2 of this Annex within a period of 30 days of

the receipt of the request and in consultation with the parties. The members so appointed shall be of different nationalities and may not be in the service of, ordinarily resident in the territory of, or nationals of, any of the parties to the dispute.

(f) Any vacancy shall be filled in the manner prescribed for the initial appointment.

(g) Parties in the same interest shall appoint one member of the tribunal jointly by agreement. Where there are several parties having separate interests or where there is disagreement as to whether they are of the same interest, each of them shall appoint one member of the tribunal. The number of members of the tribunal appointed separately by the parties shall always be smaller by one than the number of members of the tribunal to be appointed jointly by the parties.

(h) In disputes involving more than two parties, the provisions of subparagraphs (a) to (f) shall apply to the maximum extent possible.

Article 5—Procedure

Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case.

Article 9—Default of appearance

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. (p. 639) Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

Article 11—Finality of award

The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute.

VIII. 2008 Rules of Procedure of the Commission on the Limits of the Continental Shelf

Rule 45—Submission by a coastal state

In accordance with article 4 of Annex II to the Convention:

(a) Where a coastal State intends to establish the outer limits of its continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible, but in any case within ten years of the entry into force of the Convention for that State. In the case of a State Party for which the Convention entered into force before 13 May 1999, it is understood, in accordance with the ‘Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea’ (SPLOS/72 of 29 May 2001), that the ten-year time period referred to in article 4 of Annex II to the Convention shall be taken to have commenced on 13 May 1999;

(b) The coastal State shall at the same time give the names of any Commission members who have provided it with scientific and technical advice.

Rule 46—Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes

1. In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States or in other cases of unresolved land or maritime disputes, submissions may be made and shall be considered in accordance with Annex I to these Rules.

2. The actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between States.

Rule 53—Recommendations of the Commission

1. The Commission shall consider and approve or amend the recommendations prepared by the subcommission following their submission by the subcommission. Unless the Commission decides otherwise, the recommendations drafted by the subcommission shall be considered by the Commission during the next session following their submission by the subcommission. Sufficient time shall be allowed to the members of the Commission to consider the submission and the recommendations in each case.

2. The recommendations of the Commission based on the recommendations prepared by the subcommission shall be approved in accordance with rule 35 and rule 37, paragraph 1.

3. The recommendations of the Commission on matters related to the establishment of the outer limits of the continental shelf shall be submitted in writing to the coastal State which made the submission and to the Secretary-General, in accordance with article 6, paragraph 3, of Annex II to the Convention. For this purpose the Chairperson of the Commission shall transmit to the Secretariat two copies of the recommendations, one to be submitted to the coastal State, and one to remain in the custody of the Secretary-General. If the submission was not originally made in English, the recommendations shall be translated by the Secretariat into the official language in which the submission was originally made. The translation shall be transmitted to the coastal State together with the original English text of the recommendations.

(p. 640) 4. In the case of disagreement by the coastal State with the recommendations of the Commission, the coastal State shall, in accordance with article 8 of Annex II to the Convention, make a revised or new submission to the Commission within a reasonable time.

The outer limits of the continental shelf established by a coastal State on the basis of the recommendations of the Commission shall be final and binding, in accordance with article 76, paragraph 8, of the Convention.

Annex III Sample Arbitration Agreements

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Stephen Fietta, Robin Cleverly

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(p. 641) Annex III Sample Arbitration Agreements

ANNEX III—SAMPLE ARBITRATION AGREEMENTS

RULES OF PROCEDURE

FOR THE ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII TO THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

PURSUANT TO THE NOTIFICATION OF BARBADOS

DATED 16 FEBRUARY 2004

Barbados/Trinidad & Tobago

Whereas Barbados and the Republic of Trinidad & Tobago (the 'Parties') are Parties to the United Nations Convention on the Law of the Sea ('the Convention');

Whereas Barbados has invoked Article 287 of the Convention and Article 1 of Annex VII to the Convention with regard to a dispute concerning the delimitation of the exclusive economic zone and continental shelf between Barbados and the Republic of Trinidad and Tobago, as set out in Barbados' 'Statement of the Claim and the Grounds on Which it is Based' dated 16 February 2004;

Whereas in accordance with Article 298 of the Convention neither Party has declared any exceptions to Part XV of the Convention governing the settlement of disputes; and neither Party has made a written declaration choosing the means for settlement of disputes under Article 287 (1) of the Convention;

Whereas Article 287 (3) of the Convention provides that 'A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII';

Whereas an arbitral tribunal has been accordingly constituted pursuant to Article 3 of Annex VII to the Convention;

Whereas in accordance with Articles 3(b) and 3(c) respectively of Annex VII to the Convention, Barbados has appointed Professor Vaughan Lowe as a member of the Arbitral Tribunal and the Republic of Trinidad and Tobago has appointed Mr Ian Brownlie CBE QC as a member of the Arbitral Tribunal; and, in accordance with Article 3(d) of Annex VII to the Convention, the Parties have agreed to the appointment of Judge Stephen M. Schwebel (President), Professor Francisco Orrego Vicuña, and Sir Arthur Watts KCMG QC, as members of the Arbitral Tribunal;

Whereas Article 5 of Annex VII to the Convention provides that 'Unless the Parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each Party a full opportunity to be heard and to present its case';

Whereas the Parties have not agreed otherwise, the Tribunal hereby adopts the following rules of procedure in accordance with Article 5 of Annex VII to the Convention.

(p. 642) Section I. Introduction

Scope of Application

Article 1

1. The Arbitral Tribunal shall function in accordance with these Rules, and the relevant provisions of the Convention including its Annex VII. These Rules are subject to such modifications or additions as the Tribunal, after consultation with the Parties, may agree upon.

2. To the extent that any question of procedure is not expressly governed by these Rules or by relevant provisions of the Convention and its Annex VII, and the Parties have not otherwise agreed, the question shall be decided by the Arbitral Tribunal after consultation with the Parties.

3. The International Bureau of the Permanent Court of Arbitration (the 'PCA') shall serve as the Registry and shall take charge of the archives of the arbitration proceedings.

Notice, Calculation of Periods of Time

Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received by the PCA or by a Party when it has been delivered to the PCA or to the agent of the Party appointed pursuant to Article 4 of these Rules.

2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or a non-work day in the State of the Party, in the United Kingdom, or in The Netherlands, the period is extended until the first work-day which follows. Official holidays or non-work days occurring during the running of the period of time are included in calculating the period.

Commencement of Proceedings

Article 3

The proceedings are deemed to have commenced on 16 February 2004.

Representation and Assistance

Article 4

Each Party shall be represented by an agent and, if it so decides, one or more deputy agents. The Parties may also be assisted by persons of their choice. The name and address of the agent and any deputy agent or agents must be communicated in writing to the other Party and to the PCA.

Section II. Composition of the Tribunal

Number and Appointment of Arbitrators

Article 5

The Arbitral Tribunal consists of five members appointed in accordance with Article 3 of Annex VII to the Convention.

Replacement of an Arbitrator

Article 6

1. In the event of the death or withdrawal of an arbitrator during the course of the proceedings, a substitute arbitrator shall be appointed:

    a. Where the arbitrator being replaced was originally appointed by one of the Parties in accordance with Articles 3 (b) or 3 (c) of Annex VII to the Convention, by the Party making the original appointment if possible within thirty days, or otherwise not later than sixty days, from the date of the death or withdrawal of an arbitrator.

    b. Where the arbitrator being replaced was originally appointed by agreement of the Parties in accordance with Article 3(d) of Annex VII to the Convention, by agreement of the Parties or, failing such agreement, by the remaining members of the Arbitral Tribunal if possible within (p. 643) thirty days, or otherwise not later than sixty days, from the date of the death or withdrawal of an arbitrator.

2. In such an event, prior hearings may be repeated at the discretion of the Arbitral Tribunal.

Section III. The Proceedings General Provisions

Article 7

1. Subject to these Rules, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the Parties are treated with equality and that at any stage of the proceedings each Party is given a full opportunity to be heard and to present its case.

2. Subject to these Rules, the Parties shall facilitate the work of the Arbitral Tribunal in accordance with Article 6 of Annex VII to the Convention.

Place of and Language of Arbitration

Article 8

1. The place of the arbitration shall be The Hague.

2. Hearings shall be held in London, unless by 1 October 2004 the Parties have agreed on a situs in the Caribbean.

3. Notwithstanding the provisions of paragraphs 1 and 2, above, the Arbitral Tribunal may hold meetings and/or conduct its deliberations at any location indicated by the situation of its members and considerations of economy. In addition, the Arbitral Tribunal may, in consultation with the Parties, decide to hold hearings at any other location.

4. The Award shall be deemed to be made at the place of arbitration.

5. The language of the arbitration is English.

Order and Content of Pleadings

Article 9

1. On or before 30 October 2004, Barbados shall communicate in writing to the Republic of Trinidad and Tobago, to the PCA and to each of the arbitrators a Memorial containing:

(a) A statement of any facts on which Barbados relies;

(b) Barbados' legal arguments and submissions;

(c) A statement of the relief or remedy sought by Barbados.

1. On or before 31 March 2005, the Republic of Trinidad and Tobago shall communicate in writing to Barbados, to the PCA, and to each of the arbitrators a Counter-Memorial containing:

(a) An admission or denial of any facts alleged in the Memorial and a statement of facts on which the Republic of Trinidad and Tobago relies;

(b) Observations concerning the legal arguments and submissions in the Memorial and the Republic of Trinidad and Tobago's legal arguments and submissions;

(c) A statement of the relief or remedy sought by the Republic of Trinidad and Tobago.

1. On or before 9 June 2005, Barbados may submit a Reply.

2. On or before 18 August 2005, the Republic of Trinidad and Tobago may submit a Rejoinder.

3. At the request of either Party, and after having ascertained the views of the other Party, the Arbitral Tribunal may extend the time specified in paragraphs 1, 2, 3 and 4 of this Article for the submission of pleadings.

4. With every pleading there shall be submitted any relevant documents and/or other evidence or materials adduced in

support of any facts alleged in it. Documents so submitted shall be duly certified.

5. During the course of the arbitral proceedings either Party may, if given leave by the Arbitral Tribunal to do so, amend or supplement its claim or defence, provided that a claim may not (without the consent of the other Party) be amended or supplemented in such a manner that it falls outside the scope of the dispute.

(p. 644) Preliminary Objections

Article 10

1. The Arbitral Tribunal shall have the power to rule on objections to its jurisdiction or to the admissibility of the Notification or of any claim made in the proceedings.

2. Any jurisdictional objection or claim of inadmissibility shall be raised within sixty days of the filing of the pleading to which it relates.

3. The Arbitral Tribunal, after ascertaining the views of the Parties, may rule on objections to jurisdiction or admissibility as a preliminary issue or in its final Award.

Evidence and Hearings

Article 11

1. Each Party shall have the burden of proving the facts relied on to support its claim or defence. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence adduced, and no evidence or material may be relied upon that has not been submitted as part of the written pleadings other than oral evidence. The Arbitral Tribunal shall decide upon the admissibility of any evidence or material that may be submitted after the closure of the written proceedings.

2. The Tribunal may at any time call upon the parties to produce such evidence or to give such explanations as the Tribunal considers necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose, in which case it shall notify the Parties.

3. The Arbitral Tribunal may request the Parties jointly or separately to provide a non-technical document summarising and explaining the background to any scientific, technical, or other specialized information which the Tribunal considers necessary to understand fully the matters in dispute.

4. After having obtained the views of the Parties, the Arbitral Tribunal may upon notice to the Parties appoint one or more experts, including a hydrographer, to report to it, in writing, on specific issues to be determined by the Tribunal. A copy of the expert’s terms of reference, established by the Arbitral Tribunal, shall be communicated to the Parties.

5. The Parties shall cooperate in pursuance of Article 6 of Annex VII to the Convention with any expert(s) the Tribunal may wish to appoint pursuant to paragraph 4 of this Article.

Article 12

1. There shall be oral hearings of a duration and dates to be agreed upon with the Parties. The PCA shall arrange for a verbatim transcript of oral proceedings to be made.

2. If witnesses, including expert witnesses, are to be heard, each Party shall communicate to the PCA and to the other Party the names and addresses of the witnesses it intends to present, and the subject upon and the languages in which such witnesses will give their testimony. Each Party shall circulate an initial communication on witnesses at least thirty days before the hearing, and a final communication on witnesses at least twenty days before the hearing. Where a language other than English is to be used by a witness, the necessary arrangements for interpretation into English shall be made by the PCA, at the expense of the Party concerned.

3. No expert witness or witness of fact may be heard unless he or she has provided a written expert report or affidavit, which shall form part of the pleadings as set out in Article 9 above.

4. The Arbitral Tribunal shall be entitled to disregard any written expert report or affidavit of fact where the person who has made it is not made available to testify and be examined at the oral hearing.

5. Taking account of the views of the Parties, the Arbitral Tribunal shall determine the manner in which witnesses are examined. The Arbitral Tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. Expert witnesses should not normally be excluded.

Confidentiality

Article 13

1. All written and oral pleadings, documents, and evidence submitted in the arbitration, verbatim transcripts of meetings and hearings, and the deliberations of the Arbitral Tribunal, shall remain confidential unless otherwise agreed by the Parties.

(p. 645) 2. The hearings shall not be open to the public, unless otherwise agreed by the Parties.

Decisions on Administration and Routine Procedure

Article 14

Decisions of the Arbitral Tribunal, both on procedure and substance, shall be taken by a majority vote of its members, except that questions of administration or routine procedure may be decided by the President of the Arbitral Tribunal, unless the President wishes to have the opinion of the other members of the Arbitral Tribunal or the Parties request a decision of the Arbitral Tribunal.

Section IV. The Award

Publication of the Award

Article 15

The Award of the Arbitral Tribunal shall be made public, unless the Parties otherwise agree.

Form and Effect of the Award

Article 16

1. The Award of the Tribunal shall be rendered in accordance with Articles 10 and 11 of Annex VII to the Convention. The Arbitral Tribunal shall describe the course of the delimitation in a technically precise manner, with the assistance, as appropriate, of a hydrographer.

2. In addition to making a final Award, the Arbitral Tribunal shall be empowered to make interim, interlocutory, or partial Awards.

Interpretation of the Award

Article 17

1. Any request for interpretation of the Award, in accordance with Article 12 of annex VII to the Convention, shall be made within thirty days after the receipt of the Award, by giving notice to the Tribunal and the other Party.

2. The interpretation shall be given in writing within forty-five days after receipt of the request. The interpretation shall form part of the Award and the provisions of Article 16 above shall apply.

Correction of the Award

Article 18

1. Within thirty days after the receipt of the Award, either Party, with notice to the other Party, may request the Arbitral Tribunal to correct in the Award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The Arbitral Tribunal may within thirty days after the communication of the Award make such corrections on its own initiative.

2. Such corrections shall be in writing, and the provisions of Article 16 above shall apply.

Expenses and Costs

Article 19

1. Unless the Arbitral Tribunal determines otherwise because of the particular circumstances of the case, the expenses of the Arbitral Tribunal, including the remuneration of its members, shall be borne by the Parties in equal shares.

2. The expenses of the Arbitral Tribunal shall be reasonable in amount, taking into account the situs of the hearings, the complexity of the subject matter, the time spent by the arbitrators, and any other relevant circumstances of the case.

3. The PCA shall keep a record of all expenses of the Arbitral Tribunal, and shall furnish a final statement thereof to the Parties.

Article 20

The Arbitral Tribunal may make such Award as appears to it appropriate in respect of the costs incurred by the Parties in presenting their respective cases.

(p. 646) Deposit for Expenses

Article 21

1. The PCA may request each Party to deposit an equal amount as an advance for the expenses referred to in Article 19 above. All amounts deposited by the Parties pursuant to this Article shall be directed to the PCA, and disbursed by it for such expenses, including, *inter alia*, fees to the arbitrators, and the PCA.

2. The Arbitral Tribunal may review the adequacy of the deposit from time to time and request such further equal amounts as required.

3. If the requested amounts are not paid in full within thirty days after the receipt of the request, the Arbitral Tribunal shall so inform the Parties in order that one or another of them may make the required payment. If such payment is not made, the Arbitral Tribunal may order the suspension or termination of the proceedings.

4. After the Award has been made, the PCA shall render an accounting to the Parties of the amounts received and return any unexpended balance to the Parties.

RULES OF PROCEDURE

FOR THE ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII TO THE

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

PURSUANT TO THE NOTIFICATION OF THE PEOPLE'S REPUBLIC OF BANGLADESH

DATED 8 OCTOBER 2009

Bangladesh/India

Whereas the People's Republic of Bangladesh and the Republic of India are Parties to the United Nations Convention on the Law of the Sea ('the Convention');

Whereas article 286 of the Convention provides that: 'Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any Party to the dispute to the court or tribunal having jurisdiction under this section';

Whereas article 287(5) of the Convention provides that: 'If the Parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the Parties otherwise agree';

Whereas article 1 of Annex VII to the Convention provides that: 'Subject to the provisions of Part XV, any Party to a dispute may submit the dispute to the arbitral procedure provided for in this Annex by written notification addressed to the other Party or Parties to the dispute. The notification shall be accompanied by a statement of the claim and the grounds on which it is based';

Whereas Bangladesh has invoked article 287 of the Convention and article 1 of Annex VII to the Convention with regard to a Dispute concerning the Maritime Boundary between Bangladesh and India (Bangladesh v. India) ('the Dispute'), as set out in Bangladesh's 'Notification under article 287 of the Convention and Annex VII article 1 of UNCLOS and Statement of Claim and Grounds on which it is based', dated 8 October 2009 ('the Notification and Statement of Claim');

Whereas in accordance with articles 3(b) and 3(c) of Annex VII to the Convention, Bangladesh has appointed Alan Vaughan Lowe as arbitrator in respect of the Dispute and India has appointed Pemmaraju Sreenivasa Rao as arbitrator;

Whereas in accordance with article 3(e) of Annex VII to the Convention, on the 10 February 2010 the President of the International Tribunal for the Law of the Sea has appointed Ivan Shearer, Tullio Treves and Rüdiger Wolfrum as arbitrators and Rüdiger Wolfrum as president of the Arbitral Tribunal;

(p. 647) Whereas article 5 of Annex VII to the Convention provides that 'Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case';

Whereas the Parties have agreed on the following Rules of Procedure (the 'Rules') for the arbitration;

Section I. Introduction

Scope of Application

Article 1

1. The Arbitral Tribunal shall function in accordance with these Rules, the relevant provisions of the Convention and Annex VII to the Convention. These Rules are subject to such modifications or additions as the Parties may agree in writing after consultation with the Arbitral Tribunal.

To the extent that any question of procedure is not expressly governed by these Rules or by Annex VII to the Convention or other provisions of the Convention, the question shall be decided by the Arbitral Tribunal after consultation with the Parties.

The Permanent Court of Arbitration shall serve as the Registry ('the Registry') and shall take charge of the archives of the arbitration proceedings. The seat of the Arbitral Tribunal shall be The Hague.

Notice, Calculation of Periods of Time

Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received by the Arbitral Tribunal or by a Party when it has been delivered to the Registry or to the agent of the Party appointed pursuant to article 4.

2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or a non-work day in the State Party concerned or in The Netherlands, the period is extended until the first work day which follows. Official holidays or non-work days occurring during the running of the period of time are included in calculating the period.

Commencement of Proceedings

Article 3

The proceedings are deemed to have commenced on October 8, 2009.

Representation and Assistance

Article 4

Each Party shall be represented by an agent and, if it so decides, one or more co-agents. The Parties may also be assisted by counsel and other persons of their choice. The name and address of the agent and any co-agent shall be communicated in writing to the other Party, to the Registry and to all members of the Arbitral Tribunal.

Section II. Composition of the Tribunal

Number and Appointment of Arbitrators

Article 5

The Arbitral Tribunal consists of five members who have been appointed in accordance with article 3 of Annex VII to the Convention.

Replacement of an Arbitrator

Article 6

In the event of incapacity, withdrawal or death of an arbitrator during the course of the proceedings, a substitute arbitrator shall be appointed:

(p. 648) Where the arbitrator being replaced was originally appointed by one of the Parties in accordance with articles 3(b) or 3(c) of Annex VII to the Convention, by the Party making the original appointment if possible within 30 days, or otherwise not later than 60 days, from the date of the incapacity, withdrawal or death of an arbitrator.

Where the arbitrator being replaced was originally appointed by the President of the International Tribunal for the Law of the Sea in accordance with article 3(e) of Annex VII to the Convention, if the Parties do not agree otherwise within 30 days from the date of incapacity, withdrawal or death of the arbitrator, by the President of the International Tribunal for the Law of the Sea within a further 30 days.

In such an event, prior hearings may be repeated in whole or in part, by decision of the Arbitral Tribunal after consultation with the Parties.

Section III. The Proceedings

General Provisions

Article 7

1. Subject to these Rules, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the Parties are treated with equality and that at any stage of the proceedings each Party is given a full opportunity to be heard and to present its case.

2. Subject to these Rules, the Parties shall facilitate the work of the Arbitral Tribunal in accordance with article 6 of Annex Vll to the Convention.

Place of Meetings and Hearings and Language of Arbitration

Article 8

1. The place of hearings shall be The Hague unless decided otherwise by the President of the Arbitral Tribunal in consultation with the Parties.

2. The Arbitral Tribunal may hold meetings at any place it deems appropriate.

3. The language of the arbitration is English. Any document submitted to the Tribunal that is written in a language other than English shall be accompanied by a certified translation into English.

Order and Content of Pleading

Article 9

1. On or before May 31, 2011 Bangladesh shall communicate to India, to the Registry and to each of the arbitrators a Memorial containing:

   (a) A statement of any facts on which Bangladesh relies;

   (b) Bangladesh's submissions on law;

   (c) A statement of the decision sought by Bangladesh.

2. On or before May 31, 2012 India shall submit a Counter-Memorial containing:

   (a) An admission or denial of any facts alleged in the Memorial and a statement of any additional facts on which India relies;

   (b) Observations concerning the submissions on law in the Memorial and India's submissions on law in answer thereto;

   (c) A statement of the decision sought by India.

3. On or before November 30, 2012 Bangladesh may submit a Reply.

4. On or before May 31, 2013 India may submit a Rejoinder.

5. At the request of either Party, and after having ascertained the views of the other Party, the Arbitral Tribunal may extend the time specified in paragraphs 1, 2, 3 and 4 of this Article for the submission of pleadings.

6. There shall be submitted with every pleading certified copies of any relevant documents relied upon in support of any facts alleged in it.

7. Each Party will deliver 20 paper copies and 20 CD Roms or equivalents of its written pleadings to the Registry, which will transmit 10 paper copies and 10 CD Roms or equivalents to the other Party.

(p. 649) 8. During the course of the arbitral proceedings either Party may, if given leave by the Arbitral Tribunal to do so, amend or supplement its claim or defence. Provided that a claim may not be amended or supplemented in such a manner that it falls outside the scope of the Dispute as may be determined by the Arbitral Tribunal.

Preliminary Objections

Article 10

1. The Arbitral Tribunal shall have the power to rule on objections to its jurisdiction or to the admissibility of the Notification or of any claim made in the proceedings.

2. A submission that the Arbitral Tribunal does not have jurisdiction or that the Notification or a claim made in the pleadings is inadmissible shall be raised not later than three months after the date of submission of the first written pleading containing the claim to which the objection is made.

3. The Arbitral Tribunal, after hearing the Parties, shall rule on objections to jurisdiction or admissibility as a preliminary issue or in its final Award.

Provisional Measures

Article 11

1. A Party may submit a request for the prescription of provisional measures under article 290, paragraph 1, of the Convention at any time during the course of the proceedings. The request shall be in writing and specify the measures requested, the reasons therefor and the possible consequences, if it is not granted, for the preservation of the respective rights of the Parties.

2. The Arbitral Tribunal, or the President if the Arbitral Tribunal is not sitting, shall fix the earliest possible date for a hearing.

3. The Arbitral Tribunal may prescribe measures different in whole or in part from those requested and indicate the Parties which are to take or to comply with each measure.

4. A party may request in writing the modification or revocation of provisional measures. Before taking any decision on the request, the Arbitral Tribunal shall afford the Parties an opportunity of presenting their observations on the subject.

Evidence and Hearings

Article 12

1. Each Party shall have the burden of proving the facts relied on to support its claim or defence. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence adduced.

2 Each document submitted to the Tribunal shall be given a number (for Bangladesh's documents, B-1, B-2 etc; for India's documents, IN-I, IN-2 etc); and each page of each document shall be numbered. In so far as is possible, all documentary evidence shall be submitted in the first round of written pleadings.

3. The Arbitral Tribunal may take all appropriate measures in order to establish the facts.

4. After having obtained the views of the Parties, the Arbitral Tribunal may upon notice to the Parties appoint one or more experts to report to it, in writing, on specific issues to be determined by the Tribunal. A copy of the expert's terms of reference, established by the Arbitral Tribunal, shall be communicated to the Parties.

5. The Parties shall cooperate in pursuance of article 6 of Annex VII to the Convention with any expert(s) the Tribunal has appointed pursuant to paragraph 4 of this Article of the Rules. Any Report prepared by the expert shall be communicated to the Parties.

Article 13

1. There shall be hearings at which the Parties may make their oral submissions. The hearings shall be held no later than three months after the Rejoinder has been submitted.

2. The Arbitral Tribunal shall give the Parties adequate advance notice of the date, time and place of any oral hearing.

(p. 650) 3. If witnesses, including expert witnesses, are to be heard, each Party shall communicate to the Registry, to the members of the Arbitral Tribunal and to the other Party the names and addresses of the witnesses it intends to present, the subject upon which and the languages in which such witnesses will give their testimony. Each Party shall communicate an initial communication on witnesses at least forty-five (45) days before the hearing, and a final communication on witnesses at least thirty (30) days before the hearing. Where a language other than English is to be used by a witness, the necessary arrangements for interpretation into English shall be made by the Registry, at the expense of the Party concerned.

4. No expert witness may be heard unless he or she has provided a written expert report, which shall form part of the pleadings as set out in article 9 and shall stand as his or her evidence in chief. In respect of any other witness or witnesses to be heard who have not provided a witness statement or affidavit which has been included in the pleadings, the Party shall communicate to the Registry, to the members of the Arbitral Tribunal and to the other Party the subject matter of the testimony, a list of the topics to be addressed and a summary of conclusions. This communication shall be made at the time that the witnesses are identified in the initial or final communications specified in article 13(3).

5. The Arbitral Tribunal may require the retirement or presence of any witness or witnesses, including expert witnesses, during the testimony of other witnesses. Taking account of the views of the Parties, the Arbitral Tribunal shall determine the manner in which witnesses are examined.

6. The written and oral pleadings of the Parties and any documentary material or evidence submitted by them shall remain confidential until the final Award.

7. The Registry shall make arrangements for a verbatim record of each hearing to be produced.

8. The hearings shall not be open to the public, unless the Parties agree otherwise.

9. Following the hearing the Tribunal shall decide on the closure of the proceedings.

Decisions on Administration and Routine Procedure

Article 14

Decisions of the Arbitral Tribunal, both on procedure and substance, shall be taken by a majority vote of its members, except that questions of administration or routine procedure may be decided by the President of the Arbitral Tribunal, unless the President wishes to

have the opinion of the other members of the Arbitral Tribunal or the Parties request a decision of the Arbitral Tribunal.

Section IV. The Award

Publication of the Award

Article 15

The Arbitral Tribunal shall endeavour to render its Award within six months of the close of the proceedings. After it has been made available to the Parties the Award shall be made public.

Form and Effect of the Award

Article 16

1. The Award of the Tribunal shall be rendered and shall have effect in accordance with articles 10 and 11 of Annex VII to the Convention.

2. In addition to making a final Award, the Arbitral Tribunal shall be empowered to make interim, interlocutory, or partial Awards.

Interpretation of the Award

Article 17

1. Any request for interpretation of the Award, in accordance with Article 12 of Annex VII to the Convention, shall be made within 30 days after the receipt of the Award, by giving notice to the Tribunal and the other Party.

(p. 651) 2. The interpretation shall be given in writing within 45 days after receipt of the request. The interpretation shall form part of the Award and the provisions of article 16 of these Rules shall apply.

Correction of the Award

Article 18

1. Within 30 days after the receipt of the Award, either Party, with notice to the other Party, may request the Arbitral Tribunal to correct in the Award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The Arbitral Tribunal may within 30 days after the communication of the Award make such corrections on its own initiative.

2. Such corrections shall be in writing, and the provisions of article 16 of these Rules shall apply.

Expenses and Costs

Article 19

1. The expenses of the Arbitral Tribunal, including the remuneration of its members, shall be borne by the Parties in equal shares.

2. The expenses of the Arbitral Tribunal shall be reasonable in amount, taking into account the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

3. The Registry shall keep a record of all expenses of the Arbitral Tribunal, and shall furnish a final statement thereof to the Parties.

Article 20

Unless decided otherwise by the Tribunal each Party shall bear its own costs. The Arbitral Tribunal may make an Award in respect of the costs incurred by the Parties in presenting their cases, as appropriate.

Deposit for Expenses

Article 21

1. The Registry may request each Party to deposit an equal amount as an advance for the expenses referred to in article 19. All amounts deposited by the Parties pursuant to this article shall be directed to the Registry, and disbursed by it for such expenses, including, *inter alia*, fees to the arbitrators, and the Registry.

2. During the course of the proceedings, the Registry or the Arbitral Tribunal may request supplementary amounts from the Parties in respect of the expenses referred to in article 19.

3. If the requested amounts are not paid in full within sixty days after the receipt of the request, the Arbitral Tribunal shall so inform the Parties in order that one or another of them may make the required payment. If such payment is not made in full within a further 30 days, the Arbitral Tribunal may order the suspension or termination of the proceedings or take such other steps as it considers appropriate.

4. After the Award has been made, the Registry shall render an accounting to the Parties of the amounts received and return any unexpended balance to the Parties, as directed by the Tribunal. (p. 652)

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Please see under main entries for individual arbitration/tribunal decisions for specific topics relating to that decision.