

Annex 186

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INTERNATIONAL MARITIME BOUNDARIES: POLITICAL, STRATEGIC, AND HISTORICAL CONSIDERATIONS

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I. INTRODUCTION

Why do states seek to agree on maritime boundaries? Three typical situations might be distinguished in this regard:

* substantial activities subject to coastal state jurisdiction are

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being conducted or are likely to be conducted in an area of actual or potential dispute;

- * one or both states wish to stimulate uses, particularly fixed uses, of the area in question;
- * there is no significant activity or interest in the area requiring a boundary.

A. Substantial Activities Being Conducted

The first situation arises where substantial activities subject to coastal state jurisdiction are being conducted or are likely to be conducted in an area of actual or potential dispute. In this case, if either or both states attempt to enforce their jurisdiction, particularly against each other's nationals or licensees, there is a risk of serious escalation of the dispute. The consequences might include a decline in useful economic activity, inability to apply meaningful environmental or economic regulations, political animosity extending beyond those persons whose livelihoods are affected, private violence, or demands for escort with the attendant risk of direct confrontations between the armed forces of the two states.

The transfer of control over vast high seas fisheries to coastal states by virtue of extensions of fisheries jurisdiction to 200 nautical miles presents the typical case. Once jurisdiction is extended, both coastal and distant-water fishermen who visited the area yesterday (and perhaps many yesterdays) need to know where they may fish tomorrow. The basic choices governments have for avoiding confrontation arising from overlapping claims are explicit or tacit agreement on a permanent or interim boundary, explicit or tacit joint management within a defined area, explicit or tacit agreement on mutual restraint with respect to the exercise of jurisdiction over at least each other's nationals within a defined area, or unreciprocated unilateral restraint.¹

This probably explains the reasons for a significant number of delimitation agreements concluded after one or both states extended jurisdiction over fisheries to 200 miles, in most cases

1. Absent express or tacit agreement on geographic limits roughly defining the disputed area, the "defined area" for joint management or mutual restraint might encompass areas extending well beyond those likely to be in dispute, potentially embracing the full economic zones of both parties.

during or following the Third United Nations Conference on the Law of the Sea.² From this perspective, the delimitation agreement can be seen as a response to a need to agree on something and an inability or unwillingness to rely on restraint or tacit arrangements at least over the long term.

In almost all cases, the agreement also reflects a preference for a unilateral rather than joint management regime in principle, notwithstanding the practical need for joint arrangements to conserve and manage migrating fish stocks and transboundary ecosystems and the probable transboundary effort patterns of fishermen. The overwhelming majority of states has responded to the fisheries problem with defined geographic boundaries. No state appears to have entrusted a court or arbitral tribunal in a delimitation dispute with the authority to impose biologically and economically inspired fisheries management and allocation arrangements as part of a boundary regime in lieu of or in addition to a fixed boundary.

This suggests the continuing influence of the dominant political and legal approach to formal accommodation of states' competing claims to use and control on land: geographic partition with fixed, preferably precisely defined, geographic boundaries. To put it differently, while the extension of coastal state jurisdiction over fisheries places a mobile resource exploited by mobile vessels under the potential control of more than one state, the choice of a geographic boundary as the preferred formal means for accommodating and partitioning the respective interests, even where that boundary divides single stocks, ecosystems and effort patterns, may well reflect the dominance of political factors and legal habits over ostensibly dominant conservation and economic concerns.³

2. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261 [hereinafter U.N. Convention on the Law of the Sea]. For example, Mexico wished to settle its maritime boundary with Cuba prior to the effective date of its decree establishing an exclusive economic zone that extended its fisheries jurisdiction to 200 miles. *See* Agreement Concerning the Delimitation of Sea Space, July 26, 1976, Cuba-Mex., Limits in the Seas, No. 104 (1985). The relatively rapid agreement between the United States and Cuba may be due in part to the fact that a dispute over fisheries enforcement could have been quite nasty, particularly if it involved Cuban exiles residing in Florida. *See* Maritime Boundary Agreement, Dec. 16, 1977, U.S.-Cuba, S. Exec. Doc. H., 96th Cong., 1st Sess. 1 (1979) [hereinafter U.S.-Cuba Maritime Agreement].

3. The history of the Gulf of Maine adjudication is instructive. Two agree-

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Apologists for this system may argue that after, or at least in connection with, agreement on the boundary it becomes easier to address the problem of mutual cooperation in management in a formal manner. They might point to the Australia-Papua New Guinea agreement with respect to fisheries.⁴ They might also point to the practice of arriving at unitization agreements where a fluid nonliving resource such as an oil or gas deposit is traversed by a political boundary or concession limit.

B. Desire to Stimulate Uses

The second situation prompting a delimitation agreement arises where one or both states wish to stimulate uses, particularly fixed uses, of the area in question. The classic example would be exploration and exploitation of the continental shelf for oil and gas, preceded perhaps by prospecting or scientific research. The organization of the oil and gas industry generally assumes an exclusive legal right to extract the resources of an area with respect to which major site-specific investments are to be made.⁵ A dispute between neighboring states over the area casts doubt on that right.

As compared with fishing, exploitation of seabed hydrocarbons is a relatively recent development. By the middle of the Twentieth century, virtually all of the world's seabed hydrocarbons were still unexplored and unexploited. There was plenty of room for the new industry outside boundary regions. The rapid emulation by other states of the Truman Proclamation's claim to the continental shelf⁶ did not pose an immediate practical need

ments were presented to the United States Senate. One submitted the question of a single maritime boundary to a Chamber of the International Court of Justice. The second dealt with fisheries, moderating the effect of an adjudicated boundary on the fishing interests of the parties. The Senate approved the first but not the second agreement. The first agreement was not amended to permit the Chamber to impose measures to moderate the effect of the boundary on fisheries' interests and the parties did not commit themselves to do so before the Chamber. However, Canada described the general bilateral fisheries management relationship between the parties in glowing terms. It should surprise no one that the line drawn by the Chamber appears in effect to be sensitive to certain fisheries' allocation problems.

4. Treaty Concerning Sovereignty and Maritime Boundaries in the Area Known as Torres Strait, Dec. 18, 1978, Austl.-Papua N.G., 1978 Austl. T.S. No. 4 [hereinafter Australia-Papua New Guinea Treaty].

5. Indeed, it would seem that this need for exclusivity was a major driving force behind the formulation of the legal doctrine of the continental shelf.

6. Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945).

for delimitation agreements in most areas. Not surprisingly, this need was first perceived in oil-rich shallow semi-enclosed seas such as the Persian Gulf.

While the lure of potential seabed riches has a significant political impact on governments, it would appear that potential boundary disputes with respect to the seabed are more manageable than fisheries disputes, and pose less of a political risk of escalation. Governments that wish to avoid provoking their neighbors may refrain from taking affirmative actions necessary to authorize oil and gas activities, or may make them subject to future boundary arrangements.⁷ Legal uncertainty will itself have some restraining effect on the oil and gas investor, typically a transnational company with substantial alternatives for investment.

Put simply, in the case of oil and gas, it will usually take some affirmative governmental action to trigger an escalation. In the case of fisheries, the fishermen may well force the issue. This is particularly so because those with the fewest alternative economic options are likely to be the coastal fishermen of the states concerned and the coastal communities they help support.

This is not to suggest that governments are unmoved by the risk of an escalating dispute in seeking to agree on seabed boundaries in areas of potential economic interest. The fear of an unfavorable *status quo* and the desire to achieve a favorable *status quo* are omnipresent in politics and diplomacy. Governments are under constant pressure to take potentially provocative actions designed to reinforce their claims. Lawyers trained in the influence of history and possession upon legal rights and in doctrines of estoppel may themselves add to this pressure. Taken together, the opinions of the Court in the *Eastern Greenland*,⁸ *Temple of Preah Vihear*,⁹ and *Tunisia-Libya Continental*

7. In theory, the coastal state's rights with respect to the continental shelf including commercial prospecting and scientific research should accelerate the pressure for reaching a boundary agreement. These activities, however, are conducted from ships over broad areas and generally do not require economic exclusivity. To some degree, satellite data obviates the need for on-site observation. Thus, either neglect or mutual restraint can postpone the pressure to agree on precise delimitation.

8. *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (Ser. A/B) No. 53 (April 5).

9. *Concerning the Temple of Preah Vihear* (Cambodia v. Thail.), 1962 I.C.J. 6

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*Shelf*⁰ cases may have some unforeseen, arguably unjustified, but nevertheless unsettling effects in this regard.

The argument for a fixed boundary as opposed to a joint management arrangement may be stronger in the case of fixed uses such as oil and gas development than in the case of fisheries. The resource is not mobile. The exploitation activity is not mobile. Judge Jessup's observation in the *North Sea Continental Shelf* cases¹¹ that the real issue in continental shelf delimitation is allocation of valuable resource deposits seems not to have stimulated very much interest in joint management regimes. It is also not clear that the imposition of a direct joint management system on a disputed field or resource deposit is the best way to stimulate new investment or manage the resource. Some joint arrangements provide for geographic division of management authority between the states concerned.

The environmental effects of oil and gas development, however, are not necessarily localized. Pollution in a boundary region may affect several coastal states. While the United States made some arguments in this regard in support of its position concerning the location of the maritime boundary in the Gulf of Maine,¹² as in the case of fisheries there appears as yet to be no significant tendency to deviate for environmental reasons from the political tradition of a fixed boundary, except perhaps in the unusually sophisticated agreement between Australia and Papua New Guinea.¹³

C. *No Significant Activity or Interest*

The third situation is perhaps the most intriguing. It arises when governments seek to agree on a maritime boundary despite the absence of significant activity or interest in the region requiring a boundary.

(June 15).

10. Concerning the Continental Shelf (Tunis. v. Libyan Arab Jamahiriya), 1982 I.C.J. 18 (June 24) [hereinafter Tunisia-Libya Continental Shelf Case].

11. North Sea Continental Shelf (F.R.G. v. Den.), 1969 I.C.J. 3 (separate opinion of Jessup, J.); North Sea Continental Shelf (F.R.G. v. Neth.), 1969 I.C.J. 3 (separate opinion of Jessup, J.) [hereinafter North Sea Continental Shelf Cases].

12. Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, Oct. 12, 1984, 23 I.L.M. 1197.

13. See *supra* note 4, at 4.

In this regard one might bear in mind that, with the notable exception of areas where the land boundary divides a navigable river at its mouth or an otherwise important navigation channel or route is involved, navigation and overflight are activities that do not normally require a precise determination of which state has jurisdiction in a particular area, especially when that area is beyond the territorial sea. Freedom of navigation and overflight beyond twelve miles from the coast is generally respected. Even within the territorial sea, ships of all states enjoy a right of innocent passage. Ships and aircraft are frequently able to avoid disputed boundary regions close to shore. It would appear that extended coastal state jurisdiction over pollution from ships at sea is too new (and the potential source of pollution too transitory) to generate much pressure for a maritime boundary for pollution regulation purposes.

If there is no significant activity requiring a boundary, why do governments negotiate boundaries in such circumstances?

A possible answer can be found in the desire to avoid potential disputes in the future where there are now none.¹⁴ It is unclear whether this objective, in and of itself, often explains the behavior of governments. It is nevertheless likely to influence lawyers, and lawyers are likely to influence maritime boundary policy.

There may also be something special about boundaries that strengthens the desire to settle them even in the absence of a significant problem. Biologists might point out that some other mammals mark their territory, and that this marking has the effect of controlling disputes. Scope of jurisdiction lies at the heart of administrative law. Bureaucracies are preoccupied with jurisdictional limits. There is an almost palpable desire to demonstrate clearly (in this case, on a map) where power and responsibility do, and do not, exist.

Thus, it is not surprising to discover that some governments have embarked on a general program for the purpose of settling maritime boundaries in areas of extended maritime jurisdiction.

14. Canada and Denmark are said to have been motivated by the desire to avoid future disputes in a largely unsettled area where Greenland faces the Canadian Arctic. See Agreement Relating to the Delimitation of the Continental Shelf between Greenland and Canada, Mar. 13, 1974, Den.-Can., 950 U.N.T.S. 147.

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Such a program is most evident in the case of states that must negotiate boundaries with a significant number of other states. Colombia, France, Indonesia, the United Kingdom, and the United States are among the examples.

When one examines these examples, one is struck by the amount of activity related to islands and dependencies located at some considerable distance from the continental mainland or main islands. The United States has concluded a substantial number of maritime boundary agreements with respect to its islands in the Caribbean Sea and the Pacific Ocean, but has yet to agree on three of its four extended maritime boundaries with Canada or its boundary with the Bahamas. Colombia's boundary dispute with Venezuela remains unresolved.

The most obvious explanation is that it is easiest to reach agreement in the case of small islands surrounded by the deep waters of the Caribbean Sea or the Pacific Ocean where the boundary regions are unlikely to contain hydrocarbons or localized fisheries.¹⁵ While the interest of small Pacific island states in regulating foreign tuna fleets may explain some of their interest in maritime boundaries, the highly migratory patterns of tuna greatly reduce the significance of the location of any particular boundary. There is little to inspire attempts to deviate significantly from equidistance in areas between small islands of comparable size where few if any resources are at stake.

There may however be other political factors at work. One possible implication of a maritime boundary agreement is recognition of the right of the state party to the agreement to conclude the agreement on behalf of the land territory from which the maritime jurisdiction extends.¹⁶ The studies of Colombia's

15. Not much is known about commercial concentrations of high grade manganese nodules in most places, not to mention subsurface hard mineral deposits. In light of factors such as alternative sources of supply, market demand and cost of extraction, their present economic value, if any, is not regarded as great.

16. Delimitation negotiations between Australia and the Solomon Islands began within three months of Solomon independence. *See Agreement Establishing Certain Sea and Sea-bed Boundaries*, Sept. 13, 1988, Austl.-Solom. Is., 12 LOS Bull. 19 (1988). The delimitation agreement between Bahrain and Iran was concluded shortly after Iran abandoned its claim to Bahrain. *See Agreement Concerning Delimitation of the Continental Shelf*, June 17, 1971, Iran-Bahr., 826 U.N.T.S. 227. The boundary studies dealing with the Baltic Sea and the former German Democratic Republic suggest that the GDR may have seen maritime boundary agreements as reinforcing its position as a sovereign independent state. Especially in light of the long period of non-recognition of the GDR by the Federal Republic of Germany and other

attempts to negotiate maritime boundaries in the Western Caribbean suggest a close link between these efforts and Colombia's dispute with Nicaragua over sovereignty with respect to the islands in question. One assumes Indonesia was not unaware of the political implications of a delimitation agreement with Australia dealing with the so-called Timor Gap in light of the controversy surrounding Indonesia's annexation of the former Portuguese colony.¹⁷

It is possible that extra-regional metropolitan powers are particularly interested in reinforcing the recognition of their territorial role in a region even in the absence of a specific territorial dispute,¹⁸ bearing in mind that a potential boundary dispute in the future might be more difficult to resolve if the issue of the right to represent the territory in question was raised in that context. Conversely, a state may wish to provide a dependency with established maritime boundaries as a prelude to independence in order to protect the interests of the inhabitants and minimize foreign policy problems for the newly independent state.¹⁹

Western states prior to the pursuit of the so-called Ostpolitik of the Federal Republic in the early 1970s. The delimitation agreement between the GDR and the FRG is considered a direct result of *détente* between the parties. See Protocol Note between the Federal Republic of Germany and the German Democratic Republic Concerning the Boundary in Lübeck Bay, Oct. 1, 1974, F.R.G.-G.D.R., G Bl. II, 438 (1974) (G.D.R.) [hereinafter F.R.G.-G.D.R. Protocol Note].

17. These considerations apparently were not sufficient to persuade Indonesia to yield to Australia, in respect of Timor, as much as it had yielded geographically years earlier in respect of other areas. However, it may explain Indonesian willingness to accept a joint management arrangement as the basis of the settlement on the Australian side of the Timor Trough. See Treaty on Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, Dec. 11, 1989, Indon.-Austl., 29 I.L.M. 475. On the other hand, Indonesia yielded even less in geographic terms in the provisional fisheries delimitation agreement in which Timor was not as prominent an issue. See Memorandum of Understanding Concerning the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement, Oct. 29, 1981, Austl.-Indon. (on file with Dep't of Foreign Affairs and Trade, Canberra, Australia) [hereinafter Provisional Fisheries Surveillance].

18. It is curious that the text of the boundary agreement between France and Saint Lucia does not refer to Martinique, the French island concerned. See Delimitation Convention, Mar. 4, 1981, Fr.-St. Lucia, I Can. Annex. 675 (1983).

19. For example, the United Kingdom sought to establish offshore boundaries among the Trucial States while it was still responsible for their foreign affairs. Sharjah and Umm al Qaywayn accepted. See Seabed Boundary Agreement, 1964, Sharjah-Umm al Qaywayn, I Can. Annex 99 (1983); see also Orders in Council, Sept. 11, 1958, Sarawak-North Boreo-Brunei, U.K. Stat. Inst. (Nos. 1517-18), describing a

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In a similar vein, one possible way to obtain or enhance recognition of baselines is to enter into a delimitation agreement based on equidistance in which the boundary is clearly measured from those baselines.²⁰ This factor might influence archipelagic states such as Indonesia.²¹ Although the difference is not always easy to establish, this situation should be distinguished from one in which the primary purpose of the baselines is to influence the maritime boundary negotiations.

A related factor is the desire to "consolidate" coastal state jurisdiction newly acquired under international law.²² This ap-

1958 United Kingdom line drawn with respect to North Borneo and Sarawak and Brunei. Australia, on behalf of Papua New Guinea, settled the land boundary and completed a missing segment of the maritime boundary with Indonesia in contemplation of New Guinea's scheduled independence in 1975. *See* Agreements between Australia and Indonesia Concerning Certain Boundaries between Papua New Guinea and Indonesia, Feb. 12, 1973, Papua N.G.-Indon., 975 U.N.T.S. 4 [hereinafter Australia-Indonesia Certain Boundaries Agreements].

20. As a strictly legal matter, absent more specific references in the agreement, an equidistant line measured from a baseline does not necessarily imply recognition of the baseline as such, but merely acknowledgement that the claimed baseline represents an appropriate point of departure for applying equidistance principles (for example, a construction line representing the general direction of the coast). Of course, regardless of the effect of the claim on the boundary, a state may obtain recognition of its claim in connection with the boundary agreement. Panama obtained recognition of its claim that the Gulf of Panama is historic waters in its boundary agreements with Colombia and Costa Rica; only in the former case did the baseline affect the delimitation. *See* Treaty on the Delimitation of Marine and Submarine Areas and Associated Matters, Nov. 20, 1976, Pan.-Colom., I Can. Annex. 417 (1983) [hereinafter Panama-Colombia Treaty]; *see also* Agreement Relating to the Delimitation of their Marine and Submarine Areas in the Pacific Ocean and to their Maritime Cooperation, Apr. 6, 1984, Colom.-Costa Rica, Diario Oficial de Colom. (June 18, 1985). There is speculation that North Korea may have obtained Soviet recognition of its unusually long 300-mile baseline in exchange for a maritime boundary favorable to the Soviet Union. *See* Agreement on the Delimitation of the Soviet-Korean National Border, Apr. 17, 1985, U.S.S.R.-Korea [hereinafter Soviet-Korea National Border Agreement], *reprinted in* INTERNATIONAL MARITIME BOUNDARIES 1135 (Jonathan I. Charney & Lewis M. Alexander eds., 1993).

21. It is interesting that the maritime boundary between Indonesia and Singapore, which generally follows the deep draught tanker route, moves within the Indonesia archipelagic baselines at one point. *See* Agreement Stipulating the Territorial Sea Boundary Lines in the Strait of Singapore, May 25, 1973, Indon.-Sing., Limits in the Seas, No. 60 (1974) [hereinafter Indonesia-Singapore Sea Boundary Agreement].

22. In some sense, it would appear to reflect a feeling that the existence of the close is tentative or inchoate until it is actually enclosed and precisely separated from the neighboring close. One way to identify a thing is to describe its perimeter (a circle for example). Perhaps looming in the background is Grotius' (in this context disconcerting) observation that because the vagrant waters of the sea cannot be enclosed they are necessarily free. The U.N. Conference on the Law of the Sea did

pears to be particularly true in enclosed and semi-enclosed seas where the peaceful enjoyment of extended maritime jurisdiction is especially dependent upon arrangements with one's neighbors.²³ The series of British and other delimitation agreements in the North Sea followed immediately upon the entry into force of the Continental Shelf Convention on 10 June 1964, designed in part to consolidate the conventional regime in the North Sea.²⁴ A similar process occurred in the Caribbean Sea with respect to the exclusive economic zone. A desire to consolidate 200-nautical-mile limits is identified as one reason for the delimitation agreement between Denmark and Norway.²⁵

The decision to conclude a maritime boundary agreement may be influenced by political factors extraneous to the boundary itself. The objective need for agreement, particularly where relations are already strained, may become a convenient basis for governments to take tentative steps toward improving their relations. One notes, for example, that the United States negotiated a maritime boundary agreement with Cuba at a time when broader attempts were being made to improve bilateral relations.²⁶

not pursue a United States proposal to establish coastal state jurisdiction over fishing for stocks that reside in coastal areas beyond the territorial sea without fixing distance limits.

23. It is interesting to note that many states, while implementing the continental shelf doctrine and delimiting their respective continental shelves in the area, have thus far refrained from implementing exclusive economic zones or 200-mile fisheries zones in the Mediterranean Sea, even when the same states have asserted such jurisdiction outside the Mediterranean Sea.

24. This point is made in a number of North Sea boundary studies, especially Netherlands-United Kingdom (1965). See *Agreement Relating to the Delimitation of the Continental Shelf under the North Sea, Together with Amending Protocol*, Oct. 6, 1965, Neth.-U.K., 595 U.N.T.S. 105. For the states concerned, the consolidation of the regime of the Continental Shelf Convention in the North Sea included not only the principles and rules of coastal state jurisdiction, but the delimitation rules set forth in Article 6. *Convention on the Continental Shelf*, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter *Convention on the Continental Shelf*].

25. See *Agreement Concerning the Delimitation of the Continental Shelf in the North Sea/Norwegian Sea and Establishing the Boundary between the Faroes Fishing Zone and the Norwegian Economic Zone*, June 15, 1979, Den.-Nor., I Can. Annex 603 (1983).

26. Because of strained political relations between the parties, the U.S. Senate has yet to approve the treaty. Provisional application has been renewed periodically by the parties. See *U.S.-Cuba Maritime Agreement*, *supra* note 2.

II. POLITICAL FACTORS

A. Introduction

Four important political decisions can be identified in connection with maritime boundaries: the decision to negotiate, the decision to propose a particular boundary,²⁷ the decision to make concessions with a view to reaching agreement,²⁸ and the decision to agree on a particular boundary. Even the decision to respect a tribunal's legally binding determination of a boundary is political.

The study of factors potentially influencing the location of maritime boundaries is a study of the influence of these different factors on the ultimate political decisions of governments. Unless it influences the decisions of those with political authority, any given factor is irrelevant to a particular boundary. The "objective" importance of any given factor — assuming such a thing could be measured — does not necessarily explain its political impact.²⁹

When a tribunal is asked to decide a dispute regarding a maritime boundary under international law, the tribunal will limit itself to examining factors it regards as legally relevant to

27. Some states have announced a public position related to the location of the boundary prior to negotiation, whether for tactical or political reasons or because of the need to define some (temporary) geographic limit on domestic regulatory or enforcement actions.

28. The temporal relationship among the first three decisions involves complex questions of subjective intent, information regarding the other side's attitudes, management of domestic political pressures, and negotiating strategy and style. Some seasoned negotiators would argue that, once sufficient information is available regarding the other party's interests, the best approach to reaching agreement is to collapse the second and third decisions into one "reasonable" position around which one is prepared to negotiate at the margins but from which one is not prepared to retreat in principle. They would presumably regard as unfortunate the possible implication in the North Sea Continental Shelf cases that this approach might not satisfy the duty to negotiate in good faith. The International Court of Justice noted that the parties "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." North Sea Continental Shelf Cases, *supra* note 11, ¶ 85.

29. For example, the ocean policies of a major industrialized maritime state with global economic and strategic interests like the United States can be substantially influenced by local coastal fishing industries that represent a very small proportion of its economy.

the resolution of the issues in dispute. Much has been written about the rich and growing jurisprudence of the International Court of Justice and other tribunals in this connection. However flexible the articulated legal standard of "equitable principles," "relevant circumstances," and "equitable results" may be, there can be no doubt that while the parties are free to take into account virtually anything they wish in fashioning their negotiating positions, a tribunal asked to apply international law is more limited.

The law of maritime delimitation may require the parties to negotiate in good faith. But it places few if any limitations on the location of an agreed boundary or related arrangements. Provided they agree, the parties are largely free to divide as they wish control over areas and activities subject to their jurisdiction under international law. They may be guided principally, in some measure, or not at all by legal principles and legally relevant factors a court might examine, and by a host of other factors a tribunal might well ignore such as relative power and wealth, the state of their relations, security and foreign policy objectives, convenience, and concessions unrelated to the boundary or even to maritime jurisdiction as such.³⁰

From this perspective, it is difficult and arguably misleading to isolate political from other factors when analyzing agreed boundaries. Yet it would make little sense even to attempt to replicate here what is so ably presented by other authors elsewhere in this field of study.

This being said, it should be noted that maritime boundary issues do not normally seem to engage the same level of political attention as many disputes over land territory. The resultant agreements are often viewed as economic or technical. Indeed, it can be argued that few maritime boundary agreements are regarded as overwhelmingly political, with the notable exception of the agreement between Argentina and Chile.³¹

30. It is said that Italy settled for less than full effect for its islands in exchange for a wider package on various political and economic questions, including Italian fishing in exchange for one billion lire per year. *See Agreement Relating to the Delimitation of the Continental Shelf, Aug. 20, 1971, Italy-Tunis., I Can. Annex (1983).*

31. The agreement followed the Beagle Channel Arbitration, Argentina's rejection of the result, fears of armed conflict, and mediation by the Vatican. Its title is

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In addition to the difficulty of isolating political considerations from other considerations affecting maritime boundaries, one must add the difficulty of accumulating relevant data on political factors. Virtually every boundary agreement is described, often in its preamble, as designed to foster good relations between the parties.³² Yet governments may be reluctant to state publicly that for reasons of good relations they accepted a less favorable boundary than they might otherwise have obtained.³³ Governments could almost never be expected to assert that they received more because they had greater overall leverage in the bilateral relationship.³⁴

Treaty of Peace, Friendship and Maritime Delimitation. The treaty was submitted to a plebiscite in Argentina. Agreement between the Government of Argentina and the Government of Chile Relating to the Maritime Delimitation between Argentina and Chile, Nov. 29, 1984, Arg.-Chile, 24 I.L.M. 1 [hereinafter Argentina-Chile Agreement].

32. It might be noted that maritime boundary lines are frequently simplified by reducing the number of turning points, using a long line perpendicular to the general direction of the coast, or in other ways. The primary reason is to simplify compliance and enforcement. In order to avoid problems with inadvertent violations by fishermen, Chile, Ecuador, and Peru agreed to permit the neighboring state's national to fish in a ten-mile zone on either side of the maritime boundary beyond twelve miles from the coast. Agreement between the Government of Chile and the Government of Peru Relating to the Maritime Boundary between Chile and Peru, Aug. 18, 1952, Chile-Peru, Limits in the Seas, No. 86 (1979) [hereinafter Chile-Peru Agreement]; Agreement between the Government of Ecuador Relating to the Maritime Boundary between Peru and Ecuador, Aug. 22, 1985, Peru-Ecuador, Limits in the Seas, No. 88 (1979) [hereinafter Peru-Ecuador Agreement].

33. There are exceptions. The rapporteur of the France-Monaco treaty is quoted as stating to the French Senate, "Because of the close and exceptional nature of French-Monégasque relations, France has accepted provisions that the rules of international law did not oblige it to accept." The reference was to the Monégasque relations, France has accepted provisions that the rules of international law did not oblige it to accept. The reference was to the Monégasque corridor leading out into the Mediterranean in a shore. See Maritime Delimitation Agreement between Monaco and France, Feb. 16, 1984, Fr.-Monaco, No. 8-3, J.O. 6 July 1985, p. 11,600 (French) [hereinafter Monaco-France Delimitation Agreement]. Some readers of the opinions in the North Sea Continental Shelf cases, *supra* note 11, and the Guinea-Guinea-Bissau arbitration might question the statement. Award of 14 February 1985 of the Arbitration Tribunal for the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, 25 I.L.M. 252 (English translation of official French text) [hereinafter Guinea-Guinea-Bissau Award]. Senegal was no less generous to The Gambia. See Agreement between The Gambia and the Republic of Senegal, June 4, 1975, Gam.-Senegal, Limits in the Seas, No. 85 (1979) [hereinafter Gambia-Senegal Agreement]. Norway may have accepted a result that gave Iceland all of its 200-mile zone in part because Iceland is highly dependent on fishing. See Agreements between Iceland and Norway Establishing Maritime Boundaries between Iceland and Jan Mayen (1) Agreement Concerning Fishery and Continental Shelf Questions, May 28, 1980, Ice.-Nor., Official Gazette C9/1980 [hereinafter Iceland-Norway Agreement].

34. Two authors suggest that the relative strength of the parties was a factor

B. Related Accommodations

A further analytical difficulty relates to the question of when a factor is deemed to have influenced the location of the boundary. The easy case is one in which the actual location of the boundary represents the accommodation of the interest concerned, for example where a boundary follows a navigation channel. A more difficult problem arises when the interest of a state is accommodated not by adjusting the position of the boundary, but by concurrent agreement that imposes an obligation on the other state with respect to areas on the latter's side of the boundary.

It seems reasonable to assume that in such cases the interest did indeed influence the location of the boundary in the sense that agreement might not have been reached on such a boundary absent the related accommodation. For example, a state concerned about navigation rights in a channel that is closer to its neighbor's coast than its own might prefer to use the channel as the boundary, but might in some circumstances settle for an equidistant line boundary in exchange for treaty guarantees of free navigation. That same state presumably would resist an equidistant line boundary absent related navigation guarantees.

The relationship between boundaries and related accommodations is sometimes overlooked in analyses of maritime boundary law because it does not form part of the formal jurisprudence. The reason for this is that the International Court of Justice and arbitral tribunals have not been asked by the parties to fashion a broader boundary region regime that accommo-

in determining the location of the line. Its perception of Indian power may have influenced the Maldives government not to argue that Minicoy Island should be given reduced effect. See *Agreement between India and Maldives on Maritime Boundary in the Arabian Sea and Related Matters*, Dec. 28, 1976, *India-Maldives, Limits in the Seas*, No. 78 (1978) [hereinafter *India-Maldives Maritime Agreement*]. The delimitation line in the Bay of Biscay, more favorable to France than an equidistant line, was concluded at a time when Spain, under Franco, may have been in a somewhat weaker position diplomatically. See *Conventions between France and Spain (1) Concerning the Delimitation of the Territorial Sea and Contiguous Zone and (2) Concerning the Delimitation of the Continental Shelf of the Bay of Biscay*, Jan. 25, 1974, *Fr.-Spain*, (U.N. Legislative Series) U.N. Doc. No. ST/LEG/SER/B/19, 395 (1980) (France-Spain).

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dates their interests. Determining the location of a maritime boundary has generally been the sole means at the disposal of judges and arbitrators for accommodating relevant interest.³⁵

C. Effect of Political Factors

It is often difficult to discern what, if any, effect political considerations had on the location of an agreed maritime boundary.³⁶ A state's desire to maximize the areas subject to its jurisdiction and its interest in achieving agreement on a maritime boundary may well conflict. It stands to reason that if dispute avoidance is a primary purpose for seeking agreement, then a government is unlikely to maintain a position on the location of the boundary that itself stimulates a dispute. This proposition is, however, difficult to document from public sources.

Authors with knowledge of the factors influencing the U.S. decision to give full effect to Aves Island in the delimitation agreement with Venezuela point out that "as a political matter, there was little to gain and potentially much to lose in asserting a broader U.S. boundary interest, particularly in light of the marginal resource interest in the area."³⁷ One is struck by the comment that "France was so accommodating as to allow Australia to use Middleton Reef, a low-tide elevation 125 nautical miles offshore, as a basepoint" for determining the location of the equidistant line.³⁸ One of the reasons cited for Norwegian

35. The Iceland-Norway Conciliation Commission recommended a joint development zone with respect to the continental shelf. It should be noted that the Commission included prominent Icelandic and Norwegian diplomats and made a unanimous recommendation as requested. See *Iceland-Norway Agreement*, *supra* note 33, at C9; Evensen, *La Délimitation du Plateau Continental entre la Norvège et l'Islande dans le Secteur de Jan Mayen*, 27 *Ann. Fr. Dr. Int.* 711 (1981).

36. Political factors may sometimes influence even technical questions, such as the issue of which chart to use to depict the agreed boundary. National prestige may account for the fact that both Italian and Yugoslav charts were used by the parties, giving rise to differences in numerical identification and location of points. See *Agreement between Italy and Yugoslavia Concerning the Delimitation of the Continental Shelf between the Two Countries*, Jan. 8, 1968, *Italy-Yugo., Gazz. Uff., Supp.* to No. 302 of 29 Nov. 1968 (Italy).

37. Feldman & Colson, *The Maritime Boundaries of the United States*, 75 *AM. J. INT'L L.* 729, 747 (1981). One notes that the U.S. did more than just avoid a fight; it negotiated a treaty giving Venezuela what it wanted, to the chagrin of some of Venezuela's other neighbors. Two additional factors are potentially relevant. First, the U.S. had a general practice of giving full effect to islands in agreements applying equidistance. Second, Venezuela concluded its agreements with the U.S. and The Netherlands at the same time.

38. *Agreement on Marine Delimitation between the Government of Australia*

acceptance of a full 200-mile zone for Iceland was avoidance of a fishing dispute over capelin.³⁹ The boundary studies note Indonesia's generally accommodating attitude toward the location of its maritime boundaries with its neighbors.⁴⁰ It is not clear whether the fact that most of the joint development zone falls on the Japanese side of a hypothetical equidistant line with South Korea is related in some measure to historical problems in Japanese-Korean relations.

In those situations in which the desire for agreement outweighs actual or potential interest in areas that might be disputed, a state is likely to propose a boundary primarily with a view to facilitating negotiation. The proposal therefore is likely to be one that the negotiating partner would regard as acceptable, at least in principle.

In theory, all one need do is split the pie (that is the areas of overlapping jurisdiction) in half. In practice, geographic characteristics of the respective coasts and their geographic relationship to each other make delimitation a more difficult task even where states are not focusing on particular resources or areas.

The case of delimitation between relatively small islands usually presents the most notable exception. There an equidistant line will often halve the pie quite nicely. Thus it is not surprising that equidistant lines between islands have been used extensively in deeper parts of the Caribbean Sea and Pacific Ocean.

A rarer exception arises where relatively regular coasts of adjacent states face in the same general direction. In that case, either an equidistant line or a line perpendicular to the general direction of the coast (in effect an equidistant line modified to ignore coastal irregularities) will also often halve the pie quite nicely. Given the great depths off the Pacific coast of South America, rendering disputes over specific resources in seaward regions less likely, and the political desire of the states con-

and the Government of the French Republic, Jan. 4, 1982, Austl.-Fr., 1983 Austl. T.S. No. 2.

39. Iceland-Norway Agreement, *supra* note 33.

40. *See, e.g.*, the discussion of political strategic, and historical considerations in the Agreement between Australia and Indonesia Establishing Certain Seabed Boundaries, May 18, 1971, Austl.-Indon., 974 U.N.T.S. 307 (1975) [hereinafter Australia-Indonesia Seabed Agreement].

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cerned to maintain solidarity in support of their new and controversial claims of 200-mile zones, it is not surprising that this general type of approach was used by Chile, Ecuador and Peru in the 1952 Santiago Declaration, albeit in the somewhat unusual form of parallels of latitude that are not precisely perpendicular to the general directions of the coasts at the land frontiers.⁴¹

What this indicates is that equidistance or some simple equivalent is likely to be used where the desire to agree on both sides is stronger than the interest in maximizing claims, where specific resources or areas are not a major issue, and where the coastal characteristics are such that the resultant division of overlapping claims seems fair. In other situations, it cannot be asserted either that the use of equidistance necessarily reveals the existence of a dominant political interest in reaching agreement on the part of one or both parties or that the failure to use equidistance necessarily represents the absence of a dominant political interest in reaching agreement on the part of at least one of the parties. The reason is that in those situations, the question of fairness is more complex; equidistance may well represent a victory for one party and a defeat for the other.

D. Legal Factors

Whatever its relative interest in achieving rapid agreement, a government must take into account the effect of any proposals it makes on its relations with its neighbors. Powerful states may be loath to appear like bullies. Strong and weak alike have an interest in credibility. Unless a state is prepared to expend unrelated resources (whether as carrots or sticks) to obtain a favorable maritime boundary, its proposal must be grounded in more than unrestrained self-interest. The search for a platform of principle will entail, at least in part, a search for a proposal that has a plausible legal and equitable foundation.

In this context, as in many others, governments can be expected to consult legal sources that are likely to be regarded as authoritative or at least persuasive by both parties. Thus, to some degree, maritime boundary agreements may be analyzed in

41. One is tempted to wonder whether the use of parallels of latitude may have been related to the fact that the jurisdiction asserted in the declaration extended "not less than" 200 miles from the coast. See Chile-Peru Agreement, *supra* note 32; Peru-Ecuador Agreement, *supra* note 32.

terms of the chronology of major developments in the law of maritime delimitation as articulated by multilateral conferences and international tribunals.

Following the entry into force of the Continental Shelf Convention,⁴² the United Kingdom and other North Sea states set about implementing the Convention, including the delimitation rule in Article 6. A few years later, however, in direct response to this effort, the International Court of Justice in the *North Sea Continental Shelf* cases refused to apply Article 6 to a nonparty, and enunciated a broader set of equitable principles, with substantial emphasis on the nature of the continental shelf as a natural prolongation of the land territory of the coastal state.⁴³

The impact of the Court's dictum was unmistakable.⁴⁴ The United States for the first time made clear its view that the maritime boundary in the Gulf of Maine should place all of Georges Bank on the U.S. side.⁴⁵ Australia was driven by the "natural prolongation" language in the opinion to seek, and in large measure obtain, a continental shelf boundary extending to the deep trench off the Indonesian coast.⁴⁶ The summary report on North Europe notes that the 1969 opinion marks the turning

42. Convention on the Continental Shelf, *supra* note 24.

43. North Sea Continental Shelf cases, *supra* note 11.

44. Perhaps its most wide-ranging effect is the new alternative definition of the continental shelf in the U.N. Convention on the Law of the Sea as the natural prolongation of the land territory for a state extending to the outer edge of the continental margin. U.N. Convention on the Law of the Sea, *supra* note 2, at 10.

45. The position taken by the U.S. in 1970 diplomatic discussions was that "a boundary in accordance with equitable principles should follow the line of deepest water through the Northeast Channel, which would bring all of Georges Bank under U.S. jurisdiction." Feldman & Colson, *supra* note 37, at 755. For its part, Canada, which had consistently emphasized equidistance in the Gulf of Maine, later extended its claim to give reduced effect to Cape Cod and associated islands, relying on the opinion in the Anglo-French arbitration. It is possible this move was a largely tactical one related to the forthcoming litigation regarding the Gulf of Maine; it is also possible this move was not unrelated to the dispute regarding delimitation with respect to the French islands of St. Pierre and Miquelon off the Canadian coast.

46. The analysis of the 1972 Australia-Indonesia seabed boundary agreement points out that not much was known about the resource potential of the seabed areas in question at the time. See Agreement between Australia and Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, Oct. 9, 1972, Austl.-Indon., 974 U.N.T.S. 319 (1972) [hereinafter Australia-Indonesia Timor and Arafura Seabed Agreement]. The study does not advert to contemporaneous rumors that Indonesia reaped certain political benefits in connection with this agreement.

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point from equidistance to equitable principles in the region. As tribunals made clear in subsequent opinions, any legal presumption in favor of equidistance, if it ever existed, was gone.

The International Court of Justice subsequently retreated from natural prolongation in the *Tunisia-Libya*⁴⁷ case and especially in the *Libya-Malta* case.⁴⁸ The provisional continental shelf agreement between Australia and Indonesia establishing a zone of cooperation in the so-called Timor Gap⁴⁹ as well as their provisional fisheries surveillance and enforcement arrangement⁵⁰ reveal a substantial retreat from the influence of geomorphology in the earlier continental shelf agreement.

The impact of the opinion in the *Guinea-Guinea-Bissau* arbitration is not limited to Africa. A specific reaction to that decision is noted in the study of the Colombia-Honduras delimitation.⁵¹

The foregoing are mere illustrations of the fact that while states are free to ignore their legal rights *inter se* in reaching agreement with each other, legal sources may well influence their claims and expectations, sometimes decisively.⁵²

47. *Tunisia-Libya Continental Shelf Case*, *supra* note 10 .

48. *Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. Rep. 13 [hereinafter *Libya-Malta Continental Shelf Case*].

49. *Treaty between Australia and Indonesia on the Zone of Cooperation in an Area between East Timor and Northern Australia*, Dec. 11, 1989, Austl.-Indon., 29 I.L.M. 469.

50. *Memorandum of Understanding between Indonesia and Australia Concerning Fisheries Surveillance and Enforcement Arrangement*, Oct. 29, 1981, Austl.-Indon. (unpublished).

51. *See Maritime Delimitation Treaty*, Aug. 2, 1986, Colom.-Hond., (Rep. 2-4), reprinted in *INTERNATIONAL MARITIME BOUNDARIES*, *supra* note 20, at 502.

52. One might compare the comments of knowledgeable American and British foreign ministry lawyers in this regard. The former state that U.S. maritime boundary treaties "are not agreements of maximum advantage for either side. Nor are they driven by particular theories of international law. They are negotiated agreements based on mutual interest and applying methodologies suitable to expressing that interest in the particular circumstance" *See Feldman & Colson*, *supra* note 37, at 742. The latter (Anderson) states that the Irish-United Kingdom agreement "has been cited as a model for reaching pragmatic solutions to previously intractable boundary disputes. Geographical and legal factors played an important part in a successful effort to reach an equitable solution, acceptable to the respective governments and legislatures." *Agreement on the Delimitation of the Continental Shelf between the Two Countries*, Nov. 7, 1988, Ir.-U.K., U.K.T.S. No. 20 (1990) [hereinafter *Ireland-United Kingdom Agreement*].

E. Effect on Third States

A state faced with the negotiation of several maritime boundaries will need to consider the effect of its approach to one boundary on the others. Thus, for example, the United States has demonstrated a consistent practice of giving full effect to islands in agreements in which equidistance is used.

At the simplest level — influenced in part by debates of the issue during the Third U.N. Conference on the Law of the Sea — the text of delimitation agreements may expressly recite the reliance of the parties on equitable principles⁵³ or on equidistance.⁵⁴ Governments may regard such statements as a means of reinforcing their position of principle with respect to a third state; they may also be attempting to deal with arguable inconsistencies between the result they accepted in the agreement and the result they propose elsewhere.

In an effort to retain flexibility, some states will wish to avoid too precise or consistent an articulation of the underlying rules. Legal and advocacy considerations apart, it is not surprising that while Canada, in the Gulf of Maine dispute, was adhering fairly closely to an equidistance approach, it articulated the underlying rules in terms of equitable principles and relevant circumstances. At the time, other Canadian maritime boundaries remained to be determined. France and the United States have taken similar approaches in explaining the various equidistance boundaries that they negotiated.

53. For example, the Dominican Republic-Venezuela agreement refers to equitable principles, arguably reflecting Venezuela's underlying position in other contexts. *See Treaty on the Delimitation of Marine and Submarine Areas*, Mar. 3, 1979, Dom. Rep.-Venez., G.O., No. 1634, Extraordinario July 28, 1980 (Venez.) [hereinafter Dominican Republic-Venezuela Treaty]. The Turkey-U.S.S.R. agreement similarly refers to equitable principles, presumably reflecting the underlying position of both parties in other areas, including the Turkish position with respect to Greece in the Aegean. *See Agreement on the Delimitation of the Continental Shelf in the Black Sea*, June 23, 1978, Turk.-U.S.S.R., T.C. Resmi Gazete No. 17226 (1981) (Turkey-U.S.S.R.).

54. For example, the agreement between Greece and Italy refers to the "principle of the median line" and "mutually approved minor adjustments" thereto. Both parties may have had other delimitations in mind where they favor equidistance and full effect for islands. It is interesting that the agreement gives reduced effect to some islands. *See Agreement on the Delimitation of the Zones of the Continental Shelf Belonging to Each of the Two States*, May 24, 1977, Greece-Italy, Limits in the Seas, No. 96 (1982) [hereinafter Greece-Italy Delimitation Agreement].

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Others may wish to use one or more agreements to influence an outstanding delimitation either directly or indirectly. The classic example of this approach is the equidistant line drawn by Denmark and the Netherlands as part of a more general implementation of the equidistance principle in Article 6 of the Convention on the Continental Shelf in the North Sea that included, in addition to these two states, Norway and the United Kingdom. It represented not only an attempt to reinforce the use of equidistance in the North Sea but, by extending the line to a point equidistant from their coasts and the German coast, an effort to apply equidistance directly to their respective boundaries with Germany. Similarly, the Denmark-U.K. and Netherlands-U.K. equidistant lines in practice met at a tri-junction point, a result inconsistent (except perhaps in mathematical theory) with Germany's view that its continental shelf extended to the middle of the North Sea.

The fact that this effort failed has not necessarily deterred others. In reaching their continental shelf delimitation agreement with each other, Ireland and the United Kingdom "had common cause in opposing claims to part of the area by third States," presumably Denmark and Iceland.⁵⁵ The equidistant line between Sicily and Tunisia was drawn as if Malta did not exist.⁵⁶

Agreements delimiting areas claimed by third states are not, however, common. There is ample evidence of restraint. Numerous bilaterally drawn boundaries are terminated short of the tri-junction point with a third state even in the absence of any known dispute.⁵⁷

In both the *Tunisia/Libya*⁵⁸ and *Libya/Malta*⁵⁹ cases, the Court took care to protect the interests of a concerned third state that, in each case, was unsuccessful in its efforts to inter-

55. Ireland-United Kingdom Agreement, *supra* note 52, at 20.

56. Agreement of the Delimitation of the Continental Shelf between Two Countries, Aug. 20, 1971, Italy-Tunis, Limits in the Seas, No. 89 (1980). The boundary terminates in the southeast at a point roughly equidistant between Malta and the Italian island of Lampedusa; the latter was accorded only a thirteen-mile zone as against Tunisia.

57. An example is the Greece-Italy boundary, which stops short of the tri-junction points with Albania in the north and Libya in the south. Greece-Italy Delimitation Agreement, *supra* note 54.

58. Tunisia-Libya Continental Shelf case, *supra* note 10.

59. Libya-Malta Continental Shelf Case, *supra* note 48.

vene. In the first case, the Court did not specify the northeast terminus of the final segment of the boundary running in the direction of Malta. In the second case, the Court did not specify a boundary between the parties in areas claimed by Italy.

Efforts at indirectly influencing the boundaries with third states nevertheless persist:

- * the boundary studies suggest that Venezuela embarked on a strategy of entering into delimitation agreements giving Aves Island full, or substantial effect in hopes of influencing other governments to do the same, choosing to conclude the initial agreements with The Netherlands and the United States simultaneously,⁶⁰ and with France two years later,⁶¹
- * Colombia appears to have attempted to structure its delimitation agreements with Costa Rica,⁶² Honduras⁶³ and Panama⁶⁴ to be consistent with its position with regard to the use of the 82 degrees W meridian under a 1930 exchange of notes in connection with its dispute with Nicaragua;
- * Denmark and Sweden apparently felt that agreeing to give full effect to Bornholm in their agreement with each other would strengthen the Danish position vis-à-vis the GDR and Poland and the Swedish position in support of full effect for Gotland vis-à-vis Poland and the U.S.S.R.;⁶⁵

60. Delimitation Treaty between Netherlands and Venezuela, Dec. 15, 1978, Neth.-Venez., Tractenblad van Het Koninkrijk der Nederlanden, Jaargang 1978, No. 61.

61. Delimitation Treaty between Venezuela and France, July 17, 1980, Fr.-Venez., G.O., No. 3026, Jan. 28, 1983 (Venez.).

62. Treaty on the Delimitation of Marine and submarine Areas and Maritime Cooperation, Mar. 17, 1977, Colom.-Costa Rica, Limits in the Seas, No. 79 (1978).

63. Maritime Delimitation Treaty, Aug. 2, 1986, Colom.-Hond., U.N., Oficina de Océánicos y del Derecho del Mar. Boletín No. 10, (Nov. 1987).

64. Treaty on the Delimitation of Marine and Submarine Areas, Nov. 20, 1976, Colom.-Pan., Limits in the Seas, No. 79 (1978). Colombia's recognition of Panama's historic claim to the Gulf of Panama was apparently phrased not only to protect its nonrecognition of Venezuela's claim in the Gulf of Venezuela but, according to the boundary study, to advance Colombia's position that Venezuela's claim must be recognized by Colombia in order to influence the delimitation.

65. Eric Franckx, *Baltic Sea Maritime Boundaries*, in INTERNATIONAL MARITIME BOUNDARIES 345, *supra* note 20. See also Agreement between Denmark and Sweden on the Delimitation of the Continental Shelf and Fishing Zones, Nov. 9, 1984, Den-

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- * in advance of reaching agreement on a precise boundary, Brazil and Uruguay issued a joint declaration supporting the use of equidistance. This may have been intended to counter an Argentine desire to duplicate the practice on the west coast of South America and use a parallel of latitude in its delimitation with Uruguay.⁶⁶

The tribunal in the *Guinea-Guinea-Bissau* arbitration⁶⁷ devoted a great deal of attention to the problem of cut-off or enclavement, which occurs when a state's boundaries with neighboring (usually adjacent) states join at a point off its coast. This problem can be avoided if the boundaries on either side are coordinated so as to avoid a cut-off effect. The difficulty is that only the boundary between the parties to the arbitration is at issue. By emphasizing the need to avoid enclavement, determining the broad general direction of the coast with reference to the coasts of the immediate neighbors of both parties, and establishing the longest seaward segment of the boundary as a perpendicular to that general direction, the tribunal in effect was taking an approach of broader utility in West Africa, and appears to have been aware of this.

F. Sovereignty Disputes

In principle, all areas of land, including small islands and rocks above water at high tide, are entitled to some maritime jurisdiction.⁶⁸ If strict equidistance is the method of delimitation, they will have the same effect as promontories on much larger islands or longer continental coasts. Accordingly, the

mark-Sweden, *Sveriges överenskommelser med främmande makter* 1985:54 (Sweden). Neither party was completely successful.

66. Agreement Relating to the Maritime Delimitation between Brazil and Uruguay, July 21, 1972, Braz.-Uru., 1120 U.N.T.S. 133. Given the generally northeastward direction of the coast, the use of a parallel of latitude by Argentina and Uruguay would either have disadvantaged Brazil were such a parallel to be used between Brazil and Uruguay, or would have resulted in a substantial enclavement of the Uruguayan zone between the parallel to the south and an equidistant line with Brazil to the north.

67. *Guinea-Guinea-Bissau Award*, *supra* note 33.

68. See U.N. Convention on the Law of the Sea, *supra* note 2, art. 21. That article specifies by way of exception "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

existence of sovereignty dispute over insular or other coastal territory in an area requiring delimitation is likely to affect the delimitation agreement including, in many cases, the boundary itself.

If only one party to the negotiations is affected, the other may be reluctant to get involved. For example, the boundary drawn by Australia and France is terminated to the east at a point that avoids involving Australia in the territorial dispute between France and Vanuatu over certain islands controlled by France and also claimed by Vanuatu.⁶⁹ The same problem has apparently delayed Fiji's ratification of its delimitation agreement with France.⁷⁰ The terminus of the Atlantic maritime boundary between Trinidad and Tobago and Venezuela was shifted slightly to the north of a hypothetical tri-junction point with Guyana in order to avoid involving Trinidad and Tobago in any dispute between Guyana and Venezuela.⁷¹

If the sovereignty dispute is between the two states establishing the maritime boundary, they may use the same technique employed in the Australia-France agreement, namely terminating the boundary at a point where they agree that the disputed territory would not influence the location of the boundary. For example, this approach has been used with respect to disputed islands by Japan and South Korea⁷² as well as France and Mauritius.⁷³ It was also used by Canada and the United States in the Gulf of Maine, where the landward terminus of the boundary the Chamber was asked to draw was located at sea in a manner designed to avoid the issue of sovereignty over Machias Seal Island and North Rock.⁷⁴ Italy and Yugoslavia's

69. Agreement on Marine Delimitation, Jan. 4, 1982, Austl.-Fr., 1983 Austl. T.S. No. 2.

70. Agreement Relating to the Delimitation of an Economic Zone, Jan. 19, 1983, Fr.-Fiji, (Rep. 5-6), reprinted in INTERNATIONAL MARITIME BOUNDARIES, *supra* note 20, at 995.

71. Treaty on the Delimitation of Marine and Submarine Areas, Apr. 18, 1990, Trin. & Tobago-Venez., G.O., No. 34745, July 23, 1991 (Venez.).

72. Agreement Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf, Jan. 30, 1974, Japan-S. Korea, Limits in the Seas, No. 75 (1979).

73. Agreement on the Delimitation of the French and Mauritian Economic Zones, Apr. 2, 1980, Fr.-Mauritius, Limits in the Seas, No. 75 (1979).

74. Treaty to Submit to Binding Dispute Settlement on the Delimitation of the Maritime Boundary in the Gulf of Maine Area, Mar. 29, 1979, Can.-U.S., 23 I.L.M.

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maritime boundary originally stopped short of the Gulf of Trieste because the land border in the Trieste region was not settled.⁷⁵ It appears that the extensive delimitations agreed by the Irish Republic and the United Kingdom do not include delimitations measured from Northern Ireland.⁷⁶

Another approach is to resolve the sovereignty dispute and the maritime boundary simultaneously. Perhaps the best known examples are the treaty between Italy and Yugoslavia settling both their land and territorial sea boundary in the Trieste region⁷⁷ and the Treaty of Peace, Friendship, and Maritime Delimitation between Argentina and Chile following the Beagle Channel arbitration, Argentina's rejection of the award, and mediation by the Vatican.⁷⁸ There are others.⁷⁹ In some cases, the maritime boundary is expressly identified as the line dividing sovereignty over islands as well;⁸⁰ there may even be spe-

1197. It might also be noted that Art. 298(1)(a)(i) of the U.N. Convention on the Law of the Sea, *supra* note 2, permits a party to exclude from arbitration, adjudication or conciliation a maritime boundary dispute "that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory." *Id.*

75. Agreement on the Delimitation of the Continental Shelf between the Two Countries, Jan. 8, 1968, Italy-Yugo., 7 I.L.M. 547.

76. Ireland-United Kingdom Agreement, *supra* note 52.

77. Treaty between Italy and Yugoslavia, Nov. 10, 1975, Italy-Yugo., Gazz. Uff., Supp. to No. 77 of Mar. 21, 1977 (Italy) [hereinafter Italy-Yugoslavia Treaty].

78. Argentina-Chile Agreement, *supra* note 31, at 11.

79. The following are some examples. Because of its desire not to inhibit friendly relations, the United States abandoned its insular sovereignty claims in its delimitation agreements with the Cook Islands and with New Zealand with respect to Tokelau. *See* Treaty on the Delimitation of the Maritime Boundary between the United States of America and the Cook Islands, June 11, 1980, Cook Islands-U.S., T.I.A.S. No. 10774; Treaty on the Maritime Boundary between Tokelau and the United States of America, Dec. 2, 1980, N.Z.-U.S., T.I.A.S. No. 10775. New Zealand acknowledged that Swains Island is part of American Samoa. Bahrain and Saudi Arabia simultaneously divided disputed islands. *See* Agreement Concerning Delimitation of the Continental Shelf, Feb. 22, 1958, Bahr.-Saudi Arabia, 409 (U.N. Legislative Series), U.N. Doc. ST/LEG/SER. B/16 (1974). The 1973 agreement between Australia and Indonesia settling the land boundary between Indonesia and Papua New Guinea (which Australia then represented) also settled a landward gap in the maritime boundary. Australia-Indonesia Certain Boundaries Agreements, *supra* note 19. North Korea and the U.S.S.R. simultaneously settled their boundary in the Tumen River and their territorial sea boundary. Soviet-Korea National Border Agreement, *supra* note 20. Interestingly, Abu Dhabi and Dubai simultaneously moved their land frontier and their previously agreed maritime boundary ten kilometers to the west. Offshore Boundary Agreement between Abu Dhabi and Dubai, Feb. 18, 1968, Abu Dhabi-Dubai, I Can. Annex 151 (1983) [hereinafter Abu Dhabi-Dubai Offshore Boundary Agreement].

80. The following are some examples: The division of sovereignty over islands

cific reference to islands that may emerge in the future.⁸¹ In some cases, the islands with respect to which sovereignty is resolved are given reduced effect in the maritime delimitation.⁸²

III. STRATEGIC FACTORS

A. Introduction

While it is reasonably clear that at least some maritime boundaries were influenced by security interests, those interests are almost never adverted to in the text of the agreement and only rarely, and then often obliquely, in related commentary of governments. In this connection, it should be borne in mind that defense ministries are often consulted as governments develop their maritime boundary positions.⁸³ At times those ministries are represented on negotiating delegations. It seems reasonable to conclude that, whatever the apparent factors influencing its location, the acceptability of the boundary may well be reviewed from a security perspective.

between Australia and Papua New Guinea under article 2 of the agreement is in part based on the seabed delimitation line. *See* Australia-Indonesia Certain Boundaries Agreements, *supra* note 19. The same approach was used by Abu Dhabi and Qatar. *See* Agreement on Settlement of Maritime Boundary Lines, Mar. 20, 1969, Qatar-U.A.E., 403 (U.N. Legislative Series) U.N. Doc. No. ST/LEG/SER.B/16 (1974).

81. *See* Agreement on the Delimitation of the Maritime Boundary in the Adaman Sea, Dec. 23, 1986, Burma-India, art. 5, 27 I.L.M. 1144 [hereinafter Burma-India Agreement].

82. Burma abandoned its claim to Narcondam Island and India did not insist on the maximum possible claims from either Narcondam Island or Barren Island. *See* Agreement on the Boundary in Historic Waters between India and Sri-Lanka, June 26-28, 1974, India-Sri Lanka, 13 I.L.M. 1442 [hereinafter India-Sri-Lanka Agreement]. In the agreement regarding Palk Strait and Bay, the island is not counted at all in the delimitation, and there is provision for access to the island for fishermen and pilgrims. The Iran-Saudi Arabia agreement limits the effect of the islands to twelve miles. *See* Agreement Concerning the Delimitation of the Boundary Line Separating Submarine Areas, Oct. 24, 1968, Iran-Saudi Arabia, 696 U.N.T.S. 189. It is not clear what influence a 1927 Icelandic letter reserving rights to the resources of Jan Mayen, prior to the formal Norwegian claim to Jan Mayen in 1929, had on the agreement to accord Iceland a full 200-mile exclusive economic zone in areas where the distance between the coasts is less than 400 miles, or on the Conciliation Commission's decision to establish a substantial joint management area with respect to seabed resources, mostly on the Jan Mayen side of that 200-mile line. Iceland-Norway Agreement, *supra* note 33.

83. In some cases, the navy is the primary internal source of charts, technical data, or maritime expertise.

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A number of economic and other factors dealt with in other chapters of this study may engage the perceived security interests of a particular state. In a narrow sense, the term "security" might refer to the right to conduct and, conversely, the right to restrict military activities at sea, principally by warships, coast guard vessels, and state aircraft. Yet even in that narrow sense, it is difficult to distinguish commercial navigation interests from security interests. Moreover, governments have asserted that the movement of international trade, and access to and control over mineral and hydrocarbon resources of the seabed, engage not only their economic but their security interests.⁸⁴ In the broadest sense, a state's efforts to accumulate friends and control the emergence or leverage of adversaries are fundamentally tied to its security.

B. Types of Security Concerns

Two different aspects of security are potentially affected by maritime delimitation. One is the desire of a state to exclude or control activities of foreign states off its coast that it perceives to be prejudicial to its security.⁸⁵ The other is the desire of a state to be able to ensure that its own or foreign activities that are important to its security may be conducted without foreign interference, including protection of its access to the open sea and communications by sea and air with foreign states.

Under the regimes set forth in the United Nations Convention on the Law of the Sea,⁸⁶ these interests are unquestionably affected in waters subject to the sovereignty of the coastal state, namely internal waters, archipelagic waters, and the territorial sea. That sovereignty is qualified by the right of innocent passage, which is subject to certain coastal state regulatory powers as well as the power to take measures to prevent passage that is not innocent and the power to suspend innocent passage outside straits. That sovereignty is also qualified by the right of ships

84. Soviet experts have spoken of environmental security, using the same Russian word that is used in "Security Council" and "Committee on State Security" (KGB). The cognates for "security" in many Romance languages may share the arguably broader meaning of "safety."

85. The political reality of this perception of security is to be distinguished from its substantive merits. Some might argue that, in certain situations, demagoguery, paranoia, or xenophobia are better explanations for the perception.

86. U.N. Convention on the Law of the Sea, *supra* note 2.

and aircraft to transit passage of straits and archipelagic sea lanes passage.

As the tribunal in the *Guinea-Guinea-Bissau* arbitration observed,⁸⁷ the continental shelf and the exclusive economic zone are not zones of sovereignty, but rather areas in which the coastal state exercises more limited sovereign rights and jurisdiction for specific purposes. These are identified in detail in the United Nations Convention. In particular, freedom of navigation and overflight are expressly protected in the provisions dealing with the exclusive economic zone as well as the continental shelf. There are nevertheless aspects of these regimes that states may perceive as affecting their security interests:

- * The United Nations Convention provides that artificial installations used for resource or other economic purposes are subject to coastal state control in the exclusive economic zone and on the continental shelf. The same is true of scientific installations as well as any other installations that may interfere with the exercise of the rights of the coastal state.⁸⁸
- * The coastal state largely has a free hand in determining where it will permit installations (and the safety zones around them) to be placed in its exclusive economic zone and on its continental shelf, subject to a somewhat narrowly phrased duty to avoid recognized sea lanes essential to international navigation,⁸⁹ supplemented in the U.N. Convention, by a general duty to avoid interference with navigation.⁹⁰ A neighboring state could be concerned about its

87. *Guinea-Guinea-Bissau Award*, *supra* note 33, at 124.

88. U.N. Convention on the Law of the Sea, *supra* note 2, arts. 60, 80, 81.

89. U.N. Convention on the Law of the Sea, *supra* note 2, art. 60, ¶ 7, repeating art. 5, ¶ 6 of the Convention on the Continental Shelf, *supra* note 24.

90. U.N. Convention on the Law of the Sea, *supra* note 2, arts. 56(3), 58, 78(2), 87. While Article 87 of the U.N. Convention includes among the express freedoms of the high seas the freedom to lay submarine cables and pipelines, this freedom is "subject to Part VI" dealing with the continental shelf. Pursuant to Part VI, Article 79, the coastal state duty not to impede the laying or maintenance of cables and pipelines is subject to its right to take reasonable measures for the exploration of the continental shelf, the exploration of its natural resources and the prevention, reduction, and control of pollution from pipelines. Moreover, the delineation of the course for the laying of pipelines on the continental shelf is subject to the consent of

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access routes.

- * The U.N. Convention accords the coastal state enforcement rights over foreign ships in its exclusive economic zone with respect to pollution in contravention of international standards or internationally approved coastal state standards (and, in limited circumstances such as dumping or ice-covered areas, unilateral coastal state standards). The complex and carefully balanced provisions of the Convention on this matter are sometimes omitted from national laws on the exclusive economic zone that nevertheless contain a generalized assertion of jurisdiction with respect to control of pollution.
- * The trend in the twentieth century has been one of expanding coastal state jurisdiction in both a geographic and a functional sense. This trend may continue, either in terms of a gradual coastal shift in the balance between coastal and other interests in the exclusive economic zone or in some other way. Governments concerned with protecting their access to the sea may consider it prudent to deal with that contingency. In this connection it remains unclear whether the United Nations Convention on the Law of the Sea will eventually receive widespread adherence and, in any event, precisely how it will be interpreted and exactly how much of a restraining influence it will be.

C. Exclusionary Interest

There is very little evidence of boundaries being drawn to reflect a security interest of the coastal state in excluding or controlling foreign activities off its coast.⁹¹ That security inter-

the coastal state.

91. It is said that strategic considerations influenced the strong position taken by Sweden in favor of full effect for Gotland in its negotiations with the U.S.S.R. Sweden eventually settled for seventy-five percent effect. Agreement on the Delimitation of the Continental Shelf and of the Swedish Fishing Zone and the Soviet Economic Zone in the Baltic Sea, Apr. 18, 1988, Swed.-U.S.S.R., 27 I.L.M. 295. It is possible that traditional Soviet sensitivity concerning the security of the Arctic coast, at times associated with the so-called sector principle, was a factor that encouraged the Soviet Union to regard the line set forth in the 1867 U.S.-Russia Convention ceding Alaska as the maritime boundary; north of the Bering Strait, the line follows a meridian of longitude due north into the Arctic Ocean. See Maritime Boundary Agreement, June 15, 1990, U.S.-U.S.S.R., 29 I.L.M. 941 (1990) [hereinafter U.S.-U.S.S.R. Boundary Agreement].

est is sometimes perceived in terms of proximity to the coast.⁹² An equidistant line, usually regarded as based exclusively on geographic factors, or some other line reasonably far from the coast might accordingly commend itself to some parties as an appropriate accommodation of their respective coastal security interests. Since the security factor is masked, it is difficult to tell whether it actually influenced the behavior of governments.

In the *Libya-Malta* case, the Court noted that the delimitation resulting from its judgement is "not so near to the coasts of either Party as to make questions of security a particular consideration in the present case."⁹³ The tribunal in the *Guinea-Guinea-Bissau* arbitration made a similar point, noting that security implications are avoided under its proposed solution by the fact that each state controls the maritime territories opposite its coasts and in their vicinity.⁹⁴ It may well be that governments, like these two tribunals, are more likely to test particular proposed results against this security concern than to shape a proposal specifically in response to this concern.

It is also sometimes difficult to tell whether a boundary drawn to maximize access to and from a naval base, for example, is not — at least in the territorial sea — also designed to maximize that state's control over foreign activities near the base. It is reported that Soviet strategic interests with respect to the main Pacific fleet naval base at Vladivostok produced a territorial sea boundary more favorable to the U.S.S.R. than a hypothetical equidistant line.⁹⁵ There can be no doubt that access to and from the base was a primary strategic concern. It is

92. Malta associated security interests with proximity to the coast in its arguments before the International Court of Justice regarding the delimitation of its continental shelf with Libya. See *Libya-Malta Continental Shelf Case*, *supra* note 48. Guinea-Bissau did much the same in its arbitration with Guinea-Guinea-Bissau Arbitration, *supra* note 33. The Truman Proclamation on the Continental shelf, *supra* note 6, might suggest an analogous view of security (however unlikely the provenance of that limited vision from the world's dominant maritime power might appear to some observers). The preamble includes, as the final item in the list of justifications for the assertion of jurisdiction over the resources of the continental shelf, the statement, "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." *Id.*

93. *Libya-Malta Continental Shelf Case*, *supra* note 48, ¶ 51.

94. See *Guinea-Guinea-Bissau Award*, *supra* note 33, at 251.

95. *Soviet-Korea National Border Agreement*, *supra* note 20.

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not clear that this was the only strategic concern.

D. Access to and from the Open Sea

There is ample evidence that concerns about access to and from the sea have influenced maritime boundaries either directly by altering or confirming their location or indirectly by prompting simultaneous agreement on substantive provisions protecting navigation rights. The summary report with respect to the Baltic Sea notes that only navigation interests were strong enough to prevail over the general use of equidistance in that region.

It is often difficult to tell whether a state's preoccupation with navigation derives primarily from economic or security concerns. In this connection, it must be borne in mind that security concerns regarding access relate not only to the naval and air forces of the particular coastal state, but to access for the forces of friendly states and, beyond that, to the protection of trading and communications routes fundamental to the economy of the state.

One would expect most explicit concerns with naval access to be manifested by major naval powers. It is nevertheless interesting that Soviet boundaries figure prominently in the references in the boundary studies to maritime boundaries configured in response to concerns about naval access.⁹⁶ This may reflect the circumstances of Soviet geography, the historic Russian and

96. *See Id.*; *see also* Agreement Concerning the Sea Frontier in the Varangerfjord of 15 February 1957 and Protocol of 29 November 1957, Feb. 15, 1957; Nov. 29, 1957, Nor.-U.S.S.R., Limits in the Seas, No. 17 (1970) in the "strategically and politically sensitive" area of the Varangerfjord, where the "boundary runs, broadly speaking, across the broad mouth of the Gulf leaving plenty of water on either side for access from the fjord to the Barents Sea"; *see also* Agreement Concerning the Boundaries of Sea Areas and of the Continental Shelf in the Gulf of Finland, May 25, 1966, Fin.-U.S.S.R., 566 U.N.T.S. 37, where the territorial sea boundary in the Gulf of Finland established by the 1940 and 1947 peace treaties between the parties was heavily influenced by Soviet security concerns, and where Gogland (Suursaari) Island was given only limited effect to safeguard free navigation north of it. The elaborate provisions in the Turkey-Soviet Union territorial sea agreement for range markers and for situations where the markers are seen as overlapping (possibly causing a vessel to cross the line inadvertently) presumably reflect an underlying concern about protecting navigation in an area of zealous coastal security enforcement. *See* Protocol Concerning the Territorial Sea Boundary Between the Two States in the Black Sea, Apr. 17, 1973, Turk.-U.S.S.R., Limits in the Seas, No. 59 [hereinafter Turkey-U.S.S.R. Protocol].

Soviet preoccupation with access to the sea, greater emphasis on security concerns in Soviet policy-making, or a tendency by outside observers to emphasize security factors in their analyses of Soviet motives.

The Soviet Union is not, however, alone. While it is common in connection with base rights agreements to provide for rights of access through the waters and air space of the host state, the Cyprus-United Kingdom agreement went further. It established lines extending seaward from the U.K. bases between which Cyprus may not claim territorial waters.⁹⁷ The United States' desire to protect transit routes to and from San Diego, where it has a major naval base, is cited as a factor supporting the decision to give full effect to islands in a delimitation based on equidistance.⁹⁸ France made strategic arguments, particularly regarding access to the port of Cherbourg, in the *Anglo-French* arbitration. In effect, the tribunal gave priority to French interests in navigation and security between the eastern and western parts of the English Channel.⁹⁹

States may desire to ensure that specific navigation routes are within their own waters, or at least outside the waters of the neighboring state. The Soviet, U.K., U.S., and French examples already cited are generally of this type. There are, however, others.

The practice of dividing the deep channel continues to be used close to shore. This may be done when the channel extends seaward from a land boundary in a river: the inner part of the line used in the *Guinea-Guinea-Bissau* arbitration follows an

97. Treaty Concerning the Establishment of the Republic of Cyprus, Annex A, Aug. 16, 1960, Cyprus-U.K., 382 U.N.T.S. 10 [hereinafter *Cyprus Treaty*].

98. Exchange of Notes Effecting Agreement on the Provisional Maritime Boundary, Nov. 24, 1976, Mex.-U.S., T.I.A.S. 8805 [hereinafter *Mexico-United States Exchange of Notes*]; Treaty about Maritime Boundaries, May 4, 1978, Mex.-U.S., 17 I.L.M. 1073.

99. Agreement on the Shelf Boundary in the Eastern Channel and Southern North Sea, June 24, 1982, Fr.-U.K., U.K.T.S. No. 20 [hereinafter *United Kingdom-France Shelf Boundary Agreement*]. While navigation factors apparently did not affect the negotiated boundary as such, in general the east-west lane of the traffic separation scheme is on the U.K. side while the west-east lane is on the French side. Agreements between France and United Kingdom Relating to the Delimitation of the Continental Shelf in the English Channel, July 10, 1975, U.K.T.S. No. 20 (1983).

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“historic” boundary using the thalweg.¹⁰⁰ It may also be done when the channel lies between the opposite coasts of the parties: the Indonesia-Singapore boundary generally follows the deep draught tanker route, even extending within the Indonesian archipelagic baselines at one point.¹⁰¹ In other cases, the channel may be of principal concern to one state. The boundary between the Federal Republic of Germany and the former German Democratic Republic in Lübeck Bay located the entire shipping route to the FRG ports on the FRG side.¹⁰²

On occasion, a state may limit its objectives to ensuring that a navigation route or other areas, although not within its own waters, are outside the waters, or at least the territorial sea, of the neighboring state.¹⁰³ The Argentina-Chile treaty limits the territorial sea, as between the parties, to three miles in some areas.¹⁰⁴ The Australia-Papua New Guinea treaty limits the territorial sea of certain islands to three miles, and in other respects limits the territorial seas and archipelagic waters of the parties.¹⁰⁵ The agreement between Poland and the former German Democratic Republic is specifically designed to protect the northern access route to Polish ports, in part by limiting the territorial sea and other jurisdiction of the GDR.¹⁰⁶

Two interesting agreements specifically limit certain types of coastal state jurisdiction in the exclusive economic zone and on the continental shelf. The Netherlands-Venezuela agreement places limits on the exercise of jurisdiction to prevent pollution from ships and requires mutual agreement for emplacing struc-

100. Guinea-Guinea-Bissau Award, *supra* note 33, ¶¶ 45, 111.

101. Indonesia-Singapore Sea Boundary Agreement, *supra* note 21.

102. F.R.G.-G.D.R. Protocol Note, *supra* note 16. The boundary study notes that the FRG may also have considered its submarine testing areas near Nuestadt in connection with this boundary.

103. The Cyprus-U.K. Agreement discussed above is an example. See Cyprus Treaty, *supra* note 97.

104. Argentina-Chile Agreement, *supra* note 31, at 11.

105. See Australia-Papua New Guinea Treaty, *supra* note 4.

106. Treaty between German Democratic Republic and Poland Concerning the Delimitation of the Sea Areas in the Oder Bight, May 22, 1989, G.D.R.-Pol., GBl. II, No. 9, 28 July 1989, at 150-151 (G.D.R.) (discarding Treaty between the German Democratic Republic and Poland Concerning the Delimitation of the Continental Shelf in the Baltic Sea, Oct 29, 1968, G.D.R.-Poland, 768 U.N.T.S. 260 (1971). In the interim, a dispute over navigation erupted between the parties that was extensively debated in the Polish parliament. See Treaty between Germany and Poland Concerning the Confirmation of the Frontier Existing between Them, Nov. 14, 1990, F.R.G.-Pol., reprinted in INTERNATIONAL MARITIME BOUNDARIES, *supra* note 20, at 2023.

tures that may obstruct recognized sea lanes.¹⁰⁷ The Australia-Papua New Guinea agreement defines an area within the central Torres Strait, where the fisheries and seabed delimitation lines diverge, in which the exercise of "residual jurisdiction" requires the concurrence of the other party. "Residual jurisdiction" is defined as jurisdiction other than seabed and fisheries jurisdiction as well as seabed and fisheries jurisdiction not directly related to the exploration or exploitation of resources.¹⁰⁸

A number of agreements are structured so that each party's vessels can travel to and from its ports on its own side of the boundary. In many situations this objective can be achieved by any of several plausible maritime boundaries, and thus may not be evident in the specific location or discussion of the boundary.

With respect to the France-Italy delimitation in the Straits of Bonifacio, it is suggested that the "desire of both parties to reach a delimitation which would permit passage through the Mouths without entering the territorial sea of the other party might have influenced the negotiations."¹⁰⁹ A similar consideration is said to have influenced the Italy-Yugoslavia territorial sea boundary in the Gulf of Trieste; in this connection, the Italian Foreign Minister referred to the navigation of large tonnage ships without the necessity of passing through Yugoslav waters.¹¹⁰ Navigation interests prevailed over effect for the island of Ven in the 1932 territorial sea delimitation in the Sound between Denmark and Sweden.¹¹¹

107. Delimitation Treaty between the Netherlands and Venezuela, Mar. 31, 1978, *Neth.-Venez.*, 1978 *Tractenblad va het Koninkrijk der Nederlanden* No. 61 (Neth.) [hereinafter *Netherlands-Venezuela Agreement*].

108. Australia-Papua New Guinea Treaty, *supra* note 4.

109. Convention between Italy and France Relating to the Delimitation of the Maritime Boundaries in the Area of the Mouths of Bonifacio, Nov. 28, 1986, *Fr.-Italy*, *Gazz. Uff.*, Suppl. to No. 48 of 27 Feb. 1989 (Italy) [hereinafter *Italy-France Convention*].

110. Italy-Yugoslavia Treaty, *supra* note 77.

111. Agreement between Denmark and Sweden on the Delimitation of the Continental Shelf and Fishing Zones, Nov. 9, 1984, *Den.-Swed.*, *Sveriges överenskommelser med frammande makter* 1985:54 (Swed.).

E. Enclavement

A particular problem is posed by the so-called cut-off or enclavement effect that can arise when the maritime boundaries between a state and its neighbors meet at a point off its coast. In the case of enclosed and semi-enclosed seas, some cut-off effects are unavoidable. Despite this fact, extension of a state's jurisdiction so as to avoid enclavement by its boundaries with some states (e.g., adjacent states) can minimize the number of states whose zones stand between the "enclaved" state and the open sea. Thus, for example, as a result of the agreements implementing the decision in the *North Sea Continental Shelf* cases, the German continental shelf connects directly with the British for a small distance.¹¹²

The concern about enclavement may engage both types of perceived security interests. States prefer not to be surrounded by their neighbors. In some measure this concern may be political and psychological. States have articulated security concerns about their capacity to conduct and control activities off their coast. More concretely, states may be concerned about access between their territory and the open sea.

In three cases, the maritime zones of small states with the same coastal neighbor on either side were protected from enclavement by the use of parallel lines defining the small state's zones.¹¹³ With respect to The Gambia, parallels of latitude were extended out into the open Atlantic.¹¹⁴ Monaco received a corridor up to the outer limit of the territorial sea, as well as a corridor beyond extending up to an equidistant line with the opposite coast on the island of Corsica.¹¹⁵ The boundary lines between Dominica, on the one hand, and Martinique and Guadeloupe on the other, were extended in quasi-parallel fashion up to 200 miles on the Atlantic side.¹¹⁶

112. Agreement between the Federal Republic of Germany and the United Kingdom Relating to the Delimitation of the Continental Shelf under the North Sea between the Two Countries, Nov. 25, 1971, F.R.G.-U.K., 880 U.N.T.S. 185. See U.N. Convention on the Law of the Sea, *supra* note 2 and accompanying text.

113. The land territory of the state concerned is itself surrounded by the other state in the first two cases.

114. Gambia-Senegal Agreement, *supra* note 33.

115. Monaco-France Delimitation Agreement, *supra* note 33. As Corsica is part of France, some "enclavement" by French zones was ultimately unavoidable.

116. Agreement on Maritime Delimitation between Dominica and France, Sept. 7,

Where a state's boundaries with more than one state pose the risk of enclavement, one cannot be certain the risk has been avoided absent agreement on maritime boundaries with all of the neighboring states concerned. Boundaries between only two states nevertheless can be drawn so as to minimize the risk of enclavement when future boundaries are completed, thereby attempting as far as possible to assure each state access to the open ocean through its own zones and to avoid the presence of a foreign zone opposite a state's coast. This is precisely what the arbitral tribunal did in the *Guinea-Guinea-Bissau* arbitration.¹¹⁷ Parallels of latitude were apparently used for this purpose in the seaward segments of the Kenya-Tanzania¹¹⁸ and Mozambique-Tanzania¹¹⁹ delimitations.¹²⁰

F. Specific Clauses Protecting Navigation

Delimitation agreements sometimes contain specific clauses protecting navigation interests. A number of these arise in a context where the clause appears to be related to the navigation implications of the particular maritime boundary. Others seem to reflect a more general concern about navigation that is not necessarily associated with any particular boundary location or configuration. It is not always easy to tell the difference.

The Argentina-Chile treaty makes elaborate provision for

1987, *Dominica-Fr.*, Rev. Gèn. D.I. Pub. 486-90 (1989).

117. *Guinea-Guinea-Bissau Award*, *supra* note 33.

118. *Agreement between Kenya and Tanzania on Delimitation of the Maritime Boundary between the Two States*, July 9, 1976, Kenya-Tanz., (U.N. Legislative Series) U.N. Doc. ST/LEG/SER.B/19 (1980).

119. *Agreement between Tanzania and Mozambique*, Dec. 28, 1988, Tanz.-Mozam. (Rep. 4-7), *reprinted in* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 20, at 893.

120. The 1969 Brazil-Uruguay joint declaration supporting equidistance may have been prompted by a desire to demonstrate to Argentina that the use of a parallel of latitude between Uruguay and Argentina would have an enclavement effect when coupled with a Brazil-Uruguay equidistant line, that the acceptability of a parallel of latitude method to Uruguay was therefore (apart from other objections) rationally dependent upon its acceptability to Brazil, and that Brazilian agreement was not likely. *See Agreement between Brazil and Uruguay Relating to the Maritime Delimitation between the Two Countries*, July 21, 1972, Braz.-Uru., 1120 U.N.T.S. 133 (1978). Although Argentina was not threatened with enclavement as such, the Argentina-Chile treaty reflects Argentine concerns about any cut-off of its extension into the Atlantic Ocean, and offers some support for the so-called bi-oceanic principle defended by Argentina. *See Argentina-Chile Agreement*, *supra* note 31.

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the protection of navigation, including a reaffirmation of freedom of navigation in and in the approaches to the Strait of Magellan.¹²¹ The Australia-Papua New Guinea treaty contains extensive provisions designed to protect navigation and overflight in the Torres Strait area.¹²² In the Maroua Declaration extending the maritime boundary between Cameroon and Nigeria, the "two Heads of State further reaffirmed their commitment to freedom and security of navigation in the Calabar/Cross River channel of ships of the two countries as defined by International Treaties and Conventions."¹²³ In these cases, there appears to be a fairly close substantive link between these provisions and the underlying delimitation issues.

There are strong navigation and overflight provisions in the Netherlands-Venezuela agreement,¹²⁴ and a guarantee of transit passage between the islands of Trinidad and Tobago in the Trinidad and Tobago-Venezuela agreement.¹²⁵ More general clauses protecting navigation rights can be found in other agreements.¹²⁶ These clauses may have facilitated agreement either by constituting a quid pro quo for a particular boundary or in a more general sense.

IV. HISTORICAL FACTORS

A. Introduction

Historical factors are perhaps easier to isolate than political factors. Yet in the context of maritime boundaries, there is a great deal of overlap with other factors. Historic fishing may be

121. Argentina-Chile Agreement, *supra* note 31.

122. Australia-Papua New Guinea Treaty, *supra* note 4.

123. Agreement between Cameroon and Nigeria, June 1, 1975, Cameroon-Nig., Maritime Boundary Agreements (1970-84) 97 (1987).

124. Netherlands-Venezuela Agreement, *supra* note 107.

125. Treaty between Trinidad and Tobago and Venezuela on the Delimitation of Marine and Submarine Areas, April 18, 1990, Trin. & Tobago-Venez., G.O., No. 34745, June 28, 1991 (Venez.).

126. See, e.g., Agreement between Argentina and Uruguay Relating to the Delimitation of the River Plate and the Maritime Boundary between the Two Countries, Nov. 19, 1973, Arg.-Uru., U.N.T.S., No. 21424; Panama-Colombia Treaty, *supra* note 20; Dominican Republic-Venezuela Treaty, *supra* note 53, at 1634 (preambular reference to Venezuelan navigation interests); India-Maldives Maritime Agreement, *supra* note 34. France and the United Kingdom made a separate joint declaration on navigation contemporaneously with their 1982 delimitation agreement. United Kingdom-France Shelf Boundary Agreement, *supra* note 99.

viewed as a resource or economic factor. The question of using, or extending, an "historical" boundary (or even a prior *modus vivendi*) for maritime delimitation purposes is laden with political as well as legal content.¹²⁷ In a strict sense, questions of historic bays or waters frequently may be regarded as baseline questions.

B. Land Boundaries

In the normal case, a land boundary is better viewed as a geographic rather than an historic factor. The land boundary determines the allocation of coastlines from which maritime jurisdiction extends. In the case of adjacent states, the intersection of the land boundary with the sea constitutes the starting point for the maritime boundary. There are, however, some situations in which the land boundary takes on a broader historic significance with respect to a maritime boundary.

127. Article 15 of the U.N. Convention on the Law of the Sea, *supra* note 2, like art. 12 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, specifies with respect to delimitation of the territorial sea that the equidistance rule applicable in the absence of agreement to the contrary "does not apply . . . where it is necessary by reason of historic title or other special circumstances to delimit the territorial sea of the two States in a way which is at variance" therewith. Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205. The delimitation rule in Article 6 of the 1958 Convention on the Continental Shelf specifies that the equidistance rule applies "[i]n the absence of agreement, and unless another boundary line is justified by special circumstances;" there is no mention of historic title. Convention on the Continental Shelf, *supra* note 24. The delimitation rules articulated in Arts. 74 and 83 of the U.N. Convention on the Law of the Sea with respect to the exclusive economic zone and the continental shelf do not address the location of the boundary in the absence of the agreement: they require that delimitation "be effected by agreement on the basis of international law . . . in order to achieve an equitable solution," that the States concerned resort to the dispute settlement procedures provided for in the Convention "[i]f no agreement can be reached within a reasonable period of time," and that pending agreement "the States concerned . . . 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." Article 298(1)(a) permits either party, at a minimum, to submit a maritime boundary dispute to conciliation. Article 298(1)(a) permits a party to declare that it does not accept arbitration or adjudication of disputes "relating to sea boundary delimitations, or those involving historic bays or titles," but in that event requires acceptance of submission of the matter to conciliation at the request of any party to the dispute. *See* U.N. Convention on the Law of the Sea, *supra* note 2.

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1. Rivers Flowing into the Sea

One such situation arises in an essentially technical context, namely where the center or thalweg of a river that flows into the sea constitutes the land boundary. Either the shore line at the mouth of the river in the case of a center-line boundary, or the channel in the case of a thalweg, may change position over time.

Mexico and the U.S. had to deal with this problem in establishing their territorial sea boundary in the Gulf of Mexico beyond the mouth of the Rio Grande.¹²⁸ The position of the Rio Grande at its mouth, as indeed in other places, changes over time. It is evident that the parties attached significant political, historical, and practical importance to the maintenance of the Rio Grande as the boundary: in contemporaneous settlements of outstanding disputes regarding their land boundary, their solution to the problem was cession of territories that fell on opposite sides of the river and agreement to attempt to stabilize the course of the river in the future.¹²⁹ In the case of the maritime boundary, a fixed point was established somewhat seaward of the mouth of the Rio Grande. Seaward of that point, a fixed maritime boundary was established. However, landward of that point, the boundary will migrate over time, connecting the fixed point with the center of the mouth of the river.

In the *Guinea-Guinea-Bissau* arbitration, the tribunal was faced with a similar problem of linking a fixed maritime boundary with the land boundary, namely the thalweg of the Cajet River. Noting that the thalweg might migrate, the tribunal began the fixed boundary seaward of the mouth of the river, and specified that landward of that point the boundary would extend in the direction of the thalweg.¹³⁰

128. Mexico-United States Exchange of Notes, *supra* note 98.

129. Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and the Colorado River as the International Boundary between the United States and Mexico, Nov. 23, 1970, 23 U.S.T. 371. Mexico-United States Exchange of Notes, *supra* note 98; *see also* Convention for the Solution of the Chamizal Problem, Aug. 29, 1963, 15 U.S.T. 21, 505 U.N.T.S. 185.

130. Guinea-Guinea-Bissau Award, *supra* note 33, ¶ 129.

2. Direction of the Land Boundary

Adjacent states sometimes argue that a maritime boundary should be established by extending the land boundary in the same direction out to sea. The territorial sea boundary prolongs the last segment of the land boundary between Turkey and the U.S.S.R. in the same direction.¹³¹

The International Court of Justice rejected the Libyan argument that the maritime boundary should continue in the northward direction of the land frontier in the *Tunisia/Libya* case.¹³² In the *Gulf of Maine* case, the United States argued that the general orientation of the continental boundary between the two countries suggested a generally east-west orientation of the maritime boundary, while Canada argued that the general orientation of the land boundary in the coastal region between Maine and New Brunswick suggested a generally north-south orientation of the maritime boundary. The Chamber appeared unimpressed by both arguments, and established the orientation of the maritime boundary seaward of the Gulf of Maine as a perpendicular to the generally northeast-southwest orientation of the coast.¹³³

3. Lines at Sea

It is not uncommon for treaties dealing with cessions or allocations of sovereignty over islands or other territory to define the areas ceded or allocated between those states on the basis of lines drawn at sea. The essential purpose of those lines is to provide a convenient reference for determining which islands and territories are ceded or allocated to a particular party. Among other things, this approach avoids the need to identify precisely all islands and other territory ceded.

The question posed is whether those same lines (in light of

131. Turkey-U.S.S.R. Protocol, *supra* note 96.

132. Tunisia-Libya Continental Shelf Case, *supra* note 10, ¶ 85. The Court did not however identify "the factor of perpendicularity to the coast and the concept of the prolongation of the general direction of the land boundary" as "relevant criteria to be taken into account." *Id.* ¶ 120.

133. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12) [hereinafter *Gulf of Maine Case*].

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the precise text of the relevant treaty, the original intent of the parties¹³⁴ or subsequent practice, or otherwise as a relevant historical circumstance) are also to be used as maritime boundaries. For newly independent states, in particular, this issue may be linked to the importance they attach to the principle of *uti possidetis* as a means of avoiding boundary disputes and maintaining stable and peaceful relations.¹³⁵

In the *Guinea-Guinea-Bissau* arbitration, after extensive analysis of the text of the treaty, its negotiating history, and subsequent practice, the tribunal rejected Guinea's argument that the line extending far out to sea drawn in an 1866 Franco-Portuguese treaty dividing their West African territories constituted a maritime boundary as such.¹³⁶ It nevertheless used this line, deeming it a relevant factor and otherwise equitable, for determining the location of the maritime boundary in a fairly significant area in the vicinity of the coast up to a point twelve miles seaward of Guinea's Alcatraz Island.¹³⁷ The tribunal pointed out that use of the seaward portions of the line as a maritime boundary would aggravate the problem of enclavement it was trying to find means to solve in the broader context of the West African coast.

The 1990 U.S.-U.S.S.R. agreement expressly identifies the maritime boundary as the line identifying the areas ceded in the 1867 U.S.-Russia Convention regarding the purchase of Alas-

134. It should be borne in mind that while at least parts of the lines in question may be great distances from the nearest land, many of the treaties in question were concluded at a time when the territorial sea was the only generally accepted form of coastal state jurisdiction, and prevailing views regarding the maximum permissible breadth of the territorial sea revolved around the traditional three-mile limit or little more. On the other hand, this circumstance does not in itself resolve the question of whether a cession or allocation was so defined as to constitute a limit of such maritime jurisdiction as might be claimed by a party or permitted by international law at the time or in the future.

135. The Solemn of 1964 by the Heads of State and Governments of the Organization of African Unity honoring existing boundaries at the time of independence is unquestionably regarded as fundamental by African experts who recognize the chaos that could result from challenges to the legitimacy of boundaries on grounds such as their imperial provenance or demographic rationality. It should be noted Guinea-Bissau unsuccessfully challenged a 1960 maritime boundary agreed to by Portugal and France (on behalf of Senegal). *Guinea-Guinea-Bissau Award*, *supra* note 33; *see also Application of Guinea-Bissau to the I.C.J.*, 1989, (Aug. 23 Annex).

136. Since the tribunal decided that the treaty did not establish a maritime boundary as such, it was able to avoid considering the effect of the *uti possidetis* principle. *Guinea-Guinea-Bissau Award*, *supra* note 33, ¶ 85.

137. *Guinea-Guinea-Bissau Award*, *supra* note 33, ¶¶ 105, 106, 111(a).

ka.¹³⁸ The line drawn in the 1867 Convention is located entirely at sea and extends across the Bering Sea and due north into the Arctic Ocean.¹³⁹ It is the longest single maritime boundary in the world between two states, and delimits the territorial sea, the exclusive economic zone, and the continental shelf beneath and beyond the 200-mile exclusive economic zone. The agreement includes a transfer by each party to the other of coastal state jurisdiction beyond the maritime boundary to which the transferor but not the transferee would otherwise be entitled under international law.¹⁴⁰

There are a number of other situations in which both parties may regard similar lines as constituting their maritime boundaries. These are not free from uncertainty.¹⁴¹ An example is the following comment from the study of the maritime boundary between Burma (Myanmar) and Thailand:¹⁴²

The eastern terminus [of the boundary defined in the agreement] is about forty-seven nautical miles from the mouth of the Pakchan River which marks the boundary between Burma and Thailand; it is suspected that the line joining this

138. U.S.-U.S.S.R. Boundary Agreement, *supra* note 91. The text of the 1867 Convention contains a comprehensive cession of all "territory and dominion" east of the line. Convention Ceding Alaska, Mar. 18/30, 1867, 15 Stat. 539.

139. Some historical features of the 1867 line may be of interest. It was originally drawn by the Russian Imperial Navy in connection with the Russian proposal to sell Alaska to the United States. The report of the Chairman of the Foreign Relations Committee to the U.S. Senate in connection with its consideration of the 1867 Convention identifies as one of the benefits of the purchase the rich fisheries resources in extensive relatively shallow areas above what we would now call the continental shelf.

140. The 1990 agreement followed an exchange of notes in the late 1970s in which each state indicated that it intended to respect the 1867 line in connection with its extension of fisheries jurisdiction to 200 miles. Subsequent to that exchange of notes, the parties found that they differed as to the proper depiction of the 1867 line and needed to address aspects of its effect. The precise line drawn in the 1990 agreement coincides with the 1867 line where the parties agreed on its depiction and, in the Bering Sea, is composed of segments all of which lie between or coincide with the differing depictions of the 1867 line as a loxodromic or a geodetic line.

141. The regional summary report refers to the apparent use in the vicinity of the adjacent coasts of Malaysia and Thailand of a line drawn on a rough sketch in the protocol attached to a 1909 treaty which separated the territories of British Malaya from Thailand. The report also refers to the apparent use between Malaysia and Singapore of the line agreed in 1924 by Britain and the Sultan of Johore to define the extent of Singapore; that line coincided with the deep channel of Johore Strait.

142. Burma-India Agreement, *supra* note 81.

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river mouth to the eastern terminus is the line shown on a map which was part of the boundary agreement [dividing islands] between Britain and Thailand dated 30 April and 3 July 1868, when Britain ruled Burma.

An analogous situation is presented by the maritime boundary between Finland and Sweden. Three turning points and one terminal point of the continental shelf boundary coincide with points established in the 1921 Convention concerning the non-fortification and neutralization of the Åland Islands.¹⁴³ However, subsequent fishing lines drawn by each of the parties do not use those points.

C. Prior Maritime Boundaries

While widespread assertion and acceptance of coastal state jurisdiction over the continental shelf generally occurred in the decade or so following the 1945 Truman Proclamation on the continental shelf, widespread assertion and acceptance of coastal state jurisdiction over fisheries, or a more comprehensive exclusive economic zone, extending to 200 miles did not occur for another thirty years or so, in many cases in conjunction with the emerging consensus at the Third United Nations Conference on the Law of the Sea. Thus, states that established a maritime boundary beyond the territorial sea for one purpose, for example delimitation of the continental shelf, may face the question of whether to use the same boundary to delimit jurisdictions claimed subsequent to the establishment of the maritime boundary, for example fisheries or exclusive economic zone jurisdiction.

The agreements between Finland and the U.S.S.R. illustrate an affirmative response to that question. The parties used the two previously established continental shelf boundaries for fisheries delimitation purposes.¹⁴⁴ Subsequently they converted

143. Agreement between Finland and Sweden Concerning the Delimitation of the Continental Shelf in the Gulf of Bothnia, the Åland Sea and the Northernmost Part of the Baltic Sea, Sept. 29, 1972, Fin.-Swed., (U.N. Legislative Series) U.N. Doc. ST/LEG/SER.B/18, 49 (1976). The history can be traced further back to the 1809 Peace Treaty of Fredrikshavn between Russia and Sweden.

144. Agreement between Finland and U.S.S.R. on the Delimitation of the Economic Zone and Fishery Zone in the North Eastern Baltic Sea, Feb. 25, 1980, Fin.-U.S.S.R., 33 *Vedomosti Verkhovnogo Soveta S.S.S.R.* (Communications of the Supreme Soviet of the U.S.S.R.) 676 (1987).

those continental shelf and fisheries jurisdiction boundaries into all-purpose single maritime boundaries, including the exclusive economic zone.¹⁴⁵ Similarly, Turkey and the U.S.S.R. used their previously established continental shelf boundary to delimit their respective exclusive economic zones.¹⁴⁶ The line drawn in the historic 1942 seabed delimitation agreement between the United Kingdom and Venezuela with respect to the Gulf of Paria has been used, with some technical changes, in the single maritime boundaries drawn in the 1989 and 1990 agreements between Trinidad and Tobago and Venezuela.¹⁴⁷ On the other hand, the provisional fisheries surveillance and enforcement line agreed by Australia and Indonesia, for example, is substantially different from their earlier continental shelf boundary.¹⁴⁸

History or prior practice may not alone explain the decision to use a previous line drawn within the 200-mile zone. That decision may be related to the recent practice of drawing a single maritime boundary for all purposes. Attempts to use different lines for different purposes within the zone raise a number of practical problems of allocation of jurisdiction demonstrated, for example, by the treatment of "residual jurisdiction" in the

145. Economic Zone, Fishery Zone, and Continental Shelf in the Gulf of Finland and the North Eastern Baltic Sea, Feb. 5, 1985, Fin.-U.S.S.R., 25 *Vedomosti Verkhovnogo Soveta S.S.S.R.* (Communications of the Supreme Soviet of the U.S.S.R.) 1 (1987).

146. Delimitation of the Exclusive Economic Zones in the Black Sea, Dec. 23, 1986 — Feb. 6, 1987, Turk.-U.S.S.R., T.C. *Resmî Gazete* No. 19386 (1987) (Turkey-U.S.S.R.).

147. Treaty between the United Kingdom and the United States of Venezuela Relating to the Submarine Areas of Gulf Paria, Feb. 26, 1942, Trin. & Tobago-Venez., *Limits in the Seas*, No. 11 (1970). Delimitations of Marine and Submarine Areas, Trin. & Tobago-Venez., G. O., No. 34645, Apr. 18, 1990 (1991) (Venezuela).

148. Understanding between Indonesia and Australia Concerning Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement, Oct. 29, 1981, Austl.-Indon., (Rep. 6-2(4)), reprinted in *INTERNATIONAL MARITIME BOUNDARIES*, *supra* note 20, at 1238. It might be noted that the earlier continental shelf boundary between Australia and Indonesia in the area, presumably in partial response to Australian reliance on the concept of natural prolongation, was influenced by geomorphological factors. See *Australia-Indonesia Timor and Arafura Seabed Agreement*, *supra* note 46. Opinions of the International Court of Justice subsequent to that time placed substantially less emphasis on the concept of natural prolongation in continental shelf delimitation. The change in the Court's approach was itself influenced by the fact that the U.N. Conference on the Law of the Sea included sovereign rights over the resources of the seabed and subsoil within the concept of the 200-mile exclusive economic zone and defined the outer limit of the continental shelf alternatively in terms of natural prolongation or a 200-mile limit.

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Australia-Papua New Guinea agreement.¹⁴⁹

A similar question may be presented where the territorial sea is extended to twelve miles in areas that were previously subject to claims of more limited jurisdiction. Some segments of the territorial sea boundary between France and Italy in the Straits of Bonifacio follow the alignment of a 1908 fishing delimitation agreement.¹⁵⁰ The boundary between Poland and Sweden in part follows a previous provisional fisheries boundary.¹⁵¹ Following extension of the territorial sea to twelve miles, France and the U.K. agreed to modify the status of the boundary in the Straits of Dover from a continental shelf boundary to a territorial sea boundary.¹⁵²

In the *Guinea-Bissau-Senegal* arbitration, the tribunal, by a vote of 2-1, agreed with Senegal that the 1960 Franco-Portuguese agreement delimiting the territorial sea, contiguous zone, and continental shelf bound the parties. The President, who voted in the majority, declared separately that because the 1960 agreement did not delimit the exclusive economic zone, the tribunal should have addressed that delimitation question. Guinea-Bissau instituted proceedings in the International Court of Justice to void the award. The Court declined to do so.¹⁵³

An interesting variant of this issue involves the treatment of essentially the same question in successive maritime boundary agreements with different states. Thus, for example, the issue of reduced effect for Gotland was resolved between Poland and Sweden on the same basis that it was previously resolved between Sweden and the U.S.S.R., namely seventy-five percent effect.¹⁵⁴ The *North Sea Continental Shelf* cases nevertheless provide ample evidence of the limits of any strategy designed to impose such a result on a reluctant party.

149. See discussion preceding *supra* note 109.

150. Italy-France Convention, *supra* note 109.

151. Agreement on the Delimitation of the Continental Shelf and the Fishery Zones, Feb. 10, 1989, Pol.-Swed., Regeringens Proposition 1988/89:97 (Swed.) [hereinafter Continental Shelf and Fishery Zones Agreement].

152. Agreement on the Territorial Sea Boundary in the Straits of Dover, Nov. 2, 1988, Fr.-U.K., 1989 Gr. Brit. T.S. No. 26 (Cmd. 1732).

153. Award of Arbitral Tribunal (Guinea-Bissau), 1989 (July 31), Application of Guinea-Bissau to the I.C.J., 1989, (Aug. 23 Annex); Case Concerning the Arbitral Award (Guinea-Bissau v. Senegal) 1989 (July 31), 1990 I.C.J. 64 (Request for Indication of Provisional Measures Order).

154. Continental Shelf and Fishery Zones Agreement, *supra* note 151.

D. *Informal or De Facto Lines*

In some instances, an informal or *de facto* line used by both parties may become the basis for a maritime boundary. The maritime boundary agreed between Abu Dhabi and Dubai in 1965 was initially established as an administrative frontier for oil concession purposes in 1951.¹⁵⁵ In the *Tunisia/Libya* case, the International Court of Justice used a 1919 line drawn by Italian authorities when they were in control of Libya, noting that this was the *de facto* line respected by the parties as dividing their oil concessions.¹⁵⁶

Determining the political or juridical effect of informal or *de facto* lines poses a delicate problem. It is desirable to encourage parties that are unable to reach agreement on a maritime boundary for the time being to find some interim *modus vivendi*.¹⁵⁷ Fears that a *modus vivendi* may, for political or juridical reasons, evolve into a permanent boundary or boundary regime may limit the ability of the parties to find means to control the scope and intensity of their dispute.¹⁵⁸

E. *Unilateral Claims*

Whatever their effect on baselines used for purposes of measuring equidistant lines¹⁵⁹ — which appears to be scant — there is no evidence that the limits of historic claims determine the location of modern maritime boundaries as such. In the *Tunisia/Libya* case, the International Court of Justice noted the distinction between historic rights or waters and rights over the continental shelf which arise *ipso facto* and *ab initio*.¹⁶⁰ It re-

155. Abu Dhabi-Dubai Offshore Boundary Agreement, *supra* note 79.

156. Tunisia-Libya Continental Shelf Case, *supra* note 10, ¶¶ 93-96, 117, 120. It should be noted that this line is roughly perpendicular to the coast at the land boundary.

157. See U.N. Convention on the Law of the Sea *supra* note 2, common ¶ 3, arts. 74, 83 (1983).

158. See U.N. Convention on the Law of the Sea *supra* note 2, arts. 74 and 83 (specifying that provisional arrangements "shall be without prejudice to the final delimitation").

159. See generally Louis B. Sohn, *Baseline Considerations*, in INTERNATIONAL MARITIME BOUNDARIES, *supra* note 20.

160. Tunisia-Libya Continental Shelf Case, *supra* note 10, ¶ 100.

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jected use of a unilateral Tunisian fishing line and noted that the Libyan northward line on its official petroleum regulation map was insufficient even to constitute a formal claim.¹⁶¹

In connection with the influence of geomorphology in the Australia-Indonesia continental shelf boundary, one might note the earlier reference to a 100-fathom limit in the Australian Pearl Fisheries Act of 1952-53, as well as the limits specified in the 1967 continental shelf legislation in Australia dealing with the problem of competing state and federal assertions of jurisdiction.¹⁶² Even if these references were not designed to deal with delimitation, but only with the general question of the definition and seaward limit of the continental shelf,¹⁶³ it is possible that the legislation, including the state-federal settlement, added to the political pressure on the Australian government to achieve a delimitation rooted in geology or geomorphology.

It is interesting to note that the agreement between India and Sri Lanka establishing a maritime boundary in Palk Strait and Bay deals with an area that the parties both regarded as historic waters originally appertaining to the United Kingdom prior to the independence of the two states concerned. The agreement provides for reciprocal recognition of traditional rights in that area.¹⁶⁴

F. Prior Seabed Concessions

Related to the question of unilateral claims, but distinguishable therefrom, is the problem posed by prior authorizations by a state for exploration or exploitation of the seabed. Absent acceptance or some adequate manifestation of acquiescence by the neighboring state concerned, unilateral seabed concessions do not establish maritime boundaries. The problem of private investment and expectations based on such authorizations nevertheless persists. The state that issued the authorizations may

161. *Id.* ¶ 92.

162. Australia-Indonesia Timor and Arafura Seabed Agreement, *supra* note 46.

163. See 4 Whiteman DIG. OF INT'L. L. at 757, 758. Australian authorities were doubtless aware that the press release accompanying the 1945 Truman Proclamation on the continental shelf referred to the continental shelf as extending to a depth of approximately 100 fathoms. The Australian legislation in question was enacted prior to the decision in the North Sea Continental Shelf cases, *supra* note 11.

164. India-Sri-Lanka Agreement, *supra* note 82.

be responding to a variety of factors, including political pressure from its licensees, fear of liability to its licensees, or general considerations of fairness.

Denmark and the Federal Republic of Germany adjusted the line designed to implement the Court's decision in the *North Sea Continental Shelf* cases so as to permit some existing Danish licensees to remain on the Danish continental shelf.¹⁶⁵ Abu Dhabi and Qatar agreed to share ownership and revenues from a disputed field, but under the existing Abu Dhabi concession agreement.¹⁶⁶ The agreement between Australia and Papua New Guinea provides for certain protections under the laws of Papua New Guinea for holders of Australian exploration permits.¹⁶⁷

G. Traditional Fisheries

There are some cases where traditional fisheries might be regarded as an historic factor influencing the boundary agreement. Since some of these arrangements involve artisanal fisheries by indigenous peoples who are culturally or ethnically distinct or at least geographically isolated from the general populations of the states concerned, a political (if not juridical) factor relating to the protection of such peoples may also be discerned.

The most elaborate arrangement is to be found in the agreement between Australia and Papua New Guinea. It establishes a Protected Zone in the Torres Strait area providing for the continuation not only of traditional fishing but other traditional activities. Paragraph 3 of Article 10 provides:

The principal purpose of the Parties in establishing the Protected Zone, and in determining its . . . boundaries, is to ac-

165. *North Sea Continental Shelf* (Den.-F.R.G.) 1969 I.C.J. 81 (Feb. 20) (separate opinion of Jessup, J.) (suggesting some arrangement in this regard).

166. Agreement on Settlement of Maritime Boundary Lines and Sovereign Rights over Islands between Qatar and Abu Dhabi, Mar. 20, 1969, Qatar-U.A.E., (U.N. Legislative Series) U.N. Doc. ST/LEG/SER.B/16 (1974). The agreement between Sharjah and Iran regarding Abu Masa (claimed by both) provides that offshore petroleum will continue to be produced by Sharjah's concessionaire with governmental revenues being shared equally by the parties. See Agreement on Seabed Boundary between the Rulers of Sharjah and Umm al Qaywayn, 1964, Sharjah-Umm al Qaywayn, I Can. Annex 99 (1983).

167. Australia-Papua New Guinea Treaty, *supra* note 4.

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knowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement.

Pursuant to Article 11, "each Party shall continue to permit free movement and the performance of lawful traditional activities in and in the vicinity of the Protected Zone by the traditional inhabitants of the other Party."¹⁶⁸

Prior settlement of issues related to the control of Indonesian traditional fishing apparently facilitated the negotiation of the provisional fisheries enforcement line between Australia and Indonesia.¹⁶⁹ In the case of the India-Sri Lanka boundary in the Gulf of Manaar and Bay of Bengal, Sri Lankan claims of historic fishing rights in Wedge Bank did not alter the location of the line, but did result in agreement on respect for Sri Lankan fishing rights for three years and a Sri Lankan right to purchase fish thereafter.¹⁷⁰

In North America, the negotiation of a maritime boundary was regarded as part of a larger attempt to settle historic French rights to fish off Canada.¹⁷¹ On the other hand, United States efforts to demonstrate historic fishing patterns and other historic activities in support of its position that it should receive all of Georges Bank did not succeed in the *Gulf of Maine* case. It should be noted, however, that the line drawn by the Chamber was more favorable to the United States than a hypothetical equidistant line, and that the Chamber implied that a line totally unresponsive to Canadian fisheries activities in the northeastern part of the bank would not be equitable.¹⁷²

168. *Id.*

169. Provisional Fisheries Surveillance, *supra* note 17.

170. Agreement between India and Sri Lanka on the Maritime Boundary between the Two Countries in the Gulf of Manaar and the Bay of Bengal, Mar. 23, 1976, India-Sri Lanka, (U.N. Legislative Series) U.N. Doc. ST/LEG/SER.B/19 (1980).

171. Agreement between Canada and France Concerning Mutual Fishing Relations off the Atlantic Coast of Canada, Mar. 27, 1972, Can.-Fr., 862 U.N.T.S. 209 (1973).

172. *Gulf of Maine Case*, *supra* note 133, ¶¶ 237-38; Treaty between Canada and United States to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area, Mar. 29, 1979, Can.-U.S., 1984 I.C.J. 246.

V. CONCLUSION

There is no doubt that political factors influence the question of whether, and if so when, a maritime boundary will be negotiated or submitted to a tribunal for determination. The question of timing alone may influence the location of the boundary in response to an evolving jurisprudence in the field of maritime boundaries and changes in the regimes of the law of the sea more generally.

It is often difficult to demonstrate what particular influence political factors have on the precise location of a specific boundary. In this regard, however, it must be borne in mind that the interests governments seek to protect are frequently the result of a political analysis that may or may not reflect a hypothetical "objective" analysis of those interests. A government's reasons for taking into account its neighbor's interests and perceptions in the context of a negotiated boundary are, at least in some respects, different in kind and degree from its reasons for doing so in its presentations before a tribunal.

There is no direct evidence that tribunals take political factors as such into account in determining maritime boundaries. It can be argued that the broader regional analysis of the problem faced by the tribunal in the *Guinea-Guinea-Bissau* arbitration was to some, widely regarded as felicitous, degree "political." This author would be among those who believe the tribunal was, in effect, sensitive to the broader principles and purposes of the U.N. Charter and the OAU Charter in seeking means to promote peaceful relations among states.

The fact that adjudicated or arbitrated maritime boundaries tend to fall between those proposed by the parties may or may not reflect a tendency to strike a compromise. It can be argued that such results are inevitable where parties take maximum or extreme positions. At all events, the issue is merely one aspect of the broader question of whether arbitrators are prone to seek compromise results and, if so, whether that tendency is properly characterized as political.

Security factors are most prominent in dealing with maritime boundaries close to the coast, but they have influenced

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some boundary arrangements beyond the territorial sea. The evidence that states take security factors into account in negotiating maritime boundaries is probably insufficient to indicate the extent to which this is in fact done. In many situations security interests and other interests (such as commercial navigation or resource interests) coincide, and in many situations a variety of maritime boundaries may accommodate perceived security interests.

While states have raised security interests in arbitrations or adjudications, the arguments appear to have had different effects. In the *Libya/Malta* and *Guinea-Guinea-Bissau* cases, the tribunals tested the lines arrived at for other reasons against the coastal security concerns raised by the parties and found them sufficient. In the *Anglo-French* arbitration, the result was arguably responsive to France's security concerns about access in the English Channel. In the *Gulf of Maine* case, the United States, having noted that an equidistant line would extend as far south as Philadelphia, outlined its perception of Canadian tendencies to expand coastal state jurisdiction both geographically and functionally; the point had no explicit effect on the Chamber's analysis.

Historical factors can influence both negotiated and adjudicated boundaries. The most significant effect occurs in the use of lines primarily drawn for some other purpose, such as delimitation of a different form of maritime jurisdiction or allocation or cession of islands and other land territory. There is evidence of some tendency to use continental shelf boundaries to delimit fisheries or exclusive economic zones. On the whole, however, there is no consistent pattern. Each case must be examined closely in terms of the legal significance of the historical factor as well as the political, security, geographic, and economic impact of taking it into account or failing to do so.

Annex 187

D. P. Riesenberg, “Recent Jurisprudence Addressing Maritime Delimitation Beyond 200 Nautical Miles from the Coast”, *The American Society of International Law*, 2014

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Recent Jurisprudence Addressing Maritime Delimitation Beyond 200 Nautical Miles from the Coast

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By: **David P. Riesenberg**

Date: September 22, 2014



The past two-and-a-half years have witnessed considerable development in the international law of maritime boundary delimitation.[1] In particular, this brief period has seen the historic emergence of jurisprudence addressing delimitation of a state's maritime entitlements located beyond 200 nautical miles (M) from the state's coastal baselines. In a string of recent disputes involving maritime jurisdiction in the Bay of Bengal, the Caribbean Sea, and the Pacific Ocean, international courts and tribunals—including the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and an arbitral tribunal constituted under

Annex VII of the UN Convention on the Law of the Sea (UNCLOS)[2]—have begun to address the unique and critical issues arising in such delimitations.[3] This *Insight* briefly describes three of the theoretical and practical problems revealed by this emerging jurisprudence.[4]

Background

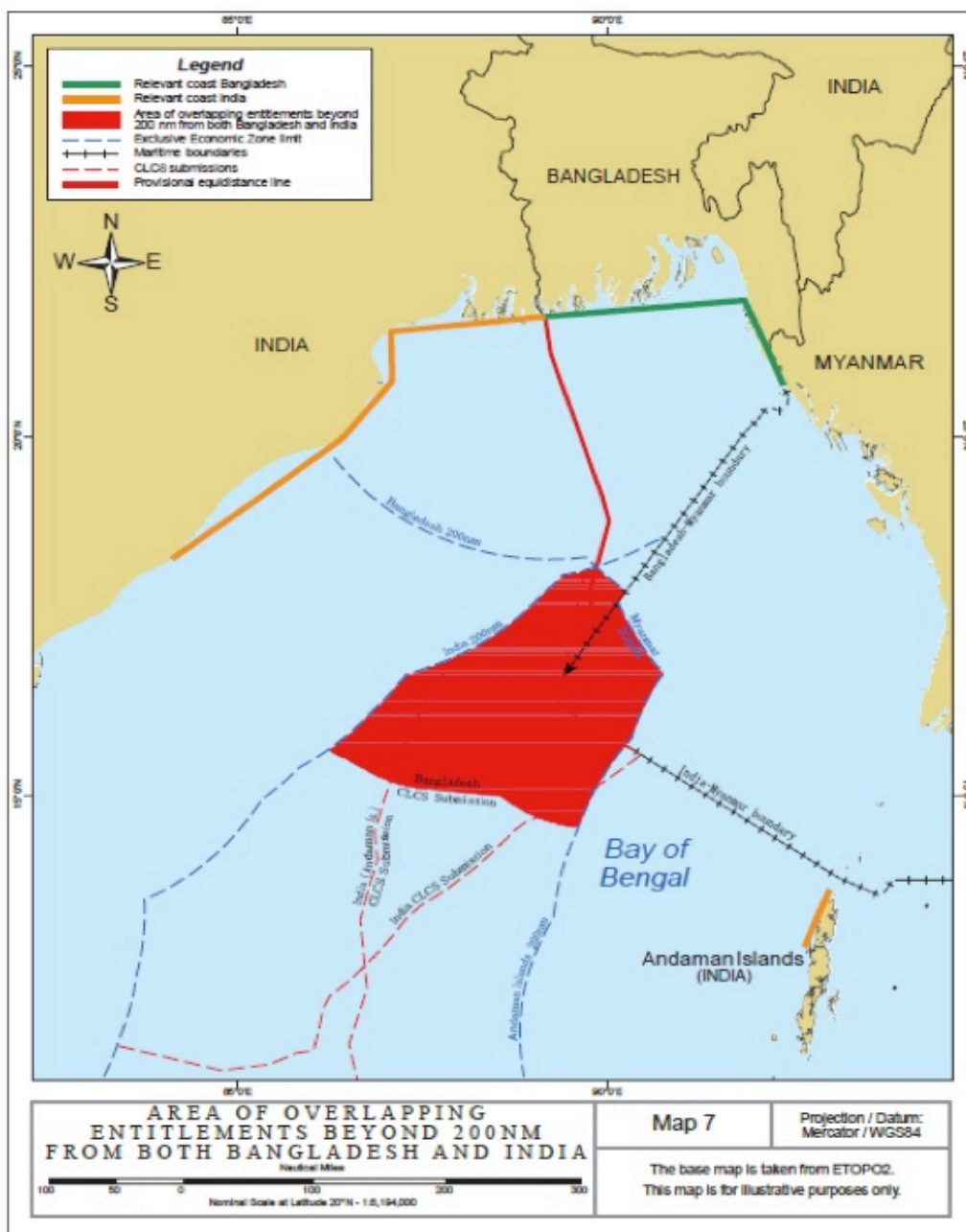
In accordance with UNCLOS and customary international law, states have generally exercised sovereign rights and jurisdiction over two types of maritime entitlements beyond the 12-M territorial sea.[5] First, a state may declare entitlement to an Exclusive Economic Zone (EEZ) up to 200 M from its coastal baselines.[6] Throughout its EEZ, a state may exercise sovereign rights to exploit all “living or non-living” natural resources of the “seabed and its subsoil” and “the waters superjacent to the seabed.”[7] The coastal state also exercises jurisdiction in the EEZ with regard to environmental protection[8] and must have due regard for the rights of other states including, among others, the freedoms of navigation and overflight.[9]

Second, a state may exercise jurisdiction over the living and non-living resources of the continental shelf’s seabed and subsoil, including hydrocarbon resources and sedentary living species.[10] Although a coastal state’s sovereign rights with respect to the continental shelf “exist *ipso facto* and *ab initio*” under customary international law,[11] Article 76(8) of UNCLOS requires coastal states to establish the outer limits of the continental shelf on the basis of recommendations from the Commission on the Limits of the Continental Shelf (CLCS) regarding the geomorphological, bathymetric, and distance criteria set forth under Article 76(4) and 76(5).[12] Where the shelf does extend beyond 200 M, the state exercises the same sovereign rights as within 200 M. But entitlement to the outer continental shelf entails no rights to and does not affect the legal status of the superjacent water column.[13]

Where two or more states’ maritime entitlements overlap, the claimant states may divide the overlapping area by agreement or by submitting to the jurisdiction of an international court or tribunal. In accordance with UNCLOS and customary international law, such boundaries are often delimited along an “equidistance” line, every point of which is equidistant from the nearest points on the claimant states’ coastal baselines.[14] Where coastal geography or other factors would render an equidistance boundary inequitable, however, the boundary may diverge from equidistance. For example, international courts and tribunals have concluded that factors such as disparities in coastal length, the concavity of one state’s coast, or the presence of islands may necessitate divergence from equidistance.[15]

In sum, the allocation of maritime space is governed by interrelated but, at times, disharmonious rules. The extent of the EEZ is based purely on distance, whereas the outer limit of the continental shelf may be based on a combination of distance, bathymetry, geomorphology, and the thickness of the seabed’s sedimentary layer. Delimitation, finally, is often based on distance (or, more precisely, equidistance), but may diverge from equidistance based on coastal geography. The tension between such rules is heightened in maritime spaces beyond 200 M, as revealed in the recent jurisprudence.

Demonstrating the Existence of an Outer Continental Shelf



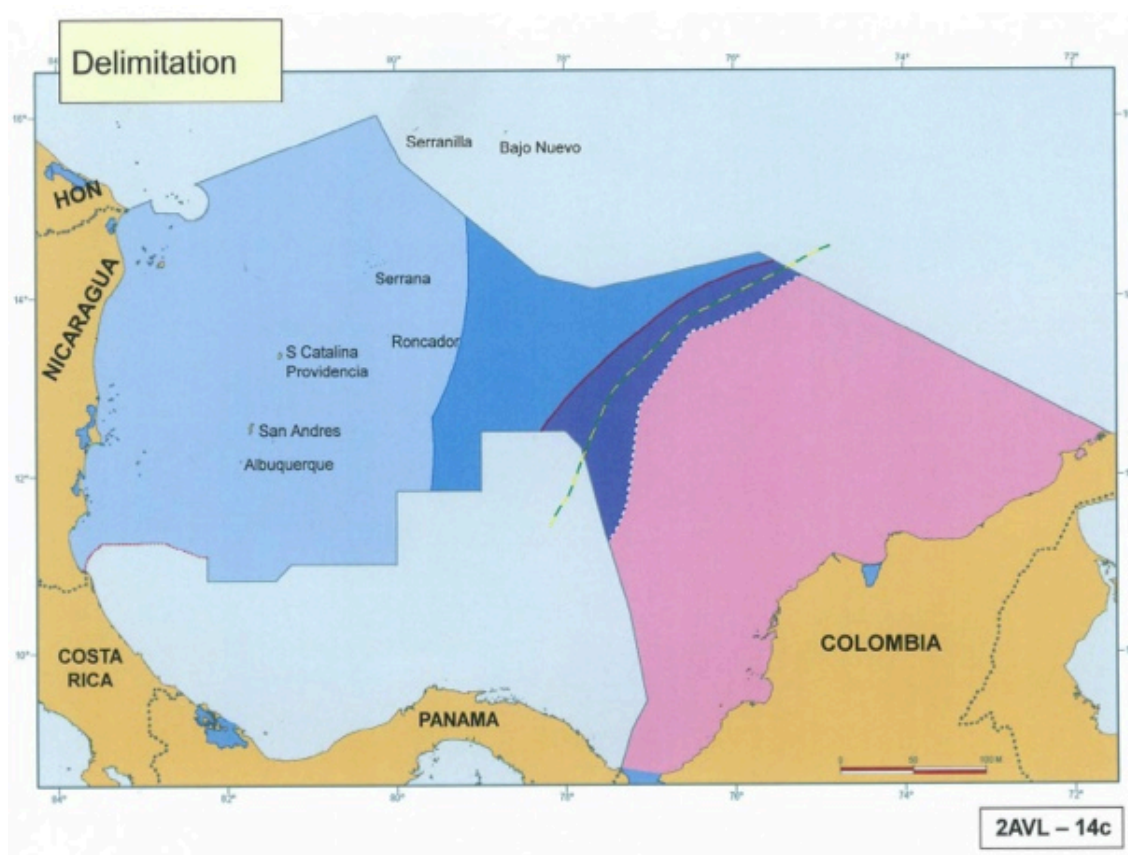
A threshold question in delimitation of maritime space beyond 200 M from the coast is whether any claimant state is entitled to the outer continental shelf based on the natural prolongation of its land mass. Whether maritime space beyond 200 M can be delimited before the CLCS has issued final recommendations is controversial.[16] As demonstrated in a 2013 survey, states often have not waited for a CLCS recommendation before delimiting their entitlements to the continental shelf beyond 200 M by treaty.[17]

Similarly, the 2012 judgment by ITLOS in *Bangladesh/Myanmar* and the 2014 award by the Annex VII tribunal in *Bangladesh v. India* both explained that it was unnecessary to wait for CLCS recommendations before delimiting the continental shelf beyond 200 M in the Bay of Bengal.[18] Importantly, none of the three coastal states—India, Bangladesh, and Myanmar—disputed that an extended continental margin existed in the Bay of Bengal.[19] Indeed, all three states had already made full CLCS submissions and were awaiting recommendations.

[20] Moreover, ITLOS and the Annex VII tribunal were in no doubt, given the sediment thickness in the Bay of Bengal, that all three states could satisfy the criteria of Article 76(4) and 76(5).

A more cautious approach was followed in the 2012 judgment in *Nicaragua v. Colombia I* by the ICJ, which declined to delimit any maritime spaces beyond 200 M from Nicaragua's coast.

[21] In that case, Nicaragua claimed entitlement to the outer continental shelf due to the presence of the "Nicaraguan Rise," a shallow area of continental shelf extending from Nicaragua's mainland and allegedly overlapping with maritime areas within 200 M of Colombia's mainland.[22] On this basis, Nicaragua asked the ICJ to delimit a maritime boundary midway between the outer limit of Nicaragua's continental shelf and the outer limit of Colombia's EEZ. Such a delimitation between opposite coasts would likely have required the ICJ to determine not only whether Nicaragua was entitled to a continental shelf beyond 200 M, but also the location of Nicaragua's outer limit.[23]



The ICJ declined, however, to delimit this alleged area of overlap.[24] As the ICJ explained, whereas both parties in *Bangladesh/Myanmar* had made full CLCS submissions, neither party in *Nicaragua v. Colombia I* had done so.[25] Colombia was not a party to UNCLOS, and Nicaragua had produced "only 'Preliminary Information' which, by its own admission, [fell] short of meeting the requirements" of the CLCS process.[26] The ICJ therefore rejected Nicaragua's request. As the ICJ explained, "the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations" under Article 76(8) of UNCLOS.[27] Accordingly, the

ICJ performed no outer continental shelf delimitation “since Nicaragua, in the present proceedings, ha[d] not established . . . a continental margin that extends far enough to overlap” with the EEZ projected by Colombia’s mainland.[28]

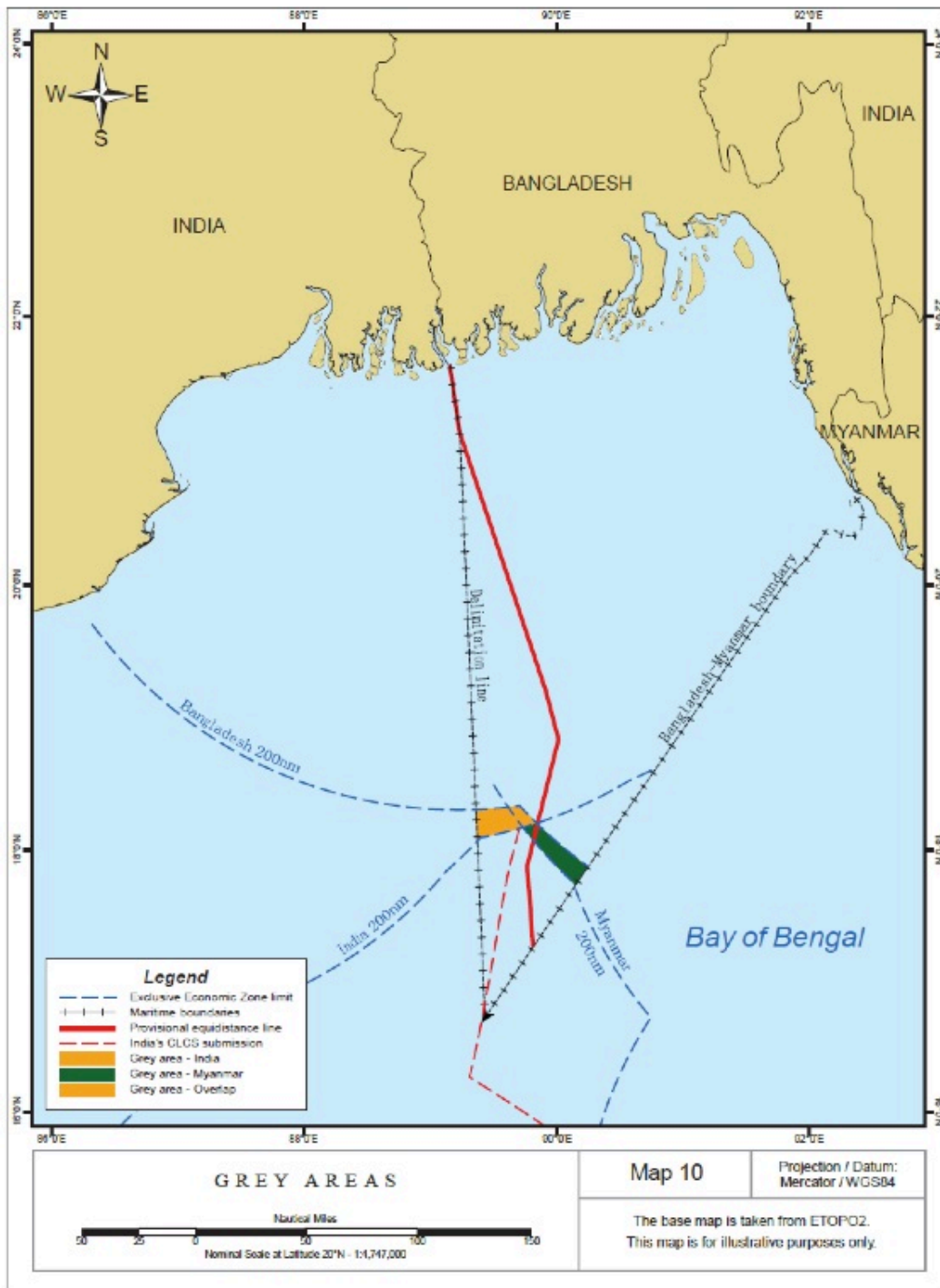
Writing separately, Judge Donoghue, Judge *ad hoc* Mensah, and Judge *ad hoc* Cot each agreed with the ICJ’s conclusion, but disagreed with the majority’s explanation of its reasoning. According to these three judges, the critical flaw in Nicaragua’s claim was not procedural noncompliance with Article 76(8), but rather the failure to produce sufficient evidence regarding the existence and extent of the Nicaraguan Rise.[29] In these judges’ view, Nicaragua’s procedural failures under UNCLOS could not be invoked in a bilateral proceeding involving Colombia, which was not party to UNCLOS.[30]

Accordingly, *Nicaragua v. Colombia I* may be distinguished from the cases decided in the Bay of Bengal based on four factors: (1) Nicaragua had not complied with the procedural requirements of UNCLOS, (2) Nicaragua failed to prove its entitlement with sufficient evidence, (3) the opponent state, Colombia, had not conceded the existence of a Nicaraguan continental margin beyond 200 M, and (4) the ICJ would likely have been required to determine the precise location of Nicaragua’s outer limit to perform the requested delimitation. Future jurisprudence may provide guidance as to which of these factors are necessary or sufficient threshold conditions for delimitation of the outer continental shelf.

More answers will likely emerge from *Nicaragua v. Colombia II*. [31] After judgment was rendered in *Nicaragua v. Colombia I*, Nicaragua made a full CLCS submission in June 2013 regarding the continental margin in the Caribbean and filed a new application with the ICJ requesting delimitation in September 2013.[32] Although no final judgment will be forthcoming in *Nicaragua v. Colombia II* for several years, it is clear that a central issue will be the ICJ’s approach to evidence regarding the Nicaraguan Rise.

Division of Rights in the “Gray Area”

A second complexity arising in delimitations beyond 200 M is the division of rights within the so-called “gray area.” A gray area constitutes any maritime space situated beyond 200 M from State A’s coast, within 200 M of State B’s coast, and on State A’s side of the two states’ maritime boundary.[33] Such areas exist wherever a boundary deviates from equidistance beyond 200 M. Because relevant sections of the boundary in *Bangladesh/Myanmar* (which partially followed a 215° azimuth)[34] and the boundary in *Bangladesh v. India* (which partially followed a 177° 30’ azimuth)[35] deviate from equidistance beyond 200 M, both delimitations create gray areas.[36]



A difficult question arises as to the allocation of rights and responsibilities in the water column within any gray area. Because both gray areas in the Bay of Bengal are located more than 200 M from Bangladesh, Bangladesh's EEZ does not encompass the water column in the gray areas.[37] However, because both gray areas fall on Bangladesh's side of its maritime boundaries with India and Myanmar, Bangladesh is entitled to jurisdiction over the continental shelf in the gray areas. Neither India nor Myanmar can exploit the seabed and its subsoil within the gray areas, because their respective continental shelf boundaries with Bangladesh restrict them from doing so.

The result is that while the seafloor in the gray areas is unequivocally under Bangladesh's jurisdiction, the water column in the same maritime spaces must either belong (1) to the opposing states as residual EEZ or (2) to the global common space known as the "high seas." International lawyers have long recognized both possibilities in theory. If the former is correct, then a regime of bifurcated national jurisdiction emerges—one state exercises jurisdiction over the natural resources of the seafloor, while another exercises jurisdiction over the natural resources of the water column. If the second option is correct, then the water column in the gray area becomes an area of high seas in which all states share equal rights.[38]

The majorities in *Bangladesh/Myanmar* and *Bangladesh v. India* preferred bifurcation and allocated jurisdiction over the water column to Myanmar and India respectively.[39] Essentially the same reasoning was followed in both decisions. First, these decisions concluded that a tribunal's "power to delimit the respective entitlements of the Parties exists only where those entitlements overlap," such that a boundary delimiting rights to the continental shelf can have no effect on the superjacent water column.[40] The premise underlying this conclusion is that the two components of the EEZ—the water column and the seafloor—constitute fundamentally severable layers, such that one state's jurisdiction over the water-column layer and another state's jurisdiction over the seafloor layer cannot overlap in a manner susceptible to delimitation. Second, both majorities concluded that UNCLOS and customary international law have long recognized areas where states may have "shared rights" in certain maritime space.[41] For example, before the emergence of the EEZ in international law, most continental shelf entitlements were situated beneath the high seas.[42] Third, the two majorities were confident that the parties could resolve any practical awkwardness caused by bifurcation through negotiation.[43]

The decisions in *Bangladesh/Myanmar* and *Bangladesh v. India* were each accompanied by dissents voicing essentially similar concerns. First, the water column and the seafloor within 200 M may be conceptualized as "indispensable and inseparable parts" of a unitary EEZ, enabling delimitation where one state's EEZ jurisdiction overlaps with another state's continental shelf jurisdiction.[44] Second, the inherent practical difficulties of sharing a maritime space might weigh meaningfully against bifurcation, even if states can ultimately negotiate around such difficulties.[45] Indeed, the ICJ reasoned in *Nicaragua v. Colombia I* that "the public order of the oceans" tends to require "a simpler and more coherent division" of maritime space and maritime resources.[46]

Today, however, bifurcation enjoys the support of the only two decisions yet rendered by international courts and tribunals addressing gray areas. Bangladesh's two gray areas actually overlap with one another—such that, in a small area of the Bay of Bengal, the seafloor falls under Bangladesh's continental shelf jurisdiction while the water column remains subject to the overlapping EEZ entitlements of India and Myanmar.[47] Meanwhile, if the Nicaraguan Rise does allow Nicaragua to extend its continental shelf beyond 200 M and into the EEZ projected by Colombia's islands or mainland, the ICJ may also soon be obliged to consider the status of another gray area.[48]

Redistribution of Sovereign Rights Where Entitlements Do Not Overlap

A third emerging question is whether and how states might validly redistribute their maritime jurisdiction in areas where their entitlements do not actually overlap. Indeed, although the majorities concluded in *Bangladesh/Myanmar* and *Bangladesh v. India* that the “power to delimit the respective entitlements of the Parties exists only where those entitlements overlap,”[49] states have occasionally concluded treaties purporting to reallocate and rearrange the placement of their maritime jurisdiction even where the states’ entitlements have not overlapped.

For example, in a 2010 treaty, Norway explicitly conferred on the Russian Federation “the sovereign rights and jurisdiction arising out of the jurisdiction in the exclusive economic zone that Norway would otherwise be entitled to exercise” in a section of the Barents Sea designated as “the Special Area.”[50] As Article 3 of the Barents Sea treaty explains, this Special Area is beyond 200 M from Russia’s coast, within 200 M of Norway’s coast, and on Russia’s side of the maritime boundary. Two more such “Special Areas” are identified in the Bering Sea under the 1990 maritime boundary treaty between the Soviet Union and the United States.[51] As did the Barents Sea treaty, the Bering Sea treaty also purported to transfer portions of each state’s 200-M EEZ to the other state even though the transferee state would ordinarily be considered too remote to extend its EEZ to encompass that maritime space.

At first glance, these innovative agreements are difficult to reconcile with the recent pronouncements by ITLOS and the Annex VII tribunal that the water column can only be delimited where two states’ entitlements to EEZ jurisdiction overlap. On the other hand, such state practice arguably suggests that states are able to redistribute their sovereign rights by arrangements that cannot be imposed upon them by international courts and tribunals, whose jurisdiction is based fundamentally on the parties’ consent.[52] The Barents Sea and Bering Sea treaties may also provide examples of what ITLOS called “appropriate cooperative arrangements,” by which states can circumvent the impracticalities of the bifurcated gray area.[53] In any event, no international court or tribunal has yet analyzed the effects of such innovative treaties or attempted to reconcile this state practice with recent jurisprudence.

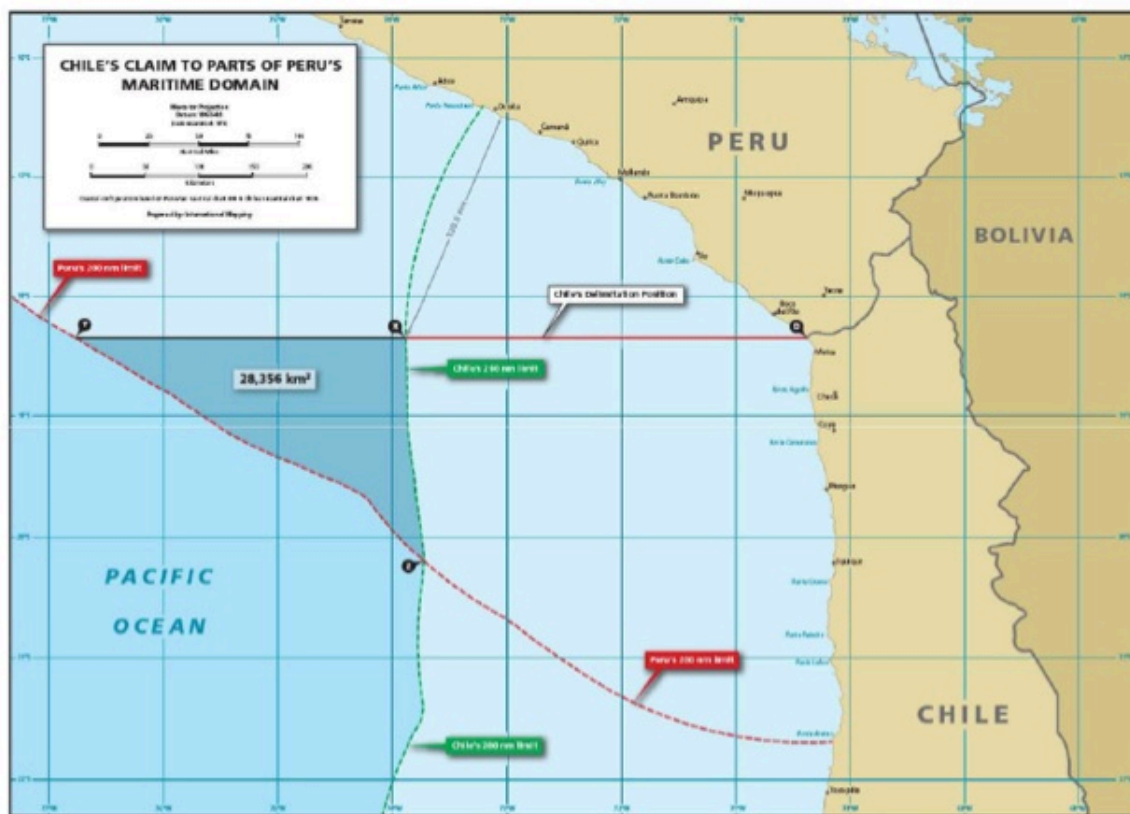


Figure 7.1

An agreement of this general sort was alleged in the recent case of *Peru v. Chile* before the ICJ. Chile argued that the 1952 Santiago Declaration delimited a maritime boundary between Peru and Chile along a line of latitude running due westward.^[54] This alleged boundary, in Chile's view, prevented Peru from exercising any jurisdiction over a large, triangular maritime space (roughly the size of Albania)^[55] located south of the boundary and within 200 M of Peru's coast—although Chile itself possessed no entitlement overlapping with this “outer triangle.”^[56] In its 2014 judgment, the ICJ rejected Chile's argument^[57] and concluded instead that Peru and Chile had tacitly agreed to a boundary extending only 80 M along the parallel of latitude.^[58] The ICJ therefore was not obliged to address any issues relating to the outer triangle.^[59]

Dissenting from the majority's conclusion regarding the extent of the boundary, five of the individual judges concluded that Peru and Chile had delimited a boundary extending to Chile's 200-M limit either by tacit agreement or by treaty.^[60] Each of these five judges also agreed that the 1952 Santiago Declaration did not constitute a transfer or waiver of Peru's rights in the outer triangle.^[61] As the ICJ's President, Judge Tomka, wrote in his individual declaration, “[t]here [wa]s no evidence that Peru ha[d] relinquished any entitlements under customary international law in areas . . . within 200 nautical miles of its coast.”^[62] Neither President Tomka nor the other dissenters provided any further reasoning on the subject.

It therefore remains somewhat uncertain whether and how a state might validly, to use President Tomka's expression, “relinquish” its sovereign rights and jurisdiction in an area where the parties' maritime entitlements do not overlap. While the Barents Sea and Bering Sea treaties are both particularly explicit about transferring maritime jurisdiction over the

“Special Areas” from one state to the other, it is also conceivable that states might create similar arrangements by tacit agreement. In this regard, the ICJ has observed that “[e]vidence of a tacit legal agreement must be compelling,” because “the establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed.”[63]

Conclusion

As demonstrated by this recent jurisprudence, a variety of theoretical and practical problems arise from the dissonant rules governing maritime jurisdiction beyond 200 M. As the case law develops further, new answers will likely materialize to resolve these tensions.

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[1] For additional analysis on recent maritime delimitation jurisprudence, see Naomi Burke, *Annex VII Arbitral Tribunal Delimits Maritime Boundary Between Bangladesh and India in the Bay of Bengal*, ASIL Insights (Sept. 22, 2014), <http://asil.org/insights/volume/18/issue/20/annex-vii-arbitral-tribunal-delimits-maritime-boundary-between> (<http://asil.org/insights/volume/18/issue/20/annex-vii-arbitral-tribunal-delimits-maritime-boundary-between>).

[2] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

[3] See Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), Award (July 7, 2014), available at http://www.pca-cpa.org/showpage.asp?pag_id=1376; (http://www.pca-cpa.org/showpage.asp?pag_id=1376;) Maritime Dispute (Peru v. Chile), Judgment (Jan. 27, 2014), available at <http://www.icj-cij.org/docket/files/137/17930.pdf>; (<http://www.icj-cij.org/docket/files/137/17930.pdf>;) Territorial and Maritime Dispute (Nicar. v. Colom.), 2012 I.C.J. 624 (Nov. 19); Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl./Myan.), Case No. 16, Judgment of Mar. 14, 2012, 12 ITLOS Rep. 4.

[4] See *Bangl. v. India*, *supra* note 3, ¶ 339 (“The ensuing—and still developing—international case law constitutes . . . an *acquis judiciaire*, 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 [UNCLOS].”).

[5] See Yoshifumi Tanaka, *The International Law of the Sea* 5–8 (2012). Although Article 33 of UNCLOS also provides for another type of zone under national jurisdiction, the contiguous zone, this maritime space in a sense “becomes part of the EEZ where it is established” for the purposes of exploiting and protecting natural resources. See *id.* at 6, 123. In any event, neither states nor international courts and tribunals have generally spoken of “delimiting” their contiguous zones. Another type of entitlement, the Fishery Zone, has been replaced to a considerable extent by the EEZ since the adoption of UNCLOS. See Robin Rolf Churchill & Alan Vaughan Lowe, *The Law of the Sea* 145 (2d ed. 1988). On at least one occasion, the ICJ has delimited a Fishery Zone using the same principles that are applicable in EEZ delimitation. See *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.)*, 1993 I.C.J. 38, 59 ¶ 47 (June 14).

[6] Tanaka, *supra* note 5, at 124–31; Churchill & Lowe, *supra* note 5, at 133–52.

[7] UNCLOS, *supra* note 2, art. 56.

[8] See *id.*, arts. 56, 61.

[9] See *id.*, art. 58.

[10] Tanaka, *supra* note 5, at 132–46; Churchill & Lowe, *supra* note 5, at 120–32.

[11] See *North Sea Continental Shelf (F.R.G./Neth.; F.R.G./Den.)*, 1969 I.C.J. 3, 23 ¶ 19 (Feb. 20). States have frequently announced these rights explicitly in proclamations or declarations. See Proclamation No. 2667, 10 Fed. Reg. 12303 (Sept. 28, 1945); *Peru v. Chile*, *supra* note 3, ¶¶ 26, 113.

[12] UNCLOS, *supra* note 2, art. 76(8).

[13] See *id.*, art. 78.

[14] See, e.g., *id.*, art. 15 (defining an equidistance-based boundary for the purposes of delimiting the territorial sea).

[15] See, e.g., *Bangl. v. India*, *supra* note 3, ¶ 408; *Nicar. v. Colom.*, *supra* note 3, ¶¶ 211, 215.

[16] See generally Bjarni Már Magnússon, *Is There a Temporal Relationship Between the Delineation and the Delimitation of the Continental Shelf Beyond 200 Nautical Miles?*, 28 Int’l J. Marine & Coastal L. 465 (2013); Bjørn Kunoy, *Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf*, 25 Int’l J. Marine & Coastal L. 237 (2010); see also Bjørn Kunoy, *The Delimitation of an Indicative Area of Overlapping Entitlement to the Outer Continental Shelf*, 83 Brit. Y.B. Int’l L. 61, 77–78 (2013) (“In the absence of relevant recommendations of the Commission, it is not possible to determine the seaward extent of entitlement, unless a forum assumes those functions of the Commission, which is rather unlikely given . . . the complementary role of the Commission and relevant forums competent in outer continental shelf disputes.”).

- [17] Bjarni Már Magnússon, *Outer Continental Shelf Boundary Agreements*, 62 *Int'l & Comp. L.Q.* 345 (2013).
- [18] *Bangl. v. India*, *supra* note 3, ¶¶ 76–83; *Bangl./Myan.*, *supra* note 3, ¶¶ 406–13.
- [19] *See Bangl. v. India*, *supra* note 3, ¶ 78; *Bangl./Myan.*, *supra* note 3, ¶¶ 440–41.
- [20] *Bangl. v. India*, *supra* note 3, ¶¶ 81, 457; *Bangl./Myan.*, *supra* note 3, ¶ 445.
- [21] *See* Pieter Bekker, *The World Court Awards Sovereignty Over Several Islands in the Caribbean Sea to Colombia and Fixes a Single Maritime Boundary between Colombia and Nicaragua*, ASIL Insights (Jan. 15, 2013), <http://www.asil.org/insights/volume/17/issue/3/world-court-awards-sovereignty-over-several-islands-caribbean-sea> (<http://www.asil.org/insights/volume/17/issue/3/world-court-awards-sovereignty-over-several-islands-caribbean-sea>).
- [22] *Nicar. v. Colom.*, *supra* note 3, Verbatim Record, 12 ¶ 8 (April 24, 2012, 10 a.m.), <http://www.icj-cij.org> (<http://www.icj-cij.org>) (Scientific and Technical Adviser for Nicaragua) (“This extensive shallow area is known as the Nicaraguan Rise. In Nicaragua’s case this physical continental shelf extends in a triangular shape about 180 miles towards Jamaica.”).
- [23] *But see Nicar. v. Colom.*, *supra* note 3, ¶ 128 (recounting Nicaragua’s argument that “the Court could make that delimitation by defining the boundary in words such as ‘the boundary is the median line between the outer edge of Nicaragua’s continental shelf fixed in accordance with UNCLOS Article 76 and the outer limit of Colombia’s 200-mile zone’”). While delimitation by such an open-ended formula would have been possible, it would have been difficult for an international court or tribunal to evaluate whether the relevant area delimited by the formula was allocated equitably.
- [24] *Id.* ¶ 129.
- [25] *See id.* ¶¶ 125–26.
- [26] *Id.* ¶ 127.
- [27] *Id.* ¶ 126.
- [28] *Id.* ¶ 129.
- [29] *Id.* ¶¶ 17–20 (declaration of Judge *ad hoc* Cot); *id.* ¶¶ 3–30 (separate opinion of Judge Donoghue); *id.* ¶¶ 2–12 (declaration of Judge *ad hoc* Mensah).
- [30] *Id.* ¶¶ 19–20 (declaration of Judge *ad hoc* Cot) (“I remain sceptical of the Court’s finding that Nicaragua is bound, vis-à-vis Colombia, to respect its obligations under Article 76, paragraph 8, of the Convention, in order to delineate the outer limit of its continental shelf beyond 200 nautical miles”); *id.* ¶¶ 15, 25–28 (separate opinion of Judge Donoghue) (“The Court has not been presented with sufficient evidence in these proceedings to conclude that there is an area of continental shelf beyond 200 nautical miles of Nicaragua’s coasts [But i]t goes without saying that [States that are non-parties to UNCLOS] have no duty to make submissions to the Commission, so the Court’s observations regarding Nicaragua’s

obligations to States parties to UNCLOS cannot be extended to them.”); *id.* ¶ 9 (declaration of Judge *ad hoc* Mensah) (“[T]he procedural requirements for obtaining a positive recommendation from the Commission under Article 76, paragraph 8, of UNCLOS . . . are only applicable where the States concerned are all parties to UNCLOS.”).

[31] See Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicar. v. Colom.), Application Instituting Proceedings (Sept. 16, 2013), <http://www.icj-cij.org/docket/files/154/17532.pdf> (<http://www.icj-cij.org/docket/files/154/17532.pdf>).

[32] See *id.* ¶¶ 5–10. Although Colombia withdrew from the ICJ’s jurisdiction under the Pact of Bogotá on November 27, 2012, Nicaragua argues that Colombia’s denunciation of the Pact of Bogotá had not yet taken effect at the time when Nicaragua’s second application was filed due to a one-year notice provision under Article LVI of the Pact. See *id.* ¶ 9.

[33] David Colson, *The Delimitation of the Outer Continental Shelf Between Neighboring States*, 97 Am. J. Int’l L. 91, 104–05 (2003); Alex G. Oude Elferink, *Does Undisputed Title to a Maritime Zone Always Exclude Its Delimitation: The Grey Area Issue*, 13 Int’l J. Marine & Coastal L. 143, 143–44 (1998).

[34] *Bangl./Myan.*, *supra* note 3, ¶ 340.

[35] *Bangl. v. India*, *supra* note 3, ¶ 509.

[36] *Bangl. v. India*, *supra* note 3, ¶¶ 498–508; *Bangl./Myan.*, *supra* note 3, ¶¶ 471–76.

[37] See *Bangl. v. India*, *supra* note 3, ¶¶ 498, 503; *Bangl./Myan.*, *supra* note 3, ¶ 463.

[38] See UNCLOS, *supra* note 2, arts. 87, 89.

[39] *Bangl. v. India*, *supra* note 3, ¶ 505; *Bangl./Myan.*, *supra* note 3, ¶ 474.

[40] *Bangl. v. India*, *supra* note 3, ¶ 503; *Bangl./Myan.*, *supra* note 3, ¶ 471.

[41] *Bangl. v. India*, *supra* note 3, ¶ 507.

[42] *Bangl./Myan.*, *supra* note 3, ¶ 475.

[43] *Bangl. v. India*, *supra* note 3, ¶ 508; *Bangl./Myan.*, *supra* note 3, ¶ 476.

[44] *Bangl. v. India*, *supra* note 3, ¶ 31 (dissenting opinion of Dr. Rao) (“[S]overeign rights of a coastal State over the water column and the seabed and its subsoil are considered as two *indispensable and inseparable parts* of the coastal State’s rights in the EEZ”); see also *Bangl./Myan.*, *supra* note 3, at 287 (dissenting opinion of Judge Lucky) (“It seems to me that continental shelf rights in the special circumstances of this case have priority over EEZ rights.”).

[45] *Bangl. v. India*, *supra* note 3, ¶¶ 35–37 (dissenting opinion of Dr. Rao) (“[A]s a matter of policy, international courts and tribunals should avoid delimiting boundaries in a way that leaves room for potential conflicts between the parties. . . . The grey area also has the potential to exacerbate bilateral relations and pose avoidable security problems.”);

Bangl./Myan., *supra* note 3, at 285–86 (dissenting opinion of Judge Lucky) (“[A]ll of the foregoing may lead to further problems and issues and may be regarded as a failure on the part of the Tribunal to determine the issue.”).

[46] *Nicar. v. Colom.*, *supra* note 3, ¶ 230; see also *Continental Shelf (Tunis./Libya)*, 1982 I.C.J. 18, 232 ¶ 126 (Feb. 24) (dissenting opinion of Judge Oda) (“Is it congruous or conceivable that the same marine/submarine column should be placed under different national jurisdictions . . . and that the same area of the ocean be consequently policed by two different States? One is entitled to enquire whether [such a situation] is tolerable as a matter of international *ordre public*.”).

[47] *Bangl. v. India*, *supra* note 3, ¶ 506.

[48] See *Nicar. v. Colom.*, *supra* note 3, Verbatim Record, 25–26 ¶¶ 49–51 (May 1, 2012, 3 p.m.), <http://www.icj-cij.org> (<http://www.icj-cij.org>) (Counsel for Nicaragua) (“In other words, where State A’s natural prolongation continental shelf lies under State B’s EEZ, State A has the continental shelf ‘seabed’ rights, and State B has the EEZ rights in the water column And that, in our respectful submission, is . . . the correct approach in the present case.”).

[49] *Bangl. v. India*, *supra* note 3, ¶ 503; *Bangl./Myan.*, *supra* note 3, ¶ 471.

[50] Treaty Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, Nor.-Russ., art. 3, Sept. 15, 2010, 2791 U.N.T.S. ___, I-49095. See also Thilo Neumann, *Norway and Russia Agree on Maritime Boundary in the Barents Sea and the Arctic Ocean*, ASIL Insights (Nov. 10, 2010), <http://www.asil.org/insights/volume/14/issue/34/norway-and-russia-agree-maritime-boundary-barents-sea-and-arctic-ocean> (<http://www.asil.org/insights/volume/14/issue/34/norway-and-russia-agree-maritime-boundary-barents-sea-and-arctic-ocean>).

[51] Agreement on the Maritime Boundary, U.S.-U.S.S.R., art. 3, June 1, 1990, 29 I.L.M. 941.

[52] See *Monetary Gold Removed from Rome in 1943 (Italy v. Fr., U.K., U.S.)*, 1954 I.C.J. 19, 32 (June 15) (referring to the “well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent”).

[53] See *Bangl./Myan.*, *supra* note 3, ¶ 476.

[54] *Peru v. Chile*, *supra* note 3, ¶¶ 14, 22–23; Declaration on the Maritime Zone (Santiago Declaration), Aug. 18, 1952, 1006 U.N.T.S. 326. See also Uzma S. Burney, *International Court of Justice Defines Maritime Boundary Between Peru and Chile*, ASIL Insights (Feb. 10, 2014), <http://www.asil.org/insights/volume/18/issue/3/international-court-justice-defines-maritime-boundary-between-peru-and-chile> (<http://www.asil.org/insights/volume/18/issue/3/international-court-justice-defines-maritime-boundary-between-peru-and-chile>).

[55] See *Peru v. Chile*, *supra* note 3, Verbatim Record, 58 ¶ 35 (Dec. 4, 2012, 3 p.m.), <http://www.icj-cij.org> (<http://www.icj-cij.org>) (Counsel for Peru) (referring to the disputed area as “une superficie équivalente à celle de l’Albanie”).

[56] See *id.*, Verbatim Record, 37–38 ¶¶ 6.1–6.2 (Dec. 7, 2012, 3 p.m.), <http://www.icj-cij.org> (<http://www.icj-cij.org>) (Counsel for Chile) (“Let me turn to Peru’s claim to the area Chile refers to as the ‘*alta mar*’ or what Peru refers to as the ‘outer triangle’ [T]he *alta mar* is an area of high seas. . . . Chile makes no jurisdictional claim to the *alta mar* under the Law of the Sea Convention.”).

[57] *Peru v. Chile*, *supra* note 3, ¶¶ 70, 91.

[58] *Id.* ¶¶ 104–51.

[59] *Id.* ¶ 189.

[60] See *Peru v. Chile*, *supra* note 3, ¶ 4 (declaration of President Tomka); *id.* ¶¶ 2, 9 (dissenting opinion of Judges Xue, Gaja, and Bhandari, and Judge *ad hoc* Orrego Vicuna).

[61] See *id.* ¶ 26 (declaration of President Tomka); *id.* ¶ 35 (dissenting opinion of Judges Xue, Gaja, and Bhandari, and Judge *ad hoc* Orrego Vicuna).

[62] See *id.* ¶ 26 (declaration of President Tomka).

[63] Territorial and Maritime Dispute (Nicar. v. Hond.), 2007 I.C.J. 659, 735 ¶ 253 (Oct. 8).

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Annex 188

T. M. Franck and D. M. Sughrue, "The International Role of Equity-as-Fairness",
Georgetown Law Journal, 1993

The International Role of Equity-as-Fairness

THOMAS M. FRANCK*
AND DENNIS M. SUGHRUE**

In law we must beware of petrifying the rules of yesterday and thereby halting progress in the name of process. If one consolidates the past and calls it law he may find himself outlawing the future.

Judge Manfred Lachs¹

In the post-Cold War international system, international law's role is both enlarged and more secure. One implication of this change is lawyers' renewed interest in the *quality* of international law. Whereas it had been common practice for international lawyers to devote much effort to defending the "lawlikeness" of their subject, that battle has long been won. The newly widespread recourse to legal principles in the conduct of global systemic relations has both made it possible, and imperative for lawyers to turn professional attention to the law's fairness. One way—at present the most highly developed way—to embark on such an inquiry is by studying the emerging role of equity in international law.

Equity is sometimes derided as a "content-less" norm amounting to little more than a license for the exercise of judicial caprice. This criticism, while addressing a potential problem, ignores the very real "content" given to equity by scholars and international courts, arbitral proceedings, and organizations. Just as the notion of justice in jurisprudential thinking commonly embodies a set of principles designed to critique the law and to promote fairness among individuals, so too has equity come to represent a set of principles designed to critique the law and ensure fairness among nations, particularly in situations of moderate scarcity.

This study surveys the development of equity in the international system since the turn of the century. First, it will discuss equity as a general principle of law-as-fairness, encompassing the elementary concepts of unjust enrichment, estoppel, and acquiescence. Second, it will discuss the difference between equitable decisions and decisions *ex aequo et bono*, that

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1. Judge Manfred Lachs, President of the International Court of Justice, Commemorative Speech at the United Nations General Assembly (Oct. 12, 1973).

is, rendered outside the framework of the law. Finally, it will discuss equity as a tool for the allocation of scarce resources among states.

I. EQUITY AS A GENERAL PRINCIPLE OF LAW-AS-FAIRNESS: HISTORICAL ORIGINS

Most municipal legal systems accommodated themselves to principles of fairness only gradually, in a process involving three stages. First, the sovereign granted dispensations to subjects exposed to inordinate hardship in a specific situation. Second, precedents accumulated, evolving into a system of equitable norms parallel to the main body of the law and displacing the system of royal dispensation. In the last stage, equitable principles became a part of the law.²

When the victorious powers established the Permanent Court of International Justice (P.C.I.J.) in the aftermath of World War I, the world's major municipal systems had largely completed this evolution.³ This evolution, moreover, had left most municipal legal systems with a shared set of principles of law-as-fairness, most prominently, unjust enrichment, estoppel, and acquiescence. Given the universality of these principles, the establishing powers thought it appropriate to graft them onto international law. Accordingly, article 38(1)(c) of the P.C.I.J. statute,⁴ which later came to govern the sources of law to be applied by the International Court of Justice (I.C.J.),⁵ allowed the Court to refer to "general principles of law as recognized by civilized nations" as a subsidiary source of international law.⁶ Although the P.C.I.J. and the I.C.J. have avoided making explicit reference to the authority conferred on them by this article, they have had frequent recourse to general principles of law-as-fairness. These principles also have a long history as an issue in international arbitration.⁷

2. Ralph A. Newman, *The Principles of Equity as a Source of World Law*, 1 ISR. L. REV 616, 619 (1966).

3. *See, e.g.*, Norwegian Claims (Nor. v. U.S.), Hague Ct. Rep. 2d (Scott) 39, 65 (Perm. Ct. Arb. 1922) (noting that most international lawyers agreed that "law and equity" represented "general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State").

4. Permanent Court of International Justice, Dec. 16, 1920, 6 L.N.T.S. 390.

5. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38 (1)(c) (1945).

6. *See, e.g.*, Oscar Schacter, *International Law in Theory and in Practice*, 178 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.D.C.A.D.I.] 9, 74-82 (1982) (describing general principles of law and equity).

7. *See, e.g.*, Indo-Pakistan Western Boundary (Rann of Kutch) (India v. Pak.) 50 I.L.R. 2, 3, 18, 27-30, 38-39, 41 (1976) (discussing the primary contentions of the parties regarding the role of equity). In the decision itself, however, the judgment relegates the equity issue to a very minor role, giving "due regard to what is fair and reasonable as to details." *Id.* at 519. In making one adjustment, the tribunal ruled that strategic reasons require it to deviate from strict application to the boundary of the prevailing legal principle because:

[I]t would be inequitable to recognize these inlets as foreign territory. It would be

A. UNJUST ENRICHMENT

“Unjust enrichment” stands for the proposition that a party should not enrich itself, without legal cause, at the expense of another.⁸ Courts and arbitral tribunals have invoked the principle chiefly in the context of calculating damages resulting from expropriation of the property of foreign nationals. The *Factory at Chorzow*⁹ case is one example. After determining in 1926 that Poland’s expropriation of a German-owned nitrate concern violated the terms of a convention on Upper Silesia,¹⁰ the P.C.I.J. in 1928 turned to unjust enrichment for guidance in calculating damages. Under general international law, damages in cases of expropriation would have been based on the book value of the property at the time of its dispossession plus interest.¹¹ The Court held that, although this standard might be appropriate for a legal expropriation, it did not adequately remedy an illegal one. Because the value of the property as a going-concern could well have exceeded its book value, the general standard would have left Poland with a gain to which it was not entitled. The true measure of damages, the Court continued, should thus reflect not merely the value of the property at the time of dispossession, but the loss sustained because of the expropriation.¹²

The arbitral tribunal that decided the 1932 *Norwegian Claims*¹³ case also departed from strict law, applying a standard like unjust enrichment to its calculation of damages. The case arose from the United States’s decision, after entering World War I, to expropriate ships being built in U.S. shipyards for foreign parties.¹⁴ After Norway and the United States failed to agree on the sum due Norwegian nationals whose contracts had been expropriated, they referred the matter to the Permanent Court of International Arbitration.¹⁵ After determining the fair market values of the

conducive to friction and conflict. The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistan territory, also be regarded as such.

Id. at 520. This recourse to equity in drawing the boundary, however, was exceptional in the context of the overall award.

8. Wolfgang Friedmann, *The Uses of “General Principles” in the Development of International Law*, in *INTERNATIONAL LAW IN THE TWENTIETH CENTURY* 246, 263 (L. Gross ed., 1969).

9. *Factory at Chorzow* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

10. *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 24 (May 25).

11. *Factory at Chorzow*, 1928 P.C.I.J. at 47.

12. *Id.*

13. *Norwegian Claims* (Nor. v. U.S.), Hague Ct. Rep. 2d (Scott) 39, 65 (Perm. Ct. Arb. 1922).

14. *Id.* at 46-50.

15. *Id.* at 41.

contracts, the Court turned to a claim brought on behalf of an American firm that had acted as broker between a Norwegian purchaser and an American shipyard.¹⁶ Once the ship had been requisitioned, the United States failed to pay the remainder of the commission, in violation of the terms of the contract. The firm sought to blame the Norwegians for this lapse, arguing that the purchaser's assignee was contractually bound to pay the remainder.¹⁷

The Court rejected the firm's claim for fulfillment of a contractual obligation, holding that the expropriation had terminated any contractual relationship between the firm and the Norwegian purchaser. It reasoned, however, that had the United States paid the amount due the broker, that amount would have been deducted from the fair market value of the contract.¹⁸ "In these circumstances," the Court wrote, "it appears to be equitable . . . to give the United States the right to retain [the amount due the firm] out of the amount awarded," on the condition that the United States pay that sum to the broker.¹⁹ The reasoning was not based on actual costs incurred by the United States, but on the unjust enrichment of Norway that would have resulted had the loss to the U.S. broker not been offset.

B. ESTOPPEL

Equitable estoppel imposes a duty on states to refrain from engaging in inconsistent conduct vis-a-vis other states.²⁰ This norm figured prominently in the *Diversion of Water from the Meuse* case.²¹ The Netherlands complained that Belgium's construction of a lock to take water from a river violated a conventional regime governing access to that river's waters.²² A few years earlier, however, the Netherlands had constructed a lock remarkably similar to the one of which it complained.²³ After concluding that the Belgian lock did not violate any of the terms of the convention,²⁴ the Court suggested that, even had it found the lock in violation, a principle closely akin to estoppel would have impelled it to reject the Dutch claim.²⁵

16. *Id.* at 78.

17. *Id.*

18. *Id.* at 78-79.

19. *Id.* at 79.

20. Oscar Schacter, *Non-Conventional Concerted Acts*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 265, 267-68 (Mohammed Bedjaoui ed., 1991).

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

22. *Id.* at 18.

23. *Id.* at 15.

24. *Id.* at 25.

25. *Id.* at 25; see Friedmann, *supra* note 8, at 255 (noting that the Court applied the equitable principle: "[H]e who seeks equity must do equity. This is closely akin to the

“[T]he Court finds it difficult to admit,” it wrote, “that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past.”²⁶

Historically, a party invoking equitable estoppel had to demonstrate detrimental reliance on the other party’s conduct.²⁷ As the P.C.I.J. noted in the *Diversion of Water from the Meuse*, the Dutch, having “set an example” through the construction of their lock, ought not to have been surprised when the Belgians followed suit.²⁸ The earlier *Tinoco Claims*²⁹ arbitration had similarly illustrated the importance of this element of reliance. In 1917, Tinoco, the Costa Rican Minister of War, overthrew the government. Two years later, his government fell, after which the new Costa Rican Congress nullified all contracts made and all currency issued by the Tinoco regime.³⁰ Britain brought a claim on behalf of two nationals injured by this move.³¹ Costa Rica responded that Britain’s failure to recognize the Tinoco government during its incumbency should estop it from championing such a claim by its nationals.³² United States Supreme Court Chief Justice Taft, the sole arbitrator, rejected Costa Rica’s defense on the ground that it had not relied to its detriment on Britain’s failure to recognize Tinoco’s regime.³³ “An equitable estoppel to prove the truth must rest on previous conduct of the person to be estopped, which has led the person claiming the estoppel into a position in which the truth will injure him,” he wrote. “There is no such case here.”³⁴

International tribunals no longer appear to require such narrow detrimental reliance on the part of those seeking to invoke equitable estoppel. Even in the absence of detrimental reliance, a nation may be estopped, under an implied principle of “good faith,” from contesting the legally binding effect of its promises. In the 1974 *Nuclear Tests* cases,³⁵ Australia and New Zealand asked the I.C.J. to order France to cease atmospheric

common law principle of estoppel.”).

26. *Diversion of Water from the Meuse*, 1937 P.C.I.J. at 25.

27. See, e.g., Thomas M. Franck, *Word Made Law: The Decision of the ICJ in the Nuclear Test Cases*, 69 AM. J. INT’L L. 612, 617-20 (1975) (discussing the difficulty of defining reliance in international law disputes, as evidenced in the *Nuclear Test* cases).

28. *Id.*

29. *Tinoco Claims* (Gr. Brit. v. Costa Rica) (William H. Taft, Sole Arbitrator, 1923), reprinted in 18 AM. J. INT’L L. 147 (1924).

30. *Id.* at 148.

31. *Id.* at 148-49.

32. *Id.* at 149.

33. *Id.* at 156-57.

34. *Id.* at 157.

35. *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20); *Nuclear Tests* (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20). The judgments in the two cases are essentially identical. Page references, hereinafter, are made to the Australia case.

testing in the South Pacific.³⁶ Before the Court issued its judgment, French officials announced that the 1974 set of tests would be the last.³⁷ These declarations, the Court held, were legally cognizable as a promissory commitment, rendering the case moot.³⁸ The principle of good faith, the Court explained, can confer a binding character on unilateral declarations.³⁹ Detrimental reliance, at least in the traditional sense, was not part of this decision because Australia had dismissed the French declaration as “inconclusive” and persevered with the litigation.⁴⁰ To overcome this lack of reliance, the Court wrote that it would “form its own view of the meaning and scope” of the declaration.⁴¹ In effect, this suggested that what mattered was not the promisee’s reliance, but the Court’s.⁴² Thus the Court, relying on France’s promise, declared the case moot.

C. ACQUIESCENCE

Acquiescence, or prescription, is another form of equitable estoppel recognized as a general principle of law-as-fairness. Silence or absence of protest may preclude a state from later challenging another state’s claim.⁴³ To succeed in a defense of acquiescence, a state must prove that the second state had knowledge of its claim.⁴⁴ As the 1951 *Fisheries*⁴⁵ case demonstrates, this knowledge usually can be inferred from the circumstances. *Fisheries* arose out of a dispute over the boundary of Norway’s continental shelf. To erase the irregularities that would have been caused by its fjord-indented coast, Norway had for decades used straight base-lines to delimit its fisheries zone, rejecting the general practice of using a line based on a coastal low-water mark.⁴⁶ Holding in Norway’s favor partly on grounds of acquiescence, the I.C.J. rejected Britain’s argument that it had not known of this system of delimitation. Because Britain was a maritime power with a strong interest in Norwegian waters, the Court

36. *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. at 256.

37. See *Work of the Court in 1974-1975*, 1974-75 I.C.J.Y.B. 108, 110 (1975) (discussing the French government’s decision to end testing).

38. *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. at 269-70.

39. *Id.* at 268.

40. Franck, *supra* note 27, at 617-18.

41. *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. at 269.

42. See Franck, *supra* note 27, at 618.

43. I.C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT’L L. 143, 147-48 (1954).

44. *Id.* at 173 (“The proposition that the possession on which title by prescription rests must fulfil [sic] the requirement of notoriety is scarcely in doubt.”).

45. *Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18).

46. See *Fisheries Case*, 1951-52 I.C.J.Y.B. 78-79 (discussing the underlying dispute between the United Kingdom and Norway).

reasoned, it must have known of Norway's practice and thus could not excuse its failure to protest.⁴⁷

The principle of acquiescence, as the 1962 *Temple of Preah Vihear*⁴⁸ case illustrates, is predicated on the notion that finality has an equitable dimension.⁴⁹ That case had its origins in a border dispute between Cambodia and Thailand.⁵⁰ Shortly after the turn of the century, two Franco-Siamese commissions delimited the frontier between French Indochina and Siam (Thailand).⁵¹ As the Siamese lacked the necessary technical expertise, the French were assigned the task of preparing maps of the frontier.⁵² Those maps pertaining to the area in which the temple was located placed it on the French side of the border.⁵³ During the fifty-year period following its reception of the map, the Siamese government registered no objection.⁵⁴

The I.C.J. held that Siam's failure to object to the content of the maps amounted to acquiescence.⁵⁵ In so doing, it discounted evidence that this acquiescence may have been coerced.⁵⁶ Rather, the Court emphasized the importance of stable borders: "[W]hen two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment . . . be called in question"⁵⁷

II. THE DISTINCTION BETWEEN EQUITY AND *EX AEQUO ET BONO*

To understand what equity is, it is important to understand also what it is not. Under article 38(2) of its statute, the I.C.J. is empowered, with the consent of the parties appearing before it, to decide cases *ex aequo et bono*,⁵⁸ that is, outside the framework of the law. While there is no "bright line" between *ex aequo et bono* and equity,⁵⁹ these two modes of decision are quite distinct. "[A]djudication *ex aequo et bono* amounts to an avowed

47. *Fisheries*, 1951 I.C.J. at 138-39.

48. *Temple of Preah Vihear (Cambodia v. Thail.)*, 1962 I.C.J. 6 (June 15).

49. For a discussion of the equitable dimensions of finality, see Paul Reuter, *Quelques Reflexions sur l'Equite en Droit International*, 15 REVUE BELGE DE DROIT INTERNATIONAL [R.B.D.I.] 165, 179-84 (1981).

50. *Temple of Preah Vihear*, 1962 I.C.J. at 14.

51. *Id.* at 17, 19.

52. *Id.* at 20.

53. *Id.* at 20-21.

54. *Case Concerning the Temple of Preah Vihear*, 1961-62 I.C.J.Y.B. 75, 76-77.

55. *Temple of Preah Vihear*, 1962 I.C.J. at 32-33.

56. *See id.* at 28-29 (Spender, J., dissenting) (concluding that Siam's silence "might otherwise have been expected of her").

57. *Id.* at 34.

58. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(2) (1945).

59. Mark Janis, *Equity in International Law*, Remarks Before The American Society of International Law (1988), in 82 AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE ANNUAL MEETING 277, 284 (1988).

creation of new legal relations between the parties," Sir Hersch Lauterpacht has written, "It differs clearly from the application of rules of equity . . . [which] form part of international law as, indeed, of any system of law."⁶⁰

Although the I.C.J. has endorsed another U.N. tribunal's *ex aequo et bono* calculation of damages after the establishment of liability,⁶¹ neither it nor the P.C.I.J. has ever decided a case *ex aequo*.⁶² This failure to use article 38(2) is attributable not only to the unwillingness of parties to confer unbridled discretion on the Court, but also to the trepidation with which the judges themselves approach the exercise of this discretion. The *Free Zones*⁶³ case, which the P.C.I.J. refused to decide *ex aequo et bono* in spite of an arbitration agreement that arguably called on it to do so, provides an excellent illustration of this judicial wariness. *Free Zones* turned on a provision of the Treaty of Versailles⁶⁴ that had designated the regime of the free zones—under which the Swiss were able to trade in the French territory surrounding Geneva without payment of customs duties—"no longer consistent with present conditions."⁶⁵ France argued that this clause abrogated the regime; Switzerland argued that it did not.⁶⁶ The two countries formed a special agreement whereby the P.C.I.J. would first determine the meaning of the clause and then, failing a private resolution of the dispute, "settle . . . all the questions" involved in its execution.⁶⁷

The Court concluded in 1929 that the clause did not abolish the regime and accorded the parties a period of time in which to solve their differences privately.⁶⁸ After this period elapsed, a sharply divided Court in 1930 rejected France's contention that the special agreement, by empowering the Court to "settle . . . all the questions," had also empowered it to ignore the clause and settle the affair *ex aequo*. A grant of such jurisdiction, the Court held, must be unambiguous: "[S]uch power, which would be of an absolutely exceptional character, could only be derived from a

60. HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 213 (1958).

61. *Judgments of the Administrative Tribunal of the Labor Organization*, 1956 I.C.J. 77, 100 (Oct. 23) ("[A]s the precise determination of the actual amount to be awarded could not be based on any specific rule of law, the Tribunal [through resort to calculations *ex aequo et bono*] fixed what the Court . . . has described as the true measure of compensation.").

62. Wolfgang Friedmann, *The North Sea Continental Shelf Cases—A Critique*, 64 AM. J. INT'L L. 229, 235 (1970).

63. *Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.)*, 1930 P.C.I.J. (ser. A) No. 24, at 5 (Dec. 6).

64. *Treaty of Versailles*, June 28, 1919, 225 Consol. T.S. 188.

65. *Id.* at 388.

66. *Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.)*, 1929 P.C.I.J. (ser. A) No. 22, at 5-6 (Aug. 19).

67. *Id.* at 7.

68. *Id.* at 20-21.

clear and explicit provision to that effect, which is not to be found in the Special Agreement”⁶⁹

Judge Kellogg, in his concurrence, adopted the extreme position that the Court could never decide a case solely on pragmatically determined merits, article 38(2) notwithstanding. “[I]t is scarcely possible that it was intended that, even with the consent of the Parties, the Court should . . . decide questions upon grounds of political and economic expediency,” he wrote.⁷⁰ “The authority given to the Court to decide a case *ex aequo et bono* merely empowers it to apply the principles of equity and justice”⁷¹ Should the Court come to base its decisions on extra-legal considerations, Judge Kellogg warned, it would be indistinguishable from an arbitral tribunal, with disastrous consequences for its jurisdiction. “It very frequently happens,” he wrote, “that a nation which would be very willing to submit its differences to an impartial judicial determination is unwilling to subject them” to the diplomatic give and take of arbitration.⁷²

Judge Kellogg’s view might have, but did not, give rise to the Court’s resorting to equity only with the specific consent of the parties. It did, however, signal a cautious judicial approach not only to *ex aequo et bono*, but more important, to equitable principles. His warning—that the resort to extra-legal considerations would lead to an erosion of the Court’s authority—has resonated throughout the jurisprudence of the I.C.J. When it has relied on equity, the Court has taken pains to emphasize that equity is rule-based and complements, rather than conflicts with, the law.⁷³ In one case in which it did resort to equity, the Court explained that, “the decision finds its objective justification in considerations lying not outside but within the rules. . . . There is consequently no question in this case of any decision *ex aequo et bono*”⁷⁴ As the next section illustrates, such cautious pronouncements have not always sufficed to erase doubts about the Court’s reliance on equity.

69. *Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.)*, 1930 P.C.I.J. (ser. A) No. 24, at 10 (Dec. 6).

70. *Id.* at 34 (Kellogg, J., concurring).

71. *Id.* at 40.

72. *Id.* at 36 (quoting Elihu Root’s instructions to the U.S. delegation to the 1907 Hague Conference).

73. See Shabtai Rosenne, *The Position of the International Court of Justice on the Foundation of the Principle of Equity in International Law*, in FORTY YEARS INTERNATIONAL COURT OF JUSTICE 85, 88-89 (A. Bloed & P. van Dijk eds., 1988) (“[T]he International Court has been very careful . . . to formulate its resort to ‘equity’ not in terms of ‘opposition’ to ‘law,’ but in terms of fulfilling the law and if necessary supplementing it.”); see also R.Y. Jennings, *Equity and Equitable Principles*, 42 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 27, 35 (1986) (asserting that the Court’s application of equity is “very different from the decision *ex aequo et bono*”).

74. *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 48 (Feb. 20).

III. EQUITY AS A MODE OF SCARCE RESOURCE ALLOCATION

Since World War I, equity-as-fairness has become relevant to one of the most vexing problems confronting international courts: the allocation of scarce resources among states. This problem arises primarily from the failure of the earth's system of territorial boundaries to resolve satisfactorily the attribution of certain resources, such as the riches of the continental shelf.⁷⁵ Equity brings important advantages to this task, affording judges a measure of discretion, within a flexible structure, commensurate with the uniqueness of each dispute and the rapid evolution of new resource recovery and management technology.⁷⁶

International lawyers are engaged in a debate as to the proper role of equity in this context. This debate shows that at least three approaches to equitable allocation have emerged. In the first model, which may be labelled "corrective equity," equity occupies the important, but fringe, role of tempering the gross unfairness that sometimes results from the application of strict law. In the second model, "broadly conceived equity," equity displaces strict law but is still rule-based, evolving into a set of principles for the accomplishment of an equitable allocation. In the third model, "common heritage equity," equity serves a dual creative function: determining the conditions for exploitation and ensuring conservation of humankind's common patrimony.

A. CORRECTIVE EQUITY

Corrective equity is the most conservative model of equitable allocation. Operating around the margins of strict law, it embraces a notion of fairness but seeks to contain this impulse within a conservative rule. It invokes equitable considerations only exceptionally, when the letter of the rule would kill its spirit. This mode of allocation has found broadest application in two contexts: preferential trading arrangements for developing states and continental shelf allocations.

1. Corrective Equity in Trading Arrangements

Equity is not a concept limited to judicial decisionmaking. It may also be the basis for mitigating the legal parameters established by a treaty system, if not the basis for an altogether new legal-institutional regime. Some instances of both the former and latter are found in the laws established to create a global market for commodities. The basic law of the trading system is that of supply and demand within a free trade regime.

75. Reuter, *supra* note 49, at 173.

76. See L.D.M. Nelson, *The Role of Equity in the Delimitation of Maritime Boundaries*, 84 AM. J. INT'L L. 837, 840-41 (1990) (discussing the notion of "autonomous equity").

While the system recognizes the paramount importance of this law to the efficient operation of the global marketplace, it has also come to accommodate principles of equity to remedy the harsher effects of supply and demand on the weakest parties.

The General Agreement on Tariffs and Trade (GATT)⁷⁷ includes a mechanism, the Generalized System of Preferences (GSP),⁷⁸ to introduce a notion of fairness into the international trading system. The GATT's most basic provision, the "Most Favored Nation" clause, guards against trade wars and cartelization by prohibiting members from giving "any advantage . . . to any product originating in or destined for any other country" that is not also accorded "unconditionally to the like product originating in or destined for the territories of all contracting parties."⁷⁹ After it became clear that such a regime would incidentally produce further erosion of the developing world's share of world trade, GATT parties agreed to the GSP.⁸⁰

Under the GSP, preferences may be given to specified goods of developing countries "without according such treatment to other contracting parties."⁸¹ The GSP, however, includes a set of principles intended to ensure that such preferential treatment serves GATT's primary purpose: the promotion of free world trade. Developed states may not use the GSP to obtain reciprocal preferential treatment in gaining access to the markets of developing states. Moreover, the GSP is cast in transitional language based on short-term needs. Upon the "progressive development of their economies," developing states are expected "to participate more fully in the framework of rights and obligations under the General Agreement."⁸²

The Lomé Convention⁸³ and the United Nations Common Fund for Commodities⁸⁴ similarly seek to inject equity into the global commodities market. Commodities are particularly susceptible to dramatic price fluctuations in an unregulated market. When the price of a particular commodity rises, production tends to shift rapidly to that product, creating an

77. General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

78. *Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries*, GATT Doc. L/4903 (Nov. 28, 1979) (contracting parties decision) [hereinafter GSP].

79. GATT, *supra* note 77, 55 U.N.T.S. at 198.

80. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 178-80 (1990).

81. GSP, *supra* note 78, at 203.

82. *Id.* at 205.

83. Fourth ACP-EEC Convention and Final Act, Dec. 15, 1989, 29 I.L.M. 783. There are four versions of the Convention. They will be referred to hereinafter as Lomé I, Lomé II, Lomé III, and Lomé IV.

84. Agreement Establishing the Common Fund for Commodities, June 27, 1980 U.K.T.S. (Cmd. 8192).

oversupply. Under the weight of this oversupply, prices may collapse, with disastrous consequences for developing nations inordinately dependent on the product for foreign exchange earnings.⁸⁵ The Lomé Convention between the European Economic Community (EEC) and African, Caribbean, and Pacific (ACP) states seeks to palliate the effects of these swings through the creation of a compensatory fund for the stabilization of export earnings. This fund, known as "STABEX," covers forty-eight agricultural products.⁸⁶ Eligibility for STABEX funding is determined by reference to two criteria, both of which must be met. A country is eligible for a transfer if a product represents at least 5% of its total export earnings in the year preceding application.⁸⁷ The export earnings of the product must also drop at least 4.5%⁸⁸ from the average calculated over a six-year reference period.⁸⁹

In Lomé IV, the latest Lomé Convention, the EEC pledged \$1.7 billion ECUs (\$1.5 billion) to STABEX to be disbursed over five years.⁹⁰ If a state succeeds in procuring STABEX funding, payment is made in the form of an outright grant.⁹¹ These payments range from the significant to the nearly trifling. In 1991, for instance, the EEC gave Uganda \$51.8 million to compensate for a drop in earnings from its coffee crop,⁹² while in 1990, Nepal received \$840,000 to compensate for a cut in income from lentil and leather exports.⁹³

The Common Fund for Commodities,⁹⁴ implemented in 1991, also operates on the margins of the commodities marketplace, but represents a

85. See Paul Lewis, *Commodity Stockpile Fund*, N.Y. TIMES, June 27, 1983, at D9 (reviewing the viability of a commodity stockpile fund as a mechanism for price stabilization).

86. *Commission Rejects Requests for STABEX Seminars in ACP Countries*, European Information Service, July 3, 1991, available in LEXIS, Nexis Library, European Report File.

87. Lomé IV, *supra* note 83, 29 I.L.M. 850, art. 196(1).

88. *Id.* at 73, art. 197(3).

89. *Id.* at 73, art. 197(2).

90. *Stabex Debts to be Canceled*, European Information Service, Nov. 9, 1991, available in LEXIS, Nexis Library, European Report File. The EEC's outlay is regrettably insufficient to meet ACP entitlements. In 1990, the 484 million European Currency Units (ECUs, \$534 million) made available for STABEX transfers amounted to only 39% of the funds necessary to accommodate eligible transfer applications. *ACP Countries Step Up Demands for Extra Funds from EC*, Inter Press Service, Oct. 14, 1991, available in LEXIS, Nexis Library, Inter Press Service File.

91. *Stabex Debts to be Canceled*, *supra* note 90. Prior to Lomé IV, only transfers made to the least developed ACP states were considered grants, with the remainder considered potentially repayable in the event of a sustained recovery in the price of the commodity for which the transfer was made. Lomé IV canceled all potential debts that had arisen under the previous three conventions. *Id.*

92. *Uganda Coffee Output to Rise*, Reuters News Service, Dec. 15, 1991, available in LEXIS, Nexis Library, Reuters News Service File.

93. *EC Gives Aid to Make Up for Lost Export Earnings*, Reuters News Service, July 5, 1990, available in LEXIS, Nexis Library, Reuters News Service File.

94. Agreement Establishing the Common Fund for Commodities, *supra* note 84.

more ambitious approach to the problems wrought by the price swings that result from the unfettered operation of the law of supply and demand. Unlike the Lomé Convention, the Fund serves a corrective, not a compensatory, purpose.⁹⁵ While accepting the inevitability, and even the desirability, of market-driven price fluctuations, the Fund seeks to keep these fluctuations within certain parameters.

The Fund is primarily intended to help international commodities organizations (ICOs), comprised of both producer and consumer states, purchase buffer stocks when prices fall below fairly wide (and sometimes flexible) parameters established for that commodity by the ICO.⁹⁶ After prices rebound, ICOs are to sell these stocks, helping to ensure that the prices do not exceed the prescribed limit and also generating the cash necessary to repay their debt to the Fund with interest. The Fund has identified ten core commodities for priority support: cocoa, coffee, tea, sugar, copper, tin, rubber, cotton, jute, and hard fiber.⁹⁷ It may also extend protection to eight other products, ranging from bananas to bauxite.⁹⁸

Out of a potential capital of \$750 million, \$470 million has been earmarked for the buffer account (the remainder will be devoted to research and development).⁹⁹ After the Fund negotiates borrowing entitlements with individual ICOs, member states will be required to deposit one-third of the agreed amount in the Fund. To make up the difference between ICO contributions and borrowing entitlements, the Fund will borrow on international capital markets, pledging ICO buffer stocks as security.¹⁰⁰ Taken together, the GSP, Lomé IV, and the Common Fund for Commodity

95. See Robin T. Tait & George N. Spear, *The Common Fund for Commodities*, 16 GEO. WASH. J. INT'L L. & ECON. 483, 486-87 (1982) (primary benefit is stabilizing commodity prices).

96. See, e.g., *The International Natural Rubber Agreement*, Oct. 6, 1979, 1983 U.K.T.S. 30 (Cmd. 8929) (regulating balanced growth in the supply and demand for natural rubber, and stabilizing conditions in the natural rubber trade).

97. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, AN INTEGRATED PROGRAMME FOR COMMODITIES 7, U.N. Doc. TD/B/c.1/166 (Dec. 9, 1974); see also Tait & Spear, *supra* note 95, at 496 n.81.

98. *U.N. Commodities Fund Prepares for an Uphill Struggle*, Reuters News Service, Mar. 20, 1990, available in LEXIS, Nexis Library, Reuters News Service File.

99. *Id.*

100. See Tait & Spear, *supra* note 95, at 508-11 (emphasizing that the primary function of the fund is to finance buffer stocks). The fund has its work cut out for it. Due to the chronically depressed condition of much of the commodities market, most ICOs are in disarray, with only the rubber organization still playing an actively interventionist role in the market. The Fund's success depends in no small measure on its ability to infuse these organizations with new life. See *U.N. Commodities Fund Prepares for an Uphill Struggle*, *supra* note 98 (noting that most Fund aid will be used to finance research and development to reverse the declines of most commodity pacts).

ties demonstrate the increasingly important role that equity plays in trading arrangements.

2. Corrective Equity in Continental Shelf Allocation

Continental shelf allocation has proved to be the most fertile field for the application of equitable principles. Initially, the international community sought to resolve disputes over this allocation through resort to a conventional rule. Under article 6(2) of the 1958 Geneva Convention on the Law of the Continental Shelf,¹⁰¹ states unable to delimit their overlapping shelves "by agreement" were directed to set boundaries by an equidistance line.¹⁰² This rule, however, came with an escape clause: a delimitation could depart from the equidistance line under "special circumstances."¹⁰³ This rule exemplifies corrective equity. While the equidistance rule was paramount, it was not sacrosanct and could be departed from in the event that it produced grossly unfair results.

This equity formulation was implemented in the 1969 *North Sea Continental Shelf*¹⁰⁴ cases. The parties—Denmark, the Netherlands, and West Germany—asked the I.C.J. to determine the principles applicable to negotiations to determine sovereignty over the resources of the North Sea shelf. The Court first determined whether the Geneva Convention, ratified by the Netherlands and Denmark but not by West Germany, governed the dispute. The Danes and the Dutch argued for application; the Germans argued against it. Geography accounted for these respective stances.¹⁰⁵ Endowed, respectively, with a straight and a convex coast, the Dutch and Danes stood to profit handsomely from application of the equidistance principle, at the expense of West Germany, whose coast was concave. To justify enforcement of the equidistance principle against West Germany, the nonparty, Denmark and the Netherlands argued first that equidistance follows naturally from the nature of the continental shelf, and alternatively, that the principle had crystallized into a norm of customary international law. West Germany, in response, argued that each state ought to receive a "just and equitable share" of the shelf, which it defined as a share proportionate to the length of its coast.¹⁰⁶

The Court dismissed the Danish and Dutch argument that it had no choice but to apply the principle set out in article 6(2) of the convention.

101. Convention on the Continental Shelf, *opened for signature* Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311.

102. *Id.*, 15 U.S.T. at 474, 499 U.N.T.S. at 316.

103. *Id.*, 15 U.S.T. at 474, 499 U.N.T.S. at 316.

104. *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3 (Feb. 20).

105. *Id.* at 19-20.

106. *Id.* at 20.

It held that equidistance had no inherent link either to the nature of the shelf or to any principle of proximity or adjacency.¹⁰⁷ It further found that state practice was too sparse and inconclusive to merit a conclusion that the principle had crystallized into a customary norm.¹⁰⁸ The Court also rejected West Germany's claim to a "just and equitable share," which it equated with a request for apportionment. There could be no question of apportioning the shelf, the Court held, because in theory, there was nothing to apportion. The Court's task was only to delimit. "Delimitation is a process which involves establishing boundaries of an area already . . . appertaining to the coastal State," the Court wrote, "and not the determination *de novo* of such an area."¹⁰⁹

Thus the Court refused to enter formally into a process of dividing the shelf into just and equitable portions and distributing them among the litigant states. Instead, it chose to engage only in the more modest task of delimiting a disputed boundary. Nevertheless, the Court wrote, such delimitation must "be effected by agreement in accordance with equitable principles . . . taking account of all the relevant circumstances."¹¹⁰ Although the Court maintained that "there is no legal limit"¹¹¹ to the number of factors that can be considered relevant to an equitable delimitation, it named only a few. These principles were: (1) geology (that is, the similarity of a piece of shelf to state territory), (2) the desirability of maintaining the unity of natural resource deposits, and (3) proportionality, which it defined as the attainment of a reasonable relationship between the extent of a state's continental shelf and the length of its coastline.¹¹²

This judgment, in spite of its seemingly capacious nature, nevertheless reflected a preference for the legal norm codified in article 6(2) of the Geneva Convention. When the parties entered into negotiations to divide the shelf following the judgment, the first factor prescribed by the Court—geology—proved unhelpful. The area in dispute did not resemble the shelf of one party any more than it did those of the others. The second factor—the maintenance of the unity of deposits—proved similarly irrelevant because the location of these deposits had yet to be fully determined. (The parties did, however, provide for negotiated resolution of disputes resulting from the later discovery of trans-boundary deposits.) The parties were thus left with proportionality. As the basis for the delimitation, they drew provisional median lines, which they adjusted to account for the

107. *Id.* at 29-32.

108. *Id.* at 41-45.

109. *Id.* at 22.

110. *Id.* at 53.

111. *Id.* at 50.

112. *Id.* at 51-52.

concavity of the West German coast.¹¹³ The delimitation thus comported with article 6(2)'s command to adhere to the equidistance line except in the face of special circumstances. The Court, through the parties, had completed an exercise in corrective equity, introducing a notion of fairness into the allocation without departing from the conventional rule.

In 1977, when an arbitral tribunal decided the Anglo-French *Continental Shelf*¹¹⁴ arbitration, it also considered equitable factors. Charged by the parties with the task of dividing the English Channel, the five-member tribunal,¹¹⁵ like the Court in the *North Sea* cases, first determined the effect to be given the Geneva Convention. Because both Britain and France had ratified the Convention, Britain argued that it was enforceable against France.¹¹⁶ With the Channel Islands much closer to the French mainland than to England, the U.K. stood to gain significantly from a delimitation placing the boundary equidistant between its islands and the French mainland. France argued that the Convention, or at least article 6 and its equidistance principle, did not apply *inter se* because France had registered objections to that article, reservations to which Britain had objected.¹¹⁷ France further argued that, even if the Convention were in effect, the tribunal should instead resolve the dispute not by equidistance but by applying equitable principles in the light of "special circumstances." Alternatively, France maintained that customary law required the tribunal to establish a boundary equidistant from the two parties' mainlands, with a six nautical-mile enclave accorded to the Channel Islands.¹¹⁸

The tribunal rejected France's argument that the Convention did not apply, holding that Britain's objection to the French reservation had not prevented the treaty from entering into force between the parties.¹¹⁹ It then turned to a provisional application of the equidistance rule between the Islands and France, concluding that this exercise resulted in a "radically" distorted boundary.¹²⁰ The tribunal also drew a provisional equidistance line between the two parties' mainlands, which would have located the

113. Treaty Between the Kingdom of Denmark and the Federal Republic of Germany Concerning the Delimitation of the Continental Shelf of the North Sea, Oct. 6, 1965, *Kolketings beslutning, Folketing saret 1970-71, reprinted in 1970-71 I.C.J.Y.B.* 117; Treaty Between the Kingdom of the Netherlands and the Federal Republic of Germany Concerning the Delimitation of the Continental Shelf of the North Sea, Jan. 28, 1971, 1971 *Tractatenblad van het Koninkrijk der Nederlanden* No. 53, *reprinted in 1970-71 I.C.J.Y.B.* 122.

114. *Continental Shelf (U.K. v. Fr.)*, 54 *I.L.R.* 6 (Ct. Arb. 1975).

115. Each party selected one member of the tribunal. Arbitration Agreement, art. (1). The French choice, Andre Gros, later served on the I.C.J.

116. *Continental Shelf*, 54 *I.L.R.* at 19-21 (U.K. Counter Memorial).

117. *Id.* at 17-19 (Memorial of France).

118. *Id.*

119. *Id.* at 47.

120. *Id.* at 102.

Channel Islands on the French side of the line.¹²¹ The tribunal then turned to equity.

Seeking to “balance the equities” presented by the dispute, the arbitrators attached relevance to a number of factors not present in the *North Sea* cases. They concluded that defense considerations weighed in favor of an adjustment benefiting France.¹²² Although the tribunal, like the I.C.J., claimed only to be delimiting and not apportioning the shelf, it nevertheless accepted Britain’s contention that the populousness and political and economic importance of the islands ought to be accorded “a certain weight.”¹²³

These considerations led the tribunal to apply an equidistance line between the two mainlands while also according the islands a twelve nautical-mile enclave.¹²⁴ In devising this novel solution, the tribunal sought shelter in the Geneva Convention’s article 6(2) formula for corrective equity. By interpreting “special circumstances” to include such factors as the islands’ populousness and political and economic importance, as well as defense considerations, the arbitrators were still able to claim that they were applying the law.¹²⁵ In particular, they asserted their reliance on the equidistance rule, from which departure could only be made in special circumstances.¹²⁶

Considerations of creative fairness also arose in another aspect of the *Continental Shelf* arbitration. Having thus decided that the median line would play a role in the delimitation, the tribunal faced the problem of selecting the line’s basepoints. Britain argued that these must include the Scilly Isles, located off Cornwall, and Ushant, a French island located off Brittany. The French objected because the Scillies project considerably further into the Channel than Ushant. The delimitation, France argued, should follow the “general direction” of the coasts of the two countries, with the Scillies and Ushant treated as special features.¹²⁷

To resolve this dispute, the tribunal turned to the equitable principle of proportionality. In so doing, it sought to clear up some of the ambiguity surrounding the I.C.J.’s treatment of this principle in the *North Sea* cases:

“[P]roportionality” in the delimitation of the continental shelf does not relate to the total partition of the area of shelf among the coastal states concerned, its role being rather that of a criterion to assess the distorting

121. *Id.*

122. *Id.* at 98.

123. *Id.* at 101.

124. *Id.* at 102-03.

125. *Id.* at 103.

126. *Id.*

127. *Id.* at 109.

effects of particular geographic features and the extent of the resulting inequity. In the present instance, “proportionality” comes into account only in appreciating whether the Scilly Isles are to be considered “special circumstances” having distorting effects on the equidistance boundary as between the French Republic and the United Kingdom and, if so, the extent of the adjustment appropriate to abate the inequity.¹²⁸

Putting proportionality into practice, the tribunal remedied the “disproportionate effects” of the projection of the Scillies into the Channel by according these islands a “half-effect.”¹²⁹ At least one commentator has criticized the tribunal for resorting to this device, noting that it found no support either in the parties’ special agreement or in any convention.¹³⁰ Nevertheless, the decision again seems to comport with the Geneva Convention’s article 6(2) command to adhere to the equidistance line absent a compelling reason not to. The marked disproportionality created by the projection of the Scillies seems to represent exactly the sort of “special circumstance” that, under the convention, triggers a correction of the median line. In stressing that the proportionality principle should not govern, but merely correct, a delimitation, the tribunal seemed to adopt a notion of fairness and yet contain it within the rule of equidistance.

B. BROADLY CONCEIVED EQUITY

In the broadly conceived equity model, equity is not a corrective aspect of another legal rule, but rather, is itself a rule of law. While still rule-based, it is not an exception to a nonequitable rule, but is itself the dominant applicable rule for the accomplishment of resource allocation. This model of allocation affords the tribunal more discretion than does corrective equity for ensuring that considerations of fairness determine the outcome. Consequently, decisions according to this model of equity are apt to be more openly distributive than those following from corrective equity.

1. Broadly Conceived Equity in Continental Shelf Allocation

The Third United Nations Conference on the Law of the Sea (UNCLOS III), which began in 1973,¹³¹ spurred courts and tribunals to abandon narrower corrective equity in the realm of shelf delimitation and to rely on a more broadly conceived notion of equity. Even so, the change was

128. *Id.* at 124.

129. *Id.*

130. See Rosenne, *supra* note 73, at 97.

131. TWENTY-THIRD REPORT OF THE COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND THE OCEANS 7 (1973).

evolutionary. The early equity jurisprudence of the I.C.J. informed UNCLOS III's discussion of maritime delimitation, leading it to give equity a more explicit role in the negotiating text.¹³² The Conference, however, ultimately went somewhat further the I.C.J. It produced a formula for maritime delimitation in which equitable principles became the principal designated standard.

The eventual triumph of equity at UNCLOS III ended a lengthy battle between its proponents and the champions of equidistance. This result, however, was only reached after painstaking negotiations. Although there was early agreement that equity should play some role in shelf delimitation—indeed, the American delegation early realized that the *North Sea* cases had made it impractical to attempt to rely on the language of the earlier Continental Shelf Convention¹³³—conferees found it more difficult to agree on the weight equitable principles should be accorded in the new instrument. They first tried to strike a balance between equity and equidistance. The 1975 Informal Single Negotiating Text (ISNT)¹³⁴ proposed that “[d]elimitation of the continental shelf between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances.”¹³⁵ This compromise failed to satisfy a small number of states, most of which had small islands located off their coasts. Fearing that the reference to equity would jeopardize their position in shelf delimitations, these states argued for greater emphasis on equidistance, although they conceded that this method may not apply in the event of special circumstances.¹³⁶ The opposition of these states “stimulated a measure of hostility to, and partisan enthusiasm for, the text.”¹³⁷ This discord made it impossible to agree on a suitable revision of the ISNT. The provision, however, was retained intact in the 1976 Revised Single Negotiating Text (RSNT)¹³⁸ and the 1977 Informal Composite Negotiating Text (ICNT).

132. Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)*, 74 AM. J. INT'L L. 1, 32 (1980).

133. *Id.*

134. U.N. Third Conference on the Law of the Sea: Informal Single Negotiating Text, May 7, 1975, 14 I.L.M. 682, 728 [hereinafter Informal Single Negotiating Text]. The reference to equitable principles in this provision was understood to refer to the criteria discussed by the I.C.J. in the *Continental Shelf* cases. Oxman, *supra* note 132, at 30.

135. Informal Single Negotiating Text, *supra* note 134, at 728.

136. Oxman, *supra* note 132, at 30.

137. *Id.* at 32.

138. See U.N. Third Conference on the Law of the Sea, Explanatory Memorandum on the Informal Composite Negotiating Text, May 23-July 15, 1977, 16 I.L.M. 1099, 1105:

On the question of the delimitation of the . . . continental shelf between adjacent or opposite States, the Chairman [of the Second Committee] decided that the relevant articles as appearing in the revised single negotiating text should be retained as it

At the ninth session, a negotiating group introduced a revision that, although slight, inspired opposition from partisans of both equity and equidistance.¹³⁹ The draft convention that emerged from the session read:

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.¹⁴⁰

At the Conference's tenth and last session, advocates of greater emphasis on equity finally prevailed. Ireland and Spain, each involved in a delimitation dispute with a neighboring country, succeeded in striking the draft convention's reference to equidistance.¹⁴¹ When it was opened for signature in 1982, article 83(1) of the U.N. Convention on the Law of the Sea¹⁴² read: "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."¹⁴³

The victory of the equity camp at UNCLOS III had profound implications for judicial interpretation of equity. In the 1982 Tunisia-Libya *Continental Shelf*¹⁴⁴ case, the I.C.J. held that the Conference's omission of any reference to equidistance meant that there was no longer formal textual guidance as to the content of an equitable solution.¹⁴⁵ In the absence of such guidance, the goal of reaching an equitable result must determine the means for achieving it. "The equitableness of a principle," the Court wrote, "must be assessed in the light of its usefulness for the purpose of arriving at an equitable result."¹⁴⁶

had not been possible to devise a formula which would narrow the differences between the opposing points of view.

Id.

139. Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)*, 75 AM. J. INT'L L. 211, 231 (1981).

140. U.N. Third Conference on the Law of the Sea, Draft Convention on the Law of the Sea, July 28-Aug. 29, 1980, 19 I.L.M. 1129, 1174.

141. Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981)*, 76 AM. J. INT'L L. 1, 14-15 (1982).

142. Third U.N. Conference on the Law of the Sea, 11th Sess., Dec. 10, 1982, 21 I.L.M. 1261, 1286 [hereinafter LOS Convention].

143. *Id.*

144. *Continental Shelf (Tunis. v. Libya)*, 1982 I.C.J. 18 (Feb. 24).

145. *Id.* at 49.

146. *Id.* at 59.

Giving effect to this doctrinal shift, the Court exercised a remarkable degree of discretion, first in selecting the principles relevant to an equitable delimitation, then in drawing the line to give effect to these principles. To arrive at an equitable result, the Court concluded, it had to account for the following factors: the general configuration of the coasts,¹⁴⁷ the existence and position of a group of islands off the Tunisian coast,¹⁴⁸ the land frontier,¹⁴⁹ and the conduct of the parties in the granting of petroleum concessions.¹⁵⁰ The Court also took proportionality into account. Unlike the previous use of that factor by the tribunal in the Anglo-French *Continental Shelf* arbitration,¹⁵¹ however, the I.C.J. did not confine its application to a post hoc check on the equitableness of a result reached by some other means. Instead, the Court assigned an independent role to proportionality.¹⁵² In practice, however, this approach had little bearing on the case, because the coasts adjacent to the disputed zone happened to be of roughly equal length.

To give effect to the principles that it had deemed relevant, the line-drawing became an unusual exercise in judicial creativity, with bisected angles used to account for the configuration of the coasts¹⁵³ and a half-effect accorded to the Tunisian islands.¹⁵⁴ Plainly, the principles designated as “equitable” by the Court had a considerably greater distributive effect than had the rule-based principle applied in the *North Sea* cases¹⁵⁵ and the Anglo-French *Continental Shelf* arbitration.¹⁵⁶

While the Court exercised great discretion in its selection of principles for inclusion in an equitable calculation, it also articulated one very important principle of exclusion. It openly refused to attach legal significance to economic need.¹⁵⁷ Tunisia placed great weight on need-based factors, arguing that it was equitably entitled to more shelf than its relatively oil-rich neighbor.¹⁵⁸ The Court rejected this claim on the ground that the applicable rules cannot change depending on who is rich and who is poor at the litigious moment.¹⁵⁹ In the Court’s opinion, a “country

147. *Id.* at 86-87.

148. *Id.* at 88-89.

149. *Id.* at 84-85.

150. *Id.* at 83-84.

151. *See supra* text accompanying notes 114-126.

152. *Continental Shelf*, 1982 I.C.J. at 75-76.

153. *Id.* at 87.

154. *Id.* at 89.

155. *See supra* text accompanying notes 104-112.

156. *See supra* text accompanying notes 114-121.

157. *Continental Shelf*, 1982 I.C.J. at 77-78.

158. *Id.* at 77.

159. Louis B. Sohn, *Equity in International Law*, in 82 AMERICAN SOCIETY FOR INTERNATIONAL LAW, PROCEEDINGS OF THE ANNUAL MEETING 277, 286 (1988).

might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource."¹⁶⁰

This refusal to consider economic criteria failed to placate the Court's conservative wing, which believed that the judgment was suffused with what Judge Oda, in his dissent, called "an implicit purpose of apportionment."¹⁶¹ Oda also chastised the Court for its preference for bisected angles and half-effects. These represented attempts, he wrote, "to split the difference."¹⁶² Judge Evensen similarly condemned what he considered the arbitrariness of the judgment, which he likened to a decision *ex aequo et bono*.¹⁶³

In the 1984 *Delimitation of the Maritime Boundary in the Gulf of Maine Area*¹⁶⁴ case, which involved delimitation of fisheries zones and shelf subsoil, proportionality became the primary tool for the application of broadly conceived equity. The case arose from the parties' failure to apportion the Gulf's resources by negotiation. In 1977, both the United States and Canada declared exclusive two hundred nautical-mile fishing zones, resulting in a substantial area of overlap in the rich fisheries in the vicinity of the Georges Bank shelf. To resolve the resultant conflict, the two countries entered into negotiations that led to two interdependent agreements: the Maritime Boundary Settlement Treaty¹⁶⁵ and the Fisheries Agreement.¹⁶⁶ Under the Boundary Settlement Treaty, the parties agreed to submit the delimitation of the maritime boundary to binding dispute settlement,¹⁶⁷ while under the Fisheries Treaty, they agreed permanently to share East Coast fisheries resources according to a system of variable quotas.¹⁶⁸ Although neither agreement was to enter into force without the other, the parties decoupled them after the U.S. Senate, succumbing to the pressure of New England fishing interests, failed to ratify the Fisheries Treaty.¹⁶⁹ Shortly after the Boundary Settlement Treaty

160. *Continental Shelf*, 1982 I.C.J. at 77.

161. *Id.* at 270 (Oda, J., dissenting).

162. *Id.*

163. *Id.* at 296 (Evensen, J., dissenting).

164. *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12).

165. Special Agreement of the Maritime Boundary in the Gulf of Maine Area, Mar. 29, 1979, U.S.-Can., 33 U.S.T. 2802 (entered into force Nov. 20, 1981) [hereinafter *Gulf of Maine Agreement*].

166. Agreement on East Coast Fisheries Resources, S. EXEC. DOC. V, 96th Cong., 1st Sess. (1979).

167. *Gulf of Maine Agreement*, *supra* note 165, at 2807-08.

168. Agreement on East Coast Fisheries Resources, *supra* note 166, at 22.

169. See David R. Robinson et al., *Some Perspectives on Adjudicating before the World Court*, 79 AM. J. INT'L L. 578, 579-80 (1985) (describing the delinkage of the two treaties).

entered into force in 1981, the parties submitted the dispute to a chamber of the I.C.J. for binding adjudication.¹⁷⁰

In its judgment, the chamber appeared to follow the I.C.J.'s reasoning in the Tunisia-Libya *Continental Shelf* case.¹⁷¹ “[D]elimitation is to be effected by the application of equitable criteria,” the chamber held, “and by the use of practical methods capable of ensuring . . . an equitable result.”¹⁷² The judges devised a theory of proportionality to satisfy this formula: the delimitation should reflect the “particularly notable” difference in the length of the parties’ coasts.¹⁷³ Applying this principle, the chamber adjusted a provisional median line using a calculation based on all of the Gulf’s coasts.¹⁷⁴

The concept of proportionality, as applied in the *Gulf of Maine* case, no longer bore much resemblance to that used earlier in the *North Sea* case¹⁷⁵ and Anglo-French *Continental Shelf* arbitration.¹⁷⁶ In those disputes, the principle was used to correct dramatic disproportionality resulting from rigid recourse to equidistance, not to draw a new line that would reflect directly the relative coastline lengths of the parties. Absent the presence of a significant distorting feature, such as the concavity of the German coast or the projection of a small set of islands into the English Channel, proportionality would have played no role in the earlier jurisprudence. In contrast, the chamber in the *Gulf of Maine* case, assigned proportionality a leading role, without first tying that principle to any distorting geographical feature. In so doing, the chamber gave itself considerable power to allocate the Gulf according to considerations of fairness.

In spite of the distributive effect of the decision, the chamber affirmed the I.C.J.’s rejection in the Tunisia-Libya *Continental Shelf* case of the relevance of economic factors to an equitable delimitation.¹⁷⁷ Had the chamber wished to break from the I.C.J.’s refusal to acknowledge the legitimacy of these criteria, it could have pointed to the special agreement as a justification. Although the parties asked the chamber to draw only one line, they asked that this line divide not only their continental shelves, but also their fisheries.¹⁷⁸ This reference to fisheries could have been

170. Gulf of Maine Agreement, *supra* note 165, at 2807, Annex I, art. II.

171. *Continental Shelf (Tunis. v. Libya)*, 1982 I.C.J. 18, 59 (Feb. 24).

172. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246, 300 (Oct. 12).

173. *Id.* at 332.

174. *Id.* at 336.

175. *See supra* text accompanying notes 104-112.

176. *See supra* text accompanying notes 114-121.

177. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246, 267 (Oct. 12).

178. *Id.* at 253.

interpreted as inviting the chamber to add economic considerations to its equitable calculation.¹⁷⁹

Canada placed great emphasis on economic considerations, arguing that any delimitation should reflect the special dependence of certain Nova Scotian communities on fishing.¹⁸⁰ The chamber rejected this claim. It did not, however, entirely banish economic factors from the judgment, but rather assigned them a subordinate, corrective role similar to that which the tribunal in the Anglo-French *Continental Shelf* arbitration had once assigned to proportionality. Economic factors were to be used only as a *post hoc* check on the equitableness of a result achieved by other means:

What the Chamber would regard as a legitimate scruple lies . . . in concern lest the overall result . . . 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. . . . Fortunately, there is no reason to fear that any such danger will arise in the present case¹⁸¹

The I.C.J. adhered to the same conception of equitable allocation in the 1985 Libya-Malta *Continental Shelf*¹⁸² case. The Court again stressed the need to arrive at an equitable result, citing Article 83(1) of the Law of the Sea (LOS) treaty.¹⁸³ To achieve this result, the Court turned to proportionality, which it called “intimately related . . . to the governing principle of equity.”¹⁸⁴ In defining proportionality, the Court sought to forge a compromise between the conceptions of this principle advanced by the tribunal in the Anglo-French *Continental Shelf* arbitration and the I.C.J. chamber in the *Gulf of Maine* case. Proportionality, it held, has two roles: it is both a factor to be considered in the delimitation and a *post hoc* check on the equitableness of the result, whatever the means by which it was reached.¹⁸⁵ The former confers upon a court the discretion to allocate resources according to considerations of fairness, while the latter allows a court to ensure that the result, achieved by reference to a range of considerations, is not unfairly influenced by the effect given to any one of them. (There is, however, likely to be less need to remedy disproportion, in this second

179. *See id.* at 368-77 (Gros, J., dissenting) (arguing that the chamber should have drawn two lines: one delimiting the continental shelves, the other the fisheries).

180. *Id.* at 341.

181. *Id.* at 342-43.

182. *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13 (June 3).

183. *Id.* at 30-31.

184. *Id.* at 43.

185. *Id.* at 49

sense, when the drawing of the line is itself influenced by considerations of proportionality.)

The problems inherent in the Court's attempt at compromise manifested themselves in the delimitation: as in the *Gulf of Maine* case, proportionality became the dominant consideration, in spite of the absence of any natural feature creating the sort of serendipitous disproportionality evident in the *North Sea* cases. After drawing an equidistant line between the two countries—one that, in the Court's opinion, need have no determinative relevance to the outcome¹⁸⁶—the Court adjusted it to reflect the “considerable disparity” in the parties' respective lengths of coastline. Broadening its frame of reference to treat the delimitation as one between the northern and southern seaboard of the Mediterranean, the Court noted that Malta represented a “minor feature” of the northern seaboard, located substantially to the south of most of it. This geographical context, the Court concluded, warranted a further adjustment in Libya's favor.¹⁸⁷ Finally, the Court determined that the resulting line met the requirements of overall equitable proportionality.¹⁸⁸

Again, in spite of the distributive effect of the application of these equitable principles, the Court continued to deny the legitimacy of need-based resource distribution. There could be no question, the Court wrote, of entertaining either Libya's claim that the vastly larger size of its landmass was a factor relevant to the delimitation,¹⁸⁹ or Malta's claim that its lack of energy resources, its requirements as an island developing state, and the range of its fisheries should influence the outcome.¹⁹⁰

Proportionality, although now evidently the preferred means by which to reify the abstract notion of equity, is not indispensable to a delimitation according to broadly conceived equity. Faced with a situation in which the parties enjoyed relatively equal coastline lengths adjacent to the disputed zone, the arbitration tribunal that decided the 1985 Guinea—Guinea-Bissau *Maritime Delimitation*¹⁹¹ case, delimited the shelf through reference to two equitable considerations largely absent from previous delimitations. First, the tribunal cited the need “to ensure that, as far as possible, each State controls the maritime territories opposite its coasts and in their vicinity.”¹⁹² Second, the tribunal cited the need to ensure that other maritime delimitations already made, or those still to be made, in the area

186. *Id.* at 47.

187. *Id.* at 50.

188. *Id.* at 55.

189. *Id.* at 40-41.

190. *Id.* at 41.

191. *Maritime Delimitation (Guinea v. Guinea-Bissau)*, 77 I.L.R. 636 (Ct. of Arb. 1988).

192. *Id.* at 676.

be given their due regard.¹⁹³ The equidistance method had no priority in accommodating these factors, the tribunal wrote, because it threatened both countries with a “cut-off effect”¹⁹⁴ (the loss of maritime areas opposite or adjacent to their coasts) and Guinea with “enclavement” (the deprivation, through the intersection of the maritime boundaries of neighboring states, of access to the open ocean).¹⁹⁵ To guard against these dangers, the tribunal drew a boundary that departed considerably from the equidistance line.¹⁹⁶ Once again, the application of broadly conceived equity produced a significantly redistributive result.

The tribunal nevertheless also dismissed the idea that economics had any role to play in the delimitation. In language reminiscent of that used by the I.C.J. in the Tunisia-Libya *Continental Shelf* case,¹⁹⁷ it declared that economic factors did not rise to the level of manifest certainty required to warrant a revision of the line. “[I]t would be neither just nor equitable,” the tribunal wrote, “to base a delimitation on the evaluation of data which changes in relation to factors that are sometimes uncertain.”¹⁹⁸ It remains to be seen whether this opens, if only a little, the door to economic considerations when the effect is more certain and permanent and more profoundly disturbing to the judges’ sense of fairness.

2. Broadly Conceived Equity in Conventional Arrangements

Broadly conceived equity is not confined to continental shelf delimitation. A number of conventional schemes also provide for distribution of scarce resources according to such equitable allocation. Prominent among them are the LOS Convention’s provisions regarding access to the exclusive economic zone (EEZ),¹⁹⁹ and the Draft Convention on the Non-Navigational Uses of Watercourses.²⁰⁰ But these conventions take broadly conceived equity a step further than the jurisprudence relating to continental shelf delimitation, explicitly calling on states to take economic need into account in resource allocation.

In its provisions dealing with state access to the EEZs of other states, the LOS Convention seeks to provide for the distribution of the area’s surplus resources in accordance with equitable principles that take ac-

193. *Id.* at 677.

194. *Id.* at 681.

195. *Id.* at 682.

196. *Id.* at 685.

197. *See supra* notes 157-160 and accompanying text.

198. *Maritime Delimitation*, (Ginea v. Ginea-Bissau), 77 I.L.R. 636, 689 (Ct. of Arb., 1988).

199. LOS Convention, *supra* note 142, at 29-31, 21 I.L.M. at 1283-84.

200. *Draft Convention on the Non-Navigational Uses of Watercourses*, U.N. GAOR, 42d Sess., Supp. No. 10, at 33, 53-88, U.N. Doc. A/42/10 (1987) [hereinafter *Draft Watercourses Convention*].

count, *inter alia*, of economic need. The Convention confers on land-locked states “the right to participate, on an equitable basis, in the exploitation of an appropriate part . . . of the exclusive economic zones of coastal States of the same subregion or region.”²⁰¹ States are directed to determine the terms of such participation by taking into account: (1) “the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State”; (2) the extent to which the land-locked state is already entitled, through agreement, to exploit the “living resources of the exclusive economic zone of the coastal State”; (3) the need to avoid disadvantaging any one coastal state in particular; and (4) “the nutritional needs of the populations of the respective States.”²⁰² The Convention further provides preferential rights of access, determined by the same criteria, to “geographically disadvantaged states,” which the Convention defines as coastal states that can claim no EEZ of their own or are dependent on the EEZs of other states for adequate nutrition.²⁰³

The Draft Convention on the Non-Navigational Uses of Watercourses²⁰⁴ similarly seeks to provide for distribution of a scarce resource through the application of broadly conceived equity.²⁰⁵ Drafted by the U.N. International Law Commission (ILC), an elected body of experts charged with the codification and progressive development of international law,²⁰⁶ the Convention includes a doctrine for the “equitable use” of river water. It directs watercourse states to utilize international watercourse systems in their respective territories “in an equitable and reasonable manner.”²⁰⁷ This right to an equitable share of river water is coupled with an obligation to participate in the “use, development, and protection” of the watercourse in “an equitable and reasonable manner.”²⁰⁸

The Convention further articulates the principles relevant to an equitable apportionment of river water. Nature itself—“geographic, hydrographic, hydrological, climatic, and other factors of a natural character”²⁰⁹—tops the list, followed by the “social and economic needs of the watercourse

201. LOS Convention, *supra* note 142, at 1283.

202. *Id.* at 1283-84.

203. *Id.* at 1283.

204. *Draft Watercourses Convention*, *supra* note 200.

205. See Stephen C. McCaffrey, *The Law of International Watercourses*, 17 DENV. J. INT'L L. & POL'Y 505, 508-09 (1989) (discussing article 6, “equitable and reasonable utilization and participation” as one of the “twin cornerstones” of the entire watercourses draft).

206. See *Statute of the International Law Commission*, G.A. Res. 174(II), U.N. GAOR, 2d Sess., at 105, U.N. Doc. A/519 (1947) (describing the objectives of the International Law Commission).

207. *Draft Watercourses Convention*, *supra* note 200, at 69.

208. *Id.* at 69-70.

209. *Id.* at 82.

States concerned.”²¹⁰ Other factors are also listed as relevant to an equitable allocation: (1) “the effects of the use . . . in one watercourse State on other watercourse States”; (2) “existing and potential uses” of the system; (3) “conservation, protection, development and economy of use of water resources”; and (4) “[t]he availability of alternatives . . . to a particular planned or existing use.”²¹¹

The draft watercourse convention thus exemplifies the manner in which broadly conceived model of equity strives to accommodate values or interests which had once been excluded from the realm of law. By incorporating such values into a legal regime, the draft convention and other manifestations of broadly conceived equity, both judge-made and conventional, ensure that law remains relevant to even the most complex and seemingly intractable problems of resource distribution.

C. COMMON HERITAGE EQUITY

Although they differ in their approach to allocation, both corrective equity and broadly conceived equity share the assumption that resources belong *ab initio* to states. The fairness issue comes to the fore in allocation among state claimants. Common heritage equity, first promoted in the 1950s with regard to global commons such as outer space,²¹² departs dramatically from this view. It assumes instead that certain resources are the patrimony of all humankind. A number of principles proceed from this assumption, namely: nonownership of the heritage, shared management, shared benefits, use exclusively for peaceful purposes, and conservation for future generations.²¹³ These principles, however, are not ranged in a fixed hierarchy of importance, but vary in importance from management regime to regime. Two conventional arrangements—the LOS Convention’s provisions relating to the deep seabed,²¹⁴ and the U.N. Moon Agreement²¹⁵—adopt a mercantile model of common heritage equity, in which equitable resource allocation is given higher priority than conservation. The Madrid Protocol to the Antarctica Treaty,²¹⁶ by contrast, adopts

210. *Id.*

211. *Id.*

212. See EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS 48 (1989) (noting that after 1950 commentators began to stress the relevance of the “common heritage of mankind” doctrine to common environments, such as outer space).

213. *Id.*

214. LOS Convention, *supra* note 142, at 1292-98.

215. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Nov. 12, 1979, 18 I.L.M. 1434 (entered into force July 11, 1984) [hereinafter Moon Agreement].

216. Protocol on Environmental Protection to the Antarctica Treaty, June 22, 1991, S. TREATY DOC. NO. 22, 102d Cong., 2d Sess. 18 (1992), 30 I.L.M. 1455 [hereinafter Madrid Protocol].

an “in trust” model of common heritage equity, in which conservation is not simply the first, but the sole, priority.²¹⁷

The LOS Convention established a Deep Seabed Mining Authority to manage and distribute equitably the benefits derived from the exploitation of the common heritage element of the marine environment.²¹⁸ The Authority is analogous to a corporation, having been established to facilitate exploitation of an asset (the deep seabed) for the benefit of its owner (humankind). In the Convention’s provisions regarding exploitation of the continental shelf within the two hundred mile EEZ, the Authority plays a relatively passive role. The LOS Convention affirms the exclusive jurisdiction of coastal states over this area.²¹⁹ Nevertheless, the Convention does require coastal states to contribute to the Authority at least a fraction of the benefit derived from mining in these areas. After five years of production, this amounts to one percent of the value or volume of production, increasing by one percent each subsequent year until the twelfth year, after which it stabilizes at seven percent.²²⁰ The Authority is to disburse these payments to states party to the Convention according to “equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them.”²²¹ To ensure that this scheme of equitable allocation does not itself produce inequitable results, developing states that are net importers of a mineral resource produced from its continental shelf are exempt from making such payments.²²²

In its provisions relating to the seabed beyond the limits of national jurisdiction, the LOS Convention assigns the Authority a much more important role, involving not simply the right to oversee, but also to participate in, exploitation.²²³ Because this area and its resources are the common heritage of humankind,²²⁴ the Authority controls all exploration and exploitation “on behalf of mankind as a whole.”²²⁵ Producers seeking to mine the seabed must submit a proposed work plan to the Authority.²²⁶

217. *See id.* at 21, 30 I.L.M. at 1462 (defining the objective of the protocol as a commitment to “the comprehensive protection of the Antarctic environment and dependent and associated ecosystems” and designating Antarctica as a “natural reserve, devoted to peace and science”).

218. LOS Convention, *supra* note 142, at 1298-99.

219. *Id.* at 1285.

220. *Id.* at 1286.

221. *Id.*

222. *Id.*

223. For a discussion of this regime, see Katherine Dixon, Recent Development, *Law of the Sea—Deep Seabed Mining*, 18 GA. J. INT’L & COMP. L. 497, 500-01 (1988).

224. LOS Convention, *supra* note 142, at 1293.

225. *Id.* at 1297.

226. *Id.* at 1297.

The proposal must include plans for the exploitation of two equally workable mining sites. If the plan is approved, the Authority can mine one of the sites through its own production unit, while the successful applicant may mine the other site, subject to the Authority's regulations and production limits.²²⁷ The applicant, moreover, must make an annual financial contribution to the Authority in the form of a production fee, which is tied to the producer's return on investment and amounts to a percentage of the market value of the processed metals extracted from the ocean floor.²²⁸ The Authority is to distribute these payments to states party to the convention according to the same terms prescribed for the allocation of payments collected from states exploiting their continental shelves beyond the EEZ: according to "equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them."²²⁹

The LOS Convention, to a limited degree, is also concerned with conservation of deep-seabed resources. It stipulates that all objects "of an archeological and historical nature" shall be preserved or disposed of for the benefit of humankind²³⁰ and directs the Authority to promulgate measures to lessen the polluting effects of exploration and exploitation.²³¹ But the Convention's emphasis is on exploitation. While it does contemplate mineral production ceilings,²³² they are not meant to ensure resource availability for future generations, but rather, to protect commodities-exporting developing nations from the price-depressing effect of overproduction.²³³

The U.N. Moon Agreement,²³⁴ which opened for signature in 1991, also includes elements of common heritage equity. The Agreement places heightened emphasis on conservation, although it seeks to facilitate the exploitation and equitable allocation of the moon's resources. Affirming that "[t]he moon and its natural resources are the common heritage of mankind,"²³⁵ the Agreement stipulates that all "exploration and use of the moon . . . shall be carried out for the benefit and in the interests of all

227. *Id.* at 1295-97.

228. *Id.* at 1334-37.

229. *Id.* at 1293-94.

230. *Id.* at 1295.

231. *Id.* at 1294.

232. *See id.* at 1295 (describing the method for calculating the production ceiling).

233. *See* MARKUS G. SCHMIDT, COMMON HERITAGE OR COMMON BURDEN? THE U.S. POSITION ON THE DEVELOPMENT OF A REGIME FOR DEEP SEABED MINING IN THE LAW OF THE SEA CONVENTION 191-96 (1989) (describing the negotiations on production controls from 1974-1977).

234. Moon Agreement, *supra* note 215, at 1434.

235. *Id.* at 1438.

countries.”²³⁶ The Agreement further calls on states to devise a regime to govern the exploitation of the moon with the purpose of facilitating the orderly development, rational management, and equitable sharing of the moon’s resources.²³⁷ The Agreement’s promotion of exploitation, however, is tempered by a concern for conservation. States are commanded not simply to refrain from polluting or disrupting the moon’s environment,²³⁸ but to pay “due regard” to the needs of future generations.²³⁹ Special protection is accorded to regions of the moon possessed of “special scientific interest.”²⁴⁰

The 1991 Madrid Protocol to the Antarctica Treaty,²⁴¹ signed by twenty-four states with environmental or scientific interest in the continent,²⁴² represents a form of common heritage equity in which conservation is paramount. The signatories to the pact departed from the mercantile model of common heritage equity, assuming the role of a trustee pledged to hold this asset in trust for the benefit of humankind. The pact takes the form of a protocol to the 1959 Antarctica Treaty,²⁴³ which banned nuclear and military activity, suspended competing claims by seven southern hemisphere states, and established rules for scientific research.²⁴⁴ The Protocol establishes environmental protection as a “fundamental consideration” in the planning and conduct of all activities on the continent.²⁴⁵ To this end, it bans all mineral and oil exploration for at least fifty years,²⁴⁶ reflecting a sentiment that mineral exploitation is fundamentally incompatible with the protection of the Antarctic environment.²⁴⁷ The Protocol further includes

236. *Id.* at 1435.

237. *Id.* at 1438.

238. *Id.* at 1438.

239. *Id.* at 1435.

240. *Id.* at 1437.

241. Madrid Protocol, *supra* note 216. For a comprehensive discussion of the protocol, see S.K.N. Blay, Current Developments, *New Trends in the Protection of the Antarctic Environment: The 1991 Madrid Protocol*, 86 AM. J. INT’L L. 377 (1992).

242. Alan Riding, *Pact Bans Oil Exploration in Antarctica*, N.Y. TIMES, Oct. 5, 1991, at A3.

243. Antarctica Treaty, Dec. 7, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

244. For a discussion of the regime established under this treaty, see Patrick T. Bergin, *Antarctica, The Antarctica Treaty Regime, and Natural Resource Exploration and Exploitation*, 4 FLA. J. INT’L L. 1 (1988); Blay, *supra* note 241, at 378-79.

245. Madrid Protocol, *supra* note 216, at 22, 30 I.L.M. at 1462.

246. *Id.* at 29, 30 I.L.M. at 1464. The moratorium may be reversed upon the vote of a three-fourths majority of the states that were signatories to the Protocol at the time of its adoption. *Id.* arts. 25(3), 25(4); see Blay, *supra* note 241, at 396-97 (describing amendment process); Riding, *supra* note 242, at 3 (describing negotiations leading to amendment formula).

247. For a discussion of the development of this consensus, see Christopher C. Joyner, *The Future of the Antarctic Regimes New Direction*, in 85 AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE ANNUAL MEETING 464 (1991).

new regulations for wildlife protection,²⁴⁸ waste disposal,²⁴⁹ marine pollution,²⁵⁰ and continued monitoring of the continent. The signatories to the pact have thus moved decisively in the direction of preserving Antarctica as an unexploited international preserve for the benefit of future generations.

CONCLUSION

Far from content-less, equity in the international system is developing into an important, redeeming aspect of a legal system that, because it still primarily pertains to sovereign states, tends to be somewhat inflexible. The case for a degree of flexibility and fairness is based on two important current conditions of global society: (1) the revolutionary pace of technological and scientific innovation and (2) the great and widening chasm between rich and poor.

The fast rate of technological and scientific progress demands of any legal system a degree of flexibility if it seeks to impose principles of general application upon human endeavors that constantly redefine the reality and transform the context in which they occur. The growing inequality in the distribution of desired goods indicates that the formal equality of states before the law must be tempered by some recourse to notions of fairness. Fairness, as an augmentation of law, is also needed when deference must be given to interests not ordinarily recognized by traditional law, such as the well-being of future generations and the "interests" of the biosphere. Finally, fairness has a tempering role to play when the apportionment of goods (as in a continental shelf) occurs in the context of an infinite number of geographical, geological, topographical, economic, political, strategic, demographic, and scientific variables, where "hard and fast" rules are likely to produce a *reductio ad absurdum*.

The international legal system does not include a jury to introduce an element of flexibility and fairness—disguised as "common sense"—into its judicial process. This has made it more urgent for judges to introduce these elements. Mindful of the frailty of the fledgling international judiciary, the judges have been quite cautious about introducing notions of equity. Increasingly, however, they have been mandated to do so by the use of the term in law-making treaties. This constitutes a deliberate delegation of power to the judiciary from which they cannot, and have not sought to, escape.

248. Madrid Protocol, *supra* note 216, at 72-74, 30 I.L.M. at 1476-77.

249. *Id.* at 79-86, 30 I.L.M. at 1479-82.

250. *Id.* at 87-95, 30 I.L.M. at 1483-86.

As judicial recourse to equitable principles increases, the outlines of the rules of equity become clearer, as is appropriate in any source of law applied by judges. Nevertheless, it is inevitable that as international law grows in its coverage and impact, equity's capacity to introduce elements of flexibility and fairness will play an increasing role in manifesting the system's legitimacy.

Annex 189

S. Reinhold, "Good Faith in International Law", *UCL Journal of Law and Jurisprudence*, 2013

GOOD FAITH IN INTERNATIONAL LAW

Steven Reinhold*

Abstract – As a ‘general principle’, good faith forms part of the sources of international law. Still not widely examined in relation to rights and obligations, the aim here is to demonstrate the specific characteristics of the principle. In general, international law rules such as *pacta sunt servanda*, abuse of rights, estoppel and acquiescence and the negotiation of disputes are grounded, to some extent, in good faith. In treaty law, good faith has various manifestations from the time prior to signature through to interpretation. These are outlined here. The article argues that good faith acts to mediate the effects of States’ rights in international law, in order to achieve acceptable results when competing interests exist. Fundamentally, good faith is a limitation of State sovereignty, albeit one that is necessary, as it protects other States and their trust and reliance in international law.

A. INTRODUCTION AND SCOPE OF THE TOPIC

According to Art. 38 (1) (c) of the ICJ Statute, the Court “shall apply the general principles of law recognised by civilised nations”. When treaties or customary law cannot yield a result, recourse is made to the general principles of law,¹ of which good faith is perhaps the most important, as it underpins many international legal rules.² The nature of good faith as an overarching legal principle makes it difficult to define in absolute terms.³ This brings to mind the (in)famous quote of Justice Stewart of the US Supreme Court, who stated: “I shall not today attempt to define [it]...But I know it when I see it.”⁴ In this article the aim will not be to attempt an all-encompassing definition of good faith,⁵ but rather to describe and exemplify its place in international law.

This article is in five parts. Firstly, it starts with an assessment of the

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¹ Hersch Lauterpacht, *International Law Vol. 1*, (ed Elihu Lauterpacht, CUP 1970) 68; Malcolm N Shaw, *International Law*, (6th edn, CUP 2008) 98; James Crawford, *Brownlie’s Principles of Public International Law*, (8th edn, OUP 2012) 134.

² *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Rep 253; Shaw (n 1) 103; Michel Virally, ‘Review Essay: Good Faith in Public International Law’ (1983) 77 AJIL 130.

³ William Tetley, ‘Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering’ (2004) 35 J Mar L & Com 561, 563.

⁴ *Jacobellis v State of Ohio* 378 US 184, 197 (1964) (Supreme Court, per J Stewart), while actually referring to obscene material.

⁵ Georg Schwarzenberger and Edward D Brown, *A Manual of International Law*, (6th edn, Professional 1976). 118, 119, and Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens 1953) 105, have also desisted; cf JF O’Connor, *Good Faith in International Law* (Aldershot 1991) 36.

legal value of the principle of good faith in municipal legal systems, the means of transmuting this understanding of good faith into international law, and the differences and difficulties of this undertaking. Secondly, specific aspects of good faith are examined with particular reference to the jurisprudence of international courts and tribunals. Thirdly, the relation between the principle of good faith and sovereignty is assessed. The argument is that good faith acts as a means of limiting state sovereignty that is inherent in international law. Then, the impact of good faith is examined in the law of treaties, before the final conclusion.

1. Good faith as a principle, a rule, or something altogether different?

In his Hague Academy Lecture in 1957, Sir Gerald Fitzmaurice stated:

“By a principle, or general principle, as opposed to a rule, even a general rule, of law is meant chiefly something which is not itself a rule, but which underlies a rule, and explains or provides a reason for it. A rule answers the question ‘what’: a principle in effect answers the question ‘why’.”⁶

Ronald Dworkin distinguishes rules from principles by the fact that rules always apply in an unconditional, all-or-nothing way, whereas a principle will only act as a guide in a decision-making process.⁷ This distinction will provide a useful aid in determining the scope of good faith in its specific forms: while good faith can have an important role in the determination of obligations, it will generally not be the source of such obligations. This article argues that good faith serves a mediatory role between a rule and a principle.

2. Good faith in municipal legal systems; recognition by "civilised nations"

Even though the interests of States and individuals are very different with regard to the application of good faith, the jurisprudence of international law has borrowed the methodology of the municipal legal systems: the indefinability of the term ‘good faith’ has led to certain *concretisations*⁸ of

⁶ Gerald Fitzmaurice, ‘The General Principles of International Law considered from the Standpoint of the Rule of Law’ (1957) 92 *Recueil des Cours de l’Academie de Droit International* 7.

⁷ Ronald Dworkin, *Taking Rights Seriously*, (Harvard UP 1977) 25 f.

⁸ The term is borrowed from Robert Kolb, ‘Principles as Sources of International Law’ (2006) 53 *NILR* 19 ff; a similar approach: Saul Litvinoff, ‘Good Faith’ (1997) 71 *Tul L Rev* 1645, 1659 f, who calls the normative structures the ‘critical areas’.

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the abstract notion of the principle. This is necessary, as good faith has limited practical application unless a court is in a position to examine and assess the conduct of the State concerned, and apply the principle accordingly.⁹ In order to identify common traits in three municipal legal systems, basic structures of this process can be identified in German, French, and English law.

In Germany good faith is most prominently codified in § 242 of the Civil Code (*Bürgerliches Gesetzbuch*, hereafter ‘BGB’), which states: “[t]he debtor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.” As a ‘general clause’ (*Generalklausel*), the judiciary and legal scholars have crafted and refined distinct legal precepts that can be applied to individual cases.¹⁰ Since a general clause is an open-ended legal provision, § 242 BGB requires balancing diverging interests in an individual case, in order to find the legal value of the provision and to make it applicable to a factual scenario. The direct application of good faith has therefore been limited to casuistry, i.e. an application of corrective justice tailored to the individual case.¹¹ Some particular aspects that have developed are the prohibition of an abuse of rights (*Rechtsmissbrauch*),¹² equitable estoppel (based on the principle of *venire contra factum proprium*),¹³ and acquiescence due to lapse of time (*Verwirkung*).¹⁴ The judiciary has had a prominent role in shaping the foundations of good faith: from a public law standpoint, the *Lüth* decision of the German Constitutional Court (*Bundesverfassungsgericht*)¹⁵ paved the way for aspects of fundamental rights to be read into the general

⁹ Cf *Case of Certain Norwegian Loans (France v Norway)* (Merits) [1957] ICJ Rep 9, para 54 (Sep Op Lauterpacht); Gerald Fitzmaurice, ‘Hersch Lauterpacht: The Scholar as Judge: Part 1’ (1961) 37 *British Ybk Intl L* 35.

¹⁰ Dirk Looschelders and Dirk Olzen ‘§ 242 BGB’ in Julius von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch Buch 2*, (Sellier 2009) paras 211, 82.

¹¹ Looschelders and Olzen (n 10) para 102; Claudia Schubert and Günther H Roth ‘§ 242 BGB’ in Franz Jürgen Säcker, Roland Rixecker and Hartmut Oetker (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (6th edn, CH Beck 2012) para 14 f.

¹² BGHZ 30, 140, 140; Schubert and Roth (n 11) para 235; Looschelders and Olzen (n 10) para 214.

¹³ BGHZ 50, 191, 196; Schubert and Roth (n 11) para 319; Looschelders and Olzen (n 10) para 286.

¹⁴ BGHZ 105, 290, 298; Schubert and Roth (n 11) para 329; Looschelders and Olzen (n 10) para 302.

¹⁵ BVerfGE 7, 198.

clauses of law.¹⁶ It thus made § 242 BGB receptive to an objective value-based paradigm,¹⁷ which demonstrates the judicial activism in the application of good faith.

In France, good faith (*bonne foi*) is codified in Art. 1134(3) of the Civil Code (*Code civil*), which states that: "[Les conventions] doivent être exécutées de bonne foi".¹⁸ Even though *bonne foi* does not have the same elevated standing as in the BGB in Germany, the concept has recently acquired increasing importance.¹⁹ Indeed, French jurisprudence has developed alternative means of achieving similar results by resorting to other, related concepts, such as waiver and *abus de droit*²⁰ - concepts that fall under § 242 in Germany. The reason why the 'general clause' idea has not been embraced can be explained by the fact that French law, similarly to English law, placed the creation of new cases of good faith into the hands of the legislature, rather than the judiciary.²¹

Turning now to English law, although Lord Mansfield stated in 1766 that good faith is "the governing principle... applicable to all contracts and dealings,"²² there is no general obligation to act in good faith. No single statutory provision or rule of English law clearly formulates the principle of good faith. Rather, the common law has developed what has been described as '*piecemeal solutions*'.²³ Instead of one overarching provision,

¹⁶ Achim Seifert, 'Die Horizontale Wirkung von Grundrechten. Europarechtliche und rechtsvergleichende Überlegungen (2011) 14 Europäische Zeitschrift für Wirtschaftsrecht 696 f.

¹⁷ Hans D Jarass, 'Die Grundrechte: Abwehrrechte und objektive Grundsatznormen. Objektive Grundrechtsgehalte' in Peter Badura and Horst Dreier (eds) *Festschrift 50 Jahre BVerfG* (Vol 2 Mohr Siebeck, 2001) 35 ff; Thomas Ritter, 'Neue Werteordnung für die Gesetzesauslegung durch den Lissabon-Vertrag (2010) Neue Juristische Wochenschrift 1110, 1114.

¹⁸ "[Agreements] must be performed in good faith" (own translation). Cf generally: François Terré, Philippe Simler and Yves Lequette, *Droit Civil: Les obligations*, (9th edn, Dalloz 2005) para 439 f.

¹⁹ Terré, Simler and Lequette (n 18) para 43 ff; Peter Jung, 'Die Generalklausel im deutschen und französischen Vertragsrecht' in Christian Baldus and Peter-Christian Müller-Graff (eds), *Die Generalklausel im Vertragsrecht: Zur Leistungsfähigkeit der deutschen Wissenschaft aus romanischer Perspektive*, (Sellier 2006) 37, 53; Reinhard Zimmermann/ Simon Whittaker, 'Good Faith in European contract law: surveying the legal landscape' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law*, (CUP 2000) 39.

²⁰ Looschelders and Olzen (n 10) para 1127 f.

²¹ M Filippo Ranieri, 'Bonne foi et exercise de droit' (1998) 50 RIDC 1058.

²² *Carter v Boehm* [1766] 97 ER (KB) 1162, cited by Tetley (n 3) 567; cf Patrick S Atiyah, *The Rise and Fall of Freedom of Contract*, (Clarendon Press, 1979) 168.

²³ *Interfoto Pictures Ltd v Stiletto Visual Programmes* [1989] QB 326, 439.

there are several legal mechanisms that can deal with instances of perceived unfairness; these include misrepresentation and mistake, undue influence, estoppel²⁴ and so on, as well as developments in equity.²⁵

Lord Denning attempted (albeit obiter), in *Lloyds Bank v Bundy*, the introduction of a general doctrine of unequal bargaining power.²⁶ However, this approach was rejected by the House of Lords in *National Westminster v Morgan*, where it was held that Denning's approach was neither justified, nor necessary, nor even desirable.²⁷ The reasons for the reluctance of English courts to develop and apply a standard of good faith in contract law have been described as being threefold: firstly, the English courts adhere to the strongly individualistic nature of bargaining for one's own end, which necessitates the shunning of elements of social justice.²⁸ Secondly, the courts have been reluctant to introduce a general principle of fairness. The competence to make such an encroachment into the law of contract is believed to lie with Parliament.²⁹ The favoured piecemeal approach can be applied case-by-case, in order to select instances of manifest injuriousness and apply corrective means on an individual basis.³⁰ Lastly, the elements of predictability and stability of the common law are seen as factors for the rejection of a general clause of good faith: as such a clause would be difficult to define, it would risk being too ambiguous to be enforced.³¹

²⁴ Stephen Smith, *Contract Theory*, (OUP 2004) 366 f (misrepresentation and mistake), 348 (undue influence), 234 (estoppel); Guenter Treitel, *The Law of Contract*, (Edwin Peel ed, 12th edn, Sweet & Maxwell 2007) 310 f (mistake), 361 (misrepresentation), 446 (undue influence), 146 (estoppel).

²⁵ For aspects of equity in international law, see Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960- 1989: Part One (1989) 59 *British Ybk Intl L* 49 f; very instructive: Vaughan Lowe, 'The Role of Equity in International Law' (1988) 12 *Aust Ybk Intl L* 54.

²⁶ *Lloyds Bank v Bundy* [1974] QB 326, 339-340 (CA) (per L Denning MR).

²⁷ *National Westminster Bank Plc v Morgan* [1985] AC 686, 692, 707 (HL).

²⁸ Maud Piers, 'Good Faith in English Law – Could a Rule become a Principle?' (2011) 26 *Tul Eur & Civ L F* 123, 130.

²⁹ *Harbutts 'Plasticine' Ltd v Wayne Tank Pump Co Ltd* [1970] 1 QB 447 (CA); *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL); Reinhard Zimmermann and Simon Whittaker, 'Coming to terms with good faith' in Zimmermann and Whittaker (n 19) 688, 690. Parliament did intervene with the Unfair Contract Terms Act 1977.

³⁰ Luigi Russi, 'Substance or mere Technique: A précis on Good Faith performance in England, France and Germany' (2009) 5 *Hanse L Rev* 21, 28.

³¹ Cf *Walford v Miles* [1992] 2 AC 128, 138 (HL); Ewan McEndrick, 'The Meaning of Good Faith' in Mads Andenas, Silvia Diaz Alabart, Basil Markesinis, Hans Micklitz and Nello Pasquini (eds), *Private Law Beyond National Systems Liber Amicorum Guido Alpha* (BICL, 2007) 687, 691; Hugh Collins, *Law of Contract*, (4th edn, CUP 2003) 181; Looschelders and Olzen (n 10) para 1149, 1150.

3. Importing municipal law into the Law of Nations "lock, stock and barrel"?

When international courts and tribunals look to general principles of law, the private law institutions are not imported into international law 'lock, stock, and barrel'.³² Rather, in the words of Judge McNair, "the duty of international tribunals is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions."³³ Accordingly, two levels have to be distinguished at which good faith has a legal value. Even though the principle of good faith has a well-defined municipal law counterpart, the international legal system has not imported these in its totality. Rather, a nuanced approach has been favoured.

The International Court of Justice (ICJ) has been reticent to turn directly to municipal law, in order to determine aspects of good faith.³⁴ Yet, the general principles of municipal law require some mechanism in order to be 'elevated' into international law.³⁵ Since an undifferentiated transmutation of municipal into international law is not applied, a different method has to be discerned. The method favoured by the Court seems to be a careful process of analogy. The municipal legal systems are examined in order to find a general legal rule that can be defined and stated in a 'pure form', which is achieved by making it widely applicable to the special interests that States have in their legal relations. By replacing the parties with algebraic forms, i.e. x and y , which are then replaced with State A and State B, the distilled rule is found and applied; if the general principle can still be applied in congruity with the aspects that are specific to international law,

³² For a different phrasing of the question, cf RD Kierney, 'Sources of Law and the ICJ' in Leo Gross (ed), *The Future of the International Court of Justice Vol. 2*, (Oceana 1976) 701: "But wherein lies the magic of this philosophers stone that transmutes municipal into international law?"

³³ *International Status of South-West Africa* (Advisory Opinion) [1950] ICJ Rep 148 (Sep. Op. McNair); cf Hersch Lauterpacht, *Private Law Sources and Analogies of International Law*, (Longmans 1927) 83.

³⁴ Hermann Mosler, 'To What Extent Does the Variety of Legal Systems of the World influence the Application of General Principles of Law?' in TMC Asser Institute (eds) *International Law and the Grotian Heritage* (TMC Asser Instituut 1985) 180.

³⁵ Cf Hugh Thirlway, 'The Law and Procedure of the ICJ: Part Two' (1990) 62 *British Ybk Intl L* 114 f.

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then the general principle is applied in the given case.³⁶

4. Differences between national and international conceptions of good faith

As municipal legal systems display different means of applying good faith, no single method can be identified.³⁷ International law differs markedly from municipal law through its lack of comparable norm-creating and enforcement institutions. The system of international law is based on a voluntarist and co-operative character, best exemplified by the acceptance, for the most part, of customary international law; i.e. the law created and observed by the States themselves.³⁸

There is, by and large, no central legislative body in international law.³⁹ Without a central body to legislate in this area, an all-pervading obligation of good faith in international law is difficult to establish.⁴⁰ The ICJ's case law is defined enough to act as a central source of guidance in applying the principle of good faith, but it is not competent to act as a law-generating institution.⁴¹ Indeed, it is questionable whether the international judiciary, made up of courts and tribunals, is best placed to serve an active role in the creation of good faith casuistry. The differing attitudes to the desirability of judicial activism in municipal legal systems would be greatly amplified in international law.

In municipal law, good faith acts to balance out unequal sides of a bargain.⁴² In international law this asymmetrical power balance, whether real or perceived, is absent. The principle of sovereign equality of nations dictates that there is no 'weak party' to a bargain in international law: by

³⁶ *South-West Africa Cases (Liberia v South Africa)* (Second Phase: Judgments) [1966] ICJ Rep 250, paras 296-297 (Diss Op Tanaka); Thirlway (n 35) 118. The methodology of the court is slightly controversial and cannot be fully examined here; for example Akehurst makes the point that it would be more efficacious only to apply the general principles that apply between the parties, rather than those of all civilised nations; Michael Akehurst, 'Equity and General Principles of Law' (1976) 25 ICLQ 801, 824.

³⁷ Cf O' Connor (n 5) 41.

³⁸ Cf Crawford (n 1) 16.

³⁹ Robert Jennings and Arthur Watts, *Oppenheim's International Law Vol 1*, (9th edn, Longman 1992) 114; however, a trend is emerging whereby the UN Security Council is seen to be acting legislatively, cf Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 AJIL 175.

⁴⁰ See generally Yuval Shany, 'Towards a General Margin of Appreciation Doctrine in International Law?' (2005) 16 EJIL 907, 920 f.

⁴¹ Cf Thirlway (n 25) 58 (on the ICJ's reluctance to be seen as "legislating").

⁴² Looschelders and Olzen (n 10) para 147; Klaus Adomeit, 'Die gestörte Vertragsparität- Ein Trugbild' (1994) 38 Neue Juristische Wochenschrift 2467, 2468.

"entering the Family of Nations a State comes as an equal to equals".⁴³ This does not necessarily mean that States are completely equal as regards power, territory, and the like. But as States, they are legally equal, at least in principle, whatever differences between them may otherwise exist.⁴⁴ As a result, even though sovereign equality can still serve to protect weaker States from the hegemony of stronger States,⁴⁵ the fundamental conception of good faith as a means of corrective justice is not directly applicable to the relations between States.

B. SPECIFIC ASPECTS OF GOOD FAITH IN INTERNATIONAL LAW

Like municipal law, good faith in international law has been subject to concretisations. In order for the international legal order to be predictable and consistent, scholars have examined and clarified the doctrinal aspects of these concretisations, while judicial bodies have applied them to factual scenarios. Though far from conclusive, four main concretisations are examined here, namely the maxim *pacta sunt servanda*, abuse of rights and discretion, estoppel and acquiescence, and negotiations in good faith. These have been subject to important judicial decisions and are recognised as sources of international law.

1. Pacta sunt servanda

The maxim '*pacta sunt servanda*' has been said to relate solely to the law of treaties.⁴⁶ However, based on good faith, the ICJ has found that that a State can be bound by a unilateral act alone: a public statement made by a State, with an intention to be bound, can create legal obligations, which could otherwise only be created through a treaty.

The rationale behind the maxim is seemingly self-evident: a need by the international community for a system that can ensure international order

⁴³Hersch Lauterpacht, *Oppenheim's International Law*, (8th edn, Longmans 1955) 263; Crawford (n 1) 449.

⁴⁴Jennings and Watts (n 39) 339; this is described as the 'orthodoxy' by Gerry Simpson, *Great Powers and Outlaw States*, (CUP 2004) 26 f.

⁴⁵Juliane Kokott, 'States, Sovereign Equality' in *Max Planck Encyclopaedia of Public International Law (MPEPIL)* (April 2011, online edn), para 43 ff, available at www.mpepil.com.

⁴⁶Anthony Aust, 'Pacta sunt Servanda' in *MPEPIL* (February 2007, online edn) para 2, available at www.mpepil.com; Richard Hyland, 'Pacta Sunt Servanda: A Meditation' (1993) 34 *Va J Intl L* 405, 406. The maxim translates as "binding agreements must be kept".

and prevent arbitrary behaviour and chaos.⁴⁷ In the *Nuclear Tests Case*, the ICJ held that:

"One of the basic principles governing the creation and performance of legal obligations... is good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the *binding character of an international obligation*. Thus interested States may take cognisance of *unilateral declarations and place confidence in them*, and are entitled to require that the *obligation thus created be respected*."⁴⁸

The French Government declared that no more nuclear tests would be conducted in the Pacific. In this case the Court gave these statements by a State (the declaring State) the same legal effects that can usually only be attributed to a binding synallagmatic treaty towards the receiving State. The Court found that if some prerequisites were met, then a unilateral declaration can bind a State; these are: the context of the statement, the intention of the declaring State, no necessary acceptance by the receiving State or observance of formal requirements.⁴⁹ For present purposes, the context and intent are most important.

The statement's context is important: it must be made publicly; a receiving State must be able to take cognisance of the declaration. The most important aspect of the binding nature is the (subjective) intention of the declaring State, as this distinguishes the statement from other, non-binding statements. However, the (objective) trust and confidence that is placed in the statement by the receiving State is paramount to the creation of an obligation; here good faith acts as the norm regulating the legal effect of the act.⁵⁰ The Court's reasoning shows that good faith can be a basis for

⁴⁷ Igor Ivanovich Lukashuk, 'The Principle Pacta Sunt Servanda and the Nature of Obligation under International Law' (83) AJIL 1989 513.

⁴⁸ *Nuclear Tests Case* (n 2) para 46 (emphasis added).

⁴⁹ The element of a form requirement is negligible, as international law imposes no strict requirements, therefore the statement may be made orally or in writing; cf *Nuclear Tests Case* (n 2) para 45. The fact that no formal acceptance is necessary seems to demarcate the unilateral statement from a formal agreement, *Nuclear Tests Case* (n 2) paras 43-50; cf Thirlway (n 25) 10-17; Camille Goodman, 'Acta Sunt Servanda? A Regime for Regulating the Unilateral Acts of States at International Law' (2006) 25 Aust Ybk Intl L 43, 53-59.

⁵⁰ Goodman (n 49) 57; Martti Koskenniemi, *From Apology to Utopia*, (CUP 1989) 308.

legal obligations in the same way as the maxim *pacta sunt servanda* is for treaty obligations.⁵¹ However, some elements and the terminology of the case are contentious and there is no general rule to determine which unilateral acts give rise to legal rights and duties.⁵²

2. Abuse of rights and abuse of discretion

Possibly the most contentious aspect of good faith in international law is the prohibition on the abuse of rights. The aspect of abuse of right and the arbitrary exercise of a right are closely related and not clearly distinguishable. An abuse of right is said to occur when a State exercises its rights in such a way as to encroach on the rights of another State, and that the exercise "... is unreasonable, and pursued in an arbitrary manner, without due consideration of the legitimate expectations of the other State."⁵³ The basis that prohibits this behaviour is good faith. If a State is able to exercise discretion, the arbitrary and unreasonable exercise of this discretion is said to amount to an abuse of rights,⁵⁴ which a State can be held internationally responsible for.⁵⁵ Abuse of rights may take place in three distinct sets of circumstances:⁵⁶

- (a) a State exercises its right in such a way as to hinder another State enjoying its own rights;
- (b) a State exercises a right for an end which it was not intended for (improper purposes);
- (c) arbitrary exercise of a right causing injury to another party.

As a result, the concept of abuse of right is often discussed in conjunction with the element of discretion that a State has in the exercise of

⁵¹ Cf Vaughan Lowe, *International Law*, (OUP 2007) 74.

⁵² Jennings and Watts (n 39) 1190; The ILC has undertaken the task of examining the unilateral acts of state as a topic of appropriate for codification (cf ILC, 'Yearbook of the International Law Commission Vol II Part 2 (1996) A/CN.4/SER.A/1996/add.1 (Part 2) 141); Thirlway is critical of the Court's use of terminology here (cf Thirlway (n 25) 10). In his opinion the ICJ wanted to enunciate the principle to the effect that the giving of consent (consent to be bound) creates legal obligations. It is submitted, however, that, even if this were the case, the Court made itself clear in assigning trust and confidence a pronounced role in its judgment.

⁵³ Cf Lauterpacht (n 43) 345.

⁵⁴ Tariq Hassan, 'Good Faith in Treaty Formation' (1980) 21 Va J Intl L 448; Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice' (1953) 30 British Ybk Intl L 1, 53.

⁵⁵ Cf *Trail Smelter Arbitration (United States of America v Canada)* (1938/ 1941) III RIAA 1904, 1965; Cheng (n 5) 130.

⁵⁶ Alexandre Kiss, 'Abuse of Rights' in *MPEPIL* (December 2006, online edn) para 4 f, available at www.mpepil.com.

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its rights.⁵⁷ Subsets (b) and (c) above borrow aspects from municipal administrative law,⁵⁸ and there is some academic dispute as to whether they can be transmuted into international law.⁵⁹ It is especially contentious whether international law has a comparable level of subordination⁶⁰ between States. This would be a necessary prerequisite for the application of the ICJ's careful analogy of municipal administrative principles.⁶¹ For the careful analogous application of aspects of municipal law, based on the methodology of the ICJ, a level of subordination would need to be evident, i.e. a State would have to be in a position to be able to exercise rights over another State without prior consent.

The discretion left to States in the exercise of their rights is very wide.⁶² In order to meet the threshold of an abuse of that right an element of bad faith is necessary. This is difficult to prove in front of a judicial body,⁶³ as bad faith is never to be presumed but, rather, always has to be proven.⁶⁴ As a whole, the Courts have not been forthcoming in holding States responsible for acts of abuse of right. However, two cases demonstrate how elements of abuse of rights can have an impact on the relations between States at the level of international law.

i. Admission of a State to the UN

In its Advisory Opinion on whether States were allowed to vote on the

⁵⁷ Michael Byers, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 McGill L J 389, 423; GDS Taylor, 'Content and Rule against Abuse of Rights in International Law' (1972) 46 British Ybk Intl L 323, 324 ff.

⁵⁸ For example: "*détournement de pouvoir* in France (see BO Iluyomade, 'Abuse of Right in International Law' (1975) 16 Harv Intl L J 47, 51), *Willkürverbot* in Germany (for the term cf Gerhard Leibholz, 'Ermessensmißbrauch im Völkerrecht' (1929) 1 ZäoRV 78 ff); see also Taylor (n 57) 336 f, 342 f for English administrative law.

⁵⁹ Cf part 0.

⁶⁰ Cf Rupert Klaus Neuhaus, *Rechtsmißbrauchsverbot im heutigen Völkerrecht*, (Duncker & Humblot 1984) 86. Subordination is here meant to denote a vertical power balance of one State over another, as opposed to the horizontal balance dogmatically rooted in the sovereign equality of States.

⁶¹ Cf Neuhaus (n 60) 88-90; Leibholz (n 58) 80-82.

⁶² Cheng (n 5) 132; for a discussion of whether a general margin of appreciation is developing, see Shany (n 40) 931 f, who interprets the ICJ's jurisprudence as rejecting a margin of appreciation.

⁶³ Nevertheless, the abuse of rights has been advanced as a basis of claim in the Barcelona Traction Case, see *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment: Second Phase) [1970] ICJ Rep 17; cf Iluyomade (n 58) 70 f.

⁶⁴ *Case concerning certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) [1926] PCIJ Rep 30; Virally (n 2) 132.

admission of a new Member State to the UN, the Court was faced with Art. 4 (1) UN Charter. This provision laid out the prerequisites which a State must meet in order to be admitted to the UN. The question was whether the list of five conditions set out in Art. 4 (1) UN Charter were conclusive, or whether other (political) considerations could be taken into account. The conditions are that the candidate must be a State, which is peace-loving, accepts the obligations of the Charter, and is both able and willing to carry out these obligations.⁶⁵

The Court concluded that no other conditions could be taken into account.⁶⁶ The interesting aspect to note here is that the Court stated that, while discretion could be used by the voting State, it was curtailed by the limits set by Art. 4 (1) UN Charter.⁶⁷ The dissenting judges agreed to the extent that the discretion was curtailed, but by the object and purpose of the UN Charter generally. For the evaluation of the relevance of good faith in determinations of this kind, it has to be noted that the judges all agreed that the discretion inherent in the right to vote must be guided by considerations of justice⁶⁸ and must be "exercised in good faith",⁶⁹ a duty that is also codified in Art. 2 (2) of the Charter.

ii. Environmental cases

Abuse of rights can also become particularly relevant when environmental resources are shared.⁷⁰ Two cases highlight how an abuse of rights can arise between neighbouring States. The *Trail Smelter Arbitration* dealt with the fumes and air pollution produced by a Canadian smelter situated on the border of the US state of Washington.⁷¹ In the *Pulp Mills Case*, the ICJ had to decide a case brought by Argentina against Uruguay. Here a pulp mill had been built on the banks of the shared Uruguay River, which created

⁶⁵ *Conditions of Admission of a State to Membership in the United Nations* (Advisory Opinion) [1948] ICJ Rep 62.

⁶⁶ *Ibid* para 65.

⁶⁷ See also Taylor (n 57) 343.

⁶⁸ *Conditions of Admission* (n 65) para 71 (Diss Op Judge Alvarez).

⁶⁹ *Ibid* para 63.

⁷⁰ Cf Kiss (n 56) para 4; this is based on the maxim *sic utere tuo ut alienum non laedas* or "use your property so as not to harm another"; Lauterpacht (n 43) 346.

⁷¹ *Trail Smelter Arbitration* (n 55) 1905-1982; see Russell A Miller, 'Trail Smelter Arbitration' in *MPEPIL* (May 2007, online edn) para 2 f, available at www.mpepil.com; cf Lowe (n 51) 240.

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pollution and affected Argentina's use of the river.⁷² In both cases a State had built, or was planning to build, an industrial plant (the utilising State) that was going to cause some measure of environmental damage to neighbouring territory. Both developments were subject to international treaties outlining the obligations that the States had in relation to the undertaking.

The territorial sovereignty of a State allows for the exploitation of natural resources. However, this right is limited when the rights of another State are at stake. The cases have both focussed on the balancing act to be conducted by the utilising State. Cheng calls this the “interdependence” of rights: “every right is subject to such limitations as are necessary to render it compatible both with a party's contractual obligations and with his obligations under the general law”.⁷³ If the utilising State uses its resources in a way that is suited to deprive the neighbouring State of its own right, an abuse of right by the utilising State may occur. However, an abuse of rights would require some element of positive bad faith, e.g. when the damage caused by the utilising State is greater than its own gain.⁷⁴ It is submitted, therefore, that there is a duty based on good faith, but under the threshold of abuse of rights, to the extent that a State may only use an absolute right in a way that does not cause damage to another. Both judgments also dealt extensively with the duty to negotiate the effects of the industrial production, an aspect of good faith that will be examined below.⁷⁵

iii. Criticisms by Schwarzenberger/ Brown and Lowe

The broadness of the definition and the difficulty in applying abuse of right has brought it substantial criticism as a general principle.⁷⁶ Schwarzenberger and Brown have stated that it is difficult to establish what constitutes an abuse of rights as opposed to a harsh, yet justified use of a right.⁷⁷ The determination is necessarily one that is subjective, along with being case-dependent, so that there is no place for the concept as a general

⁷² *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 18, para 14; Paula Maria Vernet, ‘Pulp Mills on the River Uruguay’ in *MPEPIL* (July 2010, online edn) para 7 f, available at www.mpepil.com.

⁷³ Cheng (n 5) 130.

⁷⁴ Kiss (n 56) para 4.

⁷⁵ See also: Cameron Hutchison, ‘Coming in from the Shadow of the Law: The Use of Law by States to Negotiate International Environmental Disputes in Good Faith (2005) 43 *Can Ybk Intl L* 101, 105 ff.

⁷⁶ Neuhaus (n 60) 180.

⁷⁷ Schwarzenberger and Brown (n 5) 84.

principle of law.⁷⁸ However, they go on to state that good faith has its place in treaty relations between States.⁷⁹ On the other hand, Lowe states that concepts like abuse of rights are *interstitial* rights; as such they do not have an independent normative function, but are to be seen as concomitant with the obligations that they underpin.⁸⁰ Even if abuse of right is not in itself a general principle, it can act as a yardstick for the extent of rights and obligations, especially in relation to other States that may be affected as a result. Finally, the modern jurisprudence of the ICJ suggests that the Court will be slow to assume an abuse of rights, unless the evidence is explicitly clear, and that it will favour the interpretation of the parties' acts or agreements, in order to determine the scope of the right or obligation, before reaching such a conclusion.⁸¹

Abuse of rights still remains relatively loosely defined and needs to be "pruned of its exuberances",⁸² if it is to become a specific rule of customary international law. A lack of consistent State practice means it is not likely a rule of customary international law. However, it can be helpful in determining the use and scope of rights in situations of interdependence. The doctrinal groundwork, particularly in relation to the uses of abuse of rights in municipal law, can work to shed some light on how to approach this conflict between States in international law.

3. Estoppel and acquiescence

Further aspects of good faith in international law, which have fairly well established private law counterparts, are the principles of estoppel and acquiescence. A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency.⁸³ Even though private law, particularly the

⁷⁸ So too, Neuhaus (n 60) 183.

⁷⁹ Schwarzenberger and Brown (n 5) 118.

⁸⁰ Vaughan Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing' in Michael Byers (ed) *The Role of Law in International Politics: Essays in international Relations and international Law* (OUP 2000) 207, 212-221.

⁸¹ *Case concerning Military and Paramilitary activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 para 127; *Case concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* (Merits) [1982] ICJ Rep 13 para 42; Thirlway (n 25) 28.

⁸² Georg Schwarzenberger, *International Law and Order*, (Stevens 1971) 88.

⁸³ Crawford (n 1) 421; IC MacGibbon, 'Estoppel in International Law' (1958) 7 ICLQ 468, 471; ILC, Yearbook of the International Law Commission Vol 2 (1953) A/CN.4/63 (per SR Lauterpacht) 144.

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common law, has developed a very multi-faceted approach with variations of estoppel (promissory, equitable, by silence etc.), international law also has its own (albeit more basic) conception. Under the principle of estoppel, a party is not permitted to take up a legal position that is in contradiction with its own previous representations or conduct, when another party has been led to assume obligations towards, or attribute rights to the former party in reliance upon such representations or conduct.⁸⁴

Even though municipal law, particularly contract law, has many different formulations of this behaviour (such as the notion of *venire contra factum proprium*⁸⁵), in international law the remit is broader.⁸⁶ The legitimate reliance of one State (State A) on the conduct of another (State B) precludes this State from acting contrary to its representations. If State B then acts contrary to this representation, it is acting without good faith and therefore in contravention of international law. The principle helps to safeguard a State's legitimate reliance on the actions of other States, in the sense that faith and confidence are protected when they are placed reasonably on the actions of another. This constitutes one of the most important aspects of good faith.⁸⁷

A related, yet distinguishable, aspect is acquiescence, which can be described as the inaction of a State, which is faced with a situation constituting a threat to, or infringement of, its rights.⁸⁸ The two defining differences between estoppel and acquiescence are the components of time and reliance: estoppel hinges on previous presentations; while acquiescence is that passivity in relation to a right of another State to the extent that good

⁸⁴ ILC, Yearbook of the International Law Commission Vol 2 (1963). A/CN.4/SER.A/1963/ADD.1 (per SR Waldock) 40; cf for the aspect of reliance: Thomas M Franck, 'Fairness in the International Legal and Institutional System' (1993) 240 *Receuil des Cour* 66; MacGibbon (n 83) 468; Litvinoff (n 8) 1664. It is in this regard very similar in nature to the Roman law principle of "*non licet venire contra factum proprium*" and "*allegans contraria non audiendus est*" (cf Thomas Cottier and Jörg Paul Müller, 'Estoppel' in *MPEPIL* (April 2007, online edn) para 9, available at www.mpepil.com).

⁸⁵ Cf 0.

⁸⁶ *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 39 f, (Sep Op Alfaro).

⁸⁷ Cheng (n 5) 144; DW Bowett, 'Estoppel before International Tribunals and its Relation to Acquiescence' (1957) 33 *British Ybk Intl L* 176, 193 f.

⁸⁸ IC MacGibbon, 'The Scope of Acquiescence in International Law' (1954) 31 *British Ybk Intl L* 143; in German this would be called "*beredtes (oder qualifiziertes) Schweigen*" cf BGH NJW 1951, 711; Jan Busche '§ 147 BGB' in Franz Jürgen Säcker, Roland Rixecker and Hartmut Oetker (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, (5th edn, CH Beck 2010) para 7.

faith affords the passivity the character of consent.⁸⁹ In the *Gulf of Maine Case* the ICJ acknowledged the legal effect of a "qualified silence" when it stated that it is "equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent".⁹⁰

One of the inherent difficulties of acquiescence is the establishment of the true intent of the silent state, which is inevitably a legal fiction.⁹¹ Showing that a State meant to say something (subjective aspect), while remaining silent (objective aspect) has considerable procedural difficulties. The fiction that a State has indeed acquiesced to an infringement of its rights can only be justified if due regard is had to the reasonable trust that the other State had in the subjective value of the silence.⁹²

The concepts of estoppel and acquiescence have featured strongly in border and land title disputes.⁹³ In this context, the ground-breaking decision was the *Temple of Preah Vihear Case*. The Temple is an archaeologically and artistically important sanctuary, situated on the Dangrek Mountains between Cambodia and Thailand. In 1904 a Treaty had been signed by France (on behalf of its protectorate, present day Cambodia) with Siam (now Thailand). This called for the delimitation of the area to be performed by a mixed Commission, which produced its maps in 1907 and posited the Temple in Cambodian territory. However, Thailand took the view that it possessed the area surrounding the Temple and took control of the site. Cambodia's diplomatic efforts to regain the territory failed and the case was referred to the ICJ.

The Court relied on acquiescence and estoppel,⁹⁴ rather than looking to the cultural, historic, or religious factors, the ICJ deemed that Thailand should have objected to the maps in a timely manner. Thailand entered no

⁸⁹ Jörg Paul Müller, *Vertrauensschutz im Völkerrecht*, (Carl Heymanns 1971) 38 f; cf MacGibbon (n 88) 143 f; Nuno Sergio Marques Antunes, 'Acquiescence' in *MPEPIL* (September 2006, online edn) para 19, available at www.mpepil.com; cf Franck (n 84) 68.

⁹⁰ *Case concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (Merits) [1984] ICJ Rep 305.

⁹¹ Sophie Kopela, 'The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals' (2010) 29 *Aust Ybk Intl L* 101.

⁹² A related aspect to acquiescence is that of extinctive prescription; here, a party can lose its rights by not pursuing them in a timely manner. However, a finding of good faith is not strictly necessary and it functions mainly as a procedural right; cf: Müller (n 89) 75; Jennings and Watts (n 39) 705 f; BE King, 'Prescription in Claims in International Law' (1934) 15 *British Ybk Intl L* 82, 94; Jan Wouters and Sten Verhoeven, 'Prescription' in *MPEPIL* (November 2008, online edn) para 8, available at www.mpepil.com.

⁹³ Müller (n 89) 39 f.

⁹⁴ *Case concerning the Temple of Preah Vihear* (n 86) 27 f.

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reservations to the original Treaty disputing the accuracy of the Commission's maps. Further Friendship Treaty negotiations (in 1925 and 1937) and a Franco-Siamese reconciliation Committee (set up in 1947) also ended with agreements being signed, yet with no reservations entered in respect of the original maps. Coupled with the objective of creating stability and finality⁹⁵ through the demarcation of borders, a legitimate reliance by Cambodia was implied.⁹⁶ Thailand was therefore estopped from raising any objections to the original 1907 maps at the present time, having not made declarations to that effect before. The primary foundation of the principle of estoppel is, as Judge Alfaro noted, "the good faith that must prevail in international relations, inasmuch as consistency of conduct or opinion on the part of the State to the prejudice of another is incompatible with good faith."⁹⁷

Acquiescence and estoppel ascribe substantial legal consequences to the inactivity of a State; as such, these institutions should be restrictively interpreted and applied. They find their justification in the reasonable reliance of one State (based on good faith) on the representation or conduct of another.⁹⁸ A State has the ability to make declarations to preserve its rights and preclude the effects of tacit consent,⁹⁹ placing the onus of action on the State that has allowed the reliance and trust.

4. Negotiations in good faith

When States negotiate it is not enough for representatives to meet and discuss. Good faith negotiations require the parties to demonstrate 'reasonable regard' for the other's rights and interests. Further, the parties must, with a view to end the dispute amicably, aim for a clear result; in short: the negotiations must be meaningful.¹⁰⁰ Unjustifiably breaking off the negotiations, creating abnormal delays, disregarding the agreed procedures, or systematic refusal to take into consideration adverse proposals or interests can amount to breaches of good faith.¹⁰¹ Even when

⁹⁵ Cf MacGibbon (n 83) 468 f.

⁹⁶ *Case concerning the Temple of Preah Vihear* (n 86) 34; see for the aspect of reliance of the conduct, *Nuclear Tests Case* (n 2) para 46.

⁹⁷ *Case concerning the Temple of Preah Vihear* (n 86) 42 (Sep Op Alfaro).

⁹⁸ Marques Antunes (n 89) para 24; MacGibbon (n 83) 507.

⁹⁹ See generally on the standards for these actions or 'pleas', MacGibbon (n 88) 172 ff.

¹⁰⁰ O'Connor (n 5) 95, 96; Shaw (n 1) 1017.

¹⁰¹ *Lac Lanoux Arbitration (France v Spain)* (Award) [1957] XII RIAA 281; also John G Laylin and Rinaldo L Binachi, 'The Role of Adjudication in International River Disputes: The Lac Lanoux Case' (1959) 53 AJIL 30.

there is only a small chance that the negotiations will end in success, the parties are bound by a duty to endeavour to end the dispute.¹⁰² However, there appears to be no general rule of international law requiring the negotiations to be exhausted before a judicial settlement may be sought.¹⁰³ So far, the ICJ has only developed the obligation to negotiate in good faith in relation to legal rights and has not expanded the notion to any acts between States that do not relate to a legal obligation.¹⁰⁴

In 1971 Iceland unilaterally announced that it was extending its exclusive fishing zone to 50 nautical miles, thereby terminating agreements it had with Germany and the UK. A dispute ensued before the ICJ. On the merits the Court stressed the need to reconcile the disputed fishing rights through negotiations. The Court also issued the parties with the objectives, which the negotiations should cover, e.g. delimiting the fishing rights, catch-limitations, share allocation and restrictions and required that they should be conducted in good faith.¹⁰⁵ This judgment builds on the obligation for the negotiations to be ‘meaningful’, as the Court had noted in an earlier case.¹⁰⁶

C. THE INTERRELATION OF GOOD FAITH WITH SOVEREIGNTY

Historically the principle of internal sovereignty has been understood as the supreme authority, or ultimate power, of a State within its territory,¹⁰⁷ while the external sovereignty is the dimension that pertains to the international rights and duties of a State in relation to other States.¹⁰⁸ In 1927, the Permanent Court of International Justice (PCIJ) developed the Lotus

¹⁰² JG Merrills, *International Dispute Settlement*, (5th edn, CUP 2011) 12.

¹⁰³ John Collier and Vaughan Lowe, *Settlement of Disputes in International Law*, (OUP 1999) 21.

¹⁰⁴ Judge Padilla Nervo called it an obligation *tracto continuo*: never ends and is potentially present in all relations and dealings between States, *North Sea Continental Shelf Cases (Germany v Denmark/ Netherlands) (Merits)* [1969] ICJ Rep 3, para 92 (Sep Op Padilla Nervo).

¹⁰⁵ *Fisheries Jurisdiction Case (United Kingdom v Iceland)* (Merits) [1974] ICJ Rep 3, 73 f.

¹⁰⁶ *North Sea Continental Shelf Cases* (n 104) para 87.

¹⁰⁷ *Customs Regime between Germany and Austria (Advisory Opinion)* [1931] PCIJ Rep Series A/B 57 (Ind Op Anzilotti); Samantha Besson, ‘Sovereignty’ in *MPEPIL* (April 2011, online edn) para 1, available at www.mpepil.com; Lowe (n 51) 172.

¹⁰⁸ *The Island of Palmas case (United States of America v Netherlands)* (Award) [1928] II RIAA 838 f (Op. Huber); Besson (n 107) para 70; Ronald Brand, ‘Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century’ (2001) 25 *Hastings Intl & Comp L Rev* 279, 284.

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principle:¹⁰⁹ based on its sovereignty, a State is free to act¹¹⁰ as long as this behaviour is not prohibited by an explicit rule of international law.¹¹¹ Whether this sovereignty is understood as limited or absolute, there is consensus that States must consent to rules that limit them in exercising their sovereignty.¹¹²

However, applying good faith elements to a State's conduct has a limiting effect on its external sovereignty. The requirement of acting in good faith limits the actions of a State, without the requirement of an explicit rule in international law, as envisaged by the Lotus principle. Accordingly, a state might have its supreme authority or sovereignty limited when aspects of good faith come into play, and these aspects necessitate behaviour that contravenes what a state might otherwise want to do.¹¹³ The principle of good faith therefore acts not as a source of rights or obligations, but more as a means of guiding the exercise of those rights or obligations. Instead of answering what the obligations placed on a State are, or why they create legal effects for the State, the principle of good faith (and the specific concretisations of that principle discussed above) can guide a State's behaviour as to how the inherent rights and obligations are exercised. This must be considered a limitation on the State's sovereignty.¹¹⁴

Regarding the adherence to treaty relations, the limitation of sovereignty is less controversial, as the binding nature of the treaty has been the subject to consent by the State. The Permanent Court of Arbitration (PCA) has, on this point, gone on to state that:

"According to the principle of international law that treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate at will concerning the subject matter of the treaty, and limiting the exercise of sovereignty of the State bound by a treaty with respect to that subject matter to

¹⁰⁹ *The Case of the SS Lotus (France v Turkey)* (Judgment) [1927] PCIJ Ser A No 10 4.

¹¹⁰ The question in the case was of prescribing jurisdiction, as an expression of sovereignty.

¹¹¹ *Case of the SS Lotus* (n 109) 25 f; Armin v Bogdandy and Markus Rau, 'The Lotus' in *MPEPIL* (June 2006, online edn) paras 9-10, available at www.mpepil.com.

¹¹² Cf American Law Institute, *Restatement of the Law Third, Foreign Relations Law of the United States* (St. Paul, 1987) 17 introductory note.

¹¹³ Jennings and Watts (n 39) 407 f; Taylor (n 57) 323 f; cf Neuhaus (n 60) 93.

¹¹⁴ Lukashuk, (n 47) 513, 514, who makes the point that the assumption of obligations can be seen to limit sovereignty, even though undertaking is a realisation of sovereignty; in terms of good faith, the limits placed on the exercise can only be seen to limit a State's actions, absent an express rule in international law.

such acts as are consistent with the treaty."¹¹⁵

D. GOOD FAITH IN THE LAW OF TREATIES

All signatory States of the Vienna Convention on the Law of Treaties (VCLT) note "that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognised".¹¹⁶ The VCLT is imbued with rules based on good faith that have effect at different stages of the process.

1. Treaty formation and the element of good faith in Art. 18 VCLT

After signing (but before ratifying) a treaty, a party has an obligation to observe the terms of the treaty. If a measure is taken after signature that breaches this obligation, one that is based on good faith, reciprocity can allow the other treaty party to repudiate the treaty or to claim compensation for any diminution of value.¹¹⁷ The element of good faith in treaty formation is found in Art. 18 VCLT. This article protects the legitimate expectations of the other participants in the treaty-making process, and is therefore based on good faith.¹¹⁸ Whether or not the signatory State ratifies the treaty is a matter of discretion; however, the consent-based act of placing a signature on the treaty may act to reduce this discretion, so that a State may not exploit the signed text for its own purposes by abusing its inherent discretion to ratify.¹¹⁹ It is submitted, though, that there does not exist enough state practice to point to a rule that signature of a treaty leads to a good faith *obligation to ratify*, but only an obligation not to defeat the purpose or material normative content of the treaty in question.¹²⁰

Even though there is some disagreement as to whether Art. 18 VCLT

¹¹⁵ *The North Atlantic Coast Fisheries Case (Great Britain v United States of America)* (Award) [1910] XI RIAA 169, para 188.

¹¹⁶ Third recital.

¹¹⁷ Arnold McNair, *The Law of Treaties*, (OUP 1961) 204; Schwarzenberger/ Brown (n 5) 433 f.

¹¹⁸ Oliver Dörr in Oliver Dörr and Kirsten Schmalenbach (eds) *Vienna Convention on the Law of Treaties. A Commentary* (Springer 2012), Art 18 para 2; Werner Morvay, 'The Obligation of a State not to Frustrate the Object of a Treaty prior to its Entry into Force' (1967) 27 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 451, 454.

¹¹⁹ JM Jones, *Full Powers and Ratification: A study of the development of treaty-making procedure*, (CUP 1946) 89; Hassan (n 54) 462.

¹²⁰ Hassan (n 54) 461 would seemingly agree; Anthony Aust, *Modern Treaty Law and Practice*, (2nd edn, CUP 2011) 117, suggests the contrary.

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reflects customary international law,¹²¹ international courts and tribunals have taken cognisance of this rule (even prior to the VCLT coming into force). The PCIJ laid the foundation in its judgment on *Certain German Interests in Upper Silesia*.¹²² The case concerned the alleged breach of good faith by Germany not to alienate certain property in Silesia (as part of the Versailles Treaty), prior to its entry into force. It was held that, even though the facts of the case at hand differed, Germany may not act against the principle of good faith. A misuse of its rights to alienate its property could amount to a breach of its treaty obligation.¹²³ The Greco-Turkish arbitral Tribunal was even more explicit in invoking good faith as a foundation not to defeat the object and purpose of a nascent treaty:

“WITH THE SIGNATURE OF A TREATY AND BEFORE ITS ENTRY INTO FORCE, THERE [...] EXISTS AN OBLIGATION TO DO NOTHING WHICH MAY INJURE THE TREATY BY REDUCING THE IMPORTANCE OF ITS OBLIGATIONS [...] THIS PRINCIPLE IS ONLY AN EXPRESSION OF GOOD FAITH.[...]”¹²⁴

In modern practice, this was affirmed by the Court of Justice of the European Union (CJEU) in *Opel Austria v European Council*.¹²⁵ The Court, after affirming that good faith forms part of EU law, formulated that the specifically European legal principle of ‘legitimate expectations’ is a corollary of this general principle.¹²⁶ This further shows that good faith has also taken on a regional customary international law standing (at least as part of EU law).¹²⁷

2. Performing treaty obligations in good faith (Art. 26 VCLT)

Art. 26 VCLT, in all its brevity, still makes good faith in the performance of a treaty obligation of paramount importance. Two elements make up this

¹²¹ Laurence Boisson de Chazournes, Anne-Marie La Rosa and Makane Moïse Mbengue in Olivier Corten and Pierre Klein (eds) *The Vienna Convention on the Law of Treaties: A Commentary* (OUP 2011), Art 18 para 5; Oliver Dörr (n 118) Art 18 para 5; Morvay (n 118) 458 albeit reluctantly states that it conforms to general international law.

¹²² *Certain German Interests in Polish Upper Silesia* (n 64) 5-83.

¹²³ Cf Hassan (n 54) 454; Cheng (n 5) 110; Anthony Aust differs: cf Aust (n 46) para. 8; Aust (n 120) 117: the act of ratification is the definitive act to create legal consequences, while signature itself does not.

¹²⁴ *Megalidis v Turkey* 8 TAM 395 (cited in Cheng (n 5) 111).

¹²⁵ Case T-115/94 *Opel Austria GmbH v Council of the European Union* [1997] ECR II-43.

¹²⁶ Ibid para 93; Oliver Dörr in Dörr and Schmalenbach (n 118) Art 18 para 5.

¹²⁷ Jan Wouters and Dries Van Eeckhoutte, ‘Giving Effect to Customary International Law through EC Law’ KU Leuven Faculty of Law Working Paper 25/2002, 27, available at <http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP25e.pdf>.

obligation: the determination of the object (i.e. the treaty) to be performed in good faith, as well as the manner in which the obligation is performed.¹²⁸

The material duty to act in good faith during the performance of a treaty was stated by Waldock in the ILC's Report as "one of good faith and not *stricti juris*".¹²⁹ This suggests that the object and intention of the parties is paramount, rather than a literal observation of the wording of the treaty.¹³⁰ A treaty should be performed with the intentions of the parties in mind, rather than looking to a formalistic understanding of the wording. Since the element of good faith is again context-dependent, the duty needs to be applied to the specific details of a case.¹³¹ It is submitted that elements of the general principles of law that relate to abuse of right, estoppel, and other aspects of good faith may find an analogous application to the performance of treaty obligations.

3. Good faith in treaty interpretation

Art. 31 VCLT states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning". Given that the obligation in Art. 26 VCLT applies to the entire process, the interpretation of the treaty is no different. The exact contours of how to interpret a treaty in good faith are difficult, yet an element of 'reasonableness' must be inherent when an interpretation is advanced.¹³² Two aspects that can add contour when interpreting a treaty reasonably are the effectiveness of the interpretation (as an extension), and the imposition of new obligations (as a limitation). Both of these have a basis in good faith.

As a means of interpretation, *effet utile* helps extend the meaning of the wording past its literal sense, as recourse has to be taken to "what the parties did mean when they used these words".¹³³ The principle was left out of the VCLT, as it was feared that it would open the door to a strong

¹²⁸ Jean Salmon in Corten and Klein (n 121) Art 26 para 36.

¹²⁹ ILC, 'Yearbook of the International Law Commission Vol. II (1964) A/CN.4/SER.A/1964/ADD.1 7.

¹³⁰ So too the ICJ: *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Merits) [1997] ICJ Rep 7, para 142.

¹³¹ Cf Jean Salmon in Corten and Klein (n 121) Art 26 para 53.

¹³² Cf Oliver Dörr in Dörr and Schmalenbach (n 118) Art 31 para 61; Jean-Marc Sorel and Valerie Bore-Eveno in Corten and Klein (n 121) Art 31 para 29; Richard K Gardiner, *Treaty Interpretation*, (OUP reprint 2011) 152 f; Jennings and Watts (n 39) 1272 in fn 7.

¹³³ *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Merits) [1991] ICJ Rep 69 f, citing the *Admissions Advisory Opinion* (n 65) 8; Gardiner (n 132) 159 f.

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teleological interpretation,¹³⁴ which could lead to unwritten (or implied) powers being read into treaties. However, based on the object and purpose of a treaty and a good faith interpretation of it, the favourable construction of a treaty can be achieved of upholding the treaty rather than destroying it (*ut res magis valeat quam pereat*).¹³⁵ In most cases this will also align with the expectations of the signatory parties, and is a way of interpreting treaties with recourse to good faith. The ordinary meaning of the treaty and the prohibition of creating additional obligations place a limitation on the interpretation.¹³⁶

The obligation to interpret a treaty according to good faith finds its limitations in the creation of new obligations which are no longer covered either by the wording of the treaty or the intent of the signatories.¹³⁷ The approach indicated by judicial practice aims to clear up ambiguous wording, yet not to act as a gap-filling function in order to create new obligations.¹³⁸ By advancing an interpretation that adds (or creates) obligations for another party, not intended or covered by the wording of the treaty, this party may be acting in bad faith.

Even though an undoubted element of good faith pervades the interpretation of international agreements, the ICJ has not yet interpreted a treaty based solely on good faith.¹³⁹ Therefore, it is submitted that, while the ICJ has an undoubtedly well-crafted canon of interpretation that it can draw on,¹⁴⁰ the principle of good faith is also of an *interstitial* nature when it comes to treaty interpretation. In this regard it functions as a principle

¹³⁴ Jean-Marc Sorel and Valerie Bore-Eveno in Corten and Klein (n 121) Art. 31 para 52. The ICJ did, albeit reluctantly, expressed elements of *effet utile* in: *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion, Second Phase)* [1950] ICJ Rep 228 f.

¹³⁵ Gardiner (n 132) 160.

¹³⁶ *Interpretation of Peace Treaties* (n 134) 226-230; Oliver Dörr in Dörr and Schmalenbach (n 118) Art 31 para 58; Matthias Herdegen, 'Interpretation in International Law' in *MPEPIL* (February 2010, online edn) para 30, available at www.mpepil.com.

¹³⁷ Gardiner (n 132) para 155; Herdegen (n 136) para 30.

¹³⁸ Cf *The Venezuelan Preferential Claims Case (Germany, Great Britain, Italy, Venezuela et al)* (Award) [1904] IX RIAA 110; *Netherlands v France (Award, unofficial transcript)* [1976] available at http://www.pca-cpa.org/showpage.asp?pag_id=1156, paras 54-79; *R v Immigration Officer at Prague Airport ex parte European Roma Rights Centre* [2004] 2 AC 1, 19 (HL); Gardiner (n 132) 157 f.

¹³⁹ Cf Hugh Thirlway, 'The Law and Procedure of the ICJ 1960-1989: Part Three (1991)' 62 *British Ybk Intl L* 17.

¹⁴⁰ In Art. 31-33 VCLT; cf Thirlway (n 139) 16 f.

lending contours without imposing specific obligations¹⁴¹ or creating a specific means of constructing a treaty based on good faith alone.

E. CONCLUSION

In conclusion, good faith as a general principle of law is familiar from municipal law, but striking in its differences when assessed in the practice of international law. Having examined the specific aspects of good faith and how international jurisprudence has crafted justiciable concretisations out of a vague notion, one conclusion becomes very clear. Whether in general international law or in the law of treaties, good faith acts a limitation. The limitations that the observation of good faith places on States regulate the performance of rights and obligations in international discourse. As well as the explicit duties of good faith in treaty law, general international law places legal consequences on actions that are predicated on good faith.

Returning to Fitzmaurice's statement: while a rule answers 'what' and a principle answers 'why', the principle of good faith regulates 'how'.¹⁴² As international law becomes more fragmented and dispersed in 'self-contained' regimes, the role of good faith will extend and create more permutations of this limitation, as, fundamentally, good faith acts to give legal value to the expectations that States have in the actions of other States. Good faith might therefore not be readily definable in abstract terms, it is however indispensable.

¹⁴¹ MK Yasseen, 'L'interprétation des traités d'après la Convention de Vienna sur le droit des traités' (1976) 151 *Receuil des Cours* 21.

¹⁴² Fitzmaurice (n 6) 7, and part 0.

Annex 190

I. C. MacGibbon, "Estoppel in international law", *International and Comparative Law Quarterly*, 1958

ESTOPPEL IN INTERNATIONAL LAW

By

I. C. MACGIBBON *

I

MORE than thirty years ago it was observed that the doctrine of estoppel¹ did not appear to have received much attention in the sphere of international law.² A certain reluctance to invoke estoppel may have been justified at that time, but the marked increase since then in international judicial and arbitral activity has provided substantial grounds for the modern tendency to consider estoppel as one of the "general principles of law recognised by civilised nations."³ The question whether the juridical basis of the doctrine of estoppel is to be found in customary international law rather than in the "general principles of law" is not free from difficulty; and it is not the purpose of this article to suggest that it can be satisfactorily answered.⁴ It would seem that a convincing solution must wait on both a comparative investigation into the operation of the concept in municipal systems of law and a more widespread review of State practice than the present writer has been able to attempt. The scope of the present article is limited to drawing attention to some of the aspects of estoppel which have been noted or suggested by publicists and expressed in State pleadings before international tribunals, in diplomatic correspondence, and particularly in advice tendered to the British Government by the Law Officers of the Crown.

Underlying most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation. Such a demand may be rooted in the continuing need for at least a

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¹ The Anglo-American terminology which has gained wide acceptance is used throughout. "Where the Anglo-American lawyer refers to estoppel, the continental jurist will usually say that the party is 'precluded'" (Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), p. 204). The concept is known to Scots lawyers as "personal bar."

² See McNair, "The Legality of the Occupation of the Ruhr," in *British Year Book of International Law*, 5 (1924), pp. 17 *et seq.*, at p. 34.

³ Thus, the concept of estoppel finds a place in the study by Dr. Bin Cheng entitled *General Principles of Law as applied by International Courts and Tribunals*, at pp. 137 *et seq.*

⁴ See, however, below, pp. 470, 478 and 512-513.

modicum of stability and for some measure of predictability in the pattern of State conduct. It may be, and often is, grounded on considerations of good faith. In either event, it is scarcely to be doubted that failure by a State to profess and practise some standard of consistency in its international relations would be viewed unfavourably both by other States and by any international tribunal called upon to adjudicate in a dispute in which such conduct was in issue. One of the authorities which Lord McNair mentioned as throwing some light on the position of estoppel by conduct in international law was the *Behring Sea* arbitration of 1893 between the United States and Great Britain. The Arbitrators expressly found against the United States contention that Great Britain had conceded the Russian claim to exercise exclusive jurisdiction over the fur-seals fisheries in the Behring Sea outside territorial waters; and they were fortified in this conclusion by the fact that the United States, as well as Great Britain, had protested against the Russian Ukase of 1821 in which this claim was asserted. The proceedings, as Lord McNair stated, "demonstrated that some advantage is to be gained by one State, party to a dispute, by convicting the other State of inconsistency with an attitude previously adopted."⁵ "This is not estoppel *eo nomine*," Lord McNair commented, "but it shows that international jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold—*allegans contraria non audiendus est*."⁶

It may, however, be argued that international practice, if not international jurisprudence, has accorded less tentative recognition to the principle of consistency; and one writer has advanced a view of the binding character of unilateral acts and declarations which appears to comprehend the principle underlying estoppel as part of customary international law. "If [a subject of international law] acts contrary to its notified intent," Dr. Schwarzenberger wrote, "it breaks the rule on the binding character of communicated unilateral acts."⁷ His remarks on the genesis of this rule are instructive: and it is suggested that the instances from State practice and the official opinions noted in the following pages point for the most part in the same direction. Dr.

⁵ *British Year Book of International Law*, 5 (1924), p. 35. See also the views expressed by the Law Officers concerning this dispute, below, pp. 496-497.

⁶ *Ibid.*

⁷ "The Fundamental Principles of International Law," in *Hague Recueil*, 87 (1955), p. 312. And see Schwarzenberger, *International Law*, Vol. 1 (3rd ed., 1957), Part 1, p. 553: "Provided that a unilateral act is capable of having legal effects, and is intended to have such effects, these must be determined in each individual case by reference to the *jus aequum* rule. The typical minimum effect of unilateral acts is to create an estoppel. It prevents the subject of international law, to which the unilateral act is imputable, from acting contrary to its declared intent."

Schwarzenberger summed it up thus: "No doubt, in the formative stage of this rule, the obnoxiousness of self-contradictory behaviour and *venire contra factum proprium* assisted in creating the *opinio juris sive necessitatis* which marks the borderline between international comity and international customary law."⁸

It will be recalled that the Permanent Court of International Justice in the *Eastern Greenland* case had no doubt that the "Ihlen declaration" was binding on Norway and barred a subsequent Norwegian attitude contrary to its notified intent.⁹ In analogous circumstances the doctrine of estoppel was invoked in 1907 by the United States in diplomatic correspondence with Sweden in the following terms: "So far as the international aspect of the question is concerned, there is little doubt but that a nation entering into an arrangement by the exchange of diplomatic notes is, certainly as to the other negotiating Power, estopped to say that the Foreign Office, in making such arrangement, had no power or authority in the premises. This is the position which has been assumed not infrequently by this Government in dealing with other countries."¹⁰

The extent to which estoppel, in this or some other aspect, has been invoked in the international sphere is considered below. Although there may still be some doubt as to whether it satisfies the criteria relevant to rules of customary international law, it has long been accepted as a general principle of law, in the sense of a principle common, in one form or another, to most municipal systems of law. As long ago as 1927 it was asserted by one authority that, in substance, "the principle underlying estoppel is recognised by all systems of private law, not only with regard to estoppel by record . . . but also, under different names, with regard to estoppel by conduct and by deed"¹¹; and, concluding that it was "not easy to adduce reasons why those general principles underlying estoppel should be disregarded in the relations between States,"¹² several important arbitrations were examined in which estoppel or preclusion was pleaded by the parties or made the basis of the award.

⁸ "The Fundamental Principles of International Law," in *Hague Recueil*, 87 (1955), pp. 312 *et seq.*

⁹ Series A/B, No. 53 (1933), p. 71: "The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power in regard to a question falling within his province is binding upon the country to which the Minister belongs."

¹⁰ Note, dated March 22, 1907, from the United States Acting Secretary of State to the Swedish Chargé d'Affaires *ad interim*, printed in Hackworth, *Digest of International Law*, Vol. 5 (1943), p. 393.

¹¹ Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), p. 204.

¹² *Ibid.*, p. 205.

Estoppel and good faith. The growing frequency with which use is made of arguments based upon estoppel is a measure of the importance attached to the precepts of good faith in the relations between States; and it is not uncommon to find estoppel discussed in the context of good faith as a specialised manifestation of the wider principle. Some examples may be mentioned from commentaries on the law of treaties. Thus, Judge Lauterpacht, when Special Rapporteur to the International Law Commission on the Law of Treaties, commented as follows on paragraph 2 of Draft Article 11 of his Report¹³: "A State cannot be allowed to avail itself of the advantages of the treaty when it suits it to do so and repudiate it when its performance becomes onerous. It is of little consequence whether that rule is based on what in English law is known as the principle of estoppel or the more generally conceived requirement of good faith. The former is probably no more than one of the aspects of the latter."¹⁴ The Special Rapporteur also drew attention to the solutions propounded by Lord McNair and by the late Professor Hyde with regard to the validity of treaties concluded in disregard of constitutional limitations.¹⁵ Both made use of arguments based on estoppel in this sense. Lord McNair wrote: "It seems safe to say that, in the view of the United Kingdom Government, when an international engagement has been partly performed or otherwise treated by both parties as internationally binding, it cannot validly be repudiated by either of them on the ground that its conclusion failed to comply with some internal requirement of its constitutional or other law."¹⁶ Professor Hyde, with characteristic caution, stated: "It may be said that where a contracting State holds out to another assurance that the terms of a proposed agreement are not violative of the fundamental laws of the former, and does so through an agent who is supposedly conversant with the requirements thereof by reason of the character of his connection with the particular department of his government to which is confided the management of foreign affairs, and when no written constitution is involved, and no published and authoritative instrument notoriously proclaims an opposing view, there is ground for the conclusion that the contracting State holding out such assurance is not in a position to deny the validity of an

¹³ The paragraph reads: "A contracting party may be deemed, according to the circumstances of the case, to have waived its right to assert the invalidity of a treaty concluded in disregard of constitutional limitations if for a prolonged period it has failed to invoke the invalidity of the treaty or if it has acted upon or obtained an advantage from it." (*Report on the Law of Treaties*, U.N. Document A/CN. 4/63: March 24, 1953, p. 157.)

¹⁴ *Ibid.*, p. 166.

¹⁵ *Ibid.*, p. 161.

¹⁶ *The Law of Treaties* (1938), p. 44.

agreement which has been concluded in pursuance thereof.”¹⁷ More recently the relationship between good faith and both the substantive and procedural aspects of estoppel with regard to the law of treaties has been noted by Dr. Schwarzenberger. He pointed out that every evasion or breach of a treaty involves a breach of good faith, in the sense that it amounts to a contravention of the rule that consensual engagements should be implemented in good faith. “Then, in appropriate cases,” he argued, “the rule itself may also be expressed in more specialised terms which are congenial to the realm of good faith, such as the prohibition of fraud or *venire contra factum proprium* in treaty relations.”¹⁸ As well as drawing attention to the primary duty of a party in breach of treaty provisions to make reparation, Dr. Schwarzenberger pointed out that in addition, or in the alternative, emphasis might be placed on the breach of the rule of customary international law requiring good faith in the implementation of treaty obligations. In that case, he suggested, “the exclusion of acts or evidence from consideration may be explained on grounds of the prohibition of *venire contra factum proprium* or estoppel, and the duty of reparation be founded on the breach of this substantive rule rather than the contravention of those underlying consent and responsibility.”¹⁹

In the course of a discussion of fraud as a factor which may vitiate consent, Dr. Schwarzenberger indicated a further possible application of estoppel. “It is an open question,” he wrote, “what legal consequences the vitiation by fraud of a consensual agreement entails. If the rules underlying the principle of good faith are considered to provide the answer, the minimum effects of fraud are to create an estoppel against the fraudulent party and, perhaps, a duty of restitution.”²⁰ In a later passage it was noted that provision in arbitration treaties to cover bad faith in their execution, such as the refusal of a party to appoint a member of an arbitral commission,²¹ had become redundant by common consent. “Parties to subsequent treaties of this kind,” it was stated, “took it for granted that such situations were governed by the *jus aequum* rule, and that indulgence in bad faith created an effective estoppel against the assertion of any constitutional irregularity of such commissions.”²²

It was suggested by Judge Lauterpacht, on the basis of the trend apparent in the attitude of the Permanent Court of International

¹⁷ *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed., revised, 1945), Vol. 2, p. 1385.

¹⁸ “The Fundamental Principles of International Law,” in *Hague Recueil*, 87 (1955), p. 303.

²⁰ *Ibid.*, p. 268. And see *ibid.*, p. 267 and pp. 270–271.

²¹ See below, pp. 480, *et seq.*

²² *Ibid.*, p. 525.

Justice after more than a decade of experience, that the Court was prepared to recognise the operation of the principle of estoppel in view of its impatience with evasion and its insistence on holding States to the attitude previously adopted by them.²³ To the same determination to discourage evasion was ascribed the affirmation by the Court, in a number of cases,²⁴ of the established principle that a State cannot invoke its municipal law as a reason for failure to fulfil its international obligations. These cases, however, he noted, could not be regarded as applications of the English law of estoppel, but were "reminiscent of some of the elements of estoppel in English law."²⁵

The link between estoppel and good faith was noted by Dr. Weis in relation to the denationalisation of an individual by his State while he was abroad. "The good faith of a State which has admitted an alien on the assumption that the State of his nationality is under an obligation to receive him back would be deceived if by subsequent denationalisation this duty were to be extinguished"²⁶: this Dr. Weis described as "[a] sort of estoppel on the part of the State of nationality."²⁷

Recognition as an estoppel. It has been stated by one authority that "the legal effect of every act of recognition is to create an estoppel."²⁸ On this premise alone, it may be argued that the scope of the operation of estoppel is co-extensive with that of the numerous situations in which recognition or non-recognition is a legally relevant factor. "By granting recognition," the same authority stated, "they [*i.e.*, subjects of international law] do not undertake any commitment beyond not to challenge in future whatever they have previously acknowledged."²⁸ A more guarded observation was made by Professor Corbett. He wrote:

²³ *The Development of International Law by the Permanent Court of International Justice* (1934), p. 83.

²⁴ The following cases before the Permanent Court of International Justice were cited: *Polish Nationals in Danzig*, Series A/B, No. 44, p. 24; the *Free Zones* cases, Series A, No. 24, p. 12, and Series A/B, No. 46, p. 167; and the *Greco-Bulgarian Communities*, Series B, No. 17, p. 32.

²⁵ *Ibid.*, p. 83, note 3. See also the "Written Statement of the Government of the United Kingdom" in the *Interpretation of the Peace Treaties*, I.C.J., *Pleadings*, p. 191.

²⁶ *Nationality and Statelessness in International Law* (1956), pp. 55-56.

²⁷ *Ibid.*, p. 56, note 1.

²⁸ Schwarzenberger, "The Fundamental Principles of International Law," in *Hague Recueil*, 87 (1955), p. 253. The point is made again by the same writer in *International Law*, Vol. 1 (3rd ed., 1957), Part 1, at p. 127: "By granting recognition, subjects of international law debar themselves from challenging in future whatever they have previously acknowledged. In the Judgment of the World Court in the *Eastern Greenland* case (1933), this aspect of recognition is clearly brought out [P.C.I.J., Series A/B, No. 53, pp. 68-69]: 'Norway reaffirmed that she recognised the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland.'"

“Recognition becomes a matter of evidence and, perhaps, estoppel. . . . If a number of important States had recognised a given community, either by explicit declaration or by the implication of their relations with it, this recognition created at least a rebuttable presumption of statehood and personality. English and American jurists, applying a principle not so clearly established in Roman-law countries, were also inclined to say that recognising States were by the act of recognition estopped from denying the statehood and personality of the recognised community.”²⁹

As an illustration of the “pliability of recognition as a general device of international law,”³⁰ Dr. Schwarzenberger wrote with regard to its function in establishing the validity of a territorial title in relation to other States: “However weak a title may be, and irrespective of any other criterion, recognition estops the State which has recognised the title from contesting its validity at any future time.”³¹ Like extinctive prescription,³² acquisitive prescription has “the legal effect of creating an estoppel against third States whose claims have become stale.”³³

The operation of recognition as an estoppel is noted again by the same writer in connection with the right of a State in certain circumstances to extend diplomatic protection to individuals who are not its nationals. Recognition by a State of an international protectorate, mandate or trusteeship arrangement entails the consequence that a recognising State “is then estopped from contesting the right of protecting Powers or international trustees to make international claims on behalf of individuals who have a genuine connection with such territories, but, otherwise, cannot be claimed as their nationals by such international agents or trustees.”³⁴ Again, the creation of rules “of an absolute or objective character” by way of treaty presupposes “that either all subjects of international law are parties to any particular treaty or that, by recognition, acquiescence or estoppel, such a treaty has become *opposable* to all non-parties.”³⁵ On the cognate issue of the relative or

²⁹ *Law and Society in the Relations of States* (1951), p. 61.

³⁰ *American Journal of International Law*, 51 (1957), p. 316.

³¹ *Ibid.*, pp. 316-317. He went on to point out that recognition “creates an estoppel in the relations between the State making such a unilateral declaration and its addressee,” and that “recognition of the claims of another State deprives the State which is in actual control of the territory of the chance of obtaining recognition of its own rights.” (*Ibid.*, p. 317.) And see, to the same effect, Schwarzenberger, *International Law*, Vol. 1 (3rd ed., 1957), Part 1, pp. 299-301. He commented, with regard to “the rules governing good faith in relation to territorial titles,” that “their uniform function is to create estoppels which prevent States from contesting titles which they have recognised or in which they have acquiesced.” (*Ibid.*, p. 308.)

³² See *International Law*, Vol. 1 (3rd ed., 1957), Part 1, pp. 568-569.

³³ *Ibid.*, p. 308.

³⁴ *Ibid.*, p. 361. See also *ibid.*, pp. 378-379.

³⁵ *Ibid.*, p. 458.

absolute universality of an international régime such as the mandates system, or of an international organisation, such as the United Nations, the same conclusion was reached.³⁶ A measure of ambiguity is perhaps introduced by treating estoppel as the equivalent of recognition or acquiescence rather than as their consequence³⁷; and the discussion by the same writer of international responsibility for dependent States which retain some international personality appears to represent the legal situation more closely. It was stated that the international responsibility of protecting or administering Powers towards third States was "one of the implications of the acts of recognition, consent or acquiescence by which third States make such an agency *opposable* to themselves. To the extent to which they accept this position, they treat protecting Powers, or States in similar positions, as if they were sovereign in the area in question. Correspondingly such States are estopped from denying their international responsibility."³⁸

Other aspects of estoppel. Witenberg, in his short study of estoppel in 1933, indicated some of the forms in which the concept had been expressed, and their diversity was noted.³⁹ Dr. Schwarzenberger has grounded arguments on one or other aspect of estoppel in a considerable variety of contexts, and some examples may be given to indicate the possible scope of the application of the principle underlying estoppel. Referring to certain exceptions to the local remedies rule, it was stated: "Estoppel constitutes [their] common denominator. . . . If a State fails to provide any, or at least effective, local remedies, it may not rely on its own non-compliance with the minimum standard, that is to say, its own breach of international law, to frustrate an international claim."⁴⁰ Discussing the liability of successful revolutionaries for

³⁶ *Ibid.*, pp. 129-130. He concluded (*ibid.*, p. 130): "Recognition, consent, acquiescence and estoppel are the only means by which, in international law, relatives can be transformed into absolutes."

³⁷ The same observation may be made with regard to similar passages, *e.g.*, *ibid.*, pp. 212, 225, 378 and 470. It should be noted that the writing in these passages is so compressed that the misleading impression may be conveyed that estoppel is, like recognition or acquiescence, a method by which a situation becomes opposable to a State, whereas it is no more than a description of the position resulting from the fact that a situation has become opposable to a State as a consequence of recognition or acquiescence.

³⁸ *Ibid.*, pp. 624-625.

³⁹ *Journal du Droit International*, 60 (1933), pp. 530 *et seq.* See also Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 137: "If State A has knowingly led State B to believe that it will pursue a certain policy, and State B acts upon this belief, as soon as State A decides to change its policy—although it is at perfect liberty to do so—it is under a duty to inform State B of this proposed change." Failure to do so, it was added, involved a duty to indemnify State B for damage incurred up to the time when State B learns of the altered circumstances.

⁴⁰ *International Law*, Vol. 1 (3rd ed., 1957), Part 1, p. 609. See also, *ibid.*, p. 608: "If a party has failed to exhaust its procedural opportunities in the

the torts of the defeated "legitimate" government, and the question whether the imputability of acts and omissions of revolutionaries to their State had any retroactive effect, the author concluded that "the real ground of the retroactivity of tortious liability is estoppel"⁴¹; and that the acts of successful revolutionaries could be equated retrospectively with acts of the former "legitimate" government "because the revolutionary government is estopped from asserting the true position."⁴² Again, the grounds on which illegal acts or omissions by one of the component parts of a federal or decentralised State could be imputed to a federal or central authority were stated to be either estoppel or the minimum standard: "If a federal or central authority has actually charged another authority with the exercise of a public function and, thus, delegated the function, it cannot go back on such an act and argue that it was not under any obligation to provide such a service."⁴³ Estoppel was invoked with regard to piracy in these terms: "Even in the case of a ship which as such is entitled to her national flag, but has been seized by pirates, the flag State would be estopped from making any international claim on behalf of pirates over which another State assumes criminal jurisdiction, for a specific rule of international customary law authorises the exercise of such extraordinary jurisdiction on the part of any sovereign State."⁴⁴ In his comments on the analysis by the International Court of Justice of the relevant Resolution of the General Assembly of the United Nations on Genocide, the same author suggested that, since the recommendation was unanimously adopted by the General Assembly, "its contents may be considered to have become binding on all the members of the United Nations by way of estoppel."⁴⁵ Again, pointing out that a delegate of a member State to a United Nations organ participates in its activities as a representative of his own State, Dr. Schwarzenberger commented: "In this capacity, he may be estopped from adopting policies which are incompatible with the binding character of acts of recognition or acquiescence on the part of his own government."⁴⁶ On the hypothetical assumption that a

court of first instance and, thus, itself condemned the appeal to futility, it is estopped from relying on its own fault and the nominal character of the appeal."

⁴¹ *Ibid.*, p. 628.

⁴² *Ibid.*, p. 629.

⁴³ *Ibid.*, p. 626.

⁴⁴ *Ibid.*, p. 346.

⁴⁵ *Ibid.*, p. 51. There is a danger in suggesting that a recommendation becomes binding by way of estoppel. It may become binding by consent, and by consenting to it a State may then be estopped from challenging it. Where consent is given subject to the overriding consideration that recommendations are not binding, no estoppel can be created.

⁴⁶ *Ibid.*, p. 95.

State might relinquish its claims to some or all of its territorial sea, it was stated that while it claimed jurisdiction over its territorial sea for any purpose it would be subject to all the duties imposed by international law on a State claiming such rights. If a State were to make claims going beyond the limits of general international law, it "would be estopped from claiming for such maritime areas the character of the high seas."⁴⁷ Finally, after drawing attention to two sets of circumstances in which a successor State might be held to be liable for the torts of its predecessor,⁴⁸ Dr. Schwarzenberger stated: "In both cases, such international liability as exists is based on grounds of estoppel and rests on the rules governing the principle of good faith."⁴⁹

Not all of the aspects of estoppel discussed by Dr. Schwarzenberger are illustrated below: but it is a tribute to the pliability of estoppel that so many facets of the concept should have been discovered by one writer in a textbook concerned primarily with other matters. It may serve also as a warning of the elusive character of the international law estoppel about which Witenberg in 1933 uttered the following warning: "Ces diverses formules, variables à l'extrême sont irréductibles à une définition ne comprenant que les cas d'estoppel, mais les comprenant tous."⁵⁰

The situation in this respect has not improved since Witenberg wrote. Indeed, it is probably true to say that, in its translation from the municipal to the international sphere, and in its subsequent utilisation by international lawyers, the concept of estoppel has been broadened so substantially that the analogy with the estoppel of municipal systems may be positively misleading. The extent of the development away from the precisely formulated doctrine in private law may be brought out by a reconsideration of the words of the Arbitrator in the *Tinoco Arbitration* (1923) between Great Britain and Costa Rica,⁵¹ viewed in the light of the foregoing indications of the flexibility of estoppel in international law. In a well-known passage, bearing a marked affinity to private law dicta on estoppel, the Arbitrator stated: "An equitable estoppel to prove the truth must rest on previous conduct of the person to be estopped, which has led the person claiming the estoppel into a position in which the truth will injure him."⁵² The doctrine of estoppel in those terms was not applied because, as the Arbitrator pointed out, neither was the succeeding government led "to change its position in any way on the faith" of the

⁴⁷ *Ibid.*, p. 325.

⁴⁸ *Ibid.*, pp. 175-176.

⁴⁹ *Ibid.*, p. 176.

⁵⁰ *Journal du Droit International*, 60 (1933), pp. 531-532.

⁵¹ The award is printed in the *American Journal of International Law*, 18 (1924), pp. 147 *et seq.*

⁵² *Ibid.*, p. 157.

non-recognition of its predecessor, nor had there been "an injury to the succeeding government in the nature of a fraud or a breach of faith."⁵³

Many of the aspects of estoppel to which attention is drawn in these pages would fall outwith a concept of estoppel so restrictively delimited. Moreover, it is seldom emphasised that, although the reason given was the dearth of relevant authority, the Arbitrator deliberately rejected the principle of consistency, at least as far as the effects of recognition or non-recognition were concerned. He said: "It may be urged that it would be in the interest of the stability of governments and the orderly adjustment of international relations, and so a proper rule of international law, that a government in recognising or refusing to recognise a government claiming admission to the society of nations should thereafter be held to an attitude consistent with its deliberate conclusion on this issue. Arguments for and against such a rule occur to me; but it suffices to say that I have not been cited to text-writers of authority or to decisions of significance indicating a general acquiescence of nations in such a rule. Without this, it cannot be applied here as a principle of international law."⁵⁴ It may be that the very diversity of the forms in which the principle of estoppel has been applied or invoked tends to make the concept so diffuse as to impair its value as a term of art. Nevertheless, the trend in practice appears to be away from the restricted concept approved in the foregoing Award, and towards acceptance of the wider notion which the Arbitrator rejected.

Estoppel as a rule of evidence. The main obstacle to the acceptance of estoppel as a principle of international law may well have been the long-prevalent belief that it was no more than a technical rule of evidence⁵⁵ and, therefore, singularly unsuited to the "rough jurisprudence of nations." The changing climate of opinion may be gauged from the reconsideration given to the nature

⁵³ *Ibid.*, pp. 156-157.

⁵⁴ *Ibid.*, p. 157.

⁵⁵ Judge Lauterpacht prefaced his views noted above (p. 470) with the remark that the "doctrine of estoppel is prima facie a private law doctrine forming a part of the law of evidence." (*Private Law Sources and Analogies of International Law* (1927), p. 203.) Professor Guggenheim discussed estoppel under the heading of "L'administration des preuves." He wrote: "... la procédure internationale n'admet pas l'administration de la preuve pour des faits qui découlent de l'attitude d'une des parties et d'où la partie adverse a tiré le droit de prendre des mesures ayant une signification juridique; c'est ce qu'on appelle en droit anglo-saxon le principe de l'estoppel, qui s'exprime dans l'adage: 'Non concedit venire contra factum proprium.' L'estoppel est donc une exception d'irrecevabilité opposable à toute allégation qui, bien peut-être conforme à la réalité des faits, n'en est pas moins inadmissible parce que contraire à une attitude antérieurement adoptée par la partie qui l'avance." (*Traité de Droit international public*, Vol. 2 (1954), pp. 158-159.)

of estoppel by the Judicial Committee of the Privy Council in *Canada and Dominion Sugar Company, Limited v. Canadian National (West Indies) Steamships, Limited*.⁵⁶ The Board quoted with approval Sir Frederick Pollock's description of the doctrine of estoppel as "a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence," and went on to state: "Estoppel is often described as a rule of evidence, as, indeed, it may be so described. But the whole concept is more correctly viewed as a substantive rule of law."⁵⁷ Tribunals before which the doctrine has been canvassed have occasionally accepted it by implication and without comment, approaching the solution of the problem before them in the way in which counsel had presented it. The English Court of Exchequer in 1862 formulated the doctrine and its basis in a way which emphasised its freedom from technicalities and which approximates to the form in which it has gained acceptance in international law: "[A] man shall not be allowed to blow hot and cold—to affirm at one time and deny at another. . . . Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel,' or by any other name, it is one which courts of law have in modern times most usefully adopted."⁵⁸ The doctrine has been invoked in varying forms over a period of a century and a half; and although there have been occasions on which it has been held to be inapplicable to the particular facts⁵⁹ its jurisprudential basis has been unchallenged.

II

STATE PLEADINGS; JUDICIAL AND ARBITRAL DECISIONS

The import of the pleadings and decisions in many of the cases has been discussed by other writers⁶⁰ and it is not proposed to reappraise in any detail their careful treatment of these sources. However, the arguments advanced before the International Court

⁵⁶ [1947] A.C. 46.

⁵⁷ *Ibid.*, pp. 55, 56.

⁵⁸ *Cave v. Mills* (1862) 7 Hurlstone & Norman 913 at 927.

⁵⁹ Notably in the award of the arbitrator in the *Tinoco Arbitration* (1923) between Great Britain and Costa Rica (see above, pp. 477-478); and in the judgment of the Permanent Court of International Justice in the *Serbian and Brazilian Loans* cases (1929), Series A, Nos. 20 and 21. The value of the latter as authority may be somewhat weakened by the emphasis on private law which characterised the proceedings.

⁶⁰ See, especially, Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 205 *et seq.*; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), pp. 137 *et seq.*, and Meron, in this *Quarterly*, Vol. 6 (1957), pp. 282-286.

of Justice in two recent cases merit attention both because of the use made of contentions based on the principle of estoppel and because of the extensive citation of authority which they contain. The proceedings illustrate two aspects of estoppel, namely the rule that a State cannot rely on its own wrong to excuse failure to fulfil its international obligations, and the rule that prior recognition of, or acquiescence in, a situation, or a previous admission by a State, bars it from subsequently challenging what it has recognised or admitted.

A State is barred from pleading its own default as a justification for avoiding its international obligations. In the course of the advisory proceedings before the Court concerning the *Interpretation of the Peace Treaties with Bulgaria, Hungary and Roumania* the Governments of both the United States and the United Kingdom filed written statements containing arguments based on estoppel; and the Representative of the United Kingdom made oral statements at a later stage in the proceedings, again invoking the concept of estoppel. The point was raised in considering whether a Commission composed of the representative of one party only, together with a member appointed by the Secretary-General of the United Nations, would constitute a proper Commission. The principle of estoppel was invoked to clarify the issue raised by the refusal of the three ex-enemy governments to co-operate in setting up the appropriate Commission. The Written Statement of the Government of the United Kingdom drew attention to the fact that the only party which would have the necessary *locus standi* to challenge a decision by a two-member Commission would be the other party to the dispute, the basis of its challenge being its own failure to appoint its Commissioner. "In brief," it was argued, "the party concerned is estopped or incapacitated from challenging the validity of the decision, because it cannot do so except by pleading its own wrong."⁶¹ The principle of estoppel, it was noted, had found application in pronouncements of the Permanent Court of International Justice on analogous matters; and it was recalled that it was held in the *Chorzów Factory* case that one of the parties was estopped from pleading the Court's lack of jurisdiction on the ground that "it is . . . a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one party cannot avail itself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or

⁶¹ *Interpretation of the Peace Treaties*, I.C.J., *Pleadings*, p. 190.

from having recourse to the tribunal which would have been open to him.”⁶² This suggested, the Statement argued, that if the three governments had prevented the other parties from having recourse to the tribunal they would be estopped from complaining if those parties had recourse to such process as was available to them and could not question the competence of a tribunal necessarily constituted without their co-operation.⁶³ The Government of the United States in its written statement put the matter thus: “If the governments of these States persist in their breach of obligation, refusing to appoint representatives to the commissions, they must be taken to have waived their right to be represented on the commissions. They must be considered estopped to complain now or in the future, on the ground of lack of representation, concerning the consideration and decision of disputes by commissions on which they decline to be represented. . . . Such party must be considered estopped to deny that it has waived its right to be represented on the arbitral tribunal.”⁶⁴ In a statement to the Court on June 28, 1950, the Representative of the United Kingdom, referring to the passage cited above from the *Chorzów Factory* case and applying it to the question before the Court, said: “What is involved is really an application of the principle known in English law as estoppel (or to use what I believe is the equivalent French term *préclusion*)—to which effect has frequently been given by international tribunals.”⁶⁵ He pointed out that although the Permanent Court of International Justice did not find occasion to apply the principle of estoppel in either the case of the *Serbian Loans* or the case concerning the *Legal Status of Eastern Greenland*,⁶⁶ it did apply the principle frequently in an analogous field, namely, that of the relationship between the municipal law of a State and its international obligations, particularly the rule (which was described as one of the cornerstones of the jurisprudence of the Permanent Court) “that States, being obliged to bring their domestic law into conformity

⁶² P.C.I.J., Series A, No. 9, p. 31: quoted in *Interpretation of the Peace Treaties*, I.C.J., *Pleadings*, pp. 190–191.

⁶³ *Ibid.*, p. 191.

⁶⁴ *Ibid.*, p. 237.

⁶⁵ *Ibid.*, p. 374. The representative of the United Kingdom referred to a number of the cases discussed below; and he added that the *Tinoco Concessions* case (*Great Britain v. Costa Rica*) contained a passage in which the principle was well stated in language very apt to the case before the court, to the effect that “the mere possession of a licence does not estop [the holder of the licence] from attacking its validity. It is the possession of a licence under an agreement with the licensor which estops [a person] who has not fulfilled the terms of that agreement from pleading and proving the invalidity [of the licence] in order to avoid liability for breach of his contracts.” (*Administrative Decision*, No. 1, p. 44.)

⁶⁶ These cases are discussed below.

with their international obligations wherever this is necessary for the execution of these obligations cannot, if they fail to do this, plead their domestic law as a ground for not carrying out their international obligations—since, in effect, this would amount to pleading their own default as a justification.”⁶⁷ The Court applied this principle, it was added, “on a basis of quasi-estoppel or préclusion.”⁶⁸

In his Dissenting Opinion in this case Judge Read, who answered in the affirmative the third and fourth questions submitted to the Court, stated: “Accordingly, I think that I am bound to take into account the fact that, in the existing circumstances and under existing international law, a defaulting government could not object to the competence of such a tribunal. If it raised the objection before such a Treaty Commission, it would be bound to apply existing international law and refuse to let such a government profit from its own wrong. If it raised the objection in proceedings before this Court, it would be necessary for the International Court of Justice, which is not a law-making organ, to apply existing legal principles and recognise that it was estopped from alleging its own treaty violation in support of its own contention.”⁶⁹

Previous recognition or admission bars subsequent challenge.

In an earlier statement to the Court in the proceedings concerning the *Interpretation of the Peace Treaties*, with regard to the contention of the three governments that there was no dispute, the Representative of the United Kingdom invoked a more direct and unqualified formulation of the doctrine of estoppel, arguing that “whatever they may now purport to say, they have in fact long since admitted the existence of a dispute and are juridically bound by this admission, and, as we say in England, estopped or precluded from contradicting it.”⁷⁰

A similar argument, based directly on the principle of estoppel, was developed in the Memorial submitted by the Government

⁶⁷ *Interpretation of the Peace Treaties*, I.C.J., *Pleadings*, pp. 374–375.

⁶⁸ *Ibid.*, p. 375. Cf. Schwarzenberger, *International Law*, Vol. 1 (3rd ed., 1957), Part 1, p. 69. The cases cited by the representative of the United Kingdom in support of this proposition were as follows: the *Mavrommatis (Jerusalem)* case, Series A, No. 5, pp. 42–43; the *Lotus* case, Series A, No. 10, p. 24; the second *Chorzów Factory* case, Series A, No. 17, p. 33; the *Free Zones* cases, Series A/B, No. 24, p. 12, and Series A/B No. 46, p. 167; the *Danzig Railway Officials* case, Series B, No. 15, pp. 26–27; the *Treatment of Polish Nationals in Danzig*, Series A/B, No. 44, p. 24. It was added that the same principle was applied under other aspects in the following cases: *German Interests in Polish Upper Silesia*, Series A, No. 7, pp. 21–24, 32, 42, 46; *German Settlers in Poland*, Series B, No. 6, pp. 25, 36–37; *Exchange of Greek and Turkish Populations*, Series B, No. 10, p. 20; the *Greco-Bulgarian Communities*, Series B, No. 17, p. 32.

⁶⁹ *I.C.J. Reports*, 1950, p. 244.

⁷⁰ *Interpretation of the Peace Treaties*, I.C.J., *Pleadings*, p. 316.

of Liechtenstein in the *Nottebohm* case, although this aspect of the Liechtenstein case was not pressed in the later stages.⁷¹ The Liechtenstein Memorial contended that "by expressly recognising the Liechtenstein nationality of Mr. Nottebohm the Government of Guatemala waived any right which theoretically they might otherwise have had to question the validity of the new nationality acquired"⁷²; and it put forward a second connected reason "grounded in what may be described as the international doctrine of estoppel."⁷³ The argument ran as follows: "In registering Mr. Nottebohm's change of nationality on January 31, 1940, without comment or protest, the Government of Guatemala led Mr. Nottebohm to believe that they accepted and recognised the effectiveness of the decree of naturalisation granted by the Government of Liechtenstein. In reliance upon this registration, Mr. Nottebohm continued to reside in Guatemala, to retain property and to develop his business there and to hold himself out as a Liechtenstein national. Thereafter, the Government of Guatemala, irrespective of what the position might be under its own municipal law, were precluded from denying as against the Government of Liechtenstein that Mr. Nottebohm was a Liechtenstein national."⁷⁴ The Guatemalan Counter-Memorial on this point was not directed against the validity of the principle of estoppel as such but to the inadequate character of the acts relied upon to found the alleged estoppel.⁷⁵ The Guatemalan Government argument stated: "Mais pour que les actes invoqués aient pour effet de priver le Guatemala du droit de contester la naturalisation à raison de la renonciation qui y serait contenue, soit à raison du droit d'estoppel résultant pour M. Nottebohm de la fausse sécurité dont ces actes lui avaient donné l'impression, il faudrait assurément que ces actes constituent de manière claire et non équivoque une reconnaissance définitive de la parfaite régularité et sincérité du changement de nationalité survenu. . . . Or les actes invoqués n'ont manifestement pas ce caractère."⁷⁶ The Liechtenstein Memorial pointed out that the doctrine of estoppel had been frequently considered by international

⁷¹ The *Reply* submitted by the Government of Liechtenstein stated that the Government "attaches but secondary importance to the question of the principle of estoppel." However, the Government of Liechtenstein felt bound to point out that, since under the Guatemalan Aliens Law inscription in the register of aliens had the effect of creating a legal presumption that the alien was of the nationality registered, only clear and positive evidence could rebut that presumption. (*Nottebohm* case, I.C.J. *Pleadings*, Vol. 1, p. 393.)

⁷² *Ibid.*, p. 41.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, pp. 41-42.

⁷⁵ The occasions on which it was alleged that the Government of Guatemala had recognised and accepted the change of nationality as effective are set out in paragraph 4 of the Liechtenstein Memorial. (*Ibid.*, p. 25.)

⁷⁶ *Ibid.*, p. 196.

tribunals, stressing that in each case “the decision of the tribunal has turned not upon the existence of the doctrine but upon the facts of the particular situation.”⁷⁷ A formulation of the principle was vouchsafed in general terms,⁷⁸ prefaced by the observations that the doctrine of estoppel is similar in both international and municipal law, and that it “is not, notwithstanding its apparent technical connotation, a formal and artificial rule of law” but “is essentially grounded in considerations of good faith and honest conduct in the relations of States and individuals alike.”⁷⁹

The International Court of Justice, in its judgment in the *Nottebohm* case (second phase), adopted the same approach as that noted in the Guatemalan Counter-Memorial with regard to the Liechtenstein argument that Guatemala had “recognised the naturalisation which it now challenges and cannot therefore be heard to put forward a contention which is inconsistent with its former attitude.”⁸⁰ The Court did not cavil at the principle but examined the acts on which reliance was placed. It found that they “proceeded on the basis of the statements made to them by the person concerned,”⁸¹ that “one led to the other,”⁸¹ that they had “reference to the control of aliens in Guatemala and not to the exercise of diplomatic protection,”⁸² and that “there did not thus come into being any relationship between governments.”⁸² The Court therefore concluded: “There is nothing here to show that before the institution of proceedings Guatemala had recognised Liechtenstein’s title to exercise protection in favour of Nottebohm and that it is thus precluded from denying such a title.”⁸³

⁷⁷ *Ibid.*, p. 42.

⁷⁸ “If one party has by any clear and unequivocal act or assertion led the other party to believe that that act is valid or that assertion true, and in reliance upon that act or assertion the second party has acted or refrained from acting in a manner which results in detriment to that party, the first party is thereafter precluded from denying as against the second party the validity of that act or the truth of that assertion.” (*Ibid.*)

⁷⁹ *Ibid.*

⁸⁰ *Nottebohm* case (second phase), *Judgment: I.C.J. Reports*, 1955, p. 4 at p. 17.

⁸¹ *Ibid.*, p. 17.

⁸² *Ibid.*, p. 18. Compare the finding of the tribunal in the *Croft* case, that the admissions alleged could not found an estoppel because they were internal rather than international acts. (See Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 205, 267–269.)

⁸³ *Nottebohm* case (second phase), *Judgment: I.C.J. Reports*, 1955, p. 19. In his dissenting opinion in the *Asylum* case, Judge Azevedo, noting that the course of the case had been changed by the issue of “the competence of the Court to decide on problems which had been raised only in the counterclaim” (*I.C.J. Reports*, 1950, p. 351), stated: “I cannot, for my part, remain indifferent to such a practice, which is reminiscent of the Anglo-Saxon concept of *estoppel*, nor could I accept that the onus of proving urgency should, at the eleventh hour, be placed upon the applicant who, in respect of the counterclaim, became the respondent, when, in the absence of any objection regularly presented on the point of urgency, the procedural rule applied according to which facts not disputed by the other party should be assumed to be true.” (*Ibid.*)

The principle of estoppel featured in the jurisprudence of the Permanent Court of International Justice in the cases of the *Serbian and Brazilian Loans*,⁸⁴ more prominently in the case concerning the *Legal Status of Eastern Greenland*,⁸⁵ and, if the related concept urged by the United Kingdom in its statements in the course of the proceedings in the case concerning the *Interpretation of the Peace Treaties* is accepted, in the *Chorzów Factory* case and in the other cases cited in the statement which the representative of the United Kingdom made to the Court on June 28, 1950.⁸⁶ In the course of its Advisory Opinion concerning the *Jurisdiction of the European Commission of the Danube* the Permanent Court stated that "as all the Governments concerned in the present dispute have signed and ratified both the Treaty of Versailles and the Definitive Statute, they cannot, as between themselves, contend that some of its provisions are void as being outside the mandate given to the Danube Commission under Article 349 of the Treaty of Versailles."⁸⁷ In its judgment in the case concerning the *Diversion of Water from the Meuse*, the Permanent Court found it "difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past."⁸⁸

Similarly, the doctrine has featured in the proceedings of many arbitral tribunals. A detailed analysis of the application of estoppel in the pleadings and the awards has been made by Judge Lauterpacht with regard to the *Pious Fund of the Californias*

⁸⁴ *P.C.I.J.*, Series A, Nos. 20-21, pp. 38-39. In these cases, with their emphasis on private law, the Court by implication approved the principle but pointed out that no sufficient basis had been shown for its application, drawing attention to the absence of the constituent elements of estoppel and noting the lack of any "clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied," and of any "change in position on the part of the debtor State." (*Ibid.*, p. 39.)

⁸⁵ *P.C.I.J.*, Series A/B, No. 53. Norway maintained that the attitude of Denmark when seeking recognition of her position in Greenland from other States between 1915 and 1921 was inconsistent with the possession of sovereignty at that time, and that Denmark was therefore estopped from alleging a long-established sovereignty over the whole of Greenland. (*Ibid.*, p. 45.) The Court, however, found that the circumstances provided no ground for holding Denmark thus estopped. (*Ibid.*, p. 62.) The Court observed that by accepting as binding several treaties "Norway reaffirmed that she recognised the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty." (*Ibid.*, pp. 68-69.) The Court further stated: "It follows that, as a result of the understanding involved in the Ihlen declaration of July 22, 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and, *a fortiori* to refrain from occupying a part of Greenland." (*Ibid.*, p. 73.)

⁸⁶ See *Interpretation of the Peace Treaties*, I.C.J., *Pleadings*, pp. 374-375. And see above, p. 481.

⁸⁷ *P.C.I.J.*, Series B, No. 14, p. 23.

⁸⁸ *P.C.I.J.*, Series A/B, No. 70, p. 25. Dr. Cheng discusses this case under the rubric *allegans contraria non est audiendus* (*General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 142).

case,⁸⁹ the *Venezuelan Preferential Claims*,⁹⁰ the *Russian Indemnity* case,⁹¹ the *Behring Sea* arbitration,⁹² the *Croft* case,⁹³ the *Alaskan Boundary* dispute,⁹⁴ the *Corvaia* case,⁹⁵ the *British Guiana Boundary* arbitration,⁹⁶ and a number of decisions of the British-American Claims Commission constituted under the Convention of 1910.⁹⁷ The doctrine was also considered in the *Tinoco Arbitration* between Great Britain and Costa Rica,⁹⁸ in the *Island of Palmas* arbitration, in the *Grisbadarna* arbitration between Norway and Sweden, in the *Hemming* case, in the dispute between the *Cantons of Thurgau and St. Gallen*, in the *Landreau Claim* between the United States and Peru, in *The Mechanic* case between Ecuador and the United States,⁹⁹ in the *Chamizal Arbitration*¹ and in the *Shufeldt* claim.² Finally, attention may be drawn to a recent article by Meron which includes a valuable analysis of a number of other arbitral awards based on the principle of estoppel.³ The author concluded: "The rules of ratification by conduct and of estoppel with respect to *ultra vires* State contracts can be regarded as specific applications of [the] broad principle [of good faith] and can be expressed by the maxims: *allegans contraria non est audiendus* and *nullus commodum capere de sua injuria propria*."⁴

⁸⁹ See Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 205, 248-249.

⁹⁰ *Ibid.*, pp. 205-206, 253-255. And see below, p. 506.

⁹¹ *Ibid.*, pp. 206, 259-260.

⁹² *Ibid.*, pp. 223-224.

⁹³ *Ibid.*, pp. 205, 267-269.

⁹⁴ *Ibid.*, p. 235.

⁹⁵ *Ibid.*, p. 206, note 1.

⁹⁶ *Ibid.*, pp. 232-233.

⁹⁷ *Ibid.*, pp. 277-281.

⁹⁸ Costa Rica objected that "Great Britain by her failure to recognise the Tinoco Government is estopped now to urge claims of her subjects dependent upon the acts and contracts of the Tinoco Government." The rejection of this contention in the Award has been noted above, pp. 477-478.

⁹⁹ The tribunal stated that Ecuador "having fully recognised and claimed the principle on which the case now before us turns, whenever from such a recognition rights or advantages were to be derived, could not in honour and good faith deny the principle when it imposed an obligation" (Moore, *History and Digest of the Arbitrations to which the United States have been a Party* (1898), Vol. 3, p. 3226). It has been pointed out by Dr. Jenks, on the one hand, that the case was not decided on the ground of estoppel (*British Year Book of International Law*, 29 (1952), p. 122); and by Dr. Schwarzenberger, on the other, that on one point it could have been decided entirely on grounds of estoppel (*International Law*, Vol. 1 (3rd ed., 1957), Part 1, p. 177, note 3).

¹ See the *American Journal of International Law*, 5 (1911), pp. 785 *et seq.* And see below, p. 503.

² The Arbitrator stated that it was unnecessary for him to deal with the second United States contention, which was to the effect "that the Guatemalan Government having recognised the validity of the contract for six years, and received all the benefits to which they were entitled under the contract, and allowed Shufeldt to go on spending money on the concession, is precluded from denying its validity, even if the approval of the legislature had not been given to it" (*American Journal of International Law*, 24 (1930), p. 813). He did, however, remark that this contention was "sound and in keeping with the principles of international law" (*ibid.*, p. 814).

³ "Repudiation of *ultra vires* State Contracts and the International Responsibility of States," in this *Quarterly*, Vol. 6 (1957), pp. 273 *et seq.*, at pp. 282-286.

⁴ *Ibid.*, p. 286.

III

OPINIONS GIVEN BY LEGAL ADVISERS TO THE
BRITISH GOVERNMENT

The extracts from Reports of the Law Officers of the Crown, upon which this section is largely based, are intended to illustrate some of the aspects of estoppel which have been considered in the course of the day-to-day conduct of the relations of Great Britain with other States. They may be set out conveniently, albeit with some artificiality, under the following separate headings: (1) The effect of previous admissions; (2) The principle of consistency; (3) The effect of previous recognition; (4) A State asserting a right is barred from avoiding the obligations which the exercise of the right entails; (5) A State is barred from asserting a claim the legality of which it has previously contested; and (6) A State is barred from questioning the legality of a claim which it has itself asserted or condoned. Finally, some examples of United States practice are mentioned.

The effect of previous admissions. It has been suggested that an admission "does not . . . have the same effect as an equitable estoppel. . . . Unlike the latter, an admission does not peremptorily preclude a party from averring the truth. It has rather the effect of an *argumentum ad hominem*, which is directed at a person's sense of consistency, or what in logic is paradoxically called the 'principle of contradiction.' An admission is not necessarily conclusive as regards the facts admitted. Its force may vary according to the circumstances."⁵ It will be seen in the following examination of the advice given to governments that this distinction, which is often difficult to draw in particular cases and which appears to depend upon a technical view of the nature of estoppel in international law, has been little regarded. The principle of estoppel has been invoked in the broadest and most general way, with the emphasis not, as with some judicial and arbitral tribunals, on the more highly developed requirements of the Anglo-Saxon concept of estoppel, but rather upon an insistence on good faith and equitable conduct coupled with a lively awareness of the dangers of adopting inconsistent attitudes at different times.

The following three reports, by the Queen's Advocate and by the Law Officers, illustrate the varying extent to which reliance has been placed upon admissions. On the complaint of a British

⁵ See Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 147; and see, generally, *ibid.*, pp. 144-149. See also Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 267-269, 277-279.

shipowner that he had been fined illegally by the Custom-house officials at Havana, the Queen's Advocate advised Earl Granville that he might, if he thought fit, "hold the Spanish Government bound by the despatch, of Senor Sagasta . . . in which he states that the administrative agent of the customs in Cuba exceeded his lawful powers in exacting the fine." For other reasons, however, the Queen's Advocate considered that the Spanish Government would have a good answer to any claim for demurrage by the shipowner, and he guardedly concluded "that your Lordship could not of right insist upon such payment unless your Lordship should hold the Spanish Government to be precluded diplomatically from objecting to such payment by the despatch of Senor Sagasta."⁶ When the authorities of the Canton of Vaud claimed succession duty on the property of a certain Miss England, both as to property in the Canton at the time of her death and as to the major part in England, the Queen's Advocate reported: "That the fact that the local authorities of the Canton de Vaud having . . . admitted the claim of Miss England to be non-domiciled in Switzerland would not be in my opinion a conclusive argument against them if it stood alone. . . . But as it is coupled with the fact that the same authorities never made any further attempt to tax her during her lifetime, I think it is a conclusive argument that they accepted her protest as rebutting any presumption of an intention on her part to change her domicile arising out of her *modus vivendi* in Switzerland."⁷ On November 10, 1885, the Law Officers approved the terms of a Draft Letter intended to affirm to the Turkish Government the right of British vessels to participate in the coasting trade of the Ottoman Empire. The Letter stated that the right in question had been invariably maintained by successive British Governments and exercised by British vessels without any objection on the part of the Porte until 1881, and that it had been declared by the Porte on a previous occasion. "It appears to Her Majesty's Government," the Letter stated, "that this declaration and admission by the Porte, having been made as a result of a diplomatic controversy in reference to the British right now claimed, and not having been founded on any principle limited to a particular locality, must be taken as conclusive of the present question."⁸

The principle of consistency. The effect which the previous adoption or approval by a State of an attitude or claim inconsistent with a course which it later pursues or intends to pursue has

⁶ Report of the Queen's Advocate to Earl Granville, January 7, 1871: Spain.

⁷ Report of the Queen's Advocate to Earl Granville, May 5, 1871: Switzerland.

⁸ Report of the Law Officers to the Marquis of Salisbury, November 10, 1885: Turkey.

not invariably been envisaged as outright preclusion of the later course; but there is no room to doubt that inconsistency in conduct or views has been considered to be fraught with potential disadvantages. In his Presidential Address to the Grotius Society in 1944 Sir Cecil Hurst made a number of illuminating observations on the considerations which might be expected to influence a government which is faced with the task of deciding whether or not to afford diplomatic protection to one of its nationals abroad. Remarking that, if the complaints of its nationals appeared to be well founded, a State would feel obliged to address itself to the foreign government concerned, he added: "In arriving, however, at its decision as to whether or not to make representations to the foreign governments concerned, there is another element that will come into play. The State will be bound to remember the consequences of that fundamental principle . . . that, in the matter of their legal rights, States stand on a footing of equality, and that in consequence a State cannot, and must not, put forward a claim as a claim of right on behalf of itself or of its citizens which in the converse circumstances it would refuse to admit could be put forward against itself."⁹ With the exception of claims based on treaty provisions, and apart from occasional bluff, "a State will only put forward on behalf of itself or of its citizens claims which it believes to be well founded, *viz.*, based on some established rule which it regards as equally binding on itself. No government wishes to court a rebuff: therefore it will hesitate to put forward a claim which it knows the other State will be entitled to reject."¹⁰

The more hesitant opinions, which are considered first, admittedly disclose no *opinio juris* with regard to previous actions or attitudes creating an outright bar to the adoption of a different practice. They indicate, however, that inconsistency, if not acting as a bar, at least constitutes an embarrassment: and this consideration may weigh seriously enough with a government to induce it to act in fact as if it were precluded in law from acting otherwise, either by conforming with a past pattern of conduct or by adhering to views on which it hopes to rely on a future occasion.

In 1863 the Queen's Advocate drew attention to the inconsistent attitudes to the same question which the United States had adopted on different occasions. In a despatch from Washington the British Minister enclosed a copy of correspondence between the United States Secretary of State and the Mexican Chargé d'Affaires "relative to the exportation of Articles contraband of War for the

⁹ *Transactions of the Grotius Society*, 30 (1944), p. 123.

¹⁰ *Loc. cit.*

use of the French Army in Mexico.”¹¹ The relevance of this correspondence to the *Alabama* dispute between Great Britain and the United States was noted by the Queen’s Advocate in the following passages from his report: “*That such correspondence appears to me valuable to Her Majesty’s Government, as furnishing irrefragable evidence of the different principles of law which the Government of the United States applies to her answer to Mexico, and to her demands upon Great Britain upon the same subject, namely, the allowing a belligerent to be supplied with the means of carrying on the war from a neutral territory. . . . The correspondence in question will be of use whenever the complaints in the matter of the Alabama be renewed, or any similar complaints be made by the United States.*”¹²

The Law Officers gave a warning in 1866 that, although neutral governments had no reason for making representations on the ground that they received from belligerents treatment more favourable than they were entitled to demand, yet “if they do any act wherefrom their approbation of this departure from the usual rights of the belligerent, as a maxim of international law, is to be inferred, they may most seriously embarrass their future action when their country happens to be belligerent, and when perhaps it may be of vital importance to the State to exercise the very right of which it is now by implication recognising the abolition.”¹³

In 1883 the Law Officers were asked whether Turkey was entitled to control arrangements which the Khedive of Egypt might make in relation to the Suez Canal, in view of the wider powers of internal administration which the Sultan had by Firman conferred upon the Khedives of Egypt at various times. They took the view that the matter in question was within the powers of the Khedive, but they added: “We may observe that the position . . . is considerably embarrassed by what took place between 1872 and 1876 in relation to the Suez Canal dues. The authority of the Sultan over the subject-matter in dispute was recognised by all parties, and yet, under the Firman then existing, the independent power and authority which had been granted to the Khedive did not differ substantially from that now possessed by him.”¹⁴ The Law Officers had no doubt that the Turkish Government would rely strongly on this circumstance.

The advice of the Law Officers was sought in 1894 with regard to the terms on which Great Britain and the Netherlands might

¹¹ Report of the Queen’s Advocate to Earl Russell, February 24, 1863: U.S.A., printed in McNair, *International Law Opinions*, Vol. 3, pp. 183–184.

¹² *Ibid.*, p. 184.

¹³ Report of the Law Officers to Lord Stanley, August 8, 1866: Italy.

¹⁴ Report of the Law Officers to Sir Julian Pauncefote, November 21, 1883: Egypt.

agree to arbitration in the case of the *Costa Rica Packet*. It was pointed out that, in order to assist a speedy settlement, the British Government had waived their original claim for compensation for the crew and owners of the vessel and had confined their claim to one in respect of the master. It was questioned "whether, after having once expressly disclaimed the intention . . . Her Majesty's Government would now be justified in putting forward the more extended claim for the consideration of the Arbitral Tribunal, laying themselves open to a charge of inconsistency which would deprive it of much of its moral force."¹⁵ The Law Officers reported: "In the event of Her Majesty's Government deeming it right to accept the proposal for arbitration, they would not, as a matter of law, be precluded from stipulating that the whole of the original claim should be submitted for the consideration of the arbitrators. Whether they should withdraw from the statement already made . . . is a matter of policy. The fact of such a statement having been once made would, however, greatly prejudice the case before any arbitrators, and might prevent the arbitration from satisfying the colonial feeling, and these considerations should not be lost sight of."¹⁶

During the war with South Africa, the British Government obtained the advice of the Law Officers on the legality of visiting and searching a neutral German merchant vessel for despatches addressed to the South African Government by the representative accredited by South Africa to a number of European States. With regard to the question of the propriety of treating such despatches as contraband, the Law Officers drew attention to the fact that in 1862 Earl Russell had addressed to Lord Lyons in Washington a despatch in which the immunity of diplomatic correspondence on neutral vessels had been forcefully asserted. "We submit, for the consideration of Her Majesty's Government," the Law Officers continued, "whether it is desirable on the present occasion to put into force a supposed right against the existence of which there is a great body of authority, and in contravention of which the attitude of Her Majesty's Government in the despatch just referred to would certainly be relied on."¹⁷

Finally, an earlier report may be noted in which the Law Officers considered the complaints made with regard to the service of British seamen on the *Alabama* in relation to the grounds on which the United States Secretary of State justified the inducements made to persuade British seamen to serve in the forces of the United

¹⁵ Reference by the Foreign Office to the Law Officers, July 23, 1894: Netherlands.

¹⁶ Report of the Law Officers to the Foreign Office, August 15, 1894: Netherlands.

¹⁷ Report of the Law Officers to the Foreign Office, December 23, 1899: Africa.

States. The Report of the Law Officers began as follows: “*That the position taken up by Mr. Seward ought not to be left unnoticed. ¶ It is in substance that it is perfectly competent to the Federal Government to induce, so that neither violence nor fraud be used, Her Majesty’s subjects to act as belligerents, contrary to the Foreign Enlistment Act, and in direct opposition to the principles of international law contended for by Mr. Adams in the case of the Alabama. ¶ This is a circumstance not to be forgotten, in any future correspondence between Her Majesty’s Government and Mr. Adams on the subject of that ship.*”¹⁸

Although, in the preceding reports, the Law Officers did not indicate the extent to which reliance might be placed on this type of inconsistency, and, in particular, did not assert that it constituted a complete bar, they have on other occasions expressed approval of somewhat stronger views on the effect of inconsistent conduct. In 1882 the Law Officers gave their approval to the draft of a despatch which Earl Granville proposed to send to the British Minister at Washington concerning issues raised by the United States in their interpretation of the Clayton-Bulwer Treaty of 1850. The draft despatch pointed out that since the United States, subsequent to the conclusion of its treaty of 1846 with New Granada, had concluded treaties with Great Britain and other States carrying out the general principle of the Clayton-Bulwer Treaty, which was opposed to all idea of exclusive advantages in any inter-oceanic communication to be constructed, they could hardly appeal, without inconsistency, to the New Granada treaty as giving them exclusive rights of protection over the projected Panama Canal. Turning from the principle of consistency to a line of argument in which recognition was invoked as an estoppel, the draft despatch continued: “It would seem, then, to be opposed to all sound principle, that the United States should now claim to abrogate the Treaty of 1850 by reason of the existence of a state of things which has prevailed, to their knowledge, before as well as since its ratification, to which the Treaty was never intended to apply, and notwithstanding the known existence of which they have more than once recognised the Treaty as subsisting.”¹⁹

¹⁸ Report of the Law Officers to Earl Russell, January 16, 1863: U.S.A., printed in McNair, *International Law Opinions*, Vol. 3, p. 183.

¹⁹ The Draft Despatch is printed as an Annex to the Report of the Law Officers to Earl Granville, November 25, 1882: United States. It is interesting to note that the Draft Despatch intended to rely upon a Memorandum drawn up by a member of the State Department Bureau of Claims as a further admission in favour of the British contention. The Law Officers, however, observed that “It is a question of diplomatic propriety and precedent whether it can properly be relied on,” but that “if any reasonable diplomatic objection could be taken to its use . . . the reference to it had better be omitted.” They stated that

The depredations and subsequent fate of the Peruvian rebel ironclad *Huascar* led to the appearance in the reports of the Law Officers of two instances forming an unusual double estoppel. The Peruvian Government, it will be recalled, declared by a decree in May, 1877, which was officially communicated to foreign governments, that Peru would accept no responsibility for the acts of the rebels into whose hands the *Huascar* had fallen. The Law Officers, reporting on the claim of a British firm, Messrs. Anthony and Tate, for payment from the Peruvian Government for coal and material taken from the British vessel *Imucina* by the *Huascar*, concurred with the opinion "that in view of the decree issued by the Peruvian Government on May 8, disclaiming responsibility for the acts of the *Huascar*, and in view also of the fact that Her Majesty's Government relied mainly on that decree in justification of the attack made upon the *Huascar* by Her Majesty's ships, it was impossible for them to present the claim of Messrs. Anthony and Tate to the Peruvian Government."²⁰ In the following year the Law Officers approved the terms of a communication which the Earl of Derby proposed to send to the Peruvian Minister in reply to the demand by the Peruvian Government for satisfaction in respect of the action which Rear-Admiral de Horsey had taken against the *Huascar*. The Earl of Derby forcefully defended the action of Rear-Admiral de Horsey in the protection of British lives and property, and he stated that Her Majesty's Government "cannot admit the right of the Peruvian Government, whilst disclaiming by a public Decree, all responsibility for the acts of the *Huascar* as a rebel ship, to regard her at the same time as a national vessel, and to resent as a national injury the reprisals which she brought upon herself by the outrages which she committed on a foreign flag."²¹

*The effect of previous recognition.*²² The question whether a State is justified in protesting against a claim or in denying the existence of a right which it has previously recognised was considered by the Queen's Advocate in a Report in 1868 on the legality of the proposed annexation of territory by the Transvaal Republic. Although he took the view that the claim as a whole could not be sanctioned, he observed that the terms of a Convention of 1852, under which the Boers who settled beyond the river Vaal were recognised to have established a separate government, would

they were "not in a position to judge in what light a document is regarded which is unofficially communicated in answer to official representations." (*Ibid.*)

²⁰ Report of the Law Officers to the Earl of Derby, October 9, 1877: Peru.

²¹ The draft letter from the Earl of Derby to Senor Galvez is printed as an Annex to the Report of the Law Officers to the Earl of Derby, March 5, 1878: Peru.

²² On the effect of previous acquiescence, see below, pp. 501 *et seq.*

“preclude Her Majesty’s Government from disputing any title” which the Republic might have acquired to the north of the river.²³

In 1902 the Foreign Office referred to the Law Officers the question whether Persia, after the conclusion of an arrangement with Turkey whereby she was released from tariff obligations, was also relieved of her engagements towards Egypt. It was pointed out that Persia could not plead ignorance of the effect of a Firman of 1873, since discussions had taken place subsequently when she signed with Egypt two separate Conventions regarding tobacco, and that she thereby appeared to have admitted that Egypt was a separate country for customs purposes. The reference indicated that it might be argued that Persia was entitled to maintain that her contracts were with Turkey, and that she could recognise no other party to them; and it continued: “The answer to this contention seems to be that it was open to Persia to make a declaration to that effect when the Firman was first brought to her notice, and to have maintained that position by steadily declining to negotiate with Egypt, but that it is not competent to her to revert to an attitude of protest after concluding separate Conventions with Egypt in regard to tobacco.”²⁴

The Law Officers have taken the view that recognition of a state of belligerency with regard to one of the contestants bars a denial of belligerent status of the other. When San Domingo revolted against Spain in 1864 the Spanish Government instituted a blockade of the Dominican coast. An efficient blockade was maintained and British ships were seized for breach of the blockade. By recognising the blockade the British Government had, in effect, accorded belligerent rights to Spain. The Law Officers began their Report as follows: “That we think Her Majesty’s Government cannot, consistently with the principles and practice of international law, refuse to recognise the Dominican insurgents as belligerents, inasmuch as Her Majesty’s Government has already accorded to the Spanish Government the rights of a belligerent Power, that is, rights incident, and incident only, to a state of war.”²⁵

Similarly, previous recognition of the validity of an objection to a claim has been considered effective to estop a later assertion of the claim. The Law Officers were asked to advise on the claim of the United States for compensation in respect of the losses sustained by American fishermen in the exercise of their fishery rights under the Treaty of Washington on account of the

²³ Report of the Queen’s Advocate to Lord Stanley, October 29, 1868: Africa (South).

²⁴ Reference by the Foreign Office to the Law Officers, November 17, 1902: Egypt.

²⁵ Report of the Law Officers to Earl Russell, November 22, 1864: Spain.

interference and obstruction caused by British fishermen at Fortune Bay, Newfoundland, in January, 1878. The Reference, pointing out that it was important to determine whether the American fishermen were bound by the local laws which they were alleged to have violated, drew attention to previous inter-governmental correspondence from which it appeared that, as a result of United States objections, legislation had been repealed and a new Act and Proclamation substituted from which the objectionable proviso had been omitted. It expressed "grave doubts whether Her Majesty's Government were not now precluded from maintaining" that the fishery laws were binding on citizens of the United States. The Law Officers took the view that the actions of the Newfoundland legislature must be understood as a substantial recognition of the objection of the United States to the earlier legislation and that consequently the restrictions created by local legislation could not be insisted upon by the British Government.²⁶

In 1881 the Law Officers were asked to advise in respect of the extent to which rights of navigation by British vessels on the Tigris and Euphrates still subsisted. Their Report, after reviewing evidence of persistent Turkish opposition to the claims which were made on the basis of an alleged arrangement concluded by Sir Stratford Canning, concluded: "Considering, therefore, the unsatisfactory nature of the evidence of that arrangement . . . and that the authority alleged to have been given appears not to have been acted upon, that for nearly twenty years the Turkish Government have practically denied its existence, and that Her Majesty's Representatives at the Porte, so far from insisting that it existed and relying upon it, have sought permission which would have been needless if it were in force, we think the general right to navigate the Tigris and Euphrates cannot now be claimed by British vessels under the arrangement of 1846."²⁷

A State asserting a right is barred from avoiding the obligations which the exercise of the rights entails. The Law Officers made this point in a Report in 1864 concerning the revolt of San Domingo from Spain. They wrote: "When the Spanish Government, in the autumn of last year, announced to neutral Governments their intention to put the Dominican coast under blockade, they virtually asserted, by that very act, the existence of . . . a state of war; and, while claiming its rights, they bound themselves to fulfil its obligations."²⁸

²⁶ Report of the Law Officers to Earl Granville, July 15, 1880: United States.

²⁷ Report of the Law Officers to Earl Granville, November 18, 1881: Turkey.

²⁸ Report of the Law Officers to Earl Russell, August 22, 1864: Spain. An extract from this Report is printed in McNair, *International Law Opinions*, Vol. 1, pp. 140-141.

Almost a year earlier, in a report concerning the American Civil War, the Law Officers emphasised that a contestant in a civil war which has benefited from the recognition by neutral States of the existence of a state of war is barred from denying that the other contestant is entitled to enjoy the same benefits. With regard to an intimation from the United States Government that it was prepared to maintain its right to deny the competence of all Confederate Prize Courts and the validity of their sentences, the Law Officers wrote: "Stripped of all ambiguous and superfluous language, the position is simply this: That the United States Government, having demanded and obtained from all Neutral States the peculiar rights incident during a state of war only, and to a belligerent only, and having exercised these rights to the great annoyance and distress of neutral commerce, now declare that they will not discharge the corresponding duties of a belligerent; now deny that their enemy has any right to establish a Prize Court, and declare their determination not to respect any title to property condemned by that Court, though it be a title universally recognised by all civilised States, and although neutral States have a right to insist on the existence of such a court in the territory *de facto* occupied by the Confederate States. Upon these principles it is manifest that the maintenance of a blockade, the search, visit, and condemnation of neutral ships, put in practice by the United States, instead of being lawful acts, are so many acts of unjustifiable violence, insult, and wrong. We think that upon this point there should be sent without delay, to the United States Government as strong and full a remonstrance as can be framed."²⁹

A State is barred from insisting on a claim to which it has itself previously taken objection on legal grounds. In 1890 the Law Officers gave their approval to the view held by the Foreign Office that a successor State was estopped from claiming a right to the exercise of which by its predecessor it had taken objection. This contention was advanced in a despatch which it was proposed to send to the British Ambassador in Washington, to indicate the intention of the British Government to continue to protest against the seizure of Canadian vessels in the Behring Sea by United States revenue cutters. In the course of a detailed examination and rebuttal of the United States contentions, the despatch recalled various United States official statements which showed that before the cession of Alaska the United States did not hold the views for which she now contended. In reply to the assertion that all friendly nations

²⁹ Report of the Law Officers to Earl Russell, September 16, 1863: U.S.A. An extract from this Report is printed in McNair, *International Law Opinions*, Vol. 1, pp. 139-140.

would concede to the United States the same rights and privileges in respect of Alaska which they had always conceded to the Empire of Russia, the despatch concluded: "Her Majesty's Government have no difficulty in making such a concession. In strict accord with the views which, previous to the present controversy, were consistently and successfully maintained by the United States, they have, whenever occasion arose, opposed all claims to exclusive privileges in the non-territorial waters of Behring's Sea. The rights they have demanded have been those of free navigation and fishing in waters which, previous to their own acquisition of Alaska, the United States declared to be free and open to all foreign vessels. That is the extent of their present contention."³⁰

*A State is barred from questioning the legality of a claim which it has itself asserted or condoned.*³¹ The justification which exists for protest directed against conduct which is not permitted by international law may no longer be available to a protesting State which has itself followed the same objectionable practice in the past. The Queen's Advocate took this view in a report addressed to Viscount Palmerston in 1839, at a time when France and Mexico were at war. At the end of a report on the question of the right of Mexican courts to adjudicate French prizes while they lay not in Mexican but in neutral ports the Queen's Advocate stated: "I wish it . . . to be distinctly understood that this right of a Mexican Court to adjudicate French prizes whilst lying in *Neutral Ports* is not sanctioned by any original Principles of the Law of Nations, but is only to be justified by the practice of France Herself, which in late Wars has largely indulged in this species of Irregularity. France can have no right to complain if its Enemy pursues the same course which she has Herself thought fit to adopt. *In Jure Belli, quod quis sibi sumit Hostibus est tribuendum.*"³²

In 1880 the Law Officers reported with regard to the practice of the Chinese Consul at Singapore in granting Chinese registers to vessels owned by Chinese that, if the certificates were intended to be in substitution for the regular certificate of registration, objection might properly be taken; but, they stated, "[if] these

³⁰ The despatch is printed as Annex I to the Reference by the Foreign Office to the Law Officers, May 26, 1890: United States.

³¹ The Law Officers stated the general proposition briefly in the course of a Report on the doctrine of continuous voyage in which they wrote: "That Her Majesty's Government cannot . . . deny the belligerents in this war the exercise of those rights which in all wars in which Great Britain has been concerned she has claimed to exercise herself." (Report of the Law Officers to Earl Russell, April 1, 1863: U.S.A.)

³² Report of the Queen's Advocate to Viscount Palmerston, March 22, 1839: Mexico, printed in McNair, *International Law Opinions*, Vol. 3, pp. 68-69.

certificates are merely provisional, the practice followed by British Consuls under the Merchant Shipping Act would prevent Her Majesty's Government from objecting to the use of similar documents by the Chinese."³³

The advice which the Law Officers had tendered with regard to the grounds for objecting to the provisions of a South African Bill respecting the treatment of aliens as being contrary to Article XIV of the London Convention of 1884 prompted a request for the Law Officers to give the matter further consideration. The views of the United States Government on the effect of treaty provisions similar to that Article were pointed out to them, and they were asked "to consider whether by treating the Act of the Volksraad as an infringement of Article XIV of the Convention of Her Majesty's Government would give a handle to foreign Governments, with which Great Britain had treaties containing similar Articles, to object on Treaty grounds to such legislation as the Aliens Bill introduced by the Marquess of Salisbury in the House of Lords in 1894."³⁴

In a Report in which they advised on the formalities to be observed in acquiring title to territory, the Law Officers referred to the question of the validity of cession to a State by nationals who had acquired sovereign rights over territory. They pointed out: "We have hitherto, as in the case of the Borneo Company, for example, recognised as valid the transfer of sovereign rights to individual subjects of our own. We gather, too, that we have acknowledged the acquisition of such rights by the International Association, and we presume that it would not be consistent with our policy in this respect to deny the right to obtain future cessions of the same description."³⁵

The British Government was warned by its legal advisers in 1854 of the difficulty of denying to other States in the future the exercise of a right which it had earlier persisted in claiming for itself. During the Crimean War the Law Officers, in conjunction with the Admiralty counsel, reported on the circumstances in which officers in charge of prizes might, on a plea of necessity, demand as of right the shelter and protection of neutral ports. Although they reported that, in the absence of authority, the question was not free from doubt, and they were unable to reach unanimity, they drew the attention of the Government to "the

³³ Report of the Law Officers to Earl Granville, September 13, 1880: China.

³⁴ Reference by Mr. Chamberlain to the Law Officers, December 4, 1896: Africa. The Law Officers took the view that, since the Act as passed was substantially different from the Bill which formed the subject of their earlier Report, no protest should be made against it as being in itself an infraction of Article XIV.

³⁵ Report of the Law Officers to Earl Granville, January 7, 1885: Africa.

expediency of pressing this claim upon the Swedish Government as coming within the terms and spirit of their own phrase, 'circumstances majeures'."³⁶ The Report continued with the following *caveat*: "At the same time we desire to point out that the expediency of so doing will depend upon the course which Her Majesty's Government might be prepared to take on this subject under similar circumstances in the event of Great Britain being neutral in a war between other naval Powers, and desiring to exclude prizes from her ports."³⁶

In a Memorandum prepared in the Colonial Office in February, 1891, and approved by Lord Salisbury, the writer stated: "It must be remembered that if Her Majesty's Government claim to exercise jurisdiction over foreigners by the above methods, they will, if not expressly estopped by their acceptance of the General Act of the Brussels Conference, be necessarily precluded from claiming that British subjects are exempt from jurisdiction in foreign Protectorates. But it is understood that no such exemption is claimed for this country."³⁷ Earlier in the same Memorandum the writer stated his understanding that all the Powers represented at the Berlin Conference of 1884-85, with the exception of Great Britain, maintained that a Protectorate included the right to administer justice over the subjects of other civilised Powers. "It would seem, therefore," the Memorandum continued, "that if Great Britain were now to adopt this principle in her own Protectorates, the whole body of European Powers and the United States of America are precluded from denying her right to do so; in other words, have consented to the principle."³⁸

United States practice. The very limited number of examples which follow disclose no significant difference, in their approach to the issues involved, from the foregoing survey of British opinions. Thus, in response to a request for instructions to permit the United States Minister in Haiti to join the other members of the Diplomatic Corps in a protest to the Haitian Government, the Acting Secretary of State explained that the United States could not take issue with the Haitian Government because under the United States immigration laws the United States Government

³⁶ Report of the Law Officers and the Admiralty Counsel to the Earl of Clarendon, July 28, 1854: Crimean War Reports, printed in McNair, *International Law Opinions*, Vol. 3, pp. 197-198.

³⁷ Paragraph 23 of *Memorandum as to the Jurisdiction and Administrative Powers of a European State holding Protectorates in Africa*, initialled J.B. (J. Bramston). The Memorandum is printed as Annex 1 to a Report of the Law Officers to Lord Knutsford, April 17, 1891: Africa. The Law Officers commented that the paragraph quoted was somewhat too large in its terms, and should refer only to the Protectorates recognised by the General Acts of the Berlin and Brussels Conferences.

³⁸ *Ibid.*, paragraph 11.

enforce exclusions against for example, Chinese, irrespective of the consideration that the Chinese seeking admission may at the time owe allegiance to a Power whose native subjects are ensured free access to United States territory.³⁹ In a reply to a request from the British Ambassador to alter the policy of non-interposition, the Acting Secretary of State, on February 16, 1912, stated that, leaving aside general principles of international law, his Government was compelled to adhere to its position, first because there was no treaty between the United States and Haiti covering the disputed matters, and “secondly, and more importantly, from the consideration that any different conclusion would, as has been intimated, be quite clearly inconsistent with our law practice and our policy in regard to Oriental immigration. . . . It would appear, therefore, in view of the established policy and the law and practice of this country as I have just described them, hardly open to this Government to assert that the present action of the Haitian Government is an offence against international comity.”⁴⁰

On January 23, 1926, in a communication to the Secretary of State, the Assistant Secretary of the Treasury stated: “Aliens in the United States have been required to pay Federal income taxes on their incomes from all sources under all the Revenue Acts enacted since the adoption of the Sixteenth Amendment. It appears to this Department, therefore, that the United States Government is not in a position to object to the proposed French legislation which would compel American residents of France to pay income taxes on their incomes from all sources.”⁴¹

When the Secretary of State was informed that the United States Embassy in Madrid contemplated sending a protest in the event of the seizure of gold belonging to American citizens, under a Catalan Decree prohibiting all holdings of gold, the Consul General at Barcelona was asked to inquire into the validity of the decree and the peseta rate stipulated. The Secretary of State concluded his despatch of September 10, 1936: “Defer protest pending instructions. You are, of course, aware of our own legislation that requires delivery of all gold to Federal Reserve Banks. It is possible that Catalan plan is of same nature and is, therefore, not subject to objection by us.”⁴²

Finally, with regard to the taxation of non-resident aliens, the Assistant Secretary of the Treasury informed the Secretary of State on November 15, 1922, that “under the Revenue Act of

³⁹ Despatch by the Acting Secretary of State to the American Minister in Haiti, January 20, 1912: *Foreign Relations of the United States*, 1912, pp. 529-531.

⁴⁰ *Ibid.*, pp. 533-535.

⁴¹ Hackworth, *Digest of International Law*, Vol. 3 (1942), pp. 579-580.

⁴² *Foreign Relations of the United States*, 1936, Vol. 2, p. 705.

1921 a citizen of Canada, who is not a resident of the United States, but who is employed on a railway which is operated both in Canada and in the United States is liable to the payment of income tax to the United States Government upon that portion of his salary or wages earned by his services in the United States. In view of this fact, any complaint or protest of the United States Government against taxation by the Canadian Government of the American railroad men in question would be unwarranted.”⁴³

IV

ACQUIESCENCE AS AN ESTOPPEL

THE few writers who have discussed the question have had no doubt that acquiescence was as apt to found an estoppel as recognition, provided that the circumstances were such that acquiescence could be equated with recognition⁴⁴ or consent,⁴⁵ and subject to the limitations normally associated with the doctrine of acquiescence.⁴⁶ Thus, Judge Lauterpacht has indicated the way in which absence of protest may in itself become a source of legal right in relation to estoppel or prescription. He pointed out that the far-reaching effect of failure to protest was in accordance with equity “inasmuch as it protects a State from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very States.”⁴⁷

In his short study of estoppel in 1933 Witenberg argued that silence could create an estoppel⁴⁸; and emphatic support for this proposition has come from Dr. Schwarzenberger. “Like recognition,” he wrote, “acquiescence produces an estoppel in circumstances when good faith would require that the State concerned should take active steps of some kind in order to preserve its rights of freedom of action”⁴⁹; and again: “As in the case of

⁴³ Hackworth, *Digest of International Law*, Vol. 3 (1942), p. 583.

⁴⁴ See, e.g., the Opinion handed down by the United States Supreme Court in 1862 in *The Amy Warwick et cet. (The Prize Cases)*. It was noted that the British proclamation of neutrality issued on May 13, 1861, recognised the existence of hostilities between the Government of the United States and the self-styled Confederate States. The Court added: “This was immediately followed by similar declarations or silent acquiescence by other nations. After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals.” (*Prize Cases decided in the United States Supreme Court*, Vol. 3 (1923), p. 1438.)

⁴⁵ See the writer's observations in the *British Year Book of International Law*, 31 (1954), pp. 144-146, 170-171.

⁴⁶ See *ibid.*, pp. 168-170, 172-182.

⁴⁷ *British Year Book of International Law*, 27 (1950), pp. 395-396.

⁴⁸ *Journal du Droit International*, 60 (1933), pp. 531, 537-538.

⁴⁹ “The Fundamental Principles of International Law,” in *Hague Recueil*, 87 (1955), pp. 195 *et seq.*, at p. 256.

extinctive prescription, acquiescence provides an alternative to recognition and, likewise, creates an estoppel.”⁵⁰ After stressing the function of the rules governing good faith in relation to the acquisition of title to territory, he stated: “Their uniform function is to create estoppels which prevent States from contesting titles which they have recognised or in which they have acquiesced.”⁵¹ The same author ascribed a similar effect to acquiescence with regard to the termination of treaties by desuetude. Although emphasising that tacit modification or abrogation of a treaty was not lightly to be presumed, he added that “one of the parties may take the line that a treaty is no longer binding, and the other parties may acquiesce in this attitude. Provided that treaty rights are granted to a party in its own interest, a party may also renounce expressly its rights under a treaty. Such acquiescence or renunciation creates an estoppel against subsequent invocation of the treaty.”⁵²

Acquiescence as an element of interpretation. In addition to creating an estoppel as a result of its identification with recognition, acquiescence may have a similar effect by virtue of its interpretative function. This consequence of acquiescence may, as with other aspects of estoppel, range from the persuasive to the peremptory according to the circumstances. An indication of the cautious attitude which was formerly prevalent with regard to the invocation of estoppel in international proceedings was provided by counsel for the United States before the *Alaskan Boundary* tribunal. In a speech which adumbrated the relationship between the present aspect of acquiescence and the international law estoppel, he said: “If I shall be able to show that there was a concurrent view between Russia and Great Britain which gave an interpretation which was in effect at the time the United States bought, then the United States would succeed to the rights of Russia under that interpretation. I do not mean by way of estoppel, and I do not mean to predicate anything upon that or upon the doctrine of prescription, or upon the doctrine of acquiescence, so far as acquiescence may set up an adverse claim . . . and the only point upon which I shall insist upon acquiescence is that acquiescence may be looked to as indicating an understanding and interpretation.”⁵³

⁵⁰ *Ibid.*, p. 259: and see *ibid.*, p. 257.

⁵¹ *American Journal of International Law*, 51 (1957), p. 323.

⁵² *International Law*, Vol. 1 (3rd ed., 1957), Part 1, at p. 535.

⁵³ *Proceedings of the Alaskan Boundary Tribunal*, Vol. 7, p. 813. See also, *ibid.*, pp. 622, 878, 880. And see the interjection of the President of the Tribunal,

However, in spite of this disclaimer of any intention of relying upon acquiescence as an estoppel, that contention was nevertheless put forward implicitly throughout the pleadings of the United States.⁵⁴

In the *Chamizal* arbitration of 1911, the United States argued that Mexico was estopped from asserting title to the disputed territory by reason of the long "undisturbed, uninterrupted and unchallenged possession" enjoyed by the United States. Since it was held that Mexican acquiescence had not been established, the question of the application of the doctrine of estoppel did not directly arise. Its validity, however, was not questioned either by Mexico or by the Commissioners. Indeed, the President and the American Commissioners adopted as conclusive the consideration "that the two nations have, by their subsequent treaties and their consistent course of conduct in connection with all cases arising thereunder, put such an authoritative interpretation upon the language of the Treaties of 1848 and 1853 as to preclude them from now contending that the fluvial portion of the boundary created by those treaties is a fixed line boundary."⁵⁵

Two Reports of the Law Officers in 1881 further illustrate the close relationship between the interpretative aspect of acquiescence and the concept of estoppel. In the first, which arose out of a dispute with the Government of Hawaii concerning the meaning of certain provisions, including a most-favoured-nation clause, of the Anglo-Hawaiian Treaty of 1851, the Law Officers, noting that the provisions might reasonably be construed in either of two ways, stated: "It appears, however, that in 1855, when a Reciprocity Treaty with the United States similar to that recently entered into was in course of negotiation, Her Majesty's Representative in the Hawaiian Islands, under the instructions of Lord Clarendon, addressed to the Hawaiian Minister for Foreign Affairs a note, in which it was expressly admitted that if such a Treaty of Commerce were concluded by which concessions of Tariff were made in consideration of reciprocal advantages, Great Britain could not, as a matter of right, claim the same advantages for her trade under the strict letter of the Treaty of 1851. And it is manifest that this was the position then maintained by the Hawaiian Minister. We have therefore both the persons who negotiated the Treaty putting this construction upon it—a construction which, as we have said,

Lord Alverstone, to the effect that, while prescription properly so called was not recognised in international law, estoppel and acquiescence might be of considerable importance (*ibid.*, Vol. 6, pp. 344-346).

⁵⁴ See the *Opinion* of the United States members of the Tribunal, Cmd. 1877 (1904), p. 87. And see Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), p. 235.

⁵⁵ *American Journal of International Law*, 5 (1911), p. 805.

it is well capable of bearing, and which, in view of the facts to which we have referred, there can be little doubt that it was intended to bear. Under these circumstances it would seem hardly equitable that Her Majesty's Government should now insist upon another construction of the Treaty . . . the more so as Article IV of the Treaty has been since 1858 open to denunciation at any time upon twelve months' notice; and it is possible that it would have been denounced at an earlier period than it was, had not Lord Clarendon acquiesced in the construction put upon the Treaty by the Hawaiian Government."⁵⁶

The second question dependent upon the construction of treaty provisions was whether, under the Anglo-Russian Treaty of 1859, exemption might properly be claimed for British Jews in Russia from the disabilities to which Russian Jews there were liable. The Law Officers took the view that "In all probability Prince Gortchakoff was anxious not to define matters too clearly, and designedly permitted the terms of the Treaty to be somewhat ambiguous." Their Report, however, ended: "We think . . . it is hardly open now to Her Majesty's Government to insist upon a construction of the Treaty at variance with that placed upon it in 1862. The very question now under discussion was raised at that time. The Russian Government took up the position that Her Majesty's Government were not entitled to claim, under the Treaty, that British subjects of the Jewish religion should enjoy the same privileges as other British subjects, and this view was, we gather, acquiesced in by Her Majesty's Ambassador at St. Petersburg, by the instructions of his Government, after the question had thus been distinctly raised between the two Governments."⁵⁷

*Judicial and arbitral decisions.*⁵⁸ The Statement of Reasons which followed the Award in the *Landreau Claim* between the United States and Peru, which was given on October 26, 1922, by an Arbitral Commission presided over by Viscount Finlay, considered the first question before the Commission on the basis of estoppel by acquiescence. Théophile Landreau, a French citizen resident in Peru, had borrowed money from his brother Célestin, an American citizen, to enable him (Théophile) to carry out a search

⁵⁶ Report of the Law Officers to Earl Granville, November 10, 1881: Pacific Islands.

⁵⁷ Report of the Law Officers to Earl Granville, November 5, 1881: Russia.

⁵⁸ The close inter-relationship between acquiescence and estoppel was illustrated in a decision of the Inner House of the Court of Session in 1955 in a case in which one of the issues turned on the doctrine of personal bar in Scots law: *Ben Challum, Ltd. v. Buchanan*, 1955 S.C. 348. Attention is drawn to it in this context because a number of aspects of personal bar were discussed in terms remarkably similar to those in which the notion of estoppel in international law has been expressed. See, e.g., *ibid.*, pp. 356-357, 359, 360-361.

for guano deposits for rewards offered by the Government of Peru. It was agreed between the brothers that Célestin's interest in any rewards earned should be 30 per cent. In 1892 Théophile granted a release to the Peruvian Government cancelling his rights, and the Commission found that the Peruvian Government had been notified of the assignment to Célestin of 30 per cent. of the claim. The Commission stated: "Of course if there was anything to show that Célestin knew of this release at the time of its execution and abstained from putting forward his claim, he and his representatives would be estopped from making any claim against the Peruvian Government, but there is nothing to show that there was any such acquiescence in this transaction by Célestin."⁵⁹ The Commission concluded that there was "no sufficient foundation for inferring that Célestin's representatives are estopped by any conduct on his part from asserting the right to their 30 per cent. share."⁶⁰

The concept may have been applied without positive identification in other instances.⁶¹ Thus a parallel to the rule suggested by the Special Rapporteur to the International Law Commission to cover the case where the invalidity of a treaty concluded in disregard of constitutional limitations is invoked by a party which has acted on the treaty⁶² may be found in the decision in the *Hemming* case in 1920. A claim was advanced before the British-American Claims Arbitral Tribunal on behalf of Hemming, an English lawyer, for services rendered while engaged during 1894 and 1895 by the United States Consul in Bombay in the prosecution of persons accused of counterfeiting United States gold coin in India. The United States contended that the Consul was not authorised to employ private counsel in a prosecution which might well have been conducted by the authorities of the Crown. Correspondence before the tribunal, however, showed that the United States Government was aware at the time of the employment of Hemming and that it did not object to his continued employment during the case. The extent to which considerations based on

⁵⁹ *Report of International Arbitral Awards* (United Nations Series), Vol. 1, p. 366. The Award, which is a short one, is printed *ibid.*, pp. 352-353; and the Statement of Reasons appended thereto, is printed *ibid.*, pp. 353-367.

⁶⁰ *Ibid.*

⁶¹ See, e.g., Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 224-225, where it is suggested that the question of prescription in the *Behring Sea* arbitration was implicitly related to estoppel in so far as it could have been argued that the United States had relied on British conduct from which it might be inferred that the purchase of Alaska carried with it the rights in dispute. However, it was pointed out that the concept was not mentioned in either the pleadings or the award, with the exception of an interjection by Lord Hannen in which the possibility of arguing the case on the ground of estoppel was suggested.

⁶² See above, pp. 471-472.

estoppel entered into the reasoning of the tribunal is not altogether clear; but it was held that the conduct of the United States Government must be regarded as an implicit ratification of the contract entered into by the Consul, and it was considered to be immaterial that the Consul had entered into it wrongly.⁶³

The Award in the *Venezuelan Preferential Claims*, in addition to the effect which it attributed to the Venezuelan recognition in principle of the justice of the claims of the Blockading Powers, was largely based upon the effect of acquiescence as an estoppel, as the following reasons prefacing the operative part of the Award indicate: "Whereas the Government of Venezuela until the end of January, 1903, in no way protested against the pretension of the Blockading Powers to insist on special securities for the settlement of their claims. . . . Whereas the neutral Powers . . . did not protest against the pretensions of the Blockading Powers to a preferential treatment. . . . Whereas it appears from the negotiations . . . that the German and British Governments constantly insisted on their being given guarantees. . . . Whereas the Plenipotentiary of the Government of Venezuela accepted this reservation on the part of the allied Powers without the least protest. . . . For these reasons [*inter alia*] the Tribunal of Arbitration decides and pronounces unanimously."⁶⁴

The Arbitrator in the *Island of Palmas* arbitration invoked a similar doctrine in stating that, even without taking into consideration the recognition by the Treaty of Utrecht of the position in 1714, "the acquiescence of Spain in the situation created after 1677 [the establishment of the Dutch position in Sangi] would deprive her and her successors of the possibility of still invoking conventional rights at the present time."⁶⁵ Again, the Swiss Federal Court, with regard to the denunciation by the Canton of St. Gallen of an agreement with the Canton of Thurgau which had been in effect since 1669, stated that a party invoking the *clausula rebus sic stantibus* must invoke it within a certain defined time from the change being perceived. The Court added: "But if the servient Canton [the question raised concerned an international servitude] nevertheless permits the relationship to continue for decades, her conduct shows that these changed circumstances were not present to her mind as the tacit condition of the agreement. Hence, according to the principle of good faith which must obtain

⁶³ *Annual Digest*, 1919-22, Case No. 114.

⁶⁴ The Award is printed in Cmd. 1949 (1907). See also Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 205-206, 253-255.

⁶⁵ *Reports of International Arbitral Awards* (United Nations Series), Vol. 2, p. 869.

in interstate matters as elsewhere, the change cannot later on be invoked by her in order to obtain a release from the obligation.”⁶⁶

The more pronounced the reliance upon considerations of good faith the more sympathetic a tribunal may be expected to be in the face of arguments based on the concept of estoppel. Circumstances such as expenditure on the faith of a representation or recognition constituted by acquiescence brings the principle involved close to the more technical municipal law notion of estoppel, although the expression may not be used. There is little doubt that a concept of estoppel of this nature, based on obvious considerations of good faith, lay behind the well-known Award in the *Grisbadarna Arbitration* between Norway and Sweden. Among the reasons for the allocation of the Grisbadarna bank to Sweden was the “circumstance that Sweden has performed various acts in the Grisbadarna region, especially of late, owing to her conviction that these regions were Swedish as, for instance, the placing of beacons, the measurement of the sea, and the installation of a light-boat, being acts which involved considerable expense and in doing which she not only thought she was exercising her right but even more that she was performing her duty; whereas Norway, according to her own admission, showed much less solicitude in this region in these various regards.”⁶⁷ After adverting to the maxim *quieta non movere*, the tribunal laid further stress on the co-existence of expenditure and acquiescence, in the following words: “The stationing of a light-boat, which is necessary to the safety of navigation in the regions of Grisbadarna, was done by Sweden without meeting any protest and even at the initiative of Norway, and likewise a large number of beacons were established there without giving rise to any protests. . . . It is shown by the foregoing that Sweden had no doubt as to her rights over the Grisbadarna and that she did not hesitate to incur the expenses incumbent on the owner and possessor of these banks even to the extent of a considerable sum of money.”⁶⁸

State pleadings. In the dispute between Great Britain and the United States concerning the *Title to Islands in Passamaquoddy Bay*, the concluding passage of the British Case observed that, in view of the silence of the United States with regard to the island of Grand Manan for some twenty-three years, and the admission of the United States of the fact of British settlement in and jurisdiction over the island during that period, “[it] may admit of some doubt whether this profound silence . . . ought not now to preclude all further claim to it on their part, even though their

⁶⁶ *Annual Digest*, 1927-28, Case No. 289.

⁶⁷ Scott, *The Hague Court Reports* (1916), p. 130.

⁶⁸ *Ibid.*, p. 131.

pretensions might originally have had some foundation”⁶⁹; and that doubt was strengthened, the Case continued, by the principle laid down by the Agent for the United States in his argument before the Commissioners under Article IV of the Treaty of 1794 (the Treaty of Ghent), in which he contended that, had the State of Massachusetts remained silent spectators of the improvements made upon the British Settlement on territory claimed by the United States, that would have indicated that the State of Massachusetts had no claim to the territory.⁷⁰

In the course of the correspondence respecting the boundary between Venezuela and British Guiana, the United States Secretary of State, in a passage incorporated in the *Venezuelan Argument*, dismissed British claims to have established title to the disputed territory on the basis of the settlements made by British subjects in the belief that the territory was British, on the ground that the British and not the Venezuelan Government had perpetrated and encouraged that belief, and that it was simply a matter between the persons concerned and the British Government. The Secretary of State concluded: “In but one possible contingency could any claim of that sort by Great Britain have even a semblance of plausibility. If Great Britain’s assertion of jurisdiction, on the faith of which her subjects made settlements on territory subsequently ascertained to be Venezuelan, could be shown to have been in any way assented to or acquiesced in by Venezuela, the latter Power might be held to be concluded and to be estopped from setting up any title to such settlements.”⁷¹

A similar argument was advanced by the Norwegian Government in the *Fisheries* case; and Judge McNair, although not prepared to hold that the conduct of the United Kingdom amounted to acquiescence, approached the problem in the same way by posing the question whether, supposing the system of delimitation adopted by Norway capable of being recognised as lawful, “the United Kingdom had precluded herself from objecting to it by acquiescing in it.”⁷²

Counsel for the United Kingdom in the *Minquiers and Ecrehos* case referred with approval⁷³ to the above principles of the *Grisbadarna* Award after arguing that “while maintaining a nominal claim to the Minquiers and Ecrehos, the French authorities were content to allow the Jersey authorities to discharge all the responsibilities in connection with the administration of these groups,

⁶⁹ Moore, *International Adjudications* (Modern Series), Vol. 6, p. 195.

⁷⁰ *Ibid.*, p. 231.

⁷¹ Printed in the *Venezuelan Argument*, Cmd. 9501 (1899), p. 63.

⁷² *I.C.J. Reports*, 1951, p. 171.

⁷³ *Minquiers and Ecrehos* case, *Oral Pleadings*, Vol. 1, pp. 161-162.

and to incur the expenses of the installation and upkeep of slipways, buoys, marks, beacons and other works from which navigation in general could benefit.”⁷⁴ At a later stage of the oral proceedings Sir Gerald Fitzmaurice advanced the proposition in these terms: “ [Title to territory is abandoned] by letting another country assume and carry out for many years all the responsibilities and expenses in connection with the territory concerned. Could anything be imagined more obviously amounting to acquiescence, that is in effect abandonment? Such a course of action, or rather inaction, disqualifies the country concerned from asserting the continued existence of the title.”⁷⁵

Opinions given by legal advisers to the British Government. In the course of reports on a number of matters, the Law Officers have treated acquiescence as founding an estoppel, either of itself or in conjunction with a previous admission or other positive conduct from which recognition or consent could be inferred.⁷⁶ The importance attributed to the factor of continuing expenditure by one party on the faith of an understanding which the other party has allowed to pass without challenge⁷⁷ was clearly illustrated by a report which the Queen’s Advocate wrote in reply to the question whether the Government of Colombia (formerly New Granada) had the right to levy a transit rate on British mails carried across the isthmus of Panama by the Panama Railway Company, and to levy tonnage dues on British mail-vessels in ports at either terminus of the Panama Railway. The United States resisted both of these claims on the ground that, under the Charter

⁷⁴ *Ibid.*, p. 159. Mr. Harrison suggested that the French Government was adopting the attitude of having it both ways, an attitude on which he considered Judge Lauterpacht had aptly commented in the *British Year Book of International Law*, 27 (1950), pp. 395-396.

⁷⁵ *Minquiers and Ecrehos* case, *Oral Pleadings*, Vol. 3, p. 351.

⁷⁶ In only one instance, as far as the writer is aware—a question of the right of Venezuela to impose additional duties on imports from the West Indies—did the Law Officers deny that previous acquiescence was a bar to a later protest *in pari materia*; and that instance may be explained by the fact that the previous acquiescence of Great Britain had related to the imposition of the duties by Colombia and not Venezuela. In 1834, four years after separating from Colombia, Venezuela adopted the Colombian treaty of 1825 with Great Britain upon which the British protests were based. In a Report to Earl Granville on June 22, 1882, the Law Officers stated: “ Some difficulty is, no doubt, created by the fact that similar differential duties to those now in question were imposed, without objection, during the currency of the Treaty with Colombia. . . . But we do not think that this affords any sufficient reason why Her Majesty’s Government should not maintain their protest against the Decree as being in violation of the terms of Article IV of the Treaty.” In a Report some months later, the Law Officers stated that the omission of Great Britain to protest against “ a similar though trifling imposition of differential duties by Colombia in 1826, which was shortly afterwards removed ” could not be held “ to preclude them from protesting against the present grave infraction of the Treaty by Venezuela.” (Report of the Law Officers to Earl Granville, November 11, 1882: Venezuela.)

⁷⁷ See, e.g., the *Grisbadarna Arbitration*, discussed above, p. 507.

granted by the Government of New Granada to the railway company, no authority but the company had the right to levy charges. The Queen's Advocate took the view that the Charter constituted public notice to all States that the grantor Government had conceded certain rights, including those in dispute, for a certain period to a particular corporate body. He concluded: "On the faith of this contract foreign States had a right to rely; to enter into stipulations with the foreign Company or Corporation whom the Colombian State had to so large an extent invested with its own original rights and authority in this matter. They had a right to put the obvious and national [*sc.* natural] construction on the . . . instrument—to enter, as Great Britain had done, with that Company, into engagements of a costly and complicated character . . . and any subsequent act of the grantor of the Charter, whereby it exercised to the injury of foreign States the rights which, by the plain language of the instrument, it had parted with to the Company, is a wrong to those States to which they are not obliged to submit."⁷⁸

In 1890 the Law Officers approved the draft of a despatch which the Marquis of Salisbury proposed to send to the British Agent and Consul-General in Cairo on the subject of Egyptian obligations in commercial matters towards the Porte and other States. The draft despatch, taking the view that, by the Firmans of 1867 and 1873 Egypt acquired commercial liberty as far as the Porte could grant it, observed: "Foreign Powers not having made protest against the Firmans should, in the opinion of Her Majesty's Government, be held to have accepted their effect on their own position whenever their then existing Treaty rights should lapse, and no foreign Power has ground for setting up as against Egypt the stipulations in *commercial* matters of a Treaty with the Porte of a date subsequent to the Firman of 1873. Similarly the absence of protest appears to Her Majesty's Government to be a bar to any claim by a foreign State to enjoy in Egypt most-favoured-nation treatment in commercial matters under the Capitulations or other Treaties with Turkey anterior to 1873."⁷⁹

In 1874 the Law Officers were asked whether British objections to the Spanish claim to sovereignty over the Sulu Archipelago were justified. Their Report noted that in the course of correspondence between Great Britain and Spain, the latter had clearly asserted her claim and had protested against the contemplated ratification of a treaty by Great Britain in disregard of her claim; and that

⁷⁸ Report of the Queen's Advocate to Lord Stanley, December 21, 1866: Colombia.

⁷⁹ The draft despatch is printed as an Annex to the Report of the Law Officers to the Marquis of Salisbury, July 22, 1890: Egypt.

this correspondence had closed without any definite arrangement being reached, "it being deemed expedient by the British Government . . . that the matter should 'sleep'."⁸⁰ The dangers of such an attitude are apparent from the concluding passage of the Report: "Under these circumstances . . . whilst on the one hand it is quite true . . . that Her Majesty's Government has never recognised the validity of the claims of Spain, it is, on the other, equally true that Her Majesty's Government, with a full knowledge of all the facts, has stood by and allowed the claims to be acted upon, and, in our opinion, Her Majesty's Government would not now be justified in further remonstrating against such claims."⁸¹

A similar argument was employed in the draft of a letter⁸² from Earl Granville to Musurus Pasha with reference to the disputed right of a British shipping company to operate vessels on the Tigris and Euphrates, in the context of a disagreement concerning the terms of the Agreement of 1846 with regard to general rights of navigation coupled with a Vizirial letter of 1861 under which the right was claimed. Earl Granville pointed out that the company had enjoyed that privilege ever since 1861 with the knowledge and acquiescence of the Porte, the absence of protest during that period showing that the attitude of the Porte had been not, as alleged by Musurus Pasha, one of friendly tolerance,⁸³ but one of acquiescence in a claim of right on the faith of which the company had made large capital investments. "Whatever may be the true construction of the Agreement of 1846 as to the general right of navigation," the letter added, "Her Majesty's Government consider that the attitude of the Porte during the last twenty-two years debars them from now disputing the validity of the rights claimed and exercised by the Company under the Vizirial letter of 1861, and that they are entitled to insist on the *status quo* of the Company being maintained."⁸⁴

Instructions which, after approval by the Law Officers, the Earl of Derby proposed to send to the British Minister in Rio de Janeiro, stated that the application of a Brazilian law to British subjects could not justifiably be refused in certain circumstances, although it claimed jurisdiction for Brazil in respect of crimes committed by foreigners abroad against the Brazilian State,

⁸⁰ Report of the Law Officers to the Earl of Derby, May 26, 1874: Spain.

⁸¹ *Ibid.*

⁸² Quoted in McNair, *The Law of Treaties* (1938), pp. 49-50.

⁸³ The dissenting judges in the case concerning *Rights of Nationals of the United States in Morocco* held similarly that the conduct of the French Government which knew of the United States claim to exercise capitulatory rights, and, in spite of their knowledge, continued the old practice without any reservation, was not due to mere "gracious tolerance." (*I.C.J. Reports*, 1952, p. 221.)

⁸⁴ McNair, *The Law of Treaties* (1938), p. 50.

because “[a] similar right has been assumed in laws passed by other States, and Her Majesty’s Government have not protested against the principle thus laid down.”⁸⁵ Again, in 1886, the Law Officers reported that the British Government could not properly apply any part of the surplus revenue from Cyprus to the satisfaction of the private claims of British creditors “having regard to the fact that by the *Iradé* of December 20, 1882 (of which Her Majesty’s Government had notice, and in which they appear to have acquiesced), such surplus revenue has been specially pledged as one of the securities for the interest of the general Ottoman debt.”⁸⁶

CONCLUSIONS

What appears to be the common denominator of the various aspects of estoppel which have been discussed, is the requirement that a State ought to maintain towards a given factual or legal situation an attitude consistent with that which it was known to have adopted with regard to the same circumstances on previous occasions. At its simplest, estoppel in international law reflects the possible variations, in circumstances and effects, of the underlying principle of consistency which may be summed up in the maxim *allegans contraria non audiendus est*. Linked as it is with the device of recognition, it is potentially applicable throughout the whole field of international law in a limitless variety of contexts, not primarily as a procedural rule but as a substantive principle of law. In the absence of comparative studies of the operation of estoppel in different States, the divergencies of the international law estoppel from its counterparts in municipal systems can hardly be assessed or discussed with any degree of confidence. In view of the relatively unsophisticated form in which the doctrine of estoppel has generally been expressed in international law there may be some doubt about the likelihood of its concordance with a general principle of law extracted from the more complex and technical forms assumed by the doctrine in some municipal systems. In many of the instances to which attention has been drawn, the concept of good faith has been invoked in conjunction with that of

⁸⁵ The Instructions are printed as an Annex to the Report of the Law Officers to the Earl of Derby, February 16, 1877: Brazil. The Instructions note that protest was made in 1852 against the proposal to legislate in France to extend the principle to crimes against individuals, and that the proposal was abandoned.

⁸⁶ Report of the Law Officers to the Earl of Rosebery, March 25, 1886: Turkey. See, for further illustrations of the principle, the Annex to the Report of the Law Officers to the Foreign Office, March 5, 1889: Nicaragua; and the Annex to the Report of the Law Officers to the Marquis of Salisbury, November 10, 1885: Turkey.

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estoppel. Although the relationship between the two has been underlined in this way, estoppel is not dependent for its authority on acceptance of the principle of good faith. It has itself been accorded substantial recognition by States and by tribunals. The extent to which different aspects of estoppel have been "accepted as law" is a question which can be answered only against the background of a wider survey of the practice of States than has so far been undertaken. It may be considered probable, however, that some aspects of estoppel are in process of fulfilling, if they do not already fulfil, the criteria demanded of an international custom. Any such development towards the establishment of estoppel on a customary basis may be welcomed inasmuch as it serves to encourage respect for the precept of good faith and to promote a measure of stability in the legal relations between States.

Annex 191

I. C. MacGibbon, "Some Observations on the Part of Protest in International Law", *British Yearbook of International Law*, 1953

SOME OBSERVATIONS ON THE PART OF PROTEST IN INTERNATIONAL LAW

By I. C. MACGIBBON, M.A., LL.B. (EDINBURGH)

I. Introduction

THE potentialities of the diplomatic protest, as a tool influencing the formation of international law in fields where there exists no substantial body of State practice, have not always been adequately appreciated. As unilateral and frequently opportunist instruments of State action, they may be open to the charge that the grievances which they ventilate induce a biased presentation of the legal issues in documents drafted under the pressure of events. However, in addition to providing evidence of what States consider to be the law, protests are apt to influence the development of customary rules of international law either as showing the extent of the generality of the custom in question or by assisting in the appreciation of the existence of the *opinio juris sive necessitatis* in respect of any particular practice.¹ However, it is not the purpose of this article to attempt a comprehensive survey and systematic treatment of the part which diplomatic protest plays in the international sphere. What is intended is to examine the effect of both protest and failure to protest in relation to selected topics such as the conditions of validity of protest, anticipatory protest in respect of legislation contrary to international law, the effect of the protest of a single State in the matter of subjects of general interest, and the relation of protest to the acquisition of rights by prescription.

¹ According to Hudson, the elements which must be present before a customary rule of international law can be assumed are 'the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time' (*The Permanent Court of International Justice, 1920-1942* (1943), at p. 609). The requirement of acquiescence was echoed by Judge Read in his Dissenting Opinion in the *Fisheries* case (*I.C.J. Reports, 1951*, p. 202). The customary rule which Judge Read envisaged was one of limited application. In the case of *The Lotus* the Permanent Court of International Justice observed that the divergencies in State practice, to which the parties had drawn its attention, could hardly indicate the existence of the customary rule for which France contended, to the effect that in collision cases the institution of criminal proceedings was exclusively within the jurisdiction of the flag State. In support of its conclusion the Court stated that it felt called upon to 'lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests. . . . This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown. . . . It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the *Ortigia-Onclé-Joseph Case*, and the German Government in the *Ekbatana-West-Hinder Case* would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law.' (*P.C.I.J.*, Series A, No. 10, p. 29.) And see Kunz in *American Journal of International Law*, 47 (1953), p. 667.

II. *Conditions of validity of protest*

Despite the fact that many protests may remain unpublished and their contents may consequently be unknown, save to their authors and recipients, there are readily available in volumes of State papers, in diplomatic correspondence, and in the proceedings of international tribunals, sufficient examples to justify some preliminary observations of a general character as to the nature and formal validity of protests. A protest has been defined as 'a formal communication from one State to another that it objects to an act performed, or contemplated, by the latter'.¹ Most writers who discuss the subject give their approval to the view, implicit in this definition, that governmental origin and an element of formality are essential to the validity of protests.²

1. *Governments as exclusive agencies of protest*

A protest may validly be formulated by any subject of international law³—though there is some controversy, perhaps unavoidable, as to what are the entities comprised in that category. What is generally agreed is that a protest, to merit treatment as a factor in the legal relations of States, must be made by, or on behalf of, a State. In so far as protests purport to reserve the rights of the protesting State, it is reasonable that they should be subject to the same conditions as are the acts upon which a State may rely as a basis for the acquisition of prescriptive or historic title, namely, that they should be acts which a State has either authorized at the time of their performance or adopted subsequently.⁴ For this reason protests which have emanated from unofficial sources and which have not been subsequently ratified by a Government, have often been rejected.⁵

¹ Oppenheim, *International Law*, vol. i (7th ed., by Lauterpacht, 1948), p. 789.

² See, for example, Strupp, *Éléments du droit international public*, vol. i (2nd ed., 1930), p. 260; Anzilotti, *Cours de droit international* (French transl. by Gidel, 1929), p. 349; Rousseau, *Principes généraux du droit international public*, vol. i (1944), p. 149.

³ See Brüel in *Acta Scandinavica Juris Gentium*, 3 (1932), pp. 81–82. Rousseau (op. cit.) summarizes the opinions of many writers when he states that a protest 'doit émaner de l'organe étatique internationalement compétent pour être prise en considération: une protestation émanée par exemple du Parlement, si elle peut avoir une grande valeur politique, reste sans valeur juridique'.

⁴ This proposition is clear as regards the acts relied upon to found title by occupation (see, for example, Oppenheim, op. cit., p. 507); it applies with equal force to the acquisition of rights by prescription.

⁵ In the course of the proceedings of the Arbitration Tribunal to which the United States and Great Britain entrusted the settlement of the *Alaskan Boundary* dispute, the difficulties attendant upon the submission of a protest, or a claim, by an individual who had not been clothed with the appropriate authority, were illustrated by the rival contentions with regard to the effect of the so-called 'Dawson letter' of February 1888. This letter, on which Great Britain relied as giving the United States notice of the claims of the Canadian Government, comprised a report of an interview between a Canadian and an American official, both members of the geological surveys of their respective Governments, in which the former had adopted certain views on the boundary question. Neither official had been empowered by his Government to make representations on the subject of the dispute. The letter was subsequently laid before Congress among other documents

2. *Formality of the act of protest*

The written protest presented through the diplomatic channel presents no difficulty in respect of the condition of formality. Indeed, it represents the normal practice of States, and it is the effect of a protest in this sense with which the present inquiry is mainly concerned. Governments are chary of placing reliance upon protests which are presented orally¹ or whose efficacy is likely to be impaired by any avoidable deficiency in form. The impermanence of the spoken word renders oral protests liable to the twin dangers of distortion and oblivion. The importance attached by a protesting State to the rights which its protest is directed to safeguard is properly reflected in the form and substance of the communication.²

3. *Nature of the protest and the requirement of communication*

There has been no less insistence on the part of States to which protests have been addressed that their position cannot be affected by protests which are directed against mere rumours and possible future eventualities rather

pertaining to the dispute. The British allegations that the Canadian official in question represented Her Majesty's Government and that his views embodied the views of the Canadian Government, evoked from the United States Government the comment that it was assuredly 'a most remarkable procedure . . . for a Government to waive the usual channels of diplomatic communication on matters of great import, and to entrust the advancement of [such] a contention . . . to be made by an unaccredited person to a person who understood that neither of the two "had any delegated powers whatever".' (*Proceedings of the Alaskan Boundary Tribunal*, United States, Senate Documents, No. 162, 58th Congress, 2nd Session, 7 vols., 1904, vol. v, p. 183.) As Counsel for the United States pointed out: 'Governments do not act in matters of such solemn import in that sort of loose and irregular way' (*ibid.*, vol. vii, p. 900).

It may be inferred from an Opinion of the Queen's Advocate (Harding) of 11 November 1859, relative to the dispute between Great Britain and Spain concerning the right of British fishermen to land on Cuban 'Cays' and fish in adjoining waters, that a State which considers that its rights are being infringed will not be entitled to rely upon unofficial opposition to such infringements in order to safeguard its rights, but will be expected, according to the normal practice of States, to formulate an official protest. The Opinion reads, in part, as follows: 'I concur with Sir J. Dodson in considering that the Spanish title to any of these uninhabited Cays or Islets cannot be assumed as legally valid merely because it is asserted; more especially as Governor Bayley reports that "our mariners have hitherto continued to fish on these Cays, not indeed always without annoyance, but without formal warning or menace from any recognised Officer in the service of the Queen of Spain".' (F.O. 83/2371: quoted in Smith, *Great Britain and the Law of Nations* (1932), vol. ii, p. 229.)

¹ Cf. Brüel: '[La protestation] peut être formulée verbalement ou par écrit ou encore par des actes "concluants" . . .', *loc. cit.*, p. 83.

² In a dispatch of 8 December 1824, explaining the reasons for the British protest against the pretensions of the Russian Ukase of 1821 to dominion over extensive areas of the Pacific, the British Foreign Secretary, Canning, showed that he was alive to the perils of informality in such circumstances. He wrote that the Russian Decree 'could not continue longer unrepealed without compelling us to take some measure of public and effectual remonstrance against it. . . . [A] private disavowal of a published claim is no security against the revival of that claim. The suspension of the execution of a principle may be perfectly compatible with the continued maintenance of the principle itself. . . . The right of the subjects of His Majesty to navigate freely in the Pacific cannot be held as a matter of indulgence from any Power. Having once been publicly questioned, it must be publicly acknowledged . . .' (quoted in *Behring Sea Arbitration*, British Case, Cmd. 6918 (1893), p. 46).

than against specific acts and claims.¹ Many of the protests invoked by Great Britain before the Tribunal in the *Alaskan Boundary* dispute² were criticized by the United States as vague or ambiguous and described as ineffective to operate as notice of adverse claims on the ground that they were neither precise nor explicit. The main objection raised against the validity of the British protests was that they were not communicated to the Government of the United States.³ In the *Minquiers and Ecrehos* case the International Court of Justice noted that the French protest against the British Treasury Warrant of 1875, which constituted Jersey as a Port of the Channel Islands and which included the Ecrehos islets within the limits of the Port of Jersey, was based on the ground that this legislative act derogated from the terms of the Fishery Convention of 1839. It held in consequence that the protest was ineffective to 'deprive the Act of its character as a manifestation of Sovereignty'.⁴ It is both understandable and necessary that, in the matter of protests, the intention to protest should be no substitute for the deed.

¹ A protest which does not clearly indicate the act against which it is directed is without significance and may be rejected. See, for example, Note from Senor José de Carvajal to the United States representative in Madrid, dated 14 November 1873, which includes this passage: 'The protest having been presented in general terms, and without relation to any wrong [*agravio*] inflicted on the American Union, the Government of the Spanish Republic cannot recognize your competency to make it'; and it is 'rejected with serene energy' (quoted in *Fontes Juris Gentium*, Ser. B., Sec. 1, vol. 2, Part 1, para. 513).

² See *Proceedings of the Alaskan Boundary Tribunal*, vol. v, p. 187, where one of the alleged British protests is described as 'so artfully veiled as to make it entirely undiscernible, and consequently of no significance as a notice to the Government of the United States'. And see, to the same effect, *ibid.*, p. 191, and vol. vii, pp. 903, 904.

The advice of the Queen's Advocate as to the phrasing of the projected British communication to the Spanish Government on the subject of the Cuban Cays dispute emphasized the necessity for the language of a protest to be clear and unequivocal. He urged the use of 'such decisive and peremptory language as may induce Spain if not to withdraw the claim, at least to refrain from enforcing it'. He added: 'Inasmuch as the Spanish Government persists in advancing this claim, and affects to pretend that silence gives consent to it, it is for Her Majesty's Government to consider whether its language should not be such as to obviate all doubt on the subject from henceforth . . .' (F.O. 83/2371; quoted in Smith, *op. cit.*, p. 230).

³ See *Proceedings of the Alaskan Boundary Tribunal*, vol. v, p. 198. The United States dismissed the British claim that notes which passed between the Canadian and British Governments amounted to a protest, as 'extravagant . . . unless the passage be taken to mean that the protest was simply effective as against Her Majesty's Government. . . . It certainly was no protest to the United States as it was never communicated' (*ibid.*, p. 190). As an example of studied emphasis on detail there may be mentioned the manner in which the British Minister at Caracas carried out his instructions to protest 'in unmistakable terms' against Venezuelan depredations on the liberty and property of British subjects. Enclosing a copy of his Note to the Government of Venezuela embodying the instructions to protest, he reported: 'I took this note in person to the Acting Minister for Foreign Affairs and carefully translated it to him word for word, at the same time explaining and enlarging on it in terms about which there could certainly not be any possible mistake. At the close of each sentence I asked his Excellency if he thoroughly understood it, and satisfied myself that he did so . . .' (Cmd. 1372 (1902), p. 6).

⁴ *I.C.J. Reports*, 1953, p. 66. Counsel for the United Kingdom pointed out that the first French protest 'related to the question of fisheries and did not involve any French claim to sovereignty' and was thus not an effective protest against the exercise of sovereignty by Great Britain (*Minquiers and Ecrehos* case, *Oral Pleadings*, vol. iii, p. 321).

To judge from the comparative rarity of objections to protests on grounds of form alone, it would appear that in practice States fulfil, as a matter of course and in common prudence, such requirements touching the formal validity of protests as have been indicated above to be reasonably necessary. Where a specific wrong has been done, the protesting State will normally be anxious to indicate clearly the action to which it objects and the reasons for its objection.

4. *Contents of protest*

International law prescribes no rules as to the contents of a protest. This is dictated by the purpose which the author of the protest intends to effect. It is usual, although not obligatory, for a State to indicate the reasons underlying its view that the conduct in question is contrary to international law, and for this reason a protest will often contain an exposition of the legal considerations which in the view of the protesting State are relevant.¹ Again, protests commonly indicate that the protesting State reserves its rights in respect of the conduct in question.² This practice, also, appears to be unnecessary in view of the consideration, suggested below, that the effect of a valid protest is to reserve the rights of the protesting State. The validity and effectiveness of a protest depend on the extent to which its substance accurately represents the realities, in fact and in law, of the situation which it purports to affect. It has been suggested that 'while States may give information, make representations, or "intercede" about policies which affect their interests, they may formally protest or "interpose" only when their rights are violated'.³ Although it may be possible that protests formulated on a basis other than that of a violation of the rights of the protesting State may entail legal consequences in so far as they are expressive of the conviction that the acts protested against are in the nature of an abuse of right,⁴ normally a protest is devoid of legal effect if the rights

¹ See, for example, paragraph 2 of the Note, dated 28 May 1951, from the United Kingdom to Egypt (printed in *Fisheries case, Pleadings*, vol. iv, pp. 578-9); paragraph 1 of the Notes, dated 18 July 1951, from Denmark and Sweden respectively to the Soviet Union (*ibid.*, pp. 570, 572).

² This practice is usual in protests by the United States of America. See, for example, the Notes dated 2 July 1948 from the United States to Chile and Peru respectively (*ibid.*, pp. 599-600, 602-3).

³ See Wright in *American Journal of International Law*, 32 (1938), p. 529.

⁴ See the discussion of the doctrine of abuse of rights in Lauterpacht, *The Function of Law in the International Community* (1933), pp. 286 ff. Professor Lauterpacht, discussing the frequency with which protests are made other than on a basis of right, notes: 'Accordingly, although there is little doubt that even the most absolute and exclusive rights may be exercised so that, having regard to the manner and effects of their exercise, a situation may be created amounting to the commission of an international wrong, the practice of States will frequently offer a helpful guide for the determination of the question of abuse of rights' (*ibid.*, p. 305). The protests made by a State may indicate its practice in the matter in question.

Representations have been made, which have been widely described as protests, in which the protesting State has admitted that the State to which the protest was addressed was entitled to

in defence of which it is made do not in fact pertain to the protesting State. Thus the Agent for the United Kingdom observed in the course of the oral proceedings in the *Minquiers and Ecrehos* case: 'The whole subject of protests, of course, presupposes the existence of a title on the part of the protesting country, and . . . we do not admit that France had any title. . . . For this reason alone, French protests were necessarily without legal effect.'¹ As the United Kingdom pointed out in their *Reply*,² if legal effect were to be given to protests not formulated on a basis of right the security of title of any State, however long, continuous, and peaceful the possession on which it was based, might be hazarded by the simple expedient of formulating such a protest.

5. *Purpose of protest*

A protest constitutes a formal objection by which the protesting State makes it known that it does not recognize the legality of the acts against which the protest is directed, that it does not acquiesce in the situation which such acts have created or which they threaten to create, and that it has no intention of abandoning its own rights in the premises. The view has been expressed that a protest 'serves the purpose of preservation of rights'—a matter for subsequent consideration—'or of making it known that the protesting State does not acquiesce in, and does not recognise, certain acts'.³ Other writers have come to similar conclusions with slight variations in emphasis.⁴ Considerations such as these are echoed in the

act in the manner which provoked the protest, but that in so doing it was acting contrary to the comity and established practice of nations. Thus, when the United States notified all foreign Governments that all ships were prohibited from bringing any liquors for beverage purposes within the ports or territorial waters of the United States, although Spain and Panama protested that the attempt to regulate matters on board foreign ships was contrary to international law, Denmark, Belgium, Great Britain, Italy, Mexico, The Netherlands, and Norway made representations in which they alleged that such acts were contrary to comity and established practice (see *Foreign Relations of the United States* (1923), vol. i, pp. 133 ff.) Similarly a spokesman for the State Department was reported as saying that six friendly nations had protested against the 'screening' provisions of the United States Immigration and Nationality Act (the McCarran-Walters Act) which was passed on 24 June 1952 and came into effect on 25 December 1952 (*The Times* newspaper, 12 December 1952, p. 6, and see *ibid.*, 11 December 1952, p. 4, 24 December 1952, p. 6, and 30 December 1952, p. 6). These protests were based on the inconvenience which enforcement of the legislation would entail.

¹ *Minquiers and Ecrehos* case, *Oral Pleadings*, vol. iii, p. 349. The French protests in relation to the *Minquiers* were alleged to be insufficient to interrupt the acquisition of title because their basis was a claim to fisheries, not a claim to sovereignty. The Agent for the United Kingdom gave the reason that 'you cannot in law interrupt the acquisition of title by another country unless you assert, or protest on the basis of, a claim of right yourself. You cannot in law keep territory ownerless by protesting at the exercise by another country of a sovereignty you are not prepared to assert yourself' (*ibid.*, p. 350).

² See *Reply* submitted by the United Kingdom in the *Minquiers and Ecrehos* case, para. 207.

³ Oppenheim, *op. cit.*, pp. 789-90.

⁴ G. F. de Martens states that protests are sometimes necessary 'pour empêcher que des actes qu'on prévoit ne pouvoir éviter ne soient interprétés comme faisant preuve de consentement' (*Précis du droit des gens moderne* (revised ed. of 1831), vol. i, p. 175). Fauchille (*Traité de droit international public* (8th ed., 1925), vol. i, Part 2, p. 760) and Vattel (*Le Droit des gens*, Book 2,

views expressed by Governments on the purposes of protests. Thus the reason adduced by Sir Edward Grey, the British Foreign Secretary, for the British protest of 9 December 1912 against the Panama Canal Act of that year, was that the British Government 'were unwilling to give ground for an assertion that their silence had been taken for consent'.¹

The immediate purpose for which a protest is usually made is to procure a cessation of the conduct against which the protest is directed and, in case the protesting State has suffered loss as a result of that conduct, to obtain appropriate compensation. A protest which has led to the modification or withdrawal of the offending acts to the satisfaction of the protesting State, having thus attained its object, is of no further legal interest, beyond the possibility that both the contents of the protest and the fact of compliance with its terms may be cited in future disputes as evidence of the legal views of the States concerned in matters to which the protest related.

III. *Anticipatory protest in respect of legislation contrary to international law*

In view of the above considerations there may appear to be some doubt as to the propriety of formulating anticipatory protests, i.e. protests prior to the actual occurrence of an injury. It is clear, however, that States are under no obligation to refrain from protesting until an actual violation of their rights has taken place. Sir Arnold McNair has pointed out that protests may properly be lodged on the conclusion of a treaty calculated to lead to the infringement of rights of the protesting State.² The practice of States in the making of protests affords ample support for this view.³

ch. 11, para. 145) stress that a protest signifies the intention not to abandon a right. Strupp (op. cit., p. 260) states that protest is 'une déclaration de volonté expresse par laquelle l'État manifeste son intention de ne pas admettre comme légitime une certaine situation ou prétention'. Rousseau writes of protest: 'c'est le contraire de la reconnaissance. La protestation est une déclaration de la volonté de ne pas reconnaître comme légitime une prétention donnée, une conduite donnée, un état de choses donné . . .' (op. cit., p. 149).

¹ *Foreign Relations of the United States* (1912), p. 470. See also the dispatch of an earlier British Foreign Secretary, Canning, on the subject of the Russian Ukase of 1821, in the course of which he wrote: '. . . and when we have seen in the course of this negotiation that the Russian claim . . . rests in fact on no other ground than the presumed acquiescence of the nations of Europe in the provisions of an Ukase published by the Emperor Paul in the year 1799, against which it is affirmed that no public remonstrance was made, it becomes us to be exceedingly careful that we do not, by a similar neglect on the present occasion allow a similar presumption to be raised as to an acquiescence in the Ukase of 1821' (Cmd. 6918 (1893), p. 46).

² *The Law of Treaties* (1938), p. 128: 'A State which learns that a treaty concluded between two other States has for its object or certain consequence the impairment of its rights, whether enjoyed under customary international law or under a treaty with one of the contracting parties, is entitled at once to lodge a diplomatic protest with those parties. . . .'

³ Treaties which Portugal concluded in 1887 with France and Germany were the subject of a communication from Lord Salisbury to the British Minister at Lisbon, in which the latter was instructed to protest on the ground that the treaties purported to reserve to the enterprise of Portugal districts in which Great Britain took 'an exceptional interest' (quoted in Smith, op. cit., p. 8). Great Britain protested against the conclusion in 1878 by Russia and Turkey of the Treaty of St. Stephano on the ground that it was inconsistent with the Treaty of Paris of 1856 and the London Convention of 1871, to both of which instruments Russia was a party. As a consequence

This proposition holds good even at the stage where it has come to the knowledge of the protesting State that such a treaty is merely contemplated.¹ The reason for lodging protests in these situations is the practical one that the effect of so doing may be to induce the State concerned to withdraw,² renounce,³ or amend the objectionable provisions before or after the conclusion of the treaty, to withhold ratification,⁴ or to refrain from giving practical effect to such provisions,⁵ as the case may be.

Considerations of a similar nature apply to decrees, proclamations, declarations, and legislative enactments of States which, if enforced, would impair the rights of other States. No rule of international law forbids the making of protests against such legislation, and instances abound in practice where protests have been lodged against objectionable legislation when it is pending, when it has been formally enacted, and when it has been enforced.

In 1924, when anti-foreign measures were rife in Roumania, the Ameri-

the Congress of Berlin was called in 1878 when a new agreement was reached consistent with the earlier Treaties (*Harvard Draft Convention on the Law of Treaties*, printed in *American Journal of International Law*, 29 (1935), Supplement, p. 1027). For other examples of protests against the conclusion of treaties on the ground of inconsistency with earlier treaties see Lauterpacht in this *Year Book*, 13 (1936), p. 61, n. 1; and see *Harvard Draft Convention on the Law of Treaties*, loc. cit., pp. 1027 ff.

The Anglo-Congolese Agreement of 12 May 1894 was the subject of protests by the French Government, which objected to Article 2, by which Great Britain purported to lease to King Leopold a large tract of territory which she had never occupied and over which, France asserted, she had no rights of sovereignty (Cmd. 9054 (1898), pp. 15 ff.); and by Germany, who protested against Article 3, by which the Independent Congo State leased to Great Britain a strip of territory extending from Lake Tanganyika to Lake Albert Edward, on the ground that it was in violation of the Anglo-German Arrangement of 1890 (Cmd. 7390 (1894)). These instances are cited in Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), pp. 216, 241. In the Award by the Swiss Federal Council of 22 March 1922, in the case concerning the *Colombian-Venezuelan Frontiers*, approval was given by implication to the practice of protesting against the conclusion of a treaty if the treaty was such as to threaten the rights of the protesting State. The failure of Venezuela to protest on the occasion of the conclusion of a treaty by which Colombia ceded to Brazil territory which was claimed to be Venezuelan, was a factor which weighed heavily against the Venezuelan claim (*Reports of International Arbitral Awards*, vol. i (1948), p. 223, at p. 280).

¹ See below, pp. 300-1, for a discussion of the parallel situation of protests against contemplated legislation. Similar considerations would seem to be applicable in each situation.

² The German protest against Article 3 of the Anglo-Congolese Agreement of 12 May 1894 resulted in the withdrawal of that Article. A Declaration of Withdrawal was signed on 22 June 1894 (Lindley, op. cit., p. 241. The relevant correspondence is printed in Cmd. 7390 (1894)).

³ The French protest against Article 2 of the above Agreement led to the renunciation by the Independent Congo State of all occupations and to an agreement to abstain from all political action in the greater part of the leased territory (Lindley, op. cit., p. 216. See, for the relevant correspondence, Cmd. 9054 (1898)).

⁴ The Anglo-Portuguese Treaty of 26 February 1884, in which Great Britain agreed to recognize the claim of Portugal to certain territory round the mouth of the Congo River, remained unratified as a result of the protests made by Germany and other Powers (Lindley, op. cit., p. 301; see Cmd. 4205 (1884), pp. 2, 3).

⁵ The British protest against the grant made by the Sultan of Muscat to the French Government in 1899 of a lease of a port for use as a coaling station, contrary to the terms of a Declaration in 1862 by which Great Britain and France engaged to respect the independence of the Sultan, resulted in the cancellation of the lease (Lindley, op. cit., p. 73).

can Minister there addressed a communication¹ to his Secretary of State which disclosed a situation which was not altogether unprecedented. In view of reports derived from 'the local newspapers and current rumours'² that a new law was to be passed providing for an absolute moratorium of six months against all foreign creditors who had not entered into special agreements with their Roumanian debtors, it was decided to convene a meeting of the Commercial Attachés of the United States, France, Italy, Belgium, Holland, Czechoslovakia and Switzerland to discuss the Law and to agree upon a suitable form of protest. 'At the meeting', the Minister wrote, 'it was the [general] opinion . . . that the enactment of the law in question should be anticipated by the presentation of vigorous protests from the respective legations represented.'³ In the concluding passage of this dispatch the Minister indicated the practical considerations which militated in favour of the anticipatory protest in view of the result which the lodging of such a protest is intended to secure in regard to pending legislation, namely 'its abandonment or, at least, its modification'.⁴

No doubt attaches to the right of a State to protest on the occasion of the enactment by another State of legislation which, if enforced, would impair the rights of the protesting State. Practice provides numerous examples of protests made in such circumstances against legislation in respect of a variety of matters. Thus the British Government protested⁵ against the provision in the Panama Canal Act of 1912 which exempted from charges American vessels engaged in coastal or inter-coastal trade, on the ground that such an exemption did not comply with the stipulations of the Hay-Pauncefote Treaty of 1901 to the effect that the Canal should be free and open to the vessels of all nations on terms of entire equality so that there should be no discrimination in respect of tolls or otherwise. While this legislation was still pending a preliminary protest was lodged in Washington by the British Chargé d'Affaires.⁶

¹ *Foreign Relations of the United States* (1924), vol. 2, pp. 653-6.

² *Ibid.*, p. 653.

³ *Ibid.*, p. 654.

⁴ *Ibid.*: 'En passant it is to be noted that the opinion of my colleagues, in which I concur, is that objectionable anti-foreign laws are often prepared by a Minister in secrecy and are rushed by the Government through a docile Parliament without discussion in the almost complete absence of an articulate opposition. A legislative *fait accompli* then confronts the representatives of foreign countries against which protests are almost useless, being met with the statement from the Roumanian Government that the work of Parliament cannot be undone.' See also the reply of the United States Secretary of State to a telegram from the United States Minister in Roumania in which he was informed of a proposed Roumanian Mining Law which contained provisions prejudicial to foreign oil interests. The Secretary of State recognized the utility of the method of anticipatory protest and gave it his forthright approval (*ibid.*, pp. 597-8).

⁵ *Foreign Relations of the United States* (1912), pp. 481-9. Some sixteen years later proposals were made in Congress to extend the legislation prohibiting advance wages to seamen, to payments made by foreign vessels in foreign ports if they later entered ports in the United States. These proposals were the subject of protests by several States, including Great Britain (*ibid.* (1931), p. 811). Congress was apparently dissuaded by the Department of State from enacting the proposed legislation.

⁶ *Foreign Relations of the United States* (1912), pp. 469-71.

The attempt on the part of Russia, by publication of the Ukase of the Emperor Paul in 1821, to assert dominion over the northern waters of the Pacific and to restrict the rights of other nations therein, was made the subject of immediate and emphatic protest by Great Britain and the United States.¹ The Norwegian Decree of 1869 which defined the fishery limit off Sunnmøre as a line four miles to seaward of a long straight base-line drawn between two islets of the Norwegian Skjaergaard, met prompt protest from France.² In the course of the oral proceedings in the *Fisheries* case the Agent for the United Kingdom drew the attention of the Court to the practice normally followed by States when he observed that 'Governments do often protest against Decrees of this kind even when they are not brought to their notice through the diplomatic channel and even when they have not yet been enforced against their nationals'.³ Counsel for the United Kingdom cited several instances of protests made against legislation before its enforcement, and suggested the practical reasons underlying such action.⁴ Counsel for Norway emphasized the absence of protest on the part of the international community against the 1935 Decree and made it clear that, in his view, protests would have been expected if the circumstances had been as the United Kingdom claimed.⁵ No exception was taken to the fact that the protests lodged by the United Kingdom with various Governments responsible for the promulgation of laws which the United Kingdom Government considered to be objectionable, were based not on the seizure and condemnation of British ships, but on the mere existence of laws or decrees of delimitation made by the State in question.⁶

The passing of the Panama Canal Act by the United States in 1912 was, as has been already mentioned,⁷ the occasion for a protest on the part of the British Government. The American Ambassador in London, writing to the United States Secretary of State on 15 July 1912, reported an interview he had had with Sir Edward Grey in which the latter outlined his objection to the Act. The Ambassador quoted Sir Edward Grey as stating on behalf of the British Government that that Government 'did not wish to seem premature, but were unwilling to give ground for an assertion that their silence had been taken for consent'.⁸ Some months later the United

¹ *Behring Sea Arbitration*, British Case, Cmd. 6918 (1893), p. 58.

² *Fisheries case, Pleadings*, vol. ii, pp. 66-67.

³ *Ibid.*, vol. iv, p. 375.

⁴ *Ibid.*, pp. 396-7.

⁵ *Ibid.*, p. 234: 'Si elles avaient cru que le décret de 1935 portait atteinte à leurs droits, il est probable qu'elles seraient intervenues.'

⁶ *Ibid.*, p. 241: 'La protestation porte sur les dispositions mêmes qui ont été édictées par ces États pour délimiter leurs mers adjacentes. . . . Mais l'objet de la protestation, c'est la délimitation elle-même, et ce ne sont pas du tout des actes d'exécution qui auraient été accomplis sur la base de cette délimitation. Il n'y en a pas eu.'

⁷ Above, p. 299.

⁸ *Foreign Relations of the United States* (1912), p. 470.

Kingdom Ambassador presented the point of view of his Government on the question whether a State has the right to protest against the enactment of legislation before suffering injury as a result of the enforcement of the legislation, in a Note to the United States Secretary of State on 27 February 1913: '[His Majesty's Government] conceive that international law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that the nation which holds that its treaty rights have been so infringed or brought into question by a denial that they exist, must, before protesting and seeking a means of determining the point at issue, wait until some further action violating those rights in a concrete instance has been taken. . . .'¹ This would seem to be the sound view, and the principle involved could usefully be broadened so as to embrace the protection of all rights enjoyed under international law irrespective of the source of the right in question.²

The sphere of municipal legislation in which, perhaps, the most conspicuous body of protests is encountered is that relating to the attempts of States by way of legislative enactment, decree, proclamation, or otherwise to extend, unilaterally, the area of marginal sea over which rights of sovereignty may be claimed either in all respects or in regard to one or all of various matters such as conservation of fisheries, customs control, and operations directed towards the utilization of the resources on the bed of the so-called 'continental shelf' and of its subsoil. The formal enactment of claims of this nature has in many instances met with opposition on the ground that the claims have transgressed the recognized limits and thus encroached on the jealously guarded principle of the freedom of the high seas. Legislative claims which have attracted protests have been made by Peru,³

¹ Ibid. (1913), p. 548. It is interesting to note that three years before the American refusal to admit the right of the United Kingdom to protest against the passing of the Panama Canal Act, the Department of State protested against legislation by the Government of Honduras which provided that all vessels, whether built in Honduran shipyards or built abroad, which were for the service of persons residing in Honduras, whether natives or foreigners, would be considered as Honduran vessels and as entitled, therefore, to fly only the flag of the Republic of Honduras. The Department of State pointed out that 'the decree would appear to cover vessels holding an American or other foreign registry. If so interpreted, the decree would be clearly violative of the principles of international law and in derogation of the respect due American registry' (ibid. (1909), pp. 367-8). The Law was later repealed.

² Cf. McNair, *op. cit.*, p. 128. Professor Lauterpacht has justifiably emphasized that 'a protest may be both proper and necessary for the reservation of a right' in circumstances where 'there may have taken place a legislative or administrative act in the nature of a proclamation of intention and assertion of a right, and yet, unless an actual attempt has been made to apply the law or decree in question and until an injury has actually occurred, it is probable that no judicial remedy will lie' (this *Year Book*, 27 (1950), p. 396).

³ By Presidential Decree of 1 August 1947: see *United Nations Legislative Series, Laws and Regulations on the Régime of the High Seas*, vol. i (1951), pp. 16-17. Protests were made by the United Kingdom on 6 February 1948: see the *Fisheries* case: *Pleadings*, vol. ii, pp. 747-9; and by the United States on 2 July 1948: see *United Nations Legislative Series*, *loc. cit.*, pp. 17-18.

Chile,¹ Honduras,² Yugoslavia,³ Egypt,⁴ Ecuador,⁵ Costa Rica,⁶ El Salvador,⁷ Saudi Arabia,⁸ Argentina,⁹ and Iceland.¹⁰

The argument, frequently repeated in the written and oral Pleadings of the United Kingdom in the *Fisheries* case, that it is not by making decrees

¹ By Presidential Declaration of 23 June 1947: see *United Nations Legislative Series*, loc. cit., pp. 6-7. Protests were lodged by the United Kingdom on 6 February 1948: see *Fisheries case: Pleadings*, vol. ii, pp. 750-2; and by the United States on 2 July 1948: see *United Nations Legislative Series*, loc. cit., pp. 7-8.

² (a) In Article 153 of the Constitution of 28 March 1936: see *United Nations Legislative Series*, loc. cit., p. 80. A protest was lodged by the United Kingdom on 29 July 1936: see *Fisheries case: Pleadings*, vol. ii, pp. 743-4.

(b) By Legislative Decrees Nos. 102, 103, and 104, of 7 March 1950: see *Fisheries case: Pleadings*, vol. 4, pp. 581-3. No. 102, which amended Article 153 of the Constitution of 28 March 1936, and No. 103 are printed in *United Nations Legislative Series*, loc. cit., pp. 11-12. A protest was lodged by the United Kingdom on 23 April 1951: see *Fisheries case: Pleadings*, vol. iv, pp. 583-4.

(c) By Legislative Decree No. 25, of 17 January 1951: see *Fisheries case: Pleadings*, vol. iii, pp. 694-5. A protest was lodged by the United Kingdom on 10 September 1951: see *ibid.*, vol. iv, pp. 585-7. Mention was made of a recent protest to Honduras by the United States: see *ibid.*, p. 37.

³ By Articles 3, 5, and 8 of the Law of 1 December 1948: see *United Nations Legislative Series*, loc. cit., pp. 132-5. A protest was lodged by the United Kingdom on 5 May 1949: see *Fisheries case: Pleadings*, vol. iv, pp. 574-6.

⁴ By Decree of 18 January 1951: see *Fisheries case: Pleadings*, vol. iii, pp. 676-7. Articles 5 and 9 of the Decree are printed in *United Nations Legislative Series*, loc. cit., p. 307. A protest was lodged by the United Kingdom on 28 May 1951: see *Fisheries case: Pleadings*, vol. iv, pp. 578-80; and by the United States on 4 June 1951: see *ibid.*, p. 603.

⁵ By Congressional Decree of 21 February 1951: see *Fisheries case: Pleadings*, vol. iv, pp. 587-8; and by Articles 1 and 2 of the Presidential Decree of 22 February 1951: see *ibid.*, p. 589. A protest was lodged by the United States on 7 June 1951: see *ibid.*, pp. 603-4; and by the United Kingdom on 14 September 1951: see *ibid.*, pp. 589-90.

⁶ (a) By Decree No. 116 of the Junta of the Founders of the Second Republic, of 27 July 1948: see *Fisheries case: Pleadings*, vol. iv, pp. 591-2. A protest was lodged by the United Kingdom on 28 January 1949: see *ibid.*, pp. 592-4.

(b) By Decree No. 803 of the Junta of the Founders of the Second Republic, of 5 November 1949, which amended Decree No. 116 of 27 July 1948: see *ibid.*, vol. iv, pp. 594-5. A protest was lodged by the United Kingdom on 9 February 1950: see *ibid.*, pp. 595-6.

⁷ By Article 7 of the Political Constitution of 7 September 1950: see *Fisheries case: Pleadings*, vol. iv, p. 596; and *United Nations Legislative Series*, loc. cit., p. 300. A protest was lodged by the United Kingdom on 12 February 1950: see *Fisheries case: Pleadings*, vol. iv, pp. 596-7; and by the United States on 12 December 1950: see *ibid.*, pp. 600-1; and *United Nations Legislative Series*, loc. cit., pp. 300-1.

⁸ By Decree No. 6/4/5/3711 of 28 May 1949: see *American Journal of International Law*, 43 (1949), Supplement, pp. 154-7. Articles 5 and 9 of this Decree are printed in *United Nations Legislative Series*, loc. cit., p. 89. A protest was lodged by the United States on 19 December 1949: see *Fisheries case: Pleadings*, vol. iv, p. 601.

⁹ By Decree No. 14708 of 11 October 1946: see *United Nations Legislative Series*, loc. cit., pp. 4-5. A protest was lodged by the United States on 2 July 1948: see *ibid.*, p. 5.

¹⁰ By Law of 5 April 1948: see *United Nations Legislative Series*, loc. cit., pp. 12-13; *Fisheries case: Pleadings*, vol. iii, pp. 696-9; and by Regulations of 22 April 1950: see *ibid.* Protests were lodged by the United Kingdom on 6 July 1950: see *ibid.*, vol. iv, pp. 576-7; by Belgium on 1 September 1951: see *ibid.*, p. 401; by the Netherlands on 3 October 1951: see *ibid.*, pp. 606-7; by Germany: see *ibid.*, p. 401; and by France on 13 February 1953: see *The Times* newspaper, 14 February 1953. On 17 February 1953 *The Times* newspaper published a report confirming the fact that France had protested, and emphasizing that the protest was made only on grounds of principle, but that it was intended to reserve to France a basis for protest in the event of a decision of the Icelandic Government affecting French fishing rights in the area. The report adds: 'The dispatch of the Note will have the effect of safeguarding French interests in the event of future British-Icelandic talks on this subject producing a settlement. . . .'

that a State infringes international law, but by enforcing her decrees against foreigners, appears to suggest that what is important from the point of view of determining what is the actual practice of States, and hence what is a relevant occasion for protest, is the action taken to enforce unilateral legislative claims rather than the promulgation of the decree itself. It has been shown above that the practice of protesting against decrees before their enforcement is widespread and at the same time founded on considerations of legitimate utility. It has nowhere been suggested that a protest cannot properly be made against action taken to render effective provisions of municipal legislation which infringe rights enjoyed by the protesting State under international law. Protests against enforcement measures are common occurrences in the relations of States;¹ although the facts may have been contested, protests of this nature have in no instance been rejected on the ground that the occasion was not a proper one for protest. Confirmation of the propriety of formulating protests in these circumstances may be gained from the clear implication, which can be derived from the importance which courts have attributed to failure to protest in such a case, that a protest would have been the natural and correct reaction.²

¹ The recent protests by the Governments of Denmark and Sweden to the Government of the U.S.S.R. were made in view of the seizure by the latter Government of Danish and Swedish vessels in enforcement of the Soviet Decree of 1925 concerning the regulation of fishing, and that of 1927 concerning the protection of the national boundaries of the Soviet Union. (See the *Fisheries case, Pleadings*, vol. iv, pp. 570-4.) See also, on the Russian claims in the Baltic, the Note by Schapiro in this *Year Book*, 27 (1950), pp. 439 ff.

In 1905 a Canadian sealer, the *Agnes G. Donohoe*, was seized for violation of a Uruguayan Decree prohibiting sealing at the mouth of the Rio de la Plata, but was released after a protest had been made by Great Britain (see Fulton, *The Sovereignty of the Sea* (1911), p. 663). Gidel discusses this and other similar cases (*Le Droit international public de la mer*, vol. 3 (1934), pp. 305-6).

The seizure and condemnation of British ships by the United States, in enforcement of the Tariff Act of 1922 and the National Prohibition Act of 28 October 1919, led to British protests, especially concerning the application of the principle of constructive presence (see *Foreign Relations of the United States* (1923), vol. i, pp. 172-9).

In order to enforce the Chinese Nationalist Order of June 1949 closing ports and waters under communist control, Chinese naval vessels shelled a number of American ships. The United States protested (*Department of State Bulletin*, vol. 21 (1949), p. 945). For a summary of the facts see *ibid.*, pp. 908, 957.

² See, for example, *I.C.J. Reports*, 1951, p. 138, where the Court in the *Fisheries case* said: 'Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States.'

The provisional Order of the Staatsgerichtshof of 10 October 1925, in the dispute between Lübeck and Mecklenburg-Schwerin concerning the exercise by the former of certain jurisdictional rights in the Bay of Lübeck, gave weight to the fact that the latter failed to protest against the Lübeck Law of 1896 in which the claim of Lübeck was unmistakably asserted, although the Law was actually put into force and applied (*Annual Digest and Reports of Public International Law Cases*, 1925-6, Case No. 85). And see Gidel, *op. cit.*, p. 663: 'Il est soumis effectivement à la juridiction tunisienne sans que celle-ci ait jamais rencontré aucune opposition de la part des Gouvernements étrangers à l'occasion des mesures prises contre les pêcheurs d'éponges de toute nationalité poursuivis pour contravention aux règlements de pêche tunisiens.'

IV. *Protest and prescription*1. *In general*

The proof of an historic or prescriptive title in international law depends, *inter alia*, upon possession or exercise of the rights concerned which is both peaceful and continuous.¹ Evidence of intention to abandon a title would be a fatal defect so far as the requirement of continuity is concerned. That other States do not acquiesce in the situation would deprive the situation of its peaceful character. As has been pointed out,² there are two sides to the notion of peaceful and uninterrupted possession. Considerably more attention has been given in the past to assessing the evidential value of the factors adduced by States relying upon a prescriptive process for the consolidation of a title than has been paid to the nature of the measures which must be taken by States to prevent such a title maturing. It is in this latter connexion that the diplomatic protest is of special relevance. Its importance may correctly be ascribed to either of the dual functions which it has been considered apt to fulfil and each of which springs from the requirement that the acts upon which prescriptive and historic titles are based must be peaceful and uninterrupted. Those requirements must be viewed in the light of the further consideration that acquiescence is a prerequisite for the valid formation of such titles. On the one hand, it may be maintained that a protest is effectual to interrupt the running of prescriptive time inasmuch as it is equivalent to the institution of a suit in private law. With this view is linked the difficulty which besets the principle of prescription, namely, that of determining the length of the period which will suffice to consolidate the adverse possession. It is submitted that the doctrine of acquiescence is of considerable assistance in the solution of that difficulty, in that it reduces the significance of the necessity for a fixed prescriptive period by constituting a conclusive test by which the validity of a prescriptive claim may be evaluated, namely, the test of the existence or otherwise of a general conviction that the situation which has been created is in conformity with the requirements of international stability and order.

Thus it may be asserted, on the other hand, that since acquiescence is essential to the validity of a prescriptive or historic title, the relevance of protest in this connexion may be ascertained by the extent to which it

¹ See the authorities cited by Johnson in this *Year Book*, 27 (1950), pp. 343-8. See also the *Counter Memorandum* submitted by the United States in the *Island of Palmas Arbitration*, where the views of publicists on this point are summarized, at pp. 90-91. See also the *Printed Argument* submitted by Venezuela in the *Venezuela-British Guiana Boundary Arbitration*: 'To make a good title . . . adverse holding must be peaceable and not by force' (Cmd. 9501 (1899), p. 45). The former Central American Court of Justice in the *Gulf of Fonseca* case described the rights which were exercised over the disputed area as 'peaceful ownership and possession . . . that is without protest or contradiction by any nation whatsoever . . .' (*American Journal of International Law*, 11 (1917), pp. 700-1).

² See Johnson, *loc. cit.*, pp. 345-6.

operates to rebut the presumption of acquiescence. It is suggested that this consideration underlies the opinions of those who, while affirming that States are under no obligation to protest, nevertheless maintain that a protest is necessary to preserve the rights of the protesting State in circumstances in which failure to protest would be tantamount to acquiescence.¹ To the extent that a protest serves to preserve the rights of the protesting State in such situations, it will constitute an effective bar to perfecting prescriptive and historic titles for the validity of which acquiescence forms an essential element.

2. *Protest as a bar to the acquisition of prescriptive title. Opinions of writers*

Protest is generally accepted by writers as a means of preventing the maturing of a prescriptive or historic title. It has been considered by some to serve as an indication that the protesting State does not intend to abandon its rights.² In the view of others it interrupts the continuity of the adverse claim.³ Until recently many writers have accepted it as one of the principal, if not the most important, methods of interrupting the running of prescriptive time.⁴ As late as 1934 it was possible to write with justification: 'Le moyen le plus courant, en droit international, de sauvegarder ses droits, est la protestation; on en rencontre très souvent dans la pratique. . . .'⁵ Long before that it had been pointed out⁶ that the methods of interrupting prescription in international law differed from those utilized in private law and that, as regards the former, they were neither 'aussi faciles, aussi précis ni aussi certains', the reason being the absence of tribunals to which States might bring their claims.

¹ See, for example, Oppenheim, *op. cit.*, p. 790; Strupp, *op. cit.*, p. 260; Brühl, *loc. cit.*, p. 89. Rousseau sums the matter up thus: '*Toujours facultative*, la protestation n'est juridiquement nécessaire que dans le cas où le silence équivaudrait à un assentiment tacite' (*op. cit.*, pp. 149-50).

² Vattel wrote: 'Il est bien évident aussi, que l'on ne peut opposer la Prescription au Propriétaire, qui, ne pouvant poursuivre actuellement son droit, se borne à marquer suffisamment, par quelque signe que ce soit, qu'il ne veut pas l'abandonner. C'est à quoi servent les Protestations' (*op. cit.*, Book 2, ch. 11, para. 145). See also Fauchille, *op. cit.*, vol. 1, Part 2, p. 760.

³ See, for example, Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed., revised, 1945), vol. 1, p. 387: 'Obviously a State may actively challenge the encroachments of a neighbour upon its soil, and by so interrupting the continuity of the adverse claim, prevent the perfecting of a transfer of sovereignty that might otherwise result. It is believed that diplomatic protest might suffice for that purpose, even though unsupported by the use of force.'

⁴ See Audinet in *Revue générale de droit international public*, 3 (1896), p. 322. Force of arms was considered by Fauchille to be the principal means of interrupting prescription, but he added that if a State was too weak to utilize these means 'il peut se contenter d'élever des protestations' (*op. cit.*, p. 760). Compare Gidel, *op. cit.*, p. 634: '... il est prudent pour les Gouvernements intéressés de ne pas laisser le fait préjuger le droit, de formuler leurs réserves dans un document porté sous une forme appropriée à la connaissance de l'Etat qui accomplit des actes de nature à lui permettre un jour ou l'autre de revendiquer des droits sur un espace maritime.'

⁵ Verykios, *La Prescription en droit international public* (1934), p. 99.

⁶ Audinet, *loc. cit.*

3. *The same. State practice*

In diplomatic correspondence and in pleadings before international tribunals States have utilized protests for the purposes of rebutting the presumption of acquiescence which might otherwise have been raised and to act as a bar to the perfecting of prescriptive and historic title. Counsel for the United States in the *Alaskan Boundary* dispute asserted that, had Great Britain believed her rights to be infringed or endangered, she would have protested rather than 'permit a claim of this sort to pass unchallenged, and grow into a right, or at least something by which a right can be perfected'.¹ In the course of the oral proceedings in the *Fisheries* case the Agent for the United Kingdom explained that Governments protest 'in order to make it quite clear that they have not acquiesced and to prevent a prescriptive case being built up against them'.² In the *Minquiers and Ecrehos* case Counsel for the United Kingdom observed that 'the exact legal effect of a protest depends very much on circumstances, but in general all it does is to register or record the opinion of the protesting country that the act protested against is invalid and is not acquiesced in'.³

4. *The same. Practice of international tribunals*

Similarly, international tribunals have recognized that protest is effective to prevent the acquisition of a prescriptive title. In the *Chamizal Arbitration* between the United States and Mexico the contention was advanced by the United States that it had acquired, in addition to its title under treaty provisions, a good title to the tract in dispute by prescription grounded upon possession of the territory maintained without disturbance, interruption or challenge. Only in relation to this aspect of the case was the Award of the Commissioners unanimous. They reached the conclusion that 'the possession of the United States in the present case was not of such a character as to found a prescriptive title'. They said:

'Upon the evidence adduced it is impossible to hold that the possession of El Chamizal by the United States was undisturbed, uninterrupted and unchallenged from the date of the Treaty of Guadalupe Hidalgo in 1848 until the year 1895, when, in consequence

¹ *Proceedings of the Alaskan Boundary Tribunal*, vol. 7, p. 868. The Government of Roumania expressed similar intentions in a Memorandum to Turkey of October 1876 on the question of the Danube delta: 'Elle doit néanmoins protester sans cesse pour ne pas laisser prescrire un droit, pour ne pas laisser établir l'opinion que les bouches du Danube appartiennent ou appartiendraient à la Bulgarie . . .' (*Fontes Juris Gentium*, Ser. B, Sec. 1, vol. ii, Part 1, para. 597).

² *Fisheries case: Pleadings*, vol. iv, pp. 375-6. The *Printed Argument* submitted by Venezuela in the *Venezuela-British Guiana Boundary Arbitration* contained this passage: 'No holding by force, against the protest of the State whose territory has been seized, will ever ripen into a title by prescription. As between individuals the bringing of an action arrests the running of the statute. There is no tribunal to which an injured State can appeal to recover the territory of which it has been deprived by force. Its maintained protest has the same effect to arrest the maturing of the title by prescription as the bringing of an action by an individual' (Cmd. 9501 (1899), p. 45).

³ *Minquiers and Ecrehos case: Oral Pleadings*, vol. i, p. 155.

of the creation of a competent tribunal to decide the question, the Chamizal case was first presented. On the contrary it may be said that the physical possession taken by citizens of the United States and the political control exercised by the local and federal governments, have been constantly challenged and questioned by the Republic of Mexico, through its accredited diplomatic agents.¹

The Commissioners added:

'In private law, the interruption of prescription is effected by a suit, but in dealings between nations this is of course impossible, unless and until an international tribunal is established for such purpose. In the present case the Mexican claim was asserted before the International Boundary Commission within a reasonable time after it commenced to exercise its functions, and prior to that date the Mexican Government had done all that could be reasonably required of it by way of protest against the alleged encroachment.'²

5. *Protest as a subsidiary to other means of safeguarding rights*

It may be useful, before discussing the extent to which protest constitutes a bar to the acquisition of prescriptive or historic title at the present time, to ascertain whether, and if so to what extent, the presentation of a protest effected this end in the past. It might be concluded from the foregoing pages that protest pure and simple was apt to interrupt the running of prescriptive time; and it was suggested as recently as 1945 that a diplomatic protest might suffice for that purpose.³ There are, however, indications, both in the Award of the Commissioners in the *Chamizal Arbitration*⁴ and in the proceedings of the *Venezuela-British Guiana Boundary Arbitration*, that protest was considered, of itself, inadequate for the purpose of interrupting prescription.⁵ It is suggested that protest alone suffices to prevent the acquisition of a prescriptive or historic title only in those cases in which the protesting State is able to convince the Tribunal to which the

¹ Award of 15 June 1911, in the *Chamizal Arbitration* (*American Journal of International Law*, 5 (1911), p. 806).

² *Ibid.*, p. 807.

³ See Hyde, *op. cit.*, vol. 1, p. 387. Audinet, after ascribing to protest the power to interrupt prescription, suggested that protest might not always be possible and that a weak State might remain silent and allow the prescriptive period to run against it 'parce qu'il ne sera pas à même de soutenir, au besoin, ses réclamations par les armes' (*loc. cit.* 3 (1896), p. 322).

⁴ The Commissioners may have intended protest to bear a somewhat wider connotation than that of a formal diplomatic protest. They found that Mexico 'had done all that could reasonably be required of it by way of protest against the alleged encroachment' and added that it was quite clear 'that however much the Mexicans may have desired to take physical possession of the district, the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico can not be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence' (see *American Journal of International Law*, 5 (1911), p. 807).

⁵ Venezuela argued that the 'maintained protest' of a State is effective to interrupt the development of a prescriptive title (see *Printed Argument* submitted by Venezuela: Cmd. 9501 (1899), p. 45). An earlier passage indicates that maintained protest signified more than the mere regular repetition of protests, however unequivocal their terms. The passage reads: 'Venezuela's claims and her protests against alleged British usurpation have been constant and emphatic, and have been enforced by all the means practicable for a weak power to employ in its dealings with a strong one, even to the rupture of diplomatic relations' (*ibid.*, p. 29).

question is later referred that the circumstances were such that a protest constituted the only feasible method of asserting its rights. Tribunals appear, in the past, to have required proof that the protesting State had taken some further steps as evidence of the seriousness and good faith of its intention to oppose encroachments on its rights. Into such a category might fall acts such as the severance of diplomatic relations and measures of retorsion.

It is relevant to point out in this connexion that two developments must be considered to have affected the potential value of the diplomatic protest at the present time. The first is the extent to which the General Treaty for the Renunciation of War, in conjunction with the provisions of Article 2 (4) of the Charter of the United Nations, have imposed a wide prohibition of the threat or use of force in international relations. As a result courts must now be precluded from requiring, as additional measures of self-help, that protests should be supported by force or a show of force. The second development consists in the appearance on the international scene of institutions to which resort can be had to prevent the formation of prescriptive titles. Since the establishment of the Permanent Court of Arbitration, the League of Nations and the Permanent Court of International Justice, and, later, of the United Nations and the International Court of Justice, it may be argued that there exists the necessary machinery to allow the methods for interrupting prescription to be regularized and assimilated to those in force in municipal systems of law—a consummation which the Commissioners in the *Chamizal Arbitration* hoped would be achieved in the course of time.

6. *Requirement of repetition of protest*

In the event of repetition of the acts protested against or the continuation of the situation created by them, it is clear that scant regard will be paid to the isolated protest of a State which takes no further action to combat continued infringements of its rights.¹ Failure to supplement the initial expression of disapproval will not unreasonably give rise to the presumption either that its opposition could not be supported by any show of legal right, or that, even if able to protest on the basis of a claim of right, it was for some reason indifferent to the outcome. Two illustrations are furnished by the *Fisheries* case. Counsel for Norway maintained that it was impossible to attribute any probative value to the oral protest of the German Govern-

¹ The opinion may be not unjustified that a protest constitutes no more than the minimum expenditure of effort compatible with an intention to preserve rights. However, it is arguable that increased weight will be attached to the cumulative effect of protests which have been persistently reiterated. This view is impliedly acknowledged by Hyde, who considered that a State should forfeit its rights 'at least when it has failed to make constant and appropriate effort to keep them alive, as by ceaseless protests against the acts of the wrongdoer' (op. cit., vol. 1, p. 387). And see Lauterpacht in *Hague Recueil*, 62 (1937), p. 291.

ment against the Decree of 1935 for the reason that the protest was not followed by any further action and that the subsequent attitude of the German Government deprived its initial protest of all significance.¹ At an earlier stage in the history of the Norwegian claims the French Chargé d'Affaires in Stockholm addressed a series of Notes, the last of which was dated 27 July 1870, to the Foreign Minister of Norway and Sweden, in which the French Government disassociated itself from any recognition of the principles contained in the Norwegian Decree of 1869. The British Government maintained with some justification that the terms of these Notes constituted an objection to the Norwegian claims on the part of France.² This was the point of view maintained by the Note of 27 July 1870, although the limits claimed were admittedly accepted, but only as a special case. France offered to recognize the limits laid down in the Decree, leaving aside any question of law. No answer to this offer was received and the matter was allowed to drop. France did not prosecute her objection further. This incident did not convince the Court that France was opposed to the principles contained in the Decree and it concluded that the Norwegian system of delimitation had 'encountered no opposition on the part of other States'.³

It has been affirmed that, in principle, a diplomatic protest can of itself effectively interrupt the running of prescription, with the qualification that, unless they are followed by contestation and settlement of the question, protests lose their force.⁴ The efficacy of protests admits of certain limitations once consideration is given to the situation resulting from repetition of the usage protested against or to the effect of the continuation of the situation which provoked the initial protest. It is generally conceded that a protest acts to some extent as a bar to the perfecting of a prescriptive or historic title, and therefore serves to that extent to preserve the rights of the protesting State.⁵ What is in doubt is the period during which the effectiveness of a protest persists. The matter is without complications where subsequent recognition of the claim or situation is express,⁶ but it is less straightforward where acquiescence is to be inferred from the surrounding circumstances, and this has to be done in most cases where prescriptive or historic claims are disputed. It is not suggested that a protest must be

¹ See *Fisheries case: Pleadings*, vol. iv, p. 234: 'Mais cette communication est restée sans effet et elle n'a été suivie d'aucune autre démarche. Après avoir fait ce geste, le Gouvernement allemand s'est abstenu d'en tirer la moindre conséquence.'

² See, for example, the statement by the Attorney-General (Sir Frank Soskice) in the *Fisheries case: Pleadings*, vol. iv, pp. 138-9.

³ *I.C.J. Reports, 1951*, p. 137.

⁴ See Verykios, *op. cit.*, p. 86.

⁵ See Verykios, *op. cit.*; Brüel, *loc. cit.*, pp. 90-91. See also the *Fisheries case: Pleadings*, vol. ii, p. 654.

⁶ See, for example, Anzilotti, *op. cit.*, p. 349: 'Les effets de la protestation cessent si l'Etat reconnaît les prétentions ou les faits contre lesquels il avait protesté.'

productive of factual results before it can have the effect of preventing the acquisition of title by prescription.¹

7. Requirement of action other than protest

The current view is that, having regard to the availability, since 1919, of some international machinery before which complaints can be lodged, a protest amounts to no more than a 'temporary bar'.² Such is in effect the view adopted by the Government of the United Kingdom, which maintained that a protest is 'by itself effective to manifest the objection of the protesting State and for a certain period reserve its rights'³ and that 'it is only true to say that the protest of a single State will not prevent an exceptional usage from becoming lawful by prescription *indefinitely*'.⁴

Tribunals which are seized of questions relating to the extent of the period after which protests cease to be of value and become academic, may be guided to some extent by principles which have been developed mainly in the course of proceedings before the International Court of Justice. The view that protests lost their force unless they were followed by further acts contesting the claim was substantially adopted by the United Kingdom as an accurate representation of the existing law. Mere repetition of the protest was not enough to guarantee its effectiveness. Although due weight must be given to intrinsic factors such as the special interests of the State in relation to the nature of the opposing claims and to its geographical propinquity to the area concerned, such factors could not be considered as decisive of the importance to be attached to the protest.⁵ Of more importance, in the view of the United Kingdom Government, is 'the *nature* of the protest and the action taken by the protesting State to safeguard the right which it conceives to have been infringed. . . . The protest of a single State

¹ Sørensen, in *Acta Scandinavica Juris Gentium*, 3 (1932), p. 159, writes: 'Une protestation qui, par ailleurs, reste sans résultats, n'a dès lors pour effet que de retarder le moment de l'acquisition définitive par la prescription.' Brüel (loc. cit., p. 88) advanced the somewhat unexpected view that it would be unwise to insist on a protest being effectual because such a requirement would run counter to the desirable trend of abandoning private in favour of public enforcement and preservation of rights.

² See Johnson in this *Year Book*, 27 (1950), p. 346.

³ *Fisheries case: Pleadings*, vol. ii, p. 652.

⁴ *Ibid.*, p. 654. The United Kingdom appears to have admitted the possibility that in some circumstances mere protests might be of more definite effect. It was suggested in the *Minquiers and Ecrehos* case that 'the character of the action taken by the protesting State must be related to that being taken by the State acquiring title, and the two must be considered together. Minor manifestations in the purported exercise of title might well be adequately met by protests.' This was not applicable with regard to acts of such a character as to create a situation of urgency (*Oral Pleadings*, vol. iii, p. 351).

⁵ See *Fisheries case: Pleadings*, op. cit., vol. ii, p. 653. And see Gidel: 'Une seule contestation émanant d'un seul Etat ne saurait infirmer un usage; les contestations ne peuvent d'autre part être placées toutes sur le même plan, sans distinction de leur nature, de la situation géographique ou autre de l'Etat dont elles émanent.' (Op. cit., p. 634.) Gidel adds that each must be considered in relation to the circumstances of the particular case against the background of the guiding principle expressed in the maxim *quieta non movere*.

... is effective to prevent the establishment of a prescriptive title precisely to the extent that the State takes all necessary and reasonable steps to prosecute the available means of redressing the infringement of its rights.¹ The *Reply* then proceeded to elaborate the additional measures which must be taken to make the protest effective. Not surprisingly, the suggested measures follow closely the lines of action pursued by the United Kingdom during the course of the dispute with Norway. They comprised the active prosecution of the objection through diplomatic negotiations, the arrangement of a *modus vivendi* and, ultimately, the reference of the dispute, or the willingness to refer it, to an international tribunal for adjudication. The attention of the Court was drawn to the fact that the United Kingdom had taken all the available steps necessary to permit the protest of a single State to invalidate a usage.²

That the requirement of further steps of this nature was not a point of view adopted solely for the occasion of the *Fisheries* case is indicated by evidence of the expression of similar views in other circumstances. The reactions of the United Kingdom to the incidents which gave rise to the *Corfu Channel* case are described in the *Reply of the United Kingdom* in that case as follows: '... the British forces refrained from the use of any force and the incident was followed up in a peaceful manner in the first case by diplomatic protests and in the second case ... by recourse to the Security Council of the United Nations'.³ On 23 March 1949 the Under-Secretary of State for Foreign Affairs, in reply to the question of a member of the House of Commons arising out of the establishment by nationals of Argentina and Chile of posts on British territory in the Falkland Islands Dependencies 'in defiance of our protests', referred to the British offer to bring the dispute before the International Court of Justice, and to the fact that this offer had been refused. He added: 'I do not agree that the Government's attitude has been weak. I think we have shown a good example of restraint in this matter and of going through the proper forms of international collaboration.'⁴

The proceedings in the *Minquiers and Ecrehos* case tend to endorse the view that protests may not of themselves be sufficient to prevent the acquisition of title by prescription and that courts will require evidence of the assumption by the protesting State of some positive initiative towards settlement of the dispute in the form of an attempt to utilize all available and appropriate international machinery for that purpose. Whereas the

¹ *Pleadings*, vol. ii, pp. 653-4.

² See, for example, *ibid.*, vol. ii, pp. 656, 678. In the event, it proved to be unnecessary for the Court to consider this argument in its Judgment, as it came to the conclusion that the United Kingdom had acquiesced in the Norwegian system of delimitation and therefore its subsequent opposition was out of time.

³ International Court of Justice, the *Corfu Channel* case (1950): *Pleadings*, vol. ii, p. 277.

⁴ *Hansard, House of Commons Debates* (5th series), vol. 463, No. 86, col. 343.

United Kingdom contended that protests produced no legal effects unless followed by other action, such as reference of the dispute—or a proposal to refer it—to an appropriate international organization or tribunal,¹ the French submission, based upon the Award in the *Chamizal Arbitration*,² was that since resort to force or the severance of diplomatic relations might have strained to breaking-point the relations between the two States, ‘paper’ protests sufficed to prevent the acquisition of title.³ Judge Carneiro in his Individual Opinion commented upon the French submission in words which explicitly approved the main British contention. After praising the moderation displayed by France he made the following observations: ‘Could [France] not have done anything else? It could have, and it ought to have, unless I am mistaken, proposed arbitration; all the more so since the two States were bound by the Treaty of October 14th, 1903, which provided for the settlement by the Permanent Court of Arbitration of all legal disputes or disputes involving the interpretation of a treaty.’⁴ Pointing out that the Award in the *Chamizal Arbitration* of 1911 related to the period between 1848 and 1895 when there was no international tribunal, he remarked that such a tribunal had now been in existence for many years, and added: ‘Why did France not at least propose that the dispute should be referred to this tribunal as England has done, after more than half a century of intermittent and fruitless discussion? The failure to make such a proposal deprives the claim of much of its force; it may even render it obsolete.’⁵

8. *Cases of sufficiency of protest*

It may be true, as has been asserted, that one result of the advent and development of machinery for the settlement of international disputes has been to reduce the significance of the diplomatic protest in the field of acquisitive prescription.⁶ However, the scope of the possible exceptions to the statement that protest is not now the principal mode of interrupting prescription remains wide enough to merit further consideration. There still exist circumstances in which what has been described as ‘the somewhat crude and ineffective method of the diplomatic protest’⁷ may be of decisive

¹ See *Reply* submitted by the United Kingdom in the *Minquiers and Ecrehos* case, para. 230; and see the *Oral Pleadings*, vol. iii, pp. 350, 352.

² See above, pp. 308–9.

³ *Minquiers and Ecrehos* case: *Oral Pleadings*, vol. iii, p. 384.

⁴ *I.C.J. Reports*, 1953, p. 107; and see *Reply* submitted by the United Kingdom in the *Minquiers and Ecrehos* case, para. 230: ‘The United Kingdom Government submit that, under international law, diplomatic protests may act as a temporary bar to the acquisition of title, but that they do not act as a complete bar unless, within a reasonable time, they are followed up by reference of the dispute to the appropriate international organization or international tribunal—where such a course is possible—or, at the least, by proposals to that effect, which the other party rejects or fails to take up.’

⁵ *I.C.J. Reports*, 1953, p. 108. And see Johnson, loc. cit., p. 342.

⁶ See *ibid.*, p. 346.

⁷ See *ibid.*, p. 341.

importance. It has been pointed out¹ that where there is no binding obligation upon States to submit disputes to the determination of international tribunals, a wronged State may have no recourse other than protest. If this is true in the event of wrongs which are clearly actionable, it is true also of wrongs merely anticipated as a result of published claims. A similar difficulty arises in cases where redress might be sought by application to a political agency. If the subject-matter of a dispute is not of sufficient importance or is for any other reason excluded from the category of disputes with which that agency has been constitutionally empowered to deal, a wronged State is, in this case also, restricted to making protests in an effort to safeguard its rights. Considerations such as these 'enhance the importance . . . both of protest and of the failure to protest'.²

Mention has already been made³ of the frequency with which States have asserted exceptional claims by means of municipal legislation. It has been suggested that when a claim is made in this way without actually being enforced by the State in question—e.g. when a State has claimed a belt of territorial waters of a width far in excess of that considered to be in accordance with international law by the majority of States, but has taken no positive steps to enforce its claim by the arrest of foreign vessels found fishing within the forbidden limits—the proper and probably the only effective course open to an aggrieved State is to protest formally through the diplomatic channel. Having suffered no actual infringement of its rights, it is unlikely that an aggrieved State has any substantial cause of action before an international tribunal.⁴ It is submitted that in such cases a protest which was promptly presented and subsequently maintained would suffice to reserve the rights of the protesting State, at least until the attempt is made to enforce the legislation. In view of the necessity of

¹ See Lauterpacht in this *Year Book*, 27 (1950), pp. 396-7.

² *Ibid.*, p. 397.

³ See above, pp. 303-4.

⁴ Cf. McNair, *The Law of Treaties* (1938), p. 128, in which it is stated that where a treaty is concluded which has 'for its object or certain consequence' the infringement of the rights of a State, that State is entitled to protest 'and to apply to the Permanent Court of International Justice, or to any other tribunal to which the disputants may have agreed to refer their disputes, for a declaration and for interlocutory relief. It is unnecessary to wait until the apprehended injury occurs.' Again this raises the question of compulsory jurisdiction of the tribunal to which application is made for relief. To seek a remedy by way of injunction to restrain the alleged wrongdoer from enforcing its legislative claims before an actual wrong has been committed would not appear to be a feasible procedure in the present stage of development of international law. If it were, in fact, possible to proceed by way of applying for a declaratory judgment in the face of anticipated infringements of rights, or at least of infringements of a nature which, if permitted to take place, would do irreparable harm, much of the value of recording a protest would disappear if the protesting State failed to apply for at least interim measures of protection. Diplomatic protest would remain an effective method of reserving rights in circumstances where the tribunal could not assume jurisdiction; and a protest might, as has been suggested above, lead to the withdrawal of the objectionable legislation. It may be noted that the acts involved in disputed claims to prescriptive and historic rights are not usually of such a character that their continuance would prejudice irreparably the eventual rights of the parties, and the basis of a successful application for measures of interim protection would therefore be lacking.

proving some actual exercise of sovereignty, in the case of a prescriptive title, or actual and exclusive enjoyment of the right concerned, in the case of historic title, these could hardly be perfected on the basis of mere legislative claims unsupported by evidence of enforcement.¹ This is presumably the kind of situation envisaged by the Agent for the United Kingdom in the course of the oral proceedings in the *Minquiers and Ecrehos* case when he suggested that the type of action taken by the protesting State must be related to the type of acts against which the opposition is directed, and that on occasions mere protests might suffice to nullify claims of a minor character.² During the oral hearings in the *Fisheries* case the Agent for the United Kingdom gave expression to a similar train of thought in these words: 'The decree made by a State is only one aspect of the matter. The other and equally important aspect is the attitude of other States towards the decree and in particular . . . to its enforcement against their nationals or vessels. . . . The paper protest is at least as important as the paper decree.'³

Similar considerations are relevant in the case of a situation which is of recent origin. In the absence of the consolidating factor of the passage of time, protest alone may be adequate to protect the rights of the protesting State.⁴ The question of prescriptive or historic claims does not arise in this case, and the doctrine of acquiescence is inapplicable. In its *Reply* in the *Fisheries* case the United Kingdom Government assented in general to the proposition that a single protest of one State did not invalidate a claim of right, 'so long as it is kept in mind that it relates strictly to the acquisition of title not by mere usage but by *prescriptive* usage'.⁵ Although the full import of this qualification is not readily apparent, the implication may be that where the question is one of acquisition of rights by a process akin to the formation of customary rules, in which, in theory at least, the passage of time plays no essential part, the single protest of a single State would suffice, at any rate so far as the protesting State is concerned. If the invalidation is intended to extend to the usage as a whole in relation to all

¹ The Agent for the United Kingdom pointed out in the *Fisheries* case that 'it takes a long time before a prescriptive case can be built up on the basis of mere silence when there has been no enforcement of the Decree against the nationals of the State in question' (*Pleadings*, vol. iv, p. 346).

² See *Minquiers and Ecrehos* case: *Oral Pleadings*, vol. iii, p. 351.

³ *Fisheries* case: *Pleadings*, vol. iv, p. 37; and see *ibid.*, p. 37: 'For the Court, as evidence of the practice of States the Swedish and Danish protests [against the enforcement of a Soviet Decree claiming a 12-mile belt of territorial waters] are every bit as valuable evidence as the text of the Soviet decree.'

⁴ See, for example, the *Fisheries* case: *Pleadings*, vol. iv, p. 308: 'Nous sommes également d'accord avec le Gouvernement britannique pour admettre que, si une prétention nouvelle est formulée par un Etat, cette prétention n'est pas opposable à un autre Etat qui, dès le début et d'une manière non équivoque, y aurait fait opposition. Une opposition, même isolée, suffirait en pareil cas, pour préserver les droits de l'opposant, parce qu'il s'agit d'une prétention nouvelle et sur laquelle, par conséquent, l'action du temps n'a pas encore pu produire ses effets.'

⁵ *Ibid.*, vol. ii, p. 652.

States affected by it, the proposition could only be tenable in respect of the protest of a State whose influence or interest in the sphere of activity to which the question related is paramount.¹

V. *Relevance of protest of a single State*

In connexion with the preceding observations reference may be made to the question of the effect of protest of a single State on the formation of historic title. Throughout the pleadings in the *Fisheries* case there appears to have persisted a disagreement between the parties as to the weight to be attached to the protest of a single State. The United Kingdom and Norway were at one in conceding that a State with established rights did not lose them by virtue of an essential change in the content of the customary law provided that it had persistently protested in an unambiguous manner from the first signs of change known to it.² The difficulties derive from the difference of approach of either side to the question of historic title in general. The United Kingdom maintained that an historic title was in the nature of an exception and derogated from the customary rules of international law, whereas Norway based her historic title on the enjoyment of rights which existed prior to the development of the customary rules in question. This to some extent explains why the United Kingdom stressed the necessity for a consensual basis for exceptions to the customary rules and why Norway denied that the assent of other States was essential. While admitting the efficacy of protest to preserve existing rights against customary rules developed subsequently, she was yet able to deny effect to the protests of a State against the exercise of historic rights, at least when the remainder of the international community had apparently acquiesced.

When a mere usage against which a State has protested is one which, if permitted to develop into a right based on custom, would derogate from rights vested in other States in common, the attitude of the other States concerned is a relevant factor in assessing the value of the protest of a single State. If the other States have acquiesced in the repetition of the practice complained of to such an extent that the conviction is generally prevalent that that practice has become part of the established legal order, then a single State which has repeatedly protested, if it has limited its objections to the making of protests and has failed to utilize other available machinery, will have lost those rights which its protests were intended to preserve. *A fortiori* it will lose those rights if its objection is limited to a single initial

¹ The suggestion has been made that in the formation of a customary rule less importance should be attached to the number of States participating in its evolution and to the period within which the transformation takes place than to the relative importance, in the matter in question, of the States inaugurating the change. See Lauterpacht in this *Year Book*, 27 (1950), p. 394.

² See, for example, the speech of the Attorney-General (Sir Frank Soskice): *Pleadings*, vol. iv, p. 136.

protest. The United Kingdom Government adopted this line of argument in the *Fisheries* case.¹ However, they urged that the principle by which the rights of the protesting State became barred by lapse of time was based either on a presumption of tacit acquiescence flowing from continued relative inaction or on the maxim *quieta non movere*. The 'temporary bar' which is constituted by protest extends, in these circumstances, only to the period, long or relatively short, during which the bulk of the international community remains uncommitted to the view that the usage complained of is in conformity with the law. Once the stage has been reached at which the usage has assumed the complexion of legality generally recognized, further diplomatic protests on the part of the objecting State are without effect.

It is far from clear, however, that a State which has from the outset protested vigorously and unambiguously and which has supplemented its repeated protests by utilizing every other means available to it, all without result, should be deemed to have forfeited its rights merely because of the inactivity of other States. There is little justification for allowing a presumption of acquiescence flowing from continued inaction to prevail in the face of facts to the contrary. To apply the maxim *quieta non movere* indiscriminately to such circumstances might be equally productive of injustice. It may be admitted, as the Norwegian *Reply* maintains, that 'une opposition isolée n'est point capable d'empêcher la formation du titre historique; et qu'il convient de ne pas oublier, quand on doit statuer en pareille matière, le sage conseil que contient la maxime *quieta non movere*'.² What is controversial is whether such a title is valid *erga omnes*, as Norway contended, or whether it is valid only as against those States which have either expressly assented or acquiesced. In other words, do the repeated protests of a State which alone has from the first unambiguously and persistently manifested its objection to a novel practice and which has sought to resolve the dispute by all available means, have the effect of rendering that practice invalid in relation to the protesting State and incapable of becoming a source of obligations to which the protesting State is bound to submit as a matter of law? It is submitted that reasons of both justice and logic militate in favour of the view that a State, even although it is the only member of the international community to adopt such a position, which has thus clearly demonstrated its opposition to the change, does not by virtue of the acceptance of the change by other States, forfeit its rights. This was certainly the view of the United Kingdom Government. It was clearly

¹ See *Pleadings*, vol. ii, p. 654: 'But, if the usage which is protested against is repeated and is acquiesced in by other States, then the question may ultimately be asked why the protesting State, if it attaches importance to its rights, has not taken further steps to bring the matter to contestation and settlement. In other words, a State which contents itself with paper protests and does not use the available means of pressing its objections may after a certain lapse of time be debarred from further questioning what has become part of the established legal order.'

² See *ibid.*, vol. iii, p. 462.

expressed by the Attorney-General, and may be considered as a logical extension of the Norwegian view,¹ that the single protest of a single State sufficed to preserve the rights of the protesting State when the claim or situation was of a novel character. The Attorney-General was emphatic in his insistence on the efficacy of the diplomatic protest supported by appropriate attempts to reach a settlement. He was in agreement with the argument advanced by Norway that a State with established rights does not lose its rights by virtue of a change in the customary law provided that it has unambiguously and persistently manifested its dissent therefrom. 'How then', he continued, 'can a State, which has established rights under customary law to regard certain areas of sea as high seas and which unambiguously and persistently protests against a claim purporting to alter its rights, lose its rights merely because other States do not immediately take similar action?'² Such a contention would imply that 'if only one State protests, a new claim becomes established as against all other States, including the protesting State. The new claim is apparently to be enforceable against all States regardless of whether the protesting State has had a reasonable opportunity to prosecute its objection by diplomatic and legal action and regardless of whether a sufficient time has elapsed to make it reasonable to imply the assent of other States.'³ This view the Government of the United Kingdom declined to accept.

If there is some justification for attributing to the diplomatic protest, properly supplemented, the power to prevent the formation of an historic title, there is all the more reason to suppose that it is apt—provided, again, that it is properly supplemented—to interrupt the running of prescription. The attitude of other States is not a directly relevant consideration. The decisive consideration is whether the exercise by the claimant State of the adverse right, or the enjoyment of the adverse possession, has been peaceful and uninterrupted. It is submitted that a protest, if it is prompt, unequivocal and maintained, and if it is coupled with recourse by the protesting State to all other legitimate demonstrations of its will to preserve its rights, will suffice to counter effectively the continuity and the peaceful character of a nascent prescriptive claim and will prevent the creation of any general conviction that the condition of affairs is in conformity with international order. It would be unreasonable to draw the same disabling consequences from the conduct of a State which has acted energetically in defence of its rights, by protesting and taking other appropriate action, as would follow the inaction of a State which was either indifferent to losing its rights or negligent in asserting them.

¹ See *Pleadings*, vol. iv, p. 308.

² See *ibid.*, p. 136.

³ *Ibid.*, pp. 135-6.

Annex 192

S. Africa, *Al-Shabaab as a Transnational Security Threat*, in WAR AND PEACE IN SOMALIA: NATIONAL GRIEVANCES, LOCAL CONFLICT AND AL-SHABAAB, ed. M. Keating and M. Waldman (Oxford University Press, 2018)

AL-SHABAAB AS A TRANSNATIONAL SECURITY THREAT

Sahan Africa

Authorship

Sahan Africa is a think tank and research organization with offices in Somalia, Kenya, and the United Kingdom. Its team has expertise in political affairs, security dynamics, and governance, and focuses on the Horn of Africa, East Africa, and the Middle East.

Summary

Harakaat Al-Shabaab Al-Mujahidin, Al-Qaida's affiliate in the Horn of Africa, has long been perceived as a Somali organization—albeit one that represents a security threat to the wider region. But since 2010, Al-Shabaab has aspired to become a truly regional organization, with membership and horizons that transcend national borders.¹ Since then, it has become active in six countries of the region, striking five of them with terrorist attacks.² Al-Shabaab is clearly no longer an exclusively Somali problem, and requires a concerted international response.

This expansion of Al-Shabaab's operational reach is in large part the result of the strategic direction adopted by its former leader, Ahmed Abdi Godane.

Sahan Africa, *Al-Shabaab as a Transnational Security Threat*. In: *War and Peace in Somalia: National Grievances, Local Conflict and Al-Shabaab*. Edited by Michael Keating and Waldman Matt, Oxford University Press (2018). © Oxford University Press.

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In 2013, Godane reorganized Al-Shabaab's military wing to include two transnational units—one dedicated to operations against Kenya, Tanzania, and Uganda, and another against Ethiopia—and gave instructions for Al-Shabaab's special operations wing, the Amniyat, to step up attacks against neighbouring countries.

Al-Shabaab-affiliated networks and sympathizers in Kenya also continued to plan terror attacks during this period. Although Al-Hijra, Al-Shabaab's Kenyan affiliate, experienced growing pressure from the security services and withdrew from major hubs of activity, its radicalization and recruitment efforts subsequently targeted the prison system, while operatives and recruits—including a growing proportion of women—continued to travel to Somalia for training and instructions.

The report concludes with the following recommendations for further action:

- Enhanced security cooperation in countering Al-Shabaab, including a joint review to identify gaps, challenges, and opportunities in strengthening collaboration; more joint activities, including inviting Tanzania to participate in relevant IGAD activities.
- Better understanding of the Improvised Explosive Device (IED) threat and possible counter-measures, including appropriate Counter-IED (C-IED) strategies, enhanced technical capabilities for post-blast investigation and analysis, and improved information sharing.
- Adaptation to evolving patterns of radicalization and recruitment, such as the shifting of extremist activities to new geographic areas; sensitization and training of public officials; enhancing surveillance of terrorist networks inside the prison system; and undertaking additional research into current trends of radicalization and recruitment among young women.

Introduction

The Horn of Africa has long been confronted by numerous complex and fast-evolving transnational security threats. Intra-state warfare, boundary disputes, resource conflicts, and the proliferation of small arms are longstanding and persistent challenges. But in recent decades the region has been confronted with new threats, such as terrorism, organized crime, piracy, cybercrime, and trafficking in drugs, humans, and weapons. The expansion of internet access, ease of travel, and the growing sophistication of extremist and

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criminal groups render these threats increasingly transnational, thus requiring a collaborative response.

In 2015, the IGAD Security Sector Program (ISSP) launched a new Transnational Security Threats (TST) Initiative to promote security cooperation between Member States. Under the TST Initiative, the governments of the Federal Democratic Republic of Ethiopia and the Republic of Kenya requested that ISSP assist them in preparing a submission to the Sanctions Committee that responds to successive United Nations Security Council (UNSC) resolutions calling on Member States to take specific actions against Al-Shabaab.³ These developments led to research by Sahan which forms the basis of this paper, focusing on Al-Shabaab's presence and activities in each country, as well as the opportunities for enhanced cooperation in countering this threat.

Between April 2015 and June 2016, a Sahan team operating under the auspices of ISSP conducted primary and secondary research on the presence of Al-Shabaab in Ethiopia and Kenya, with special emphasis on cross-border networks and operations. Sahan personnel, working in close consultation with the Member States, interviewed members and former members of Al-Shabaab and its Kenyan affiliate, Al-Hijra, as well as close associates, and received regular briefings from government officials, access to relevant documentation and evidence, and the opportunity to observe operations against Al-Shabaab. The Sahan team adhered strictly to the standards of evidence required of UN Expert Groups and other research bodies. The team based its findings on a "reasonable grounds to believe" standard of proof. Minimum standards included reliance on at least two credible, independent, and mutually corroborating sources or a single credible source supported by independently verified physical, documentary, audio-visual, or electronic evidence.

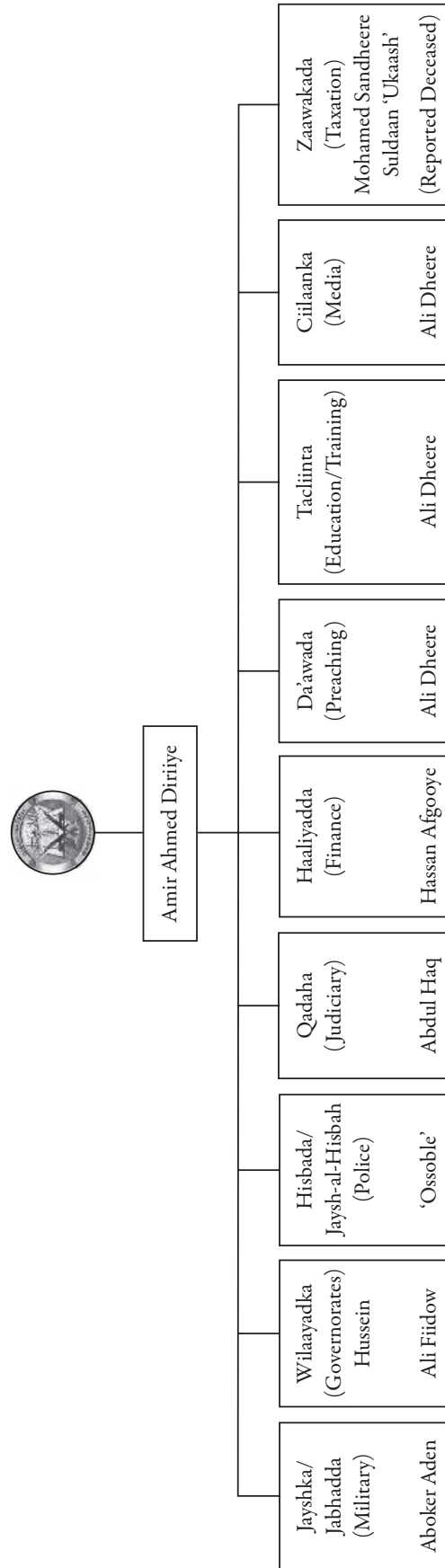
The second phase of this initiative commenced in August 2016 and concluded in May 2017 with the submission of a report to the UN Security Council Committees on Somalia/Eritrea and the so-called Islamic State (IS)/Al-Qaida. This summary covers only Phase 1 of the Initiative, but some information has been updated in light of the findings of Phase 2.

Harakaat Al-Shabaab Al-Mujahidin

Al-Shabaab continues to pose a threat to peace and security in Somalia, conducting an insurgency against federal and regional Somali forces as well as troops contributing to the African Union Mission in Somalia (AMISOM).

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Figure 1: The leadership of Al-Shabaab in 2016



AL-SHABAAB AS A TRANSNATIONAL SECURITY THREAT

Al-Shabaab's zone of control has remained relatively stable as the organization continues to engage in asymmetrical warfare, waging steady attacks on political, military, and civilian targets, collecting taxes, extorting rents from businesses, and running effective, parallel justice and educational systems—even in government-controlled areas.

The jihadists' tactics, techniques, and procedures (TTPs) have also remained consistent, although the reporting period featured an increase in the number of complex attacks against hotels in Mogadishu and AMISOM/Somali National Army forward operating bases. The proliferation of attacks inside Mogadishu demonstrates that Al-Shabaab maintains considerable freedom of movement and operational capacity inside the capital.

Leadership

Al-Shabaab's overall leadership structure throughout remained largely unchanged in 2016, with changes made to the positions held by certain individuals during 2017. Despite persistent rumours of his ill health, the new "Amir" Ahmed Diiriye continues to hold power without any overt challenges to his position. The group has endured some second-tier leadership losses, including the reported killing of a top tier Amniyat officer. As with previous leadership attrition, however, these deaths do not appear to have significantly altered the operational capacity of the organization.

The most notable alteration in Al-Shabaab's leadership has been the establishment of a new "Council of Clan Leaders", which held its first congress in October 2016. The event was hosted by the group's "governor" for Bay and Bakool regions, Abdullahi Ma'allim Geeddow (aka "Abu Farhiya"). Following the conference, the then head of Al-Shabaab's "Office for Governorates", Hussein Ali Fiidow, announced the reorganization of the group's governance structure from seven governorates (or *wilayat*) into 11 across Somalia. The Council, which currently comprises four elders from each *wilaya*, signals Al-Shabaab's most overt attempt to co-opt traditional clan elders into the group's governance structure.

Modus Operandi

Composite Insurgency

Although Al-Shabaab's rank and file are from all Somali clans, as well as other countries, the movement skilfully appropriates local grievances, aligning itself

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with disaffected groups. Al-Shabaab typically targets communities that harbour grievances against government authorities; feel historical resentment against more dominant clans; belong to minority groups that have long been marginalized; or have lost influence during the civil war. The result is a “composite insurgency” in which a patchwork of different groups support, tolerate, or collude with Al-Shabaab to varying degrees, albeit for largely parochial reasons.

During 2016, Al-Shabaab made significant efforts to influence the behaviour of specific clans, employing alternating cycles of violence and negotiation to steer them into the jihadist camp. Key examples included the Gaalje’el and Awrmale in Lower Jubba, elements of the Dir in Lower Shabelle, of the Abgaal in Galgaduud, and a sub-group of the Habar Gedir in Mudug. In several cases, Al-Shabaab applied “collective punishment” against the clan concerned, killing community members, confiscating livestock, and threatening forced displacement unless they came to the bargaining table.

Similarly, Al-Shabaab has at times intervened to influence the choice of clan leadership. While engaging in a negotiation with a sub-clan in Lower Jubba in December 2016 for example, Al-Shabaab leaders demanded that the community appoint a new *Ugaas*⁴ who met with the jihadists’ approval.

Protection, Taxation, and Justice

In areas under its direct control, Al-Shabaab provides security through its rudimentary justice system based on the group’s interpretation of Sharia law, and imposes a structured form of taxation. In some areas, the group also places rules and restrictions on the movements of people and goods, violation of which can result in imprisonment, fines, or even accusations of spying.

Al-Shabaab extends some of these measures to areas beyond its control with varying degrees of success. Al-Shabaab courts are widely considered to be more effective and less corrupt than the alternatives, especially with respect to disputes over land and property. Residents of Mogadishu routinely travel to an Al-Shabaab court near Afgooye to lodge complaints, while disputes in Kismayo may be heard by Al-Shabaab courts in Behane or Jilib. Yet the group’s attempts to expand *zakat*⁵ have encountered mixed results. In towns under government control, businesses routinely pay “taxes” to Al-Shabaab in exchange for peace and security: essentially a protection racket. But in rural areas, Al-Shabaab has encountered resistance from communities that perceive the group’s demands as unwelcome or excessive.⁶

AL-SHABAAB AS A TRANSNATIONAL SECURITY THREAT

Improvised Explosive Devices (IEDs)

Somalia experienced a significant increase in the number of IED attacks conducted by Al-Shabaab in 2016, with 395 IED incidents recorded in comparison with 265 the previous year. Although targeting has largely remained the same—focused on members of AMISOM and Somali security forces—the number of reported casualties from such attacks has risen alarmingly, the majority of them civilians:⁷ an estimated 1,839 IED-related casualties were recorded in Somalia in 2016, with 1,116 individuals wounded and 737 killed—an increase of more than 800 victims over 2015.⁸

The rise in deaths and injuries can be at least partially attributed to an upswing in the number of complex attacks, notably against hotels in Mogadishu⁹ and AMISOM forward operating bases. Such attacks generally involve various types of IEDs, including Person-Borne IEDs (PBIEDs), Vehicle-Borne IEDs (VBIEDs), Suicide-Vehicle-Borne IEDs (SVBIEDs), and suicide infantry.

Indeed, Al-Shabaab has augmented IED usage during the course of the reporting period, notably through an increase in both the number and size of S/VBIEDs and Directional Fragmentation Charges (DFCs).¹⁰ Instead of using cars or minivans to deliver VBIED attacks, the group has more recently shifted towards the use of SVBIEDs carried inside much larger trucks, allowing an augmentation of the quantity of explosives.¹¹ Al-Shabaab conducted only one such attack in 2015, but carried out five in 2016¹² and two more in the first quarter of 2017.

Other TTPs include the increasing use of secondary IEDs to target primary responders in Mogadishu or AMISOM/SNA convoys in remote rural areas;¹³ of area saturation (the placement of multiple IEDs within a target area) as a defensive measure; and of command-wire IEDs (CWIEDs) instead of the common radio-controlled IEDs (RCIEDs) in order to circumvent electronic counter-measures used by AMISOM and the SNA.

Traditionally, Al-Shabaab has built IEDs using military-grade explosives scavenged from locally acquired munitions and supplemented with aluminium. But the difficulty in acquiring high quantities of such explosives in some parts of Somalia has led the group to produce fertilizer-based home-made explosives (HME).¹⁴ Fertilizer is imported legally into Somalia for agricultural use and is easily procured in local markets.¹⁵

Finally, throughout 2016 and into early 2017, IEDs in at least three distinct locations across southern Somalia have been manufactured with identical

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components, and in certain cases likely from the same munitions supply. The same types of large pipes that hold explosives charges in SVBIEDs and VBIEDs were found in the production of RCIEDs and DFCs. These observations suggest that Al-Shabaab is currently using a centralized logistical chain for the production of IED components, which are then delivered to smaller hubs across the country where they are assembled for targeting.

*Al-Shabaab as a Transnational Threat**Overview of the Regional Threat*

Although Somalia remains Al-Shabaab's geographic centre of gravity, the group has long demonstrated a determination to operate beyond Somalia's borders and maintains a significant presence in at least six countries of the region. As early as 2010, Godane harboured aspirations for Al-Shabaab to acquire a regional character.¹⁶ He established two new units dedicated to external operations, one targeting Kenya, Tanzania, and Uganda, and the other Ethiopia, while also tasking Al-Shabaab's special operations and intelligence branch, the Amniyat, with targeting Somalia's neighbours.

Al-Shabaab has also inspired and encouraged the emergence of affiliated groups and autonomous networks of jihadists across the region. Although they differ considerably with respect to operational capability and the nature of their relationship with Al-Shabaab, all of these groups aspire and actively plan to engage in acts of terrorism.

*Kenya**Jaysh Ayman*

In 2014, Al-Shabaab launched a new offensive in Kenya, with the creation of a new unit dedicated to staging operations in Kenya, Tanzania, and Uganda: Jaysh Ayman (a.k.a. Jeshi la Ayman). Despite its profile as an East African force,¹⁷ the group has limited its activities to northern Kenya, particularly in Lamu county, and southwards along the Kenyan coast. Attacks typically originate within Somalia, with groups of militants crossing over into Kenya to conduct operations and then retreating across the border.

Jaysh Ayman proved capable of carrying out a sustained campaign against Kenyan government and civilian targets, causing mass casualties and characterized by extreme brutality. From June 2015 however, it suffered significant

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losses at the hands of the Kenyan security forces, and today the threat in Lamu county¹⁸ and at the coast¹⁹ appears to be contained. The militants' operational tempo in Garissa County also seems to have declined since the death in May 2016 of Mohamad Kunow, Al-Shabaab's military commander in Lower and Middle Jubba.²⁰

Since mid-2016, new trends in cross-border attacks include the targeting and looting of Kenyan police camps²¹ and vehicles,²² the reported use of IEDs to target first responders,²³ and the destruction of communications masts near the border.²⁴

Al-Hijra

Despite its operational limitations, Al-Hijra (formerly known as the Muslim Youth Centre, or MYC) remains Al-Shabaab's most important and active affiliate in the region. Faced with enhanced scrutiny from security services and the attrition of its leadership,²⁵ Al-Hijra has shifted its activities and radicalization and recruitment efforts away from Nairobi and Mombasa, the traditional hubs for jihadist activity in Kenya. Not only has the group invested in safe houses and networks throughout the country,²⁶ it continues to operate from within Kenya's prison system.²⁷ Imprisoned Al-Hijra members still direct plots against targets in Kenya using a variety of cells and networks, and routinely assist in the facilitation of individuals looking to join Al-Shabaab or IS. Al-Hijra is also placing a growing emphasis on the recruitment of girls and young women.

Sympathizers and Affiliates

Since 2006, the conflict in Somalia has left its mark on a generation of young East Africans, propelling growing numbers toward extremism. Some of these sympathizers have organized themselves into cells along the coast, using social media and mobile phone applications to share information and attempt to organize attacks, and hundreds (possibly thousands) have used Al-Shabaab and Al-Hijra networks to travel to Somalia, and even Syria.²⁸

In Tanzania,²⁹ an emerging network has operational ties to Al-Hijra, and unconfirmed connections to Mombasa-based cells.³⁰ The group's motivation remains unclear but an initial assessment suggests a financial rather than an ideological inclination.³¹

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Ethiopia

Al-Shabaab has long sought to strike Ethiopia—so far without success. It came closest to its goal in 2013, when a team of suicide bombers succeeding in deploying to Addis Ababa, but accidentally blew themselves up following an abortive attempt to bomb a World Cup qualifying match at a major stadium. In March 2014, months before his death, Godane renewed his call for “jihad” against Ethiopia.³²

Jaysh al-Usra’s Ethiopian Wing

In parallel with the establishment of Jaysh Ayman, Godane took steps towards the establishment of an Ethiopian Al-Shabaab military unit, initially headed by a veteran jihadist commander named Ali “Diyaar” (a.k.a. “Warsame”).³³ The new Jaysh unit was based at Diinsoor and by late 2014 had approximately 500 fighters: mainly Ethiopian Somalis, but also a significant Oromo contingent as well as smaller numbers from other Ethiopian ethnic groups. The unit has yet to stage any significant military operation inside Ethiopia.

The Amniyat

In late 2013, Godane also tasked key figures in Al-Shabaab’s special operations and intelligence branch, known as the Amniyat, to begin planning and preparing operations against Somalia’s neighbours. The Amniyat network³⁴ has been implicated in the 2013 Westgate Mall attack in Nairobi, the 2014 suicide bombing of La Chaumière restaurant in Djibouti, and the massacre of over 60 Kenyan civilians near Mandera in two separate attacks in late 2014. Since May 2014, it actively began planning suicide attacks against the Ethiopian capital, Addis Ababa, recruiting and deploying members of attack cells, mobilizing networks of activists and sympathizers, and collecting information on possible targets. Its largest operation in Ethiopia to date is the “Bole Wedding plot”, which involved the attempted bombing of a shopping mall in Addis Ababa. Although the plan initially involved deploying three teams³⁵ totalling some 20 operatives, it ultimately failed.

Conclusions

IGAD Member States have already taken measures to counter the expanding threat from Al-Shabaab, whether within their own borders, through their

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support to Somali authorities, or through regional and continental security cooperation mechanisms. Indeed, IGAD Member States participate in the African Union Mission in Somalia (AMISOM) combating Al-Shabaab, and are engaged in diplomatic efforts to bring political stability to Somalia. Ethiopian National Defence Forces (ENDF) have been committed to AMISOM since January 2014, playing a leading role in the ground offensive of Operation Jubba Corridor in south-western Somalia,³⁶ and helping their Somali counterparts by opening roads, providing technical expertise,³⁷ and monitoring Al-Shabaab activities.

The Kenya Defence Forces (KDF) entered Somalia unilaterally in October 2011 in response to the Al-Shabaab threat in the border area³⁸ then joined AMISOM in 2012.³⁹ They played a key role in liberating Kismayo in October 2012, and have since been operationally active with their Somali counterparts, engaging in joint operations, capacity-building, community engagement, and intelligence sharing.⁴⁰ Kenyan security forces have also expanded their footprint in northern Kenya, increasing their presence and monitoring of the border area, and launching several operations targeting Al-Shabaab in Garissa⁴¹ and Lamu counties,⁴² as well as stepping up efforts to identify Al-Shabaab networks and disrupt their activities across the entire country.⁴³

Yet the importance of further emphasis on cooperation and coordination cannot be overemphasized. As extremists linked to Al-Shabaab exploit weaknesses to operate across the region's borders, states must be capable of working together to ensure that security services throughout the region share a holistic view of the threats that they face. Member States should therefore consider working towards a more robust regional framework for security cooperation, intelligence sharing, and mutual legal assistance.

Recommendations

Specific, immediate measures to enhance cooperation in countering Al-Shabaab

Member States should consider convening a joint review to identify gaps, challenges, and opportunities in strengthening cooperation. The objectives of such a review might include:

- Establishing a clear understanding of the types of information all parties can share and the processes for doing so, including necessary levels of authorization, points of contact, and protocols for handling sensitive information (for example, call data and financial records).

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- Engaging systematically in more joint activities, such as:
 - Joint analytical teams or expert committees;
 - Joint units to investigate specific threats;
 - Establishment of enhanced liaison or “secondment” positions to allow familiarization across countries.

IEDs and Counter-Measures

Al-Shabaab’s use of IEDs has evolved at an alarming pace. Although Somalia is the epicentre of the regional IED threat, the TTPs tested in that country are routinely exported to neighbouring countries.

IGAD Member States vary widely in their capacity to prevent such attacks, and to conduct investigations after the fact. Most lack a comprehensive counter-IED (C-IED) strategy. It is therefore proposed that they seek ISSP’s support in enhancing their collective understanding of the IED threat, develop appropriate C-IED strategies, strengthen their technical capabilities for post-blast investigation and analysis, and improve information sharing within the region.

Adaptation to evolving patterns of radicalization and recruitment

As Al-Shabaab’s radicalization and recruitment efforts adapt to the investigative measures employed against them, authorities should maintain a proactive and flexible approach to monitoring these activities. Short-term operational responses might include:

- Sensitization of security officials in areas previously unaffected by extremism in order to identify and react appropriately to potential threats;
- Anticipating the swift reallocation of dedicated resources to areas with newly emerging threats to disrupt networks as quickly as possible;
- Enhancing surveillance of terrorism suspects and convicts inside prisons to identify individuals attempting to radicalize their peers or remain operationally engaged. Additional measures include:
 - Tighter controls to prevent contraband, especially mobile phones;
 - Closer vetting of and enactment of stiffer penalties for prison staff; and
 - Development of disengagement programmes for extremists in the prison system.
- Undertaking additional research into the radicalization of young women.

Annex 193

S. D. Farquhar, “When Overfishing Leads to Terrorism”, *World Affairs: The Journal of International Issues* 2, 2017

WHEN OVERFISHING LEADS TO TERRORISM

THE CASE OF SOMALIA

Somalia has the longest coastline in Africa and a wealth of marine resources. However, weak governance, lack of infrastructure and illegal, unregulated and unreported (IUU) fishing by foreign countries have impeded Somali efforts to take full advantage of the economic potential of these resources. The overfishing caused by IUU vessels has decreased the domestic catch, forcing local fishermen to turn to piracy. The increase in piracy has been mirrored by Al-Shabaab terrorist activity. Despite the different motivations of these two groups, profits from piracy have been used to fund terrorist activity and the two groups have become intertwined. This article reviews the case of overfishing in Somalia, its fostering of piracy and explores the link between piracy and Al-Shabaab. It suggests that nationwide economic stability and peace could be furthered with the improved management and development of Somali marine resources.

SAMANTHA D FARQUHAR

HISTORY

For understanding how circumstances in Somalia fostered Al-Shabaab activity and piracy, a review of its history is essential. Somalia's first contact with Islam occurred when a group of persecuted Muslims from Arabia sought refuge in the region at the time of Prophet Muhammad in the eighth century. Over time, these refugees integrated with local pastoral clans and developed

administrative and legal systems based on Sharia Law (Helen Chapin Metz and Thomas Leiper Kane, *Somalia: A Country Study*, Federal Research Division, Library of Congress, Washington DC, 1993, online at <https://www.loc.gov>). Clans are integral to Somali life as seen in day-to-day cultural, economic, political and social interactions. There are six major Somali clan-families. Four of them—the Darod, Dir, Hawiye and Isaaq—are predominantly pastoral and represent about 70 per cent of the population. The remaining two, the Digil and Rahanweyn, are agricultural and located mainly in the south where rivers are found. The rest of the country consists primarily of arid plateaus and plains, with some rugged mountains in the north near the Gulf of Aden coast. Due to sparse rainfall, nomadic pastoralism has been the principal occupation of clan-families in much of the country (*ibid*). Over the centuries, the Somali Peninsula and the East African coast were subject to various rulers, including the Omanis, the Zanzibaris, the Sharifs of Mecca and the Ottoman Turks. By 1885, there were five mini-Somalilands—the north central part controlled by the British; the east and southeast controlled by the French; the south controlled by the Italians; the Ogaden in the west controlled by Ethiopia and the southwest that became a part of Kenya. The British regarded northern Somalia mainly as a source of livestock for Aden, whereas the Italians developed plantation agriculture with bananas, citrus fruits and sugarcane in southern Somalia. Colonial control continued in various forms until Somalia gained independence in 1960. However, after independence the country faced several obstacles economically as well as internal instability and external threats (*ibid*).

By October 1969, domestic tensions manifest themselves in the assassination of President Abdirashid Ali Shermarke by one of his bodyguards, paving the way for army commander Major General Mohamed Siad Barre to take over. The new governing body, the Supreme Revolutionary Council, named Siad Barre president and aimed to break up the old administrative units into smaller entities as well as resettle many of the nomadic people. It also sought to promote nationalist and socialist goals by appointing “peacekeepers” to replace the traditional elders and by creating various committees in place of traditional clan groups. Historically, clans

Traditionally, Somalia has been a country that practiced agriculture and pastoralism. The lack of a developed fishing industry and government regulations made the waters of Somalia an ideal fishing ground for foreign fishing vessels. These were illegal, unregulated and unreported.

had relied on religiously devout males (*wadaddo*), who were usually the only literate individuals and often played judicial roles as well. Although Siad Barre proclaimed scientific socialism compatible with Islam, his regime attempted to reduce the influence of Muslim leaders, particularly in politics (*ibid*). To cement his personal rule and regain the Ogaden, Siad Barre launched the Ogaden War against Ethiopia in 1977. While the war officially ended in 1978, conflict continued with border raids and skirmishes for many years. Overall, the war caused the death of 8,000 men, the influx of about 650,000 ethnic Somali and Ethiopian Oromo refugees and was a severe drain on the economy. The economic crisis forced Somalia to devalue its currency and encourage privatisation. Economic output from agriculture and manufacturing however showed little progress and in some cases declined, partly as a result of intermittent droughts. The country lacked energy sources apart from charcoal and wood despite surveys indicating the likelihood of offshore oil in the Gulf of Aden. Transportation and communication networks were also minimal. Apart from livestock and agricultural products, which constituted the bulk of Somali exports, the country had a number of undeveloped sectors such as fishing, forestry and mineral deposits including uranium.

As the country continued to struggle, several organised internal opposition movements arose that were led by clans. To counter them, Siad Barre undertook increasingly repressive measures such that involved numerous human rights violations. Africa Watch reported that 50,000 unarmed civilians were killed in the course of Siad Barre's reprisals against the Hawiye, Isaaq and Majeerteen clans. Thousands more died of starvation resulting from the poisoning of water-wells and the slaughtering of cattle. In addition, hundreds of thousands sought refuge outside the country. The civil war ended in 1991 when Siad Barre was overthrown and fled the country, leaving anarchy behind as various clans fought for control (*ibid*). Less than a year later, the country's suffering from drought induced famine prompted international aid. The United States of America (US) was among the nations that sent peacekeeping forces to Somalia. The country's military presence threatened the clan militias and led to the October 1993 *Black Hawk Down* fiasco in which 18 US Army soldiers were killed and their bodies dragged through the streets. The event led to an immediate withdrawal of aid, leaving Somalia in a continued state of anarchy. This resulted in Somalia being seen worldwide as a dangerous failed state, overrun by poverty, piracy and terrorism. Since 1991, fourteen different governments have attempted to reorganise Somalia with little success. However, the country's failed state status is thought to have ended with the 2012 election of President Hassan Sheikh Mohamud (Stig J Hansen, "Somalia", *Africa Yearbook Volume 11*, 2015, online at <http://booksandjournals.brillonline.com>).

MARINE RESOURCES IN SOMALIA

Traditionally, Somalia has been a country that practiced agriculture and pastoralism (JB Véron, “La Somalie: Un Cas Désespéré”, *Afrique Contemporaine*, January 2009, online at <http://www.cairn.info>). Animals like camels and sheep were largely kept by farmers in the country. The lack of a developed fishing industry and government regulations made the waters of Somalia an ideal fishing ground for foreign fishing vessels. These were illegal, unregulated and unreported (IUU) fishers and their presence rapidly increased throughout the 1990s, leading to Somali waters being overfished and to declining catch for local fishermen (Sarah M Glaser, *et al*, *Securing Somali Fisheries*, One Earth Future Foundation, Denver, 2015, online at <http://securefisheries.org>).

Overfishing is deemed as the greatest threat to oceanic ecosystems today (Jeremy BC Jackson, *et al*, *Historical Overfishing and the Recent Collapse of Coastal Ecosystems*, 2001, online at <http://science.sciencemag.org>). This is a recent global phenomenon as until the twentieth century people believed the oceans to be an inexhaustible resource (Richard Peet, Paul Robbins and Michael Watts (Eds), *Global Political Ecology*, Abingdon: Routledge, 2011). The new problem is largely attributed to an increased demand in seafood and the industrialisation of fishing methods and gear. Small trawlers and fishing boats have been replaced by giant factory ships that are over 400 feet long and can stay at sea for over a year. These vessels are equipped with advanced technology such as sonar and global positioning systems and have processing centres as well as vast cold storage onboard. They have the ability to deploy fishing lines that are miles long with hundreds of thousands of hooks or haul a net that can hold the equivalent of 13 jumbo jets indiscriminately capturing whatever is in its path. One of these industrial vessels can catch what hundreds of small-scale boats would in a year (*ibid*).

In the case of Somalia, in 2003 IUU foreign industrial fishing reached its

peak with a reported catch of 337.2 million tonnes of fish, while local fishermen caught approximately 32.4 million tonnes (Figure 1) (Glaser, *et al, ibid*). With an approximate average of \$300 million dollars of seafood stolen annually from Somalia, local fisherman could not compete with the IUU vessels and consequently turned to piracy. Thus this period saw a drastic rise in Somali piracy, which peaked in 2011 with 219 incidents (Figure 2). While there were two types of piracy—one by Somali pirates and the other by IUU fishers—the world only condemned the Somalis (Mohamed Abshir Waldo, *The Two Piracies in Somalia: Why the World ignores the Other*, 2009, online at <http://www.imcsnet.org>). Soon after the rise in piracy, Al-Shabaab activity spiked and mirrored the trends seen in piracy (Figure 2). With the North Atlantic Treaty Organization's involvement and patrol of Somali waters, the activity of both groups decreased significantly with incidences of piracy now rare. However, IUU foreign fishing is on the rise again and consequently both piracy and Al-Shabaab activity may be expected to rise in the future. To prevent a vicious circle between overfishing, piracy and terrorism, strong internal government regulations need to be established and enforced, starting at the environmental management level.

Figure 1: Marine Production caught by Foreign Industrial Fishers and Artisanal Domestic Fishers in Somalia, 1999–2014

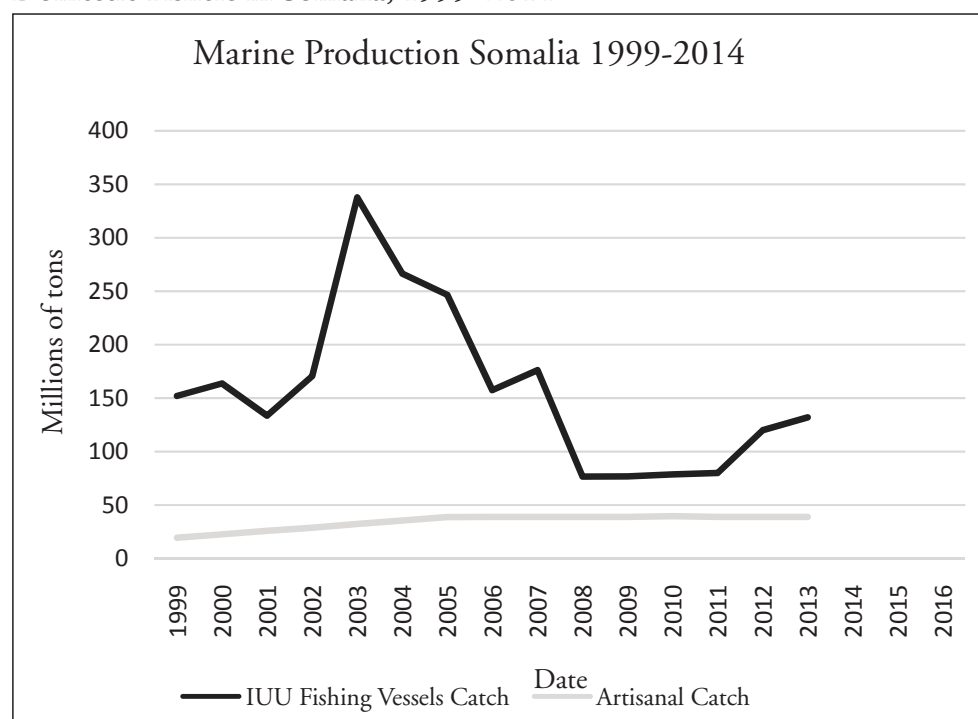
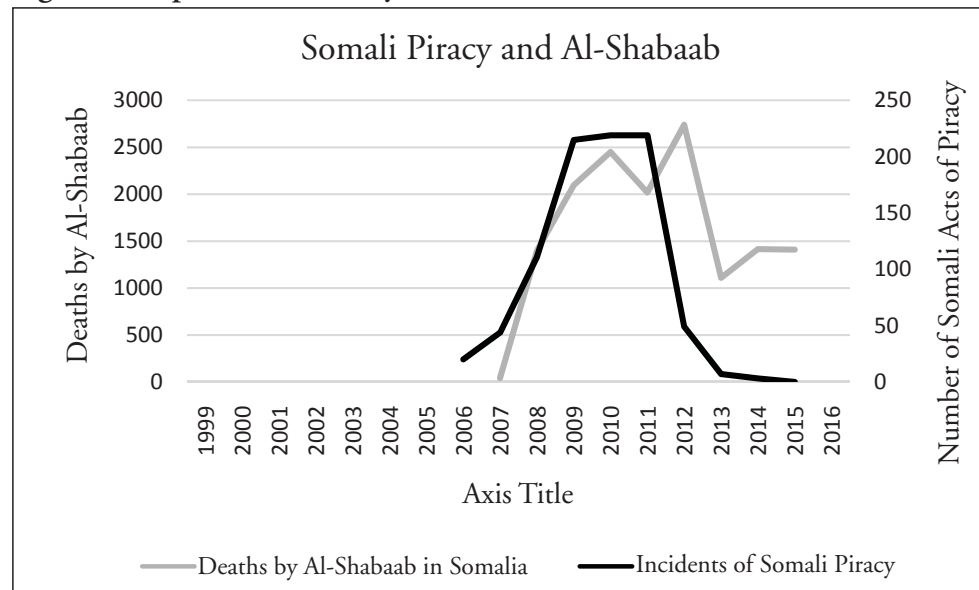


Figure 2: Reported Deaths by Al-Shabaab in Somalia and Incidents of Somali Piracy



MOTIVES

While Somalia was in the midst of anarchy in the late 1990s, neighbourhood courts based on Sharia Law appeared as a means of imposing some sort of order. Despite most Somalis traditionally following the more moderate Sufi branch of Islam, these courts were welcomed and offered protection. However, as the courts gained power they became an outlet for imposing strict fundamentalist versions of Islam. In mid-2004, eleven courts came together to form the Islamic Courts Union (ICU). By 2006, the ICU had eliminated warlords, decreased crime and improved the economy, as businesses could operate in peace. However, in some of the areas controlled by the ICU, Sharia Law was in extreme effect and women were forced to cover themselves from head to foot, soccer was banned and any activity deemed un-Islamic was punished corporally (Graham Turbiville, Josh Meservey and James Forest, *Countering the Al-Shabaab Insurgency in Somalia: Lessons for US Special Operations Forces*, 2014, online at <https://jsoupublic.socom.mil>).

The Al-Shabaab group arose from the ICU. With members originally belonging to the previous Islamic organisation the Al-Itihaa Al-Islamiya, the Al-Shabaab became a militant faction of the ICU that was especially useful

in defeating warlords. As the ICU's power grew, Ethiopia to the west became increasingly concerned. When an attack was expected on the city of Baidoa, where the Ethiopian backed Transitional Federal Government was located, Addis Ababa sent thousands of troops into Somalia to regain control. While the ICU quickly dissolved, Al-Shabaab called for a *jihad* against Ethiopia with the objective of creating an Islamic Emirate of Somalia, which would include Somalia, Somaliland, Puntland, northeast Kenya, the Ogaden region of Ethiopia and Djibouti. Originally, the group used common national antipathy towards Ethiopia to recruit thousands of volunteers, engaging in guerrilla warfare. Due to a lack of governance, Al-Shabaab was able to build a system of taxation and extortion to raise funds. It also provided Somalis with support and basic governmental structures, which were otherwise lacking. This fostered goodwill among the Somali people and aided in their recruitment. In 2008, Al-Shabaab made great strides by aligning interests with Al-Qaeda and the collaboration benefited both parties—Al-Shabaab gained increasing legitimacy and resources while Al-Qaeda gained a level of influence over the group. Al-Shabaab also changed its ideological rhetoric and began to portray Somalia as a front in the “global war” against the West. The group became populated with Al-Qaeda core members and altered its operational strategy to focus on suicide attacks against civilians both inside and outside Somalia (*ibid*). For example, Al-Shabaab was responsible for the September 2013 Westgate Mall attack in Nairobi which killed 67 people and the April 2015 massacre of university students in Garissa, Kenya killing 150. Al-Shabaab translates to “the youth” and this is an apt name, as the majority of members are unemployed young men. As the civil war left 67 per cent of the youth aged 14–30 unemployed and 73 per cent of the total population living under two US dollars a day, recruitment into Al-Shabaab became a viable alternative (United Nations Development Programme, *Somalia Human Development Report 2012*, online at <http://www.undp.org>).

While Somali piracy captured the world's attention in the early 2000s, it was not its first occurrence. Piracy arose out of feuds between Somali fishermen and foreign fishers in the early to mid-1990s. As the presence of foreign fishing vessels continued to increase in Somali waters, tensions grew. It was reported that foreign fishers were deliberately harming domestic fisheries by sabotaging equipment. Domestic fishermen then retaliated by engaging in opportunistic attacks in which they would steal equipment. However, these attacks escalated with the first reported hijacking for ransom in late 1994, when two SHIFCO

fishing vessels were hijacked and released for a large sum. Piracy saw its revival in the early 2000s shortly after record amounts of catch were reported by foreign fishers. During this time, foreign vessels on average caught three times more fish than local Somali fishermen and their profits reflected this inequality. Foreign fishers made \$306 million dollars from Somali fisheries while local fishers made \$58 million (*ibid*). Local fisherman defended acts of piracy as a form of self-defence and economic support. However, with the involvement of warlords and international financing, piracy soon developed into a highly organised criminal operation outfitted with high-speed boats and assault rifles with the sole purpose of making large profits. Somali pirates reportedly earned between \$30,000–\$75,000 per successful trip (World Bank, United Nations Office on Drugs and Crime and International Criminal Police Organization, *Pirate Trails: Tracking Illicit Financial Flows from Pirate Activities off the Horn of Africa*, 2013, online at <https://openknowledge.worldbank.org>). While the long-term intentions of Al-Shabaab and piracy differ, motives for partaking in either activity overlap—both are driven by the monetary incentive. In interviews with former Al-Shabaab recruits, the majority indicated joining for economic reasons as they were reportedly paid between \$150 and \$300 per month (Anneli Botha and Mahdi Abdile, *Radicalisation and Al-Shabaab Recruitment in Somalia*, Institute for Security Studies Paper 266, Pretoria, September 2014, online at <http://mercury.ethz.ch>).

Due to a lack of governance, Al-Shabaab was able to build a system of taxation and extortion to raise funds. It also provided Somalis with support and basic governmental structures, which were otherwise lacking. This fostered goodwill among the Somali people and aided in their recruitment.

PIRACY AND AL-SHABAAB


In the early 2000s, reports suggested rivalry rather than cooperation between pirates and terrorists. When the Islamic Courts Union came to power in Mogadishu in 2006, it publicly declared piracy *haram* and called for an end to all maritime crime, making special efforts to crackdown on pirate bases and threatening pirates with punishment under Sharia Law (Currun Singh and Arjun S Bedi, *‘War on Piracy’: The Conflation of Somali Piracy with Terrorism in Discourse*,

Tactic and Law, International Institute of Social Studies of Erasmus University Working Paper—General Series 543, 2012). While Al-Shabaab had initially tried to impose this through force, gradually a growing nexus between the two became prevalent. Al-Shabaab activity, measured by the number of deaths caused by the group in Somalia, closely mirrors the trend of piracy—both in its rise and fall (Figure 2 above). This may be explained by the possible dependence of Al-Shabaab on piracy and its profits. While this connection has not been clearly defined it has been described in various accounts. For example, a known pirate leader Ciise Yulux reportedly provided money and equipment to fighters linked to Al-Shabaab and Al-Qaeda in 2012. Furthermore, through an agreement in Harardhere, a port north of Mogadishu, pirates paid a “development tax” of 20 per cent to Al-Shabaab to keep their boats in port. Sheikh Hassan Afrah, another known pirate leader, was responsible for receiving Al-Shabaab’s cut from pirate ransoms and troubleshooting friction between the two parties. The majority of fighters associated with Al-Shabaab have few direct ties to piracy, instead personal connections among individuals are more popular (Christian Bueger, Jan Stockbruegger and Sascha Werthes, “Pirates, Fishermen and Peacebuilding: Options for Counter-Piracy Strategy in Somalia”, *Contemporary Security Policy*, vol32, no2, August 2011, pp356–81). A lack of transparency and Somalia’s complex network of cash transmitters make it difficult to track business deals. However, it is known that from 2005 to 2012 between \$339 million and \$413 million were paid in ransom to Somali pirates with the average haul being \$2.7 million. Djibouti, Kenya and the United Arab Emirates were the main transit points and final destinations for the profits from piracy. It has been estimated that a third of pirate financiers invested profits in setting up militias and/or gaining political influence including Al-Shabaab (World Bank, *et al, ibid*). While the level of collaboration between Somali piracy and Al-Shabaab is vague and uncertain, it has become clear that the two are intertwined. By this account, piracy is being used to support terrorism.

PEACE THROUGH MARINE RESOURCE MANAGEMENT

Both terrorism and piracy are fuelled by poverty and a lack of governance in Somalia. Furthermore, trends in their activity closely correlate with each other (Figures 1 and 2 above). However, with the elections in 2012, Somalia has changed its status from a failed to a fragile state and shows potential for

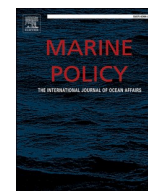
growth. Developing and protecting the domestic Somali fishing industry has high potential for encouraging a stable economy and promoting peace. While the unemployment rate in Somalia is 54 per cent (United Nations Development Programme, *ibid*), the fishing sector has the potential to create numerous direct and indirect jobs. While IUU vessels have damaged the marine environment and fish stocks, Somali waters remain productive and contain many commercially important species with the most promising being sardines (Glaser, *et al*, *ibid*). Furthermore, development of the marine industry has the potential of increasing countrywide food security. From 2010–12 nearly 260,000 people, half of whom were children, died from famine in Somalia (United Nations Development Programme, *ibid*). Fish and other aquatic resources offer important sources of protein and essential micronutrients such as iron, zinc, omega-3 fatty acids and vitamins. To break the resource curse and increase the accessibility of marine resources to Somalis, a better regulatory framework of fishing regulations and rights needs to be defined. This includes developing greater capacity for monitoring IUU vessels and enforcing laws, increasing land based infrastructure such as processing and cold storage centres and creating local fishery management plans (*ibid*). Additionally, while it is not as profitable, Somalia has the potential of earning \$17 million dollars through fishing agreements with other countries.

Overall the relationship between global security forces, IUU fishers, pirates and Al-Shabaab is intricate and causative. IUU overfishing led local fishermen to piracy and as this became more organised, business deals were made with Al-Shabaab. Post-2011, piracy numbers have dropped due to increasing patrols by global security forces and Al-Shabaab activity has concurrently decreased. Thus, since the crackdown on piracy, incidents of Somali piracy have been fewer and a decrease of in-country violence by Al-Shabaab has been noted as well. However, as the waters become pirate free, the presence of IUU fishing vessels has begun to rise again. If these vessels overfish and exploit Somali waters as before, piracy could return and this time it would be more dangerous and organised than before, with ties for funding Al-Shabaab terrorist activity. 

In the early 2000s, foreign vessels on average caught three times more fish than local Somali fishermen and their profits reflected this inequality. Foreign fishers made \$306 million dollars from Somali fisheries while local fishers made \$58 million.

Annex 194

A. Østhagen, “Maritime boundary disputes: What are they and why do they matter?”, *Marine Policy*, 2020



Maritime boundary disputes: What are they and why do they matter?

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ABSTRACT

When states legalised the maritime domain in the 20th century, the relationship between states and maritime space changed. Since the turn of the millennium, certain global trends have further amplified the role of the oceans in international affairs. This has led to a renewed focus on maritime space, as well as states' rights and responsibilities within this domain, delineated through the concept of a 'boundary' at sea. What, in essence, is a maritime boundary? Why do states end up disputing them? Perhaps more important, how do states go about settling such disputes, and how can we better understand the development of the legal and political principles that frame such endeavours? These are the questions examined in this article, which sets out to examine the concept of maritime boundaries and related disputes. Leaning on political science, international law and political geography, it reviews how the idea of a maritime boundary came about; what principles govern how they are drawn; how they at times are resolved; and possible future trends that might impact boundary-making at sea.

1. Introduction¹

In 2010, Norway and Russia agreed on a maritime boundary in the Arctic, stretching from the Eurasian landmass almost all the way to the North Pole. The new 1750-km (1087-mile) boundary was ten times the length of the land border between the two countries and it was hailed as a sign of a new 'era' in Norway–Russia relations, as well as Arctic governance more broadly [1,2]. Pundits were quick to argue that the primary reason for the maritime boundary agreement must have been the presence of oil and gas resources, not least as resource extraction figured prominently in the two countries' newly launched Arctic strategies [3].

However, it is unlikely that Norway and Russia would have been able to reach an arrangement today, a decade later. As the former Norwegian foreign minister highlighted explaining one of the factors behind the agreement: 'There must be trust between the negotiating partners'.² The worsening in relations between the two countries after the Russian annexation of Ukraine in 2014 have made bilateral relations resemble those of the Cold War when the two countries were on opposing sides in the larger 'East West' dispute.

This speaks to the challenge of settling boundary disputes.

Boundaries in the ocean are man-made constructs of importance to everything from oil and gas production, to fisheries and environmental protection. Presently, more than half of all maritime boundaries are still disputed, across all continents [4,5]. As put by the Norwegian and Russian foreign ministers in 2010: 'unresolved maritime boundaries can be among the most difficult disputes for states to resolve' [1]. Timing, in other words, is everything, when it comes to settling maritime boundaries.

This begs the question: What, in essence, is a maritime boundary, and why do states end up disputing them? Perhaps more important, how do states go about settling such disputes, and how can we better understand the development of the legal and political principles that frame such endeavours?

It is only recently – in an extended view of history – that states' ability to uphold sovereignty at sea has led to oceans becoming subject to explicit international jurisdiction. How states have viewed and utilised the sea – eventually attempting to control and develop a legal order for it – has varied and changed over the past millennium [6], pp. 153–154], [7]. From the 15th to the 19th centuries, the use of maritime space in exploration, dominance and industrialisation transformed the world [8].

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² [92] Author's translation.

When states legalised the maritime domain in the 20th century, with the Geneva Conventions on the Law of the Sea in 1958 and the UNCLOS regime in 1982, the relationship between states and ocean space changed.³ Since the turn of the millennium, certain global trends have further amplified the role of the oceans in international affairs. Technological developments, increased seaborne trade, growing demand for marine resources, and climate-change effects on the oceans and the location of those resources are all factors that have led to a renewed focus on maritime space, as well as states' rights and responsibilities within this domain. As Steinberg [9], p. 366] wrote already two decades ago: 'we are now entering an era when [...] human interactions with ocean-space are ever more intense and complex'.

The effects of climate change on the oceans – provoking sea level rise and in turn, coastal erosion – have also become increasingly apparent in recent decades. That in turn may influence the delineation of maritime space: with changes in the baselines from which boundaries are determined, or in the characteristics of islands and territory, states may find themselves faced with new challenges, or be forced to re-visit old and unresolved disputes [10], pp. 12–13], [11]. This could cause further tension, even conflict [12,13].

As this happens, more and more attention is paid to the question of 'who owns what' at sea. Writing about the *Political Geography of Oceans* in 1975, Victor Prescott argued that '[s]tates seek to use the oceans for precisely the same reasons as they use their territory: to provide security and the opportunity for development' [14], p. 30]. This simple fact has not changed. States have rights and duties regarding maritime space, and, as this space gains attention, the delineation of ownership and rights is already rising to the fore of domestic and international politics.

In turn, these trends require that we better examine the notion of boundary-making at sea, and why states engage in disputes over these more generally. This article does exactly that, by investigating the notion of maritime boundaries more generally, and how states go about managing and settling related disputes, before discussing the future of maritime boundary disputes. It draws on the fields of political science, international law, and political geography, as well as scholarly work that has dealt with maritime boundaries specifically, in order to outline *what* maritime boundaries are, and *why* they matter, at a time when questions of ocean governance are increasingly on the political agenda.⁴

2. States and territory

As a consequence of European state formation and finite territorial space, the concepts of territorial sovereignty and boundaries have come to define the modern state [15–17]. As states formed, developed, and expanded, the need to define and uphold territorial boundaries became increasingly relevant [18], p. 131]. As Kratochwil [19], p. 32] argues: 'boundaries are points of contact as well as of separation between a

social system and an environment'. According to Ruggie [20], p. 150], '[t]he notion of firm boundary lines between the major territorial formations did not take hold until the thirteenth century; prior to that there were only 'frontiers', or large zones of transition'. Kratochwil [19], p. 33] in turn holds that the 1659 Treaty of the Pyrenees between France and Spain established the first modern state boundary.

When the emphasis was placed on delimitation of all territory (terrestrial) in the 19th and 20th centuries, 'frontier' regions became a source of inter-state friction, as they lacked clear demarcation. Disputes emerged as states sought to expand their territory and define their borders.⁵ Even today, related border disputes exist [19], p. 37].

The concept of territoriality developed slowly in what has become the international system. Because of European state formation and the finite territorial space in this part of the world, the concept of territorial sovereignty and boundaries have come to define the modern state and its relations to other states across the globe [21–23]. 'The rise of the bounded state as a political unit necessitated a concern with the drawing and redrawing of political borders and the formalization of territorial arrangements' [24], p. 45].

Scholars thus agree that boundaries and the integrity of territory constitute a pillar of the modern state-system. Tracing the development of the norm of 'territorial integrity' in recent centuries, Zacher [16] shows how the norm has undergone three phases: emergence, acceptance, institutionalisation.⁶ Examining all territorial conflicts between 1946 and 2000, he finds that the norm has indeed been commonly accepted through efforts and statements from the 1970s onwards.

The link between territory, sovereignty and conflict has been extensively proven [25–30]. Vasquez, for example, shows how at least 79% of all wars between 1648 and 1990 were fought over territory-related issues [31,32]. Disputes emerged – and still emerge – as states seek to expand their territory and define their external boundaries. The classic territorial dispute involves two states that disagree on where a border should go, either because one state does not recognise another state's border derived from a previously signed treaty, or because no treaty exists at all. More complicated disputes concern situations where a state has occupied the territory of another state, where a state does not recognise the sovereignty of another state, or where a state does not recognise the independence *and* sovereignty of a seceding state [29], pp. 20–23].

Territory has been the primary source of conflict between states over the last millennium, as states grew into existence, developed and matured. Territory and where to draw related borders have also not lost their importance. According to Wiegand [30], territorial disputes concern 41% of all sovereign states today. Hensel [33], p. 137] holds that interstate rivalry is still twice as likely to escalate into war when territory is involved. As noted by Weber [34], it is the monopoly on the use of force in a given *geographical area* that has come to characterise the modern state. The notion of territoriality has come to define the very idea of statehood [21].

³ See Ref. [43,93,94].

⁴ The United Nations has dedicated the period 2021–2030 as 'Ocean Science for Sustainable Development', linked to Sustainable Development Goal #14: to conserve and sustainably use the oceans, seas and marine resources for sustainable development.

⁵ For an examination of the concept of territoriality and fixed territory, see for example [21,22,24]. Territoriality can be defined as the process whereby territory (here: the ocean) is claimed by individuals or groups. 'Territoriality can be seen as the spatial expression of power and the processes of control and contestation over portions of geographic space are central concerns of political geography' [24, p. 8]. Studies of territory and territoriality are primarily concerned with land and the human need/desire to inhabit and control land. However, the idea of 'socialized territoriality' is relevant also for discussions of the maritime domain, as it enables the role of territory to be conceived more broadly. Sack [23, p. 219] sees territoriality as a 'device to create and maintain much of the geographic context through which we experience the world and give it meaning'. In turn, once 'territories have been produced, they become spatial containers within which people are socialized' [24, p. 20], [95].

⁶ Zacher adapts from Finnemore and Sikkink [96].

3. Maritime space and boundaries at sea

At sea, however, ‘territoriality’ and the rights of states take on a different form. Inherently a distinct domain altogether, the way in which society has viewed, legalised, and utilised the ocean has evolved through history. In the 15th century, as European powers pursued colonisation in waters outside Europe, a debate was sparked concerning the status of oceans and what rights nations could have at sea. Ideas of a natural law of nations were retrieved from antiquity and the Middle Ages and used by scholars to argue for various understandings. Grotius became a frequently cited proponent of the right to peaceful commerce and that passage at sea is natural to the ‘need of all men to ensure their survival’ [35], p. 33]. Grotius argued for the freedom of the seas in order to counter Portuguese and Spanish claims to trade monopolies in the world outside Europe, when they divided the non-Christian world between themselves with the 1494 Treaty of Tordesillas.

The principle of the oceans as global commons came to clash with the idea that nations had rights and sovereignty in nearby waters. For example, Norwegian kings around AD 1000 had claimed sovereignty in waters adjacent to Norway stretching all the way to the British shorelines [36], p. 481]. In the 15th century, a version of this position was advanced by Britain, in response to Dutch attempts at dominion of the North Sea. As Maier [35], p. 37] describes it:

The Dutch sent a fishing fleet of two thousand ships protected by an armed squadron to the North Sea waters off the east coast of Britain; and John Selden argued that the ocean’s bounty of cod was no more a public good, replenished by nature, than the land, and like the land it could be assigned to particular owners.

Legal scholars like Hugo Grotius (*mare liberum* – freedom of the seas) and John Selden (*mare clausum* – closed seas) have become symbols for two opposing ways of grappling with questions of maritime ownership and rights. These conceptions of the ocean, which also hold varying degrees of relevance for different maritime spaces (open seas and/or coastal zones), came to dominate approaches to the sea in the subsequent centuries, until the international community began negotiating a legal framework for the oceans in the 20th century.

Already in the 18th century, the territorial waters of states were defined as being a ‘cannon shot’ from land, an idea developed by van Bynkershoek in 1703, and later defined as three nautical miles (n.m.) by Galiiani [37], p. 138].⁷ The League of Nations attempted to codify international law concerning the oceans in The Hague in 1930, but never managed to reach agreement [38].

Then, in 1945, US President Truman declared that the natural resources of the continental shelf were under the exclusive jurisdiction of the coastal state [39]. This rapidly advanced discussions on what rights states have beyond a limited (3 n.m.) territorial sea. Central to the success of this declaration was not only the US position of strength after the Second World War, but also how the principle entitled every coastal state to similar rights, and the fact that these sovereign rights did not depend on occupation [40], pp. 91–92]. This was later codified in the 1958 Geneva Convention on the Continental Shelf, which preserved the prospect of exclusive coastal state jurisdiction over offshore seabed resources [41].

At the same time, some states started expanding their territorial seas from three to twelve n.m., as negotiations of an international regime for the oceans were underway. This led to conflict around adjacent and overlapping maritime spaces. The first and second Law of the Sea Conferences were held in 1956–1958 and 1960, without reaching final agreement on the extent of the territorial sea or the extension of State rights and jurisdiction extending further offshore, beyond the territorial

sea [37]. Then followed decades of negotiations aimed at developing a coherent international legal framework for the oceans; in 1982, most states agreed on a comprehensive legal regime: the United Nations Convention on the Law of the Sea – UNCLOS [42].

When it was agreed, UNCLOS provided the legal rationale for states to implement new maritime zones in addition to the 12-n.m. territorial sea, with a 200 n.m. ‘resource’ or ‘fisheries’ zone (what became termed the Exclusive Economic Zone – EEZ), driven largely by growing awareness of the possibilities for marine natural resource extraction (hydrocarbons, fisheries, minerals) and the desire of states to secure potential future gains [38,43].

Already in 1952, Peru, Chile and Ecuador had made claims of exclusive rights out to 200 n.m., seeking to reap benefits of an expansion in fisheries [44]. These initial claims wetted the appetite of many coastal States and after a diversity of claims were put forward – because other states also claimed resource zones, including exclusive fishery zones in the 1950s, 60s and 70s – the international community agreed on the legal regime of the EEZ as defined under Part V of UNCLOS.

When states began expanding their maritime zones, the notion of straight baselines also came to the fore. This is the line drawn along the coast from which the seaward limits are measured. Instead of drawing the baseline of a country’s maritime zone along its coast following all features, some states with indented coastlines or with multiple fringing islands started to draw *straight* lines along the coast, in essence claiming more maritime space (territorial sea) than a country with an even coastline. The UK took a case against Norway concerning this practice to the ICJ, which in 1951 endorsed the Norwegian approach regarding straight baselines with the *Anglo-Norwegian fisheries case* [45].

In consequence, states had in the span of a few decades gone from having control over a relatively limited (often just 3 n.m.) maritime domain, to having an international agreement on expanding the length of the territorial sea where states have full sovereignty to a maximum of 12 n.m., while also adding an EEZ where states have certain sovereign rights for an additional 188 n.m.

Moreover, with UNCLOS it was concluded that states have sovereign rights on the continental shelf up to 200 n.m., and, when relevant, beyond 200 n.m. where the shelf is a prolongation from the land mass of the coastal state by submitting this information on the limits to the Commission on the Limits of the Continental Shelf (CLCS) [46]. The limit of such claims was determined to be up to 350 n.m. from a country’s baseline, or not exceeding 100 n.m. beyond the point where the seabed is at 2500-m depth (2500-m isobath) [47], p. 321].

With 168 ratifications as of 2020, UNCLOS has become part of the larger framework of international politics and law [48]. Many of its provisions today reflect customary international law, which is universally binding on all states, and not limited to UNCLOS parties only [49]. This legal-political regime that took decades to develop, has enabled states to reach a relative agreement on how to tackle issues that first arose centuries ago. As Keohane and Nye [50], p. 56] put it in 1977: ‘there is very little direct functional relationship between fishing rights of coastal and distant-water states and rules for access to deep-water minerals on the seabed; yet in conference diplomacy they were increasingly linked together as oceans policy issues’.

However, a central bone of contention that remained – and remains – is how and where to delineate maritime space and related rights to resources on the seabed and in the water column.

4. The process of drawing lines at sea

As states expanded their maritime zones, a number of maritime boundary disputes between neighbouring states emerged. Different states have developed different interpretations of how to draw boundary lines at sea [51]. These relate to which map projection to use when drawing the boundary; whether or not to base the boundary on a median principle or a sector principle; the shape of the geographical attributes of the land from which the maritime boundary is derived – i.e. the direction

⁷ One nautical mile (n.m.) is 1852 m/approx. 1.15 miles, and this has become the standard unit of measurement for both marine and air navigation, as well as zones at sea.

of the coastal front and the weight given to islands and submarine features; and which portion of the coast is relevant to delimitation [52–54].

When states expanded their fisheries zones or EEZs to 200 n.m., existing maritime boundary disputes were enlarged as the disputed areas grew in size. Boundary disputes also arose or became more significant between the maritime zones of ‘adjacent’ or ‘opposing’ coastal states. Some of these boundary disputes were settled immediately, but a large number remain today. The map (Fig. 1) display how the EEZs of countries bundled together are contiguous and thus also need a clear boundary.

As maritime zones and state interest in them rose on political agendas in the middle of the 20th century and the need for their delimitation increased, the concept of ‘equidistance’ came to the fore. This guiding principle encountered another principle, namely that of equity. The balance between these two principles has shifted over the last half-century, and this tension is crucial in understanding how states settle their maritime boundary disputes (and the principles that guide such processes).

Equidistance entails a boundary that corresponds with the median line at an equal distance (equidistance) at every point from each state’s shoreline. Some scholars have taken the position that this was codified under Article 6 (2) of the 1958 Geneva Convention on the Continental Shelf (Geneva Convention), which directs states to settle overlapping claims by reference to the equidistance principle [55], p. 62]. As St-Louis [56], p. 26] points out, with the Geneva Convention, states ‘intended to have equidistance applied as the basic principle, to be deviated from only in the case of special circumstances’.

However, international law is not a static set of rules, but rather a process that evolves through time [40]. The attention given to ‘relevant’ or ‘special’ circumstances led to varying interpretations among states. In addition to coastal length and other geographical variables, security interests and the location of natural resources have at times been accorded weight in a few international court rulings. This has been termed ‘equity’, as a principle distinct from ‘equidistance’.

Equity thus acquired importance in delimiting disputes the maritime domain [57]. In particular, the North Sea Continental Shelf Cases between Denmark, West Germany and the Netherlands from 1969 pitted the principle of equity and equidistance against each other [58]. Denmark and the Netherlands argued for the use of equidistance, whereas West Germany argued for a ‘just and equitable share’ of the disputed area. Outlining its approach to maritime boundary dispute settlement in general, the Court held that delimitation must be ‘effected in accordance with equitable principles ... taking account of all the relevant circumstances’ [59], p. 53].

In addition, the Court introduced the concept of the ‘natural prolongation’ of the continental shelf – that also the geophysical attributes of the shelf in question matter for delineation between states [60], p. 15]. Although the ICJ specified that there was ‘no legal limit’ to the number of factors that were relevant to delimitation of the shelf, these were initially defined as geology, the desirability of maintaining unity of the natural resource deposits, and proportionality (the ratio between the water and shelf areas attributed to each state and the length of their coastline) [59], pp. 51–52].

States were thus not deemed to be obliged to apply the equidistance principle: equity was seen as extending beyond mere equidistance [56, 58]. Robert Kolb [61], p. 108] argues that the ICJ’s rulings in the 1960s and 1970s changed the jurisprudence from method (equidistance) to objective (equity). This entails that not equidistance, but fairness on its own was introduced as a guiding principle for maritime dispute resolution.

A case that exemplifies this came about in 1980, when Denmark extended its 200-mile fisheries zone northwards along the east coast of Greenland (Denmark being the colonial power operating on behalf of Greenland), creating an overlap with the Norwegian zone on the northwest side of the island of Jan Mayen [62]. Denmark argued that it deserved a larger proportion of this disputed zone because Greenland’s

coast is longer than that of Jan Mayen, and because the population of Greenland deserved privileged access to fish stocks [63]. Norway held firm to the equidistance principle; after years of unsuccessful negotiations, Denmark submitted the dispute to the ICJ in 1988.

The Court concluded that the longer length of the Greenland coast required a delimitation that tracked closer to Jan Mayen [64]; and that the maritime boundary line should be shifted somewhat eastwards to allow Greenland equitable access to fish stocks [63,65], p. 55]. However, the Court rejected other arguments concerning population size and socio-economic conditions, declaring them irrelevant to the final determination of the boundary line.

Scholars have outlined how UNCLOS negotiations in the late 1970s concerning maritime boundary dispute resolution reached a compromise between two groups of states: those that wanted the equidistance principle enshrined, and those that wanted equity as the guiding principle without specifying any particular method [43,52,60,66]. Equity as a principle was incorporated in 1982 UNCLOS article 74 (*delimitation of the exclusive economic zone*) and article 83 (*delimitation of the continental shelf*), with the wording: ‘The delimitation of the exclusive economic zone/continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law ... in order to achieve an equitable solution’ [46]. Kaye argues that ‘The result was an acceptable (if fragile) compromise, but one that did little to clarify the method by which delimitation was to take place’ [60], p. 16]. The UNCLOS regime consequently does not specify *how* states are to settle maritime boundary disputes – it merely calls for ‘an equitable solution’ [46].⁸

As these cases and developments show, how states initially divided maritime space amongst themselves became questions where maritime law rested on the principles of both equity and equidistance. Thus, the process of settling a maritime boundary has not very straightforward As Finnemore and Toope put it in 2001 [48], p. 748]:

If one considers the decisions of the International Court of Justice in boundary delimitation cases, for example, the results are clearly legal, influential, and effective in promoting compliance, but they are highly imprecise.

However, in rulings in recent decades, the ICJ has favoured a stricter interpretation of which relevant circumstances to include, placing emphasis on geographical factors in a three-stage approach in delineating maritime boundaries, as outlined in the Black Sea Case between Romania and Ukraine in 2009 [67], p. 381]. First, a ‘provisional delimitation line’ between the disputing countries is established, based on equidistance. Second, consideration is given to of ‘relevant circumstances’ that might require an adjustment of this line to achieve an ‘equitable result’. This is where ‘equity’ is considered. Third, the Court evaluates whether the provisional line would entail any ‘marked disproportion’, taking the coastal lengths of the states into consideration [68], Paras. 116–122].

Concerning the continental shelf vis-à-vis the EEZ, initially, the rules/process to settle the two kinds of boundaries were different. The emphasis on ‘natural prolongation’ and the scientific elements to prove it involved using a different approach for continental shelf delimitation. However, as state practice and court rulings developed after the 1969 North Sea Continental Shelf Cases, the principle of natural prolongation lost its hold. The main reason was the introduction of the 200-n.m. concept, where states, regardless of submarine features, immediately acquired rights over the seabed and water column out to 200 n.m. from shore. With the new rules in UNCLOS and the move away from ‘natural prolongation’ as a basis of entitlement to the continental shelf, courts have adopted a uniform approach to maritime boundary delimitation for

⁸ UNCLOS Article 74 concerning the EEZ has wording identical to that of the Continental Shelf, Art. 83.

Illustration I: The Exclusive Economic Zones in Oceania/the South Pacific

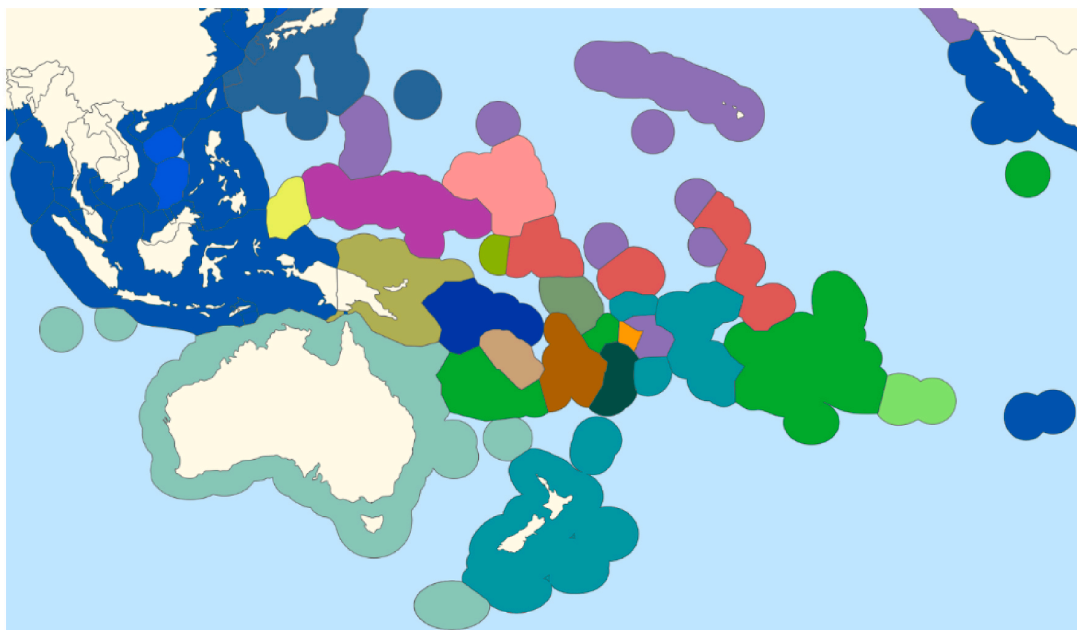


Fig. 1. Displaying the numerous EEZs in the South Pacific and how these are adjacent/overlapping and thus have been – at various times – in need of delimitation. Source: Wikimedia.

both the water column and seabed.

This does not mean, however, that the idea of natural prolongation has become totally irrelevant. As Kaye [60], p. 19 argues, it has relevance if the submarine feature is ‘vast and significant’. Further, the notion of natural prolongation has remained the determining factor concerning ‘extended’ continental shelves, as states must use scientific data concerning the seabed in its submission to the CLCS as described in section 3. Then the geomorphology (and to a lesser extent, the geology) of the seabed and the ability of states to prove their natural extension come into play.

In summary: The concept of boundary-making at sea is in itself based on abstract lines on the map, and not borders that physically separate the maritime domains of two countries. States have leaned on – albeit often deviated from – legal principles set out in international Court rulings as well as UNCLOS as they attempt to agree on how to draw lines at sea [69].

5. Maritime boundary disputes today

The principles that guide the drawing of maritime boundaries are one thing, how states go about settling maritime boundary disputes is something rather different. Turning to how – practically – states manage to agree on boundary disputes, states may agree on a mutual solution after bilateral negotiations; or after having attempted to negotiate in good faith, they can submit the case for adjudication at the ICJ or another international Court like ITLOS (International Tribunal for the Law of the Sea); or they can use third-party arbitration like the Permanent Court of Arbitration (PCA).

However, because of the need to compromise, disputes are generally settled through bilateral negotiations without the use of international courts [70], pp. 14–15]. The uncertainty as to outcome of international adjudication and arbitration does not inspire states to bring cases before courts and tribunals. Resolving a dispute bilaterally leaves states with the option of a creative resolution not confined by the international rules applied by courts and tribunals. Moreover, litigation is costly and in the maritime domain, the process often requires a great deal of scientific

data, making it expensive for states to pursue delimitation actively [71], p. 245].

Consequently, more than 90% of maritime boundaries have been settled through bilateral negotiations [72], p. 131], where states are free to choose whichever approach they prefer when delineating maritime space. However, studies show that although states choose bilateral negotiations to avoid the shackles of international adjudication/arbitration, they still lean on, and mostly adhere to, the legal principles as set out by international court rulings [54,72,73].

Furthermore, if we compare with how the state emerged as geographical unit, in the maritime domain, as opposed to land, conflict over boundaries, sovereignty and jurisdiction have generally been resolved peacefully through negotiations and adjudication/arbitration. As outlined in the previous section, international law provides the framework for settling maritime disputes. The use of pure power in determining the limits of state jurisdiction at sea has in practice been ruled out in the post-World War II order [74], also because few states have the military and economic capacity for protracted conflict at sea (or see the benefit from such efforts).

This does not, however, mean that all disputes over maritime space and maritime resources are settled in an orderly way [75]. Albeit central in guiding the process, as shown here international law does not always provide a clear pathway to settling maritime boundaries. As argued by Jagota [76], p. 4]: ‘Maritime boundary, like territorial or land boundary, is a politically sensitive subject, because it affects the coastal State’s jurisdiction concerning the fishery, petroleum and other resources of the sea as well as concerning the other uses of the sea’. As Weil [77], pp. 30–31] further argues: ‘Maritime boundaries, like land boundaries, are the fruit of the will of States or the decision of the international judge, and neither governments nor judges limit themselves simply to scientific fact.’

Historic resource conflicts and contemporary disputes around the world make clear the economic and political interests involved in maritime space. An unsettled maritime boundary can hinder economic exploitation of offshore resources [70,78]. Similarly, it may complicate the management of transboundary fish stocks. At times, states engage in

indirect conflict over such disputes, whether by arresting fishing vessels from the other party to the dispute, or by engaging with navy or coast guard vessels directly. Several disputes became entrenched, as states leaned on historical, legal and economic arguments to support their positions [30].

Therefore, today maritime boundary disputes exist on all continents. Settlement of outstanding disputes continues to take place, but many disputes remain, ranging from active and conflictual to dormant, or successfully managed. Prescott and Schofield [71], p. 218] highlight that ‘out of 427 potential maritime boundaries, only about 168 (39%) have been formally agreed, and many of these only partially’. Other figures concerning the total number of maritime boundary disputes exist, with varying degrees of specificity. Some estimate that there are approximately 640 maritime boundary disputes, with around half resolved [79]. Newman [80] claims there are 512 maritime boundaries in total, again half of them resolved.

A dataset by Ásgeirsdóttir and Steinwand⁹ provides a more general overview of the total number of disputes (settled/not settled by 2008) per country and per continent [4].¹⁰ These figures give a rough idea of the global outreach of this phenomenon, not confined to one part of the world or a specific group of states. Unsurprisingly, large countries with more access to maritime space have a larger number of maritime boundaries. Russia, China, Canada, and Australia have long coasts, resulting in multiple neighbours and in turn multiple maritime boundaries. Also, areas like the Mediterranean and the Caribbean, where numerous small states are clustered together – such as Turkey, Italy, Greece, and Egypt; or Colombia, Venezuela, and Cuba – have a large number of maritime boundaries. Moreover, countries with overseas colonies and/or dependencies – such as France, the United Kingdom (UK), Spain and the USA – have multiple maritime boundaries, settled as well as unsettled.

This help to pinpoint exactly how common maritime disputes – settled as well as unsettled – are around the world. Most countries (157 to be exact) have had a maritime boundary in need of settlement at one point since 1950. In 2008, there were still 228 disputes (54.7%) that remained unsettled, out of a total of 417 [4]. If compared to borders on land, an interesting paradox emerges: Although the chance of outright conflict at sea over where to delineate boundaries is rather low, the political, economic and historic interests in the same boundaries have made it difficult for states to concede in bilateral negotiations. Consequently, more than half of all boundaries at sea are still disputed.

6. The future of maritime boundary disputes

Maritime boundary disputes are acquiring rising importance for states in the 21st century, as human interactions with ocean-space are becoming ever more intense and complex. Exogenous and endogenous changes are underway in the maritime domain. Changes deriving from resource pressures, international commodity prices, and new technology are exogenous to the ocean, driven by economic developments.

Rising sea levels and other oceans changes resulting from climate change, and changing resource distributions, are endogenous to the maritime domain, with a specific geographic component. Disputes over maritime boundaries, access rights and interpretation of legal treaties or of UNCLOS have been left unresolved for decades. These are now being brought to the agenda by the mentioned trends, at times even leading to direct clashes at sea between the involved states.

For example, with shipping increasing in territorial waters across the globe, issues concerning access rights, status of sea-lanes, and environmental protection are at the forefront of international debates. Within

and across EEZs, climate change and other environmental factors are causing variability in the spatial distribution of fish stocks, challenging established management regimes [81]. The processes for determining the limits of continental shelves beyond 200 nautical miles are becoming increasingly relevant [69]. And in the high seas, there are ongoing international negotiations to develop legal instruments for designating and managing MPAs beyond national jurisdiction [82]. New political challenges are consequently emerging, as states hold differing views on access rights, marine environmental protection and how to exploit and manage marine resources.

Steinberg [7], in his *The Social Construction of the Ocean*, shows how the idea of maritime space has changed throughout history. There are many ways of thinking about the ocean: as a territorialised extension of land; as a domain where only limited control can be exercised; and as a great void [7], pp. 18–25]. In particular, the role of oceans in international affairs changed with the introduction and adoption of UNCLOS. Steinberg argues that states have desired to keep the oceans free of conflict. Baker [74], p. ii] supports this, finding that states have become behaviourally conditioned by an international norm *against* the ‘forceful acquisition of maritime spaces and resources of other states’.

However, the way we see maritime space and the related boundary-making is not static. ‘The social construction of ocean-space, like that of land-space, is a process by which axes of hierarchy, identity, cooperation, and community are contested, establishing bases for both social domination and social opposition’ [7], p. 191]. Steinberg conclude – in 2001 – by arguing that ocean space today is under pressure, as the various ways of conceiving it are clashing. Greater territorialisation (for exploitative purposes) clashes with the idea of oceans as free for all, as well as the increasingly prevalent ideas of ‘stewardship’.

From a purely functional perspective, maritime ‘territory’ has become more valuable for states. With the sea having emerged from being literally a great blue empty space to an institutionalised policy domain, the expansion of activities taking place at sea and the growing reliance on maritime activities have resulted not only in greater importance being placed on the outcome of maritime boundary disputes, but also in shifts in the political relevance and usage of the maritime domain. Today, oceans matter more than before for states in their power-relations vis-à-vis other states, as well as for political leaders seeking to sway domestic audiences.

Does that mean that maritime space has indeed come to take on the characteristics of traditional territory on land? It is essential to understand the difference between land and maritime space in the legal process of settling a maritime dispute. The concept of occupation – crucial in establishing title to land territory – does not hold the same relevance in the maritime domain. Occupation of the continental shelf itself could not separately lead to acquisition of the shelf, contrary to sovereignty over land territory [56], p. 16]. A marked separation between land and sea thus became apparent with UNCLOS, as rights to the latter derive from the former.

Consequently, what we are discussing with regard to states and maritime space are *sovereign rights* to resources in the water column or on the seabed, not exclusive rights to the entire maritime ‘territory’ in question, apart from their territorial sea. States cannot deny passage through their EEZs; they may only deny actors access to marine resources and apply environmental regulations in their maritime zones. For delimitation in the maritime domain, both states may have valid legal claims to a given area, in which case it becomes a matter of ‘reasonable sacrifice such as would make possible a division of the area of overlap’ [77], pp. 91–92], or even joint sharing – as with oil and gas resources or a joint fisheries zone.

Still, states’ and state leaders’ preoccupation with marine resources as well as the general strategic value of extended maritime space, together with technological developments that enable greater control over the maritime domain (coast guard vessels, satellites, drones, subsea installations, etc.) will not render current disputes over the same space any less relevant [83]. It could be reasonable to expect that as maritime

⁹ Courtesy of Ásgeirsdóttir and Steinwand, obtained through email correspondence.

¹⁰ ‘Continent’ here refers to the world’s seven main continuous expanses of land (Europe, Asia, Africa, North and South America, Australia, Antarctica).

space becomes increasingly relevant for states, related outstanding boundary disputes will be more difficult to settle.

Additionally, as maritime disputes become infused with intangible dimensions and issues concerning symbolism and engaged domestic audiences [84,85], the characteristics of dispute ‘containment’ at sea could be changing. Vasquez and Valeriano [86], p. 194 describe a conflict as spiralling when it becomes infused with symbolic qualities. It might be assumed that maritime disputes – whether concerned with fishing rights or boundaries – would be a simple matter of delineating rights and ownership, given the tangible character of such disputes. Huth [29], p. 26], for example, has argued that ‘the political salience of the [maritime] dispute is generally limited, in contrast with the importance and attention often given to land-based disputes’.

However, when a maritime dispute reaches the political agenda, there are (domestic) actors who stand to benefit from infusing it with intangible dimensions like ‘national pride’ or ‘being cheated out of what is ours’ [87]. Contrary to popular belief [33,88], maritime disputes may assume some of the same characteristics as disputes on land. Although disputes over ocean space may initially be more concerned with tangible questions of resource delimitation and ‘who owns what’, they too can become infused with symbolism and intangible characteristics [5].

This concerns not only the economic interests of the actors involved, but also wider ideas of symbolism and identity. States (and their inhabitants) *do* care about their maritime disputes, even those of limited economic value, and increasingly so. Once a dispute has become politicised, any resolution of the dispute carries domestic political risk. Indeed, even undertaking negotiations may be risky, which explains why government officials sometimes refer to negotiations as ‘discussions’ [5]. As Kleinsteiber [84], p. 18] has noted, regarding disputes in the South and East China Seas:

While these disputes have the potential to die down if they are ‘shelved’ in favour of pursuing more mutually beneficial goals, they can flare up at any time, especially when driven by nationalist sentiments. This has the potential to be the troubling future of maritime conflict, when conflicts in question may be impossible to separate from national identity.

In a study of a 2005-incident between the Norwegian Coast Guard and a Russian trawler, Fermann and Inderberg [89] show the effect of the Norwegian media as they were quick to broadcast the event live on national television, in turn helping to spur politicians into action. The role of maritime space in domestic politics has arguably changed over the course of decades – from a functional space that inspired limited engagement, to that of a national space requiring ‘protection’ and defence. In conjunction with this, the function of ocean space itself has expanded, with more and more resources being harvested at sea, ranging from fisheries to hydrocarbons.

On the one hand, we therefore have the idea of the ocean and states’ maritime space as a legalised, institutionalised and governed domain, where states tend to abide by the rules set forth by UNCLOS because it is in their common interest to do so. On the other hand, greater domestic engagement is also spurred by recognition of the ocean as a policy issue in need of common efforts to combat everything from sea-level rise to plastic pollution. As put by a Norwegian official from the 2010-rounds of negotiations with Russia: ‘A boundary itself is just one element. More important are those normative factors increasingly related, such as military interests, economy and larger security considerations’ [90]. Greater utilisation of oceans, or national maritime zones, in domestic politics is a trend likely to increase as maritime space continues to rise on the agenda.

The maritime domain has certain characteristics that nevertheless keeps it separate from the terrestrial domain. There are geographical barriers that hinder prolonged interaction between the actors concerned. Maritime boundaries are also a construct of international law: and (coastal) states seem to depend on the UNCLOS regime, and also

desire to apply the regime to their own advantage. Also, as fisheries continue to grow in importance in terms of livelihoods and a source of protein [91], certain characteristics of fisheries and maritime boundaries might become more pronounced, spurring cooperation. As states fulfil their UNCLOS obligation to manage transboundary fish stocks, the continued development of management regimes might render the exact location of a maritime boundary less important for this specific purpose. Further, the use of complex resource-sharing mechanisms, or the increasing focus on developing adequate management solutions concerned with transboundary fish stocks, as well as the establishment of protected areas in tandem with greater environmental awareness over the state of the oceans, might make the exact location of the maritime boundary itself (if not the maritime domain) less important.

Establishing agreements on such mechanisms is still necessary, but perhaps with a slightly different focus than when settling maritime boundaries in the traditional sense. Managing the disputed maritime area might also, in some instance be an easier, and even preferred, solution, when tensions are low and relations stable.¹¹ That being said, it does not seem likely that international ocean politics and related issues of resource management, sovereignty, and rights at sea are likely to become less relevant in years to come.

This article was solely written, developed and submitted by the author, Andreas Østhagen.

Statement

This academic article has not been published previously, or submitted to any other journal.

Appendix A. Supplementary data

Supplementary data to this article can be found online at <https://doi.org/10.1016/j.marpol.2020.104118>.

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¹¹ Like in the case of Canada and the USA. See Ref. [97].

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Annex 195

*Decision of the Permanent Court of Arbitration in the Matter of the Maritime
Boundary Dispute between Norway and Sweden, (1910) 4 American Journal of
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DECISION OF THE PERMANENT COURT OF ARBITRATION IN THE MATTER OF
THE MARITIME BOUNDARY DISPUTE BETWEEN NORWAY AND SWEDEN

Whereas, by Convention under date of March 14, 1908, Norway and Sweden agreed to submit to the final decision of a Tribunal of Arbitration, comprised of a president who shall neither be a subject of either of the contracting parties nor domiciled in either of the two countries, and of two other Members of whom one shall be a Norwegian and the other a Swede, the question of the maritime boundary between Norway and Sweden as far as this boundary has not been determined by the royal resolution of March 15, 1904; and

Whereas, in pursuance to said convention, the two Governments have appointed respectively as president and arbitrators:

Mr. J. A. Loeff, Doctor of Law and Political Sciences, former Minister of Justice, Member of the Second Chamber of the States-General of the Netherlands;

Mr. F. V. N. Beichmann, President of the Court of Appeals of Trondhjem, and

Mr. K. Hj. L. de Hammarskjöld, Doctor of Law, former Minister of Justice, former Minister of Public Worship and Public Construction, former Envoy Extraordinary and Minister Plenipotentiary to Copenhagen, former President of the Court of Appeals of Jönköping, former Professor in the Faculty of Law of Upsal, Governor of the Province of Upsal, Member of the Permanent Court of Arbitration; and

Whereas, in accordance with the provisions of the Convention, the memorials, counter memorials, and replications have been duly exchanged between the parties and communicated to the arbitrators within the periods fixed by the President of the Court; and

Whereas, the two Governments have respectively appointed as agents, to wit:

The Government of Norway, Mr. Kristen Johanssen, attorney at the Supreme Court of Norway; and the Government of Sweden, Mr. C. O. Montan, former member of the Court of Appeals of Svea, Judge in the Mixed Court of Alexandria; and

Whereas, it has been agreed by Article II of the Convention:

1. That the Court of Arbitration shall determine the boundary line in the waters from the point indicated by XVIII on the map annexed to the project of the Norwegian and Swedish Commissioners of August 18, 1897, in the sea as far as the limit of the territorial waters;

2. That the lines, limiting the zone which may be the subject of litigation in consequence of the conclusions of the parties and within which the boundary line shall consequently be established, must not be traced in such a way as to comprise either islands, islets, or reefs which are not constantly under water; and

Whereas, it has likewise been agreed by Article III of the said Convention:

1. That the Tribunal of Arbitration must decide whether the boundary line is to be considered, either wholly or in part, as being fixed by the boundary treaty of 1661 together with the map thereto annexed, and in what manner the line thus established should be placed.

2. That, as far as the boundary line shall not be considered as fixed by said treaty and said map, the Tribunal shall fix this boundary line, taking into account the circumstances of fact and the principles of international law; and

Whereas, the agents of the parties have presented the following conclusions to the Tribunal:

The agent of the Norwegian Government:

That the boundary between Norway and Sweden within the zone which constitutes the object of the arbitral decision, shall be determined in accordance with the line indicated on the map annexed, under No. 35, to the memorial presented in behalf of the Norwegian Government.

And the agent of the Swedish Government:

I. As regards the preliminary questions:

May it please the Tribunal of Arbitration to declare that the boundary line in dispute, as regards the space between point XVIII as already fixed on the map of the Commissioners of 1897, and point A on the map of the boundary treaty of 1661, is but incompletely established by the said treaty and the map annexed thereto, for the reason that the exact situation of this point is not shown clearly therein, and, as regards the rest of the space, extending westward from the same point A to the territorial boundary, that the boundary line was not established at all by these documents.

II. As regards these main questions:

1. May it please the Tribunal to be guided by the treaty and map of 1661, to take into account the circumstances of fact and the principles of the law of nations, and to determine the maritime boundary line in dispute between Sweden and Norway from point XVIII as already fixed, in such a manner that in the first place the boundary line shall be

traced in a straight line to a point which constitutes the middle point of a straight line, connecting the northernmost reef of the Rösökären, belonging to the Koster Islands, that is to say, the reef indicated on table 5 of the report of 1906 as being surrounded with depths 9, 10, and 10, and the southernmost reef of the Svartskjär, belonging to the Tisler Islands, and which is furnished with a beacon, which point is indicated on the same table 5 as the point XIX.

2. May it please the Tribunal further to take account of the circumstances of fact and the principles of the law of nations and establish the rest of the disputed boundary in such a manner that—

a. Starting from the point fixed according to the conclusions of paragraph 1 and designated as point XIX, the boundary line shall be traced in a straight line to a point situated midway on a straight line connecting the northernmost of the reefs indicated under the name of Stora Drammen, on the Swedish side and the Hejeknub rock, situated to the southeast of Heja Island, on the Norwegian side, which point is indicated on the said table 5 as point XX; and

b. Starting from the point last mentioned, the boundary shall be traced in a straight line due west as far into the sea as the maritime territories of the two nations are supposed to extend. And

Whereas, the line mentioned in the conclusions of the Norwegian agent is traced as follows:

From point XVIII as indicated on the map of the Commissioners of 1897, in a straight line to point XIX situated midway on a line drawn between the southernmost reef of the Svartskjär (the reef which is furnished with a beacon) and the northernmost reef of the Rösökären.

From this point XIX in a straight line to point XX, situated midway on a line drawn between the southernmost reef of the Heiefluer (söndre Heieflu) and the northernmost of the reefs comprised under the name of Stora Drammen.

From this point XX to point XXa, following a perpendicular drawn from the middle of the last mentioned line.

From this point XXa to point XXb, following a perpendicular drawn from the middle of the line connecting the said southernmost reef of the Heieflu with the southernmost of the reefs comprised under the name of Stora Drammen.

From this point XXb to point XXc, following a perpendicular drawn from the middle of a line connecting the Söndre Heiefluer with the small reef situated to the north of Klöfningen islet near Mörholmen.

From this point XXc to point XXd, following a perpendicular drawn from the middle of a line connecting the Midtre Heiefu with the said reef to the north of Klöfningen islet.

From this point XXd, following a perpendicular drawn from the middle of the line connecting the Midtre Heiefu with a small reef situated west of the said Klöfningen to point XXI, where the circles cross which are drawn around said reefs with a radius of 4 nautical miles (60 to a degree). And

Whereas, after the Tribunal had visited the disputed zone, examined the documents and maps which had been presented to it, and heard the pleas and replies as well as the explanations furnished it at its request, the discussion was declared terminated at the session of October 18, 1909. And

Whereas, as regards the interpretation of certain expressions used in the convention and regarding which the two parties expressed different opinions during the course of the discussion —

In the first place the Tribunal is of opinion that the clause in accordance with which it is to determine the boundary line in the sea *as far as the limit of the territorial waters* has no other purpose than to exclude the possibility of an incomplete determination, which might give rise to a new boundary dispute in future. And

It was obviously not the intention of the parties to fix in advance the terminal point of the boundary, so that the Tribunal would have only to determine the direction between two given points. And

In the second place, the clause in accordance with which the lines bounding the zone which may be the subject of dispute in consequence of the conclusions of the parties *must not be traced in such a manner as to comprise either islands, islets, or reefs which are not constantly under water* can not be interpreted so as to imply that the islands, islets, and reefs aforementioned ought necessarily to be taken as points of departure in the determination of the boundary. And

Whereas, therefore, in the two respects aforementioned, the Tribunal preserves full freedom to pass on the boundary within the limits of the respective contentions. And

Whereas, under the terms of the Convention, the task of the Tribunal consists in determining the boundary line in the water from the point indicated as XVIII on the map annexed to the project of the Norwegian and Swedish Commissioners of August 18, 1897, in the sea as far as the limit of the territorial waters. And

Whereas, as regards the question "Whether the boundary line should be considered, either wholly or in part, as being fixed by the boundary treaty of 1661 and the map thereto annexed," the answer to this question should be negative, at least as regards the boundary line beyond point A on the aforementioned map. And

Whereas, the exact situation of point A on this map can not be determined with absolute precision, but at all events it is a point situated between points XIX and XX, as these points will be determined hereinafter. And

Whereas, the parties in litigation agree as regards the boundary line from point XVIII on the map of August 18, 1897, to point XIX as indicated in the Swedish conclusions, and

Whereas, as regards the boundary line from the said point XIX to a point indicated by XX on the maps annexed to the memorials, the parties likewise agree, except that they differ with regard to whether, in determining point XX, the Heiefluer or the Heiek-nub should be taken as a starting point from the Norwegian side. And

Whereas, in this connection, the parties have adopted, at least in practice, the rule of making the division along the median line drawn between the islands, islets, and reefs situated on both sides and not constantly submerged, as having been in their opinion the rule which was applied on this side of point A by the treaty of 1661; and

The adoption of a rule on such grounds should, without regard to the question whether the rule invoked was really applied by said treaty, have as a logical consequence, in applying it at the present time, that one should take into account at the same time the circumstances of fact which existed at the time of the treaty. And

Whereas, the Heiefluer are reefs which, it may be asserted with sufficient certainty, did not immerge from the water at the time of the boundary treaty of 1661 and consequently they could not have served as a starting point in defining a boundary. And

Whereas, therefore, from the above mentioned standpoint the Heiek-nub should be preferred to the Heiefluer. And

Whereas, point XX being fixed, there remains to be determined the boundary from this point XX to the limit of the territorial waters. And

Whereas, point XX is situated, without any doubt, beyond point A as indicated on the map annexed to the boundary treaty of 1661. And

Whereas, Norway has held the contention, which for that matter has not been rejected by Sweden, that from the sole fact of the Peace of

Roskilde in 1658 the maritime territory in question was divided automatically between her and Sweden. And

Whereas, the Tribunal fully endorses this opinion. And

Whereas, this opinion is in conformity with the fundamental principles of the law of nations, both ancient and modern, in accordance with which the maritime territory is an essential appurtenance of land territory, whence it follows that at the time when, in 1658, the land territory called The Bohuslan was ceded to Sweden, the radius of maritime territory constituting an inseparable appurtenance of this land territory must have automatically formed a part of this cession. And

Whereas, it follows from this line of argument that in order to ascertain which may have been the automatic dividing line of 1658 we must have recourse to the principles of law in force at that time. And

Whereas, Norway claims that, inside (on this side) of the Koster-Tisler line, the rule of the boundary documents of 1661 having been that the boundary ought to follow the median line between the islands, islets, and reefs on both sides, the same principle should be applied with regard to the boundary beyond this line. And

Whereas, it is not demonstrated that the boundary line fixed by the treaty and traced on the boundary map was based on this rule, and there are some details and peculiarities in the line traced which even give rise to serious doubts in this regard, and even if one admitted the existence of this rule in connection with the boundary line fixed by the treaty, it would not necessarily follow that the same rule ought to have been applied in determining the boundary in the exterior territory. And

Whereas, in this connection,

The boundary treaty of 1661 and the map thereto annexed make the boundary line *begin* between Koster and Tisler Islands; and

In determining the boundary line they went in a direction from the sea toward the coast and not from the coast toward the sea; and

It is out of the question to say that there might have been a continuation of this boundary line in a seaward direction; and

Consequently, the connecting link is lacking in order to enable us to presume, without decisive evidence, that the same rule was applied simultaneously to the territories situated this side and to those situated that side of the Koster-Tisler line. And

Whereas, moreover, neither the boundary treaty nor the map appertaining thereto mentioned any islands, islets, or reefs situated beyond the Koster-Tisler line, and therefore, in order to keep within the probable

intent of these documents we must disregard such islands, islets, and reefs. And

Whereas, again, the maritime territory belonging to a zone of a certain width presents numerous peculiarities which distinguish it from the land territory and from the maritime spaces more or less completely surrounded by these territories. And

Whereas, furthermore, in the same connection, the rules regarding maritime territory can not serve as a guide in determining the boundary between two contiguous countries, especially as, in the present case, we have to determine a boundary which is said to have been automatically traced in 1658, whereas the rules invoked date from subsequent centuries;

And it is the same way with the rules of Norwegian municipal law concerning the definition of boundaries between private properties or between administrative districts. And

Whereas, for all these reasons, one can not adopt the method by which Norway has proposed to define the boundary from point XX to the territorial limit. And

Whereas, the rule of drawing a median line midway between the inhabited lands does not find sufficient support in the law of nations in force in the seventeenth century. And

Whereas, it is the same way with the rule of the *thalweg* or the most important channel, inasmuch as the documents invoked for the purpose do not demonstrate that this rule was followed in the present case. And

Whereas, we shall be acting much more in accord with the ideas of the seventeenth century and with the notions of law prevailing at that time if we admit that the automatic division of the territory in question must have taken place according to the general direction of the land territory of which the maritime territory constituted an appurtenance, and if we consequently apply this same rule at the present time in order to arrive at a just and lawful determination of the boundary. And

Whereas, consequently, the automatic dividing line of 1658 should be determined (or, what is exactly the same thing expressed in other words) the delimitation should be made today by tracing a line perpendicularly to the general direction of the coast, while taking into account the necessity of indicating the boundary in a clear and unmistakable manner, thus facilitating its observation by the interested parties as far as possible. And

Whereas, in order to ascertain what is this direction we must take equally into account the direction of the coast situated on both sides of the boundary. And

Whereas, the general direction of the coast, according to the expert and conscientious survey of the Tribunal, swerves about 20 degrees westward from due north, and therefore the perpendicular line should run toward the west to about 20 degrees to the south. And

Whereas, the parties agree in admitting the great unsuitability of tracing the boundary line across important bars; and

A boundary line drawn from point XX in a westerly direction to 19 degrees to the south would completely obviate this inconvenience, since it would pass just to the north of the Grisbadarna and to the south of Skjöttegrunde and would also not cut through any other important bank; and

Consequently, the boundary line ought to be traced from point XX westward to 19 degrees south, so that it would pass midway between the Grisbadarna banks on the one side and Skjöttegrunde on the other. And

Whereas, although the parties have not indicated any marks of alignment for a boundary line thus traced there is reason to believe that it will not be impossible to find such marks. And

Whereas, on the other hand, we could, if necessary, avail ourselves of other-known methods of marking the boundary. And

Whereas, a demarkation which would assign the Grisbadarna to Sweden is supported by all of several circumstances of fact which were pointed out during the discussion and of which the following are the principal ones:

a. The circumstance that lobster fishing in the shoals of Grisbadarna has been carried on for a much longer time, to a much larger extent, and by much larger number of fishers by the subjects of Sweden than by the subjects of Norway.

b. The circumstance that Sweden has performed various acts in the Grisbadarna region, especially of late, owing to her conviction that these regions were Swedish, as, for instance, the placing of beacons, the measurement of the sea, and the installation of a light-boat, being acts which involved considerable expense and in doing which she not only thought that she was exercising her right but even more that she was performing her duty; whereas Norway, according to her own admission, showed much less solicitude in this region in these various regards. And

Whereas, as regards the circumstance of fact mentioned in paragraph *a* above,

It is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible; and

This rule is specially applicable in a case of private interests which, if once neglected, can not be effectively safeguarded by any manner of sacrifice on the part of the Government of which the interested parties are subjects; and

Lobster fishing is much the most important fishing on the Grisbadarna banks, this fishing being the very thing that gives the banks their value as fisheries;

Without doubt the Swedes were the first to fish lobsters by means of the tackle and craft necessary to engage in fishing as far out at sea as the banks in question are situated;

Fishing is, generally speaking, of more importance to the inhabitants of Koster than to those of Hvaler, the latter having, at least until comparatively recent times, engaged rather in navigation than fishing;

From these various circumstances it appears so probable as to be almost certain that the Swedes utilized the banks in question much earlier and much more effectively than the Norwegians;

The depositions and declarations of the witnesses are, generally speaking, in perfect harmony with this conclusion;

The arbitration Convention is likewise in full accord with the same conclusion;

According to this Convention there is a certain connection between the enjoyment of the fisheries of the Grisbadarna and the keeping up of the light-boat, and, as Sweden will be obliged to keep up the light-boat as long as the present state of affairs continues, this shows that, according to the arguments of this clause, the principal enjoyment thereof is now due to Sweden. And

Whereas, as regards the circumstances of fact as mentioned under *b*:

As regards the placing of beacons and of a light-boat —

The stationing of a light-boat, which is necessary to the safety of navigation in the regions of Grisbadarna, was done by Sweden without meeting any protest and even at the initiative of Norway, and likewise a large number of beacons were established there without giving rise to any protests; and

This light-boat and these beacons are always maintained by Sweden at her own expense; and

Norway has never taken any measures which are in any way equivalent except by placing a bellbuoy there at a time subsequent to the placing of the beacons and for a short period of time, it being impossible to even compare the expenses of setting out and keeping up this buoy with those connected with the beacons and the light-boat; and

It is shown by the foregoing that Sweden had no doubt as to her rights over the Grisbadarna and that she did not hesitate to incur the expenses incumbent on the owner and possessor of these banks even to the extent of a considerable sum of money.

As to the measurements of the sea —

Sweden took the first steps, about thirty years before the beginning of any dispute, toward making exact, laborious, and expensive measurements of the regions of Grisbadarna, while the measurements made some years later by Norway did not even attain the limits of the Swedish measurements. And

Whereas, therefore, there is no doubt whatever that the assignment of the Grisbadarna banks to Sweden is in perfect accord with the most important circumstances of fact. And

Whereas, a demarkation assigning the Skojöttegrunde (which are the least important parts of the disputed territory) to Norway is sufficiently warranted by the serious circumstance of fact that, although one must infer from the various documents and testimony that the Swedish fishers, as was stated above, have carried on fishing in the regions in question for a longer period, to a greater extent, and in greater numbers, it is certain on the other hand that the Norwegian fishers have never been excluded from fishing there. And

Whereas, moreover, it is averred that the Norwegian fishers have almost always participated in the lobster fishing on the Skjöttegrunde in a comparatively more effective manner than at the Grisbadarna:

THEREFORE —

The Tribunal decides and pronounces:

That the maritime boundary between Norway and Sweden, as far as it was not determined by the royal resolution of March 15, 1904, is fixed as follows:

From point XVIII situated as indicated on the map annexed to the project of the Norwegian and Swedish Commissioners of August 18, 1897, a straight line is traced to point XIX, constituting the middle point of a straight line drawn from the northernmost reef of the Rösökären to the southernmost reef of the Svartskjär, the one which is provided with a beacon;

From point XIX thus fixed, a straight line is traced to point XX, which constitutes the middle point of a straight line drawn from the northernmost reef of the group of reefs called Stora Drammen to the Hejknub situated to the southeast of Heja Islands; from point XX a

straight line is drawn in a direction of west 19 degrees south, which line passes midway between the Grisbadarna and the Skjöttegrunde south and extends in the same direction until it reaches the high sea.

Done at The Hague, October 23, 1909, in the Palace of the Permanent Court of Arbitration.

J. A. LOEFF, *President*,

MICHIELS VAN VERDUYNEN, *Secretary General*,

ROELL, *Secretary*.

Annex 196

*Dubai-Sharjah Border Arbitration, Award, 13 October 1981, (1993) 91 International
Law Reports 543 (Extract)*

Arbitration — Arbitration agreement — Function of arbitral tribunal — Boundary dispute — Whether tribunal's task one of demarcation of existing boundary or delimitation — Law applicable to arbitration

Arbitration — Concept of arbitration — Distinction between arbitration and political settlement — Boundary dispute — Dependent States — Trucial States — Reference of dispute to British official — Consent of Rulers of the Trucial States — Whether obtained by coercion — Whether decision of official based upon law — Whether decision of official legally binding upon successor States

Territory — Boundaries — Land boundaries — Arbitration of boundary dispute — Critical date — Acquisition of title — Prescription — Protest — Desert areas — Allegiance of tribes — Exercise of jurisdiction — Significance in establishing title to territory

Sea — Maritime boundaries — Delimitation — Adjacent States — Equity — Harbour works — Use as part of base lines — Equidistance method — Special circumstances — Islands — Whether island should be given half effect — Effect of island's entitlement to a territorial sea

DUBAI-SHARJAH BORDER ARBITRATION

*Court of Arbitration.*¹ 19 October 1981

(Cahier, *President*; Simpson and Simmonds, *Members*)

SUMMARY: *The facts:*—Dubai and Sharjah had been under the protection of Great Britain since 1892, but without clearly defined boundaries. The extent of the territory controlled by a particular Ruler depended on which

¹ Constituted under an agreement of 30 November 1976, reproduced at p. 550.

tribes gave allegiance to him. The tribes changed allegiance from time to time and, in any event, being nomadic, the “dirah” or homeland they claimed was far from precise. In 1937, however, when the discovery of oil led companies to seek concessions from the Rulers, Great Britain took steps to define these boundaries.

As regards the land boundary, a British official, Julian Walker, surveyed the territory and, on the basis of his reports, the British Political Agent, Mr Tripp, made a series of decisions or “awards” in 1956–57 establishing the land boundary, although no map accompanied these “awards”. The Ruler of Dubai declined to accept these “awards”, notwithstanding the fact that both Rulers had requested the British Government in 1954 to “arbitrate” these boundaries.

The continuing uncertainty over the location of the land boundary impeded good relations between the two Emirates, and two areas caused special friction. The first was the Al Mamzer peninsula, part of the coast adjacent to Dubai and separated from Sharjah town by Khan Creek. The Tripp “award” had placed the boundary on this peninsula some distance west of the creek, so that Sharjah claimed territory on which Dubai wished to extend its harbour. The second was Hadhib Azana, an area further inland, and south-west of Sharjah Town, on which Sharjah was building an industrial estate but subject to protest from Dubai.

The maritime boundary was not covered in the Tripp “awards”. However, in 1963 the United Kingdom Government proposed a lateral boundary offshore, starting at the coastal terminal point of the land boundary on the Al Mamzer peninsula, and running seaward as a perpendicular to the line of general direction of the coast, i.e. a form of simplified equidistance. Dubai rejected this line since its acceptance would have involved acceptance of the division of the Al Mamzer peninsula. In 1971 United Kingdom protection ceased and Sharjah and Dubai, together with a number of other States formerly under British protection, established the Federation of the United Arab Emirates (“the Federation”).

Lacking any political settlement, the two Parties signed a *Compromis d'Arbitrage* on 30 November 1976, under the auspices of the Supreme Council of the Federation. The subject-matter of the arbitration was broadly defined as “the outstanding dispute between the two Emirates of Dubai and Sharjah concerning the demarcation of the boundaries between them ...” In the ensuing arbitration the Parties differed radically over a number of issues.

(1) *The task of the Tribunal*: Sharjah saw this as essentially the task of *demarcation* of an existing boundary established by the Tripp “awards”. Dubai argued for the broader task of *delimitation*, on the basis that the Tripp “awards” were not binding, that no such award had been made for the maritime boundary (so delimitation was demonstrably required there), and that it could not have been the intention of the Parties to nominate three jurists if what was required was a simple demarcation exercise.

(2) *The applicable law*: the *Compromis* contained no choice of law clause. Dubai argued that international law governed, whereas Sharjah additionally argued that the federal law of the United Arab Emirates applied, with the implication that, within the Federation, boundaries were already settled.

(3) *The critical date*: Sharjah argued for two alternative dates; 1955, when the Rulers had agreed to “arbitration” by the United Kingdom Government, or 1971, when the Federation was formed. Dubai denied that the theory of the critical date had any relevance to a case in which the question posed was where sovereignty lay now, as opposed to the question where sovereignty lay on a specified date.

(4) *The status of the Tripp “awards” of 1956/57*: Sharjah argued these were arbitral decisions, and thus binding and *res judicata*. The effect was, therefore, that as regards the land boundary the Tribunal was bound to follow those decisions. Dubai argued, first, that its Ruler had been coerced by the United Kingdom Government into consenting to its “arbitration”; secondly, that the concept *res judicata* attached only to judicial or arbitral decisions, not to administrative decisions. It contended that the processes initiated by the United Kingdom Government which led to the Tripp “awards” had nothing in common with a true, arbitral process and were essentially administrative processes leading to administrative decisions: therefore *res judicata* could not apply to them. Accordingly, both as to the land boundary and the maritime boundary the Tribunal had full discretion to review all the evidence, of which the Tripp “awards” formed a part, and come to its own, independent decision.

(5) *As regards the Al Mamzer peninsula*: Sharjah advanced a historical claim but little evidence of concrete control and possession in the present century and nothing after 1940. By contrast, Dubai gave evidence of patrolling, some construction work, and the assertion of the right to hold inquests on bodies found on the beach. Protests by Sharjah began only in the mid-seventies.

(6) *In the area further inland (Nahada Amair and Hadhib Azana)*, Sharjah argued that Tripp's location of Nahada Amair was clear, and had not been protested by Dubai. Sharjah had regularly sent police patrols and exercised full criminal and civil jurisdiction up to this point. Dubai could only adduce evidence of actions beyond Nahada Amair during hostilities between Sharjah and Dubai in 1940 and, more recently, a few police patrols.

The location of Hadhib Azana was far from clear, with both parties relying on different maps to support different positions. But Sharjah had built extensively in the area and exercised jurisdiction there, whereas Dubai had effectively protested only after 1978.

(7) *In the inland, desert area*, there were few settlements and the line established by the Tripp decision had followed certain natural features. This was the line claimed by Sharjah. Dubai claimed a line further to the north and east.

The nomadic tribe whose “dirah” this area was, was the Bani Qitab, and Sharjah claimed this tribe owed allegiance to the Ruler of Sharjah. Dubai disputed that there existed any clear evidence of acceptance of the Ruler's authority by the Bani Qitab, and adduced evidence of control by Dubai, in that Dubai had dug wells in the area and had allied with the Bani Qitab in a war against Abu Dhabi in 1943.

(8) *As regards the maritime boundary*: Sharjah argued that the lateral line—a rhumb line of 312°—proposed by the United Kingdom Government in 1963 had in practice been accepted by the Parties. But in the event that the Tribunal should reject the Tripp decision on the terminal point of the land

boundary (the point on the Al Mamzer peninsula from which the 312° line was drawn) Sharjah argued for a boundary based on “equitable principles”. Dubai's position was that there was no existing boundary and that the Tribunal must determine the boundary *de novo* based on “equitable principles”.

However, the Parties differed as to how “equitable principles” might apply in this particular case. There were two essential points of difference.

(a) *The use of harbour works as base-points*: Although the coastline was more or less straight, Dubai's harbour works extended seawards three times farther than those of Sharjah. Dubai invoked Articles 3 and 8 of the Geneva Convention on the Territorial Sea and Contiguous Zone, 1958, to support the argument that these harbour works were nevertheless legitimate base-points for drawing an equidistance line. The effect of so doing was to move the equidistance line further towards Sharjah, and thus give Dubai a larger maritime area. Sharjah argued that this was inequitable.

(b) *The effect of the island of Abu Musa*: Lying some 35 miles off the coast of Sharjah, Sharjah claimed “half-effect” for this island. The effect of this claim was to swing the equidistance line across the front of Dubai's coast. Dubai counteracted by arguing that Sharjah's sovereignty over the island was disputed by Iran, and the half-effect technique was inappropriate for disputed islands. Moreover, such a direction of the equidistance line would contravene the principle of “non-encroachment” expounded by the International Court of Justice in 1969 in the *North Sea Continental Shelf* cases. Dubai also argued that since 1964 it had been agreed by Sharjah, the United Kingdom and Umm al Qaiwan that the island would have only a 3 mile territorial sea. On that basis the island would have no effect on the equidistance line. Dubai further argued that the line produced by half-effect for the island would be incompatible with the existing median-line agreed between the United Arab Emirates and Iran in 1974.

Held (Mr Simpson dissenting in part):—(1) The task of the Tribunal was not limited to demarcation, for that implied the binding character of the Tripp “awards”, which the Tribunal rejected; and in any event, had demarcation been intended, the Parties would have established a technical commission, not a judicial body (pp. 566–85).

(2) International law applied, but with regard being had to the special conceptions of sovereignty over territory prevalent amongst the peoples of the territory at the relevant times, with the result that “allegiance” and “control” became crucial criteria (pp. 585–90).

(3) Neither 1955 nor 1971 could be accepted as “critical dates”. The claims had not “crystallised” in 1955; nor did the establishment of the Federation preclude disputes over sovereignty after Federation or the relevance of conduct after Federation. In any event, in many judicial or arbitral decisions the role of the critical date was minimal, especially where the question was which Party had sovereignty at the present time (pp. 590–4).

(4) The consent given by Dubai to the “arbitration” by the United Kingdom resulting in the Tripp “awards” of 1956–57 was not vitiated by duress. The United Kingdom had doubtless exercised its influence and pressure on the Ruler but that was not to be equated with duress in the sense

used in Articles 51 and 52 of the Vienna Convention on the Law of Treaties, 1969. Nevertheless, the Tripp “awards” were not true arbitral awards, judged by the standards of the 1958 International Law Commission Model Rules of Arbitral Procedure. The Parties had not had an adequate opportunity to deploy their arguments and these so-called “awards” were not reasoned. Accordingly, whatever binding character was possessed by these “awards” was that of binding administrative decisions. However, the evidence disclosed that, after independence, the Parties had not accepted these decisions as binding, and to the extent that the decisions were not accepted they lost any binding character which they might have originally possessed (pp. 568–85).

(5) As to the land territory: (i) The Al Mamzer peninsula had been in part controlled by Sharjah in the nineteenth century, but by a process of dereliction Sharjah had abandoned any control, so that by 1940 Sharjah had lost any legal title. Accordingly, the Tripp decision was not based on law but was rather in the nature of a political compromise. The Tribunal was therefore bound to reject it. The evidence showed sufficient acts of control and sovereignty by Dubai which, coupled with Dubai's rejection of the Tripp “awards” demonstrated a clear assertion of sovereignty. Sharjah had failed to protest within a reasonable time, and accordingly the entire Al Mamzer peninsula belonged to Dubai (pp. 595–625).

(ii) The areas of Nahada Amair and Hadhib Azana presented less difficulty. Nahada Amair could be accurately located and had not been protested as part of the boundary by Dubai, when identified as such in the Tripp “awards”. The evidence showed Sharjah had exercised jurisdiction and control up to this point, and therefore it could be confirmed (pp. 626–8).

On Hadhib Azana, the Tribunal disregarded the conflicting map evidence and concentrated on the conduct of the Parties. It upheld Sharjah's location, because the Boundaries Section of the Federal Ministry of the Interior seemed to share Sharjah's view, because Dubai had conceded jurisdiction over a murder committed nearby to Sharjah, and because Dubai's protests against construction work by Sharjah came only in 1978, two years after the Compromis had been signed (pp. 628–35).

(iii) As to the inland area, the United Kingdom Government had accepted that the Bani Qitab owed allegiance to Sharjah, and this was reflected in the Tripp decision. The protest by Dubai came seven years after that decision, which was too late, and in any event did not challenge the line as such but only one specific area. Dubai's own conduct in digging wells, or the testimony of some few inhabitants professing allegiance to Dubai, was not sufficient to reverse the presumption that Sharjah, the original sovereign, had not been divested of sovereignty by Dubai (pp. 635–52).

(6) As to the maritime boundary: (i) Following the rejection of the Tripp decision on the terminal point for the land boundary, there was no basis for applying the 312° line, and a boundary had to be determined *de novo* from the tip of the Al Mamzer peninsula (pp. 652–5).

(ii) State practice and conventional law supported the use of harbour works as base-points for an equidistance line, and the result in this case, although favourable to Dubai, was not inequitable (pp. 655–63).

(iii) The equidistance method was the appropriate method, and the only “special circumstance” was the island of Abu Musa (pp. 663–73).

(iv) To give half-effect to Abu Musa would be disproportionate and inequitable. Nevertheless, the island was entitled to a 12 mile territorial sea. Accordingly, the correct and equitable boundary was an equidistance line which, at the point at which it met the 12 mile limit off Abu Musa, followed the arc of that 12 mile limit around the island out to the median line with Iran in the middle of the Gulf (pp. 671–78).²

The text of the Award of 19 October 1981 commences on the opposite page.

² See the sketch map at p. 700.

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[1] INTRODUCTION

In consequence of the existence of a dispute between the Emirate of Dubai and the Emirate of Sharjah an Arbitration Agreement was signed on 30 November 1976, between His Highness Sheikh Rashid Bin Said AlMaktoum, The Ruler of Dubai, and His Highness Sheikh Sultan Bin Mohamed Al Qasimi, The Ruler of Sharjah.

The Arbitration Agreement, in its English translation, (As supplied by the Federal authorities of the United Arab Emirates to the Court of Arbitration; the fifth Article was missing from this text), reads as follows:

In the Name of God the Compassionate the Merciful

Arbitration Agreement

His Highness Shaikh Rashid Bin Sa'id Al Maktoum, Ruler of the Emirate of Dubai, and His Highness Shaikh Sultan Bin Mohammed Al Qasimi, Ruler of the Emirate of Sharjah, have agreed as follows:

First: the outstanding dispute between the two Emirates of Dubai and Sharjah concerning the demarcation of the boundaries between them shall be referred to Arbitration.

Second: three arbitrators from among the leading judges and lawyers of two friendly States shall be [2] appointed to decide the said dispute, and the Ministry of Foreign Affairs of the United Arab Emirates will approach these two States to appoint the arbitrators.

Third: the arbitrators will conduct the investigation to hear the evidence which the two said Parties wish to submit in order to secure to each Party the right of a complete defence. In addition the arbitrators have the right to hear any evidence which they deem appropriate.

Fourth: the arbitrators will issue their decision by an absolute majority within three months of the date of their acceptance of this task, and the Supreme Council shall have the right to extend this period at the request of the arbitrators as the Council sees fit.

Sixth: the arbitrators will conduct their meetings at any place they may select in the United Arab Emirates.

Seventh: if any arbitrator resigns or becomes incapacitated for any reason, the appointment of another arbitrator to replace him will be made in accordance with the Second Article above, provided it is understood that the nationality of the substitute must be the same nationality as that of the resigning or incapacitated arbitrator.

Eighth: the decision of the arbitrator will be binding on the above two Parties and not subject to challenge for any reason whatsoever.

[3] Done this 30.11.76 (equivalent to 9.12.1396).

In accordance with Article 2 of the Agreement, Mr John L. Simpson, CMG, QC, Professor Kenneth R. Simmonds, Professor of International Law in the University of London, and Professor Phillipe Cahier, Professor at the Graduate Institute of International Studies at

Geneva, were appointed Members of the Court of Arbitration. Professor Philippe Cahier was subsequently elected President of the Court of Arbitration.

The Court was formally established at Abu Dhabi on 2 May 1978, and held its first formal meeting on the same day in the presence of the Agents and Counsel of the Parties.

By an Order of 7 June 1978, the Court appointed as its Registrar Mr Peter Haggemacher, Lecturer at the Graduate Institute of International Studies at Geneva.

Finding that the period of three months provided for in Article 4 of the Arbitration Agreement was insufficient for it to be able to render its Award, the Court, by a letter of 3 May 1978, requested the Supreme Council of the United Arab Emirates to grant permission for an extension of its competence until 2 May 1979. This permission was granted by telegram from the Ministry of Foreign Affairs of the United Arab Emirates to the Registrar of the Court on 8 November 1978.

[4] However, this extension of time was itself found to be insufficient in view of various requests for further extensions of time made to the Court by the Parties. The Court, therefore, wishing to give full effect to Article 3 of the Arbitration Agreement, which provides that "... the arbitrators will conduct the investigation and hear the evidence which the ... parties wish to submit in order to secure to each party the right of a complete defence", subsequently obtained further extensions of time from the Supreme Council, the last of which extended the competence of the Court to 31 October 1981.

Accordingly, the date of deposit of the Memorials of the Parties, originally fixed for 31 July 1978, was postponed, at the request of the Government of Dubai, to 30 September 1978. The Memorials of both Parties were deposited simultaneously in Geneva on 29 September 1978.

Between 5 and 13 January 1979, the Court undertook a visit to the boundary region. The Court takes this opportunity of expressing its appreciation of the great assistance and the excellent facilities afforded to it on this occasion by the Federal Authorities and by the Parties.

Following an informal meeting held in London with the Parties, the Court decided, by an Order of 8 November 1978, to establish the date for the deposit of the Counter Memorials, originally foreseen as 30 November 1978, as 20 January 1979. [5] At the request of the Government of Dubai this date was changed to 30 April 1979, by an Order of the Court of 19 February 1979. The Government of Sharjah deposited its Counter Memorial on 30 April 1979, and the Counter Memorial of the Government of Dubai was deposited on 11 May 1979.

As the Court found the Counter Memorial of the Government of Dubai to be incomplete, the Parties were required by the Court to deposit supplementary written materials in a sequence designed to preserve the equality of the Parties. In consequence, the Reply of the Government of Dubai was deposited on 29 September 1979. The Reply of the Government of Sharjah, originally required to be deposited by 31 October 1979, was postponed until 20 December 1979, by an Order of the Court of 29 October 1979; this Reply was eventually deposited on 28 February 1980, and this date marked the conclusion of the Written Pleadings.

The Court nevertheless, by letters of 30 March and 17 June 1980, authorised the Parties to present to it after the conclusion of the Written Pleadings, certain “additional factual documents either to support or to counter arguments contained in the written pleadings”. The Government of Dubai deposited supplementary materials, comprising documents and maps, on 28 February; 24 October; 5, 13, 25 and 27 November 1980. The Government of Sharjah deposited supplementary materials in April 1980, and on 11 October and 1 December 1980.

[6] By an Order of 24 October 1979, the Court resolved to afford the Parties the right of Oral Hearings. The Parties having agreed not to apply the provisions of Article 6 of the Arbitration Agreement, the Court decided, by an Order of 17 August 1980, that the Oral Hearings should take place in London and should commence on 2 December 1980. The Oral Hearings opened in London, in the premises of the Royal Geographical Society, on 2 December 1980, and continued until 19 December 1980.

The order in which the Parties made their presentations during the Oral Hearings was decided by lot. The Court heard first submissions from the representatives of the Government of Dubai, represented by M. Hamdi Abdul Majid, as Agent, and by Sir Frank Layfield, QC, Dr Derek Bowett, QC and Mr William Hicks, as Counsel. The Court heard expert evidence on behalf of the Government of Dubai given by Lieutenant Commander J. C. E. White, who was cross-examined on his evidence.

The Court then heard submissions from the representatives of the Government of Sharjah, represented by Judge Yusri M. Dweik, as Agent, by Mr Northcutt Ely and Professor R. Y. Jennings, QC, as Counsel, and by Mr Jeremy P. Carver, Adviser to the Emirate of Sharjah.

Final submissions on behalf of the Government of Dubai were made by Sir Frank Layfield, QC, Dr Derek Bowett, QC, and Mr William Hicks.

[7] Final submissions on behalf of the Government of Sharjah were

made by Mr Northcutt Ely, Professor R. Y. Jennings, QC, and Mr Jeremy P. Carver.

Following upon the ending of the Oral Hearings the Parties, at the request of the Court, submitted their formal Conclusions.

The Government of Dubai submitted the following “Final Submissions”:

In the light of the evidence before the Court and of the arguments presented to it by the Parties, Dubai invites the Court to adopt the following submissions.

Considerations of Law and Practice

1. The proper interpretation of the Compromis requires the Court to delineate the entire maritime and land boundaries of Dubai and Sharjah.

2. The law to be applied by this Court of Arbitration is international law and no provision in the Provisional Constitution of the Emirates, or in federal law, operates in this particular dispute so as to preclude the application of international law.

3. In the performance of the Court's task the [8] Court is entitled, and bound, to have regard to the whole of the evidence, including the historical evidence, of the conduct of the two Parties up to the present time.

4. International law requires that the Court, in general, place greater weight on evidence of conduct by the Parties in recent times in preference to evidence of more distant dates.

5. Normal tests of evidence should be applied by the Court when weighing the evidence before it. Direct evidence from a witness is to be preferred to indirect evidence, whenever the former is available. The witnesses' means of knowledge is critical.

6. The concept of the critical date has no application to this dispute or, in the alternative, to the extent that the Court may determine it has application, it does not exclude evidence of the conduct of the Parties but affects only the weight which the Court may attach to the evidence, the scope of such evidence being covered by Submission 3 above.

7. The three decisions of Mr Tripp, Her Majesty's Political Agent, in 1956/57 were based directly or indirectly on investigations in the 1950s.

Those decisions are part of the historical evidence of the present boundary dispute. The decisions were of an administrative and not [9] judicial character; at the time they were made they were objected to by Dubai; the practice and conduct of the Parties shows that they never accepted the decisions as an accurate statement of their boundaries, or even as a statement of where Her Majesty's Government thought they should lie. The decisions do not constitute *res judicata* and do not preclude or limit the task of this Court in any way; their evidentiary weight is limited because the decisions suffered from serious and material mistakes of law and fact and contained material uncertainties and ambiguities.

The Land Boundary

8. The rules of international law require that, in areas in dispute between the Parties, sovereignty should be accorded to that Party which has demonstrated in its own conduct the greater degree of continuous effective control, jurisdiction or possession. Such conduct should show the *intention* to act in a sovereign manner and an actual *display* of authority. The period to which the evidence refers is material, among other things, because the length of period is indicative of continuity.

9. The conduct of individuals or non-State entities, including tribes, is, of itself, not to be [10] treated as conduct of the Parties unless there is clear evidence that the individuals or non-State entities were acting on behalf of, and subject to the control and authority of, the Parties.

10. Accordingly, on the evidence, especially of State conduct, before the Court the land boundary should run, so far as it can be expressed in words, as follows:

Starting from the mid-point of Khan Creek between the land extremities of the Al Mamzer peninsula and the Khan Village peninsula and thence in a south-easterly direction:

to Gezirat al Hubab (as marked on Sheet 32/78)
 to a point to the west of Ghafat Bagar (as marked on Sheet 34/78)
 passing to the north of Aud al Bilalit,
 to Bada bin Birqa, and
 Tawi bin Ghobbash (as marked on Sheet 34/78)
 to Bada Bin Ghannam (as marked on Sheet 34/78)
 to Jiza'at Barahama (as marked on Sheet 36/78)
 to Ghafat Sahal (as marked on Sheet 36/78)
 to Al Kahaif (as marked on Sheet 36/78)
 to Al Fahud (as marked on Sheet 36/76)
 to Mahani (as marked on Sheet 36/76)
 to Magail al Wahar (as marked on Sheet 36/76)
 [11] to Raqhamya (as marked on Sheet 36/74)
 to Tawi Hamad (as marked on Sheet 36/74)
 to a point on the track S. W. of Tawi Fau (as marked on Sheet 36/72)

This land boundary is depicted on the accompanying Maps marked:

Dubai Map 32 (a) being 1:25,000 Sheet 32/78
 Dubai Map 32 (b) being 1:25,000 Sheet 34/78
 Dubai Map 32 (c) being 1:25,000 Sheet 36/78
 Dubai Map 32 (d) being 1:25,000 Sheet 36/76
 Dubai Map 32 (e) being 1:25,000 Sheet 36/74
 Dubai Map 32 (f) being 1:25,000 Sheet 36/72

In the event of ambiguity in the written description or conflict between the wording and the Maps it is intended that Maps 32 (a) to 32 (f) should prevail.

Also submitted are amended copies of Dubai Maps 3(a), 3(b) and 3(c) based on the latest 1:25,000 mapping.

The Maritime Boundary

11. The maritime boundary begins at the terminal point of the land boundary which is that point in the entrance to Khan Creek, identified in Submission 10.

[12] 12. The 312° line, proposed by Her Majesty's Government in 1963 as a maritime boundary, has never been accepted in practice by the Parties as a boundary, nor is it binding upon them in law, and its starting point, the coastal terminus of the land boundary, is obscure.

13. The correct boundary under customary international law is an equidistance boundary, beginning at the point defined in Submissions 10 and 11 above and extending to such furthestmost point as does not involve any encroachment into an area of the continental shelf which reasonably may, under some future delimitation between the United Arab Emirates and Iran, be determined to belong to Iran.

14. In the construction of that equidistance boundary, effect is to be given to the base-lines of the mainlands of both Dubai and Sharjah, in conformity with the rules of law, especially those contained in Articles 3 and 8 of the Geneva Convention on the Territorial Sea and Contiguous Zone of 1958 which states the rules of customary international law, and including in those base-lines the outer-most harbour works of both Dubai and Sharjah.

15. The equidistance boundary so constructed would accord with the relationship of the two Parties as adjacent States, would accord to each Party that area of continental shelf which is the [13] natural prolongation of its landmass, which appertains to it *de jure* and *ab initio*, and would produce an equitable and proportionate result.

16. Such an equidistance boundary is fully in accordance with the rules of customary international law as reflected in the Judgment of the International Court of Justice in the *North Sea Continental Shelf* cases,^[3] and it conforms to equitable principles and produces an equitable result in the light of all the relevant circumstances.

17. It would be inequitable, and not in accord with the principles and rules of customary international law, to allow the equidistance boundary to be deflected to allow for an area of territorial waters and/or continental shelf pertaining to the island of Abu Musa; and it would be even more inequitable and contrary to law to adopt a continental shelf boundary giving "halfeffect" for the island of Abu Musa.

18. The maritime boundary is described and defined in submissions 11 to 17 and is depicted on Dubai Map 10, proceeding through Points 10, 11, 17, 8 and 9.

The Government of Sharjah submitted the following "Submissions of the Emirate of Sharjah".

The Court of Arbitration constituted pursuant to [14] the Agreement for Arbitration dated 30 November 1976, is asked to adjudge and declare:

[³ 41 *ILR* 29.]

1. That the Award made by Her Britannic Majesty's Agent on 1 and 2 April 1956, together with his Award made on 3 and 4 July 1956, together with his Award made on 18 March 1957, fixed and established a boundary line between the Emirates of Sharjah and Dubai which is defined in the following terms:

The boundary point on the coast between Sharjah and Dubai is a line running between Mamzer and Abu Hail, leaving Mamzer to Sharjah, starting at right angles from the coast and passing half-way between the sites of the houses of Hilal bin Humaid and Khalifah bin Hassan, near the site of Birka well.

Thence the boundary proceeds by a straight line to Nahada Amair; from there to Hadhib Azana; from there to Arqub Rakan so as to leave Aud Bilalid and Arqub Sba'a entirely within Sharjah and Aud al Matinah within Dubai; from Arqub Rakan to Chilah, leaving Arqub Alam (Nauf) entirely within Sharjah, and Tawi Bida'at within Dubai; from Chilah to Naqdat az Zamul, leaving Tawi Tai entirely within Sharjah, [15] thence to Tawi bil Khabis, which is divided between Sharjah and Dubai.

From Tawi bil Khabis, the boundary turns south to Mirial, leaving Arafat entirely within Sharjah, and Jiza'at bin Ta'aba and Arqub Dhabian within Dubai; from Mirial to Khobai; and thence to Qawasir; thence continuing southwards, so as to leave Tawi Mghram and Bedirat Mghram entirely within Sharjah, and Sih Atham and Bada Hilal within Dubai, to Al Alam; and thence by a straight line to Arqub Salama, so as to leave Bada Zigag and Muwaihi Daij entirely within Sharjah, and Rummaiayah within Dubai.

2. That the boundary line thus established was binding upon the Emirates of Sharjah and Dubai by reason of the prior consents to the Arbitration of Her Britannic Majesty's Political Agent, given by the Rulers of the two Emirates; and/or the aforementioned Awards constituted decisions made by an Authority then competent to make such decisions; and/or because the boundary line so described was recognised and used as the boundary for a sufficient period of time subsequent to the date of the Awards.

3. That the points on the boundary described in paragraph 1 above are defined by the following [16] Universal Transverse Mercator co-ordinates:

	North	East
Point on the Coast	2798782	332117
Nahada Amair	2798535	335150
Hadhib Azana	2797830	337900
Arqub Rakan	2794465	347700
Chilah bin Salumah	2790655	352700
Naqdat az Zamul	2788000	359625
Tawi bil Khabis	2788425	361475
Mirial	2772380	364000
Khobai	2768875	361400
Qasasir	2762210	361450
Al Alam	2748795	363140
Arqub Salama	2735580	367640

4. That the said boundary be plotted on an Award Map prepared to the scale of 1:25,000 and based upon the photogrammetric surveys undertaken by Hunting Surveys Limited in October 1978 (but without reference to the names of places marked on the said map save insofar as the locations of such places are agreed or not in dispute between the Parties); such Award Map to be an integral part of the Award of the Court.

5. That the works undertaken by Dubai on the Sharjah side of the said boundary line constitute an unlawful breach of the sovereignty of the Emirate of Sharjah.

[17] 6. That in the event that the Court, by reason of the dispute between the Parties over the location of Hadhib Azana on the ground, be unable to decide the correct location of Hadhib Azana, the boundary line in this sector should be drawn as a straight line joining Nahada Amair to Arqub Rakan.

7. That the sea boundaries between the Emirate of Sharjah and the Emirate of Dubai should be fixed from the point on the coast determined by the Award made by Her Britannic Majesty's Political Agent on 1 and 2 April, 1956 (and described in paragraph 1 above and defined by co-ordinates in paragraph 3 above), as a rhumb line drawn out to sea on a bearing of 312° (true) to its intersection with the continental shelf boundary defined in the agreement between the United Arab Emirates and the Government of Iran dated 13 August, 1974.

8. That, in the event that the Court considers that the sea boundaries must be determined otherwise than as stated in paragraph 7 above, the sea boundaries be determined in accordance with the customary rules of international law, which in the circumstances existing in the area require the fixing of an equidistance line between the said terminus of the land boundary on the mainland coast (described in paragraph 1 above) and the point of intersection with the said continental shelf boundary between the United Arab Emirates [18] and Iran in such a way as to give "half effect" to Sharjah's island of Abu Musa and no effect to the respective harbour works of Sharjah and Dubai, such sea boundaries being plotted in accordance with the illustration appearing on Sharjah Map 27.

9. That the said sea boundaries be plotted on an Award Chart based upon the current edition of Admiralty Chart 2889, to be made an integral part of the Award of the Court.

[96] CHAPTER V: THE COASTAL ZONE—AL MAMZER

The coastal zone discussed below is the territory which extends from Dubai Creek to Khan Creek over a distance of approximately 5 miles. The Government of Dubai claims the entire zone and demands that the boundary should start from the mid-point of Khan Creek between the land extremities of the Al Mamzer peninsula and the Khan Village peninsula (point 10 of the Dubai Final Submissions). However, in the view of the Government of Sharjah:

... the boundary point on the coast between Sharjah and Dubai is a line running between Mamzer and Abu Hail. (Point 1 of the Sharjah Submissions.)

The boundary point would therefore be at approximately the midpoint between Dubai Creek and Khan Creek. In making this demand the Sharjah Government is simply referring to Mr Tripp's decisions of 1 and 2 April 1956.

The Court has already shown above that when faced with binding decisions its task has been first to identify the places indicated in the decisions as forming part of the boundary line, in cases where their location was uncertain, and then to investigate whether, when drawing the [97] line, the British authorities had taken into account all the relevant factors, and lastly to see to what extent these decisions had been recognised and applied by the Parties.

1. Identification of the boundary line in the coastal region

In his letter of 2 April 1956, Mr Tripp began by noting the Ruler of Dubai's undertaking to abide by the decision of the Political Agent with regard to the delimitation of the boundary and then gave the content of his decision as follows:

Mr Walker has examined all the available evidence concerning your territorial claims on my behalf and on the basis of his report I have come to the following decisions:

That the boundary point on the coast between your Shaikhdom and that of the Shaikh of Sharjah shall be a line running between Al Mamzer and al bu Hail leaving al bu Hail to Dubai. This line starts at right angles from the coast and passes half way between the houses of Hilal bin Humaid and Khalifah bin Hassan near Birka Well. (D. M. vol. 4, p. 218.)

The letter of 1 April 1956, addressed to the Ruler of Sharjah began in the same way and continued:

[98] That the boundary point on the coast between your Shaikhdom and that of the Shaikh of Dubai shall be a line running between Mamzer and al bu

Hail leaving Mamzer to Sharjah starting at right angles from the coast and passing half way between the houses of Hilal bin Humaid and Khalifah bin Hassan near Birka well. (Sh. M. vol. II, p. 282.)

In the view of the Government of Sharjah, and according to Point 3 of its Submissions, the coastal terminus, as fixed by the decision, can be identified precisely and according to its Submissions:

... is defined by the following Universal Transverse Mercator Co-ordinates: North 2798782, East 332117.

However, the Government of Dubai was not certain that this point was settled, since if reference is made to the sketch map drawn by Mr Walker and annexed to his report of 1964, the coastal terminus is approximately five hundred metres north east of that maintained by Sharjah. As for the British map of 1963 designed to illustrate a sea boundary proposal, the coastal terminus is even further from the one indicated by Sharjah and also from the one shown on Mr Walker's sketch map.

For reasons which will emerge later, the Court does [99] not consider it necessary to resolve this problem. It wishes to observe, however, that the very precise wording of the Tripp decision appears to support the view of the Government of Sharjah, and any maps or documents which may have been drafted subsequently are not relevant where they conflict with this wording: it may be added that according to a Foreign Office memorandum dated 16 June 1969:

... strictly speaking only the letters of award have real validity. (Sh. M. vol. II, p. 364.)

2. The legal position

It is the opinion of the Government of Dubai that when Mr Walker drafted his report, which formed the basis for Mr Tripp's decisions of April, 1956, he did not know all the facts of the matter, and the result was that he fixed a boundary line which did not take account of reality. The grounds on which it bases this opinion fall under two main headings: firstly, Abu Hail was not located at the place indicated by Mr Walker; and secondly, the Al Mamzer peninsula was under the effective control of Dubai and not of Sharjah.

(a) The location of Abu Hail

The Dubai Government considers that:

Mr Walker did not have a correct understanding of the historical background of Abu Hail and [100] Al Mamzer.

In particular: (1) He was not clear as to the historical position relating to Abu Hail ... (D. CM. vol. 1, p. 25.)

Moreover, Mr Walker was wrong in stating that the boundary should pass between Abu Hail and Al Mamzer, i.e. in locating Abu Hail between Dubai Creek and Khan Creek, since historically this little town was situated on the tip of the Al Mamzer peninsula opposite the village of Khan.

This assertion was supported by a number of documents from British sources.

In 1820, a map drawn by Thomas Remond, a British Lieutenant of Engineers who had taken part in the British expedition to the region in 1819, shows Abu Hail at the position indicated by the Dubai Government. This position would appear to be supported by Admiralty Chart 2837 (AI) of 1860 which shows the position of a fort which might have been formed by the fortifications erected at Abu Hail in 1846.

Another map published in 1872 (Admiralty Hydrographic Department, reference 753 BI) clearly shows Abu Hail opposite Khan.

Lastly, the *Persian Gulf Pilot* which records the *Sailing Directions for the Persian Gulf*, published in 1870 [101] but on the basis of explorations done between 1857 and 1860, states:

At 214 miles south west from Liyeh point is a little creek with two small towns, Khan and Abu Hail, on opposite sides of it.

In its description of the two towns the *Persian Gulf Pilot* indicates that both have defence towers, which shows that there could be no confusion between them. (D. CM. vol. 2, p. 4.)

The Court therefore finds, in the light of these documents, that Abu Hail was at that time situated on the extremity of the Al Mamzer peninsula. However, the town must have extended well beyond this area, since the same *Persian Gulf Pilot* gives its population as two thousand people, which would make it a relatively large town, since it gives for the same period the population of Dubai as between five and six thousand inhabitants and that of Sharjah as between eight and ten thousand.

Mr Walker's report of 1955 is rather confused regarding Abu Hail. It would appear, according to him, that Abu Hail was situated between Khan Creek and Dubai Creek, but that there was a second town called Al Mamzer on the peninsula of the same name. The confusion might have arisen from the fact that the *Persian Gulf Pilot* said that Abu Hail was "also [102] called Mumza" and the Dubai Government recognised that:

Al Mamzer was merely another name for this town of Abu Hail. (D. CM. vol. 1, p. 41.)

One thing we know for certain is that Mr Walker inserted a correction in his report of 1964, since he says:

There was another town ... called Abu Hail situated at Al Mamzer opposite Khan on the mouth of Khan Creek. (Sh. M. vol. II, p. 165.)

This therefore confirms the opinion of the Court regarding the location of Abu Hail. The parties differ as to the time of the destruction of Abu Hail, but they are agreed in saying that the town was no longer inhabited after the end of the nineteenth century. This also emerges from the second volume of J. R. Lorimer's *Gazeteer of the Persian Gulf, Oman and Central Arabia*. It describes Abu Hail as follows:

A sandy locality with date plantations, on the coast of Trucial Oman ... In the date season it is occupied by people from both Khan and Dubai: at other times it is uninhabited. (Lorimer, vol. II, p. 603.)

[103] As to its location:

It lies a short distance south west of Khan, from which it is divided by the Khan Creek, and is 212 miles from Sharjah town and 5 miles from the town of Dubai. (*Ibid.*)

Since, according to Lorimer, Khan was situated 2 miles away from Sharjah, Abu Hail must have been half a mile from Khan, not on the Al Mamzer tip but on the peninsula itself; this is not surprising, as the Court has already shown, by reason of its size, Abu Hail must obviously have extended beyond the extremity.

Commenting on Lorimer's description, Mr Walker says the following in his 1964 report:

... in Lorimer's time Abu Hail was the name given to the whole district controlled formerly by the town of Abu Hail, which comprised both of the present districts of Abu Hail and of Al Mamzer. The mileages given by Lorimer appear to be a survival of the description of the position of the town given in the old Bombay records. (Sh. M. vol. II, p. 167.)

This appears also to be the theory held by the Government of Sharjah.

[104] The Court cannot support this view. It is possible that in Lorimer's time the name Abu Hail covered a larger area than the old town, but if he had wanted to indicate such an area he would have spoken in more general terms. By specifying that Abu Hail was half a mile from Khan, Lorimer was obviously indicating an area, since the

town no longer existed, but an area which could only be situated on the Al Mamzer peninsula. As to the statement that he had referred as regards distances to those given in the "old Bombay records", this does not appear to be supported, firstly, because these distances do not correspond to Lorimer's, and, secondly, because Lorimer, who had visited the area, knew it and had no reason, therefore, to consult the records. Even allowing for a possible margin of error, it is clear that the Abu Hail indicated by Lorimer was situated on the Al Mamser peninsula and not where Mr Walker located it in 1955.

This is not to say, however, that Mr Walker was mistaken in locating Abu Hail where he did. In fact, the important thing was to locate Abu Hail where it was in 1955 and not where it might have been in the last century or at the beginning of this century. It is, moreover, a fact that in the decades which followed Lorimer's description the name Abu Hail referred to a location which was different from that of the nineteenth century but exactly that indicated by Mr Walker in his 1955 report.

This emerges firstly from the map drawn following the [105] Survey of *HMS Ormonde* carried out in 1933, and also from Admiralty Chart No. 3791 of 1935 and from all subsequent maps. It also emerges from the ninth edition of the *Persian Gulf Pilot* of 1942 which says:

Abu Hail is a small rush village about two miles south-westward of Khan minaret and is inhabited during the date picking season only. (Sh. M. vol. II, p. 325.)

This change in the location of Abu Hail can easily be explained. Following the destruction of the town, which took place at the latest towards the end of the nineteenth century, the name Abu Hail no longer refers to an exact location, but to an area which is inhabited only during the date picking season. The documents supplied indicate that gradually the palms which grew on the Al Mamzer peninsula disappeared, although palms remained in the area subsequently called Abu Hail. This is shown clearly on the two British maps referred to above. For its part, the Dubai Counter Memorial (p. 60) recognises that:

By 1927, there were only 5 palms remaining at the site of the [old] town of Abu Hail and there was then a gap of up to 1 1/2 sea miles without palms, before the continuous belt of palms to Dubai.

It is not so surprising then that the inhabitants of Dubai and Khan, whilst retreating gradually from the Al Mamzer [106] peninsula where there were no longer any palms, should continue to use the name Abu Hail for the area into which they went to pick dates, even if the name no longer referred to exactly the same location as it had

done. Henceforth the names Al Mamzer and Abu Hail did not refer to the same place but to different places, with the result that Mr Walker quite rightly distinguished between them in his report. Moreover, the Dubai Counter Memorial (p. 69) states:

With the decline of the palm trees the name Abu Hail came to be used more generally and Al Mamzer came to be used to refer to the peninsula itself.

The Court therefore has arrived at the following conclusions with respect to the location of Abu Hail:

(1) During the nineteenth century the town of Abu Hail was situated at the tip of the Al Mamzer peninsula and was also referred to by the name Mamzer.

(2) The town was destroyed at the latest by the end of the nineteenth century and the name was used to indicate either the former location or the surrounding area which was inhabited during the date picking season.

(3) The palm trees which grew in this area gradually disappeared and the name of Abu Hail was given to the site indicated by Mr Walker, i.e. in an area where the palm trees still grew.

[107] (4) Even if Mr Walker's 1955 report is far from explicit on the various aspects of the problem dealt with in this Chapter, he was right in distinguishing the site of Abu Hail from that of Al Mamzer.

Having once established that the geographical location of the places in Mr Walker's report corresponded to reality in 1955, the Court will proceed to an investigation of the second argument put forward by the Government of Dubai, namely, that Mr Walker did not take account of the fact that the Al Mamzer peninsula was under its effective control and not under the control of the Ruler of Sharjah.

(b) The problem of effective control in the coastal zone

There appears to be no disagreement between the parties that before Dubai ended its dependence upon Abu Dhabi, the boundary between the latter and the Emirate of Sharjah was at Dubai Creek. This is evidenced by, for example, a peace treaty concluded in 1829 between the two Rulers. (Quoted in the 1964 Walker Report, Sh. M. vol. II, p. 105.)

Likewise, it is indisputable that the inhabitants of Dubai, once it was independent, settled in 1841 at Dairah, on the other side of the creek, opposite Dubai. This did not mean annexation of the territory; in fact, a declaration by the Dubai leaders, which is given in an annex to both Mr Walker's reports states:

[108] Let it be known to any Muslim Ruler who may see this letter. Peace be upon you. This new country of Dairah we established by the order of

Shaikh Sultan bin Saqr. It belongs to him. He has no opponent whatever he wishes or proposes to do. He will find no objection from us. The country is his country, and the people are his people and he sees in them his own interests. (Sh. M. vol. II, p. 114.)

Relations between the two Emirates were bad, however, and in 1846 the Ruler of Sharjah decided:

... to erect a number of towers in a place called Khan, which, although in his own dominions, bordered also upon those of Debaye, the growing influence of whose Chief it was his particular interest to keep in check and restrain.

and further on it is written:

The actual place of the fort was a place called Aboo Heyle within gunshot range of Khan ... (Lieutenant H. F. Disbrowe, Assistant to the resident in the Persian Gulf. "Historical Sketch of the Joasmee Tribe of Arabs" from July 1844 to 1853; included in *Bombay Selections*, XXIV, New Series, p. 347. D. CM. vol. 2, p. 38.)

[109] This passage is interesting since it shows that Abu Hail formed part of Sharjah, and that the territory of that Emirate extended well beyond the Al Mamzer peninsula, because it bordered on the Emirate of Dubai. Now, even if Dubai was in the process of expansion, its territory could not have been extended very much further since 1841, the date of the founding of Dairah.

Also in 1846 the leaders of Abu Hail made a declaration of loyalty to the Ruler of Sharjah saying:

... that they would listen and obey Shaik Sultan bin Saqr. That they would unite with him in fighting and that they and their followers would not support his enemies either openly or secretly. That their residences which are called Bu Hail houses are deposits with them, and that they are residing according to his wish. Whenever he wants to take it from them, they have no objection to that. (Annex to Mr Walker's 1964 Report; D. M. vol. 4, p. 114.)

The building of these towers was viewed badly by the Ruler of Dubai, and, despite the efforts of the British authorities to pacify him, conflict ensued. Finally an agreement was concluded in 1847 under which the Ruler of Sharjah undertook to dismantle the fortification. In fact the agreement was not implemented and the towers remained in position.

[110] The Court therefore finds that in the middle of the nineteenth century the Ruler of Sharjah had a legal title over Abu Hail, firstly, because of the allegiance owed to him by its inhabitants, and, secondly, because he had effective control over it, since it was at his

instigation that the fortifications were erected and it was to him that approaches were made to have them pulled down.

A further result, as Lieutenant Disbrowe's evidence shows, was that this legal title extended well beyond Abu Hail, which would seem logical since, as the Court has already found, the town, which was relatively populous, must have had a hinterland proportionate to its size. It must then have had a "haram" which must have extended towards Dubai since on the other side of Khan Creek lay Khan whose "haram" could not have been on the Al Mamzer peninsula because Abu Hail was itself there.

During this period Dubai does not appear to have exercised any authority in this area.

The causes and date of the destruction of Abu Hail are not clear from the evidence. According to Mr Walker's 1964 report the town was destroyed around 1860 by the Ruler of Sharjah after a revolt by its inhabitants. This is also the theory held by Sharjah.

However, the Government of Dubai gives another version [111] of the facts:

The town of Abu Hail was not finally destroyed after its rebellion against Sharjah in 1860. During the latter half of the nineteenth century it was inhabited by the Al bu Mahair and Sudan tribes.

These people were independent but became allied with Dubai. Sheikh Rashid bin Maktoum of Dubai married a daughter of one of the Al bu Mahair elders and Abu Hail came under the control of Dubai. Sheikh Rashid bin Maktoum was the Ruler of Dubai from 1886 to 1894.

Sheikh Rashid's successor as Ruler of Dubai was Sheikh Maktoum bin Hasher who was Ruler from 1894 to 1906. He continued to exercise control over Abu Hail.

It was Sheikh Maktoum bin Hasher of Dubai who finally broke up the town and moved the inhabitants partly to Dairah and partly to Khan, so confirming Dubai's effective control over the whole of the peninsula now known as Al Mamzer. (D. CM. vol. 1, pp. 41-2.)

If the Court has correctly understood the theory of the Government of Dubai, it was at that time that a change took place in the area and the new population of Abu Hail allied itself with the Ruler of Dubai who henceforth took control of the town and the area.

[112] This statement rests primarily on the evidence of a person 85 years of age who was born and lives in Dubai and who, since he could not have known Abu Hail which no longer existed, based his statements on what he had been told by his father who had lived in Abu Hail.

The Court finds that these statements are extremely vague. No dates are given either for the change which took place nor the destruction of the town.

Moreover, it is questionable whether the Ruler of Sharjah, who had destroyed the town of Abu Hail in 1860 because it showed hostility towards him, would have permitted only a few years later and on the same site the existence of a town whose inhabitants owed allegiance to another Ruler.

What does appear to the Court to be more important is that the 1870 edition of the *Persian Gulf Pilot*, as also the 1890 edition, after mentioning Khan and Abu Hail, goes on to say:

These two places are dependencies of Sharjah (D. CM. vol. 2, pp. 4 and 14.)

Conversely, when mentioning Dairah, the same editions give it as a “suburb” of Dubai, which shows clearly that the British authorities took no account of the historical title which might have resulted from the 1841 declaration, but only [113] of the effective control which Dubai exercised in the locality.

When presented with a document of the period and evidence relating to events which took place a century before, the Court has little choice but to accept the version given in the document. So therefore, even if it is accepted that the town of Abu Hail continued in existence until around the end of the nineteenth century, and there is no evidence to disprove this, it is nevertheless a fact that it was a “dependency” of Sharjah.

Whatever view one takes as to the existence or otherwise of Abu Hail at the end of the nineteenth century, it is a fact that during that century there was a gradual growth of Dubai on the coast towards Sharjah, since it was in order to halt that movement that the Ruler of Sharjah had defence towers built, as mentioned above.

The disappearance of the town and the void this created were to enable Dubai to extend considerably its influence into the area concerned. This emerges quite clearly from what Lorimer wrote in 1908. Not only does he say that the Abu Hail area is occupied during the date picking season by the inhabitants of Dubai and Khan, but also when describing the place he says:

A sandy locality with date plantations, on the coast of Trucial Oman, on the boundary between the [114] principalities of Sharjah and Dubai. (Lorimer, vol. II, p. 603.)

In its investigation above of the location of Abu Hail, the Court has indicated that it could not accept the theory held by Mr Walker in 1964, and subsequently adopted by the Government of Sharjah, that in his reference to Abu Hail Lorimer intended to encompass an area including Al Mamzer and the present location of Abu Hail. The Court has shown that, even allowing for a margin of error, Abu Hail was

situated in Lorimer's view on the Al Mamzer peninsula and, judging by the distances given, relatively near to the tip.

Of course, Lorimer was not in the area for the purpose of defining boundaries and obviously one could not speak at that time of boundaries in the same way as today. Even with these reservations, it is still true that Lorimer's evidence indicates that in 1908 part of the Al Mamzer peninsula was in Dubai's possession.

Two events which took place in subsequent years appear to show that the Ruler of Sharjah became unconcerned with the Al Mamzer peninsula. The first is the Louth Agreement concluded in 1910 between Dubai and Sharjah. "Louth" is the Arabic word for anything washed up by the sea. According to custom (which is not very clear) part of what is found in such circumstances becomes the property of the Ruler or the headman of the port and the rest goes to the finder. The [115] document containing Sharjah's undertaking in respect of Dubai reads:

I, Saqr bin Khalid bin Sultan, hereby state that I have granted Shaikh Buti bin Suhail bin Maktum, as regards wood and cargo belonging to his people washed up by the sea in our territory between Khan and Ras al Khamah, whether in creeks or on the shore, that we shall not take anything or oppose them; on the contrary, we shall be kind to them. (Sh. M. vol. II, pp. 178-9.)

It has not been possible to find Dubai's undertaking in respect of Sharjah.

This agreement, according to the Dubai Government, proves that Sharjah jurisdiction did not extend to beyond Khan since this town was indicated as the beginning of Sharjah territory.

Mr Walker had quoted this agreement in an annex to his 1955 report and had commented on it in the 1964 report. According to him, the Dubai interpretation should be rejected for the following reasons:

In the first place, Shaikh Saqr bin Khalid had, the year before, protested against a proposed British bombardment of Dairah which he regarded as [116] his territory. In the second place Lorimer stated clearly that the frontier lay at Abu Hail part of which belonged to Sharjah four years before the signing of the agreement, and in the third every Arab town or well is considered as having a "haram" or area under its control and therefore it would be reasonable to consider that Khan had an area in Al Mamzer under its control. (Sh. M. vol. II, p. 168.)

The Government of Sharjah appears to adhere to this theory, but adds that the object of the agreement was not to define a boundary, but concerned the fate of wrecks; it also commented:

Why was the Sharjah coast described at all? It was described because along Sharjah's coast line there are various ports: for example, Khan, Sharjah ...

Who owned the traditional salvage rights? The headman of each port, whose people would be the ones to discover the wreckage. The rule was that the owner had to pay to the headman of the town a proportion—usually one third—of the value of the goods. There was no point in saying in the letter “from Abu Hail to Rams”. Anything washed up at Abu Hail would accrue normally to the headman of Khan. (Oral Hearings, p. 319.)

In the opinion of the Court, even if the Louth Agreement is not conclusive evidence that Sharjah had lost interest [117] in the part of the Al Mamzer peninsula attributed to it by Lorimer, it does nevertheless provide a significant pointer. It is possible that Khan was mentioned because it was a port which had a headman who was to be notified of the existence of any wreckage, but, in order to give back to the inhabitants of Dubai any wreckage belonging to them, it was necessary to indicate the coast over which Sharjah had jurisdiction; this is what the letter does when it says:

... in our territory between Khan and Ras al Khamah.

The term “between” appears to the Court to be significant in this respect, as does the absence of any reference to Abu Hail. Of course, Mr Walker said that Al Mamzer could be regarded as the “haram” of Khan, but apart from the fact that this explanation is given in his 1964 report and might be seen as a justification *a posteriori* of the 1955 report, no evidence is put forward, and, as the Court has pointed out, at the time when Abu Hail existed the area could not have been its “haram”. As to the point that the year after (and not the year before as Mr Walker said), the Ruler of Sharjah protested “against a proposed British bombardment of Dairah which he regarded as his territory”, it cannot be accepted because, not only does it conflict with Lorimer’s statements, but also Dairah would then have been mentioned in the Louth Agreement as being part of the territory of Sharjah.

[118] The impression the Louth Agreement gives in favour of the claim of the Government of Dubai is strengthened by reading the agreement concluded in 1914 between the Ruler of Sharjah and the *de facto* Ruler of Ras al Khaimah which sought to define their respective territories. The territory of Sharjah is described in it as follows:

Sharjah and its dependencies: Khan, Hajrah, Wadi al Helu, Dibba and its surroundings and Dhaid. (Sh. M. vol. II, p. 118.)

According to the Government of Dubai, the mention of Khan as the limit of Sharjah territory shows that the Emirate concerned did not own Abu Hail.

According to the Government of Sharjah, the use of the term “dependencies” refers to the territories surrounding the towns and:

The Khan dependency included Mamzer and Abu Hail. (Oral Hearings, p. 321.)

The Court cannot share this view. The term “dependencies” refers to those of Sharjah and not to the dependencies of the localities mentioned. The two subsequent points clearly demonstrate this, as does the list of names which is included: they are localities and dependencies of Sharjah.

[119] In the opinion of the Court, the omission of Abu Hail can hardly be justified, since the reasons which might explain the mention of Khan alone in the Louth Agreement did not apply in this case. Quite the opposite, as this was an agreement intended to define the respective territories of the two parties it was important to distinguish where Sharjah finished and Dubai began. Even if it is recognised that the boundary between the two Emirates was not clearly defined, it was nevertheless possible, even necessary, to indicate an area such as Abu Hail or Al Mamzer, unless, as is probable, the territory of Sharjah ended at Khan.

Both parties to the dispute have attempted on various grounds to show that the territories in question were under their effective control. First they gave accounts of the activities of private individuals, and in particular details of their property rights. The Court does not consider it necessary to examine them; the effective control of a territory does not depend on the actions of private individuals *per se* but only on the actions of public authorities or individuals acting on their behalf.

No-one could contest the fact that this area was occupied during the date picking season by inhabitants both of Dubai and of Khan who owned date plantations there.

In this connection, the Court considers it would be appropriate to quote from a letter from the Resident Agent, [120] Sharjah, to the Deputy Political Resident, Persian Gulf, dated 31 July 1920. According to this report:

... the Manasirs and the Al-Bushames men kidnapped a negro and plundered a house in which there were some women of Khan who had gone to their palm plantations in summer in a place called Bohail in Debai jurisdiction ... According to Arabian rules, the Shaikh of Dubai is responsible for the restoration of the stolen property. (D. CM. vol. 2, p. 49.)

This letter confirms that in 1920 Abu Hail was under Dubai control. However, this is the present Abu Hail and not the former locality. In fact, the women of Khan were there to pick dates. Now, at that time it appears there were no longer any date palms left in the Al Mamzer area. This emerges from the Remark Book of *HMS Triad* of 1927, which states:

There are no date trees for 3 miles towards Dubai except for a conspicuous clump of five tall palms ... (D. CM. vol. 1, p. 56.)

Conversely, the map published following the Survey by *HMS Ormonde* in 1933 shows that there were palm trees growing from the present position of Abu Hail along towards Dubai.

But this letter also shows that the fact that the inhabitants of Khan owned palm plantations did not prevent the [121] locality passing under Dubai authority and thus that the private ownership of property was of no significance on the coast.

The Government of Dubai next attempted to prove its effective control over the area on the basis of the accounts of witnesses who would show that order was maintained by patrols from Dubai, whereas no such patrols came from Sharjah. It also recounted incidents which were settled by the Ruler of Dubai.

For its part, the Government of Sharjah has attempted to show that it did not remain inactive in the area and that it was Sharjah patrols which were keeping order. It also in its turn produced a certain amount of evidence in support of its claim, in order to show, for example, that from 1930 to 1940 there was a permanent post of guards, called a "sangar", stationed in the vicinity of Birka well near Abu Hail.

In the opinion of the Court, such conflicting evidence from the Parties tends to cancel itself out, although this should not be taken as casting any doubt on the *bona fides* of those who gave it. It is, moreover, a well-recognised fact that it is often difficult to give an exact account of events which have taken place several years previously.

Mr Walker's 1955 report is of little help on the subject of effective control. His conclusions regarding [122] Al Mamzer are based exclusively on the fact that the inhabitants of Khan owned palm plantations there. As the Court has already indicated, however, this does not provide an adequate criterion for the attribution of territory to one Emirate rather than another. Moreover, according to Lorimer, the area of the former Abu Hail, the present day Al Mamzer, was occupied during the date picking season by inhabitants of both Emirates.

In his 1964 report, Mr Walker quoted several episodes of banditry, but, after noting the conflicting evidence of inhabitants of both Dubai and Khan on the way in which the incidents were settled, Mr Walker appears to have consistently favoured the version given by the inhabitants of the latter. However, as the Court has already had occasion to indicate, the 1964 report should be approached with caution, since in many instances it appears to be justifying *ex post facto* the 1955 report.

For the reasons indicated above, the Court attaches only relative importance to these episodes of banditry as described in the evidence. Two other factors appear to it to be not only more important, but even decisive overall.

The first is that over a long period of time the Ruler of Sharjah had difficulty in establishing his authority over Khan.

[123] In 1917 difficulties arose between the Ruler of Sharjah and the headman of Khan and the British had to intervene, with the result that following a meeting on board ship the headman signed a declaration of loyalty. It appears, however, that this declaration was not respected, since the Residency Agent, Sharjah, and the Deputy Political Resident, Persian Gulf, had to intervene again on several occasions to prevent trouble. In fact, a letter dated 1934 from the Commanding Officer, *HMS Fowey*, at Henjam, to the Senior Naval Officer, Persian Gulf, informing him of the death of the headman of Khan, reads:

The late Sheikh of Khan ... had for some time pursued a quietly determined policy of separation. (D. CM. vol. 2, p. 53.)

In the opinion of the Government of Dubai, if Sharjah was unable to control Khan then *a fortiori* it did not control Al Mamzer.

The second factor is that Sharjah throughout this period was in a condition of great weakness. This emerges from documents from the British archives. In a letter dated 1920 the headman of Khan was already writing in the following terms to the Deputy Political Resident, Persian Gulf:

Three times were our men plundered by Bedouins and when we go to Shaikh Kaled (the Ruler at the time) [124] he does not listen to our representations at all. (D. CM. vol. 2, p. 50.)

This view was shared by the Residency Agent, Sharjah, in a letter to the Secretary to the Political Resident in the Persian Gulf in 1935:

I beg to state that Shaikh Sultan Bin Saqar is, evidently, unable to deal with the Bedouin robbers. (D. R. vol. 2, p. 14.)

The same Agent wrote to the Political Agent, Bahrein, in 1936:

... the Ruler of Sharjah ... cannot recover persons kidnapped. He has not such power than can make the marauders fear him and deter them from committing crimes in the area of his Shaikhdom. (D. R. vol. 2, p. 17.)

Although these letters are not expressly concerned with the coastal area, they do show the generally weak situation of the Emirate of

Sharjah at that time. Mr Walker was aware of this, since, after mentioning various acts of banditry in his 1964 report, he adds:

It is probably worth mentioning that at the time of all these incidents Sharjah was in a particularly weak [125] state ... (Sh. M. vol. II, p. 172.)

This comment is difficult to reconcile with his version of the events.

Be that as it may, the situation at this period seems to have been summed up perfectly in a letter from the Political Agent to the Political Resident, dated 12 August 1937, which in a passage concerning the refusal of the Ruler to indicate where the boundaries lay, reads:

I am not surprised at the Shaikh (of Sharjah) refusing to state what area he claims. There is no doubt that a very large area belongs *de jure* to this Shaikh, but at the same time it is equally certain that he is unable to control one tenth of his area. At present his effective control only extends as far as his gardens beyond the aerodrome. (Sh. M. vol. II, p. 353.)

Whereas a report by the Senior Naval Officer, Persian Gulf, in 1937 giving his impressions of some of the Rulers in the area describes the Ruler of Dubai as follows:

Has more experience than the rest ... and has a lot of power up and down the coast, largely owing to his control of the Trucial Coast Trade, (D. R. vol. 2, p. 15.)

[126] This shows clearly that it is not possible that Sharjah could have kept a guard post (“sangan”) near Abu Hail between 1930 and 1940.

On the one hand, the Ruler failed to establish his authority over the headman of Khan, and on the other, because of his weak condition, he had scarcely any forces available to be kept stationed in a semi-desert area. This is not to say that the “sangan” did not exist; it was established in 1940 during the hostilities between the two Emirates, but only for the purposes of the war. In this connection, the Political Officer wrote in his report on the events:

A truce was in progress which was due to expire on 21st February, but the Shaikh of Sharjah on 20th February allowed himself to be persuaded by the Shaikh of Ras al Khaimah to send men to occupy a Sangan on the Dubai side of Khan Creek. (D. CM. vol. 2, p. 83.)

This report is important for two reasons: firstly, because they were going to occupy a “sangan”, which means that it was not occupied. Secondly, in saying “on the Dubai side of Khan Creek” the Political Officer demonstrates that in his mind Al Mamzer came under the authority of Dubai.

The Court therefore concludes that during the 1930s the Al Mamzer peninsula was under the effective control of Dubai. It reaches this conclusion not on the basis of any [127] single piece of evidence, but on the basis of a number of pieces of evidence, which show, firstly, that the Ruler of Sharjah had abandoned his pretensions to the area (the Louth Agreement, the agreement with the Ruler of Ras al Khaimah defining their respective possessions) and, secondly, that Sharjah had not the means to exercise control in Al Mamzer (difficulties with Khan, the general weakness of the Emirate).

Doubtless during the last century, through the allegiance of the population of Abu Hail, Sharjah had a legal title over the Al Mamzer peninsula and well beyond, but, with the disappearance of the town, the development of Dubai and its increasing economic and political weight caused Sharjah gradually to lose this title. Lorimer noted this already in 1908, since he gives the boundary as passing half a mile from Khan. In any event from the beginning of the present century neither reference to allegiance nor to the ownership of property was appropriate for the determination of legal title, because, as far as the former is concerned, the Court has already indicated that the population of the area was both mixed and occasional, and, as far as the latter is concerned, the British authorities in 1920 admitted the existence of control by Dubai irrespective of the property rights of individuals in the area. The only other possibility was to refer to effective control and this control was no longer exercised by Sharjah. In consequence, by this time, the former legal title of Sharjah was lost.

[128] Having arrived at this conclusion, there is no need for the Court to consider the events connected with the 1940 war between the Emirates of Sharjah and Dubai, which the latter has cited in order to demonstrate its control over the Al Mamzer peninsula.

It appears, therefore, that the Ruler of Dubai was right in claiming the Al Mamzer peninsula in 1937. The line ran:

... to Al Mamzer on the sea and about 5 miles north-north east of Dubai town. (Sh. M. vol. II, p. 95.)

In this regard, the Government of Sharjah has tried to show that in 1937 Dubai did not claim the whole of Al Mamzer:

A claim purporting to encompass the whole district of Mamzer could not have been expressed in terms of a line ending at Al Mamzer; it would have been at the mouth of Khor Khan. In Dubai's 1953 claim the boundary remained simply at Mamzer, thus confirming the impression given in 1937.

In 1955, after the British Arbitration had commenced, the Ruler of Dubai for the first time extended his claim to territory as far as "the western headland of al Khan Creek". (Sh. CM. vol. III, p. 118.)

[129] The Court cannot accept this view. In fact, Mr Wilton in his 1952 report and Mr Walker in his of 1955 both mention the mouth of Khan Creek as being claimed by Dubai:

The Ruler of Dubai claims Al Mamzer, saying that the mouth of Khan Creek is his boundary. (Sh. M. vol. II, p. 82.)

In saying this Mr Walker could not have been influenced by the 1955 claim as Sharjah maintains, since the latter was made after the month of March 1955, the date of Mr Walker's report.

On the coast there is certainly continuity in the Dubai claim, continuity which corresponds to its effective control.

Since no event altering the existing legal position has been put forward by the Parties in respect of the period from 1940 to 1955, the Court finds that first Mr Walker and then Mr Tripp were wrong in attributing the Al Mamzer peninsula to Sharjah. Mr Walker based his decision on the position as it was in the last century—the town of Abu Hail, on the ownership of palm plantations or land—whereas given the local situation at the time, this position was irrelevant. Furthermore, Mr Walker disregarded the effective control in the area even though he had indicated in his 1955 report that the question of effective control was listed first in his “approximate order of importance”.

[130] The decision regarding the coast appears not to have been based upon legal considerations but to have been a political compromise.

The Court will now proceed to investigate the conduct of the parties following the decision.

3. Subsequent conduct of the parties

The Court has indicated in Chapter II that in certain circumstances an administrative decision establishing a boundary might be set aside. In this connection, three questions need to be investigated in the case in point. Firstly, the reaction of the Parties to Mr Tripp's decision. Secondly, the activities of police in the area. Lastly, work relating to economic development.

(a) The reaction of the Parties to Mr Tripp's decision

The Court finds that the Ruler of Dubai did not accept Mr Tripp's decision defining the boundary on the coast. In fact, on 5 June 1956, two months after the decision, he wrote to the Political Agent:

The main boundary point of Dubai in the northern coast is (? al-Mazt) and all that lies in its south-western bank is our domain. Mr Walker's decision to

draw the line between the house of Hilal Bin Humayd and Khalifah Bin Hasan is not fair that the line should pass in the centre of [131] our recognised domain. (D. M. vol. 2, p. 182.)

This did not, of course, prevent him subsequently from giving the British authorities his authorisation to fix the boundary line in the interior, but this was a different matter from the coast. The Government of Sharjah has noted the behaviour of the Ruler of Dubai in 1958 when he succeeded his father. The Political Agent wrote a letter of 24 October 1958, to the new Ruler of Dubai which reads:

I assume that your letter (in which he had informed the Political Agent that he had become the new Ruler of Dubai) is to be interpreted as meaning that you accept and will abide by all the treaties, agreements, usages and customs which were accepted by your predecessors concerning relations between Dubai and the British Government and that you will respect these undertakings in the same manner as your predecessors. On this understanding I am authorised by Her Majesty's Government to inform you that they accord you their formal recognition. (D. M. vol. 2, p. 184.)

The new Ruler of Dubai replied:

... I hereby confirm that this understanding is correct. (*Ibid.*, p. 185.)

However, even if the letter may be interpreted as [132] confirming the authorisation granted by the former Ruler of Dubai in March 1955, it cannot be interpreted as implying renunciation of the protest made in 1956. Furthermore, according to the letter from the Political Agent, acceptance of prior undertakings was a precondition for the Government of Her Britannic Majesty's recognition of the new Ruler. It is clear that, given the situation prevailing in the area at that time, no Ruler could dispense with the recognition of the British authorities. In such circumstances, the Ruler of Dubai could have done no other than to give his consent.

According to Mr Walker's 1964 report, it would appear that the Ruler of Dubai expressed his discontent again in 1961 and 1963 with regard to the boundaries in the coastal zone. Lastly, in a letter dated 1 July 1964, to the Political Agent (Sh. M. vol. II, pp. 235–8), concerning, it is true, a part of the boundary in the interior, he contested the validity of the constants given to the British authorities by his father in the matter of defining the boundary.

It emerges from these documents that the Government of Dubai has protested on several occasions against Mr Tripp's decision of 1956. These were occasional protests but if one has regard to the state of relationships at the time between the Rulers and the British authorities, it could hardly have been otherwise.

[133] (b) *Police patrols after 1956*

The problem of who controlled the Al Mamzer peninsula after 1956 is complicated by the fact that, since the relevant archives of the British Government have not been made public, the Court can only base its findings on the evidence put forward by the Parties and on certain documents.

The Government of Dubai maintains that since the 1956 decision has not been recognised the Al Mamzer peninsula has continued to be controlled by its police force. In this regard, it should be noted that its police force was founded in 1957 whereas the Sharjah police force was founded in 1967.

It bases its claims on the evidence of ten police officers including that of Mr Briggs, a member of the Trucial Oman Scouts from 1963 to 1965 and Chief of the Dubai Police from 1965 to 1975.

All this evidence shows, according to the Government of Dubai, that the Al Mamzer peninsula was controlled by patrols of Dubai Police, and supports the contention that there were no police from Sharjah there.

The Court should point out that this evidence is very detailed as to the means employed—the use of landrovers and boats; as to the circumstances—patrols were carried out at night rather than during the day time; and the reasons for the inspections—campaigns against illegal immigration, arms smuggling, etc.

[134] Presented with this detailed evidence, the Government of Sharjah sought to show that the Al Mamzer peninsula was under the surveillance of its own police force and put forward the evidence of Mr Sirri, Assistant Commandant of the Sharjah Police, and currently Commandant of the Sharjah Police, and also that of Mr Burns who was Chief Officer of the Sharjah Police from 1967 to 1973 and who has since left the country.

The Court finds that their evidence is extremely vague; both men state that they knew where the boundary lay between the two Emirates, both describe it in accordance with the line established by the 1955 decision, and both declare that the boundaries were respected by the Dubai police.

For Mr Sirri:

Since the establishment of the Sharjah police and up to the present time, our police force has carried out all its duties and jurisdiction in the regions of Sharjah on the basis of the frontiers with the Emirates of Dubai which I have mentioned, whether those jurisdictions or duties concerned security, patrolling, guard duties, traffic control or observation. (Sh. CM. vol. IV, p. 48.)

The Court has no reason to doubt the worth of this evidence in any general sense, but it does not prove very much as regards the Al Mamzer area.

[135] As for Mr Burns, he states:

In the winter of 1969, I was instructed by His Excellency Sheikh Saqr, the Deputy Ruler of Sharjah, to complain to the Political Agent about Dubai citizens taking sand from the area of Mamzer. The Sharjah Police prevented the lorries returning to the area whilst the Political Agent investigated and then ruled that the area being exploited was, in fact, in Sharjah State. No further incursions took place during my time in office. (Sh. R. vol. VIII, p. 42.)

The Court finds, however, that the Government of Sharjah was not in a position to produce any documentation in support of this contention. Furthermore, other evidence given by a police officer from Sharjah appears to contradict Mr Burns since it states:

In the year 1971 some lorries belonging to people from Dubai tried to join in transporting sand from the area of Mamzer. We prevented them doing so until they had obtained permission from the Municipality of Sharjah. (Sh. R. vol. VII, p. 114.)

Such conflicting evidence put forward by the same Party shows that this type of evidence should be viewed with caution.

[136] The Court, leaving aside the conflicting evidence, will confine its examination to certain specific incidents which, in the opinion of the Government of Dubai, show that it was in control of Al Mamzer.

That Government states, first of all, that there was intensive patrolling in the years before 1970 and immediately after the British withdrawal, in order to combat illegal immigration. In this regard, the Government of Dubai quoted from a document from the Trucial Oman Scout Headquarters which dealt with the arrangements for a joint counter illegal immigration exercise to be held in August 1971. In this document, the zone allocated to the Dubai police included the Al Mamzer peninsula, whereas that allocated to the Sharjah police stopped at Khan. The Court finds, however, that this document proves nothing in this case, since the same order also allocated part of Sharjah territory to the police of Ras al Khaimah. These were simply administrative arrangements by way of *ad hoc* response to practical needs without regard to territorial boundaries.

The second incident concerns the fire on board the ship *Dissri Mardu*, which ran aground on the Al Mamzer peninsula in 1970. Two pieces of evidence indicate that it was at the request of the Political Agent that the police and firemen from Dubai intervened. The Dubai

police guarded the ship and its cargo and later made a claim for their work in guarding it.

[113] The Government of Sharjah is non-committal on this point; it maintains that:

All the various authorities did what they could to save the situation. (Sh. R. vol. VI, p. 120; vol. VII, p. 104.)

This is also Mr Burns' version, although he admits that he was not in the Emirates at the time of the incident. Even if this account is accepted, it remains a fact that, unlike the evidence put forward by Dubai, that put forward by Sharjah is very reticent about any concrete action taken by its authorities, and that it is difficult to understand why the wreck was guarded by the Dubai police.

Even more significant are two incidents which arose in 1972. In the same year, in fact, but on different dates, two drowned men were found on the beaches of the Al Mamzer peninsula. These events are not only reported in the evidence of the Dubai police officers who discovered them, but also in two police reports, which it is appropriate to quote in full:

At approx. two o'clock on Friday 19/5/72 we received a report from the officer on duty patrol Lt. Abdul Aziz Mohammed informing us of the dead body of a person on the shore at Khor al-Khan opposite the burnt-out freighter.

Acting on the report I, Lt. Hassan Mohammed Khamis [138] proceeded to the place of the incident and noticed the following:

The body was that of an unknown person, naked, without clothes, on the shore at the place mentioned above. It was lying on its front. I didn't find any visible evidence, the body being in a state of decay (it had been dead for about 10 days). The dead body measured about six feet and there were no tracks/traces around the body. It was transported to Maktoum Hospital by municipality ambulance men and the duty doctor was fetched.

The body is still in the hospital awaiting a detailed report. (D. R. vol. 2, p. 167.)

On 7 August 1972, another police report indicated:

At approx. ten minutes past one there was a radio message from Corporal Haji Hassan Mohammed who was on patrol about a dead person found in the vicinity of Khor al-Khan. Immediately I, First Lieutenant Abdullah Ghanim Saeed, together with 2nd Sergeant Juma Jelaal went to the scene of the incident. Captain Nasser Al-Sayyid, the police doctor and photographers were also informed at this time. Upon arrival at the place where the dead body was I noticed that it was situated on the sandy shore at Khor al-Khan opposite the burnt-out freighter, about twenty feet from the sea. The dead person was lying on his front and was in a [139] state of decomposition. He

was dressed in only white khaki trousers. He was about thirty-four years of age and thought to have been of Lebanese nationality and a Muslim since rings were found on the fingers of one of his hands including a gold ring with the Lebanese emblem on it. Similarly there was a gold chain around his neck and written on the chain was the word "Allah". No criminal instruments were found, nor anything else.

The dead body was taken immediately to the Maktum hospital and after an examination the duty doctor and the police doctor revealed that death had taken place in the sea by drowning and that about ten days had passed since then, and that it had been the waves that had thrown the body up on the shore.

There were no injuries to indicate a crime.

The body was put in the hospital deep-freeze for the completion of the investigation. I demanded a detailed report of the incident. (*Ibid.*, p. 169.)

The Government of Sharjah maintained that the reason why both bodies had been taken to the hospital in Dubai was that this hospital possessed appropriate facilities for preserving corpses.

In the opinion of the Court this argument is scarcely relevant. Indeed the interest of these documents lies not in the fact that they show that the two drowned persons had been taken to hospital in Dubai, but that they had been discovered [140] by the Dubai police over a period of three months. If therefore, as is asserted by the Government of Sharjah, the Al Mamzer peninsula was under its control, it is difficult to understand why members of the Sharjah police force had not made these discoveries. Moreover, these reports expressly contradict the Government of Sharjah's argument that the Dubai police did not patrol Al Mamzer.

Sharjah had all the more reason to protest here as the discovery of these two drowned persons led to an enquiry being instigated by the competent authorities in Dubai. In one case, following a request from the Dubai police, the judge of the Dubai Civil Court attested:

It is hereby certified by the Dubai Civil Court, that having considered all the evidence, medical and otherwise, produced by the Dubai Police, that the body of a male person found drowned at Dubai on 19th May 1972, is beyond all reasonable doubt identified as that of a Belgian National, DANIEL TICHON, aged 22 years, son of Mrs. JEAN TICHON, 71 Avenue Emile Vandervelde, 1200, Brussels, Belgium. (D. R. vol. 4B, p. 238.)

In the other case, where the authorities suspected that a crime had been committed, the Dubai Prosecuting Attorney attested to the judge of the Dubai Civil Court after an inquiry:

[141] Dear Sir,

Re: Shahata Adib—Palestinian National

Al Sayed Al Arabee Adbul Salam—Egyptian National

Ali Soobhi Kaloot—Lebanese National

The above-named are accused of killing Ali Ahmed Suleiman, which happened on 4.8.1972. Whereas there is no evidence, we request you to close the case.

Prosecuting Attorney

I decide to accept the request 1.2.1973.

(*Ibid.*, p. 234.)

These two incidents show that, unlike the Sharjah police, the Dubai police made regular inspections of Al Mamzer.

Moreover, that is confirmed by one of Sharjah's own witnesses, the owner of the Sharjah Transport Company, who came to take sand from the Al Mamzer peninsula. He states:

I know the area of Mamzer, and I recall that around 1967 we were transporting sand for the casting of concrete from the area of Haira in Sharjah; but, by reason of the occurrence of some damage to the ground due to our removal of sand from it, the Municipality of Sharjah forbade us to do so from that area and asked us to move to the area of Mamzer. We actually moved to it and our trucks and work force continued to remove sand from Mamzer from a place [142] near Birka al Wahaida, where our works continued until nearly 1972, when we noticed that Dubai had started to build a corniche on its territories and had reached nearly Birka al Wahaida well in its work, at which point some friction occurred between us and the company building the corniche for Dubai. The Dubai police then interfered and asked us, in order to prevent any further friction with the Dubai company, to remove our employees and trucks from near Birka al Wahaida well to another place near Mamzer which is further away from the previous area. So, in order to avoid trouble with Dubai, we removed ourselves and began transporting sand from a place in Mamzer near the ruins of the old Mamzer village where our activities continued for about a year and a half. Since the Dubai corniche works went beyond Birka al Wahaida well in the direction of Mamzer and came close to the place of our work (towards the end of 1973), the Dubai police came to us and tried to forbid us from working and to expel us from the area. We refused and contacted the Municipality of Sharjah which informed us that the Federal Government had intervened in the matter as a result of a complaint from the Emirate of Sharjah about the Dubai corniche, and that an order was issued by the Head of State stopping all works, whether in Sharjah or Dubai, in the area of Mamzer until the matter had been settled between the two Emirates. Whereupon and in accordance with a request [143] from the Municipality of Sharjah, we stopped transporting sand from Mamzer and moved to another area in Sharjah. (Sh. R. vol. VIII, pp. 35–6.)

The Court has once again to observe that it was the Dubai police, not the Sharjah police, who dealt with the Al Mamzer peninsula. Even if the Sharjah police were not present on that particular day—and it cannot be claimed that they maintained a continuous presence there, given the fact that this is a semi-desert area—they should have

intervened very quickly, both to protect their national, who, if Al Mamzer was in his country, was completely within his rights to carry out his business in the area, and to remind the Dubai police that they should not exercise their jurisdiction there. The argument that the Sharjah police would not intervene in order to avoid incidents whilst awaiting intervention by the Federal Government cannot be accepted as the date given in this statement is 1973 and the Federal intervention was in 1976.

The Court will examine below the importance to be attributed to the work carried out in the area by the Government of Dubai; it restricts itself here to concluding that the documents supplied by the Parties show that in the period following the Tripp ruling in 1956 not only were the Sharjah police not present in the Al Mamzer peninsula but that the Emirate of Sharjah took no interest in what was happening there.

[144] With the help of evidence, the two Parties have attempted to show that they had control of this peninsula because some of their nationals were taking sand from it and that, in view of the subsequent erosion, the respective authorities had had either to prohibit this practice or to control it.

The Court has on several occasions pointed out how problematical it finds the cogency of contradictory evidence given by witnesses unless it is supported by documentary proof.

Thus two witnesses for the Government of Sharjah have stated that persons taking sand from Al Mamzer could only do so with a permit from the Municipality of Sharjah.

However, the Government of Sharjah has not produced copies of these permits although requested to do so by the Government of Dubai. In these circumstances the Court does not have to give a decision on the question of the sand which, in its opinion, cannot, in the absence of any concrete proof, contradict the conclusions which it reached above.

Finally, the Government of Sharjah gave the evidence of the Head of the Justice Department of Sharjah. According to him:

All judicial incidents which took place from Khan [145] Roundabout as far as Nahada Amair and the area of Mamzer in the period between 1958 and 1968 were investigated by the Sharjah authorities, and the offenders were prosecuted before the Sharjah Shari'a Court, on the basis that the boundaries between the two Emirates in that area are at the Birkat al Wahaida well and Nahada Amair. All incidents which have taken place since 1968 to date in that area have been investigated by the Sharjah Police and offenders have been prosecuted before the Sharjah Civil Court.

I have asked the Criminal Division of the Civil Court to prepare a list of some of the criminal cases which have taken place on the public road between Khan Roundabout and Nahada Amair for the period from 1969 to 1975.

That has been done, and I confirm the accuracy of the contents thereof. So far as concerns cases before the Shari'a Court from 1958 to 1968, we have not been able to prepare a list, due to the files having been destroyed owing to the passage of time.

The Dubai Police and also the Courts of Dubai co-operate with our police and courts in arresting criminals, gathering evidence, and exchanging information on criminal matters. All of this co-operation has taken place on the basis that the boundaries between the two Emirates are from Birkat al Wahaida well to Nahada Amair to Hadhib Azana and thence to the desert. (Sh. R. vol. VII, pp. 109-10.)

[146] The Court carefully examined the list supplied by His Excellency the Head of the Justice Department. It noted that all cases show, as the evidence had indicated, that Sharjah had exercised jurisdiction in a whole series of incidents occurring in the area between Nahada Amair and the town of Sharjah, but there is not one case dealing with the Al Mamzer area even for the year in which, as the Court pointed out, Sharjah might have had the opportunity of asserting its jurisdiction in the area when the two drowned persons were discovered.

The Court will now examine the work connected with economic development.

(c) *Development work*

Sharjah does not dispute the fact that it did not carry out any building in the Al Mamzer area or any other public or private operations.

It is quite a different story as far as the Emirate of Dubai is concerned. In 1972, with a view to building a university on land situated on the Sharjah side of the line as laid down in Mr Tripp's decision, a compound wall was built. (Dubai Municipality Site Plan, Town Plan Sheet No 3/3, dated 5 June 1972.)

The Government of Dubai also referred to three Dubai Municipality Site Plans, the first of which shows a plot of [147] land being granted to H. H. Sheikh Hamdan Ben Mohd Al-Nahyan (Town Plan Sheet No 7, dated 30.5.1974), the second a plot of land being granted for building a microwave relay station for federal use (Federal Mast) (Town Plan Sheet No 183, dated 5.7.1975) and the third a plot of land being granted for building a school (Town Plan Sheet No 12, dated 28.12.1975).

There is no doubt, however, that the most spectacular work was that involved in building a corniche and a small port which straddles the line laid down by Mr Tripp.

Work started on the corniche in May 1971 at the mouth of Dubai Creek. In the spring of 1973, at the end of the second stage of the work,

it extended 4,000 feet beyond the line laid down by Mr Tripp, and at the end of the third stage, in June 1975, 6,000 feet beyond this line.

Following the intervention of the Federal authorities, the work stopped in June 1976.

The Government of Sharjah maintained that during this work it made several protests to the Ruler of Dubai, the Federal Government and the Head of State. These protests would have been behind the abandonment of the university project and would explain the slowness with which work on the corniche progressed, once Mr Tripp's line had been crossed. In fact, each protest caused the work to be interrupted but it started up again afterwards.

[148] With reference to the notion of the critical date, the Government of Sharjah believes that here there were acts designed to secure an improvement of position, which should not be construed as evidence of title.

As for the Federal Mast, the Federal authorities would have asked the Sharjah authorities for permission.

With reference to the building of the corniche, the Government of Dubai asserted:

They can be seen to be the kind of works which are an outstanding example of State activity which by their very nature demonstrates (the) assertion that its promoters effectively control the area of the land in question. (Oral Hearings, p. 461.)

That Government states, moreover, that during work on the corniche no written protest was made to Dubai and that the work was never halted as a result of protests until the intervention of the Federal Authorities in 1976.

The Court has had the opportunity of pointing out above that the notion of the critical date played no part in this case at least until 1976 and it does not deem it necessary to settle the question of whether the work undertaken by the Emirate of Dubai constitutes an act in pursuance of its authority or an improvement of position.

[149] Even if it could be admitted, as Sharjah claims, that these acts belong to the second category, this Emirate's absence of reaction seems inexplicable. The first thing that a State must do when the authorities of another State enter its territory is to make a protest and send its police force to put an end to these actions. The evidence given by the Chief Engineer of the company which built the university compound shows that the Sharjah police never intervened. Likewise, a report from the company building the corniche only mentions one intervention by the Federal police in 1976. Moreover, the Government of Sharjah did not claim that its police intervened to prevent this work. This is additional proof that the police were not in the area. But even

if they were not there, they must have been aware of the work that was going on—because of its size it was visible from the road linking Dubai and Sharjah. Therefore, if Sharjah had felt that it had the right to do so it should have sent in patrols to try and stop the work. In the view of the Court this absence of reaction on the part of Sharjah demonstrates clearly that this Emirate did not consider Al Mamzer to be part of its territory. For if the Sharjah authorities had been convinced that they had the right to do so they would surely not have hesitated to intervene as they had done in two incidents in the interior in 1966 and 1969. These were the incidents concerning the digging of a well in the area of Bida'at by an inhabitant of Dubai and concerning the water pump at Tawi bil Khabis. Those incidents occurred at a considerable distance from the town of Sharjah and were certainly [150] less important in every way than the construction work in Al Mamzer. This lack of action contrasts also strangely with Sharjah police activity on the road linking Nahada Amair and Sharjah.

As regards the protests, the Court does not wish to rule out the possibility that the Ruler of Sharjah made a verbal complaint to the Federal authorities but the documents provided show that the first formal protest was on 28 June 1975 (Sh. R. vol. VIII, p. 62) and that it was, moreover, taken very seriously as can be seen from correspondence between the various administrations concerned (*Ibid.*, pp. 64–8). This step was to lead to intervention by the Federal power in 1976 and the work on the cornice being halted.

As for the building of the Federal Mast, it is not surprising that the Federal authorities, aware of the existence of the line laid down by Mr Tripp, should have asked the Ruler of Sharjah for his permission; however, they also asked the Ruler of Dubai for his permission and it was the municipality of Dubai which granted the necessary land. In this context, the Court must call attention to the existence of a letter from the Federal authorities dated 25 October, 1978 and addressed to the municipality of Dubai, requesting permission to build a new unit for the installation of special equipment in connection with the Mast, permission which, moreover, was granted.

[151] 4. *Conclusion*

After examining the situation which existed in 1956 at the time of Mr Tripp's decision the Court has concluded that the Al Mamzer peninsula was under the authority of Dubai. However, faced with contradictory claims, the British authorities, disregarding the legal situation, had endeavoured to find a compromise likely to satisfy both parties.

The Tripp decision could have brought about a new legal situation in either of two ways, i.e. (i) that Dubai subsequently respected

Sharjah's title over Al Mamzer and (ii) that Sharjah subsequently had sought to apply the Tripp decision in Al Mamzer.

After examining the subsequent behaviour of the parties, the Court has concluded that neither of these conditions was fulfilled and that, on the contrary, the parties continued to behave as if there had never been this decision.

Not only did the Emirate of Dubai immediately protest against Mr Tripp's decision but it continued to treat the Al Mamzer peninsula as its own territory. Its police patrolled there, even though only occasionally; its courts exercised their jurisdiction; its municipality granted the land needed for building. These were peaceful and public acts of authority which the Government of Sharjah could not ignore, given the nearness of Al Mamzer and the very limited size of this region.

[152] The Court is aware that Dubai's activities, even though very limited, have to be assessed in the face of inactivity on the part of Sharjah. Setting aside what might have happened before 1967, when Dubai, unlike Sharjah, had a police force, the Court finds that even after this date all the documents record the absence of Sharjah's police in Al Mamzer, the fact that its courts did not exercise their jurisdiction and the lack of building activity by its municipality.

What appears decisive to the Court is not that Sharjah did not assert its authority over an un-populated region by some positive action, but that it offered no opposition to the Government of Dubai treating the Al Mamzer peninsula as its own territory.

Between 1967 and 1975 the Sharjah police remained inactive, whereas the Dubai police were present and Sharjah even allowed the latter to evict one of its nationals from his place of work and did nothing, although major work was being carried out on what it should have considered its territory.

Finally, not only did the Government of Sharjah not protest to the Government of Dubai but, although since 1971 there had been a Federal Power which could have acted as an appeal body, it did not formally ask it to intervene until 1975.

[153] The Court observes that there is a substantial body of case law which indicates that, when one State engages in activity, by means of which it seeks to acquire a right or to change an existing situation, a lack of reaction by another State at whose expense such activity is carried out, will result in the latter forfeiting the rights which it could have claimed.

In the *Grisbadarna* case, decided in 1909, the mooring of a Swedish light vessel needed for safe navigation, and the positioning by Sweden of a fairly large number of buoys justified among other things, in the absence of any protest from Norway, granting the disputed maritime

area to Sweden. (United Nations, *Report of International Arbitral Awards*, vol. XI, p. 161.)

In the *Island of Palmas* case,^[17] decided in 1928, the sovereignty of the Netherlands over this island was recognised not only because:

... the documents laid before the Arbitrator contain no trace of Spanish activities of any kind specifically on the Island of Palmas

but also because Spain, which originally had a legal claim based on discovery, had recorded:

... no contestation or other action whatever or [154] protest against the exercise of territorial rights by the Netherlands over the Talautse (Sangi) Islets and their dependencies (Miangas included) has been recorded. (*Ibid.*, vol. II, pp. 851 and 868.)

In the *Norwegian Fisheries* case,^[18] the International Court of Justice, deeming that the method adopted by the Norwegian Government for laying down base lines to define its fishing grounds was not contrary to international law, wanted to see what the attitude of the United Kingdom had been in this matter. Observing that the latter had refrained from expressing any reservations, it added:

... her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom. (*ICJ Reports*, 1951, p. 139.)

In the case of the *Temple of Préah-Vihéar*,^[19] the geographical map defining the boundary between Siam and Cambodia was deemed by the International Court of Justice not to have been binding in the beginning. However:

... it is clear that circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and [155] thereby must have held to have acquiesced. (*ICJ Reports*, 1962, p. 23.)

It emerges from this analysis that a State must react, although using peaceful means, when it considers that one of its rights is threatened by the action of another State.

Such a rule is perfectly logical as lack of action in a situation like this can only mean two things: either the State does not believe that it really possesses the disputed right, or for its own private reasons, it decides not to maintain it.

[¹⁷. 4 *Ann Dig* 3.]

[¹⁸. 18 *ILR* 86.]

[¹⁹. 33 *ILR* 48.]

In the case in question, as the Court has pointed out, the Emirate of Dubai performed acts of authority in the Al Mamzer area, above all between 1967 and 1975, which should have brought about some reaction on the part of the Emirate of Sharjah, but nothing of this kind was recorded until 1975.

Dubai's actions were doubtless relatively sporadic, but international law (the *Island of Palmas* case;^[20] the 1933 Judgment of the Permanent Court of International Justice in the case of the *Legal Status of Eastern Greenland*,^[21] Series A/B, No 53, p. 46) admits that the extent to which sovereign rights may require to be exercised depends on the territory in question and that this exercise may be very limited when it is a question of territories which are sparsely populated or have no permanent inhabitants, which is precisely the [156] case with the Al Mamzer peninsula.

International law also requires demonstrations of sovereignty to be both peaceful and public. It is not disputed that the Dubai authorities behaved peacefully and the Court has pointed out that the Government of Sharjah could not have been unaware of what was happening at Al Mamzer.

The Court will now examine the final aspect of the problem. International law in fact requires the exercise of authority by the State claiming a territory to be continuous and of a certain duration and that the State possessing the legal title should react, when faced by such a claim, within "a reasonable period of time", to quote the expression used by the International Court of Justice in the case of the *Temple of Préah-Vihéar*,^[22] However, it has never been specified what is meant by a "certain duration" nor by "a reasonable period of time".

The Court has noted there are no rules in international law specifying the length of such a duration or period of time. This will vary in each case according to the circumstances, and will be dependent, for example, on the remoteness of the territory in question, or on the kind of acts manifesting authority which have been employed.

In the opinion of the Court, the State whose rights are threatened by the actions of another State does not [157] necessarily have to make its protest as soon as it learns about the action giving rise to the complaint, but it must be made as soon as the State realises that these actions may be prejudicial to its rights. Referring again to the case of the *Temple of Préah-Vihéar*,^[23] the silence of the Siamese authorities presented with the geographical map placing the temple in Cambodian territory could not in itself be deemed acquiescence. Time was needed so that the geographical map could be examined by competent persons and the

[²⁰. 4 *Ann Dig* 3.]

[²¹. 6 *Ann Dig* 95.]

[²². 33 *ILR* 48.]

[²³. *Ibid.*]

mistake perceived; when the mistake was perceived the Siamese authorities should have reacted.

In the case in question, however, Sharjah could not have failed to realise very quickly that the exercise of authority by the Emirate of Dubai was contrary to Mr Tripp's delimitation; it should therefore have reacted very rapidly which it did not do.

An examination of the case, therefore, shows that the situation existing in the sixties and at the beginning of the seventies was only an extension of that which existed before the 1956 decision. Whether before or afterwards, the Government of Dubai exercised its authority over the disputed territory to a greater or lesser extent, whereas Sharjah's actions were very sporadic in the earlier period and non-existent in the later. The lack of reaction on the part of Sharjah shows that it did not rely on any legal title resulting from Mr Tripp's decision or that it took no further interest in [158] this matter. In any event, the Tripp decision was not applied by either Party. In view of this, the Court therefore concludes that the Al Mamzer peninsula falls within the territory of the Emirate of Dubai.

In its Final Submissions, the Government of Dubai asked the Court to state that the boundary should begin at the:

...mid-point of Khan Creek between the land extremities of the Al Mamzer peninsula and the Khan village peninsula. (Point 10 of the Final Submissions.)

This request differs from that made in the documents of the written proceedings which asked the Court to rule that the boundary began at the tip of the Al Mamzer peninsula.

In the opinion of the Court such an important change in the Final Submissions, at the very end of the proceedings, is inadmissible and must be rejected.

As will be seen in Chapter VI the Tripp decision of 3 July 1956, which has been accepted by this Court, shows the boundary between the Emirates of Dubai and of Sharjah as proceeding through Nahada Amair. Therefore the Court, having determined that the coastal terminus of the boundary line is at the tip of the Al Mamzer peninsula and having observed that throughout the documentation submitted in the [159] Pleadings, it has been shown that the two arms of this inlet have always been used by the fishermen of Khan village to gain their livelihood, and that, by contrast, the Government of Dubai has at no time asserted that it had authority over these waters, decides that the boundary line must proceed from the tip of Al Mamzer peninsula following the low water line of the peninsula to point 1, thence by a straight line to point 2, thence by a straight line to point 3, thence by a straight line to Nahada Amair. The co-ordinates are given in the *dispositif* and the line is shown on Map A published with this Award.

As the scale of British Admiralty Chart 2889 is too small to allow of its being used as a definitive document it must be considered as an illustrative Chart. The description of the maritime boundary given in this Award and the co-ordinates of points B to H on that boundary given in this Award are to be considered as definitive. The definitive position of point A, the coastal terminus of the land boundary, is as determined in the description of the land boundary in the *dispositif* of this Award.

Commencing at position A below, the maritime boundary shall be a series of geodesic lines joining successively the positions the coordinates of which are given below:

A)	25° 19' 35" N	55° 21' 14" E
B)	25° 21' 32" N	55° 18' 14" E
C)	25° 22' 18" N	55° 16' 19" E
D)	25° 25' 23" N	55° 12' 53" E
E)	25° 39' 26" N	54° 58' 21" E

[267] thence along arcs of 12 nautical miles radius which intersect at the positions of F, G and H, the co-ordinates of which are given below, until the intersection of a boundary line, at a position yet to be determined, between Iran and the United Arab Emirates.

F)	25° 39' 43" N	54° 57' 23" E
G)	25° 44' 18" N	54° 50' 21" E
H)	25° 44' 49" N	54° 49' 57" E

All co-ordinates are on Revised Nahrwan Datum. A nautical mile is 1852 metres in length. A list of Basepoints is given in the Appendix to this Award.

[268] AWARD

The Court of Arbitration

having considered all of the evidence and the arguments of the Parties, and their Submissions,

has *determined*

in accordance with the rules of international law applicable in the matter as between the Parties and for the reasons set out above the land and the maritime boundary between the Emirate of Dubai and the Emirate of Sharjah.

On the land, as far as it can be described in words, the Court *decides* by two votes to one:

that the boundary commences at the coastal terminus point A, the Universal Transverse Mercator co-ordinates of which are 2801880 North and 334303 East; thence, following the low water line of the Al Mamzer peninsula, to point 1, the Universal Transverse Mercator co-ordinates of which are 2801250 North and 334240 East; thence by a straight line to point 2, the Universal Transverse Mercator co-ordinates of which are 2800100 North and 333585 East; thence by a straight line to point 3, the Universal Transverse Mercator co-ordinates of which are 2798820 North and 333965 East; thence by a straight line to Nahada Amair, the Universal Transverse Mercator co-ordinates of which are 2798535 North and 335150 East.

The Court further *decides* unanimously:

that the boundary proceeds in a straight line from Nahada Amair to Arqub Rakan, the Universal Transverse Mercator co-ordinates of which are 2794465 North and 347700 East.

The Court further *decides* unanimously:

that the boundary proceeds from Arqub Rakan to Chilah, the Universal Transverse Mercator [269] co-ordinates of which are 2790655 North and 352700 East, leaving Arqub Alam (Nauf) entirely within Sharjah, and Tawi Bida'at within Dubai;

from Chilah to Naqdat az Zamul, the Universal Transverse Mercator co-ordinates of which are 2788000 North and 359625 East, leaving Tawi Tai entirely within Sharjah;

from Chilah thence to Tawi bil Khabis, the Universal Transverse Mercator co-ordinates of which are 2788425 North and 361475 East, which is divided between Sharjah and Dubai.

From Tawi bil Khabis, the boundary turns south to Mirial, the Universal Transverse Mercator co-ordinates of which are 2772380 North and 364000 East, leaving Arafî entirely within Sharjah and Jiza'at bin Ta'aba and Arqub Dhabian within Dubai;

from Mirial to Khobai, the Universal Transverse Mercator co-ordinates of which are 2768875 North and 361400 East;

and thence to Qawasir, the Universal Transverse Mercator co-ordinates of which are 2762210 North and 361450 East;

thence continuing southwards, so as to leave Tawi Mghram and Bedirat Mghram entirely within Sharjah, and Sih Atham and Bada Hilal within Dubai, to Al Alam, the Universal Transverse

Mercator co-ordinates of which are 2748795 North and 363140 East;

and thence by a straight line to Arqub Salama, the Universal Transverse Mercator co-ordinates of which are 2735580 North and 367640 East, so as to leave Bada Zigag and Muwaihi Daij entirely within Sharjah, and Rummayah within Dubai.

So far as the land boundary is concerned Map A and Maps 1, 2, 3, 4, 5 and 6 attached to this Award are an integral part of this Award.^[41]

The Court further *decides* by two votes to one

that the maritime boundary shall be based upon a series of geodesic lines joining successively the positions the co-ordinates of which are given below:

- | | | |
|----------|---------------|---------------|
| A) | 25° 19' 35" N | 55° 21' 14" E |
| B) | 25° 21' 32" N | 55° 18' 14" E |
| [270] C) | 25° 22' 18" N | 55° 16' 19" E |
| D) | 25° 25' 23" N | 55° 12' 53" E |
| E) | 25° 39' 26" N | 54° 58' 21" E |

thence along arcs of 12 nautical miles radius which intersect at the positions of F, G and H, the co-ordinates of which are given below, until the intersection of a boundary line, at a position yet to be determined, between Iran and the United Arab Emirates:

- | | | |
|----|---------------|---------------|
| F) | 25° 39' 43" N | 54° 57' 23" E |
| G) | 25° 44' 18" N | 54° 50' 21" E |
| H) | 25° 44' 49" N | 54° 49' 57" E |

All co-ordinates are on Revised Nahrwan Datum. A nautical mile is 1852 metres in length.

The Chart attached to this Award is illustrative.^[42]

[271] Done in English in London This Nineteenth Day of October, 1981.

Signed: Professor Philippe Cahier, President, Mr John L. Simpson, Professor Kenneth R. Simmonds.

Mr Simpson appends a Dissenting Opinion to the Award of the Court.

^[41] An illustrative sketch combining these maps will be found in the fold out at the end of this volume.]

^[42] See p. 700.]

Annex 197

Jay Bahadur (@PuntlandPirates) on Twitter at 9.22 am 20 January 2016, Twitter,
20 January 2016, available at: <https://twitter.com/puntlandpirates/status/689739858579963905> (last accessed: 21 December 2020)



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.@PrivateEyeNews shreds @spectator journo Aidan Hartley over involvement in Soma Oil & Gas. #somalia



20



Spectating in Somalia

A SPECTATOR columnist by day, a player in the Somali oil industry by night: that is the curious double life of Kenya-based British journalist Aidan Hartley.



Having spent years making films about Africa for TV's *Unreported World* and *Dispatches*, Hartley played a backstage role in the creation three years ago of Soma Oil & Gas, the company chaired

by former Tory leader Lord (Michael) Howard which is now being investigated by the Serious Fraud Office for payments to key officials in the Somali oil ministry. Soma says the payments were for "capacity building", but the UN Monitoring Group on Somalia and Eritrea said they were more like influence-buying.

The *Eye* has been told that Hartley was the man who introduced the company's founder, Tory donor Basil Shiblaq, to the Somali government. This led to the creation of Soma, a firm with no track record for oil exploration, which was given an exclusive contract by the authorities in Mogadishu to explore for oil.

As a reward Hartley received 5.5 percent of Soma's shares, which he has thought prudent to keep in the discreet BVI-registered company Kalyra Investments, of which he is the principal shareholder. Just what Soma gained from

awarding a lowly hack such a large shareholding remains a mystery.

A keen eye can spot Hartley in footage of Soma's signing ceremony aired by *Newsnight* last August (see below), though the BBC failed to identify him.

Those observing the event in Mogadishu said Hartley was vague about his role there, and most assumed it was in his capacity as a newshound.



Sources close to Hartley insist he has never been a Soma executive, merely a minority shareholder. However, the *Eye* has seen a business card he was using which suggests he was a bit more than that: billing him as the company's "adviser", it shows he has a company email address and gives as his business address the Soma office in London.

Hartley's need for discretion is no surprise in light of his earlier muckraking. In a 2008 *Dispatches* documentary – *The Warlords Next Door* – Hartley investigated "Britain's Somalia connection" and asked incredulously how the UK could support such a violent and corrupt state. Just a few years later, and he's the one making the introductions in Mogadishu!

Despite repeated attempts by the *Eye* to let Hartley explain his involvement in Soma Oil & Gas, he declines to comment.



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