

Division for Ocean Affairs and the Law of the Sea  
Office of Legal Affairs



# Digest

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**of International Cases  
on the Law of the Sea**



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## INTRODUCTION

1. The present publication, entitled Digest of International Cases on the Law of the Sea, is a compilation of selected summaries of cases dealing with law of the sea issues from the late nineteenth century to the present time and is not meant to be exhaustive. The 33 cases selected have been deemed useful in understanding the evolution of jurisprudence concerning the law of the sea. Moreover, the cases give an essential overview of the breadth of the issues dealt with by the law of the sea, which is a significant aspect of public international law. The summaries include judgments rendered by the Permanent Court of International Justice (2), the Central American Court of Justice (1), the International Court of Justice (12), and the International Tribunal for the Law of the Sea (7), as well as awards rendered by arbitral tribunals (10) and a special commission (1). Inasmuch as disputes concerning the law of the sea continue to be adjudicated, the possibility of issuing future updates is not excluded.
2. The Digest of International Cases on the Law of the Sea has been prepared by the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, of the United Nations Secretariat. The Registries of both the International Court of Justice and the International Tribunal for the Law of the Sea have been consulted. Nonetheless, any errors, omissions or deficiencies in the publication are the sole responsibility of the Division for Ocean Affairs and the Law of the Sea, which should be contacted directly for any eventual rectifications that may be required.
3. The Division for Ocean Affairs and the Law of the Sea took the initiative to prepare the Digest of International Cases on the Law of the Sea with the intention of providing a new dimension to the series of publications and studies of the Division for the purpose of facilitating a better understanding of the modern international law of the sea, as codified in the United Nations Convention on the Law of the Sea.
4. The publication is divided into seven Chapters covering several key subjects contained in the 1982 United Nations Convention on the Law of the Sea: Chapter I – Baselines, Bays and Territorial Seas; Chapter II - Straits Used for International Navigation; Chapter III - Maritime Delimitation; Chapter IV - Fisheries and Marine Living Resources; Chapter V – Criminal Jurisdiction and Flag State Jurisdiction on the High Seas; Chapter VI – Navigation; and Chapter VII - Marine Environment.
5. The cases contained in the Digest have been summarized in such a way as to present the most salient facts of the decision; the main legal issues, including the questions before the forum and the arguments presented by the Parties to the dispute; the legal reasoning of the forum, where the Parties' arguments, the legal issues at stake and the applicable law are considered; the judgment or award rendered; and a brief summary of opinions and declarations.
6. In addition, each summary is preceded by a caption. The caption sets forth in a succinct format the name of the case; the Parties involved in the dispute; the main issues of the case; the forum having rendered the decision; the date of the decision; publications containing the text of the decision; and selected articles or publications where commentaries on the case may be found.

## I. BASELINES, BAYS AND TERRITORIAL SEAS

### A. Gulf of Fonseca<sup>1</sup> Case

|                          |   |
|--------------------------|---|
| <b>Parties:</b>          | El Salvador and Nicaragua   |
| <b>Issues:</b>           | Co-ownership of the waters; concession to a third country             |
| <b>Forum:</b>            | Central American Court of Justice                                     |
| <b>Date of Decision:</b> | Judgment of 2 March 1917  |
| <b>Published in:</b>     | 11 <u>American Journal of International Law</u> , (1917), pp. 674-730 |

#### 1. Facts

7. The Government of the Republic of El Salvador initiated proceedings against the Government of the Republic of Nicaragua as a result of the conclusion of a treaty by the latter with the Government of the United States of America on 5 August 1914, known as the Bryan-Chamorro Treaty.

8. The Treaty granted rights to the United States for the construction of an interoceanic canal and for a lease of 99 years for the establishment of a naval base in a part of the Gulf of Fonseca.

9. According to the Convention that established the Central American Court of Justice, the signatory nations entered into a solemn agreement to submit to it all controversies or questions arising among them, whatever their nature and origin, imposing no other limitation than the requirement to seek first a settlement between the respective departments of foreign affairs of the Governments concerned.

10. On 28 August 1916, El Salvador brought a complaint before the Court against Nicaragua.

#### 2. Issues

##### (a) Questions before the Court

- (i) To determine the status in international law of the Gulf of Fonseca;
- (ii) To consider whether the Bryan-Chamorro Treaty violates the rights of El Salvador in the Gulf of Fonseca;
- (iii) To consider whether the Bryan-Chamorro Treaty violates the 1907 General Convention of Peace and Amity; and
- (iv) To decide on the obligation of the Government of Nicaragua to restore and maintain the legal status that existed between the two countries before the conclusion of the Bryan-Chamorro Treaty.

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<sup>1</sup> The case summary will deal with the first complaint, i.e., “the legal status of the Gulf of Fonseca” as regards the right of co-ownership among the riparian States. Also concerning the Gulf of Fonseca, see “Case concerning the land, island and maritime frontier dispute (El Salvador/Honduras, Nicaragua intervening) (ICJ, 1992)”.

**(b) Arguments presented by the Parties**Jurisdiction

11. On the basis of the General Treaty of Peace and Amity concluded by the three Central American Republics in Washington on 20 December 1907, Nicaragua contended that negotiations between the respective departments of foreign affairs of the Governments concerned had not been exhausted and that the Court was incompetent for lack of jurisdiction to take cognizance of, and decide, the complaint presented by El Salvador. Nicaragua also argued that the Court had no jurisdiction over the subject matter of the suit because it involved the interest of a third nation (United States of America) that was not subject to the authority of the Court.

Co-ownership of the Gulf of Fonseca

12. (i) **El Salvador** argued that the Bryan-Chamorro Treaty ignored and violated the rights of co-ownership possessed by El Salvador in the Gulf of Fonseca. Spanish ownership over the waters of the Gulf had been exclusive and those rights were transferred to the Federal Government of Central American States prior to its dissolution and subsequently to El Salvador, Honduras and Nicaragua. El Salvador therefore contended that the waters of the Gulf of Fonseca were common to the three States since (i) no delimitation had been made between the three riparian States; (ii) the demarcation of boundaries of 1884 (between El Salvador and Honduras) and of 1900 (between Nicaragua and Honduras) were inoperative inasmuch as the interests of a third State in each case were not considered; (iii) the Gulf of Fonseca belongs to the category of "historic bays"; and (iv) on the basis of the "imperium doctrine", ownership has been exercised by the three States concerned over the Gulf.

13. As to the establishment of a naval base in the Gulf of Fonseca, El Salvador stated that the Bryan-Chamorro Treaty endangered its security and preservation and contended that the concession made by Nicaragua turned the territories concerned over to the complete domination of the sovereignty of the concessionary nation, i.e., the United States of America.

14. (ii) **Nicaragua** contended that the three States were owners of the Gulf in the sense that to each belonged a part thereof. Exclusive ownership over the Gulf and nothing more belonged to the Republics of Nicaragua, Honduras and El Salvador in their maritime territory as owners of their respective coasts. However, the lack of demarcation of frontiers did not result in common ownership.

15. Nicaragua argued that it was not a co-riparian State with El Salvador in the Gulf of Fonseca because of the absence of the element of adjacency. Co-riparian States are Nicaragua and Honduras and Honduras and El Salvador on account of being co-boundary States. In this connection, Nicaragua cited the boundary treaty between Nicaragua and Honduras of 1900 and the boundary negotiations that had taken place in 1884 between El Salvador and Honduras.

16. As for the "imperium doctrine", Nicaragua maintained that this right could only be exercised directly opposite along and coextensive with the coast of a nation up to the high seas and not to the right or left over portions of the territorial waters of other nations adjacent on those sides.

17. Nicaragua also contended that the Bryan-Chamorro Treaty did not endanger El Salvador's security, nor did the placement of a naval base constitute a serious menace to its autonomous life. In order to maintain the contrary, El Salvador would have to show that American influence in the Central American Republics was initiated by virtue of the Bryan-Chamorro Treaty.

18. Finally, Nicaragua maintained the impossibility for El Salvador to allege the nullity of the Treaty because the exclusive power to do so resided in the Parties who negotiated that pact or those who possessed the right to join therein.

### **3. Reasoning of the Court**

#### **(a) Jurisdiction**

19. The Court was of the opinion that a negotiated settlement was impossible and that therefore the complaint came properly under the jurisdictional power of the Court.

20. The Court stated that the language of article I of the General Treaty of Peace and Amity concluded by the three Central American Republics was very clear as to any controversies arising between the Central American nations. Therefore, to admit Nicaragua's argument that the Court lacked jurisdiction would render almost negligible the judicial power of the Court since the fact of invoking interests connected with a third nation would detract from the Court's judicial mission, which was essential to the object of the Treaty of "guaranteeing the rights of signatory Parties and maintaining unalterably peace and harmony in their relations without being obliged to resort in any case to the employment of force".

#### **(b) Co-ownership of the Gulf of Fonseca**

21. The Court determined the international legal status of the Gulf of Fonseca based on considerations of history, geography and the vital interests of the surrounding States. It reached the conclusion that the waters of the Gulf, as a historic bay, had mainly remained undivided and in a state of community between the Parties. It stated that this community had continued to exist by virtue of continued and peaceful use of the waters of the Gulf by the riparian States. This was shown by the overlapping jurisdiction in the zone in which both litigant States had been exercising their rights of imperium. Moreover, the Court found clear evidence of consensus by the community of nations on the basis of respect for the ownership and possession of the Gulf during Central American history as well as the affirmation of peaceful ownership and possession of the Gulf by the authorities of the three States. As for the legal status of the three miles that form the littoral on the coasts of the mainland and islands, the Court found that it belonged to the States separately and that they exercised exclusive and absolute ownership and possession over their three-mile zones.

22. The Court stated that the Gulf of Fonseca belonged to the category of historic bays, possessing the characteristic of a closed sea. The Court found no proof to show that the Central American States ever effected a complete division of all the waters of the Gulf.

23. The Court then noted that the concession of the naval base in the Gulf, presupposing occupation, use and enjoyment of waters in which El Salvador possessed a right of co-sovereignty, would have the practical effect of nullifying or at least restricting that right. The Court concluded that the establishment of such a naval base at any point on that interior and

closed sea would menace the natural security of El Salvador, rejecting thereby Nicaragua's contentions. Furthermore, the Court stressed that every dismemberment of territory, even though in the form of a lease, violates the interests of the complainant.

24. As to Articles II and IX of the General Treaty of Peace and Amity, the Court acknowledged their violation by the Bryan-Chamorro Treaty and affirmed that the latter Treaty placed in jeopardy the right El Salvador had acquired by virtue of Article IX, since it left the Parties dependent upon a foreign sovereign that was under no obligation to recognize or respect those rights.

25. Finally, the Court pronounced itself to be without competence to declare the Bryan-Chamorro Treaty null and void. To declare absolutely the nullity of the Treaty would be equivalent to adjudging and deciding the rights of the other party to the Treaty without having heard that other party and without its having submitted to the jurisdiction of the Court.

#### **4. Decision**

26. The judgment was rendered on 2 March 1917. The Court, having concluded its deliberations, held that:

- (a) It was competent to take cognizance of and decide the present action brought by the Government of the Republic of El Salvador against the Government of the Republic of Nicaragua;
- (b) By the concession of a naval base in the Gulf of Fonseca, the Bryan-Chamorro Treaty menaced the national security of El Salvador and violated its rights of co-ownership in the Gulf;
- (c) The said Treaty violated Articles II and IX of the Treaty of Peace and Amity; and
- (d) Nicaragua was under the obligation to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the Republics concerned.

## B.      Fisheries Case

|                               |   |
|-------------------------------|---|
| <b>Parties:</b>               | Norway and the United Kingdom   |
| <b>Issues:</b>                | Straight baselines; bays  |
| <b>Forum:</b>                 | International Court of Justice (ICJ)  |
| <b>Date of Decision:</b>      | Judgment of 18 December 1951  |
| <b>Published in:</b>          | <u>ICJ: Reports of Judgments, Advisory Opinions and Orders</u> , 1951, pp. 116-206<br><u>International Law Reports</u> , Vol. 18, 1957, pp. 86-144  |
| <b>Selected commentaries:</b> | <p>Evensen, J., “The Anglo-Norwegian Fisheries Case and its Legal Consequences”, 46 <u>American Journal of International Law</u>, (1952), pp. 609-630</p> <p>Johnson, D.H.N., “The Anglo-Norwegian Fisheries Case”, 1 <u>International and Comparative Law Quarterly</u>, (1952), pp. 145-180</p> <p>Waldock, C.H.M., “The Anglo-Norwegian Fisheries Case”, 28 <u>British Year Book of International Law</u> (1951), pp. 114-171</p> <p>Marston, G., “Low-Tide Elevations and Straight Baselines”, 46 <u>British Year Book of International Law</u>, (1972-73), pp. 405-423</p> |

### 1.      Facts

27. Since 1911 British trawlers had been seized and condemned for violating measures taken by the Norwegian Government specifying the limits within which fishing was prohibited to foreigners. In 1935, a Decree was adopted establishing the lines of delimitation of the Norwegian fisheries zone.

28. On 28 September 1949, the Government of the United Kingdom filed with the Registry of the ICJ an application instituting proceedings against Norway. The subject of the proceedings was the validity, under international law, of the lines of delimitation of the Norwegian fisheries zone as set forth in a Decree of 12 July 1935.

29. The application referred to the declarations by which the United Kingdom and Norway had accepted the compulsory jurisdiction of the ICJ in accordance with Article 36 (2) of its Statute.

### 2.      Issues

#### (a) Questions before the Court

- (i) To declare the principles of international law applicable in defining the baselines by reference to which the Norwegian Government was entitled to delimit a fisheries zone, extending seaward to 4 nautical miles from those lines and exclusively reserved for its own nationals; and to define the said baselines in the light of the arguments of the Parties in order to avoid further legal differences; and

- (ii) To award damages to the Government of the United Kingdom in respect of all interferences by the Norwegian authorities with British fishing vessels outside the fisheries zone, which, in accordance with the ICJ's decision, the Norwegian Government may be entitled to reserve for its nationals.

**(b) Arguments presented by the Parties**

- (i) The **United Kingdom** argued:

- That Norway could draw straight lines only across bays;
- That straight lines, regardless of their length, could be used subject to the following conditions set out in point 5 of its Conclusion;
 

"Norway is entitled to claim as Norwegian internal waters, on historic grounds, all fjords and sunds which fall within the conception of a bay as defined in international law ... whether the proper closing line of the indentation is more or less than 10-nautical miles long". (Basing itself by analogy on the so-called rule of 10 miles relating to bays, the United Kingdom maintained that the length of the baselines drawn across the waters lying between the various formations of the skjaergaard must not exceed 10 miles.);
- That certain lines did not follow the general direction of the coast, or did not follow it sufficiently closely, or that they did not respect the natural connection existing between certain sea areas and the land formations separating or surrounding them; and
- That the Norwegian system of delimitation was unknown to the United Kingdom and that the system therefore lacked the essential notoriety to provide the basis of an historic title enforceable upon, or opposable to, the United Kingdom.

- (ii) **Norway** argued:

- That the baselines had to be drawn in such a way as to respect the general direction of the coast and in a reasonable manner.

**3. Reasoning of the Court**

30. It was agreed from the outset by both Parties and by the Court that Norway had the right to claim a 4-mile belt of territorial sea, that the fjords and sunds along the coastline, which have the character of a bay or of legal straits, should be considered Norwegian for historical reasons, and that the territorial sea should be measured from the line of the low-water mark.

31. The Court found itself obliged to decide whether the relevant low-water mark was that of the mainland or of the skjaergaard, and concluded that it was the outer line of the skjaergaard that must be taken into account in delimiting the belt of Norwegian territorial waters.

32. The Court then considered the three methods that had been contemplated to effect the application of the low-water mark. The Court rejected the method of the "tracé parallèle", which "consists of drawing the outer limit of the belt of territorial waters by following the coast in all its sinuosities", as unsuitable for so rugged a coast. Furthermore, that method was abandoned in the written reply and later in the oral argument by the United Kingdom and, consequently, no

longer relevant to the case. The Court also declined to apply the "courbe tangente" (the "arcs of circles" method) inasmuch as it was concededly not obligatory by law. Thus, the instant case required the application of a third delimitation method according to which the belt of the territorial waters must follow the general direction of the coast. Such a method consisted of selecting appropriate points on the low-water mark and drawing straight lines between them. The Court found that the method had already been applied by a number of States without giving rise to any protests by other States.

33. The Court was unable to share the United Kingdom view according to which Norway could draw straight lines only across bays. If the belt of the territorial waters must follow the outer line of the skjaergaard and if the method of straight baselines must be admitted in certain cases, there was no valid reason therefore to draw straight lines only across bays, and not draw them also between islands, islets and rocks, across the sea areas separating them, even when such areas did not fall within the concept of a bay.

34. The Court further considered that the 10-mile rule relating to bays had not acquired the authority of a general rule of international law. Neither State practice nor judicial decisions have been uniform and consistent in this respect. Certain States had adopted the 10-mile rule both in their national laws and in their treaties and conventions. And, although certain arbitral decisions had applied the rule as between those States, other States had adopted different limits. Additionally, the 10-mile rule appeared to be inapplicable to Norway inasmuch as it had always opposed any attempt to apply it to its coast.

35. However, the Court held that the delimitation of sea areas had always had an international aspect and could not be dependent merely upon the will of the coastal State as expressed in its municipal law. Although necessarily a unilateral act, the validity of delimitation of sea areas with regard to other States depended upon international law. The Court considered that in drawing straight baselines, the coastal State had to follow the general direction of the coast. Moreover, the relationship between certain sea areas and the mainland as well as the economic interests in a certain region had to be considered.

36. The Court rejected the British argument, which was based by analogy on the so-called 10-mile rule relating to bays, that the length of the baselines should not exceed 10 miles.

37. On the basis of the evidence presented, the Court established the existence and the constituent elements of the Norwegian system of delimitation and found that the system had been applied consistently and uninterruptedly from 1869 until the time when the dispute arose. From the standpoint of international law, it held that the application of the Norwegian system had encountered no opposition from foreign States.

38. The last question with which the Court was confronted was whether the Decree of 12 July 1935 conformed in its application to the Norwegian delimitation method or whether, at certain points, it departed from it to any considerable extent. The Court found that the lines drawn were in accordance with the traditional Norwegian system and, moreover, pointed out that they were a result of a careful study initiated by the Norwegian authorities as far back as 1911. The United Kingdom contended that certain of the baselines adopted by the Decree were contrary to the principles stated by the Court as governing any delimitation of the territorial sea. Its criticism was particularly directed against 2 sectors: the sector of Svaerholthavet and that of Lophavet. As to the former, the Court considered that the basin had the character of a bay. As to the latter, the Court remarked that the rule in question was devoid of any mathematical precision

and that, except in case of manifest abuse, one could not confine oneself to examining one sector of the coast alone. "Even if it were considered that in the sector under review, the deviation was too pronounced, it must be pointed out that the Norwegian Government has relied upon an historic title since the end of the Seventeenth Century". In addition, the Court considered that "traditional rights reserved to the inhabitants of the Kingdom over fishing grounds ... founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line, which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable".

#### **4. Decision**

39. The Judgment was rendered on 18 December 1951:

(a) By 10 votes to 2 the Court held that "the method employed for the delimitation of the fisheries zone by the Royal Norwegian Decree of July 12<sup>th</sup> 1935 is not contrary to international law";

(b) By 8 votes to 4 the Court held that "the base-lines fixed by the said Decree in application of this method are not contrary to international law".

#### **5. Declaration, Separate Opinions, Dissenting Opinions**

##### **(a) Declaration**

40. **Judge Hackworth** declared that he concurred with the operative part of the judgment since he considered that the Norwegian Government had proved the existence of an historic title to the disputed areas of water.

##### **(b) Separate Opinions**

41. **Judge Alvarez** relied on the evolving principles of the law of nations applicable to the law of the sea, *inter alia*:

(a) States have the right to modify the extent of their territorial sea;

(b) Any State directly concerned may object to another State's decision as to the extent of its territorial sea;

(c) The international status of bays and straits must be determined by the coastal States directly concerned with due regard to the general interest; and

(d) Historic rights and the concept of prescription in international law: prescription will have effect if the right claimed to be based thereon is well established, has been uninterruptedly enjoyed and complies with conditions such as that it does not infringe on the rights acquired by other States, does not harm general interests and does not constitute an *abus de droit*.

42. The conclusion reached by Judge Alvarez acknowledges Norway's right to delimit the extent of its territorial sea and to determine the method for calculating this extent. Consequently, Norway is allowed to prohibit fishing by foreigners within the specified limit concerned.

43. **Judge Hsu Mo**'s opinion diverged from the Court's as regards the conformity with the principles of international law of straight baselines as fixed by the Decree of 1935.

44. Judge Hsu Mo allowed the possibility, in certain circumstances, of deviating from the general rule that says that the belt of territorial sea should be measured from the line of the coast at low tide. Norway's special geographical and historical conditions - two circumstances to be taken into consideration - could justify her practice of using the method of delimiting the belt of territorial sea by drawing straight lines between two points. Therefore, the question of the validity of the baselines as drawn by Norway should be considered on the basis of the degree of deviation from the general rule.

45. Two instances were mentioned in which the baseline could not be considered to have been justifiably drawn: the baselines drawn across Sværholthavet and Lophavet. The reasons underlying the assumption are the non-conformity of those baselines with the general direction of the coast and the lack of substantial proof establishing an historic title to the waters in question.

### (c) Dissenting Opinions

46. **Judge Sir Arnold McNair**'s analysis of the case rested on a few rules of the law of international waters. Though exceptions existed (e.g., "bays"), the normal procedure to calculate the extent of territorial waters is from the land, the baseline of territorial waters being a line which follows the coastline along low-water mark, and not a series of lines connecting the outermost points of the mainland and islands.

47. Judge McNair rejected the arguments upon which Norway has based its Decree, including:

- (a) The protection of Norway's economic and other social interests;
- (b) The exceptional character of Norway's coast;
- (c) That the United Kingdom should not be precluded from objecting to the Norwegian system embodied in the Decree because of previous acquiescence in the system; and
- (d) An historic title allowing a State to acquire waters that would otherwise have the status of high seas.

48. Judge McNair concluded therefore that the Decree of 1935 is incompatible with international law.

49. **Judge Read** was unable to concur with parts of the judgment that related to certain sections of the Norwegian coast.

50. The judge rejected the justification invoked by Norway for enlarging her maritime domain and seizing and condemning foreign ships:

- (a) The sovereignty of the coastal State is not a basis for Norway's claim to have the right to measure the four-mile belt from straight baselines;
- (b) Customary international law does not recognize the rule according to which the belt of territorial waters of a coastal State is to be measured from long baselines that depart from the line of the coast; and
- (c) The Norwegian system cannot be legitimated by an historic title.

### C. Beagle Channel Arbitration

|                               |   |
|-------------------------------|---|
| <b>Parties:</b>               | Argentina and Chile   |
| <b>Issues:</b>                | Delimitation; territorial sea; straight baselines   |
| <b>Forum:</b>                 | Court of Arbitration appointed by the British Government as Arbitrator under the 1902 General Treaty of Arbitration between Argentina and Chile; Subsequent appointment by the Parties of the Holy See as Mediator for the unresolved dispute   |
| <b>Date of Decision:</b>      | Award of 18 February 1977, which was ratified by the Arbitrator and communicated to the Parties on 18 April 1977; Mediation resulted in the conclusion of the 29 November 1984 Treaty of Peace and Friendship between the Parties   |
| <b>Published in:</b>          | <ul style="list-style-type: none"> <li>-<u>Reports of International Arbitral Awards</u>, Vol. XXI, 1997, pp. 53-264</li> <li>-17 <u>International Legal Materials</u>, (1978), pp. 632-679</li> <li>-<u>Beagle Channel Arbitration Award</u>, 1977, HMSO, London</li> </ul>   |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Garrett, J.L., "The Beagle Channel Dispute: Confrontation and Negotiation in the Southern Cone", 27 <u>Journal of Inter-American Studies and World Affairs</u>, (Fall, 1985), pp. 81-109</li> <li>- Princen, T., "International Mediation: The View from the Vatican: Lessons from Mediating the Beagle Channel Dispute", 3 <u>Negotiation Journal</u> (1987), pp. 347-366</li> <li>- Greig, D.W., "The Beagle Channel Arbitration", 7 <u>Australian Yearbook of International Law</u>, (1976-1977), pp. 332-385</li> <li>- Lindsley, L., "The Beagle Channel Settlement: Vatican Mediation Resolves a Century-old Dispute", 29 <u>Journal of Church and State</u>, (1987), pp. 435-455</li> <li>- Dutheil de la Rochère, J., "L'affaire du Canal de Beagle", <u>Annuaire Français de Droit International</u> (1977), pp. 408-435</li> </ul> |

#### 1. Facts

51. The Beagle Channel is a waterway connecting the Atlantic and Pacific Oceans located in the Tierra del Fuego Archipelago, at the southern tip of South America. In its western part, the Channel divides into two long branches, known as the southwestern and the northwestern arms. After their junction, there is a stretch of fairly straight, parallel coasts, and then the Channel widens and curves towards the southeast to form the eastern mouth, the exact shape and extent of which have been a matter of disagreement between Argentina and Chile.

52. In the eastern mouth of the Channel there are three fairly large islands (not more than 100 square kilometres each), Picton, Nueva and Lennox, the sovereignty of which has been disputed, together with that related to many smaller islands, some of which are adjacent to the three larger ones at the mouth of the Channel, while others are situated in its inner part. The last stretch of land boundary line was traced on Isla Grande (the largest and most important island of Tierra del Fuego) and follows the 68°36'38.5" West meridian until it touches the Beagle Channel. The area west of that line is Chilean while that to the east is Argentine. The Channel consequently has an Argentine coast on its north side and a Chilean coast on its south side, facing each other.

53. With the exception of the limits of the two countries' respective claims in Antarctica, the boundaries between Argentina and Chile were fixed by the Treaty of 23 July 1881, which sets forth in article III that:

"In Tierra del Fuego a line shall be drawn, which starting from the point named Cape Espíritu Santo, in parallel 52° 40', shall be prolonged to the south along the meridian 68° 34' west of Greenwich until it touches Beagle Channel. Tierra del Fuego, divided in this manner, shall be Chilean on the western side and Argentine on the eastern.

"As for the islands, to the Argentine Republic shall belong Staten Island, the small islands next to it, and the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia; and to Chile shall belong all the islands to the south of the Beagle Channel up to Cape Horn, and those there may be to the west of Tierra del Fuego."

54. The territorial and maritime boundaries dispute between Argentina and Chile and the determination of title to certain islands, islets and rocks near the extreme end of South America predate the first official attempt to solve the dispute in 1904-1905. After several fruitless negotiations over a protracted period of time, both Parties concluded an Arbitration Agreement on 22 July 1971, by which they submitted their dispute concerning the region of the Beagle Channel to arbitration.

55. The Arbitration Agreement was concluded within the framework provided by the General Treaty of Arbitration of 1902, a bilateral agreement whereby the British Government was appointed as Arbitrator to any dispute that might arise between the two Parties.

56. However, in view of the relations between the United Kingdom and Argentina in respect of the Falkland (Malvinas) Islands, it was agreed that the Arbitrator would establish a Court of Arbitration composed of five judges from the International Court of Justice.

57. The Court of Arbitration would render a "decision", which the British Government, the Arbitrator, could either ratify or reject, but which it could not modify. If accepted by the British Government, the "decision" would be communicated to the Parties with a declaration that such "decision" constituted the Award in accordance with the Treaty of 1902.

58. The questions of the Parties to the Court of Arbitration were contained in article I of the Arbitration Agreement. It was agreed that the Court of Arbitration would decide the case in accordance with the principles of international law and that it would draw the resulting boundary line on a chart.

## 2. Issues

**(a) Questions before the Court of Arbitration**

- (i) Whether Argentina or Chile had sovereignty over Picton, Nueva and Lennox islands as well as the adjacent islands and islets;
- (ii) What was the maritime boundary between Chile and Argentina in the area of the Beagle Channel.

**(b) Arguments presented by the Parties**

- (i) **Argentina** requested the Arbitrator to determine the boundary line between the respective maritime jurisdictions of Argentina and Chile from meridian 68°36'38.5" West, within the region referred to in paragraph 4, article I, of the Arbitration Agreement, and, consequently, to declare that Picton, Nueva and Lennox Islands and adjacent islands and islets belonged to Argentina; and
- (ii) Argentina claimed that, due to historical reasons, the real mouth of the Beagle Channel was to the southwest of Picton and passed between that island and Navarino. The three larger islands were therefore in different positions regarding the course of the Channel, but in any case they were not south of it. In addition, Argentina claimed that the three islands concerned were on the Atlantic and that according to the "Atlantic principle" they were under Argentine sovereignty. This argument was based, among other things, on the Treaty of 1881, which embodied a principle derived from *uti possidetis juris* of 1810, according to which the Atlantic littoral was to be Argentine and the Pacific littoral, Chilean.
- (iii) **Chile** requested the Arbitrator to decide, to the extent that they related to the region referred to in paragraph 4, article I, of the Arbitration Agreement, the questions referred to in its Notes of 11 December 1967 to the British Government and to the Government of Argentina, and to declare that Picton, Lennox and Nueva Islands, the adjacent islands and islets, as well as the other islands and islets whose entire land surface was situated wholly within the region referred to in paragraph 4, of article 1, belonged to Chile.
- (iv) Chile maintained that the eastern mouth of the Channel was situated between Isla Nueva and Isla Grande, thus passing to the north of Picton and Nueva. Therefore, the three larger islands were claimed as Chilean on the basis that they were south of the Beagle Channel.

## 3. Reasoning of the Court of Arbitration

59. The award deals basically with the Court of Arbitration's interpretation of the text of the 1881 Treaty, on the one hand, and, with the examination of confirmatory or corroborative incidents and material, on the other.

(a) The Court determined the scope and meaning of the term "Beagle Channel" as used in the 1881 Treaty. The relevant passage in article III attributed to Argentina states: "...to the Argentine Republic shall belong Staten Island, the small islands next to it, and the other

islands there may be on the Atlantic to the east of Tierra del Fuego and off the eastern coast of Patagonia; and to Chile, shall belong all the islands on the south of the Beagle Channel up to Cape Horn, and those there may be to the west of Tierra del Fuego". In interpreting this clause, the Court applied both the literal method of interpretation and also took into consideration the context and the requirements for the effectiveness of the Treaty. Accordingly, it could not differentiate "the two arms into waterways of distinct categories, one being a channel (or part of one) and the other not, and set out to establish which arm was the "Treaty arm", that is, which was the arm of the Channel that the negotiators of the 1881 Treaty had in mind. It concluded that the "Treaty arm" was the northern one, which passes north of the islands of Picton and Nueva, and therefore, that the three islands at the mouth were "south of the Channel".

Regarding the "Atlantic" principle invoked by Argentina on the basis of the 1810 *uti possidetis juris* doctrine, the Protocol of 1893 and the text of article III of the 1881 Treaty that allocated to Argentina the islands "on the Atlantic to the east of Tierra del Fuego and eastern coasts of Patagonia", the Court concluded that there was no overriding principle which determined that all the Atlantic coasts were to be Argentine, but rather that any Atlantic motivations were to be given effect only in respect of the individual articles that clearly showed that intention by reason of their method of drafting or content. It further considered that if the Treaty did not attribute specifically the three islands to Argentina (in article III), then they were deemed to belong to Chile because the Treaty had to be interpreted as ensuring a complete allocation of all the territories and islands. To this, it added that by virtue of further wording in article III, the expression "to the south of" only made sense on the basis of a west-east direction of the Beagle Channel, otherwise there would be a marked deviation in the course of the Channel which would have required special mention in the Treaty. The Court also inferred from allocations made by the Treaty in favour of Argentina that the southern limit of the Argentine part of the Channel was the southern share of the Isla Grande plus the appurtenant waters save for any islands expressly disposed of under the islands clause in article III.

As for the islands, islets and rocks to be attributed which were not mentioned in article III, the Court found that there existed a general principle of law according to which the attribution of a territory carries with it the attribution of the appurtenant waters. The Court followed the line claimed by Argentina, as drawn in a chart presented by that party, as far as a point in mid channel somewhat to the east of Snipe Island. Then it followed a different course, allocating Snipe to Chile and the Becasses Islands to Argentina. The Court explained the drawing of the line in the following terms:

"The boundary line itself is the resultant of construction lines drawn between opposite, shore to shore, points, sometimes to or from straight baselines. It is in principle a median line, adjusted in certain relatively unimportant respects for reasons of local configuration or of better navigability for the Parties. Over the whole course, account has been taken of sand-banks, siltings, etc., which would make a strict median line unfair, as in the case of certain islands or rocks."

(b) In the part of the decision dealing with "confirmatory or corroborative incidents and material" the Court considered several matters, which, in its opinion, confirmed the conclusions reached before, but clearly stated that the substantive conclusions were not based on such "confirmatory" or "corroborative" evidence. The conduct of the Parties during the period 1881-1888 was considered by the Court as providing an important indication of their interpretation of the Treaty. Within this context, the Court analyzed the statements made by the Argentine and Chilean foreign ministers on the occasion of their presentations of the Boundary Treaty to the respective Congresses for consent, as well as charts and maps issued during the

period 1881-1888. It further considered certain acts of jurisdiction performed by Chile, mostly land or mining concessions, while not creating any situation to which the doctrines of estoppel or preclusion would be applicable, yet tended to confirm the correctness of the Chilean interpretation of the islands clause of the Treaty.

#### **4. Decision**

60. On 18 February 1977, the Court of Arbitration decided the following, which was ratified by the British Government and communicated to the Parties on 18 April 1977 and became the Award under the General Treaty of Arbitration of 1902:

- (a) That the islands of Picton, Nueva and Lennox, together with their immediately “appurtenant” islets and rocks, belonged to the Republic of Chile;
- (b) That a line drawn on an attached chart, which formed an integral part of the decision, constituted the boundary between the territorial and maritime jurisdictions of Argentina and Chile;
- (c) That within the area of the “hammer”, the title to all islands, islets, reefs, banks, and shoals was vested in Argentina if situated to the northern side, and in Chile if situated to the southern side, of that line;
- (d) That in so far as any special steps needed to be taken for the execution of the decision, they were to be taken by the Parties, and that the decision was to be executed within a period of nine months from the date on which, after ratification by the British Government, it was communicated by the latter to the Parties; and
- (e) That the Court was to continue in being until it had notified the British Government that, in its opinion, the Award had been materially and fully executed.

#### **5. Declaration of Judge Gros**

61. **Judge Gros** indicates a different approach to obtain the interpretation of Article III of the Treaty of 1881, reaching the same conclusion as the Court.

62. The dispute must be viewed as an issue concerning the defining of boundaries. The intentions of the Parties as regards Article III could only be discovered by taking into account all aspects of the negotiations carried out between 1876-1881 as well as the special context of the international relations between the two States.

63. Since the 1881 Treaty was concluded without a map and the meaning of Article III had been decided on the basis of the text and historical circumstances, the study of the cartography appears to be devoid of legal relevance (except as corroborative evidence).

64. As for the Court’s view concerning the conduct of the Parties after the conclusion of the Treaty, it “can only be understood by looking to the effect which they themselves attributed to it at the time, and not by a retroactive introduction of principles totally alien to the attitude of the two States in question”.

#### **6. Mediation and subsequent boundary agreement**

65. On 2 May 1977, the British Government notified Argentina and Chile of the Arbitral Award. The Government of Argentina, after studying the Award, however, considered that it had serious and numerous defects and concluded that the Award was null and void since it violated

international law by which the Court of Arbitration had to abide in carrying out its task. Chile rejected the declaration of invalidity of the Award by Argentina.

66. Consequently, on 8 January 1979, Argentina and Chile requested the Holy See to act as Mediator in their dispute (Act of Montevideo), to guide them in the negotiations and to help them find a solution. On 29 November 1984, the Treaty of Peace and Friendship (United Nations Treaty Series, vol. 1399, No. 23392) was signed by Argentina and Chile. The Treaty, taking account of the proposal, suggestions and advice by the Mediator for the solution of the dispute, defined the maritime boundary between the two States as well as the respective sovereignty over the seabed and subsoil in the area of the Beagle Channel. Articles 7 to 11 of the Treaty delimit the maritime boundaries between the two States as follows:

“Article 7

“The boundary between the respective sovereignties over the sea, soil and subsoil of the Argentine Republic and the Republic of Chile in the sea of the southern zone from the end of the existing boundary in the Beagle Channel, i.e., the point fixed by the co-ordinates 55° 07.3' South latitude and 66° 25.0' West longitude shall be the line joining the following points:

“From the point fixed by the co-ordinates 55°07.3' South latitude and 66° 25.0' West longitude (point A), the boundary shall follow a course towards the south-east along a loxodromic line until a point situated between the coasts of the Isla Nueva and the Isla Grande de Tierra del Fuego whose co-ordinates are South latitude 55° 11.0' and West longitude 66° 04.7' (point B); from there it shall continue in a south-easterly direction at an angle of 45° measured at point B and shall extend to the point whose co-ordinates are 55° 22.9' South latitude and 65°43.6' West longitude (point C); it shall continue directly south along the meridian until the parallel 56° 22.8' of South latitude (point D); from there it shall continue west along that parallel, 24 miles to the south of the most southerly point of Isla Hornos, until it intersects the meridian running south from the most southerly point of Isla Hornos at co-ordinates 56° 22.8' South latitude and 67° 16.0' West longitude (point E); from there the boundary shall continue South to a point whose co-ordinates are 58° 21.1' South latitude and 67°16.0' West longitude (point F).

“The exclusive economic zones of the Argentine Republic and the Republic of Chile shall extend respectively to the east and west of the boundary thus described.

“To the south of the end of the boundary (point F), the exclusive economic zone of the Republic of Chile shall extend, up to the distance permitted by international law, to the west of meridian 67° 16.0' West longitude, ending on the east at the high sea.

“Article 8

“The Parties agree that in the area included between Cape Horn and the easternmost point of Isla de los Estados, the legal effects of the territorial sea shall be limited, in their mutual relations, to a strip of three marine miles measured from their respective base lines.

“In the area indicated in the preceding paragraph, each Party may invoke with regard to third States the maximum width of the territorial sea permitted by international law.

“Article 9

“The Parties agree to call the maritime area delimited in the two preceding articles "Mar de la Zona Austral" (Sea of the Southern Zone).

“Article 10

“The Argentine Republic and the Republic of Chile agree that at the eastern end of the Strait of Magellan (Estrecho de Magallanes) defined by Punta Dungeness in the north and Cabo del Espíritu Santo in the south, the boundary between their respective sovereignties shall be the straight line joining the “Dungeness marker (former beacon)” and “marker I” on Cabo del Espíritu Santo in Tierra del Fuego.

“The sovereignty of the Argentine Republic and the sovereignty of the Republic of Chile over the sea, seabed and sub-soil shall extend, respectively, to the east and to the west of this boundary.

“The boundary agreed on here in no way alters the provisions of the 1881 Boundary Treaty, whereby the Strait of Magellan is neutralized for ever with free navigation assured for the flags of all nations under the terms laid down in article V.

“The Argentine Republic undertakes to maintain, at any time and in whatever circumstances, the right of ships of all flags to navigate expeditiously and without obstacles through its jurisdictional waters to and from the Strait of Magellan.

“Article 11

“The Parties give mutual recognition to the base lines which they have traced in their respective territories.”

#### **D. Case concerning the Land, Island and Maritime Frontier Dispute**

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| <b>Parties:</b>               | El Salvador and Honduras (Nicaragua intervening, not as a Party)   |
| <b>Issues:</b>                | Land boundary, legal status of the islands and legal situation of the maritime spaces within and outside the closing line of the Gulf of Fonseca (Summary covers solely the part of the proceedings relating to the legal situation of the maritime spaces)  |
| <b>Forum:</b>                 | International Court of Justice (ICJ) (Chamber of the Court)  |
| <b>Date of Decision:</b>      | 11 September 1992  |
| <b>Published in:</b>          | <u>ICJ: Reports of Judgments, Advisory Opinions and Orders</u> , 1992, pp. 351-761   |
| <b>Selected commentaries:</b> | <p>Ratner, S.R., "Land, island and maritime frontier dispute (El Salvador/Honduras), application to intervene", 85 <u>American Journal of International Law</u> (1991), pp. 680-686</p> <p>Bleichert, M.A., "The effectiveness of voluntary jurisdiction in the ICJ: El Salvador v. Honduras, a case point", 16 <u>Fordham International Law Journal</u> (1992-1993), pp. 799-847</p> <p>Charney, J.I., "Progress in International Maritime Boundary Delimitation Law", 88 <u>American Journal of International Law</u> (1994), pp. 227-256</p> <p>Rottem, G. "Land, Island, and Maritime Frontier, Dispute (El Salvador/Honduras, Nicaragua Intervening)", 87 <u>American Journal of International Law</u> (1993), pp. 618-626</p> <p>Shaw, M.N., "Case Concerning the Land, Island and Maritime Frontier Dispute" (El Salvador/Honduras, Nicaragua intervening) Judgment of 11 September 1992, 42 <u>International and Comparative Law Quarterly</u> (1993), pp. 929-937</p> <p>Kwiatkowska, B., "Judge Shigeru Oda's Opinions in Law of the Sea Cases: Equitable Maritime Boundary Delimitation", 36 <u>German Yearbook of International Law</u> (1993), pp. 225-294</p> <p>Kohen, M.G., "L'uti possidetis revisité: larrêt du 11 septembre 1992 dans l'affaire El Salvador/Honduras", 97 <u>Revue Générale de Droit International Public</u> (1993), pp. 939-973</p> <p>Kohen, M.G., "La requête à fin d'intervention du Nicaragua dans l'affaire du différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras): l'ordonnance de la Cour du 28 février 1990 et l'arrêt de la Chambre du 13 septembre 1990," 36 <u>Annuaire Français de Droit International</u> (1990), pp. 341-367</p> |

## 1. Facts

67. On 11 December 1986, by a joint notification filed with the Registry of the International Court of Justice, Honduras and El Salvador transmitted a copy of a Special Agreement signed by them on 24 May 1986 for the submission of their dispute to a Chamber of the Court.

On 8 May 1987, the Court formed the Chamber to deal with the case. On 17 November 1989, Nicaragua filed an application for permission to intervene in the case. The Chamber of the Court decided in September 1990 that Nicaragua could intervene in the case, but not as a party, solely in respect of the question of the status of the waters of the Gulf of Fonseca.

68. The Chamber of the International Court of Justice noted that the dispute was composed of three main elements: the dispute over the land boundary; the dispute over the legal situation of the islands; and the dispute over the legal situation of the maritime spaces.

69. The maritime spaces concerned were both those within the Gulf of Fonseca, of which the two Parties and the intervening State - Nicaragua - are the coastal States, and the waters outside the Gulf. There was also a dispute concerning whether the role of the Chamber included the delimitation of the waters between the Parties.

70. The two Parties (and the intervening State) came into existence with the disintegration of the Spanish Empire in Central America, and their territories correspond to administrative subdivisions of that Empire. It was accepted that the new international boundaries should be determined by application of the generally accepted principle in Spanish America of the *uti possidetis*, whereby the boundaries were to follow the colonial administrative boundaries. The problem arose as to how to determine where those boundaries actually were.

71. The independence of Central America from the Spanish Crown was proclaimed on 15 September 1821. Until 1839, Honduras and El Salvador made up, together with Costa Rica, Guatemala and Nicaragua, the Federal Republic of Central America. Upon the disintegration of the Federal Republic, El Salvador and Honduras, along with the other component States, became, and have since remained, separate States.

72. It was in respect of the islands of the Gulf of Fonseca, all of which had been under Spanish sovereignty, that a dispute first became manifest. An attempt was made in 1884 to delimit the waters of the Gulf between El Salvador and Honduras, by the inclusion of that delimitation in a boundary convention, which was, however, not ratified by Honduras. The negotiation of the Convention nevertheless enabled both Parties to indicate the nature of their claims. In 1900, a delimitation agreement on part of the waters of the Gulf was concluded between Nicaragua and Honduras. In 1916, proceedings were brought by El Salvador against Nicaragua before the Central American Court of Justice, which raised the issue of the status of the waters of the Gulf. Subsequently, with the development of the law of the sea, each Party modified its maritime legislation so as to lay claim to the waters outside the Gulf.

73. The dispute has over the years been the subject of a number of direct negotiations between the Parties during various conferences, the last one of which, in 1962, was an attempt to settle the problem of delimitation. A mediation process began in 1978 and led to the conclusion of a General Treaty of Peace, signed and ratified in 1980 by El Salvador and Honduras. That Treaty provided, *inter alia*, a mandate for the Joint Frontier Commission, established in 1980, to determine the legal situation of the maritime spaces. The Commission worked from 1980 to 1985 but did not succeed in accomplishing its mandate within the time limit set out in the Treaty. In view of this failure, the dispute was referred to the International Court of Justice (ICJ), in accordance with the provisions of the Treaty. Under an Agreement of 1986 the Parties agreed to

execute in its entirety and in complete good faith the decision to be rendered by the ICJ. For that purpose, the Parties also established a Special Demarcation Commission, which was to begin the demarcation of the frontier line to be fixed by the Judgment no later than three months from the date of the said Judgment.

## 2. Issues

### (a) Questions before the Court

- (i) **El Salvador** asked the Chamber of the Court to determine that:
  - The Chamber had no jurisdiction to effect any delimitation of the maritime spaces;
  - The legal situation of the maritime spaces within the Gulf of Fonseca corresponded to the legal position established by the Judgement of the Central American Court of Justice of 9 March 1917;
  - The legal situation of the maritime spaces outside the Gulf of Fonseca was that (a) Honduras had no sovereignty, sovereignty rights or jurisdiction in or over them; and (b) the only States which had sovereignty, sovereign rights or jurisdiction in or over them were States with coasts that directly front on the Pacific Ocean, El Salvador being one such State.
- (ii) **Honduras** asked the Chamber of the Court to adjudge and declare that:

Within the Gulf:

  - The community of interests existing between El Salvador and Honduras by reason of their both being coastal States bordering on an enclosed historic bay produced between them a perfect equality of rights, which had nevertheless never been transformed by the same States into a condominium;
  - Each of the two States was entitled to exercise its powers within zones to be precisely delimited between El Salvador and Honduras;
  - The course of the line delimiting the zones falling, within the Gulf, under the jurisdiction of Honduras and El Salvador, respectively, taking into account all the relevant circumstances for the purpose of arriving at an equitable solution, should consist of the line equidistant from the low water-line of the mainland and island coasts of the two States up to a certain point, from where a line joining a series of points situated at a distance of 3 miles from the coasts of El Salvador up to the closing line of the Gulf;
  - The community of interests existing between El Salvador and Honduras as coastal States bordering on the Gulf implies an equal right for both to exercise their jurisdiction over maritime areas situated beyond the closing line of the Gulf;

Outside the Gulf:

- The delimitation line producing an equitable solution, taking into account all relevant circumstances, is represented by a line starting from the closing line of the Gulf at a point situated at a distance of 3 nautical miles from the coast of El Salvador, and running out 200 nautical miles from that point, thus delimiting the territorial sea, exclusive economic zone and continental shelf of El Salvador and Honduras.
- (iii) **Nicaragua**, in its written statement, presented a summary of its conclusions that no regime of a community of interests had ever existed in respect of the Gulf of Fonseca. The legal considerations presented to support that conclusion were:
- The issues presented by El Salvador and Honduras related to the law of the sea, except in so far as they related to the question of condominium;
  - The relevant principles of maritime delimitation could not be displaced by the unjustified introduction of a concept of “the perfect equality of States”;
  - The consistent practice of the riparian States had recognized the absence of any special legal regime within the Gulf, apart from its having the character of an historic bay;
  - The contentions of Honduras were designed to obtain a result, that would not be obtainable by application of the equitable principles relating to maritime delimitation and forming part of general international law.

In the oral proceedings, Nicaragua submitted further conclusions, *inter alia*, to the effect that:

- The claim by Honduras affected the legal interest of Nicaragua directly and substantially, in particular because the “community of interests” would have entailed an entitlement to areas of maritime territory incompatible with the inherent rights of Nicaragua;
- International law did not recognize a concept of “community of interests”, either in a form that overrode the application of the principles of the law of the sea, or in any other form;
- The claim made by Honduras regarding the waters west of the legal boundary established between Honduras and Nicaragua was invalid in general international law and consequently was non-opposable to any other State, whether or not a party in the present proceedings;
- The legal entitlements of the coastal States, including Nicaragua, remained the same whether the waters of the Gulf were classified as internal waters or as territorial sea or as continental shelf;
- No regime of condominium existed in the Gulf of Fonseca or any part thereof (this argument was consistently advanced by Nicaragua in opposition to the 1917 Judgment of the Central American Court of Justice – see below, Reasoning of the Court).

**(b) Arguments presented by the Parties**

**(i) El Salvador**

*Nicaragua's written statements:* El Salvador expressed reservations regarding what it considered to be Nicaragua's expression of its point of view with respect to delimitation within the Gulf, in relation to which Nicaragua was not granted the right to intervene. Later, El Salvador stated that it had no objection to the manner in which Nicaragua had exercised the rights accorded to it by the Court.

*Delimitation of the maritime boundary:* El Salvador stated that the Chamber had no jurisdiction to effect any delimitation of the maritime spaces and in fact it maintained that there existed no dispute between the Parties as to the delimitation of the waters of the Gulf, and that the Chamber therefore could not adjudicate such a non-existent dispute. In response to Honduras' argument, it was emphasized that El Salvador's Constitutional provision could only show the unlikelihood of El Salvador's representatives having had an intention to confer a delimitation mandate on the Chamber.

*Legal situation of the waters of the Gulf:* El Salvador approved strongly of the condominium concept in the waters of the Gulf established by the 1917 Judgment of the Central American Court of Justice, as described by the Chamber (see below). It further held that such a status could not be changed without its consent.

**(ii) Honduras**

*Nicaragua's written statements:* Honduras complained that the statements had entered into matters on which the Chamber had ruled specifically that Nicaragua had no right to intervene (e.g., the legal regime of the waters outside the Gulf), or had dealt with matters extraneous to the issue over which the Chamber had ruled that Nicaragua did have a right to intervene.

*Delimitation of the maritime boundary:* Honduras asked for the delimitation of the maritime boundary inside and outside the Gulf of Fonseca, by means of a line to be determined by the Chamber of the Court. In Honduras' view, the Treaty of Peace and the Special Agreement did not permit an interpretation that the Parties had asked for the determination of the legal situation of the maritime spaces (including the territorial sea and exclusive economic zone) unaccompanied by a delimitation, since it was already established that the rights of the coastal States existed *ipso facto* and *ab initio*. For Honduras a legal title without delimitation of its scope would have been a title without any real substance.

The absence of any specific reference to delimitation in the Special Agreement was explained by Honduras as the consequence of a provision in El Salvador's Constitution, which does not permit of any delimitation of the waters of the Gulf of Fonseca, being subject to a condominium. For this reason, the term "determine the legal situation" of the waters was used, in order not to prejudice the position of either Party.

Honduras also stated that subsequent practice of the Parties should have been taken into account to interpret the Special Agreement. In particular, the Joint Frontier Commission had examined, *inter alia*, proposals aimed at the delimitation of the maritime spaces, notwithstanding the fact that the 1980 General Treaty of Peace also used the expression "determine the legal situation of the islands and the maritime spaces".

*Legal situation of the waters of the Gulf.* Honduras opposed the concept of condominium, as established in the 1917 Judgment of the Central American Court of Justice and, in fact, called into question the correctness of this part of the 1917 Judgment. It maintained that, as it was not a Party to the case it therefore could not be bound by the decision. Honduras also argued that condominium could only be established by agreement. Honduras proposed the alternative idea of “community of interests” or of “interest” as expounded in the Judgment of the Permanent Court of International Justice in the case of the Territorial Jurisdiction of the International Commission of the River Oder of 1929. In that ruling, each State remained master of its own area of jurisdiction. Thus, while delimitation was incompatible with the existence of a condominium, a community of interests presupposed delimitation. In fact, each of the coastal States had an equal right to have defined maritime spaces attributed to it, over which it could exercise the competences conferred on it by international law.

### 3. Reasoning of the Court

74. *Nicaragua’s written statements.* The Chamber considered it pointless, given the nature of the case, to single out which of the contentions of Nicaragua were squarely within the limit of its permitted intervention, and which may be said to have gone beyond those limits. In any case, the Chamber had only taken into account the arguments of Nicaragua which were relevant in its consideration of the legal regime of the waters of the Gulf of Fonseca.

75. *Delimitation of the maritime boundary.* On the face of the text of the Special Agreement, the Chamber noted that no reference was made to any delimitation of the waters of the Gulf. For the Chamber to have the authority to delimit maritime boundaries it must have been given a mandate to do so, either in express words or according to the true interpretation of the Special Agreement. No indication of a common intention to obtain a delimitation by the Chamber could be derived from the text of the Agreement.

76. The Chamber was also unable to accept Honduras’ contention based on El Salvador’s Constitution. Such a contention, in the view of the Court, amounted to recognizing that, when the Special Agreement was signed, the Parties were not able to agree that the Chamber should have jurisdiction to delimit the waters of the Gulf. Since the jurisdiction of the Court depends upon the consent of the Parties, it followed that it had no jurisdiction to effect such delimitation.

77. As for Honduras’ argument based on the previous practice of the Parties, the Chamber held that none of those considerations could prevail over the absence from the text of any specific reference to delimitation.

78. *Legal situation of the waters of the Gulf.* The Chamber noted that the geographical dimensions and proportions of the Gulf were such that it could be considered a juridical bay under Article 7 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and Article 10 of the 1982 United Nations Convention on the Law of the Sea (not yet in force at the time of the hearing). Although neither Party to the case was a party to these Conventions, the above provisions were considered to be general customary law.

79. However, both Conventions applied to those bays “the coast of which belong to a single State” and furthermore they did not apply to “so-called historic bays”. The Gulf of Fonseca was manifestly not a bay according to the definition used in those Conventions; furthermore, the Parties and the intervening State agreed that it was an historic bay. The Chamber proceeded to investigate the particular history of the Gulf in order to determine the regime of its waters. The Gulf was a single-State bay under Spanish domain until the three riparian States gained their independence in 1821. From 1821 to 1839 the Gulf was under the jurisdiction of the Federal

Republic of Central America, of which the three coastal States were member States. The rights in the Gulf of the present coastal States were thus acquired by succession from Spain.

80. Under the principle of the *uti possidetis*, it was necessary to establish what was the status of the waters of the Gulf at the time of the succession. This was a question that the Central American Court of Justice had analysed in its Judgment of 9 March 1917, reaching the conclusion that the Gulf was an historic bay with the character of an enclosed sea. All three coastal States agreed on the findings. The problem arose, however, vis-à-vis the precise character of the sovereignty which the three coastal States enjoyed in the historic waters. While in the case of a single-State bay the enclosed waters are internal waters of the coastal State, in the case of an enclosed pluri-State bay, all the coastal States need to be assured practical rights of access from the ocean. In 1917, the Court reached the conclusion that the legal status of the Gulf was that of property belonging to the three coastal States as a community of interest or co-ownership. The maritime belts of 1 marine league from the coasts were considered to be within the exclusive jurisdiction of the coastal State and therefore were outside the community of interest or co-ownership. The further outer zone of 9 nautical miles was indicated as a zone of rights of inspection and the exercise of police powers for fiscal purposes and for national security.

81. In response to Honduras' argument that condominium could only be established by agreement, the Chamber pointed out the possibility of the existence of joint sovereignty arising as a juridical consequence of State succession, where a single and undivided maritime area passes to two or more new States. Accordingly, the 1917 Judgment was described as using the term condominium or co-ownership to describe the legal result where three States jointly inherit by succession waters, which for nearly three centuries had been under the single jurisdiction of the State from which they were the heirs and in which waters there were no maritime administrative boundaries at the time of inheritance. The *ratio decidendi* of the 1917 Judgment was that while the absence of delimitation between the three countries did not always result in community, the undelimited waters of the Gulf had remained undivided and in a state of community, which entailed a condominium or co-ownership of those waters. The existence of a community was also evidenced by the continued and peaceful use of the waters by all the riparian States after independence.

82. As for the legal status of the 1917 Judgment (given the fact that Nicaragua protested the Judgment), the Chamber decided that it was a valid decision of a competent Court. The decision obviously could not be considered *res judicata* between the Parties in the present case, especially in light of Honduras' reliance on the principle that a decision in a judgment or an arbitral award can only be opposed by the Parties. Thus, the Chamber decided to take the 1917 Judgment into account as a relevant precedent of a competent court and, following the words of Article 38 of the Court's Statute, as "a subsidiary means for the determination of rules of law".

83. It thus concluded that the Gulf was an historic bay, and its waters, other than a 3-mile maritime belt, were historic waters and subject to joint sovereignty by the three coastal states. It was then necessary to determine the closing line of the waters of the bay. The Court decided that the closing line was the line as recognized by the three coastal States in practice and as referred to in the 1917 Judgment (from Punta Ampala to Punta Cosigüina). Such closing line was also considered a baseline.

84. Inside the Gulf closing line, other than in the 3-mile belt subject to the sovereignty of each of the coastal States and subject to mutual rights of innocent passage, vessels of third States seeking access to the ports of any one of the three coastal States must be able to exercise a right of passage. This meant that the juridical status of the waters was the same as that of internal waters,

though subject to certain rights of passage. The waters were not considered territorial sea; in fact, that would be incompatible with the Gulf's waters having the character of an historic bay.

85. *Legal situation of the waters outside the Gulf.* It was decided by the Court that the closing line of the Gulf constituted "the coast", in the sense of a territorial sea baseline from which a territorial sea proper would be measured. Given the condominium of the waters in the Gulf, it followed that there was a tri-partite presence at the closing line and that Honduras was not locked out from rights in respect of the ocean waters outside the bay. This meant that all three of the joint sovereign States must have entitlement outside the closing line to a territorial sea, a continental shelf and an exclusive economic zone. Whether the situation should have remained in being or be replaced by a division and delimitation into three separate zones is, as inside the Gulf, a matter for the three States to decide.

86. In terms of the effect of the Judgment for the intervening State, it was stated that Nicaragua would not become party to the proceedings. The binding force of the Judgment for the Parties did not therefore extend also to Nicaragua as intervener.

#### 4. Decision

87. Judgment was rendered on 11 September 1992.

(a) The Chamber decided unanimously on the boundary line between El Salvador and Honduras in the first, second, third, fifth, and sixth sectors and by four votes to one in the fourth sector of their common frontier not described in Article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980;

(b) The Chamber decided by four votes to one that the Parties, by requesting the Chamber, in article 2, paragraph 2, of the Special Agreement of 24 May 1986 "to determine the legal situation of the islands...", conferred upon the Chamber jurisdiction to determine, as between the Parties, the legal situation of all the islands of the Gulf of Fonseca; but that such jurisdiction should only be exercised in respect of those islands which have been shown to be the subject of a dispute;

(c) The Chamber decided that the islands shown to be in dispute were:

- (i) four votes to one, El Tigre;
- (ii) unanimously, Meanguera and Meanguerita;

(d) The Chamber decided unanimously that the island of El Tigre was part of the sovereign territory of Honduras;

(e) The Chamber decided unanimously that the island of Meanguera was part of the sovereign territory of El Salvador;

(f) The Chamber decided by four votes to one that the island Meanguerita is part of the sovereign territory of El Salvador;

(g) The Chamber decided by four votes to one that the legal situation of the waters of the Gulf of Fonseca was that the Gulf was an historic bay. Prior to 1821 the waters had been under the single control of Spain, and from 1821 to 1839 of the Federal Republic of Central America. Thereafter, the waters succeeded to and were held in sovereignty by El Salvador, Honduras and Nicaragua, jointly. However, this joint sovereignty did not apply to a belt extending 3 miles from the littoral or coast of each of the three States, which was under the exclusive sovereignty of the coastal State and subject to the delimitation between Honduras and

Nicaragua effected in June 1900, and to the existing rights of innocent passage through the 3-mile belt and the waters held in sovereignty jointly. The waters at the central portion of the closing line of the Gulf (between a point on that line 3 miles from Punta Ampala and a point on that line 3 miles from Punta Cosigüina) are to be subject to the joint entitlement of all three States of the Gulf unless and until a delimitation of the relevant maritime area is effected;

(h) The Chamber decided by four votes to one that the Parties, by requesting the Chamber, in article 2, paragraph 2, of the Special Agreement of 24 May 1986, "to determine the legal situation of the ... maritime spaces", have not conferred upon the Chamber jurisdiction to effect any delimitation of those maritime spaces, whether within or outside the Gulf; and

(i) The Chamber decided by four votes to one that the legal situation of the waters outside the Gulf is such that the Gulf of Fonseca is an historic bay with three coastal States, the closing line of the Gulf constituting the baseline of the territorial sea. The territorial sea, continental shelf and exclusive economic zone of El Salvador and those of Nicaragua off the coasts of those two States are also to be measured outwards from a section of the closing line extending 3 miles along that line from Punta Ampala (El Salvador) and 3 miles from Punta Cosigüina (Nicaragua), respectively. Entitlement to the territorial sea, the continental shelf and the exclusive economic zone seaward of the central portion of the closing line appertains to all three States of the Gulf (El Salvador, Honduras and Nicaragua). Any delimitation of the relevant maritime areas is to be effected by agreement on the basis of international law.

## **5. Declaration, Separate Opinions, Dissenting Opinions**

### **(a) Declaration**

88. **Vice-President Oda** expressed the wish to put on record that he did not share the views of the Chamber concerning the effect of Nicaragua's intervention in the case. In his view Nicaragua, as a non-party intervener, was bound by the Judgment in so far as it related to the legal situation of the maritime spaces of the Gulf. He recalled that his views on the effect of Judgments of the Court upon intervening States were detailed in his separate or dissenting opinions appended respectively to the Continental Shelf (Tunisia/Libya) case of 1981 and the Continental Shelf (Libya/Malta) case of 1984. In light of this, he did not agree with the findings of the Chamber on the legal situation of the maritime spaces and appended a dissenting opinion to the Judgment (see below).

### **(b) Separate Opinions**

89. **Judge ad hoc Valticos**. In relation to the maritime spaces, and in particular in relation to the waters outside the Gulf, he recognized that the Chamber was dealing with the extension of a particular historic bay shared by three riparian States, with respect to which the general international law of the sea did not contain any specific norms. There were many elements that carried some weight in the consideration of the problem, but in the end he considered that the line of argument of the majority of the Chamber was acceptable from a legal standpoint. He pointed out, though, that the conclusions of the Chamber were a consequence of the particular situation of the Gulf and could not be given a more general scope in circumstances of a different kind.

90. **Judge ad hoc Torres Bernárdez** agreed with the Chamber that the joint sovereignty status of the undivided historic waters of the Gulf had a successorial origin. It was a joint sovereignty, pending delimitation, which resulted from the operation of the principles and rules of international law governing succession to territory. The Judgment limited itself to declaring the legal situation of the waters of the Gulf resulting from such a regime. In relation to the historic character of the waters of the Gulf, the Judgment was not a piece of judicial legislation but a declaration of the legal situation of the waters of the Gulf established at that moment on the basis of successorial and consensual elements, without modifying them in any respect. For example, the maritime belt of exclusive jurisdiction or sovereignty was one of those elements which possessed a consensual origin; it did not proceed from the objective law on succession. In fact, he pointed out that entitlements to and delimitations of “maritime belts”, their location, etc., were a matter to be solved by agreement among the coastal States. He also expressed satisfaction at the decision of the Chamber relating to Honduras holding sovereignty jointly with El Salvador and Nicaragua over all the waters of the Gulf, including the central portion of the Gulf’s closing line, as well as the decision that Honduras was a Pacific Ocean coastal State, with an entitlement to a territorial sea, a continental shelf and an exclusive economic zone seaward of the said central portion of the closing line of the Gulf.

91. Having recognized this, he emphasized that the Chamber could not proceed to a delimitation of the maritime spaces concerned, within or outside the Gulf, since this would amount to delimiting maritime spaces in which the Judgment had recognized the existence of rights and entitlements of Nicaragua, which was not granted the status of a Party to the procedure. Therefore he disagreed with the Chamber on its determination of the issue of competence of the Court under the Special Agreement of 1986 for the submission of the dispute to the Chamber. He believed the issue was moot and as such should not have been addressed by the Chamber.

92. Judge Torres Bernárdez then presented an explanation of his disagreement with the merits of the Chamber’s finding on the issue of whether the Special Agreement of 1986 allowed the Chamber to effect a delimitation of the maritime spaces. By applying the rules of the 1969 Vienna Convention on the Law of Treaties on interpretation of treaties, he reached the conclusion that the original text of the 1986 Special Agreement allowed for the delimitation of the maritime spaces, as a way to fulfil the requirement of the Agreement itself to determine the legal situation of the spaces concerned.

93. In relation to the effect of the Judgment for the intervening State (Nicaragua), he agreed that the Judgment was not *res judicata* for Nicaragua. He expressed his agreement with Judge Oda’s Declaration.

### (c) Dissenting Opinion

94. **Vice-President Oda** was not able to share the view of the Chamber with regard to the legal situation of the maritime spaces within and outside the Gulf of Fonseca. In his opinion the Gulf was not “an historic bay” as conceived in the law of the sea, since the concept of pluri-State bay, which the Chamber employed to characterize the Gulf, had no existence as a legal institution. In any case, he believed that the Gulf did not fall in the category of an “historic bay”, despite what the Chamber assumed. He believed that the waters in the Gulf constituted, under general rules of the law of the sea, the sum of the distinct territorial seas of each respective State.

95. In his analysis of the development of the legal concept of “historic bay” under the law of the sea, Judge Oda concluded that a geographical bay which was bordered by the land of two or more riparian States could not, as one area, be accorded any special status in the law of the sea;

thus the waters inside such a bay were left as being territorial sea and the high seas. In addition, while claims to the territoriality of a bay the mouth of which spanned more than a certain fixed limit (10 miles) had been made for historical reasons, it was certain that no such claim was ever made in respect of any bay the coast of which was divided among two or more States. The codification process of the Law of the Sea showed that there did not exist any such legal concept as a “pluri-state bay” the waters of which were internal waters.

96. He thus came to the conclusion that the Gulf was defined as an “historic bay”, by the Parties to the proceedings and by the Chamber, solely on the basis of the 1917 Judgment of the Central American Court of Justice. It was never proved that any established rules governing “historic bays” bordered by the land of two or more States, or even a concept of an “historic bay” covering such a case existed. The Central American Court of Justice in 1917 simply drew its conclusions on the basis of the replies given by each judge of that Court in response to some questionnaires prepared in advance. No ground, except for those answers of the judges, was to be found in the 1917 Judgment, which could justify the contention that the Gulf was an “historic bay”.

97. The decision of the Chamber that the Gulf was an historic bay the waters of which were held in condominium by the littoral States excluding a belt of 3 miles under the exclusive jurisdiction of the coastal State, based on the decision of the 1917 Judgment, was therefore the part of the whole Judgment which Judge Oda found most difficult to understand.

98. In his opinion the waters of the Gulf consisted of the territorial seas of the three riparian States, without leaving any maritime space beyond the 12-mile distance from any part of the coasts. This conclusion on the legal status of the waters of the Gulf was reached on the basis of past claims of the riparian States to a territorial sea of 1 league plus an area where they exercised certain police powers.

99. Although the Chamber was in no position to make any delimitation of the territorial sea of the three States in the Gulf, article 15 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) established that the equidistance method was the rule in delimitation of the territorial sea of neighbouring States either opposite or adjacent to each other, and the shape of the coast as a baseline was of importance for measuring the territorial sea. He did not see any historic title or other special circumstances being advanced by either Party, which would have justified any departure from the application of the general rule of the equidistance line.

100. In the case of Honduras, whose territorial title to waters in the Gulf is locked within the Gulf itself, the right of innocent passage through the traditional 3-mile territorial sea would certainly be guaranteed in the now expanded 12-mile territorial sea of the other two riparian States. He added that given the large measure of mutual understanding displayed by the three riparian States in respect of the common interest derived from their geographical location bordering on the Gulf, it was possible to envisage that they would accept their obligation to cooperate under Part IX of UNCLOS.

101. Outside the Gulf, in light of the above reasoning, Judge Oda was unable to associate himself with the Judgment’s finding to the effect that, since a condominium of three States extended up to the closing line of the Gulf, Honduras, as one of the three, was entitled to claim an exclusive economic zone and continental shelf outside the Gulf. The fact that Honduras could not lay a claim in the offshore areas of the Pacific coast outside the Gulf was a geographical reality of nature, which the Chamber could not “refashion”.

**II. STRAITS USED FOR INTERNATIONAL NAVIGATION****A. [deleted for technical reasons]**

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|--------------------------|--|
| <b>Parties:</b>          |  |
| <b>Issues:</b>           |  |
| <b>Forum:</b>            |  |
| <b>Date of Decision:</b> |  |
| <b>Published in:</b>     |  |

**1. Facts**

102. [deleted]

103. [deleted]

104. [deleted]

105. [deleted]

**2. Issues****(a) Questions before the Court**

(i) [deleted]

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<sup>2</sup> [deleted]

<sup>3</sup> [deleted]

(ii) [deleted]

**(b) Arguments presented by the Parties**

(i) [deleted]

(ii) [deleted]

**3. Reasoning of the Court**

106. [deleted]

107. [deleted]

108. [deleted]

109. [deleted]

**4. Decision**

110. [deleted]

**5. Dissenting Opinions**

111. [deleted]

112. [deleted]

113. [deleted]

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<sup>4</sup> [deleted]

## B. Corfu Channel Case

|                               |   |
|-------------------------------|---|
| <b>Parties:</b>               | Albania and the United Kingdom  |
| <b>Issues:</b>                | Sovereignty in territorial sea; innocent passage of warships  |
| <b>Forum:</b>                 | International Court of Justice (ICJ)  |
| <b>Date of Decision:</b>      | 25 March 1948 (Preliminary Objection)<br>9 April 1949 (Merits)<br>15 December 1949 (Amount of Compensation Assessment)  |
| <b>Published in:</b>          | <ul style="list-style-type: none"> <li>- <u>ICJ: Reports of Judgments, Advisory Opinions and Orders</u>, 1949, pp. 4-131</li> <li>- <u>International Law Reports</u>, Vol. 15, p. 349 and Vol. 16, p. 155</li> </ul>  |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Schultze, T., "Free Passage of Warships through the Strait of Hormuz: Is the Logic of the Corfu Channel Case Applicable?", 18 <u>Thesaurus Acroasium</u> (1991), pp. 603-612</li> <li>- Gardiner, L., <u>The Eagle Spreads his Claws: A History of the Corfu Channel Dispute and of Albania's Relations with the West, 1945-1965</u>, Edinburgh, London, Blackwood, 1966</li> <li>- Wright, Q., "The Corfu Channel Case", 43 <u>American Journal of International Law</u> (1949), pp. 491-494</li> <li>- Jones, J.M., "The Corfu Channel Case: Preliminary Objection", 24 <u>British Year Book of International Law</u>, (1947), pp. 409-412</li> <li>- Jones, J.M., "The Corfu Channel Case: Merits", 26 <u>British Year Book of International Law</u> (1949), pp. 447-453</li> <li>- Chung, I.Y., <u>Legal Problems in the Corfu Channel Incident</u>, Geneva, Librarie E. Droz, 1959</li> </ul> |

### 1. Facts

114. On 15 May 1946, an Albanian battery fired in the direction of two British cruisers that were navigating through the Corfu Channel. Although the warships did not suffer any damage, the British Government protested, stating that innocent passage through straits, without the need to make any announcement or to await permission, is a right recognized by international law. The Albanian Government replied that foreign warships and merchant vessels had no right to pass through Albanian territorial waters without prior authorization. The British Government then advised the Albanian Government that if, in the future, fire was opened on a British warship passing through the Channel, the fire would be returned.

115. Then, on 22 October 1946, four British warships entered the North Corfu Strait. Two British destroyers struck mines and were heavily damaged, causing deaths and injuries among the naval personnel. Consequently, British minesweepers swept the North Corfu Channel, after having announced the operation in advance. The Albanian Government, however, denied its consent.

116. By a resolution of 9 April 1947, the Security Council of the United Nations recommended that the two Governments submit their dispute to the International Court of Justice. The United Kingdom unilaterally instituted proceedings against Albania by filing an application with the International Court of Justice. By a letter dated 2 July 1947, Albania protested against the unilateral British application, expressing the opinion that the application was not in conformity with the Court's Statute and that the Parties should have come to an understanding regarding the submission of their dispute to the Court. Notwithstanding the application to the Court by the British Government, Albania declared that it was prepared to appear before the Court on the understanding that its acceptance of the Court's jurisdiction could not constitute a precedent for the future. On 25 March 1948, Albania and the United Kingdom concluded a Special Agreement for the purpose of submitting two questions to the International Court of Justice. (See first two questions below.)

## 2. Issues

### (a) Questions before the Court

- (i) Whether Albania was responsible under international law for the explosions that occurred on 22 October 1946 in Albanian waters, for the resulting damage and loss of human life and for payment of any compensation;
- (ii) Whether the United Kingdom had violated the sovereignty of Albania under international law by reason of the acts of the Royal Navy in Albanian waters on 22 October and 12 and 13 November 1946 and if there was any duty to give satisfaction;
- (iii) Whether the minesweeping operation by the British Government in Albanian waters had violated the sovereignty of Albania; and
- (iv) If the Court found that it had jurisdiction to do so, to assess the amount of compensation.

### (b) Arguments presented by the Parties

- (i) **Albania** asserted that foreign warships and merchant vessels had no right to pass through Albanian territorial waters, without prior notification to, and the permission of, the Albanian authorities. It further contended that the sovereignty of Albania was violated because the passage of the British warships on 22 October 1946 was not innocent. The Albanian Government also alleged that the said passage was a political mission and the methods employed - the number of ships, their formation, armament, manoeuvres, etc.- showed an intention to intimidate and not merely to carry out a passage for purposes of navigation.

- (ii) The **United Kingdom** claimed that innocent passage through straits was a right recognized under international law. It further argued that the minesweeping operation of 13 November 1946 was justified by a right of self-help or self-protection.

### 3. Reasoning of the Court

117. In its Judgement of 25 March 1948, the Court considered that the Albanian letter of 2 July 1947 constituted a voluntary and indisputable acceptance of the Court's jurisdiction and declared that unilateral applications to the Court were possible, even though no compulsory jurisdiction existed.

118. In its Judgment of 9 April 1949, the Court considered Albania's attitude before and after the event of 22 October 1946 and the feasibility of observing the laying of mines from the Albanian coast. The Court found that the factual evidence presented made it improbable that the Albanian authorities had been unaware of the mine laying in Albanian waters. The Court further stated that the presumed knowledge of the Albanian Government entailed its obligation to notify "for the benefit of shipping in general, the existence of a minefield in Albania territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them". Such obligations, stated the Court, "were based on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".

119. The Court held that the United Kingdom had not violated Albanian sovereignty by sending warships through the strait without the prior authorization of the Albanian Government. In this connection, the Court made an important pronouncement on the question of innocent passage through straits, stating that it is "generally recognized, and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent". The Court held that the Corfu Channel was such a strait and that the passage of the British warship on 22 October 1946 was innocent. As for the contentions of the Albanian Government with respect to measures taken by the United Kingdom during the passage, the Court, taking into account the evidence presented, was unable to characterize those measures as a violation of Albania's sovereignty.

120. As regards the minesweeping operation, the Court could not accept the United Kingdom's line of defence. The "right of intervention" mentioned by the United Kingdom is regarded by the Court as a manifestation of a policy of force and therefore inadmissible because it would be reserved for the most powerful States. The Court was also unable to accept the notion of "self-help" since the respect for territorial sovereignty between independent States is an essential foundation of international relations. Consequently, the Court declared that the action of the Royal Navy constituted a violation of Albanian sovereignty.

121. The Court concluded that it had jurisdiction to assess the amount of compensation. The conclusion of the Special Agreement by the Parties had the main objective of establishing complete equality between them by replacing the original procedure based on a unilateral application with a procedure based on a Special Agreement. There was no suggestion that this change of procedure was intended to involve any change with regard to the merits of the British

claim, as originally presented, including the claim for a fixed sum of compensation. Although the Albanian Government disputed the jurisdiction of the Court to assess the amount of compensation, the Court decided in favour of the British claim and considered it well founded in fact and law.

#### 4. Decision

122. In the Judgment of 25 March 1948 (preliminary objection):

- By fifteen votes to one, the Court rejected the preliminary objection submitted by the Albanian Government.

#### Separate Opinion, Dissenting Opinion (Preliminary objection)

##### (a) Separate Opinion

123. **Judges Basdevant, Alvarez, Winiarski, Zoricic, De Visscher, Badawi Pasha and Krylov** concurred with the Judgment of the Court. However, they were not convinced by the arguments adduced by the United Kingdom that the case was a new one where the compulsory jurisdiction of the Court existed. Instead, the Judges were of the view that the case came under the ambit of the recommendation made by the United Nations Security Council for the Parties to come to an understanding in order to submit their dispute to the Court.

##### (b) Dissenting Opinion

124. **Judge ad hoc Daxner** denied that article 25 of the Charter accorded to a recommendation under article 36 (3) of the Charter any obligatory character. He also denied that proceedings could be instituted by application. The mere acceptance of the United Nations Security Council's recommendation by the two Parties did not have the effect of bringing the case before the Court. Having analysed the Albanian letter of 2 July 1947 and having underscored the position of Albania as a State not party to the Statute of the Court, he concluded that the letter was merely a "recognition of the jurisdiction of the Court for the purpose of enabling Albania to appear before it". Albania therefore had a "right to ignore the application" made unilaterally by the United Kingdom. Judge Daxner concluded that the United Kingdom's application was irregular *ab initio*, that Albania had done nothing to make it valid and that the preliminary objection should have been upheld.

#### 5. Decision

125. In the Judgment of 9 April 1949 (Merits: Albania's responsibility for the explosion of 22 October 1946):

- By eleven votes to 5, the Court held that Albania was responsible under international law for the explosions and for the damage and loss of human life that resulted therefrom.
- By ten votes to six reserved for further consideration the assessment of the amount of compensation.

- By fourteen votes to two, the Court held that the United Kingdom had not violated Albania's sovereignty by sending the warships through the strait without the prior authorization of the Albanian Government.
- Unanimously, with the concurring vote of the British Judge, McNair, the Court decided that the minesweeping operation had violated the sovereignty of Albania.

### **Separate Opinion, Dissenting Opinions (Merits)**

#### **(a) Separate Opinion**

126. **Judge Alvarez** appended to the Judgment a statement of his individual opinion in support of the judgment.

#### **(b) Dissenting Opinions**

127. **Judge Winiarski** dissented from the first part of the judgment. He did not agree with the legal reasoning given to explain Albania's responsibility. He agreed with the Court on the rejection of the first argument put forward by the United Kingdom, i.e., that Albania had direct knowledge of the existence of the minefield. In order to admit such an argument it had to be established that Albania had knowledge of the mine laying. He also agreed with the Court's reasoning for rejecting the second argument advanced by the United Kingdom, i.e., that Albania laid the minefield, and for considering that the indirect evidence produced by the United Kingdom was not decisive proof either of the fact that mines were laid by Yugoslav vessels in Saranda Bay or of collusion between the two Governments. In its third argument, the United Kingdom asserted that the mine laying operation could not have been effected without the Albanian Government's knowledge. Judge Winiarski did not consider the Court's conclusion imputing knowledge to Albania to be sound, because such an exceptionally grave charge against a State would have required a degree of certainty that had not been reached in the case. He also stated that the Special Agreement did not contain a request to the Court to assess the amount of compensation and therefore he could not agree with the Court's decision on the matter.

128. **Judge Badawi Pasha** agreed with the Court in rejecting the British argument asserting that Albania either laid the mines itself or was conniving with those who laid them. Although there may have been a strong suspicion of connivance, it was not judicially proven. On the other hand, Judge Badawi Pasha held that he could not support the Court's acceptance of the British argument that the mine laying, which caused the explosion of 22 October 1946, could not have been unknown to the Albanian Government. Although there was a strong suspicion of knowledge, just as of connivance, it was not sufficiently proved. Also, he did not agree with the Court's decision to assess the amount of compensation since he considered the terms of the Special Agreement to exclude such jurisdiction.

129. **Judge Krylov** agreed with the Court in rejecting the British argument that the laying of mines in the North Corfu Channel was effected with the connivance of Albania. In support of this decision he stated that only circumstantial evidence existed against Albania. In his view, although circumstantial evidence could be considered adequate in the municipal law of several States, it is unlikely, basing oneself solely on such proof, to conclude the responsibility of a State towards another State.

130. As regards Albania's prior knowledge of mine-laying, Judge Krylov asserted that it had

not been proven. The arguments presented in support of such theory could not be accepted because there was insufficient evidence to prove prior knowledge. He also stated that the responsibility of a State for an international delinquency presupposes, at the very least, “culpa” on the part of the State. However, one cannot attach liability to a State, thus incurring international responsibility, simply on the basis that the act of which the State is accused took place in its territory.

131. Moreover, Judge Krylov could not align himself with the opinion of the majority to the effect that the Court had jurisdiction to determine the amount of compensation to be paid by Albania. In his view, according to the text of the Special Agreement and the circumstances under which it was concluded, the Court did not have jurisdiction to fix the amount of compensation.

132. **Judge Azevedo** considered that the notion of “culpa” was always changing and undergoing a slow process of evolution and that it was moving away from the classical elements of imprudence and negligence to a system of objective responsibility. This, in his view, had led certain authors to deny that “culpa” was definitely separate, in regard to a theory based solely on risk. Judge Azevedo also held that when a Special Agreement did not require a determination of a pecuniary sanction, such a sanction could not be granted even symbolically.

133. **Judge ad hoc Ecer** was unable to accept the conclusion of the judgment that the laying of the minefield could not have escaped the knowledge of the Albanian Government. He held that the Albanian Government's knowledge of the mine laying had not been judicially established. The conclusion that Albania was cognizant of the minefield was in reality a presumption of fact, which was not sufficient to annul the legal presumption of international law according to which States act in conformity with it.

## 6. Decision

134. In the Judgment of 15 December 1949 (Assessment of the amount of compensation):

- By ten votes to six, the Court held that the British-Albanian compromise granted it the competence to assess the amount of compensation.<sup>5</sup>

### Dissenting Opinion (Assessment of the amount of compensation)

135. **Judge ad hoc Ecer** considered that the Court had no competence to assess the amount of compensation. In his view, the Parties had submitted to the Court a request for a declaratory judgment and did not ask the Court to condemn a Party to pay compensation.

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<sup>5</sup> The judgment on the amount of compensation was held on 15 December 1949 and was based on the claim by the United Kingdom and the report of experts. Albania was ordered to pay a total compensation of 843,947 pounds sterling.

### III. MARITIME DELIMITATION

#### A. Maritime Boundary Delimitation Arbitration (Grisbadana)

|                               |  |
|-------------------------------|--|
| <b>Parties:</b>               | Norway and Sweden  |
| <b>Issues:</b>                | Delimitation of maritime boundaries  |
| <b>Forum:</b>                 | Arbitral Tribunal composed of three members pursuant to the Agreement of 14 March 1908   |
| <b>Date of Decision:</b>      | Arbitral Award of 23 October 1909  |
| <b>Published in:</b>          | <ul style="list-style-type: none"> <li>- 4 <u>American Journal of International Law</u>, (1910), p. 226-236</li> <li>- <u>Reports of International Arbitral Awards</u>, Vol. XI, pp. 147-166</li> <li>- De Martens, G.F.R., III Tome <u>Nouveau Recueil Général de Traités</u>, 3è série, p. 85</li> </ul>                             |
| <b>Selected commentaries:</b> | <p>Rhee, S.M. “Sea Boundary Delimitation between States before World War II”, 76 <u>American Journal of International Law</u> (1982), pp. 555-588</p> <p>François, J.P.A., “La Cour permanente d’Arbitrage, son origine, sa jurisprudence, son avenir”, Académie de Droit International, <u>Recueil des Cours</u>, I, 1955, p. 498</p> |

#### 1. Facts

136. The Treaty of 26 October 1661 established the maritime boundary between Sweden and Norway (at the time, part of Denmark). By the early 19th century, Denmark had ceded Norway to Sweden. In 1905 Norway and Sweden separated to become two independent States. As a result of the separation, the boundary delimitation of the territorial sea took on added significance for the two States. The maritime boundary delimitation was settled between Norway and Sweden on 18 August 1897 and approved by a royal resolution of 15 March 1904. However, the issue of the overlapping interests between the Parties in the banks of Grisbadarna remained unresolved.

137. In accordance with an Agreement of 14 March 1908, Norway and Sweden submitted their maritime boundary dispute concerning the banks of Grisbadarna to a tribunal of the newly created Permanent Court of Arbitration in The Hague.

138. The Arbitral Tribunal was composed of three members: Beichmann (Norway), Hammarskjöld (Sweden) and Leoff (the Netherlands), the presiding judge, and was assisted by the Secretariat of the Permanent Court of Arbitration pursuant to article 45, paragraph 1, of The Hague Convention for the Pacific Settlement of International Disputes of 19 July 1899.

## 2. Issues

**(a) Questions before the Arbitral Tribunal**

- (i) Whether the boundary line was to be considered, either wholly or in part, as being fixed by the Boundary Treaty of 1661; and
- (ii) If the boundary line was not considered as fixed by the said Treaty, the Tribunal was requested to fix the boundary line, taking into account the circumstances of fact and the principles of international law.

**(b) Arguments presented by the Parties**

Both Parties submitted detailed arguments on how the boundary should be traced:

- (i) **Norway** contended that:
  - Based on the Peace Treaty of Roskilde of 1658 the maritime territory in question was divided automatically between Norway and Sweden (not disputed by Sweden); and
  - The rule followed for the boundary line set by the Treaty of 1661 was that the boundary line ought to follow the median line between the islands, islets and reefs and, therefore, that same principle should be applied to the settlement of their dispute regarding the banks of Grisbadarna.
- (ii) **Sweden** contended that the boundary line should run westward following the median line between inhabited islands, which would give Sweden all of Grisbadarna as well as most of the neighbouring bank of Skjöttegrundet.

## 3. Reasoning of the Arbitral Tribunal

139. The Tribunal noted that the Parties had 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 since, in their opinion, that rule had been applied by the Treaty of 1661. Without regard to whether the rule invoked was actually applied by the said Treaty, the Tribunal relied on the principle of law applicable at the time when the original boundary Treaty of 1661 was concluded, taking into account the contemporaneous circumstances (e.g., a reef, which was constantly submerged at the time, could not serve as the present border line).

140. The Tribunal fully agreed with Norway's contention that, on the basis of the Peace of Roskilde of 1658, the maritime territory in question was divided automatically between Norway and Sweden. The Tribunal, taking into account the fundamental principles of the law of nations, regarded the maritime area as an appurtenance of land territory and considered that in 1658, when the land territory called the Bohuslan was ceded to Sweden, the radius of maritime territory constituting an inseparable whole must have automatically formed a part of the cession. Accordingly, the Tribunal noted that in order to ascertain which may have been the automatic dividing line of 1658, it must have had recourse to the principles of law in force at that time.

141. The Tribunal also noted that the rule of drawing a median line midway between the inhabited lands did not find sufficient support in the law of nations in force in the 1700s and was doubtful whether the Treaty of 1661 had foreseen its application. In the same manner, the Tribunal considered inappropriate the rule of the *thalweg* or "the most important channel" inasmuch as the documents invoked for the purpose did not demonstrate that the rule had been followed in the present case.

142. Moreover, the Tribunal considered that if the delimitation should follow the ideas of the seventeenth century and the notions of law prevailing at the time, then, if the automatic division of the territory in question took place according to the general direction of the land territory of which the maritime territory constituted an appurtenance, the Tribunal should apply the same rule at the present time in order to arrive at a just and lawful determination of the boundary.

143. The Tribunal pointed out several circumstances that supported the demarcation assigning the Grisbadarna to Sweden, namely:

(a) That lobster fishing in the shoals of Grisbadarna had been carried out for a much longer time and to a much larger extent by a much larger number of fishermen subjects of Sweden than fishermen subjects of Norway; and

(b) That Sweden had performed various acts in the Grisbadarna region, owing to her conviction that these regions were Swedish, such as the placing of beacons, the measurement of the sea and the installation of a light boat, being acts involving expenses, which in so doing, she not only thought she was exercising her right but, moreover, that she was performing her duty.

144. Therefore, the Tribunal found that Norway, according to her own admission, showed much less attentiveness in the above matters.

#### **4. Arbitral Award**

145. The arbitral award was rendered on 23 October 1909. The Tribunal fixed the boundary line in the disputed area by tracing a line perpendicular to the general direction of the coast, thereby assigning the Grisbadarna banks to Sweden. It considered that this settlement was in accordance with the principle of international law that a state of things, which exists and has existed for a long time, should be changed as little as possible and that this rule was especially applicable "in a case of private interests, which, if once neglected, cannot be effectively safeguarded by any manner of sacrifice on the part of the Government of which the interested Parties are subjects".

146. Accordingly, the Tribunal decided and pronounced that the maritime boundary between Norway and Sweden was to be 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 Röskären 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 Dranmen to the Hejeknub 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".

## B. North Sea Continental Shelf Cases

|                               |  |
|-------------------------------|--|
| <b>Parties:</b>               | Denmark, Federal Republic of Germany and the Netherlands   |
| <b>Issues:</b>                | Delimitation; continental shelf; adjacent States; equidistance method  |
| <b>Forum:</b>                 | International Court of Justice (ICJ)   |
| <b>Date of Decision:</b>      | Judgment of 20 February 1969   |
| <b>Published in:</b>          | <ul style="list-style-type: none"> <li>- <u>ICJ: Reports of Judgments, Advisory Opinions and Orders</u>, 1969, pp. 3-257</li> <li>- <u>International Law Reports</u>, Vol. 41, p. 29</li> </ul>  |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Guernsey, K.N., "The North Sea Continental Shelf Cases", 27 <u>Ohio Northern University Law Review</u> (2000-2001), pp. 141-160</li> <li>- Friedman, N.W., "The North Sea Continental Shelf Cases: A Critique", 64 <u>American Journal of International Law</u> (1970), pp. 229-240</li> <li>- Grisel, E., "The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases", 64 <u>American Journal of International Law</u> (1970), pp. 562-593</li> <li>- Blecher, M.D., "Equitable Delimitation of Continental Shelf", 73 <u>American Journal of International Law</u> (1979), pp. 60-88</li> <li>- Jennings, R.Y., "The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment", 18 <u>International and Comparative Law Quarterly</u> (1969), pp. 819-832</li> <li>- Jewett, M.L., "The Evolution of the Legal Regime of the Continental Shelf," 22 <u>Canadian Yearbook of International Law</u> (1984), pp. 153-193</li> <li>- Hutchinson, D.N., "The Concept of Natural Prolongation in the Jurisprudence Concerning Delimitation of Continental Shelf Areas", 55 <u>British Year Book of International Law</u> (1984), pp. 133-187</li> <li>- Monconduit, F., "Affaire du plateau continental de la Mer du Nord", <u>Annuaire Français de Droit International</u>, (1969), pp. 213-244</li> <li>- Lang, J., "Le plateau continental de la mer du Nord: arrêt de la Cour Internationale de Justice", 20 février 1969, <u>Librairie</u></li> </ul> |

### 1. Facts

147. On 1 December 1964, the Federal Republic of Germany and the Netherlands concluded an agreement for the partial delimitation of the boundary near the coast. On 9 June 1965, the Federal Republic of Germany and Denmark concluded a similar agreement.

148. The three States failed to reach an agreement on the boundaries beyond the limits of the partial delimitations. Denmark and the Netherlands both contended that the boundaries should be determined in accordance with the principle of equidistance. The delimitation of the boundaries near the coast had been made on the basis of this principle, but the Federal Republic of Germany considered that the prolongation of these boundaries would result in an inequitable delimitation for the Federal Republic of Germany.

149. On 31 March 1966, Denmark and the Netherlands concluded an agreement on the delimitation of the boundary between the other parts of what they regarded as their respective continental shelves on the basis of "the principle of equidistance". This delimitation assumed that the areas claimed by the Netherlands and Denmark were conterminous and, in particular, that the agreed boundaries between the Federal Republic of Germany and Denmark, and the Federal Republic of Germany and the Netherlands were necessarily delimited on the basis of the principle of equidistance.

150. On 2 February 1967, the Federal Republic of Germany and Denmark, and the Federal Republic of Germany and the Netherlands signed two special agreements for the submission of the disputes between them concerning the delimitation of their continental shelf boundaries in the North Sea to the International Court of Justice. The Special Agreements further stated that the respective Governments "should delimit the continental shelf in the North Sea between their countries by agreement in pursuance of the decision requested from the International Court of Justice".

## 2. Issues

### **(a) Question before the Court**

What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea, which appertain to each of them beyond the partial boundary as determined by the Agreements of 1964 and 1965?

### **(b) Arguments presented by the Parties**

#### **(i) Federal Republic of Germany**

- Delimitation of the continental shelf between the Parties in the North Sea was governed by the principle that each coastal State was entitled to a just and equitable share, taking into account the particular geographical situation in the North Sea; and
- The equidistance method of determining boundaries was not a rule of customary international law. In addition, the rule contained in the second sentence of article 6 (2) of the Continental Shelf Convention had not become customary international law. Even if that rule had been applicable between the Parties, special circumstances within the meaning of that rule would exclude the application of the equidistance method in this case. Moreover, the equidistance method could not be used for the delimitation of the continental shelf unless it was established by agreement, arbitration or otherwise, that it would achieve a just and equitable apportionment of the continental shelf among the States concerned. Denmark and the Netherlands could not rely on the application of the equidistance method for the delimitation of the continental shelf between the Parties in the North Sea, since it would not lead to an equitable apportionment.

**(ii) Denmark and Netherlands**

- Delimitation as between the Parties was governed by the principles and rules of international law expressed in article 6 (2)<sup>6</sup> of the Geneva Convention on the Continental Shelf, 1958. Denmark and the Netherlands argued that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice. The Parties being in disagreement, unless another boundary was justified by special circumstances, the boundary between them was to be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured;
- If special circumstances to justify another boundary line were not established, the boundary between the Parties should be determined by the application of the principle of equidistance; and
- If the rules and principles of international law expressed in article 6 (2) of the Geneva Convention were not applicable as between the Parties, the boundary was to be determined on the basis of the exclusive rights of each party over the continental shelf adjacent to its coast and of the principle that the boundary should leave to each Party every point of the continental shelf which lay nearer to its coast than to the coast of the other Party.

**3. Reasoning of the Court**

151. The Court first stated that article 6 "provides for delimitation between 'adjacent' States, which Denmark and the Netherlands clearly are not, or between 'opposite' States which the Court thinks they equally are not".

152. The Court also stated that article 6 of the Geneva Convention was not binding for all the Parties to the case, the Federal Republic of Germany not having ratified it and therefore not being a party.

<sup>6</sup> Article 6 of the Geneva Convention of 1958 on the Continental Shelf reads as follows:

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

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land."

153. The Court then considered the question of the opposability of the equidistance principle, embodied in article 6, to the Federal Republic of Germany as a rule of customary international law. Denmark and the Netherlands contended that the "equidistance special circumstances" principle was part of customary law. They considered that prior to the Conference continental shelf law was only in the formative stage and State practice lacked uniformity. Yet the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reactions of governments to that work and the proceedings of the Geneva Conference, and finally through the adoption of the Continental Shelf Convention by the Conference. The Court proceeded to consider the following:

(a) First of all, it noted that the principle of equidistance, as it now figures in article 6 of the Convention, was proposed by the International Law Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda* and not at all *de lege lata* or as an emerging rule of customary international law;

(b) Secondly, article 6 of the Convention is one of those in respect of which, under article 12 of the Convention, reservations may be made by any State which is, generally speaking, a characteristic of purely conventional law; whereas, this cannot be the case of general or customary law rules, which by their very nature, must have equal force for all members of the international community. The normal inference would therefore be that any articles that do not figure among those excluded from the ambit of a reservation under Article 12 were not regarded as declaratory of previously existing or emergent rules of law;

(c) The Court considered that the particular form in which article 6 is embodied in the Convention, and having regard to the relationship of that article to other provisions of the Convention, the equidistance principle was not of a fundamentally norm-creating character. In the first place, article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Also, the part played by the notion of special circumstances relative to the principle of equidistance as embodied in article 6 and the controversies as to the meaning and scope of this notion, raises further doubts as to the potentially norm-creating character of the rule; and

(d) Finally, the Court considered that the rest of the elements regarded as necessary before a conventional rule can be considered to have become a general rule of international law: the widespread and representative participation in the Convention, provided it included that of States whose interests were especially affected, was hardly sufficient in this case. State practice in the matter of continental shelf delimitation was not of the kind to satisfy this requirement. As for the *opino juris sive necessitatis* element, the Court found that the States - not a great number - which had drawn boundaries according to the principle of equidistance, had not felt legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so.

#### **4. Decision**

154. The Judgment was rendered on 20 February 1969. By eleven votes to six, the Court held that, in each case,

(a) The use of the equidistance method of delimitation was not obligatory as between the Parties;

(b) There was no other single method of delimitation, the use of which was in all circumstances obligatory;

(c) The principles and rules of international law applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundaries determined by the Agreements of 1964 and 1965 respectively are:

- Delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other; and
- If, in the application of this method, the delimitation left to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a régime of joint jurisdiction, user, or exploitation for the zones of overlap or any or part of them;

(d) In the course of the negotiations, the factors to be taken into account are to include:

- (i) The general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
- (ii) So far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;
- (iii) The element a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal States and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.

## 5. Declarations, Separate Opinions, Dissenting Opinions

### (a) Declarations

155. **Judge Sir Zafrulla Khan.** Though in agreement with the judgment, Judge Sir Zafrulla Khan added a few observations:

(a) The essence of the dispute laid in the claim by which the Netherlands and Denmark stated that the delimitation effected between them under the 1966 Agreement was binding upon the Federal Republic of Germany, which the latter resisted;

(b) Article 6 of the Geneva Convention was not opposable to the Federal Republic and the delimitation effected under the 1966 Agreement did not derive from the provisions of that article; and

(c) Even if paragraph 2, Article 6, had been applicable to the dispute, the configuration of the coastline of the Federal Republic should have been considered as a “special circumstance”.

156. Judge Zafrulla Khan concluded that the principle of equidistance was not inherent in the concept of the continental shelf.

157. **Judge Bengzon** made a declaration stating that Article 6 was the applicable international law and that, as between the Parties, equidistance was the rule for delimitation.

### (b) Separate Opinions

158. **President Bustamante y Rivero** shared the view of the Court, with the exception of paragraph 59 of the judgment, on the content of which he expressed reservations.

159. The Judge's separate opinion was based on the statement that the notion of the continental shelf, although new, had a very widespread application. But, even though certain basic concepts were already sufficiently deeply anchored to justify incorporation into general international law, Judge Bustamante y Rivero considered that other principles could be deduced from the accepted concept of the continental shelf. The concept of "natural prolongation" of the land territory of the coastal State implied a relationship of proportionality between the length of the coastline of the land territory and the extent of the continental shelf appertaining to such land territory. This principle raised the question of the method for measuring the length of the coastline, which, according to the Judge, could not be measured from the low-water line. The geographical configuration of the North Sea is also the basis for a number of principles that bear an influence upon the legal régime of the continental shelf, including:

(a) The principle of convergence, that introduces a new factor, i.e., the progressive narrowing of the shelf as it approaches the central apex;

(b) The principle of what is reasonable applies in all cases, for the recognition as legally proper of variants of the principles and rules, which are the basis of the legal régime of the continental shelf; and

(c) The principle of equity, by which the delimitation of the apex of the shelf of the Federal Republic of Germany should be effected.

160. **Judge Jessup** concurred in the Court's judgment, but wished to emphasize the reasons underlying the Parties' concern for the delimitation of their continental shelves, i.e., the known or probable existence of deposits of oil and gas in the seabed of the North Sea. For this purpose, Judge Jessup quoted a few passages showing the ambivalence characterising the pleadings of the Parties in regard to the relevance of the mineral resources of the continental shelf. Although the problem of the exploitation of oil and gas resources was in front of their minds, the Parties preferred to argue on other legal principles. Furthermore, Judge Jessup pointed out that contrary to the pleadings, the negotiations between the Parties were specifically related to such resources. According to him, an agreed delimitation of the continental shelf in conformity with the Court's judgment would not seem to impinge upon most of the areas, which had already proved productive. However, there might be areas in which two States may have equally justifiable claims, areas in which claims overlap. In such situations, the Court indicated that the solution might be found in an agreed division of the overlapping areas or in an agreement for joint exploitation.

161. The conclusion drawn by Judge Jessup was that, even if his analysis would not be considered to reveal an emerging rule of international law, it might be regarded as an elaboration of the factors to be taken into account in the negotiation that had to be undertaken by the Parties.

162. **Judge Padilla Nervo**'s separate opinion emphasized his individual point of view regarding the main issues before the Court. He analysed the conflicting contentions of the Parties and the reasoning, which led him to agree with the Court. He concluded that in this specific case, the equidistance rule was not applicable; that there was no general customary law binding the Federal Republic of Germany to abide by the delimitation of its continental shelf as a result of

the lines drawn as a consequence of the *ad hoc* agreements made between the Netherlands and Denmark; that the Parties should search for and employ another method in conformity with equity and justice; and that the Parties should undertake new negotiations to delimit the continental shelf in the North Sea with the aim of reaching an agreement, in pursuance of the decision given by the Court.

163. For Judge Padilla Nervo the only principle of general international law implicit in Article 6 was the obligation to negotiate (the delimitation between the continental shelves of adjacent States "shall be determined by agreement between them").

164. Following his analysis of the dispute, **Judge Fouad Ammoun** agreed with the decision that the equidistance method provided in paragraph 2, Article 6, of the Geneva Convention was not opposable as a rule of treaty law to the Federal Republic of Germany and that the rule had not up to that time become a rule of customary law. However, on one point, he felt he should depart from the Court's view. According to him, recourse might be had to the equidistance method, qualified by special circumstances, as a legal rule applicable to the case and derived from a general principle of law, *equity praeter legem*: the principle of equity that should be applied was not the abstract equity contemplated by the judgment, but that which filled a lacuna, like the principle of equity *praeter legem*, which is a subsidiary source of law.

### (c) Dissenting Opinions

165. **Vice-President Koretsky** considered that the Judgment disjoined the equidistance principle from the two other components of the triad: agreement - special circumstances - equidistance. These three interconnected elements, in his view, had entered the province of the general principles of international law, and therefore article 6 (2) of the Convention on the Continental Shelf ought to be applied in these cases. Even if one did not agree entirely that this provision was applicable, it was nevertheless necessary that the rules and principles applied in the delimitation of a lateral boundary of the continental shelf should have a natural connection with the three interconnected principles (agreement, special circumstances and equidistance), which determined the boundaries of the territorial sea. As the continental shelf is a continuation or natural prolongation of the territorial sea, its limits should be drawn consistently with the principles, rules and treaty provisions that provided the basis for delimitation of the territorial sea between two adjacent States.

166. He regretted that the Judgment did not fully deal with the question as to whether "special circumstances" could in fact be established with regard to the maritime boundaries between the Federal Republic of Germany and the Netherlands, and between the Federal Republic of Germany and Denmark, respectively.

167. He could not agree with the "rule of equity" as a ground for the Court's decision, and considered that to introduce such a vague notion into the jurisprudence of the International Court would open the door to subjective and arbitrary evaluations. He pointed to the power of the Court to decide on the basis of *ex aequo et bono*, if the Parties agree thereto, and to the fact that there never had been a case in which the Parties had agreed to this procedure, reflecting that States were somewhat averse to resort to it. In any case, it was not on this basis that the Court was asked to give a decision in the present case, but nevertheless, in his view, it may be thought to have tended somewhat in that direction.

168. He disagreed with the Court's indication of "factors to be taken into account" by the Parties in their negotiations. In his view, the Court had put forward considerations that were rather economic and political in nature and had given some kind of advice or even instructions, but it had not given what he personally conceived to be a judicial decision.

169. **Judge Tanaka** considered that certain circumstances, operating as a whole, contributed to the binding power of the equidistance principle provided in article 6, paragraph 2, vis-à-vis the Federal Republic of Germany, should it be bound by a ground other than contractual obligation, namely by the customary law character of the Convention. Among those circumstances, he cited Germany's positive participation in the work of the Convention and its signature, the Government Proclamation of 20 January 1964, the exposé des motifs to the Bill for the Provisional Determination of Rights over the Continental Shelf of 15 May 1964, and the conclusion of the two "partial boundary" treaties between the Federal Republic and the Netherlands of 1 December 1964 and between the Federal Republic of Germany and Denmark of 9 June 1965.

170. He stated that "it is not certain that before 1958, the equidistance principle existed as a rule of customary international law, and was as such incorporated in article 6 (2) ... , but it is certain that equidistance in its median line form has long been known in international law ... that therefore it is not the simple invention of the experts of the International Law Commission and that this rule has finally acquired the status of customary international law accelerated by the legislative function of the Geneva Convention".

171. Judge Tanaka then proceeded to prove that the two creative factors of customary law existed in this case (usage plus *opinio juris*). Alternatively, he argued that in the event those factors were not proved, the equidistance principle, as incorporated in article 6 (2), flowed from the fundamental concept of the continental shelf as the logical conclusion on the matter of its delimitation. The equidistance principle was integrated in the concept of the continental shelf.

172. **Judge Morelli** considered that, in order to find the rules and principles of general international law concerning the delimitation of the continental shelf, it might be useful to take account of the Convention as a very important evidential factor with regard to general international law. The reason underlying this consideration is that the purpose of the Convention was specifically to codify general international law and because this purpose had been, within certain limits, effectively realized. Contrary to the opinion of the Court, he thought that the statement that the purpose of the Geneva Convention was, at least in principle, to codify general international law was not contradicted by the fact that the Convention recognized the possibility of reservations.

173. Judge Morelli was of the opinion that the rule concerning the apportionment of the continental shelf must be considered as an integral part of the rule, which confers upon different States the rights over the continental shelf. Consequently, he thought that a criterion for apportionment was really provided by the law, as it could be deduced from the very rule which confers on different States certain rights over the continental shelf. This criterion could only be inferred indirectly from the concept of contiguity, from which it is possible to infer that of proximity, and, finally, that of equidistance.

174. According to Judge Morelli, any consideration of equity falls outside of the rule of equidistance. The purported rule of equitable sharing out could not be accepted. If certain circumstances should give rise to a serious inequitable application of the equidistance criterion, the prejudiced State would be entitled to claim that the boundaries of its continental shelf should be modified. One of these circumstances may consist in the configuration of the coastline of one State in relation to the coastline of two other adjacent States and in the combined effect of the application of the equidistance criterion to the delimitation of the continental shelf of the first State in relation to the continental shelves of each of the two other States, which was viewed by Judge Morelli to be the situation in the present cases.

175. Judge Morelli concluded by mentioning the gravely inequitable nature of the result to which the application of the equidistance criterion would lead, consisting in the disproportion between the area of the continental shelves pertaining to each of the three States, on the one hand, and the length of their respective coastlines, on the other.

176. **Judge Lachs** also considered that the principle of equidistance was applicable and added that there were not in this case any special circumstances that would justify the application of some other principle.

177. Judge Lachs, after a detailed analysis on the creative factors of customary law, concluded that the provisions of article 6 (2), and more especially the equidistance rule, had attained the identifiable status of general law and that this could only be contested in a particular case by a State denying its opposability to itself. Consequently, by analysing the position taken by the Federal Republic of Germany (Signature of the Convention, the Government Proclamation of 20 January 1964, the exposé des motifs to the Bill for the Provisional Determination of Rights over the Continental Shelf), he concluded that this country had recognized article 6 (2) as binding and that its subsequent changes of attitude had no legal effects (this situation could not be assimilated with that of a country which "has always opposed any attempt to apply" a rule nor with that of one having "repudiated" the relevant treaty).

178. As to the concept of "special circumstances", he considered that this term should not be made subject to unique and arbitrary interpretation and that it should respond to a combination of factual elements creating a situation to ignore which would give rise to obvious hardships or difficulties. In his view, there had been no evidence produced to justify an exemption from the rule and no special hardship, or undue burdens or serious difficulties had been created for the Federal Republic of Germany.

179. **Judge ad hoc Sorensen** also concluded that the provisions of the Convention on the Continental Shelf must be considered as generally accepted rules of international law and that they were applicable to the Federal Republic of Germany, even as a non-contracting State, and that article 6 (2) had become part of generally accepted international law on an equal footing with the other provisions of the Convention. Nevertheless, he did not think that the equidistance principle was inherent in the legal concept of the continental shelf or was part of that concept by necessary implication.

180. He also found that within the meaning of article 6 (2) no special circumstances existed which justified another boundary than that resulting from the application of the principle of equidistance.

### C. Continental Shelf Arbitration

|                               |  |
|-------------------------------|--|
| <b>Parties:</b>               | France and the United Kingdom  |
| <b>Issues:</b>                | Continental shelf delimitation   |
| <b>Forum:</b>                 | Court of Arbitration composed of five arbitrators constituted in accordance with the Arbitration Agreement of 10 July 1975   |
| <b>Date of Decision:</b>      | Decision of 30 June 1977; Interpretative Decision of 14 March 1978   |
| <b>Published in:</b>          | <u>International Law Reports</u> , Vol. 54, pp. 6-138 and pp. 139-213  |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Merrills, J.G., "The United Kingdom – France Continental Shelf Arbitration", 10 <u>California Western International Law Journal</u> (1980), pp. 314-364</li> <li>- Bowett, D.W., "The Arbitration between the United Kingdom and France concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches", 49 <u>British Year Book of International Law</u> (1978), pp. 1-29</li> <li>- McRae, D.M., "Delimitation of the Continental shelf between the United Kingdom and France: the Channel Arbitration", 15 <u>Canadian Yearbook of International Law</u>, (1977), pp. 173-197</li> <li>- Colson, D.A., "The United Kingdom – France Continental Shelf Arbitration", 72 <u>American Journal of International Law</u> (1978), pp. 95-112</li> <li>- Blecher, M.D., "Equitable Delimitation of Continental Shelf", 73 <u>American Journal of International Law</u> (1979), pp. 60-88</li> <li>- Symmons, C.R., "British Off-shore Continental Shelf and Fishery Limit Boundaries: An Analysis of Overlapping Zones", 28 <u>International and Comparative Law Quarterly</u> (1979), pp. 703-733</li> <li>- Berry, K.B., "Delimitation and the Anglo-French Arbitration", 6 <u>Australian Yearbook of International Law</u> (1974-1975), pp. 139-152</li> <li>- Hutchinson, D.N., "The Concept of Natural Prolongation in the Jurisprudence Concerning Delimitation of Continental Shelf Areas", 55 <u>British Year Book of International Law</u>, (1984), pp. 133-187</li> <li>- Quéneudec, J-P., "L'Affaire de la délimitation du plateau continental entre la France et le Royaume-Uni", 83 <u>Revue Générale de Droit International Public</u> (1979), p. 53-103, pp. 133-187</li> <li>- Zoller, E., "L'affaire de la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", 23 <u>Annuaire Français de Droit International</u>, (1977), pp. 359-407</li> </ul> |

## 1. Facts

181. Between 1960 and 1970, the United Kingdom successfully delimited its continental shelf in the North Sea through negotiation. During the same period, France delimited, through negotiation also, its continental shelf in relation to Spain.

182. After informal contacts, in 1964 and 1965, the United Kingdom and France began negotiations in October 1970 with a view to delimiting the continental shelf's areas that lay between them. The negotiations resulted in a partial agreement on a boundary east of 30 minutes longitude west of Greenwich. However, the two sides were in fundamental disagreement concerning the portion of the continental shelf boundary west of 30 minutes longitude west of Greenwich. In order to settle their differences, the Parties concluded an Arbitration Agreement on 10 July 1975 by which they submitted their dispute to an ad hoc court of arbitration.

183. Both States were Parties to the Geneva Convention on the Continental Shelf of 29 April 1958. Problems arose regarding the effect of the French reservations to article 6 of the Convention as well as with respect to the three geographic areas in which the following features could possibly influence the delimitation: (a) the Eddystone Rocks, a group of rocks roughly eight nautical miles south of Plymouth; (b) the Channel Islands, an archipelago which is British although lying in the Golfe Breton-Normand close to the French coast; and (c) the Scilly Isles, a group of small islands some 21 nautical miles south west of Cornwall.

## 2. Issues

### (a) Question before the Court of Arbitration

- The Parties asked the Court to decide in accordance with international law the course of the boundary (or boundaries) between the portions of the continental shelf appertaining to them in the English Channel westward of 30 minutes west of the Greenwich meridian as far as the 1,000-metre isobath.

### (b) Arguments presented by the Parties

- (i) France stated that the 1958 Geneva Convention on the Continental Shelf was not in force between the Parties owing to the French reservations and the objections to them made by the United Kingdom. However, even if the Court found that the Convention was applicable, article 6 concerning delimitation was still not applicable on account of the French reservations.

According to France, the rules of international law applicable to the dispute were the rules of customary law as stated in the North Sea Continental Shelf cases. Therefore, the boundary must be drawn in conformity with the principle of natural prolongation and in accordance with equitable principles.

Alternatively, France argued that if article 6 were found to be applicable, "special circumstances" in the Channel Islands and Atlantic areas prohibited recourse to the equidistance method.

As for the Channel sector, France argued that the boundary should follow the median line between the French coast and the mainland of the United Kingdom and that the

Channel Islands should be entitled to no more than a belt of jurisdiction six miles wide on the side of those islands facing the English Channel.

In the Atlantic area, the French argued that the boundary should follow the bisection of an angle formed by two lines expressing the general direction of the coasts of the United Kingdom and France, this being more in accord with the principles of natural prolongation and equity.

- (ii) The **United Kingdom** contended that the Geneva Convention on the Continental Shelf in its entirety was in force between the Parties. Furthermore, the United Kingdom argued that its objections to the French reservations did not preclude the entry into force of the Convention between the Parties. In any event, even if the reservations were deemed applicable, they would not make any difference in the application of the relevant legal principles.

Accordingly, the United Kingdom considered article 6, paragraph 1, of the Convention as applicable and therefore maintained that the boundary should be determined by application of the principle of equidistance, giving full effect in that process to the base points from which the territorial sea was measured, including the Scilly and Channel Islands. It further argued that France had not proved that the circumstances of the relevant areas constituted "special circumstances" within the meaning of article 6.

Alternatively, the United Kingdom argued that if the Court found that customary law governed, as opposed to article 6 of the Convention, then the boundary line should be drawn in such a way as to leave as much as possible to each Party of its natural prolongation without encroachment on the natural prolongation of the other Party. Since the continental shelf was essentially of a continuous geologic character, then the equidistant line should divide the natural prolongation of the two countries.

In a further alternative, the United Kingdom argued that if the Court was of the view that a structural discontinuity existed in the seabed and subsoil as to disrupt the geologic continuity of the continental shelf, the rule of international law was that the boundary should be drawn along the axis of this structural discontinuity thereby leaving to both States those parts of the continental shelf that constituted the natural prolongation of their land territory.

### **3. Reasoning of the Court of Arbitration**

#### **(a) Competence of the Court of Arbitration**

184. Since the Arbitration Agreement referred specifically to the continental shelf and since the continental shelf is defined according to the 1958 Convention as an area beyond the territorial sea, the question arose as to whether the Court had competence to settle differences between the Parties regarding the maritime boundary of their respective territorial seas or fishing zones.

185. France considered that the Court did not have competence to deal with any area included within the French territorial sea, while the United Kingdom was of the view that the Court had competence to determine the continental shelf boundary throughout the entire arbitration area.

186. The Court decided that it had no competence to delimit a boundary in the narrow waters between the Channel Islands and the French coast because its competence derived from the agreement of the Parties and they were not in agreement on this point.

187. The other matter relating to competence was the fact that a France-United Kingdom boundary would meet a United Kingdom-Republic of Ireland boundary at a tripoint east of the 1,000-metre isobath within the arbitration area. The United Kingdom argued that it was a middle State compressed between France and Ireland, like the Federal Republic of Germany in the North Sea Continental Shelf cases. The French Republic contested the validity of this analogy, stressing that neither France and the United Kingdom nor the Republic of Ireland and the United Kingdom are States that have coasts adjacent to each other.

188. The Court found that its task was to determine the boundary between the United Kingdom and France without regard to the possibility that a United Kingdom-Ireland boundary could result in the overlapping of zones, which, if it occurred, should be resolved through negotiations between the three States concerned.

### **(b) Applicable law**

189. The Court first focused on the effect to be given to the French reservations and the United Kingdom objections. The Court found that it was not the intent of the United Kingdom by its objections to the French reservations to prevent the entry into force of the 1958 Continental Shelf Convention between the two States.

190. It then proceeded to the question of the effect of the French reservations to article 6. The three reservations made by France (equidistant boundaries determined from baselines established after 1958; boundaries extending beyond the 200-metre isobath; areas of special circumstances, including the Bay of Granville and the Channel Islands area) were found to be appropriate and thus, modifying the legal effect of article 6. However, the Court found that relying on the principle of mutuality of consent and the effect of article 21, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties, article 6 was inapplicable between the Parties only to the extent of the reservations. So, where reservations were operable, the Court held that the principles of customary law applied. This meant that customary law applied to the Channel Islands area and that article 6 applied in the Atlantic area. The Court stated that, in "the circumstances of the present case, the rules of customary law lead to much the same result as the provisions of Article 6" and that the delimitation articles under discussion at the Third United Nations Conference on the Law of the Sea, if applicable, would not have made any difference in the present case.

191. As to the interrelationship between article 6 and equitable principles, the Court found that article 6 did not establish two separate rules: an equidistance rule and a special circumstance rule; but one combined equidistance-special circumstance rule which provided for the general norm of customary law that the continental shelf boundary is to be determined in accordance with equitable principles. The Court held that "the equidistance-special circumstances rule and the rules of customary law have the same object: the delimitation of the boundary in accordance with equitable principles".

192. Regarding the rule of equidistance as a method of delimitation (and recalling the principles set forth in the North Sea Continental Shelf cases), the Court found that under article 6 the rule possesses an obligatory force which it does not have under the rules of customary law. However, the equidistance-special circumstances rule in Article 6 has the purpose of giving expression to a “general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles”. Ultimately, it is the geographical and other circumstances that determine whether, in any given case, the equidistance method achieves an equitable solution rather than the inherent quality of the method.

### **(c) Course of the boundary**

193. *Eddystone Rocks*. The Parties were not in agreement whether Eddystone Rocks should be used as a basepoint for determining the course of the boundary. France argued that it was a low-tide elevation not entitled to a territorial sea and that therefore could not be used as an equidistant line basepoint. The United Kingdom argued that it was an island, having a territorial sea and thus relevant as a basepoint for measuring the equidistant line.

194. The Court did not pronounce itself on the interesting question of the island character of Eddystone Rocks and concluded from the negotiations preceding the dispute that France had already accepted them as a starting point for a median line in 1971 and therefore considered France to be bound because of its acquiescence.

195. *Channel Islands*. The Court concluded that in the area of the Channel Islands it was customary law that should be applied. The Parties in principle were in agreement that the boundary was to be the equidistance line, although they were in profound disagreement regarding how the line should be drawn. The Court accepted that if the Channel Islands did not exist, a mid-channel equidistance line would be a delimitation in accordance with equitable principles. However, since they do exist, their presence disturbed the balance of geographical circumstances that would otherwise exist between the Parties in this region as a result of the broad equality of the coastlines of their mainlands. Therefore, the Court found it necessary to evaluate the extent of this disturbance and took into account the following factors:

- (a) The Channel Islands had to be treated as islands of the United Kingdom, thus law and geographical facts were to be evaluated as between the United Kingdom and France, not as between the Channel Islands and France;
- (b) The Channel Islands were of significant economic and political importance;
- (c) The existing juridical regime in the region: the French 12-nautical mile territorial sea, the British 12-nautical mile fishing zone and the potential 12-nautical mile territorial sea of the Channel Islands; and
- (d) Navigational, defence and security interests of both Parties.

196. Taking into account the above, the Court concluded: "the presence of these British Islands close to the French coast, if they are given full effect in delimiting the continental shelf, will manifestly result in a substantial diminution of the area of the continental shelf which would otherwise accrue to the French Republic. This fact by itself appears to the Court to be, *prima facie*, a circumstance creative of inequity and calling for a method of delimitation that in some measure redresses the inequity".

197. On the other hand, the Court was of the view that certain equitable considerations regarding size, population and economy of the Channel Islands militated against complete acceptance of the French position but did not remove the overall imbalance in the equities noted by the Court.

198. As a consequence, the Court decided in the first instance that a primary boundary should be drawn equidistant from the French coast and the coast of the mainland of the United Kingdom. Secondly, a boundary was to be drawn between the French shelf south of the mid-channel equidistant line and the Channel Islands. In the Court's view, this line should be drawn 12 miles from the baselines of the Channel Islands so as not to encroach on the 12-nautical mile fishing zone already established. The continental shelf of the Channel Islands would thus form a British enclave within the French continental shelf.

199. *Atlantic region.* The Court had concluded that article 6 applied in this area. France argued that special circumstances existed which justified a method of delimitation other than the equidistant line, particularly the effect of the small islands in the Scillies and Ushant on the general direction of the English and French coasts. On the other hand, the United Kingdom proposed the equidistant line measured from the baseline from which the breadth of the territorial sea of each country was measured. The Court declared article 6 to be an exhaustive rule and paragraph 1 to be applicable in this case.

200. Then the Court proceeded to examine whether in the actual circumstances the prolongation of the Scilly Isles some distance further westward than the Island of Ushant rendered "unjust" or "inequitable" an equidistance boundary delimited from the baselines of the French and the United Kingdom coasts. It found that a "special circumstance" in the greater projection of the United Kingdom coast existed and asserted that giving "full effect" to the islands would create disproportionate results. However, due to their relative closeness to the British mainland, their size and population, they should not, on the other hand, be neglected altogether. The Court, consequently, gave them "half effect" by drawing the final boundary as the median line between the respective equidistance lines determined in the first instance by taking the Scilly Isles fully into account and then in the second instance by neglecting them.

#### 4. Decision

201. The Court of Arbitration rendered its decision on 30 June 1977. Unanimously, it was decided in accordance with the rules of international law applicable in the matter as between the Parties that:

"(a) Except as provided in paragraph (2) below, the course of the boundary between the portions of the continental shelf appertaining to the United Kingdom and to France, respectively, westward of 30 minutes west of the Greenwich meridian as far as the 1,000 metre isobath shall be the line traced in black on the Boundary-Line Chart as set out in the Decision.

(b) To the north and west of the Channel Islands, the boundary between the portions of the continental shelf appertaining to the United Kingdom (Channel Islands) and to the French Republic, respectively, shall be the line composed of segments of arcs of circles of a 12-mile radius drawn from the baselines of the Bailiwick of Guernsey and traced in black on the Boundary-Line as set out in the Decision."

## 5. Declaration by Mr. Briggs

202. Mr. Briggs was in complete agreement with the course of the boundaries delimited by the Court. However, he did not concur with the Court's evaluation of the French reservation to Article 6. He stated that the intent of the three reservations was solely to prevent unilateral delimitations by other States based upon equidistance and thus had no application in an arbitral proceeding. He further stressed that the first two reservations to Article 6 were invalid because their true effect was to modify Articles 1 and 2 of the Convention. He found also that the third reservation was not properly a reservation because, in fact, "Granville Bay" could not mean the entire Channel Islands area and, in law, it was a mere interpretative declaration.

## 6. Interpretation of the Decision of 30 June 1977

### (a) Facts

203. Following receipt of the Court's Decision of 30 June 1977, the United Kingdom notified France that its consideration of the terms of the Decision and the accompanying Boundary Line Chart, together with the technical report, had raised certain technical questions as to the meaning and scope of the Decision.

204. The United Kingdom proposed urgent talks between representatives of both Governments to resolve the questions, while reserving its rights under article 10(2)<sup>7</sup> of the Arbitration Agreement. The French refused to participate in such talks, focusing on the binding nature of the Decision required by paragraph 1 of article 10.

205. Therefore, on 17 October 1977, the United Kingdom referred to the Court of Arbitration two questions relating to the meaning and scope of the Court's Decision of 30 June 1977 on the delimitation of the continental shelf between the United Kingdom and France.

### (b) Issues

206. **United Kingdom.** The first question concerned the 12-mile exclusive boundary, which had been drawn to the north and west of the Channel Islands. According to the British application, the boundary as drawn on the chart accompanying the Decision and as defined in its dispositif did not coincide with the general description of the Decision, i.e., with the outer limit of the 12-mile fishery zone.

207. The second question related to the technical method used in the Atlantic area to establish the median line giving half effect to the Scilly Isles. The Court in the dispositif of its Decision had used a straight line on a Mercator projection chart (loxodrome), which, on the spheroidal

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<sup>7</sup> Article 10 of the Arbitration Agreement signed at Paris on 10 July 1975 reads as follows:

1. The two Governments agree to accept as final and binding upon them the decision of the Court on the question specified in article 2 of the present Agreement.

2. Either Party may, within three months of the rendering of the decision, refer to the Court any dispute between the Parties as to the meaning and scope of the decision."

surface of the earth, leads to scale distortions, in this case, at the expense of the British area. The British application claimed that the boundary line to be equidistant as stated in the findings had to be a geodesic instead of a loxodromic line.

208. **France** replied that the application was not within the required time-limit and that the dispute did not relate to the “meaning and scope of the Decision”. It also contended that the United Kingdom was in effect asking the Court to “rectify” certain elements in the Decision, including the boundary, which the Court had no power to do under the guise of interpretation.

209. Having specific regard to the Atlantic sector, the French Government argued that the use of the Mercator projection was consistent with the Court’s intention and such projection was commonly used and had decided advantages.

### **(c) Reasoning of the Court of Arbitration**

210. As to the first query posed by the United Kingdom, the Court recognized the existence of a material error in the dispositif of its Decision and stated that the contradiction must be resolved in favour of the findings in the reasoning. The new definition of the boundary slightly enlarged the continental shelf area of the Channel Islands.

211. Regarding the technical method used in the Atlantic area, the Court stated that in the delimitation of maritime boundaries there was no established state practice as to the use of geodesic lines instead of loxodromes. It declared that the method applied, which does not correct scale errors, was compatible with the simplified frame for applying the “half effect solution”. It further declined to reopen the question of which method to apply.

### **(d) Decision**

212. The Court of Arbitration rendered its decision on 14 March 1978. The Court unanimously decided that:

“(a) The British application to the Court was made within the required time-limit and admissible. Thus, the French objections on its admissibility had to be rejected; and

“(b) Regarding the Channel Islands sector, the boundary should be rectified so as to take account of the basepoints previously not taken into account.”

213. The Court by 4 votes to 1 decided that:

- “Regarding the Atlantic sector, it had not been established that the course of the boundary line was in contradiction with the findings of the Court. Therefore, the boundary line in the Atlantic sector was not incompatible with the Court’s prescribed method of delimitation. Accordingly, the United Kingdom request is not well-founded and must be rejected.”

### **(e) Separate Opinion, Dissenting Opinion**

#### **Separate Opinion**

214. **Sir Humphrey Waldock** appended a separate opinion, related to the Atlantic Sector. He stated that the Court should have given more weight to the fact that no correction for scale error had been made as well as to the deficiencies of the Mercator projection. However, even if

in his opinion there was a contradiction between the Court's reasoning and its application, he doubted the existence of a "material error", which could allow an exercise of the Court's power.

**Dissenting Opinion**

215. **Mr. Briggs**, as regards the Court's decision on the Atlantic Sector, believed that the use of the Mercator projection was inappropriate and that the Court had the necessary power, under article 10(2) of the Arbitration Agreement, to rectify the errors.

#### D. Case concerning the Continental Shelf

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|-------------------------------|--|
| <b>Parties:</b>               | Libyan Arab Jamahiriya and Tunisia   |
| <b>Issues:</b>                | Delimitation; continental shelf; equity  |
| <b>Forum:</b>                 | International Court of Justice (ICJ)   |
| <b>Date of Decision:</b>      | Judgment of 24 February 1982   |
| <b>Published in:</b>          | <p><u>ICJ: Reports of Judgments, Advisory Opinions and Orders</u>, 1982,<br/>pp. 18-323</p> <p><u>International Law Reports</u>, Vol.67, p. 4</p>  |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Brown, E.D., "The Tunisia-Libya Continental Shelf Case: a Missed Opportunity", 7 <u>Marine Policy</u> (1983), pp. 142-162</li> <li>- Hodgson, D.C., "The Tuniso-Libyan Continental Shelf Case", 16 <u>Case Western Reserve Journal of International Law</u> (1984), pp. 1-37</li> <li>- Charney, J. I., "Ocean Boundaries between Nations: A Theory for Progress", 78 <u>American Journal of International Law</u> (1984), pp. 582-606</li> <li>- Feldman, M.B., "The Tunisia-Libya Continental Shelf Case: Geographic Justice or Judicial Compromise?", 77 <u>American Journal of International Law</u> (1983), pp. 219-238</li> <li>- Herman, L.L., "The Court Giveth and the Court Taketh Away: An Analysis of the Tunisia-Libya Continental Shelf Case", 33 <u>International and Comparative Law Quarterly</u> (1984), pp. 825-858</li> <li>- Kwiatkowska, B., "Judge Shigeru Oda's Opinions in Law-of-the-Sea Cases: Equitable Maritime Boundary Delimitation", 36 <u>German Yearbook of International Law</u> (1993), pp. 225-294</li> <li>- Jewett, M.L., "The Evolution of the Legal Regime of the Continental Shelf", 22 <u>Canadian Yearbook of International Law</u>, (1984), pp. 153-193</li> <li>- Hutchinson, D.H.N., "The Concept of Natural Prolongation in the Jurisprudence Concerning Delimitation of Continental Shelf Areas", 55 <u>British Year Book of International Law</u> (1984), pp. 133-187</li> <li>- E. Decaux, "L'Arrêt de la Cour Internationale de Justice dans l'affaire du plateau continental (Tunisie/Libye): arrêt du 24 février 1982", <u>Annuaire Français de Droit International</u>, Vol. 28, (1982), pp. 357-391</li> <li>- Slim, H. "Les arrêts de la Cour Internationale de Justice du 24 février 1982 et du 10 décembre 1985 dans l'affaire du Plateau Continental Tunisie/Jamahiriya Arabe Libyenne", <u>Études Internationales</u> (Association des études internationales (Tunis)), No. 21, décembre 1986, pp. 97-143</li> </ul> |

## 1. Facts

216. By a Special Agreement of 10 June 1977, the Parties requested the Court to indicate the principles and rules of international law, which they should apply in negotiating a treaty on the delimitation of the area of the continental shelf appertaining, respectively, to the Socialist People's Libyan Arab Jamahiriya and to the Republic of Tunisia.

217. The Court was specifically requested to take account of "equitable principles" and the relevant circumstances which characterize the continental shelf, as well as the newly accepted trends in the Third United Nations Conference on the Law of the Sea.

## 2. Issues

### **(a) Questions before the Court**

- (i) What principles and rules of international law may be applied to the delimitation of the continental shelf appertaining to the Socialist People's Libyan Arab Jamahiriya and the Republic of Tunisia?
- (ii) To clarify the practical method for the application of principles and rules in this specific situation so as to enable the experts of the two countries to delimit the continental shelf without any difficulties.

### **(b) Arguments presented by the Parties**

Both Parties agreed in their pleadings that in accordance with the principles established by the Court in the North Sea Continental Shelf Cases in 1969 each was entitled to its "natural prolongation", with the delimitation between their respective natural prolongations being effected in accordance with equitable principles.

Both Parties agreed in their pleadings that the equidistance method was inappropriate and could not yield an equitable result in the circumstances of the case.

- (i) **Libya** relied upon the theory of plate tectonics and supporting evidence to show that the rifting process had been in a north-south direction.

As a consequence, it argued that the entire Pelagian Block, the area covered by the dispute, was a shelf area that extended northwards from the continental landmass to the south.

That being so, and on the basis of "natural prolongation", the area in dispute was a northerly prolongation of the landmass, and justified a northerly trending boundary following the direction of this prolongation from Ras Ajdir.

Libya, nevertheless, conceded that the prominent configuration of the Tunisian Sahel Promontory and the offshore Kerkennah Islands could not be ignored. It therefore argued that the area should be divided into two sectors. In the first sector, the boundary should proceed northwards from Ras Ajdir and in the second sector it should deviate eastwards parallel to the general line of the Sahel Promontory to reflect this relevant geographical circumstance.

(ii) **Tunisia** sought to exclude from the area to be delimited the whole of the Tunisian internal waters lying behind straight baselines, as promulgated by Tunisia in 1973.

It sought as well to exclude all waters and seabed landward of the 50-metre isobath on the ground that this was an area in which Tunisia had historic rights. This area being unquestionably Tunisian, it lay outside any area in dispute.

Tunisia contended that the area lying in and east of the Gulf of Gabes was an easterly prolongation of the Tunisian landmass lying to the west, which was demonstrated by the bathymetric and geomorphological evidence.

To produce a delimitation line consistent with the above, Tunisia proposed three different methods:

- The first was a line which followed two submarine features, the "rides" (ridges or crests) of Zira and Zuwarah, trending away from the coastal boundary terminal point (at Ras Ajdir) in a north-easterly direction;
- The second was a line from Ras Ajdir to the centre of the Ionian Abyssal Plain in the middle of the Mediterranean;
- The third was a line based upon geometrical principles, the so-called "bissectrice", which involved transferring the angle of the coasts in the south-west corner of the Gulf of Gabes to the actual frontier point at Ras Ajdir, and then bisecting that angle.

### **3. Reasoning of the Court**

218. For both Parties the starting point for a discussion of the applicable principles and rules had been the Court's Judgment of 20 February 1969 in the North Sea Continental Shelf Cases. Both Parties took the view that, as declared in that Judgement, the delimitation in the present case had to be effected "by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other."

219. The Court considered that equitable principles had to be subordinate to the goal of achieving an equitable result and depended on the relevant circumstances of the particular case.

220. Both Parties in the present case had considered that the determination of what constituted a natural prolongation of their land territory into and under the sea would produce a correct delimitation. The Court could not agree with the idea that an equitable delimitation and the physical limits of natural prolongation were synonymous and rejected the Libyan contention that a delimitation which gave effect to the principle of natural prolongation must be equitable.

221. As for the interpretation of "natural prolongation", the Libyan theory of "plate tectonics" as well as the Tunisian argument based on bathymetry and geomorphology were disregarded by the Court, since, for legal purposes, it was impossible to define the areas of the continental shelf appertaining to each of the Parties by reference solely or mainly to those considerations.

222. The Court recalled that the coast of each of the Parties constituted the starting line from

which one had to set out in order to ascertain how far the submarine areas appertaining to each of them extended in a seaward direction.

223. As for the "relevant circumstances", which characterized the area, these included the change in the direction of the Tunisian coast, the existence of the Tunisian offshore islands of Jerba and the Kerkennahs, the position of the land frontier of Ras Adjir and the past conduct of the Parties. Of the claims forming part of that conduct, the Tunisian claim to a 45° line from Ras Adjir was never recognized as a maritime boundary nor was the due north line featured in the Libyan 1955 Petroleum Law. However, a line perpendicular to the general line of the coast had been accepted as a *modus vivendi* between the French and Italian authorities in the early part of the century, and a 26° line (closely approximating the perpendicular line) had been observed by both Tunisia and Libya as a *de facto* maritime limit for the purpose of granting oil concessions.

224. As regards the historic rights claimed by Tunisia, which derived from the long-established interests and activities of its population in exploiting the fisheries of the bed and waters, the Court found that they were not relevant because these stemmed from a legal régime distinct from that of the continental shelf and because the line envisaged by the Court would not, in fact, enter into the area claimed by Tunisia as subject to "historic rights". Nevertheless, for purposes of applying any proportionality test, the area subject to historic rights and indeed the area of internal waters behind the Tunisian baselines had to be considered as part of the Tunisian natural prolongation, even though such areas may not be "shelf" in the legal sense.

225. The Court then proceeded to consider the methods of delimitation. It believed that the area should be treated as two different sectors, for the appropriateness of any method had to depend on the geographical situation. In the first sector, the Court advocated a method adopting the 26° line since this corresponded to the conduct of the Parties. In the second sector, beginning at a point at the same latitude as the innermost part of the Gulf of Gabes, the Court recognized the significance of the change in direction of the Tunisian coast in the Sahel Promontory and in the Kerkennah Islands. The Court did not accept the Libyan contention of ignoring the Kerkennah Islands nor did it consider right to give the islands "full effect" by drawing a line parallel to them. (It should be noted that Libya finally conceded that the prominent configuration of the Tunisian Sahel Promontory and the offshore Kerkennah Islands could not be ignored.) What the Court did was to give them "half effect", a boundary line parallel to a line midway between the "no effect" and "full effect" lines representing the Tunisian coast, which produced a boundary line of 52° inclination in the second sector.

226. The Court considered that the result produced by the combination of the two lines in the two sectors met the requirements of the proportionality test as an aspect of equity.

#### 4. Decision

227. The Judgment was rendered on 24 February 1982. By ten votes to four, the Court held that:

"A. The principles and rules of international law applicable for the delimitation, to be effected by agreement in implementation of the present Judgment, of the areas of continental shelf appertaining to the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya respectively, in the area of the Pelagian Block in dispute between them [...] are as follows:

- "(1) the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances;
- "(2) the area relevant for the delimitation constitutes a single continental shelf as the natural prolongation of the land territory of both Parties, so that in the present case, no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation as such;
- "(3) in the particular geographical circumstances of the present case, the physical structure of the continental shelf areas is not such as to determine an equitable line of delimitation."

228. The Court enumerated the relevant circumstances to be taken into account in achieving an equitable delimitation, including: the fact that the area relevant to the delimitation in the present case was bounded by the Tunisian coast from Ras Ajdir to Ras Kaboudia and the Libyan coast from Ras Ajdir to Ras Tajoura and by the parallel of latitude passing through Ras Kaboudia and the meridian passing through Ras Tajoura; the general configuration of the coasts of the Parties; the existence and position of the Kerkennah Islands; the land frontier between the Parties and their conduct prior to 1974; and the element of a reasonable degree of proportionality.

229. The Court stated that the practical method for the application of the aforesaid principles and rules of international law in the specific situation of the present case was the separation of the disputed area in two sectors as determined by the Court. The Court then provided a detailed description of the route to be taken by the boundary line in each sector.

## 5. Separate Opinions, Dissenting Opinions

### (a) Separate Opinions

230. **Judge Ago** concurred with the conclusion reached by the Court and, in particular, the idea that the "area of delimitation" should have been considered as composed of two distinct sectors.

231. Consequently, he was also pleased with the adoption by the Court, for these two sectors, of two delimitation lines at different angles, or of one delimitation line divided in two segments.

232. Nevertheless, Judge Ago expressed a few reservations with regard to the justification given for the inclination of the first segment of the line. He felt unable to share the Court's opinion concerning the alleged absence of any genuine "maritime boundary" between the two countries during the period preceding decolonization. According to him, several facts proved the existence at the time of an acquiescence of a delimitation that concerned the respective territorial waters of the Parties and that could be extended to serve new ends. Therefore, he believed that the order of the arguments invoked by the Court for the adoption of the practical method as governing the determination of the first segment of the line delimiting the areas of continental shelf appertaining to each Party should have been reversed.

233. **Judge Schwebel** supported the Judgment, except for one point: since the Kerkennahs were substantial Islands and since the Court had not demonstrated why granting full effect to the Kerkennah Islands would result in giving them "excessive weight", it was not clear that the Court was correct in according to the Islands only half effect in the process of delimitation.

234. After a very thorough development, **Judge ad hoc Jiménez de Aréchaga** fully concurred with most of the Court's legal reasoning, although he expressed minor divergences concerning some of the final conclusions in the Judgment: essentially, the insufficient significance that had been attributed to the 26° historic line and the consideration that a veering of 52° was too pronounced.

### (b) Dissenting Opinions

235. Each of the dissenting Judges - **Gros and Oda and Judge ad hoc Evensen** - voiced great concern over the lack of method in the Court's approach. Each was critical of the Court's approach in both geographical sectors of the delimitation area. Each was of the view that the Court's assessment of the equities should properly have employed equidistance as a starting point and each was concerned about the vague and subjective content the majority Judgment tended to give to the law of delimitation and to the central legal concept of equitable principles. They were particularly troubled by the majority's use of proportionality. They were concerned that the Court had now extended the significance of the concept in delimitation law well beyond the restricted role it had been given in the 1969 Judgment in the North Sea Continental Shelf Cases and the 1977 Award of the Court of Arbitration in the Delimitation of the Continental Shelf Case between France and the United Kingdom.

236. First of all, **Judge Gros** criticized the lack of precision in the Judgment with respect to the binding force of the judicial decision it contained. Secondly, he disagreed with the way in which the Court set out to search for an equitable delimitation of the continental shelf areas as between the Parties, which he found contrary to the role of equity in the delimitation of a continental shelf adopted by the Court in its 1969 Judgment in the North Sea Continental Shelf Cases. According to him, the Judgment relied on controversial and fragile arguments for the deduction of the line; no historic right had been established; and the construction of the equitable line of delimitation was solely based on unfounded calculations and assertions as to the facts of the case, the visible factors and the rules of applicable law. In conclusion, Judge Gros stated that the Judgment failed to present a solution that truly balanced the interests of the Parties.

237. **Judge Oda** dissented from the Court's Judgment on various points. In his view, the Court failed to arrive at a proper appreciation of the "trends" at the Third United Nations Conference on the Law of the Sea, and largely ignored the changes that have occurred with the concept of the continental shelf and the possible impact of the new concept of the exclusive economic zone on the exploitation of submarine mineral resources. The Judgment, in his opinion, did not even attempt to prove how the equidistance method, which has often been maintained to embody a rule of law for delimitation of the continental shelf, would have led to an inequitable result. The line suggested by the Court in dealing with the practical method to be employed in application of the principles, he expressed, was not grounded in any persuasive consideration.

238. **Judge ad hoc Evensen** dissented from the views of the Court on the practical method laid down in the Judgment for determining the line of delimitation for the area of the continental shelf appertaining to each Party. He considered that the Court seemed unaware of the fact that in the 1981 draft Convention of the Third United Nations Conference on the Law of the Sea, the text had given special consideration to the equidistance - median line principle. It was the only concrete principle added to the broad reference to equity, which had been discussed in the Third United Nations Conference on the Law of the Sea, as related to the delimitation of the exclusive economic zone and the continental shelf of adjacent and opposite States. He held as well that the

Court had disregarded the very abundant State practice laid down in numerous delimitation agreements and enactments demonstrating the practical importance of the equidistance principle for the delimitation of continental shelves and exclusive economic zones. Judge Evensen considered that the Court had failed to mention any legal principles on which a decision on delimitation should have been based. The Court, in his view, seemed to consider "delimitation based on relevant circumstances" as a purely discretionary operation where the Court more or less could disregard relevant geographical factors. To him, the Judgment seemed closer to a decision making process based on an *ex aequo et bono* approach. He disagreed also with the assessment of the Court that the "equidistance principle may be applied if it leads to an equitable solution; if not, other methods should be employed". This relegation of the equidistance principle to the last rank of practical methods did not, in his view, correspond to prevailing principles of international law as evidenced by State practice, multilateral and bilateral conventions, the findings of the Court in its 1969 Judgment in the North Sea Continental Shelf Cases and the findings by the Court of Arbitration in 1977 in the Delimitation of the Continental Shelf Case between France and the United Kingdom.

**E. Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area**

|                               |   |
|-------------------------------|---|
| <b>Parties:</b>               | Canada and United States of America   |
| <b>Issues:</b>                | Delimitation; continental shelf; exclusive fishery zone   |
| <b>Forum:</b>                 | International Court of Justice (ICJ) (Chamber of the Court)   |
| <b>Date of Decision:</b>      | Judgment of 12 October 1984   |
| <b>Published in:</b>          | <u>ICJ: Reports of Judgments, Advisory Opinions and Orders</u> , 1984, pp. 245-390<br><u>International Law Reports</u> , Vol. 71, p. 74   |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Legault, L.H., Hankey, B., "From Sea to Seabed: the Single Maritime Boundary in the Gulf of Maine Case", 79 <u>American Journal of International Law</u> (1985), pp. 961-991</li> <li>- Shelley, A.F., "Law of the Sea: Delimitation of the Gulf of Maine: Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States)", 26 <u>Harvard International Law Journal</u>, (1985), pp. 646-654</li> <li>- Clain, L.E., "Gulf of Maine: a Disappointing First in the Delimitation of a Single Maritime Boundary", 25 <u>Virginia Journal of International Law</u> (1985), pp. 521-620</li> <li>- Schneider, J., "The Gulf of Maine Case: The Nature of an Equitable Result", 79 <u>American Journal of International Law</u> (1985), pp. 539-577</li> <li>- Evans, M.D., "Maritime Delimitation and Expanding Categories of Relevant Circumstances", 40 <u>International and Comparative Law Quarterly</u> (1991), pp. 1-33</li> <li>- Willis, L.A., "From Precedent to Precedent: The Triumph of Pragmatism in the Law of Maritime Boundaries", 24 <u>Canadian Yearbook of International Law</u> (1986), pp. 3-60</li> <li>- Legault, L.H., McRae, D.M. "The Gulf of Maine Case", 22 <u>Canadian Yearbook of International Law</u> (1984), pp. 267-290</li> <li>- Jewett, M.L., "The Evolution of the Legal Regime of the Continental Shelf", 22 <u>Canadian Yearbook of International Law</u> (1984), pp. 153-193</li> <li>- Evans, M.D. "Delimitation and the Common Maritime Boundary", 64 <u>British Year Book of International Law</u> (1993), pp. 283-332</li> <li>- Bermejo Garcia, R., "Les principes équitables et les délimitations des zones maritimes: analyse des affaires Tunisie/Jamahiriya Arabe Libyenne et du golfe du Maine", 1 <u>Hague Yearbook of International Law</u> (1988), pp. 59-110</li> </ul> |

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|  | Decaux, E., "L'arrêt de la chambre de la Cour internationale de Justice dans l'affaire de la délimitation de la frontière maritime dans le Golfe du Maine", <u>Annuaire Français de Droit International</u> , (1984), pp. 304-339 |
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## 1. Facts

239. On 29 March 1979, Canada and the United States of America signed a Special Agreement by which the Parties decided to refer to the Court a long-standing dispute between them concerning the maritime delimitation of the fisheries zones and continental shelf in the Gulf of Maine.

240. The proceedings were instituted on 25 November 1981 by the filing of a Special Agreement with the International Court of Justice. The Agreement called upon the Court to decide upon the conflicting claims in accordance with "the principles and rules of international law applicable in the matter as between the Parties".

241. Pursuant to article 40 of the Statute of the International Court of Justice, the Parties requested that the Court establish a five-member chamber under article 26 (2) of the Statute to hear the case.<sup>8</sup>

## 2. Issues

### (a) Question before the Court

- What is the course of the single maritime boundary that divides the continental shelf and fishery zones of Canada and the United States of America from a point in latitude 44° 11' 12" N, longitude 67° 16' 46" W to a point to be determined by the Chamber within an area bounded by straight lines connecting the following sets of geographic co-ordinates: latitude 40° N, longitude 67° W; latitude 40° N, longitude 65° W; latitude 42° N, longitude 65° W?

### (b) Arguments presented by the Parties

Both Parties started from the same fundamental norm: "delimitation in accordance with equitable principles, taking into account the relevant circumstances in the area to produce an equitable solution".

The Parties agreed that the starting point of the delimitation (44° 11' 12" N, 67° 16' 46" W), called point A, was the first point of intersection of the two lines representing the limits of the fishing zones claimed, respectively, by Canada and the United States when they decided upon the extension of their fisheries jurisdiction up to 200 nautical miles.

<sup>8</sup> The Gulf of Maine case was procedurally innovative in making use for the first time of the "Chambers" procedure provided for in the Statute and Rules of the International Court of Justice. The case is also the first settlement of a "single maritime boundary" for both the continental shelf resources and the exclusive fishery zone in which the Parties asked for the drawing of an actual line, rather than simply an indication of the principles and rules of international law applicable to the delimitation and clarification of the practical method for applying them.

The two Parties agreed at the outset that the Gulf of Maine area had two parts, which the United States characterized as its "interior" and "exterior" components and Canada referred to as its "inner" and "outer" portions. There was also early agreement that the continental shelf of the Gulf of Maine area is part of a single, uninterrupted North American Atlantic seaboard and that its geological structure is "essentially continuous".

- (i) **Canada** identified two main sources of applicable law. The first was article 6 of the 1958 Geneva Convention on the Continental Shelf. Canada believed that article 6 was the only clear treaty provision that would be applicable to the case and binding upon the Parties. The second source of applicable law was the unity of the delimitation of the shelf and of the exclusive economic zone, as reflected in the parallel wording of articles 74 and 83 of the 1982 United Nations Convention on the Law of the Sea. Two inferences from the exclusive economic zone concept were sought from this: the criterion of distance from the coast gives a new importance to the factor of proximity in the delimitation of maritime boundaries, at least within the 200 mile-limit; owing to economic considerations, a significant economic dependence upon the resources of the disputed area is a factor that should be given special weight.

Canada contended that each coastal State should receive as much as possible of its 200-mile entitlement without encroaching on the corresponding entitlement of the other Party, and that the method most precisely reflecting this requirement was equidistance.

Canada also contended that, as the name exclusive economic zone implies, the central purpose is an economic zone, rooted in the special dependence of coastal States upon the resources off their coasts. Canada thus argued that the coastal populations of South West Nova Scotia have a vital dependence on the fishery resources of Georges Bank. Canada also maintained that its Georges Bank fishery has deep historical roots.

Canada claimed that the relevant geographical circumstances were those of the Gulf of Maine area itself rather than any macrogeographical general direction of the North Atlantic coast. It cited relevant circumstances based upon the socio-economic or "human geography" of the area, including the fact that fishing in Georges Bank is conducted primarily by communities located on the coastal wings of Nova Scotia, between Digby and Lunenburg, and of Massachusetts and Rhode Island from Gloucester to Newport. Canada also relied upon relevant circumstances associated with the conduct of the Parties concerning an agreement between the United States and Canada on East Coast fishery resources and Canada issuing permits of exploration and exploitation of oil and gas resources in the Northeast portion of Georges Bank.

Canada regarded Cape Cod and Nantucket as "incidental special features" added to the general convexity of the Massachusetts coast. If the equidistance method were to be applied in this case, these features would attract a sea area more than eight times their land territory, which would result in a situation recognized as inherently inequitable.

Additionally, Canada claimed that the United States' conduct, which involved its consent to the application of the equidistance method, could be taken into account in three ways of varying importance: as evidence of acquiescence; as an indication of the existence of a *modus vivendi*; and as a case of estoppel.

- (ii) The **United States** predicated its claim to the whole of Georges Bank on four grounds alleged to be "equitable principles":
- The relationship between the coasts of the Parties and the maritime areas in front of those coasts: this principle of seaward extension rested upon a distinction between "primary coasts" – coasts that follow the general direction of the mainland coastline as a whole - and the "secondary coasts", as well as the notion of perpendicular extension of primary coasts.
  - Resource conservation and management. This principle rested on two premises: first, the United States considered that a basic theme of the exclusive economic zone is management by a single State wherever possible in order to facilitate conservation and minimize the potential for international disputes; secondly, the United States contended that there are "three identifiable and different oceanographic and ecological regimes" in the Gulf of Maine area, with a natural boundary at the Northeast Channel.
  - Minimizing the potential for international disputes: this third principle was also supposed to be fulfilled by awarding the whole of Georges Bank to the United States, and thus, minimizing a potential source of disputes between the two States.
  - Relevant circumstances of the area. The United States identified nine geographical circumstances alleged to be relevant including: the location of the land boundary in the far northern corner of the Gulf of Maine; the general direction of the coast in the Gulf of Maine area; the coastal concavity that is the Gulf of Maine; the Northeast Channel, Georges Bank and Browns Bank and Sherman Bank on the Scotian Shelf, as special features. The United States also alleged non-geographical circumstances to be relevant: the three separate and identifiable ecological régimes associated, respectively, with the Gulf of Maine Basin, Georges Bank, and the Scotian Shelf, and the role of the Northeast Channel as a "natural boundary" between ecological régimes of Georges Bank and the Scotian Shelf, a miscellaneous collection of other State activities.

These four principles were supplemented by a broad claim by the United States of "predominant interest" over the entire Gulf of Maine, based upon a number of factors relating to defence, navigation and search and rescue activities.

Historically, the United States claimed that from the Truman Proclamation of 1945 it had maintained that the Gulf of Maine boundary must be settled by agreement between the Parties. The United States then claimed that Georges Bank fell within the United States definition of its continental shelf at the time of the Truman Proclamation, and that subsequent United States behaviour and claims were consistent with that understanding.

### **3. Reasoning of the Chamber**

242. The Special Agreement having eliminated all preliminary questions concerning jurisdiction, the Chamber noted that the only initial problem was to what extent it was bound by the starting point selected by the Parties, and concluded that it should conform to the terms defined by the Parties.

243. The Chamber noted that, as to the possibility of drawing a single boundary delimiting both the continental shelf and the fisheries or exclusive economic zones, there was no rule of international law to the contrary and there was no material impossibility in drawing a boundary of this kind.

244. The Chamber defined with greater precision the geographical area, called "the Gulf of Maine area", within which the delimitation had to be carried out. It noted that the Gulf of Maine was a broad, roughly rectangular indentation, bordered on three sides by land and on the fourth side open to the Atlantic Ocean. The Chamber observed that delimitation was not limited to the Gulf of Maine but comprised, beyond the Gulf closing line, another maritime expanse including the whole of the Georges Bank, the main focus of the dispute.

245. Then it considered the geological characteristics of the area. It noted that the Parties were in agreement on the unity and uniformity of the seabed, and that there were no geomorphological reasons for distinguishing between the respective natural prolongations of the United States and Canadian coasts in the continental shelf of the delimitation area.

246. As to the water column, the Chamber concluded that the great mass of water belonging to the delimitation area possessed the same character of unity and uniformity, which led to an impossibility to discern any natural boundary capable of serving as a basis for carrying out a delimitation of the kind requested by the Parties.

247. The Chamber rejected both Canada's contention on the "basis of title", and the United States' contention regarding primary and secondary coasts, and proceeded to summarize the prescriptions of general international law for maritime delimitation between neighbouring States as follows:

- "(i) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.
- "(ii) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result."

248. The Chamber believed that, although article 6 of the 1958 Convention would have been mandatory in respect of the delimitation of the continental shelf between Canada and the United States, there was no obligation to apply it to the delimitation of a single maritime boundary for both the continental shelf and the superjacent fishery zone.

249. As for Canada's contention about the United States' conduct concerning the Canadian continental shelf permits, it found that the doctrines of estoppel and acquiescence were unwarranted in these circumstances.

250. The Chamber stated that the criterion underlying the United States' line of 1976 was too much geared to one aspect of the present problem, i.e., avoiding the splitting of fishing banks, for it to be capable of being considered equitable in relation to the characteristics of the case. As for the 1982 line, the Chamber considered that "the method of delimitation by the perpendicular to

the coast or to the general direction of the coast might possibly be contemplated in cases where the relevant circumstances lent themselves to its adoption, but is not appropriate in cases where these circumstances entail so many adjustments that they completely distort its character."

251. Concerning the two lines adopted successively by Canada, based on the same criterion and both purported to be the result of applying the equidistance method, the Chamber recalled that the application of the equidistance method was not mandatory between the Parties, but observed that this did not imply that Canada was bound to refrain from applying any such method for drawing the boundary claim it intended to propose.

252. Finally, taking action on the question of drawing a single maritime boundary, the Chamber again stressed the unprecedented character of the delimitation that was required, and stated that such a delimitation "can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of the two objects to the detriment of the other."

253. As a result, the Chamber felt bound to turn towards "an application to the present case of criteria more especially derived from geography," this being understood to be "mainly the geography of coasts, which has primarily a physical aspect, to which may be added, in the second place, a political aspect." The configuration of the coasts of the Gulf of Maine was found to exclude any possibility that the maritime boundary could be formed by a unidirectional single line. It was therefore obvious that between Point A and the Nantucket - Cape Sable closing line, the delimitation line must comprise two segments.

254. For the first segment, belonging to the sector closest to the international boundary terminus, the Chamber drew from Point A two lines respectively perpendicular to the two basic coastal lines (from Cape Elizabeth to the international boundary terminus and from there to Cape Sable) and bisected the angle thus formed. The finishing point of the first segment was to be automatically determined by its intersection with the line containing the next segment.

255. For the second segment of the boundary, the Chamber was dealing with the "quasi-parallelism" between the coasts of Nova Scotia and Massachusetts, and realized that corrections should be made in order to take into account the difference in length between the respective coastlines of the Parties. The ratio between the coastal fronts of the two States had to be applied to a line drawn across the Gulf where the coast of Nova Scotia and Massachusetts are nearest to each other. The second segment of the boundary would begin where the corrected median line intersected the bisector drawn from Point A and ended where it intersected the Nantucket-Cape Sable closing line.

256. The third segment of the boundary is the one that actually crosses Georges Bank. Since this segment would inevitably be situated throughout its entire length in open ocean, it seemed to the Chamber "obvious that the only kind of practical method which can be considered for [delimiting the final segment] is, once again, a geometrical method," and that "the most appropriate is that recommended above all by its simplicity, namely in this instance the drawing of a perpendicular to the closing line of the Gulf." Finally, the Chamber determined the precise point on the closing line of the Gulf from which the perpendicular to that line should be drawn seawards.

257. Whether the result could be considered intrinsically equitable did not seem absolutely necessary for the first two segments of the line, since their guiding parameters were provided by geography. The third segment was the principal area at stake in the dispute because it traversed

Georges Bank. The Chamber considered that the Parties' contentions could not be taken into account as a relevant circumstance or as an equitable criterion in determining the delimitation line, and it found there was no likelihood of catastrophic repercussions for the livelihood and economic well-being of the Parties.

#### 4. Decision

258. The Judgment was rendered on 12 October 1984. By four votes to one, the Chamber held that:

"The course of the single maritime boundary that divides the continental shelf and the exclusive fisheries zones of Canada and the United States of America in the area referred to in the Special Agreement concluded by those two States on 29 March 1979 shall be defined by geodetic lines connecting the points with the following co-ordinates:

|   | <b>Latitude North</b> | <b>Longitude West</b> |
|---|-----------------------|-----------------------|
| A | 44° 11' 12"           | 67° 16' 46"           |
| B | 42° 53' 14"           | 67° 44' 35"           |
| C | 42° 31' 08"           | 67° 28' 05"           |
| D | 40° 27' 05"           | 65° 41' 59" "         |

#### 5. Separate Opinion, Dissenting Opinion

##### (a) Separate Opinion

259. **Judge Schwebel** voted for the Chamber's judgment because he agreed with the essentials of its analysis and reasoning and because he found that the resulting line of delimitation was "not inequitable". In his opinion, the Chamber was right to exclude the claims of both the United States and Canada because those claims were insufficiently grounded in law and equity.

260. The point on which Judge Schwebel disagreed was the placement of the dividing line. He felt that the adjustment applied by the Chamber was inadequate because of its treatment of the Bay of Fundy. In his opinion, a calculation of proportionality with that portion of the coast of New Brunswick, which "actually fronts upon the Gulf of Maine", should have been taken into account.

##### (b) Dissenting Opinion

261. **Judge Gros** dissented from the judgment of the Chamber. In his view, the Judgment on 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libya) brought to an end the situation resulting from the 1958 Convention on the Continental Shelf as interpreted by the Court in the 1969 Judgment on the North Sea Continental Shelf, and by the Anglo-French Court of Arbitration in its Award of 1977. This turning point amounted to exclusive reliance on the work of the Third United Nations Conference on the Law of the Sea, which produced a solution for maritime delimitation, the so-called "agreement plus equity", of which Judge Gros disapproved.

262. What today is called equitable "is no longer a decision based on law but on appraisal of the expediency of a result, which is the very definition of the arbitrary, if no element of control is conceivable". This "renders the judge's mission impossible except as a conciliator, which is a role he has not been asked to fill".

263. Finally, Judge Gros emphasized the role of equidistance in the law and believed that the boundary should be an equidistance line constructed from mainland basepoints.

## F. Maritime Boundary Delimitation Arbitration

|                               |   |
|-------------------------------|---|
| <b>Parties:</b>               | Guinea and Guinea-Bissau  |
| <b>Issues:</b>                | Delimitation; territorial water; exclusive economic zone; continental shelf; interpretation   |
| <b>Forum:</b>                 | Arbitral Tribunal composed of three members established on 14 October 1983 on the basis of a Special Agreement of 18 February 1983  |
| <b>Date of Decision:</b>      | Award of 14 February 1985   |
| <b>Published in:</b>          | <u>Reports of International Arbitral Awards</u> , Vol. XIX, pp. 148-196.  |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- McLarky, K.A., “Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary, February 14, 1985”, 11 <u>Maryland Journal of International Law and Trade</u>, Spring (1987), pp. 93-121</li> <li>- Fu, K-C., “Note on the Guinea/Guinea-Bissau Maritime Boundary Delimitation Arbitration”, 7 <u>Chinese Yearbook of International Law and Affairs</u>, (1987/88), pp. 120-123</li> <li>- Aquarone, M-C., “The 1985 Guinea/Guinea-Bissau Maritime Boundary Case and its Implications”, 26 <u>Ocean Development and International Law</u>, (1995), pp. 413-431</li> <li>- Evans, M.D., “Maritime Delimitation and Expanding Categories of Relevant Circumstances”, 40 <u>International and Comparative Law Quarterly</u> (1991), pp. 1-33</li> <li>- Willis, L.A., “From Precedent to Precedent: The Triumph of Pragmatism in the Law of Maritime Boundaries”, 24 <u>Canadian Yearbook of International Law</u> (1986), pp. 3-60</li> <li>- Evans, M.D., “Delimitation and the Common Maritime Boundary”, 64 <u>British Year Book of International Law</u> (1993), pp. 283-332</li> <li>- David, E., “La sentence arbitrale du 14 février 1985 sur la délimitation de la frontière maritime Guinée/Guinée-Bissau”, <u>Annuaire Français de Droit International</u>, (1985), pp. 350-389</li> </ul> |

### 1. Facts

264. On 12 May 1886, France and Portugal signed a Convention for the delimitation of their respective possessions in West Africa.<sup>9</sup>

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<sup>9</sup> The final paragraph of Article I of the 1886 Convention states that: “Portugal will possess all the islands included between the meridian of Cape Roxo, the coast and the southern limit formed by a line following the thalweg of the Cajet River, and then turning towards the south-west across the Pilots Passage, where it reaches 10° 40' north latitude, and follows it as far as the meridian of Cape Roxo”.

265. Article I of the Convention posed no difficulty until 1958, when Portugal granted an oil concession to a foreign company. Portugal, and later Guinea and Guinea-Bissau, proceeded to issue laws and decrees defining their territorial waters. Consequently, the maritime areas over which Guinea and Guinea-Bissau claimed to exercise jurisdiction overlapped.

266. Negotiations were initiated between the Parties and resulted in the adoption of a Special Agreement on 18 February 1983 for the delimitation of their maritime territories by arbitration. An arbitral tribunal was established on 14 October 1983.

## 2. Issues

### (a) Questions before the Arbitral Tribunal

- (i) Whether the Franco-Portuguese Convention of 12 May 1886 determined the maritime boundary between the French and Portuguese possessions in West Africa;
- (ii) What legal significance was to be attached to the additional protocols and documents of the 1886 Convention for the purpose of interpreting the Convention?
- (iii) What course should be followed by the single line delimiting the territorial waters, the exclusive economic zones and the continental shelves appertaining respectively to Guinea-Bissau and to Guinea?

### (b) Arguments presented by the Parties

The Parties agreed that, even if they were not Parties to the 1969 Vienna Convention on the Law of Treaties, articles 31 and 32 of the Convention were the relevant rules of international law governing the interpretation of the 1886 Convention.

As for the question of delimitation of the maritime boundary, the Parties agreed that the Arbitral Tribunal should have regard to customary international law, judgments and arbitral awards and conventions concluded under the auspices of the United Nations.

(i) **Guinea asserted that:**

- The "southern limit" not only established which islands belonged to Portugal, but also represented a general maritime boundary;
- The delimitation should be sought by applying the "southern limit" of the 1886 Convention, extending it as far as might be necessary, beyond the meridian of Cape Roxo until the 200-mile limit.

(ii) **Guinea-Bissau contended that:**

- The only purpose of the "southern limit" mentioned in the 1886 Convention was to designate the islands belonging to Portugal;
- Guinea-Bissau then argued that the delimitation should be an equidistance line, starting from the low-water mark of the coasts of the Parties.

### 3. Reasoning of the Arbitral Tribunal

267. The Arbitral Tribunal noted that the 1886 Convention remained in force between France and Portugal until the end of the colonial period, and then became binding as between Guinea and Guinea-Bissau by virtue of the principle of *uti possidetis*. The Tribunal proceeded to interpret the terms of the last paragraph of article I of the Convention in accordance with the provisions of the 1969 Vienna Convention on the Law of Treaties to which both Parties agreed. The Tribunal found that the meaning of "limit" was uncertain, although it was clear from the facts submitted that until the dispute arose neither France, Portugal, Guinea or Guinea-Bissau interpreted the last paragraph of article I of the 1886 Convention as having established a maritime boundary.

268. The Tribunal recalled that in the minutes of the negotiations of 1885-1886, there was no reference to the delimitation of territorial waters, except in a proposed draft text of the last paragraph of article I, which was submitted suddenly by France and was immediately withdrawn at the request of Portugal. As no explanation was given in the minutes for the submission and withdrawal of this draft, the Tribunal considered that the two States did not intend to fix a general maritime boundary.

269. As for the course of the delimitation line, the Tribunal noted that both Parties took the view that customary international law was enshrined in the recent 1982 United Nations Convention on the Law of the Sea, even though it was not yet in force. The Tribunal observed that, according to article 74, paragraph 1, and article 83, paragraph 1, of the Convention, the aim of any delimitation process is to achieve an equitable solution having regard to the relevant circumstances. In order to ensure that the delimitation rests on an equitable and objective basis, every effort must be made to guarantee that each State controls the maritime areas situated in front of its coast and in proximity to them.

270. The coastline in question was easy to define, since it comprised the whole of the coasts of the two countries from Cape Roxo, which marks the boundary of Guinea-Bissau with Senegal, as far as Point Sallatouk, where Sierra Leone begins. However, there was no maritime boundary that could be taken into account at either of these extreme points, since there was an ongoing dispute in relation to the first, and as far as the second was concerned, there was only a unilateral delimitation on the part of Guinea. Moreover, there were numerous islands, some of which were coastal, others belonging to the Bijagos Archipelago and others scattered. In these circumstances, the most relevant factor was the general configuration and direction of the coastline, including the islands.

271. The Tribunal observed that, taken together, the coasts of the two countries, including islands, were concave, with the effect that the equidistance line would cut off Guinea's maritime area in front of its coast and would tend to enclave it between the maritime areas belonging to Guinea-Bissau and Sierra Leone. As for the "southern limit", the Tribunal concluded, in reply to the first question, that it did not establish a maritime boundary. Even if it did establish a maritime boundary, seaward of Alcatraz it would produce a cut-off effect and might well lead to an enclavement, which would operate to the detriment of Guinea-Bissau.

272. For these reasons, the Tribunal, passing from the short coastline to the long coastline, decided to focus upon the entire West African region. It concluded that an equitable delimitation in this case had to be carried out by following a direction that took overall account of the convex

shape of the West African coastline and would be adaptable to the pattern of present or future delimitations in the region. After investigating various methods of taking account of the general configuration of the western coast of Africa, the Tribunal observed that a coastal front proceeding in a straight line from Almadies Point in Senegal to Cape Shilling in Sierra Leone would most faithfully reflect this situation.

273. Thus an equitable delimitation could be derived by first pursuing the "southern limit" (Pilots Passage and the parallel 10° 40' N) to 12 miles west of Alcatraz, and then, to the south west, a straight line broadly perpendicular to the Almadies-Shilling line.

274. The Tribunal considered that an examination of the other circumstances invoked in this case by the Parties should not call into question whether its decision had achieved an equitable result. There was no possibility of invoking any feature based on the concept of natural prolongation of the land territory of either State since the continental shelves of Guinea and Guinea-Bissau comprise a single whole, without sufficiently marked divisions. The rule of proportionality, applied between the extent of maritime areas to be allocated and the length of the coastline, does not permit either of the Parties to claim any additional advantage since when the general direction of the coasts of the two countries, including islands, is taken as a basis, they must be treated for delimitation purposes as both having the same length. Finally, the Tribunal considered that economic factors were not of a sufficiently durable nature to be taken into account for delimitation purposes. The Tribunal merely emphasised that economic concerns should motivate the Parties to practice mutually beneficial co-operation with a view to attaining their right to development.

#### 4. Award

275. The arbitral Award was rendered on 14 February 1985. The Tribunal unanimously held that:

- (a) The 1886 Convention between France and Portugal did not establish a maritime boundary between their respective possessions in West Africa;
- (b) The additional protocols and documents played an important part in the interpretation of the above-mentioned Convention; and
- (c) The line delimiting the maritime areas appertaining respectively to the Republic of Guinea-Bissau and the Republic of Guinea:

- Starts at the intersection of the Cajet thalweg and the meridian longitude 15° 06' 30" west;
- Connects, by means of loxodromes, the following points:

|   | Latitude north | Longitude west |
|---|----------------|----------------|
| A | 10° 50' 00"    | 15° 09' 00"    |
| B | 10° 40' 00"    | 15° 20' 30"    |
| C | 10° 40' 00"    | 15° 34' 15"    |

- Follows a loxodrome on a bearing of 236° from point C above to the outer limit of the maritime territories that are recognized under general international law as appertaining to each State.

## G. Case concerning the Continental Shelf

|                               |  |
|-------------------------------|--|
| <b>Parties:</b>               | Libyan Arab Jamahiriya and Malta   |
| <b>Issues:</b>                | Delimitation; continental shelf; equity  |
| <b>Forum:</b>                 | International Court of Justice (ICJ)   |
| <b>Date of Decision:</b>      | Judgment of 3 June 1985  |
| <b>Published in:</b>          | <p><u>ICJ: Reports of Judgments, Advisory Opinions and Orders</u>, 1985,<br/>pp. 12-187</p> <p><u>International Law Reports</u>, Vol. 81, pp. 238 and 726</p>  |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- McGinley, G.P., “Intervention in the International Court: the Libya/Malta Continental Shelf Case”, 34 <u>International and Comparative Law Quarterly</u> (1985), pp. 671-694</li> <li>- Brown, E.D., “The Libya-Malta Continental Shelf Case (1985)”, <u>Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on his Eightieth Birthday</u>, Stevens &amp; Sons, London, 1988, pp. 3-18</li> <li>- Decaux, E., “L’Arrêt de la Cour internationale de Justice dans l’affaire du plateau continental (Libye c. Malte): arrêt du 3 juin 1985”, 31 <u>Annuaire Français de Droit International</u> (1985), pp. 294-323</li> <li>- Conforti, B., “L’Arrêt de la Cour internationale de Justice dans l’affaire de la délimitation du plateau continental entre la Libye et Malte”, 90 <u>Revue Générale de Droit International Public</u> (1986), pp. 313-343</li> <li>- Leigh, M., “Case Concerning the Continental Shelf (Libya/Malta)”, 80 <u>American Journal of International Law</u> (1986), pp. 645-648</li> <li>- Kwiatkowska, B., “Judge Shigeru Oda’s Opinions in Law-of-the-Sea Cases: Equitable Maritime Delimitation”, 36 <u>German Yearbook of International Law</u> (1993), pp. 225-294</li> <li>- Willis, L.A., “From Precedent to Precedent: The Triumph of Pragmatism in the Law of Maritime Boundaries”, 24 <u>Canadian Yearbook of International Law</u> (1986), pp. 3-60</li> <li>- McDorman, T., “The Libya-Malta Case: Opposite States Confront the Court”, 24 <u>Canadian Yearbook of International Law</u> (1986), pp. 335-367</li> <li>- Evans, M.D., “Delimitation and the Common Maritime Boundary”, 64 <u>British Year Book of International Law</u> (1993), pp. 283-332</li> </ul> |

## 1. Facts

276. On 23 May 1976, a Special Agreement was signed between the Socialist People's Libyan Arab Jamahiriya and the Republic of Malta providing for the submission to the Court of a dispute concerning the delimitation of the continental shelf between the two States.

277. The Parties were broadly in agreement as to the sources of the law applicable to the case, but disagreed as to the way in which the Court was to indicate the practical application of those principles and rules. Malta wished the Court to draw the delimitation line, while Libya wanted it only to pronounce itself on the applicable principles and rules.

278. Having examined the intention of the Parties to the Special Agreement, from which its jurisdiction derived, the Court considered that it was not barred by the terms of the Special Agreement from indicating a delimitation line.

279. The delimitation contemplated by the Special Agreement related only to the areas of continental shelf that appertained to the Parties, to the exclusion of areas which might appertain to a third State. Although the Parties had in effect invited the Court not to limit its Judgment to the area in which theirs were the sole competing claims, the Court did not consider itself free to do so, especially in view of the interest shown in the proceedings by Italy, which in 1984 submitted an application for permission to intervene under article 62 of the Statute. The Court had rejected this application.

## 2. Issues

### **(a) Questions before the Court**

- (i) What principles and rules of international law are applicable to the delimitation of the area of the continental shelf that appertains to the Republic of Malta and the area of the continental shelf that appertains to the Libyan Arab Jamahiriya?
- (ii) How in practice can the two Parties, in this particular case, apply such principles and rules in order that they may, without difficulty, delimit the areas concerned by agreement?

### **(b) Arguments presented by the Parties**

Since only Malta was a Party to the 1958 Geneva Convention on the Continental Shelf, the Parties agreed that the Convention, in particular article 6, was not applicable in the relations between them. Both Parties had signed the 1982 Convention on the Law of the Sea, but that Convention had not entered into force, and it was therefore not operative as treaty law. Furthermore, the Special Agreement contained no provisions as to the substantive law applicable. Therefore, the Parties agreed that the dispute was to be governed by customary international law. The Parties agreed as well that some of the provisions of the 1982 Convention constituted, to a certain extent, the expression of customary international law in the matter. However, the Parties did not agree on identifying the provisions that had such a status nor the extent to which they were so treated.

The Parties agreed that the delimitation of the continental shelf was to be effected in accordance with equitable principles and taking into account all relevant circumstances in order to achieve an equitable result.

The fact that Malta constitutes an island State gave rise to some argument between the Parties as to the treatment of islands in continental shelf delimitation. The Parties agreed that the entitlement to continental shelf was the same for an island as for the mainland. Libya insisted that, for this purpose, no distinction should be made between an island State and an island politically linked to a mainland State. Malta explained that it did not claim any privileged status for island States; but that it distinguished for purposes of shelf delimitation between island States and islands politically linked to a mainland State.

- (i) **Libya.** The fundamental basis of legal title to continental shelf areas is the principle of natural prolongation.

Libya pointed out that this case was only concerned with the delimitation of the continental shelf. It contended that the "distance principle" was not a rule of positive international law with regard to the continental shelf and that the "distance criterion" was inappropriate for application in the Mediterranean. Libya reminded the Court that the continental shelf had not been absorbed by the concept of the exclusive economic zone. According to Libya, the 1982 United Nations Convention on the Law of the Sea, and particularly article 78, maintained the disassociation of the legal régime of the continental shelf, the seabed and subsoil, from the régime of the superjacent waters.

Libya then advanced the argument of the existence of a "rift zone" in the region of the delimitation. From its contention that the natural prolongation, in the physical sense, of the land territory into the sea was still a primary basis of title to continental shelf, it would follow that, if there existed a fundamental discontinuity between the shelf area adjacent to one Party and the shelf area adjacent to the other, the boundary should lie along the general line of that fundamental discontinuity. According to Libya, there were two distinct continental shelves divided by a rift zone and it was "within and following the general direction of rift zone" that the delimitation should be carried out.

Libya also argued that geographical considerations included the landmass behind the coast in the sense that the landmass provided the factual basis and legal justification for the State's entitlement to continental shelf rights, a State with a greater landmass having a more intense natural prolongation.

Finally, Libya attached great importance to proportionality and placed particular reliance upon the 1982 Judgment of the Court in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya). It contended that the delimitation in the present case should reflect a reasonable degree of proportionality, which would be achieved by a delimitation carried out in accordance with equitable principles, between the extent of the continental shelf areas appertaining to the respective States and the lengths of the relevant parts of their coasts.

- (ii) **Malta.** According to Malta, prolongation should no longer be defined by reference to physical features, geological or bathymetric, but by reference to a certain distance from the coast.

Malta relied on the genesis of the exclusive economic zone concept and its inclusion in the 1982 Convention as confirming the importance of the "distance principle" in the law of the continental shelf and the detachment of the concept of the shelf from any criterion of physical prolongation. For Malta, the reference to distance in article

76 of the 1982 United Nations Convention on the Law of the Sea represented a consecration of the "distance principle".

Relying upon the "distance principle", Malta argued that the new importance of the idea of distance, for the purposes of delimitation of the continental shelf between opposite coasts, had conferred primacy on the method of equidistance. Malta considered that the distance principle required that, as a starting point of the delimitation process, consideration be given to an equidistance line, subject to verification of the equitableness of the result achieved by this initial delimitation. Malta then contended that the relevant equitable considerations to assess the equitableness of the delimitation included economic factors (absence of energy resources in the island of Malta, range of its established fishing activity), security and defence interests.

Malta also invoked the principle of sovereign equality of States as an argument in favour of the equidistance method pure and simple. It observed that since all States are equal and equally sovereign, the maritime extensions generated by the sovereignty of each State must be of equal juridical value, whether or not the coasts of one State are longer than those of the other.

### **3. Reasoning of the Court**

280. The Court found that, as to the law applicable to the delimitation of areas of shelf between neighbouring States, which is governed by article 83 of the 1982 Convention, the Convention sets a goal to be pursued, namely "to achieve an equitable solution" but is silent as to the method to achieve it.

281. In the view of the Court, the principles and rules underlying the régime of the exclusive economic zone could not be left out of consideration in the present case, the two concepts - continental shelf and exclusive economic zone - being linked together in modern law. Since the right enjoyed by a State over its continental shelf would also be possessed by it over the seabed and subsoil of any exclusive economic zone which it might proclaim, one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone appertaining to that same State. From practical and juridical reasons, it followed that the distance criterion must apply to the continental shelf as well as to the exclusive economic zone. The Court was thus unable to accept the Libyan contention that distance from the coast was not a relevant element for the decision of the present case.

282. The Court considered that the "rift zone" could not constitute a fundamental discontinuity terminating in a southward extension of the Maltese shelf and a northward extension of the Libyan as if it were some natural boundary. According to law, a State has the right to claim a continental shelf up to as far as 200 miles from its coast and, whatever the geological characteristics of the corresponding seabed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance.

283. The Court was unable to accept that the equidistance method had to be used, even as a preliminary or provisional step towards the drawing of a delimitation line. According to the Court, a coastal State might be entitled to continental shelf rights by reason of distance from the coast and irrespective of the physical characteristics of the intervening seabed and subsoil, but it would not entail that the equidistance should be the only appropriate method of delimitation. The application of equitable principles in the particular relevant circumstances might still have required the adoption of another method or combination of methods of delimitation, even from the outset. The Court considered State practice as well and found that it fell short of proving the existence of a rule prescribing the use of equidistance, or indeed of any method, as obligatory.

284. The Court rejected the Libyan argument that the landmass provided the legal justification of entitlement to continental shelf rights. It also did not subscribe to the Maltese contentions that a delimitation should be influenced by the relative economic position of the two States in question. Regarding the security or defence interests, the Court noted that the delimitation which would result from the judgment was not so near to the coast of either Party as to make questions of security a particular consideration in the present case. The Court rejected Malta's argument derived from the sovereign equality of States, whereby the maritime extensions generated by the sovereignty of each State must be of equal juridical value, whatever the length of the coasts. The Court considered that if coastal States have an equal entitlement, *ipso jure* and *ab initio*, to their continental shelves, this did not imply equality in the extent of these shelves. Furthermore, the reference to the length of coasts as a relevant consideration could not be excluded *a priori*.

285. As to the "proportionality argument", the Court recalled that according to the jurisprudence, proportionality was one possibly relevant factor among several others to be taken into account, without ever being mentioned among the "principles and rules of international law applicable to delimitation".

286. The Court considered that a median line between the coasts of Malta and Libya, by way of a provisional step, was the most judicious manner of proceeding with a view to the eventual achievement of an equitable result with the requirements derived from other criteria, which might call for an adjustment of this initial result. It compared this with the requirements derived from other criteria, which might call for an adjustment of this initial result.

287. The Court then proceeded to adjust the equidistance line. Among the relevant circumstances to be taken into account, the Court developed that of the significant difference between the lengths of the coasts of each Party, which justified the adjustment of the median line so as to attribute a larger shelf area to Libya.

288. The Court therefore found it necessary to adjust the delimitation line so as to lie closer to the coasts of Malta. The coasts of the Parties being opposite to each other and the equidistance line lying broadly west to east, this adjustment was achieved by transposing the line in a northward direction. The Court then established what should be the extreme limit of such a transposition. The Court concluded that it was reasonable to assume that an equitable boundary between Libya and Malta must be to the south of a median line between Libya and Sicily and decided that the equitable boundary line was produced by transposing the median line northward through 18' of latitude.

289. Finally, there remained the aspect, which the Court in its Judgment in the North Sea Continental Shelf Cases called "the element of a reasonable degree of proportionality ... between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast". In the view of the Court, there was no reason of principle why the test of proportionality, more or less in the form in which it was used in the Tunisia/Libya case, namely the identification of "relevant coasts", the identification of "relevant areas" of continental shelf, the calculation of the mathematical ratios of the lengths of the coasts and the areas of shelf attributed and finally the comparison of such ratios, should not be employed to verify the equity of a delimitation between opposite coasts just as well as between adjacent coasts.

290. The conclusion reached by the Court was that there was no evident disproportion in the areas of shelf attributed to each of the Parties respectively such that it could be said that the requirements of the test of proportionality as an aspect of equity were not satisfied.

#### 4. Decision

291. The Judgment was rendered on 3 June 1985. By fourteen votes to three, the Court held that "with reference to the areas of continental shelf between the coasts of the Parties within the limits defined in the present Judgment, namely the meridian 13° 50' E and the meridian 15° 10' E:

"A. The principles and rules of international law applicable for the delimitation, to be effected by agreement in implementation of the present Judgment, of the areas of continental shelf appertaining to the Socialist People's Libyan Arab Jamahiriya and to the Republic of Malta respectively are as follows:

- (1) the delimitation is to be effected in accordance with equitable principles and taking account of all relevant circumstances, so as to arrive at an equitable result;
- (2) the area of continental shelf to be found to appertain to either Party not extending more than 200 miles from the coast of the Party concerned, no criterion for delimitation of shelf areas can be derived from the principles of natural prolongation in the physical sense.

"B. The circumstances and factors to be taken into account in achieving an equitable delimitation in the present case are the following:

- (1) the general configuration of the coasts of the Parties, their oppositeness, and their relationship to each other within the general geographical context;
- (2) the disparity in the lengths of the relevant coasts of the Parties and the distance between them;
- (3) the need to avoid in the delimitation any excessive disproportion between the extent of the continental shelf areas appertaining to the coastal State and the length of the relevant part of its coast, measured in the general direction of the coastlines.

"C. In consequence, an equitable result may be arrived at by drawing, as a first stage in the process, a median line every point of which is equidistant from the low-water mark of the relevant coast of Malta (excluding the islet of Filfla), and the low-water mark of the relevant coast of Libya, that initial line being then

subject to adjustment in the light of the above-mentioned circumstances and factors.

"D. The adjustment of the median line referred to in subparagraph (c) above is to be effected by transposing that line northwards through 18' of latitude (so that it intersects the meridian 15° 10' E at approximately latitude 34° 30' N) such transposed line then constituting the delimitation line between the areas of continental shelf appertaining to the Socialist People's [Libyan] Arab Jamahiriya and to the Republic of Malta respectively."

## 5. Declaration, Separate Opinions, Dissenting Opinions

### (a) Declaration

292. **Judge El-Khani** voted in favour of the Judgment. However, he felt that a reasonable degree of proportionality, taking into account the lengths of the coasts of the two Parties, should have produced a line lying further north.

### (b) Joint Separate Opinion of Judges Ruda and Bedjaoui and Judge ad hoc Jiménez de Aréchaga

293. Judges **Ruda, Bedjaoui and Jiménez de Aréchaga** agreed with many of the findings and conclusions of the Court's Judgment. However, certain aspects of the case compelled them to make some observations. The first one was inspired by the complete absence in the Judgment of any reaction in respect of Malta's claim based on the principle of a radial projection of its coast in all directions, which would have the shape of a trapezium extending towards Benghazi on the Libyan coast of Cyrenaica. According to the three Judges, the Court should have found a way to state its opinion on that contention and not avoid any pronouncement on this claim on the ground that it extended beyond the area where the Court was found to have jurisdiction. The second one was based on the need felt by the Judges to deal with an argument advanced by Malta: "if Malta did not exist Libya could not reasonably claim a continental shelf extending beyond a line equidistant between its coasts and those of Italy ... should the presence of Malta operate in such a way as to give Libya the advantage of pushing its claim very substantially to the north of that line?" Following those two observations, Judges Ruda, Bedjaoui and Jiménez de Aréchaga developed an analysis of the case based on four concepts:

- (1) The reasoning of the trapezium;
- (2) The fictitious line between Italy and Libya;
- (3) The comparison in the length of the coasts;
- (4) The application of the proportionality test.

### (c) Separate Opinions

294. **Vice-President Sette-Camara**, however, convinced that an equitable solution was fully achieved by the Judgment, felt it necessary to explain his reservations concerning some aspects of the reasoning of the Court. First, Judge Sette-Camara stressed the extreme importance of the definition of the relevant coastlines since the Judgment considered the disproportion in the lengths of the coasts as a special circumstance requiring correction of the equidistance line. Then he recalled that equidistance had always been found to be a useful technical method for

delimitation. Judge Sette-Camara tried to “fill the gap” of the Judgment concerning the history of the evolution of the concept of continental shelf in order to draw up a marginalia of the important findings of the Court as a significant background for considerations of the more recent achievements in the field of treaty law. He criticized the excursus of the Judgment on the exclusive economic zone, as, in his view, it was unnecessary and did not contribute to the clarity of the reasoning. He also criticized the principle of proportionality as having been retained only for its normal *a posteriori* use to test the equity of the final result.

295. **Judge Mbaye** advanced two main observations in his separate opinion. The first was a comment on the Court’s finding as to the two meanings attributed by customary law to the concept of natural prolongation. According to him, the principle of natural prolongation in Article 76 of the 1982 Convention is a purely legal concept while, in the physical sense, natural prolongation finds concrete expression in the outer edge of the continental margin. Secondly, Judge Mbaye felt he had to depart from the Court’s decision relating to “the considerable distance between the coasts” of the two Parties. In his view, the distance between the coasts of the Parties could not instigate or justify the correction of the median line initially drawn by the Court as a provisional step in the delimitation.

296. **Judge ad hoc Valticos** concurred with the Judgment as a whole, but wished to express some reservations as to part of the Court’s reasoning and findings. Points on which Judge Valticos agreed were the interest of third Parties and the role of geological and geomorphological features. However, he had reservations concerning:

- (a) The criterion of the “median line”. According to Judge Valticos, a number of reasons existed for choosing the median line as a delimitation line, not merely on a provisional basis, but also on a final basis;
- (b) The “proportionality” factor and the circumstances of the “length of the coasts”. In Judge Valticos’ opinion, since the case did not relate to adjacent coasts or to any abnormal configuration, no part should have been played by proportionality. Moreover, the proportionality calculation seemed difficult to make with accuracy;
- (c) The distance between the coasts;
- (d) The role of certain other “relevant circumstances”. Judge Valticos also addressed two circumstances mentioned during the proceedings: economic factors and security;
- (e) The delimitation area.

#### **(d) Dissenting Opinions**

297. In his dissenting opinion, **Judge Mosler** considered that the Court should have defined in geographical terms the area relevant to the delimitation and the area in dispute between the Parties. He held that the question as to which areas of the Central Mediterranean are subject to the delimitation between the Parties was explicitly left open. In his view, this should have been addressed by an assessment of the geographical relationship between the coasts of the Parties. He held as well that the determination of the Court, as a consequence of the Italian intervention, that it was without competence to deal with the Italian claims, did not dispense the Court from examining the geographical relationship of the Libyan and Maltese coasts in the whole region.

298. Judge Mosler agreed with the delimitation method of the Judgment and considered that the median line was the normal method of arriving at an equitable result, not only as the first step in the delimitation process, but also as a rule as its final result, except when particular

circumstances required a correction. However, he could not see any convincing reason for the Court to depart from the median line and arrive at an overall shift of 18 minutes northwards. His view was that the particular geographical circumstances alleged (comparison of the lengths of the respective coasts and the special geographic position of the small Maltese Island in the Central Mediterranean) had not been taken into account on the basis of calculable criteria, but on the basis of unspecified impressions of equitableness.

299. In Judge Oda's view, the Court had not fully grappled with the recent developments in the law of the sea and was in danger of identifying the principle of equity with its own subjective sense of what is equitable in a particular case. He found that the Judgment was mistaken in confining its task to a narrow area, merely in order to avoid interfering with a third State's claim, which had not been judicially established. Furthermore, the Judgment's employment of a proportionality test to verify the equity of the suggested delimitation was paradoxical. The adjustment or transposition of the Libya/Malta median line so as to shift it northwards appeared to Judge Oda to be groundless. Despite the Judgment's professing to have taken the Libya/Malta median line as an initial or provisional delimitation, the final line suggested as a consequence of the 18-minute shift was devoid of all the properties inherent in the concept of equidistance. Thus, the resultant line could not properly be regarded as an adjusted median. In effect, the technique of the Judgment had involved viewing the entire territory of one Party as a special circumstance affecting a delimitation (Sicily/Libya), which the Court had no call to make and which excluded that third Party. To clarify his criticisms, he analysed the relevant sections of previous Judgments (*Continental Shelf Tunisia/Libya and Gulf of Maine Case*) as well as the "proportionality" test as originally mentioned in the *North Sea Continental Shelf cases*. Judge Oda remained of the view that the "equidistance/special-circumstances rule" indicated in the 1958 Geneva Continental Shelf Convention was still part of international law and, furthermore, that the role of special circumstances, if not to justify any substitute for the equidistance line, was to enable the bases of that line to be rectified with a view to the avoidance of any distorting effect.

300. **Judge Schwebel** dissented from the Judgment in two respects. In his view, the delimitation line, laid down by the Court, was unduly truncated to defer to the claims of Italy. The Court granted Italy what it would have achieved if its request to intervene had been granted and, once granted, if Italy had established to the Court's satisfaction "the areas over which Italy has rights and those over which it has none". Judge Schwebel remained therefore convinced that the Court's decision to deny Italy's request to intervene was an error. Secondly, in his opinion, the line drawn by the Court was not a median line between the opposite coasts of Libya and Malta, but a "corrected" median line, which was incorrect since it was inadequately justified by the applicable principles of law and equity. Judge Schwebel could not subscribe to the "relevant circumstances" (disparity in the lengths of the coasts; distance between the coasts; sparsity of basepoints, which control the course of a median line; general geographical context) invoked by the Court as a justification for its conclusion. According to him, the relevance of those circumstances was not demonstrated; authority for them in conventional or customary international law, in judicial or arbitral decisions or in State practice was not shown.

## H. Delimitation of Maritime Areas Arbitration

|                               |   |
|-------------------------------|---|
| <b>Parties:</b>               | Canada and France (Saint Pierre and Miquelon)   |
| <b>Issues:</b>                | Maritime delimitation; opposite or adjacent coastlines; treaties; enclave and frontal projection theories; principle of proportionality; equidistance; fisheries; mineral resources; equity; dependant territories  |
| <b>Forum:</b>                 | Court of Arbitration constituted under an Agreement of 30 March 1989  |
| <b>Date of Decision:</b>      | 10 June 1992  |
| <b>Published in:</b>          | 31 <u>International Legal Materials</u> (1992), pp. 1145-1219<br><br>96 <u>Revue Générale de Droit International Public</u> (1992), pp. 673-751   |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Cole, C.V., "The St. Pierre and Miquelon maritime boundary case and the relevance of ancient treaties", 31 <u>Canadian Yearbook of International Law</u> (1993), pp. 265-281</li> <li>- Blakeslee, M.R., "The distant island problem: the arbitration on the delimitation of the maritime zones around the French collectivité territoriale of Saint-Pierre-and-Miquelon", 21 <u>Georgia Journal of International and Comparative Law</u> (1991), pp. 359-385</li> <li>- de La Fayette, Louise, "The award in the Canada-France maritime boundary arbitration". <u>International Journal of Marine and Coastal Law</u> (1993), pp. 77-103</li> <li>- Highet, D.J., "Delimitation of the Maritime Areas between Canada and France", 87 <u>American Journal of International Law</u> (1993), pp. 452-464</li> <li>- Charney, J.I., "Progress in International Maritime Boundary Delimitation Law", 88 <u>American Journal of International Law</u> (1994), pp. 227-256</li> <li>- Evans, M.D., "Less Than an Ocean Apart: The St. Pierre and Miquelon and Jan Mayen Islands and the Delimitation of Maritime Zones", 43 <u>International and Comparative Law Quarterly</u>, (1994), pp. 678-696</li> <li>- Fabri, H.R., "Sur la délimitation des espaces maritimes entre le Canada et la France: sentence arbitrale du 10 juin 1992", 97 <u>Revue Générale de Droit International Public</u> (1993), pp. 67-106</li> <li>- Zoller, E., "L'affaire de la délimitation des espaces maritimes entre le Canada et la République française (décision du 10 juin 1992)", 38 <u>Annuaire Français de Droit International</u> (1992), pp. 480-500</li> </ul> |

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|  | <ul style="list-style-type: none"> <li>- Hornby, R., Hughes, V., "L'affaire de la délimitation maritime Canada/France", 30 <u>Canadian Yearbook of International Law</u> (1992), pp. 3-41</li> <li>- Dipla, H., "La sentence arbitrale du 10 juin 1992 en l'affaire de la délimitation des espaces maritimes entre le Canada et la France", 121(3) <u>Journal du Droit International</u>, (1994), pp. 653-669</li> <li>- Vignes, D., " 'Le procès-verbal d'application de l'accord relatif aux relations réciproques entre la France et le Canada en matière de pêche du 27 mars 1972', signé le 2 décembre 1994, conséquence de la décision arbitrale du 10 juin 1992 (Saint-Pierre-et-Miquelon)", 41 <u>Annuaire Français de Droit International</u> (1995), pp. 728-741</li> </ul> |
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## 1. Facts

301. Saint Pierre and Miquelon are two small French islands close to the Canadian coast, south of the Canadian island of Newfoundland, and east of the Canadian island of Cape Breton and the coast of mainland Nova Scotia. There are numerous bays and many small islands and islets lying off the coasts and the area is open to the Atlantic Ocean to the east and south. In 1966, by exchange of notes, France and Canada made known their positions concerning delimitation of the continental shelf between Canada and St. Pierre and Miquelon. The Parties adopted differing positions as to the criteria that should govern the demarcation line between offshore areas under respective Canadian and French jurisdiction. France considered that the delimitation of the continental shelf should be based on the principle of equidistance while Canada claimed that the "special circumstances" rule was applicable. From 1967, the Parties engaged in difficult negotiations which did not succeed, even though both Governments made genuine attempts to reach a compromise.

302. In 1970, Canada extended its territorial sea to 12 nautical miles. France did the same in 1971. In 1977, Canada and France extended their maritime jurisdictions up to 200 nautical miles from their respective coasts. Canada declared the 200-mile zone extending along its coasts as an exclusive fishing zone and France declared the zone extending 188 miles beyond the territorial waters of Saint Pierre and Miquelon to be an economic zone under its jurisdiction.

303. On 27 March 1972, the Parties signed the Agreement on their Mutual Fishing Relations. On 3 October 1980, they signed a document based on this Agreement dealing with the annual catch French ships were permitted to take in Canadian waters during the period 1981-1986. Yet, in the mid-1980s a new dispute arose between the Parties: Canada accused France of fishing in excess of the allowable quota, and France accused Canada of using management practices to deprive it of its fisheries rights.

304. In January 1987, facing the impossibility of settling the dispute and given the urgent need for a settlement, the Parties agreed to negotiate an arbitration agreement. The Agreement establishing the Court of Arbitration was signed on 30 March 1989. With the assistance of a mediator, Mr. Enrique Iglesias, the Parties agreed on temporary fishing quotas during the proceedings.

305. The Court was composed of five arbitrators: Mr. Eduardo Jiménez de Aréchaga (President), Mr. Prosper Weil (appointed by the French Government), Mr. Allan E. Gotlieb (appointed by the Canadian Government), Mr. Gaetano Arangio-Ruiz and Mr. Oscar Schachter.

306. The Court first met at Santiago de Compostela, Spain, on 7 September 1989. At this meeting, and in accordance with article 5 (2) of the 1989 Agreement, the Court, in consultation with the Agents of the Parties, appointed Mr. Felipe H. Paolillo as Registrar and Cdr. P.B. Beazley as Expert. Both Parties filed memorials on 1 June 1990 and counter-memorials on 1 February 1990. The Court of Arbitration rendered its decision on 10 June 1992.

## 2. Issues

### **(a) Questions before the Court**

The Parties defined the mission of the Court in article 2 of the 1989 Agreement. The Court was to delimit, as between the Parties, the maritime areas south of Newfoundland and on all sides of Saint Pierre and Miquelon appertaining to France and appertaining to Canada, in accordance with the principles and rules of international law applicable in the matter. The delimitation was to be effected from point 1 to point 9 of the delimitation referred to in Article 8 of the Agreement of March 27, 1972.

### **(b) Arguments presented by the Parties**

Both Canada and France asked the Court to declare and adjudge that the delimitation of the maritime area be defined in a specific manner.

- (i) **Canada** invoked the principles of non-encroachment and proportionality to delimit the respective zones and favoured a projection of not more than 12 miles from the coast of Saint Pierre and Miquelon, except where the coast was opposite to Newfoundland where the median line would apply.
- (ii) **France** considered that the Court had to respect the sovereign equality of States and the equal capacity of islands as well as the mainland to generate maritime areas up to the 200-mile limit. France considered that the equidistance method combined with the "relevant circumstances" rule would permit the delimitation of the area while respecting the two principles. France also asked the Court to determine the limits of the continental shelf beyond 200 miles. However, the Court declared itself incompetent to carry out a delimitation that would affect the rights of a Party that was not appearing before it. According to the 1982 United Nations Convention on the Law of the Sea article 76 (8) and Annex II, only the "Commission on the Limits of the Continental Shelf" is competent to make such a determination since a delimitation does not concern only the Parties, but also the international community.

## 3. Reasoning of the Court of Arbitration

307. The Court did not agree with the contradictory argumentation of the Parties. Indeed, the Court considered that both countries applied the criteria that suited them. Thus, the Court pointed out that while France claimed that the principle of equality of States had to apply, it denied any seaward projection to important segments of the southern coast of Newfoundland. Similarly,

Canada invoked the principle of non-encroachment and tried to avoid a cut-off of its coastal projections towards the south and west, while denying any projection beyond the territorial sea to the coastal openings of Saint Pierre and Miquelon towards the south and the west. Consequently, the Court decided to disregard the solutions proposed by the Parties and relied on the International Court of Justice's *Gulf of Maine* decision, asserting: "that it must undertake this final stage of the task entrusted to it and formulate its own solution independently of the proposals made by the Parties" (ICJ Reports, 1984, para. 190).

308. As regards the principles or criteria invoked by France and Canada, the Court asserted that:

(a) Article 6 (equidistance rule) of the 1958 Geneva Convention on the Continental Shelf invoked by France was not mandatory. The Court rejected the French interpretation of this article and emphasized that doing otherwise would link, and subject, the status of the maritime water mass to the status of the continental shelf. Moreover, the Court noted that the obligation to apply the equidistance principle depends on circumstances and on geographical conditions. Therefore, the Court did not consider the principle of equidistance applicable to the case;

(b) The 1977 decision in the Anglo-French Arbitration was not applicable as a precedent inasmuch as the situation of the Channel Islands is substantially different from the situation of Saint Pierre and Miquelon;

(c) The extent of the seaward projection of a coast does not depend on its length, even if the difference of length of coasts of the Parties is an important factor to take into account for an equitable delimitation. Geographical circumstances also had to be considered;

(d) A continuum shelf, characterized by the unity and uniformity of the whole seabed, cannot be considered to be the exclusive domain of one State. The Court rejected the Canadian argument that Saint Pierre and Miquelon is only superimposed upon the continental shelf and thus have no continental shelf of their own. Each coastal segment has its share of shelf. The Court favoured the criterion of distance over the criterion of physical structure of the seabed. Furthermore, the Court stated that the physical structure of the seabed should not be taken into account, because it ceases to be important when the object of the arbitration is to establish a single, all-purpose delimitation;

(e) Under international law, the extent of the maritime rights of an island does not depend on its political status. The fact that Saint Pierre and Miquelon is dependant on France cannot be the basis for unequal treatment. In this connection, the Court pointed out that Newfoundland is also an island with no independent or semi-independent status;

(f) The principle of proportionality, although useful for checking the result of a delimitation, should not be applied as a test of equity nor used as a corrective measure for the method used to define the boundary lines; and

(g) A single delimitation meant a single boundary line; consequently, the Court decided to close the French corridor at the 200-mile limit.

#### **4. Decision**

309. The Court stressed the importance of the geographical features of the area and considered that the relevant area consisted of "the geographical concavity formed by Newfoundland and

Nova Scotia.” Measuring the length of the coasts of Newfoundland and Saint Pierre and Miquelon, the Court concluded that the ratio between the two coasts was 15.3 to 1 and that the relationship was one of adjacency.

310. The Court decided to examine separately the western sector and the south-southeast sector. In the western sector, the Court found it equitable to grant Saint Pierre and Miquelon an additional twelve nautical miles from the limit of its territorial sea, for its exclusive economic zone. Consequently the exclusive economic zone covers the 24-mile extent of contiguous zone defined in article 33 of UNCLOS. In the south-southeast sector, Saint Pierre and Miquelon has a coastal opening, which is unobstructed by any opposite or laterally aligned Canadian coast. Consequently, the Court found that France was fully entitled to a frontal seaward projection towards the south up to 200 nautical miles, save where it encroached upon or cut off a parallel frontal projection of the adjacent segments of the Newfoundland southern coast. France was thus granted a corridor 10.5 miles wide. However, the Court did not extend this zone up to the high seas and as a result the French zone is enclaved in the Canadian area.

311. Because the delimitation was based upon geographical criteria, the Court considered it necessary to check the equity of its decision. Regarding the fisheries issue, it appeared that the relations between Canada and France on fisheries were governed by the Agreement of 27 March 1972, which gave full access to nationals of each Party to the fishing zones of the other. In the view of the Court, the delimitation would have no impact on either fishing rights or mineral resources. The Court also conducted a test of proportionality *a posteriori* and found the delimitation to be equitable under this test. Lastly, the Court urged the Parties to maintain good relations with each other.

312. The decision was rendered by a vote of three to two, with dissenting opinions by Judge Gotlieb and Judge Weil. The decision of the Court consisted in the drawing of the relevant lines of delimitation from points A to S, all coordinates being expressed in the North American Datum (1983) geodetic system.

## 5. Dissenting Opinions

### (a) Mr. Weil (appointed by France)

313. Mr. Weil disagreed with the delimitation settled by the Court. He explained that the Court had chosen a “mushroom form” of delimitation as it was considered to be the most equitable solution by the majority. However, he did not consider the solution to be equitable for France and warned that equity could be dangerous because it introduced too much uncertainty in the jurisprudence on delimitation. He blamed the Court for acting as if only Canada had a sovereign and natural right over the area. He pointed out that France would never be able to exploit rationally the zone granted because of its shape.

314. Mr. Weil considered the decision to be without any legal basis and quite arbitrary. He did not understand the relevancy of the contiguous zone to define the western line and did not agree with the choice of the method applied to delimit the maritime boundaries. He regretted that the Court had chosen to apply a frontal projection and not a radial one. He also noted the inequitable way the Court had applied the principle of encroachment. Regarding the proportionality test, he resented the Court having used it, even if only *a posteriori*.

315. Furthermore, Mr. Weil regretted that the Court had not included economic or socio-economic factors and political considerations for security and navigation to delimit the area. He advocated a broad equitable spatial approach, including economic and political considerations. He also favoured a spatial equity instead of a geographical one, even if he admitted that there might then be a risk of bringing the judicial decision too close to conciliation.

316. Regarding the problem of fisheries, in particular, which was an important issue at stake, Mr. Weil thought that the Court should have paid more attention to it as a criterion to determine the limits.

**(b) Mr. Gotlieb (appointed by Canada)**

317. Mr. Gotlieb disagreed with the Court because he considered the delimitation to be inequitable. He did not consider the method employed by the Court to be in accordance with equitable principles and international law.

318. Mr. Gotlieb noted that the Court had adopted the wrong figures for both coasts and the wrong area for the proportionality test. He denied the accuracy of the geographic criterion used by the Court. He also pointed out that the use of two sectors was contradictory. He did not agree with the projections used by the Court to delimit the area, nor the ratio used by the Court to question the equitability of its delimitation and, consequently, considered the conclusions of the Court to be wrong. He emphasized that the Court had ignored the eastward projection of Cape Breton Island.

319. Mr. Gotlieb also considered that the use of the contiguous zone was not relevant and denied any right of France to a broad continental shelf beyond the 200-mile limit.

**I. Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen**

|                               |   |
|-------------------------------|---|
| <b>Parties:</b>               | Denmark and Norway  |
| <b>Issues:</b>                | Delimitation of the continental shelf and fishery zones of two States with opposite coasts  |
| <b>Forum:</b>                 | International Court of Justice (ICJ)  |
| <b>Date of Decision:</b>      | Judgment of 14 June 1993  |
| <b>Published in:</b>          | <p><u>ICJ: Reports of Judgments, Advisory Opinions and Orders</u>, 1993, pp. 38-314</p> <p><u>International Law Reports</u>, Vol. 99, pp.395-682</p>  |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Charney, J. I., "Progress in International Maritime Boundary Delimitation Law", 88 <u>American Journal of International Law</u> (1994), pp. 227-256</li> <li>- Richardson, E. L., "Jan Mayen in Perspective", 82 <u>American Journal of International Law</u> (1988), pp. 443-458</li> <li>- Charney, J.I., "Maritime Delimitation in the Area between Greenland and Jan Mayen", 88 <u>American Journal of International Law</u> (1994), pp. 105-109</li> <li>- Evans, M.D., "Less Than an Ocean Apart: The St. Pierre and Miquelon and Jan Mayen Islands and the Delimitation of Maritime Zones", 43 <u>International and Comparative Law Quarterly</u>, (1994), pp. 678-696</li> <li>- Evans, M.D., "Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)", 43 <u>International and Comparative Law Quarterly</u> (1994), pp. 697-704</li> <li>- Evans, M.D., "Delimitation and the Common Maritime Boundary", 64 <u>British Year Book of International Law</u>, (1993), pp. 283-332</li> <li>- Decaux, E., "Affaire de la délimitation maritime dans la région située entre le Groenland et Jan Mayen", <u>Annuaire Français de Droit International</u> (1993), pp. 495-513</li> </ul> |

**1. Facts**

320. On 16 August 1988, Denmark filed in the Registry of the International Court of Justice (ICJ) an Application instituting proceedings against Norway in respect of a dispute concerning the maritime delimitation between the Danish territory of Greenland and the Norwegian island of

Jan Mayen. The Application relied on declarations made by the Parties accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Court's Statute. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Application was communicated to Norway and to all other States entitled to appear before the Court.

321. The maritime area subject to the proceedings was that part of the Atlantic Ocean lying between the east coast of Greenland and the island of Jan Mayen, north of Iceland, and the Denmark Strait, between Greenland and Iceland. The Court designated three maritime areas between Greenland and Jan Mayen, which had featured in the arguments of the Parties. First, the "area of overlapping claims", bounded by the single 200-mile delimitation line claimed by Denmark and the median line asserted by Norway, limited to the north by the intersection of the delimitation lines proposed by the Parties and to the south, by the limit of the 200-mile economic zone claimed by Iceland. Secondly the "area of overlapping potential entitlement" situated between the 200-mile line claimed by Denmark and the corresponding line drawn 200 nautical miles from the baselines on the coast of Jan Mayen. Thirdly the "area relevant to the delimitation dispute", which refers to the waters between the baselines of the Parties, limited to the north by the intersection of the delimitation lines proposed by the Parties and to the south by the limit of the 200-mile economic zone claimed by Iceland.

322. In 1965, Denmark and Norway concluded an Agreement concerning the delimitation of their mainland continental shelf. Article 1 of the Agreement establishes that "[t]he boundary between those parts of the continental shelf over which Norway and Denmark respectively exercise sovereign rights shall be the median line which at every point is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each Contracting Party is measured". Article 2 provides that the lines accordingly defined lie in the Skagerrak and part of the North Sea, between the mainland territories of Denmark and Norway. In the present case the Parties disagreed as to the meaning and the effects of the 1965 Agreement.

323. In 1976, Denmark enacted legislation extending the existing Danish fishery zone so as to comprise waters along the coast of Denmark up to a limit of 200 miles from the relevant baselines. In June 1980, Denmark extended to 200 miles the fishery zone off the east coast of Greenland, but it was provided that vis-à-vis Jan Mayen fisheries jurisdiction would not, "until further notice", be exercised beyond the median line. In August 1981, jurisdiction was asserted over the full 200 miles. In 1976, Norway enacted legislation establishing 200-mile "economic zones" around its coasts. In May 1980, Norway established a 200-mile fishery zone around Jan Mayen. The legislation provided that the zone should not extend beyond the median line in relation to Greenland. Between June 1980 and August 1981 the median line was the *de facto* line between the areas where the two Parties exercised their respective fisheries jurisdictions.

324. Despite negotiations conducted since 1980, it had not been possible to find an agreed solution to the dispute concerning the delimitation of Danish and Norwegian fishing zones and continental shelves in the relevant area.

## 2. Issues

### (a) Questions before the Court

**Denmark** instituted proceedings seeking the Court to adjudge and declare that:

- (i) Greenland was entitled to a full 200-mile fishery zone and continental shelf area vis-à-vis the island of Jan Mayen;
- (ii) Consequently to draw a single line of delimitation of the fishery zone and continental shelf area of Greenland in the waters between Greenland and Jan Mayen at a distance of 200 nautical miles measured from Greenland's baselines; and
- (iii) If the Court, for any reason, did not find it possible to draw the line of delimitation requested, Denmark requested the Court to decide, in accordance with international law and in light of the facts and arguments developed by the Parties, where the line of delimitation should be drawn between Danish and Norwegian fisheries zones and continental shelves in the waters between Greenland and Jan Mayen, and to draw that line.

**Norway** requested the Court to adjudge and declare that:

- (i) The median line constituted the boundary for the purpose of delimitation of the relevant areas of the continental shelf between Norway and Denmark in the region between Jan Mayen and Greenland;
- (ii) The median line constituted the boundary for the purpose of delimitation of the relevant areas of the adjoining fisheries zones in the region between Jan Mayen and Greenland; and
- (iii) The Danish claims were without foundation and invalid, and that the Danish submissions and claims were to be rejected.

## **(b) Arguments presented by the Parties**

### **(i) Denmark**

#### The 1965 Agreement

325. Denmark argued that the object and purpose of the 1965 Agreement was solely the delimitation in the Skagerrak and part of the North Sea, on a median line basis. Such Agreement did not apply to any other sea areas under Danish jurisdiction.

#### Conduct of the Parties

326. Denmark observed that the 1963 Royal Decree concerning the Exercise of Danish Sovereignty over the Continental Shelf was promulgated in accordance with the 1958 Geneva Convention on the Continental Shelf and expressly extended the Danish claim to its continental shelf as far as the Convention allowed. Special circumstances had in fact been under contemplation in 1963, but were not mentioned specifically, since they were considered to be incorporated by reference in the Royal Decree, which mentioned the 1958 Convention.

327. Regarding the Danish Act of 17 December 1976, Denmark noted that because the Danish Government had considered it to be inexpedient to raise the question of delimitation, the 200-mile fishing limit was not extended beyond 67° N off the east coast of Greenland.

328. In relation to the 1980 Executive Order, issued pursuant to the Act of 1976, the reason for

showing restraint in the enforcement of its fishing regulations (generally extended to a 200-mile limit) in the area concerned was to avoid difficulties with Norway.

Nature of the task conferred on the Court

329. Denmark asked the Court to draw a specific delimitation line and, in fact, indicated with precise coordinates where it considered the line should be. This line would constitute a single line of delimitation of the fishery zone and the continental shelf area.

Circumstances to be taken into account to achieve an equitable result

330. Denmark contended that the median line should not be used, even as a provisional solution. Jan Mayen was considered to fall within the concept of "special circumstances", and therefore should be given no effect on Greenland's continental shelf area. The reasons for this position were: Jan Mayen's small territory in relation to the opposite coasts of Greenland; its impossibility to sustain human habitation or economic life of its own; other factors of geography, population, constitutional status of the respective territories, socio-economic structure, cultural heritage; proportionality; the conduct of the Parties; and other delimitations in the region.

331. *Proportionality.* Disparity or disproportion between the lengths of the relevant coasts (in regard to both continental shelf and fishery zone) was considered by Denmark as a determinant factor for testing the equity of the delimitation line arrived at. In the case under consideration, the disparity should result in a delimitation line granting Greenland's right to a maritime zone of 200 miles.

332. *Access to resources.* Denmark emphasized the dependence of the Inuit population of Greenland on the exploitation of the resources of the east coast of Greenland, particularly in relation to sealing and whaling. It also underlined that the quotas established for East Greenland accounted for over half the total quotas fixed for Greenland waters under a Fishery Agreement with the European Community.

333. Owing to the presence of ice, the 200-mile zone off the Greenland coast claimed by Denmark would not have provided Greenland with 200 miles of exploitable sea, thus the median line proposed by Norway would in effect have left Denmark with only 10 per cent of the waters in which fishing was made possible by the absence of ice.

334. *Socio-economic factors.* Denmark considered as relevant to the delimitation the major differences between Greenland and Jan Mayen as regards the population and socio-economic factors. It was pointed out that Jan Mayen has no settled population and cannot sustain and has not sustained human habitation or economic life on its own. As regards socio-economic factors, Denmark emphasized the importance of fishing and fisheries related activities for Greenland, which constitute the mainstay of its economy. The cultural factor and the attachment of Greenland's population to the land and surrounding sea were also underlined.

335. *Conduct of the Parties.* Denmark contended that the Agreement dated 22 October 1981 between Norway and Iceland indicated a choice of a particular method of delimitation in the area (granting a 200-mile extension to Iceland's economic zone and continental shelf), which should have been applied also to the delimitation between Greenland and Jan Mayen. Moreover, it was pointed out that Norway's Royal decree of 3 June 1977, establishing a fishery protection zone around Svalbard, including Bear Island, also needed to be considered as relevant conduct on

Norway's side.

**(ii) Norway**

The 1965 Agreement

336. Norway contended that a delimitation already existed between Jan Mayen and Greenland, on the basis of the bilateral Agreement of 1965 (see "Facts" above). The text of Article 1 of the Agreement was considered by Norway to be general in scope, unqualified and without reservation, and the natural meaning of the text was "to establish definitively the basis for all boundaries which would eventually fall to be demarcated" between the Parties. Article 2 of the Agreement was, in Norway's view, "concerned with demarcation". The Parties thus were and remained committed to the median line principle of the 1965 Agreement.

337. Moreover, since the 1965 Agreement made no reference to special circumstances, such as might affect the demarcation of their continental shelf boundaries, Norway submitted that it had to be concluded that both Parties at the time of the conclusion of the Agreement had found that there were no "special circumstances" to be taken into account.

The 1958 Geneva Convention on the Continental Shelf

338. Norway contended that a delimitation of the continental shelf boundary, in the form of a median line boundary, already existed as a result of the effect of Article 6, paragraph 1, of the 1958 Convention (to which both Norway and Denmark were Parties at the relevant time).

339. Norway based its contention on its view that the 1965 Agreement was declaratory of the interpretation by the Parties of the 1958 Convention that no special circumstances existed. Norway further expressed the view that there were in fact no special circumstances within the meaning of Article 6. Thus, in the absence of agreement and special circumstances, Article 6 operated on a prescriptive and self-executing basis to establish the median line as the boundary.

Conduct of the Parties

340. Norway contended that the Parties by their "conjoint conduct" had long recognized the applicability of a median line delimitation in their mutual relations.

341. The 1963 Royal Decree issued by Denmark, concerning the Exercise of Danish Sovereignty over the Continental Shelf, in its Article relating to the delimitation vis-à-vis opposite or adjacent States to Denmark omitted any reference to the proviso of Article 6 of the 1958 Convention: "unless another boundary line is justified by special circumstances". In Norway's view this omission proved that the geographical situation of Denmark had been examined during the legislative process and no special circumstances had been found that would call for delimitation on any other basis than a median line.

342. Norway also noted that Article 2 of the Danish Act of 1976, proclaiming a 200-nautical mile fishery zone, provided that "the delimitation of the fishing territory relative to foreign States whose coasts are situated at a distance of less than 400 nautical miles opposite the coast of the Kingdom of Denmark or adjacent to Denmark, shall be a line which at every point is equidistant from the nearest points on the baselines at the coast of the two States (the median line)".

343. Norway further argued that the Danish Executive Order of 14 May 1980, issued pursuant to the 1976 Danish Act and extending Danish fisheries jurisdiction to the area between Greenland and Jan Mayen, should also have been interpreted as committing Denmark to accepting a median line boundary.

344. Reference was also made to the 1979 Agreement between the Parties concerning the delimitation between Norway and the Faroe Islands. Norway emphasized that this Agreement employed the median line both for the delimitation of the continental shelf and for the boundary affecting fisheries.

345. Norway also relied on diplomatic contacts and exchanges having occurred from 1979-1980 between the Parties, recorded in letters, notes and minutes of discussions, as well as the positions expressed by the Parties on the question of maritime delimitation during the Third United Nations Conference on the Law of the Sea.

#### Nature of the task conferred on the Court

346. Norway submitted that the adjudication of the dispute should result in a judgment declaratory as to the basis of delimitation, leaving the precise demarcation to negotiations between the Parties. It was further contended by Norway that the median line constituted the coinciding boundary for delimitation of the continental shelf and fishery zone, although the two boundaries remained conceptually distinct. The two lines, even if coincident in location, stemmed from different strands of the applicable law, the location of the continental shelf line being derived from the 1958 Convention, and the location of the fishery zone line being derived from customary law.

#### Circumstances to be taken into account to achieve an equitable result

347. Norway contended that a median line delimitation between opposite coasts generally results in an equitable solution, particularly if the coasts in question are nearly parallel.

348. *Proportionality.* The length of coasts was not considered by Norway as an independent principle of delimitation, but a test of the equitableness of a result arrived at by other means. It was noted that differences in the length of coasts never qualified as special circumstances for the purposes of Article 6 of the 1958 Convention.

349. *Access to resources.* Norway indicated that the waters between Jan Mayen and Greenland have long been the scene of Norwegian whaling, sealing and fishing. Besides, the various fishing activities in the Jan Mayen area accounted for more than 8 per cent of the total quantity of Norwegian catches, and they contributed to the fragile economy of the Norwegian coastal communities.

350. *Security.* Norway argued that, in relation to the Danish claim to a 200-mile zone off Greenland, the drawing of a boundary closer to one State than to another would imply an inequitable displacement of the possibility of the former State to protect its interests.

351. *Conduct of the Parties.* Norway denied that the delimitation Agreement between Norway and Iceland of 22 October 1981, indicating that Iceland's continental shelf and economic zone would extend to 200 nautical miles in the areas between Iceland and Jan Mayen and also where the distance between the baselines was less than 400 nautical miles, constituted relevant conduct or a precedent applicable to the delimitation between Greenland and Jan Mayen. Norway

underlined that the 1981 Agreement was a political concession in favour of Iceland alone. Norway also underlined that the Royal decree of 3 June 1977, by which Norway established a fishery protection zone around Svalbard, including Bear Island, the outer limit of which was to meet the outer limit of the economic zone of the Norwegian mainland, referred to territory belonging to Norway, so there was no question of an international delimitation of overlapping areas.

### **3. Reasoning of the Court**

#### **(a) The 1965 Agreement**

352. The Court was of the view that the 1965 Agreement should be interpreted as adopting the median line only for the delimitation of the continental shelf between Denmark and Norway in the Skagerrak and part of the North Sea. The Agreement did not result in a median line delimitation of the continental shelf between Greenland and Jan Mayen. The Court considered that if the intention of the 1965 Agreement had been to commit the Parties to the median line in all ensuing shelf delimitations, it would have been referred to in subsequent delimitation agreements (e.g. in the 1979 Agreement concerning the delimitation of the continental shelf and fisheries zone between the Faroe Islands and Norway). The Court did not find any relevance in the 1965 Agreement to the present case.

#### **(b) The 1958 Geneva Convention on the Continental Shelf**

353. Norway's contention that the 1965 Agreement (which omits any reference to "special circumstances") was declaratory of the Parties' interpretation of the 1958 Convention that no special circumstances were present, was rejected on the basis of the irrelevance of the 1965 Agreement to the case.

354. Moreover, the validity of Norway's contention that Article 6 of the 1958 Convention resulted in a median line continental shelf boundary already in place between Greenland and Jan Mayen was considered by the Court to depend on whether it found that there were "special circumstances" as contemplated by the Convention.

#### **(c) Conduct of the Parties**

355. In terms of the conduct of the Parties, the Court emphasized that it was the conduct of Denmark, which had primarily to be examined in this connection.

356. In light of the information provided by Denmark in relation to the 1963 Royal Decree issued by Denmark concerning the Exercise of Danish Sovereignty over the Continental Shelf, the Court was not persuaded that the Decree supported the Norwegian argument on conduct.

357. In relation to the Danish Act of 1976, the Court explained the provision contained in Article 2 (referring to the median line as the delimitation of fishery zones) by the Parties' concern not to aggravate the situation pending a definitive settlement of the boundary. The Court did not consider that the terms of the Danish legislation implied recognition of the appropriateness of a median line vis-à-vis Jan Mayen.

358. The Court also stated that it could not regard the terms of the 1980 Executive Order (which in any case was amended in August 1981 to remove the restraint on exercising jurisdiction beyond the median line) as committing Denmark to acceptance of a median line boundary in the area concerned.

359. In the view of the Court, the use of the median line in the 1979 Agreement concerning the delimitation between Norway and the Faroe Islands did not commit Denmark to a median line boundary in a different area.

360. The diplomatic contacts and exchanges between the Parties, as well as the positions expressed by the Parties at the Third United Nations Conference on the Law of the Sea, had not prejudiced Denmark's position.

#### (d) Nature of the task conferred on the Court

361. There was no agreement between the Parties for a single maritime boundary as in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (I.C.J. Reports, 1984). Inasmuch as the 1958 Convention was binding upon the Parties, it governed the continental shelf delimitation as a source of applicable law different from that governing the delimitation of fishery zones. The Court therefore examined separately the two strands of applicable law: the effect of Article 6 of the 1958 Convention applicable to the delimitation of the continental shelf and the effect of customary law governing the fishery zone. However, for the Court, this did not mean that Article 6 could be interpreted and applied without reference to customary law on the subject, or independently of the fact that a fishery zone boundary was also in question in the area concerned. The Court recalled the *Continental Shelf (Libya/Malta)* case (I.C.J. Reports, 1985), during which it was held that the continental shelf and exclusive economic zone are linked together in modern law, as the delimitation of any of the two should attribute greater importance to elements, such as distance from the coast, which are common to both concepts.

362. Regarding the law applicable to the delimitation of the fishery zone, the Court noted that both Parties had no objection to determine such delimitation on the basis of the law governing the boundary of the exclusive economic zone, which is customary international law.

363. At the time both States were only signatories of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), neither of them having ratified it. The provision to achieve an "equitable result" as the aim of any delimitation agreement (articles 74 and 83 of UNCLOS) was considered by the Court as the codification of customary law.

364. In relation to the delimitation of the continental shelf, the Court considered that since it was governed by Article 6 of the 1958 Convention and the delimitation was between opposite coasts, it was appropriate to begin with a provisional median line and then enquire whether "special circumstances" required "another boundary line". The Court also held that even if customary law had to be applied (rather than Article 6 of the 1958 Convention) it would have been in accord with previously decided cases to begin with a provisional median line and then ask whether "special circumstances" required any adjustment or shifting of that line.

365. In accordance with previous decisions, and in particular the *Gulf of Maine* case, the Court established that, also in relation to the delimitation of the fishery zone, it was proper to begin the delimitation process by a provisional median line.

366. The Court then examined the factors of the case, which might suggest the need to adjust the provisional median line so as to achieve an equitable result. The 1958 Convention requires the investigation of any “special circumstances” (described as those circumstances which might modify the result produced by an unqualified application of the equidistance principle); customary law, based upon equitable principles, requires the investigation of “relevant circumstances” (described as those facts necessary to be taken into account in the delimitation process). The Court noted a tendency towards the assimilation of the two concepts, and, in fact, not surprisingly the result of their application can produce the same result.

#### (e) Circumstances to be taken into account to achieve an equitable result

367. *Proportionality.* In light of the existing case law, the Court came to the conclusion that the disparity between the lengths of the coasts constituted a special circumstance within the meaning of Article 6 of the 1958 Convention. Similarly, in view of the great disparity of the length of the coasts, the application of the median line would have led to manifestly inequitable results. The Court thus considered that the median line should be adjusted in order to effect a delimitation closer to the coast of Jan Mayen. This did not imply a direct and mathematical application of the relationship between the length of the coastal front of eastern Greenland and that of Jan Mayen. Nor did it support Denmark’s claim that the boundary should be drawn 200 miles from the baselines of the coast of Eastern Greenland, leaving Norway merely a residual part of the area relevant to the delimitation dispute. Such a delimitation was considered to run wholly counter to the rights of Jan Mayen and the demands of equity.

368. *Access to resources.* As far as seabed resources were concerned the Court recalled the statement in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case to the effect that the natural resources of the continental shelf might well constitute relevant circumstances, which it would be reasonable to take into account in a delimitation (*I.C.J. Reports*, 1985).

369. With regard to fishing, the Court, recalling that in the *Gulf of Maine* case it took into account the Parties’ respective fishing activities by ensuring that the delimitation would not entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned (*I.C.J. Reports*, 1984), considered the median line to be too far west for Denmark to be assured of an equitable access to the fisheries resources. For this reason the median was adjusted eastward.

370. *Presence of ice.* The Court accepted that perennial ice might significantly hinder access to the resources of the region, and thus could constitute a special geographical feature. In the present case though, the Court considered that while ice constituted a considerable seasonal restriction on access to the waters, it did not materially affect access to migratory fishery resources in the southern part of the area of overlapping claims. Thus it was not considered as a special circumstance.

371. *Socio-economic factors.* The Court did not accept Denmark’s argument to the effect that Jan Mayen should not have been accorded full effect, but only partial effect in the delimitation process. Nor did it accept the argument based on the “cultural factor”. The question was considered to be whether the size and special character of Jan Mayen’s population, and the absence of locally-based fishing, were circumstances which affected the delimitation. In the

specific case, the Court concluded that there was no reason to consider either the limited nature of the population of Jan Mayen or socio-economic factors as circumstances to be taken into account.

372. *Security.* Recalling the decision in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case (*I.C.J. Reports*, 1985), the Court held that security considerations were relevant to the delimitation process. It was further stated that, in the present case, the delimitation would not be so near to the coast of either Party as to make questions of security a particular consideration.

373. *Conduct of the Parties.* Norway's argument that the Parties, by their conduct, had already recognized the applicability of a median line delimitation was not accepted by the Court (see above, section (iii) - Conduct of the Parties). Denmark's contention based on the delimitation between Norway and Iceland, and between mainland Norway and the fishery protection zone of the Svalbard Archipelago (Bear Island – Bjørnøya) was also dismissed. As far as Bear Island was concerned the Court noted that the territory is situated in a region unrelated to the area of overlapping claims to be delimited in the case. It was observed that there can be no legal obligation for a party to a dispute to transpose, for the settlement of that dispute, a particular solution previously adopted by it in a different context. Particular consideration was given to the Agreements between Iceland and Norway, since those Agreements concerned Jan Mayen itself. By invoking those Agreements, Denmark was trying to invoke equality of treatment with Iceland. The Court observed that international law does not prescribe, with a view to reaching an equitable solution, the adoption of a single method for the delimitation of the maritime spaces on all sides of an island, or for the whole of the coastal front of a particular State. Varying systems of delimitation for the various parts of the coast are permitted. The Court then concluded that the conduct of the Parties did not constitute an element that could influence the operation of delimitation in the present case.

374. The Court came to the conclusion that the median line adopted provisionally, as the first stage in the delimitation of both the continental shelf and the fishery zones, had to be adjusted to become a line such as to attribute a larger area of maritime space to Denmark than would the median line. The line drawn by Denmark 200 nautical miles from the baselines of eastern Greenland would however have been excessive as an adjustment, and would have been inequitable in its effects. The delimitation line was thus placed within the area of overlapping claims. In the view of the Court, the position of the delimitation lines for the two categories of maritime spaces (fishery zones and continental shelf) was identical and constituted, in the circumstances of this case, a proper application both of the law applicable to the continental shelf and to the fishery zones.

375. For the definition of the line, the area of overlapping claims was divided into three zones, as indicated in sketch-map no. 2 reproduced in the text of the Judgement. The two marked changes of direction on Greenland's 200-mile line were joined to the two points of marked change of direction on the median line submitted by Norway – lines L-J and K-I were determined, creating zone 1, zone 2 and zone 3. Zone 1 corresponded to the main fishing area and, having established that both Parties should have enjoyed equitable access to the fishing resources, the zone was divided in two parts of equal area by the determination of line M-N. Zones 2 and 3 were then created by determining point O on the line K-I such that the distance from I to O is twice the distance from O to K. The delimitation of zones 2 and 3 is then effected by the straight line from point N to point O, and the straight line from point O to point A.

#### 4. Decision

376. The Judgment was rendered on 14 June 1993. By fourteen votes to one, the Court decided that, within the limits defined:

- “(a) to the north by the intersection of the line of equidistance between the coast of Eastern Greenland and the western coast of Jan Mayen with the 200-mile limit calculated as from the said coasts of Greenland; indicated on sketch-map No. 2 as point A, and
- (b) to the south, by the 200-mile limit around Iceland, as claimed by Iceland, between the points of intersection of that limit with the two said lines, indicated on sketch-map No. 2 as points B and D,

the delimitation line that divided the continental shelf and fishery zones of the Kingdom of Denmark and the Kingdom of Norway is to be drawn as set out in paragraphs 91 and 92 of the present Judgment.”

#### 5. Declarations, Separate Opinions, Dissenting Opinions

##### (a) Declarations

377. In his Declaration **Judge Oda** stated that in his view the Danish Application was misconceived and therefore the case should have been dismissed. Considering that the line established by the Court did lie within the infinite range of those possibilities which could have been selected by the Parties if they had reached an agreement, he decided that it was proper to vote with the majority despite his difference of opinion on several points.

378. In his concurring declaration **Judge Evensen** highlighted that the United Nations Convention on the Law of the Sea, which at the time of the hearing had not yet entered into force, was considered to reflect a number of principles of general international law. In Article 121, the Convention provided that islands shall be governed by the same legal regime applied to other land territory in the determination of their territorial sea, contiguous zone, exclusive economic zone and continental shelf. Therefore, Jan Mayen had to be taken into full consideration in delimiting the maritime areas concerned, although its small size should also be recognized in comparison with that of Greenland, a continental-size area.

379. He stressed that it was within the Court’s measure of discretion, to arrive at an equitable result, to make proper provisions for establishing a system of equitable access to the fisheries resources in the area of overlapping claims.

380. **Judge Aguilar Mawdsley**. Although he concurred with the reasoning behind the Judgment, he was not persuaded that the delimitation line established by the Court provided an equitable result. The difference in the length of coasts was such that Greenland should have received a larger proportion of the disputed area.

381. **Judge Ranjeva** indicated that his vote was in favour of the operative part of the Judgment and the arguments on which it was based, which brought about an equitable result. In his opinion, the Court should have been more explicit in stating its reasons for drawing the delimitation line adopted and more specific in setting forth its grounds for proceeding as it did. The Parties were entitled to expect fuller explanations regarding the elements of the decision arrived at. The authority of the Court’s decisions would be reinforced by revealing the factors upon which such decisions are based, e.g., criteria, methods, rules of law, etc. He also underlined

that the Court should have specified that it was in relation to the rights of the Parties over their maritime spaces that special and relevant circumstances could or sometimes should be taken into account in a delimitation operation. He pointed out that in relying on the positions taken by the two Parties at the Third United Nations Conference on the Law of the Sea, the Court failed to take into account the exceptional nature of the procedural rules adopted during these negotiations. Special or relevant circumstances were facts affecting the rights of States over their maritime spaces as recognized in positive law, either in their entirety or in the exercise of the powers relating thereto.

### (b) Separate Opinions

382. In his separate opinion, **Judge Oda** expressed concern over Denmark's Application to the Court, which he considered to be incorrect and to show a misunderstanding of certain concepts of the law of the sea. His main criticism was that the concept of the EEZ seemed to not have been properly grasped, especially in relation to its coexistence with the concept of a fishery zone. At the same time the request for a single boundary overlooked the separate background and evolution of the continental shelf regime. In this respect, he pointed out that the sea area in dispute in this case was not the continental shelf within the meaning of the 1958 Geneva Convention on the Continental Shelf, as proposed by the Parties, but may well have been the continental shelf referred to in the 1982 United Nations Convention on the Law of the Sea, or the customary international law which may now be reflected in that Convention. Denmark also seemed to confuse title to the continental shelf or the EEZ with the concept of delimitation of overlapping sea areas. Secondly, in the Judge's opinion, the delimitation of maritime boundaries providing an equitable solution should not fall within the sphere of competence of the Court, unless the Court is specifically requested by the agreement of the Parties to effect a delimitation of that kind, applying equity within the law or determining a solution *ex aequo et bono*. If the Court is requested by the Parties to decide on a maritime delimitation in accordance with Article 36, paragraph 1, of the Statute, it will not be expected to apply rules of international law but will simply "decide a case *ex aequo et bono*". But in that case, as in the present one, an Application based on Article 36, paragraph 2, of the Statute, conferring jurisdiction only for strictly legal disputes, an act of delimitation requiring an assessment *ex aequo et bono* would go beyond the jurisdiction of the Court.

383. Thirdly, even assuming that the Court was competent to draw a line or lines of delimitation of the EEZ or continental shelf, the single line drawn in the Judgment did not appear to be supported by cogent reasoning.

384. **Judge Schwebel** declared himself to be in substantial but not full agreement with the Court's Judgment. The three questions whose treatment by the Court he found to be questionable were:

(a) Should the law of maritime delimitation be revised to introduce and apply distributive justice? The Court, by applying distributive justice, has departed from the accepted law on the matter, as fashioned pre-eminently in its previous decisions;

(b) Should the differing extent of the lengths of opposite coastlines determine the position of the line of delimitation? From an analysis of the legislative history of Article 6 of the 1958 Geneva Convention on the Continental Shelf, he concluded that there was no suggestion that differing lengths of opposite coastlines would constitute a special circumstance. His analysis

of the application of the difference in coastal length criteria in previous cases decided by the Court also made him criticize the fact that equity seemed to be unjustifiably and impressionistically based on the length of opposite coastlines; and

(c) Should maximalist claims be rewarded? The delimitation indicated by the Court gave the impression of rewarding Denmark's maximalist claim and penalizing Norway's moderation. The Judge questioned whether this should be seen as equitable. At the same time he considered that it would encourage immoderate and discourage moderate claims in the future.

385. In conclusion, he questioned the basis upon which the Court established the same line for the continental shelf and the fishing zone through the application of Article 6 of the 1958 Geneva Convention on the Continental Shelf, in relation to the continental shelf, and customary international law, in relation to the fishery zone.

386. **Judge Shahabuddeen** gave an explanation of his view that the delimitation regime applicable to the continental shelf in this case was embodied in Article 6 of the 1958 Geneva Convention on the Continental Shelf. His conclusion was that the equidistance rule, as contained in that Article, formed part of a rule of law to the effect that, in the absence of agreement and of special circumstances, the boundary is the median line. To equate this rule to the equitable principles as applied to the special circumstances position in general international law would serve no useful purpose. He thus upheld the submission by Norway to the effect that, absent both agreement and special circumstances, "the boundary is the median line".

387. Judge Shahabuddeen stated that in the past the question of proportionality had been influenced and restrained by the definition of the continental shelf as "the natural prolongation of the land domain", in a geophysical sense. In his view, the relaxation of reliance on the natural prolongation concept in favour of the more neutral principle of adjacency measured by distance, diminished those restraints. This new principle, being geometric, leaves the factor of proportionality free to operate. The non-encroachment principle still remained to prevent one State from exercising jurisdiction "under the nose of another". Proportionality by itself was not considered to be a method of delimitation, but a special circumstance to be taken into consideration.

388. In terms of disparity of coastal length, the Judge underlined that a circumstance was a special circumstance if it was such as to render the use of the median line inequitable; the disparity between the coastal lengths of Greenland and Jan Mayen would have rendered the use of the median line inequitable and was accordingly a special circumstance.

389. The above observations were considered to be applicable in principle also to the fishery zone, in the sense that taking account of the relevant circumstances, equitable principles precluded the use of the median line for its delimitation.

390. In the Judge's opinion, the delimitation by the equitable line as determined by the Court was susceptible to possible criticism in relation to the discretionary character of the decision. Although a degree of discretion was described as intrinsic to the judicial function, it was pointed out that in the field of maritime delimitation the difficulty was one of offering a satisfactory legal basis for any particular exercise of the discretion, if the result was not to appear to be a line which the Court had derived at *ex nihilo*. He underlined that judicial discretion needs to be defined by clear bounds, or governed by criteria relating to its exercise within prescribed limits.

391. In relation to the competence of the Court to establish a single line, the Judge stated that since agreement between the Parties is necessary for such a line, and in the specific case there was no agreement, the only way in which the continental shelf and fisheries zone could have a single line (in the sense of two congruent lines) was if congruence was the incidental result of the operation of the normally applicable principles of international law. Nevertheless, his doubts were not sufficiently strong to prevent him from adhering to the Court's conclusion.

392. Finally, on the question of jurisdiction, he found that the Parties had accepted the competence of the Court to determine what constitutes the boundary, rather than simply stating the principles on which the Parties should have negotiated a settlement of the dispute. He considered that where the Parties failed to agree on a boundary, the resulting dispute as to what the boundary could be brought before the Court via a unilateral application made under Article 36, paragraph 2, of the Statute of the Court.

393. Although expressing his agreement with the Judgment of the Court, **Judge Weeramantry** gave an extended analysis of the jurisprudential content and practical application of the concept of equity, in view of the extensive reliance on equity in the Judgment. In this context, the opinion focused on the field of maritime delimitation, as well as the broader equitable landscape. The opinion underlined that the important role of equity in the Court's decision involved the application of equitable principles, equitable procedures and equitable methods, both *a priori* to work towards a result and *a posteriori* to test the result thus reached. Nevertheless the Court did not resort to equity *ex aequo et bono*, defined as equity not confined within limitations of existing rules of law and entering the realm of equity *contra legem*. In the present case the Court used equitable concepts and procedures, which entered its jurisdictional field through routes other than Article 38 (2) of the Statute of the Court. The decision was *intra legem*, in the sense that substantive law called for the application of such concepts and procedures. So long as the Court did not act *contra legem* it was acting in a field far removed from that of equity *ex aequo et bono*, for which the explicit consent of the Parties is necessary.

394. The opinion also addressed the question whether the uncertainties of equity rendered it a practically unsuitable tool for the determination of cases such as the present one. Having analyzed some of the causes of uncertainties, the Judge's opinion showed that these were not sufficient to reject the use of equity, both in the specific case and, in general, in the development of the law of the sea.

395. In his opinion **Judge Ajibola** expressed strong support for the decision of the Court, but at the same time he stated that there were areas of the Judgment in need of elaboration. In terms of procedure, Judge Ajibola analyzed the issue of the jurisdiction of the Court to: draw a delimitation line, rather than give a declaratory judgment; draw a dual purpose single line or two coinciding lines; engage in a delimitation without the agreement of the Parties. His conclusion was that once the Court had been convinced that there was an issue in dispute, then it rightly proceeded to take a decision on the merits. Once it was concluded that the Court could draw a delimitation line/lines, the next issue was to decide whether to draw a dual-purpose single line or two coincidental lines, in light of the relevant applicable law in the case. He concluded, in agreement with the Court, that it was only prudent, judicially desirable and even legally mandatory to keep, at least *prima facie*, the regimes of the continental shelf and fishery zone distinct. The two lines could eventually coincide by operation of law.

396. He then analyzed Norway's argument that Denmark's claim was for entitlement to a 200-nm continental shelf and fishery zone, rather than a request for a delimitation. In this context, he supported the view that, notwithstanding the difference in size between Greenland and Jan Mayen, the issue of entitlement emanates from sovereignty over the coast and it is thus equally justifiable and recognized in international law for both Parties.

397. He agreed with the Court on the issue of the applicable law in the case: the 1958 Geneva Convention on the Continental Shelf in relation to the continental shelf and customary international law, in relation to the fishery zone. He then analyzed the applicability of equitable principles and their development over the previous four decades. He concluded that equitable principles were the fundamental principles which customary law brought to the task of maritime delimitation, and perhaps constituted the *fons et origo* of the future development of this area of the law. There was no doubt in his mind that the international customary law of maritime boundary delimitation was solidly based on equitable principles.

398. As regards "special circumstances" under Article 6 of the 1958 Geneva Convention on the Continental Shelf and "relevant circumstances" under customary international law, he reached the conclusion that the concept consisting of agreement/special circumstances/equidistance and the concept consisting of agreement/relevant circumstances/equitable principles were equal. Besides, he stated that the application of equitable principles constituted the ultimate rule of customary law in the field of maritime delimitation.

#### (a) Dissenting Opinion

399. **Judge ad hoc Fisher** voted against the decision, although he pointed out that he agreed with some of the reasoning of the Court. He then analysed the issues with which he was in disagreement. Firstly, he did not consider that the 1958 Geneva Convention on the Continental Shelf was the sole legal source concerning the continental shelf delimitation, as Article 6 of that Convention had to be interpreted according to and supplemented by customary law. He also disagreed with the Court on the fact that, on the basis of Article 6, it was appropriate provisionally to draw a median line as a first stage in the delimitation process. The Court did not produce any substantive arguments to support the use of the median line as a starting point for the delimitation process. In using the median line, however, the Court accorded preferential and unwarranted status to such a line. The basis for the Court doing so was to arrive at an equitable solution. In his opinion this did not correspond to the developments in international law since 1958, especially as codified in the 1982 UN Convention on the Law of the Sea, which has diminished the importance of the median line principle, seen as no more than one means amongst others of reaching an equitable result.

400. He thought that the Court did not draw a clear distinction between the concepts of "entitlement" and "delimitation". The distinction between the two concepts was considered important because the law applicable to the basis for entitlement to areas of continental shelf or fishery zone was different from the law applicable to the delimitation of such areas.

401. He pointed out that in all cases concerning maritime delimitation, customary law prescribed that a delimitation was to be effected by the application of equitable principles capable of ensuring an equitable result. The equitableness of the result was to be determined by balancing all the relevant factors of the particular case. The factors that have primarily been taken into consideration in the present case were those related to geographical features. This case

was characterized by a very marked difference between the lengths of the two relevant opposite coasts. The proportionality factor was thus crucial. The use of the median line could not in this case be considered equitable, not even as a starting point in the delimitation process. According to the Judge, the Court did not take into sufficient consideration the differences in length between the relevant coasts and therefore the partition was not equitable.

402. He also disagreed with the Court in terms of not taking into consideration the population and socio-economic factors, on the grounds that they are variable over time while delimitation is destined to be permanent. He considered that the case was characterized by a fundamental difference between Greenland and Jan Mayen with respect to their demographic, socio-economic and political structures, which should have been taken into consideration.

403. He considered the Iceland/Jan Mayen delimitation to be highly relevant and a strong indication of what could be an equitable delimitation of the maritime area between Greenland and Jan Mayen, since the factors which were relevant in the former case were very similar to those in the present case.

404. Finally, he did not agree with the method of delimitation of the area of overlapping claims (zones 1, 2 and 3), which he considered to be very ingeniously invented expressly for the case.

405. He thus reached the conclusion that the Judgment did not reach the most equitable solution. A delimitation of the continental shelf and of the fisheries zone between Greenland and Jan Mayen at a distance of 200 nm from eastern Greenland would have been the most equitable solution and consequently should have been the outcome of the case.

**J. Award of the Arbitral Tribunal in the Second Stage  
(Maritime Delimitation)**

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| <b>Parties:</b>               | Eritrea and Yemen  |
| <b>Issues:</b>                | Maritime delimitation; arbitration; equidistance; baselines; islands; proportionality; fishing   |
| <b>Forum:</b>                 | Arbitral Tribunal constituted under the Agreement of 3 October 1996 (Proceedings under the auspices of the Permanent Court of Arbitration)   |
| <b>Date of decision:</b>      | Award of 17 December 1999  |
| <b>Published in:</b>          | <ul style="list-style-type: none"> <li>- 40 <u>International Legal Materials</u> (2001), pp 983-1019</li> <li>- <u>International Law Reports</u>, Vol. 119, p. 417</li> </ul>  |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Reisman, W.M., "Eritrea-Yemen Arbitration, Award Phase II: Maritime Delimitation", 94 <u>American Journal of International Law</u> (2000), pp. 721-736</li> <li>- Marques Atunes, N.S., "The 1999 Eritrea-Yemen Maritime Delimitation Award and the Development of International Law", 50 <u>International and Comparative Law Quarterly</u>, (2001), pp. 299-344</li> <li>- Kwiatkowska, B., "The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation", 32 <u>Ocean Development and International Law</u> (2001), pp. 1-25</li> <li>- Dobelle, J-F., "Le compromis d'arbitrage signé par l'Erythrée et le Yémen à Paris le 3 Octobre 1996", 42 <u>Annuaire Français de Droit International</u> (1996), pp. 477-481</li> <li>- Dobelle, J-F., "Le différend entre l'Erythrée et le Yémen: la sentence arbitrale du 17 Décembre 1999 sur la délimitation des frontières maritimes", 45 <u>Annuaire Français de Droit International</u> (1999), pp. 554-565</li> <li>- Distefano, G., "La sentence arbitrale du 17 décembre 1999 sur la délimitation des frontières maritimes entre l'Erythrée et le Yémen: quelques observations complémentaires", 46 <u>Annuaire Français de Droit International</u> (2000), pp. 255-284</li> </ul> |

### 1. Facts

406. On 21 May 1996, Eritrea and Yemen signed an Agreement on Principles, witnessed by the Governments of the French Republic, the Federal Democratic Republic of Ethiopia and the Arab Republic of Egypt, obliging themselves to settle peacefully the dispute regarding their respective sovereignty over a number of islands and maritime zones in the Red Sea.

407. On 3 October 1996, Eritrea and Yemen signed an Arbitration Agreement under which they submitted their dispute to an Arbitral Tribunal.

408. Eritrea appointed as arbitrators Judge Stephen M. Schwebel and Judge Rosalyn Higgins; Yemen appointed Dr. Ahmed Sadek El-Kosheri and Mr. Keith Hight. The four arbitrators appointed Sir Robert Y. Jennings, recommended by both Parties, President of the Tribunal on 14 January 1997.

409. The arbitral proceedings consisted of two phases dealing respectively with sovereignty over territory and maritime delimitation.<sup>11</sup> For both phases, the Tribunal fixed the location of its registry at the International Bureau of the Permanent Court of Arbitration.

410. The Tribunal rendered its decision in the first phase of the dispute on 9 October 1998. It found unanimously that sovereignty over the disputed islands, islets and rocks was to be divided between Eritrea and Yemen.<sup>12</sup> However, the Tribunal limited Yemen's sovereignty over the group of islands awarded to it by stipulating that free access to the sea for the fishermen of both Eritrea and Yemen and the traditional fishing regime in the region were to be maintained. Consequently, on 16 October 1998, Eritrea and Yemen concluded the Treaty Establishing the Joint Yemeni-Eritrean Committee for Bilateral Cooperation.

411. The arbitral award on the maritime delimitation was rendered on 17 December 1999.

## 2. Issues

### **(a) Questions before the Arbitral Tribunal**

- The Tribunal was asked to delimit the maritime boundaries between Eritrea and Yemen in the Red Sea. The Tribunal understood "maritime boundaries" as referring to its normal and ordinary meaning, and not to the limits of the territorial sea or contiguous zone.

### **(b) Arguments presented by the Parties**

Both Parties claimed a form of median international boundary line, although their respective claimed median lines followed a very different course and did not coincide.

<sup>11</sup> Article 2 of the Arbitration Agreement provides that:

"1. The Tribunal is requested to provide rulings in accordance with international law, in two stages.

2. The first stage shall result in an award on territorial sovereignty and on the definition of the scope of the dispute between Eritrea and Yemen (...)

3. The second stage shall result in an award delimiting maritime boundaries. The Tribunal shall decide taking into account the opinion that it will have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any other pertinent factor."

<sup>12</sup> See Award in the First Stage, Chapter XI, Dispositif, paras. 527-528.

**(i) Eritrea**

412. Eritrea requested the Tribunal to render an award preserving “the Eritrean people's historic use of resources in the mid-sea islands which includes fishing, trading, shell and pearl diving, guano and mineral extraction, and all associated activities on land including drying fish, drawing water, religious and burial practices, and building and occupying shelters for sleep and refuge”. Nevertheless, Eritrea was willing to share those rights with Yemen and proposed to negotiate an agreement with Yemen that would be submitted to the Tribunal. Eritrea put forward a proposal for the definition of the outer borders of the shared maritime zone.<sup>13</sup>

413. As to the waters beyond the shared area of the mid-sea islands, Eritrea envisaged dividing them “in accordance with a median line drawn between two coasts, which shall include the islands historically owned by either State prior to the decade preceding commencement of this Arbitration in accordance with Article 121 of the United Nations Convention on the Law of the Sea”.

414. Eritrea pointed out that the Yemeni argument contained a fundamental contradiction: the boundaries of the continental shelf and the EEZ were governed by articles 74 and 83 of the United Nations Convention on the Law of the Sea (the Convention) and neither of these two articles mentioned equidistance. The requirement was thus that a delimitation of these areas should “achieve an equitable solution”. Only in areas where the distance between the two coasts was less than 24 miles would the basic rule be equidistance, by application of article 15 of the Convention. Eritrea also objected that according to Yemen's proposal there was no access corridor for certain islets belonging to Eritrea through the surrounding territorial sea of Yemen. Furthermore, Yemen's proposal would result in the inclusion of the main shipping channels within what would be Yemen's territorial waters.

415. Eritrea's proposed solution for the delimitation consisted of two parts: a proposed international boundary, the purpose of which was to delimit the area which Eritrea claimed to be “joint resource zones” or “shared maritime zones around the islands”, and the exclusive waters of Yemen, to the east, and the exclusive waters of Eritrea to the west – which included not merely the territorial sea but also all the waters west of the mid-sea islands and west of the historic median line. Eritrea's claim was aimed at maintaining its traditional fishing regime (while Yemen had expressed the view that the traditional fishing regime should not have had any impact on the delimitation). The line proposed by Eritrea was the median line between the mainland coasts, ignoring the presence of the mid-sea islands of Yemen, but taking into account the islands of Eritrea. The “joint resource boxes” system was proposed as a flexible suggestion to solve the complex problem of the islands. In this connection, Eritrea claimed that no arrangements had been made to protect its traditional fishing rights in the waters around the mid-sea islands.

416. As for historical rights, Eritrea further sustained the view that Yemen's recently acquired sovereignty (in the first stage of the Arbitration) over a number of islands made them less important as factors to be taken into consideration for the purposes of the delimitation. Only the islands historically owned by either State should be taken into consideration in establishing the median line. In fact, it was pointed out that the Award on Sovereignty spoke of the traditional

<sup>13</sup> The outer borders of the maritime zones of the islands in which these shared rights exist shall be defined as extending: A. on the western side of the Red Sea, to the median line drawn between the two coasts, which shall include the islands historically owned by either State prior to the decade preceding commencement of this arbitration in accordance with Article 121 of the United Nations Convention on the Law of the Sea; and B. on the eastern side of the Red Sea, as far as the twelve mile limit of Yemen's territorial sea.”

fishing regime as having established, by historical consolidation, rights for both Parties as a form of international servitude falling short of territorial sovereignty.

417. As for proportionality, Eritrea's response to Yemen's argument on proportionality was to question whether Yemen's claimed line in the central sector really was the median line envisaged in article 15 of the United Nations Convention on the Law of the Sea, since it ignored the low-water line base points of some Eritrean islands.

## (ii) Yemen

418. Yemen proposed a median line delimitation taking into account some islets and rocks.<sup>14</sup> Yemen began its argument with the general understanding that a median line normally produces an equitable result when applied between opposite coasts. Yemen considered that a major preliminary task for the Tribunal was to decide which were the coasts to be used as baselines. For this purpose Yemen divided the area into three sectors – northern, central and southern. Having indicated its proposed lines, Yemen observed that, in accordance with the applicable legal principles, the appropriate delimitation would be achieved by a median line between the relevant coasts and that there was no justification for any adjustment of this line on the basis of equitable principles. Yemen also addressed a number of relevant factors, such as proportionality, "non-geographical relevant circumstances" such as "dependency of the fishing communities in Yemen upon the Red Sea fishing" and "the element of security of the coastal State".

419. As for historical rights, in response to Eritrea's argument that only the island historically owned by either State should be taken into consideration in establishing the median line, Yemen replied that its title to formerly disputed islands was not created by the adjudication in the Award on Sovereignty, but that the adjudication was rather a confirmation of an already existing title and that in arbitrations the issue of title could be determined both retrospectively and retroactively. Yemen also expressed the concern that Eritrea's proposed joint resource zones were founded upon a supposition that the sovereignty awarded to Yemen in the First Stage of the Arbitration was "only limited or conditional".

420. As for proportionality, Yemen's position was that proportionality was a factor to be taken into account in testing the equitableness of a delimitation already effected by other means. In particular, Yemen suggested that the relative lengths of the coasts were not significant in the present case in the light of a series of reasons, including that in certain areas any modifications of the median line would involve the principle of non-encroachment, while in other areas equal division alone would guarantee an equitable result.

<sup>14</sup> "The Republic of Yemen, respectfully requests the Tribunal to adjudge and declare:

1. That the maritime boundary between the Parties is a median line, every point of which is equidistant from the relevant base points on the coasts of the Parties as identified in Chapters 8 through 10 of Yemen's Memorial, appropriate account being taken to the islets and rocks comprising South West Rocks, the Haycocks and the Mohabbakahs;

2. That the course of the delimitation, including the coordinates of the turning points on the boundary line established on the basis of the World Geodetic System 1984 (WGS 84), are those that appear in Chapter 12 to Yemen's Memorial."

### 3. Reasoning of the Arbitral Tribunal

#### (a) Applicable Law

421. It should be noted that the Arbitration Agreement referred to the United Nations Convention on the Law of the Sea of 1982 (UNCLOS) as containing applicable rules of law. This is an important point since Eritrea was not a party to UNCLOS. The Tribunal considered that it had to apply also the customary law of the sea and such principles as proportionality and non-encroachment, taking into consideration the presence of islands and "any other permanent factor" to reach an equitable decision. The Tribunal also used Islamic Law to support the concept of an artisanal fishing regime, although it was not provided for in the Agreement.

#### (b) Method

422. Both Eritrea and Yemen requested the use of the equidistance method although they did not agree on the point of departure.

423. The Tribunal, relying on the writings of commentators, the applicable jurisprudence and UNCLOS, stated that "between coasts that are opposite to each other the median or equidistance line normally provides an equitable boundary in accordance with the requirements of the Convention."

424. The Tribunal decided to draw a single median line all-purpose boundary. A median line is defined as a line "every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured" (article 15, UNCLOS). The Tribunal described precisely and justified its methods to determine the delimitation line. It also answered the claims of the Parties.

425. The Tribunal used the low-water line as the baseline because it considered that it was required to do so under international law, in particular article 5 of UNCLOS. It rejected the Yemeni claim that the Tribunal should measure the median line boundary from the high-water line instead of the low-water line along the Eritrean coast. In this connection, it should be noted that the domestic legislative definition of the territorial sea of Eritrea was found in the 1953 enactment by Ethiopia, which defined Ethiopia's territorial waters as "extending from the extremity of the seaboard at maximum annual high".

426. The Tribunal scrutinized the situation of the islands in the general geographical and social coastal configuration to determine which ones could be used as relevant base points. Indeed, the Tribunal emphasized the effect of the presence of islands upon the boundary line. The Tribunal quoted from article 121(2) of UNCLOS that islands, however small, and even rocks, provided they are indeed islands surrounded by water at high-tide, are capable of generating a territorial sea of up to 12 miles and concluded that a chain of islands which is less than 24 miles apart can generate a continuous band of territorial sea. Thus, the Tribunal included islets in the calculation because it considered that they were part of a "fringe system" as defined in article 7 of UNCLOS. Nevertheless, the Tribunal refused to use certain islands proposed by Yemen as a base point inasmuch as it considered that their barren and inhospitable nature and their position well out to sea rendered them not appropriate to take into account.

427. The Tribunal also referred to article 15 of UNCLOS, stating that the equidistant median line could be modified because of historic title or other special circumstances. However, the Tribunal decided that there were no such circumstances in the present case. Both Parties had stressed the importance of fishing activities and had requested that the delimitation should

respect existing historical practices, and should be without effect on local fishermen, the population, the economy, the diet and health of the population. Nonetheless, the Tribunal considered that: “neither Party has succeeded in demonstrating that the line of delimitation proposed by the other would produce a catastrophic or inequitable effect on the fishing activity of its nationals or detrimental effects on fishing communities and economic dislocation of its nationals.” The Tribunal recognized the historic, social and economic importance of fishing activity for both countries, but did not consider it as legally relevant to determine the maritime delimitation. As to the Petroleum Agreement signed by the Parties prior to commencement of the Arbitration, the Tribunal stated again in stage two, as it had done in the award in the first stage, that it had no effect on the delimitation. In any event, the Tribunal proposed a joint exploitation of the zone.

428. The Tribunal also applied the principle of non-encroachment to ensure an equitable delimitation.

429. Finally, the Tribunal calculated respective lengths of the Parties’ coasts, applied the test of proportionality to the case and found that there was no disproportion. The Tribunal considered that the test of proportionality is “a test of the equitableness of a delimitation arrived at by some other means” rather than an independent mode or principle of delimitation.

### **(c) Traditional Fishing: Interpretation of the First Stage Award**

430. It is recalled that in the first stage (territorial sovereignty), the Tribunal held that: “In the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men”. It added in the Dispositif of the Award that: “The sovereignty found to lie within Yemen entails the perpetuation of the traditional fishing regime in the region, including free access and enjoyment for the fishermen of both Eritrea and Yemen.”

431. Eritrea argued during the second stage (maritime delimitation) that the finding in the first stage meant that the Tribunal should delimit joint resource zones during the second stage. Therefore, Eritrea asked the Tribunal to specify the implications of its first Award. As for Yemen, it had understood the first Award as giving Yemen sole responsibility for the preservation of the traditional fishing regime.

432. Relying on regional legal traditions and Islamic concepts, the Tribunal explained that the purpose of the Award in the first stage was to protect the inherent right of traditional fishermen in the area. The Tribunal stated that: “There is no reason to import into the Red Sea the western legal fiction - which is in any event losing its importance - whereby all legal rights, even those in reality held by individuals, were deemed to be those of the State.” Consequently, sovereignty over the maritime area surrounding the islands awarded to Yemen in the first stage was neither joint nor conditional. The Tribunal only wanted the fishermen of both States to benefit from a particular protection, allowing them to continue to fish in an area now deemed under the sovereignty of Yemen. However, the Tribunal excluded guano and mineral extraction from the scope of the fishing privilege.

**4. Award**

433. Taking into account articles 15, 74 and 83 of UNCLOS, the Tribunal drew a single all-purpose equidistant median line between Eritrea and Yemen to delimit their maritime boundary. Thus, the international maritime boundary between Eritrea and Yemen is a series of geodetic lines joining, in the order specified, points which are defined in degrees, minutes and seconds of the geographic latitude and longitude, based on the World Geodetic System 1984 (WGS 84).

434. As regards the traditional fishing regime, the Tribunal granted free access to and from the islands concerned, including unimpeded passage through Yemeni sovereign waters, to Eritrean artisanal fisherman.

435. As for oil and gas exploration and exploitation, the Tribunal held that: “the Parties were bound to inform and consult one another on any oil and gas and other mineral resources that might be discovered and that straddled the single maritime boundary line between them or that lay in its immediate vicinity.”

**K. Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain**

|                               |   |
|-------------------------------|---|
| <b>Parties:</b>               | Qatar and Bahrain   |
| <b>Issues:</b>                | Sovereignty over islands; straight baselines; maritime boundary delimitation; single maritime boundary; equidistance line; special circumstances  |
| <b>Forum:</b>                 | International Court of Justice (ICJ)  |
| <b>Date of Decision:</b>      | 1 July 1994 (Jurisdiction and Admissibility)<br>15 February 1995 (Jurisdiction and Admissibility)<br>16 March 2001 (Merits)   |
| <b>Published in:</b>          | 40 <u>International Legal Materials</u> (2001), pp. 847-899<br><br>ICJ: <u>Reports of Judgments, Advisory Opinions and Orders</u> 2001, pp. 40-461  |
| <b>Selected commentaries:</b> | <p>Reichel, M.C., “Maritime Delimitation and Territorial Questions between Qatar and Bahrain”, 26 <u>Denver Journal of International Law and Policy</u>, (1997-1998), pp. 725-744</p> <p>Campbell, A.M., “International Law - Maritime Delimitation and Territorial Dispute, Qatar v. Bahrain, 1994 I.C.J. 112 (July 1)” 19 <u>Suffolk Transnational Law Review</u>, (1996), pp. 573 et seq.</p> <p>Klabbers, J., “Qatar v. Bahrain: the concept of ‘treaty’ in International Law”, 33 <u>Archiv des Völkerrechts</u>, (1995), pp. 361-376</p> <p>Bulloch, J., Glubb, F., “Latest moves in the Bahrain-Qatar Dispute”, 50 <u>Gulf Report</u>, (1995), pp. 3-51</p> <p>Plant, G., “Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)”, 96 <u>American Journal of International Law</u> (2002), pp. 198-210</p> <p>Merrills, J.G. “Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)”, 51 <u>International and Comparative Law Quarterly</u> (2002), pp. 709-722</p> <p>Tanaka, Y., “Reflections on Maritime Delimitation in the Qatar/Bahrain Case”, 52 <u>International and Comparative Law Quarterly</u> (2003), pp. 53-80</p> <p>Mendelson, M., “The Curious Case of Qatar and Bahrain in the International Court of Justice”, 72 <u>British Year Book of International Law</u> (2001), pp. 183-211</p> |

Kwiatkowska, B., “The Qatar-Bahrain Maritime Delimitation and Territorial Questions Case”, 33 Ocean Development and International Law (2002), pp. 227-262

Décaux, E., “Affaire de la délimitation maritime et des questions territoriales entre Qatar et Bahreïn, fond”, 47 Annuaire Français de Droit International (2001), pp. 177-240

## 1. Facts

436. From 1976, the King of Saudi Arabia conducted a mediation in order to resolve the dispute between Bahrain and Qatar, concerning sovereignty over certain islands and their mutual maritime boundary. No agreement could be reached. On 8 July 1991, Qatar filed an Application with the International Court of Justice instituting proceedings against Bahrain on account of a number of disputes between the two States relating to “sovereignty over the Hawar Islands, sovereign rights over the shoals of Dibal and Qit’at Jaradah, and the delimitation of the maritime areas of the two States”. Qatar contended that the Court had jurisdiction to entertain the dispute in keeping with the two “agreements” concluded between the Parties in December 1987 and 1990, respectively, referred to as the “Bahraini formula”. However, Bahrain contested the basis of jurisdiction invoked by Qatar in letters to the Court dated 14 July and 18 August 1991.

437. The Court, by its Judgment of 1 July 1994, found that the exchanges of letters by the Emirs of Qatar and Bahrain with the King of Saudi Arabia as well as a document entitled “Minutes” constituted international agreements creating rights and obligations for the Parties. The Court also found that by the terms of those agreements the Parties had undertaken to submit to the Court the whole of the dispute between them, as set out in the “Bahraini formula”. Subsequently, by a judgment of 15 February 1995, the Court found that it had jurisdiction to adjudicate upon the dispute between Qatar and Bahrain.

438. Then, in the course of written proceedings on the merits, Bahrain challenged the authenticity of 82 documents produced by Qatar. Each of the Parties submitted several expert reports on the matter and the Court issued various Orders. In its final Order, the Court placed on record the decision of Qatar to disregard, for the purposes of the case, the 82 documents whose authenticity had been challenged by Bahrain.

439. The present summary will deal exclusively with the maritime boundary delimitation aspect of the case. In this regard, it should be noted that in order to determine what constituted the Parties’ relevant coasts the Court had to first establish which islands came under their respective sovereignty.

## 2. Issues

### (a) Questions before the Court

- (i) Sovereignty over certain islands, islets and shoals;
- (ii) Delimitation of the maritime boundary between Qatar and Bahrain.

**(b) Arguments presented by the Parties**

- (i) **Qatar** requested the Court to adjudge and declare in accordance with international law:
- That Qatar has sovereignty over the Hawar Islands;
  - That Dibal and Qit'at Jaradah shoals are low-tide elevations that are under Qatar's sovereignty;
  - That Bahrain has no sovereignty over Janan;
  - That Bahrain has no sovereignty over Zubarah; and
  - That any claim concerning archipelagic baselines and areas for fishing for pearls and swimming fish should be irrelevant for the purpose of maritime delimitation in the case.

440. In addition, Qatar requested the Court to draw a single maritime boundary between the maritime areas of seabed, subsoil and superjacent waters appertaining respectively to Qatar and Bahrain on the basis that Zubarah, the Hawar Islands and the island of Janan appertain to Qatar and not to Bahrain. Qatar specified for the Court the geographical points and directions that the boundary should take, starting from point 2, as set out in the 1971 Delimitation Agreement between Bahrain and Iran.

- (ii) **Bahrain**, on the other hand, requested the Court to declare that:

- Bahrain is sovereign over Zubarah; and
- Bahrain is sovereign over the Hawar Islands, including Janan and Hadd Janan.

441. Moreover, in view of Bahrain's sovereignty over all the insular and other features, including Fasht ad Dibal and Qit'at Jaradah, comprising the Bahraini archipelago, Bahrain proposed a maritime boundary between Bahrain and Qatar, as set forth in part Two of its Memorial.

### 3. Reasoning of the Court

442. The Court noted the geographical setting of the Qatar peninsula and the number of islands, islets and shoals off the eastern and western coasts of the main island that compose Bahrain.

443. The Court also traced briefly the complex history that formed the background to the dispute between the Parties until 1971, when Qatar and Bahrain ceased to be British protected States.

**(a) Sovereignty over Zubarah**

444. The Court found that it could not accept Bahrain's contention that the United Kingdom had always regarded Zubarah as belonging to Bahrain since the terms of the 1868 Agreement between the British Government and the ruler of Bahrain, the 1913 and 1914 Conventions and the exchanges of letters of 1937 between the British Political Resident and the Secretary of State of India all show otherwise. After 1868, the authority of the ruler of Qatar over the territory of

Zubarah was gradually consolidated. That authority was confirmed in the 1913 Anglo-Ottoman Convention and definitively established in 1937. The Court therefore concluded that Qatar had sovereignty over Zubarah.

### **(b) Sovereignty over the Hawar Islands**

445. The Court observed that the Parties' lengthy arguments on the issue of sovereignty over the Hawar Islands raised several legal issues: the nature and validity of the 1939 decision by the United Kingdom; the existence of an original title; "effectivités"; and the applicability of the principle of *uti possidetis juris* by the Court.

446. Bahrain maintained that the 1939 decision of the British Government holding that the Hawar Islands belonged to Bahrain must be considered primarily as an arbitral award, which is *res judicata*, basing its proposition on decisions of the Permanent Court of International Justice. On the other hand, Qatar denied the relevance of the judgments cited by Bahrain.

447. The Court, in considering the question whether the 1939 British decision must be deemed to constitute an arbitral award, observed that the word "arbitration", for purposes of public international law, usually refers to the "settlement of differences between States by judges of their own choice, and on the basis of respect for law", this wording having been reaffirmed by the International Law Commission. However, in the present case, the Court noted that no agreement had existed between the Parties to submit the case to an arbitral tribunal made up of judges chosen by them and ruling on the basis of law or *ex aequo et bono*. In fact, the Parties had only agreed that the issue would be decided by "His Majesty's Government" and left it to the latter to determine how the decision would be reached and by which officials. Thus the 1939 British decision did not constitute an international arbitral award. Accordingly, the Court did not need to consider Bahrain's argument concerning the Court's jurisdiction to examine the validity of arbitral awards. Nonetheless, the fact that a decision is not an arbitral award does not mean that the decision is devoid of legal effect.

448. Qatar contended that it never gave its consent to have the question of the Hawar Islands decided by the British Government and maintained that the British officials deciding the matter were biased.

449. The Court noted that the pleadings relating to the 1939 decision as well as exchanges of letters showed that Bahrain and Qatar consented to the British Government settling their dispute over the Hawar Islands. Therefore, the 1939 decision must be regarded as being binding from the outset on both States and continued to be binding on them after 1971, when they ceased to be British protected States. The Court concluded that Bahrain had sovereignty over the Hawar Islands and observed that it was unnecessary to rule on the existence of an original title, effectivités and the applicability of *uti possidetis juris* to the present case.

### **(c) Sovereignty over Janan Island**

450. The Court, in considering the Parties' claims to Janan Island, observed that Qatar and Bahrain had different ideas of what constituted "Janan Island". After examining the arguments of the Parties, the Court decided to treat Janan and Hadd Janan as one island. The Parties also debated at length whether Janan should be regarded as part of the Hawar Islands and whether, as a result, it pertained to Bahrain by virtue of the 1939 decision or was not covered by that decision.

451. Then the Court considered the letters sent on 23 December 1947 by the British Political Agent in Bahrain to the rulers of Qatar and Bahrain. By those letters the Political Agent, acting on behalf of the British Government, informed the Parties of the delimitation of their seabeds that had been effected by the British Government and made it clear that “Janan Island is not regarded as being included in the islands of the Hawar group”. Rather, the British Government regarded Janan Island as belonging to Qatar. The Court considered that the British Government provided an authoritative interpretation of the 1939 decision and the situation resulting therefrom. Consequently, on the basis of the decision taken by the British Government in 1939, the Court found that Qatar has sovereignty over Janan Island, including Hadd Janan.

**(d) Maritime boundary delimitation**

452. Both Parties agreed that the Court should render its decision on maritime boundary delimitation in accordance with international law. However, neither Bahrain nor Qatar is a party to the 1958 Geneva Conventions on the Law of the Sea; Bahrain had ratified the 1982 United Nations Convention on the Law of the Sea (UNCLOS), but Qatar was only a signatory. The Court therefore concluded that the applicable law would be customary international law, as codified in UNCLOS.

**(e) Single maritime boundary**

453. The Court noted that under the terms of the “Bahraini formula”, the Parties requested the Court “to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters”. In this connection, the Court observed that the concept of a single maritime boundary did not stem from multilateral treaty law, but from State practice and finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various, partially coincident, zones of maritime jurisdiction appertaining to them.

**(f) Delimitation of the territorial sea**

454. The Court recalled that the rights of the coastal State in the territorial sea are not functional but territorial and entail sovereignty over the seabed, superjacent waters and air column. While taking into account that its ultimate task was to draw a single maritime boundary, the Court applied the principles of customary international law relating to the delimitation of the territorial sea.

455. The Parties agreed that the provisions of article 15 of UNCLOS, which is virtually identical to article 12(1) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, are part of customary international law. Article 12(1) is often referred to as the “equidistance/special circumstances” rule.

456. The Court noted that in delimiting the territorial sea, the most logical and widely practised approach was first to draw provisionally an equidistance line and then to consider whether that line should be adjusted in the light of the existence of special circumstances.

**(g) The equidistance line**

457. The Court noted that the equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each of the two States is measured. This line could only be drawn when the baselines are known.

### (h) The relevant coasts

458. Qatar argued that, for purposes of the delimitation, it is the mainland-to-mainland method that should be applied in order to construct the equidistance line. For Qatar the application of the mainland-to-mainland method takes no account of the islands, islets, rocks, reefs or low-tide elevations lying in the relevant area and would mean that the equidistance line has to be constructed by reference to the high-water line.

459. Bahrain contended that it is a *de facto* archipelago or multiple-island State, characterized by a variety of maritime features of diverse character and size. As it is the land that determines maritime rights, the relevant basepoints are situated on all those maritime features over which Bahrain has sovereignty. Bahrain also contended that, according to conventional and customary international law, it is the low-water line that is determinative for the breadth of the territorial sea for the delimitation of overlapping territorial waters.

460. The Court recalled that under the applicable rules of international law the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast in keeping with article 5 of the 1982 United Nations Convention on the Law of the Sea.

461. The Court had made it clear in previous cases that maritime rights derive from the coastal State's sovereignty over the land, a principle that can be summarized as "the land dominates the sea". It is thus the terrestrial situation that must be taken as a starting point for the determination of the maritime rights of a coastal State.

### (i) Low-tide elevations

462. **Fasht al Azm.** The Parties were divided on the issue of whether Fasht al Azm was part of the island of Sitrah or whether it was a low-tide elevation that is naturally connected to Sitrah Island. The Court did not have to determine the issue in order to undertake the delimitation of this sector.

463. **Qit'at Jaradah.** The Parties had opposing views on whether Qit'at Jaradah was an island or a low-tide elevation. The legal definition of an island is "a naturally formed area of land, surrounded by water, which is above water at high tide" in accordance with article 10 (1) of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone and article 121 (1) of the 1982 United Nations Convention on the Law of the Sea. After having weighed the evidence, the Court concluded that Qit'at Jaradah was an island and should be taken into account in drawing the equidistance line and that Bahrain had sovereignty over it.

464. **Fasht ad Dibal.** Both Parties agreed that Fasht ad Dibal was a low-tide elevation. However, Qatar maintained that as a low-tide elevation Fasht ad Dibal could not be appropriated while Bahrain contended that low-tide elevations could be appropriated in accordance with the criteria that pertain to the acquisition of territory. The Court was of the view that the decisive issue was whether a State can acquire sovereignty by appropriation over a low-tide elevation situated within the breadth of its territorial sea when that same low-tide elevation lies within the territorial sea of another State.

465. The Court concluded that a low-tide elevation did not generate the same rights as islands or other territory. Consequently, there was no ground for recognizing the right of Bahrain to use as a baseline the low-water line of those low-tide elevations that are situated in the zone of overlapping claims or for recognizing Qatar as having such a right. The Court concluded that for the purpose of drawing the equidistance line, such low-tide elevations must be disregarded.

**(j) Method of straight baselines**

466. The Court observed that the method of straight baselines, on which Bahrain relied in its reasoning and in the maps provided to the Court, was an exception to the normal rules for the determination of baselines and might only be applied if a number of conditions were met. The method had to be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into or that there is a fringe of islands along the coast in its immediate vicinity. Bahrain contended that the maritime features off the coast of the main islands could be assimilated to a fringe of islands that constitute a whole with the mainland. The Court, however, did not qualify such features as “a fringe of islands” and concluded that Bahrain was not entitled to apply the method of straight baselines.

**(k) Special circumstances**

467. The Court observed that special circumstances may exist that make it necessary to adjust the equidistance line as provisionally drawn in order to obtain an equitable result.

468. Taking into account special circumstances, the Court decided that, from the point of intersection of the respective maritime limits of Saudi Arabia, on the one hand, and of Bahrain and Qatar, on the other, which cannot be fixed, the boundary would follow a north–easterly direction, then immediately turn in an easterly direction, after which it would pass between Jazirat Hawar and Janan; it would subsequently turn to the north and pass between the Hawar Islands and the Qatar peninsula and continue in a northerly direction, leaving the low-tide elevation of Fasht Bu Thur and Fasht al Azm, on the Bahraini side, and the low-tide elevations of Qita'a el Erge and Qit'at ash Shajarah, on the Qatari side; finally, it would pass between Qit'at Jaradah and Fasht ad Dibal, leaving Qit'at Jaradah, on the Bahraini side, and Fasht ad Dibal, on the Qatari side.

469. As regards navigation, the Court emphasized that the waters lying between the Hawar Islands and the other Bahraini islands are not internal waters of Bahrain, but its territorial sea. Therefore, Qatari vessels, like those of other States, would enjoy in those waters the right of innocent passage accorded by customary international law. Similarly, Bahraini vessels, like those of other States, enjoyed the same right of innocent passage in the territorial sea of Qatar.

**(l) Delimitation of the continental shelf and exclusive economic zone**

470. The Court drew a single maritime boundary in the part of the delimitation area covering both the continental shelf and the exclusive economic zone. As with the Court's approach in earlier cases, for the delimitation of the maritime zones beyond the 12-mile zone, the Court first provisionally drew an equidistance line and then considered whether there were circumstances that would lead to an adjustment of the line.

471. In this connection, the Court noted the nexus between the equidistance/special circumstances rule, which is applicable, in particular, to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, which had been developed through case law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone.

472. As regards circumstances that might make it necessary to adjust the equidistance line in order to achieve an equitable result, the Court did not consider the existence of pearl banks, though predominantly exploited in the past by Bahraini fishermen, as justifying an eastward shifting of the equidistance line, as requested by Bahrain.

473. In addition, the Court did not consider that the disparity in length of the coastal fronts of the Parties, as Qatar claims, necessitated an adjustment of the equidistance line.

474. In order to avoid a distortion in the boundary line and to avoid disproportionate effects, the Court was of the view that Fasht al Jarim, a remote projection of Bahrain's coastline in the Gulf area, would have no effect in determining the boundary line in the northern sector. The single maritime boundary in this sector is to be formed by a line that would meet the equidistance line as adjusted to take account of the absence of effect of Fasht al Jarim. Then the line is to follow the adjusted equidistance line until it meets the delimitation line between the respective maritime zones of Iran, on the one hand, and of Bahrain and Qatar, on the other.

475. The Court concluded that the single maritime boundary that divides the various maritime zones of Qatar and Bahrain would be formed by a series of geodesic lines joining points with specific coordinates, as set out in paragraph 250 of its Judgment.

#### 4. Decision

476. On 16 March 2001, the Court found:

- (a) Unanimously, that Qatar has sovereignty over Zubarah;
- (b) By twelve votes to five, that Bahrain has sovereignty over the Hawar Islands;
- (c) Unanimously, that the vessels of Qatar enjoy in the territorial sea of Bahrain separating the Hawar Islands from the other Bahraini islands, the right of innocent passage in keeping with customary international law;
- (d) By thirteen votes to four, that Qatar has sovereignty over Janan Island, including Hadd Janan;
- (e) By twelve votes to five, that Bahrain has sovereignty over the island of Qit'at Jaradah;
- (f) Unanimously, that the low-tide elevation of Fasht ad Dibal falls under the sovereignty of Qatar; and
- (g) By thirteen votes to four, that the single maritime boundary that divides the various zones of Qatar and Bahrain was to be drawn as indicated in paragraph 250 of its Judgment.

## 5. Declarations, Separate Opinions, Dissenting Opinions

### (a) Declarations

477. **Judge Herczegh** stressed the importance of the operative part of the Judgment in which the Court stated that Qatari vessels enjoy in the territorial sea of Bahrain, separating the Hawar Islands from the other Bahraini islands, the right of innocent passage. That part, he stated, had enabled him to vote in favour of the part of the Judgment that defined the single maritime boundary that divides the maritime areas of the two States concerned.

478. **Judge Vereshchetin** stated that he was prevented from concurring in the Court's findings on the legal position of the Hawar Islands and the maritime feature of Qit'at Jaradah. As regards the decision, he noted that by abstaining from analyzing whether the 1939 British decision was well founded in law and rectifying it, if appropriate, the Court had failed in its duty to take into account all the elements necessary for determining the legal position of the Hawar Islands.

479. As for Qit'at Jaradah, his view was that the tiny maritime feature, constantly changing its physical position, could not be considered an island within the meaning of the 1982 UN Convention on the Law of the Sea. Instead, he considered the feature to be a low-tide elevation whose appurtenance depended on its location in the territorial sea of one State or the other. Accordingly, the attribution of Qit'at Jaradah should have been effected after the delimitation of the territorial seas of the Parties and not vice versa.

480. **Judge Higgins** stated that the Court, had it so chosen, could have grounded Bahraini title in the Hawars on the law of territorial acquisition. Among the acts occurring in the Hawars were some that did have relevance for legal title. The effectivités were no sparser than those on which title had been founded in other cases. Even if Qatar had, by the time of the early *effectivités*, extended its own sovereignty to the coast of the peninsula facing the Hawars, it performed no comparable effectivités in the Hawars. She therefore concluded that these elements were sufficient to displace any presumption of title by the coastal State.

### (b) Separate Opinions

481. **Judge Oda** disagreed with the Court's methods for determining the maritime boundary as well as with the Court's decision to demarcate the boundary's precise geographic coordinates. He made special mention of the Court's treatment of low-tide elevations and islets and noted in particular the incongruity between the expansion of the territorial sea from 3 to 12 miles and the regime under which low-tide elevations and islets are accorded territorial seas of their own. In this connection, he expressed the view that such a regime might not be considered customary international law as it was only addressed indirectly by the relevant provisions of the 1982 United Nations Convention on the Law of the Sea.

482. Judge Oda also disagreed with the Court's use of the phrase "single maritime boundary" and noted the distinction between the regimes governing the exclusive economic zone and the continental shelf, on the one hand, and the territorial sea, on the other. Therefore, the Court's use of "a single maritime boundary" was inappropriate.

483. As regards the southern sector, he objected to the Court's decision to delimit the southern sector as a territorial sea, stating that even if the Court's approach to the southern sector were appropriate, the Court had misinterpreted and misapplied the rules and principles governing the

territorial sea. Judge Oda noted that the “equidistance/special circumstances” rule, mistakenly employed by the Court for purposes of territorial sea delimitation, pertained to the continental shelf regime.

484. Lastly, Judge Oda noted the importance of oil exploitation for the region and its political history and advanced the view that the case should have demarcated only the continental shelf boundaries and not those of the territorial seas.

485. **Judge Parra-Aranguren** stated that his favourable vote on the operative part of the Judgment did not mean that he shared all and every part of the reasoning followed by the Court in reaching its conclusion. In particular, in his opinion Qatar enjoyed the right of innocent passage accorded by customary international law in all the territorial sea under the sovereignty of Bahrain. In addition, he stated that the drilling of an artesian well and the construction of navigational aids in respect of the low-tide elevation of Fasht ad Dibal could not be characterized as acts of sovereignty, as Bahrain had advanced. Accordingly, he did not believe that it was necessary to take a stand, as the Judgment did, on the question whether, from the point of view of establishing sovereignty, low-tide elevations could be fully assimilated with islands or other land territory.

486. **Judge Kooijmans** took issue with the Court with regard to that part of the Judgment which deals with the territorial issues that divided the Parties: Zubarah, the Hawar Islands and Janan. He disassociated himself from the Court’s reasoning on all three issues inasmuch as the Court, in his view, had taken an unduly formalistic approach by basing itself mainly on the position taken by the former protecting power and not on substantive rules and principles of international law, in particular those of acquisition of territory.

487. **Judge Al-Khasawneh** concurred with the majority decision regarding territorial issues: Zubarah and the Hawars. With regard to the latter, however, he criticized the Court’s exclusive reliance on the 1939 British decision “as a valid political decision that binds the Parties”. He felt that the approach was too restrictive and unduly formalistic. Moreover, he believed that the absence of any reference to substantive law in the part of the Judgment dealing with the Hawars was also unwarranted. Alternative lines of reasoning, he felt, should have been explored by the Court if the decision was to stand on firmer ground, such as *uti possidetis*, historic or original title, effectivités and the concept of geographic proximity.

488. **Judge ad hoc Fortier**, as regards the Qatari documents, noted that they served as the only basis for Qatar’s claim to the Hawar Islands although their authenticity was challenged by Bahrain. But, despite the challenge to authenticity, Qatar did not abandon its claim to the Hawar Islands and adduced a new argument not developed in its original Memorial. Judge Fortier felt that if Qatar had not eventually informed the Court that it had decided to disregard the challenged documents, damage might have been done to the administration of international justice and to the position of the Court.

489. As regards delimitation, Judge Fortier had serious reservations with regard to the Court’s reasoning in respect of certain aspects of the maritime boundary delimitation. He did not agree with the part of the single maritime boundary that ran westward between Jazirat Hawar and Janan.

**(c) Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma**

490. As regards the British decision of 1939, which served as the sole basis of the Court’s Judgment, the Judges felt that the Court rendered an *infra petita* ruling since it had ignored all of the other grounds relied on by the Parties. Moreover, the Court’s analysis of the formal validity of the 1939 British decision was incomplete and questionable. Nonetheless, the Judges agreed with the Court that the 1939 decision was a political decision and not an arbitral award having the authority of *res judicata*.

491. With respect to the voluminous map file submitted by Qatar, the Judges regretted the silence of the Judgment on the subject of map evidence. Even though it is true that the evidentiary importance of cartographic material is only relative, maps are the expression or reflection of general public opinion and of repute.

492. As for delimitation, the Judges stated that confirmation in the operative part of the Judgment of the right of innocent passage through Bahrain’s territorial waters was not enough and that the risk of conflicts arising in connection with the implementation of the right of innocent passage should not be underestimated. The Judges were of the opinion therefore that the Court should have regarded as part and parcel of the settlement of the merits of the dispute the conclusion of an agreement between the Parties providing for the legal enclavement of the Hawar Islands under a regime of “international easement”.

493. In addition, the Judges criticized the method adopted to draw the provisional median line as being contrary to the basic principles of delimitation. Under the adage, “the land dominates the sea”, it is essentially terra firma that has to be taken into account and special circumstances should not be allowed to influence prematurely the course of the theoretical provisional median line.

**(d) Dissenting Opinion of Judge ad hoc Torres Bernárdez**

494. The dissent of Judge ad hoc Torres Bernárdez concerned essentially the finding of the majority of the Court on the Hawar Islands dispute, the legal basis of that finding and the consequences it entailed for maritime boundary delimitation. In fact, the finding failed, according to him, to acknowledge the original title and corresponding sovereignty of Qatar over the Hawar Islands, a title established through a process of historical consolidation and general recognition, and the absence of any superior *derivative* title of Bahrain over the Hawar Islands. To this it should be added that the resulting *superveniens* maritime “special circumstances” was not treated as such in the definition of the course of the single maritime boundary in the Hawar Islands maritime area.

495. For Judge ad hoc Torres Bernárdez it was not possible to explain a finding on the basis of a vitiated consent to a 1938-1939 British procedure and whose outcome, the 1939 British “decision”, was clearly and obviously an invalid decision in international law, both formally and essentially, at the time of its adoption and remains so. The resurrection in the year 2001 of an invalid colonially-minded decision linked to oil interests to resolve a territorial question in dispute between two States is for Judge ad hoc Torres Bernárdez a quite unacceptable legal proposition.

496. It follows that Judge ad hoc Torres Bernárdez was unable to accept the conclusion that Bahrain was the holder of a derivative title to the Hawar Islands on the basis of consent to the British procedure as determined by the Judgment.

**L. Case concerning the Land and Maritime Boundary between Cameroon and Nigeria**

|                               |  |
|-------------------------------|--|
| <b>Parties:</b>               | Cameroon and Nigeria (Equatorial Guinea intervening, not as a Party)   |
| <b>Issues:</b>                | Maritime boundary delimitation (only issue treated in the present summary)   |
| <b>Forum:</b>                 | International Court of Justice (ICJ)   |
| <b>Date of Decision:</b>      | 11 June 1998 (Preliminary objections on jurisdiction and admissibility)<br>25 March 1999 (Request for interpretation of Judgment of 11 June 1998) and<br>10 October 2002 (Merits) (as they relate to the maritime boundary delimitation issue)   |
| <b>Published in:</b>          | <p>- <u>ICJ: Reports of Judgments, Advisory Opinions and Orders</u>, 1998, p. 275</p> <p>- <u>ICJ: Reports of Judgments, Advisory Opinions and Orders</u>, 2002, pp. 303-602</p>   |
| <b>Selected commentaries:</b> | <p>- Merrills, J.G., “Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea intervening)” merits judgment of 10 October 2002, 52 <u>International and Comparative Law Quarterly</u> (2003), pp. 788-797</p> <p>- Udombana, N.J., “A harmony or a cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa’s Development”, 13 <u>Indiana International &amp; Comparative Law Review</u>, (2002-2003), pp. 185-236</p> <p>- “ICJ: Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), No. 94 (October 10, 2002)”, <u>International Law in Brief</u>, 12 December 2002 (issue of the American Society of International Law)</p> |

**1. Facts**

497. On 29 March 1994, Cameroon filed an Application with the International Court of Justice instituting proceedings against Nigeria in a dispute concerning the question of sovereignty over the peninsula of Bakassi. Cameroon also requested the Court to determine the course of the maritime boundary between the two States in so far as that boundary had not been established in 1975 by the Maroua Declaration, signed by the head of State of each country after years of negotiations to resolve the dispute peacefully.

498. As a basis for the Court's jurisdiction, the Application referred to the respective declarations of acceptance of the Court's compulsory jurisdiction by Cameroon and Nigeria under article 36, paragraph 2, of the Statute of the Court.

499. On 6 June 1994, Cameroon filed an Additional Application to extend the case to a further dispute with Nigeria over "part of the territory of Cameroon in the area of Lake Chad", which it claimed was also occupied by Nigeria. Cameroon, *inter alia*, asked the Court to specify definitively the frontier between itself and Nigeria from Lake Chad to the sea.

500. On 13 December 1995, Nigeria filed eight preliminary objections relating to the Court's jurisdiction and to the admissibility of Cameroon's claims, asserting that for at least 24 years both States had accepted a duty to settle all boundary questions through the existing bilateral machinery. On 12 February 1996, Cameroon requested the Court to indicate a number of provisional measures with reference to "serious armed incidents" that had taken place in the Bakassi Peninsula. On 15 March 1996, the Court issued an Order indicating provisional measures. The Court rejected seven of the preliminary objections and declared that it would rule on the eighth in the judgment on the merits. The Court also rejected Nigeria's request of 28 October 1998 for interpretation of that judgment.

501. By an Order issued on 30 June 1999, the Court ruled that the counter-claims submitted by Nigeria against Cameroon were admissible and formed part of the proceedings.

502. On 30 June 1999, Equatorial Guinea filed an Application for permission to intervene in the case in order to protect its legal rights in the Gulf of Guinea and to inform the Court of its legal rights and interests so that those would remain unaffected when the Court addressed the question of the maritime boundary between Cameroon and Nigeria. However, Equatorial Guinea noted that it did not wish the Court to determine its maritime boundary with the Parties since it would prefer to make such a determination with its neighbours by negotiation.

503. The Court, by its Order of 21 October 1999, authorized Equatorial Guinea to intervene in the case, to the extent, in the manner and for the purposes set out in its Application for permission to intervene.

504. The present summary will deal exclusively with the maritime boundary delimitation aspect of the case.

## 2. Issues

### **Questions before the Court**

- (i) **Cameroon** requested the Court to declare and adjudge, among other things, that:
  - In order to prevent any dispute arising between the two States concerning their maritime boundary, to proceed to prolong the course of its maritime boundary with Nigeria up to the limit of the maritime zones which international law places under their respective jurisdictions.
  - The boundary of the maritime zones appertaining respectively to Cameroon and to Nigeria follows the course set out in a precise geographical description with stated coordinates on British admiralty Chart No. 3433.
- (ii) **Nigeria**, in its Counter-Memorial, requested the Court to adjudge and declare:
  - That the Court lacked jurisdiction over Cameroon's maritime claim from the point at which its claim line entered waters claimed by or recognised by Nigeria as

belonging to Equatorial Guinea, or, alternatively, that Cameroon's claim was inadmissible to that extent;

- That Cameroon's claim to a maritime boundary based on the global division of maritime zones in the Gulf of Guinea was inadmissible, and that the Parties were under an obligation, pursuant to articles 74 and 83 of the United Nations Law of the Sea Convention, to negotiate in good faith with a view to agreeing on an equitable delimitation of their respective maritime zones, such delimitation to take into account, in particular, the need to respect existing rights to explore and exploit the mineral resources of the continental shelf, granted by either party prior to 29 March 1994 without written protest from the other, and the need to respect the reasonable maritime claims of third States;
- In the alternative, that Cameroon's claim to a maritime boundary based on the global division of maritime zones in the Gulf of Guinea was unfounded in law and therefore rejected;
- That, to the extent that Cameroon's claim to a maritime boundary could be held admissible in the proceedings, Cameroon's claim to a maritime boundary to the west and south of the area of overlapping licences was rejected;
- The respective territorial waters of the two States are divided by a median line boundary within the Rio del Rey; and
- That, beyond the Rio del Rey, the respective maritime zones of the Parties are to be delimited in accordance with the principle of equidistance, to the point where the line so drawn meets the median line boundary with Equatorial Guinea at approximately 4° 6' N, 8° 30' E.
- **Equatorial Guinea**, at the end of the oral observations as regards its intervention, recalled that it had asked the Court not to delimit a maritime boundary between Cameroon and Nigeria in areas lying closer to Equatorial Guinea than to the coasts of the two Parties or to express any opinion which could prejudice its interests in the context of its maritime boundary negotiations with its neighbours. Safeguarding the interests of the third State in the proceedings meant that the delimitation between Nigeria and Cameroon decided by the Court should remain to the north of the median line between Equatorial Guinea's Bioko Island and the mainland.

### **3. Preliminary objections by Nigeria regarding jurisdiction and admissibility**

505. In its seventh preliminary objection Nigeria contended that there was no legal dispute concerning delimitation of the maritime boundary between the two Parties which could have been appropriate for a resolution by the Court.

506. Nigeria advanced two reasons for its position: in the first place, no determination of a maritime boundary was possible prior to the determination of title in respect of the Bakassi Peninsula. Secondly, at the juncture when there would be a determination of the question of title over the Bakassi Peninsula, the issues of maritime delimitation would not be admissible in the absence of prior sufficient action by the Parties, on a footing of equality, to effect a delimitation "by agreement on the basis of international law".

507. With Nigeria's eighth preliminary objection it contended, in the context of and supplementary to the seventh preliminary objection, that the question of maritime delimitation

necessarily involves the rights and interests of third States and is to that extent inadmissible. In this connection, the Court and the Parties noted that the problem of rights and interests of third States arises only for the prolongation, as requested by Cameroon, of the maritime boundary seawards beyond point G (situated, according to the Parties, some 17 nautical miles from the coast) on the map accompanying the judgment. Consequently, the Court concluded that the eighth preliminary objection of Nigeria did not possess an exclusively preliminary character and would of necessity have to deal with the merits of Cameroon's request.

#### **4. Arguments presented by the Parties (Merits)**

**Cameroon** argued that:

- A delimitation in the case could not affect Equatorial Guinea or Sao Tome and Principe because, in accordance with article 59 of the Court's Statute, the Judgment would be *res inter alios acta* for all States other than Cameroon and Nigeria. The Court could determine the respective rights of Cameroon and Nigeria without prejudging the rights of Equatorial Guinea and Sao Tome and Principe. The effect of the Court's Judgment would be the same as a bilateral maritime delimitation treaty by which two Parties may fix their maritime boundary up to a tripoint decided without the participation of the third State concerned.
- The decisions in *Frontier Dispute* (Burkina Faso v. Republic of Mali) (ICJ Reports, 1986, p. 554) and *Territorial Dispute* (Libyan Arab Jamahiriya v. Chad) (ICJ Reports, 1994, p. 6), both of which relate to land boundaries, should be applied also to maritime boundaries. As such, if the Court were to comply with Cameroon's request to specify the course of the boundary between the two Parties "up to the outer limit of the maritime zones which international law places under the respective jurisdiction of the two Parties" this would not amount to a decision that this outer limit was a tripoint which affected Equatorial Guinea or Sao Tome and Principe.
- There were several ways in which Equatorial Guinea's rights could be protected, including moving the delimitation line to take full account of those rights, refraining from ruling on delimitation in the areas that presented a problem, making the line a discontinuous one, or indicating the direction of the boundary without ruling on a terminal point. Using these methods, the Court should provide as complete a solution as possible in the dispute between the Parties.
- Non-party intervention cannot prevent the Court from fully settling the dispute before it, and as such the Court must proceed to a complete delimitation whether or not it would be binding on the intervening Party, otherwise the intervention regime would cease to have any usefulness. Moreover, an intervening Party cannot, by making fanciful claims, preclude the Court from ruling on the area to which such claims relate.
- The Court must take into account the entire geographic situation of the region, in particular the disadvantage suffered by Cameroon as a result of its position in the centre of a highly concave coastline, which results in the claims of adjoining States having a "pincer" effect on its own claims. Cameroon claimed that it was simply asking the Court to "move, as it were, the Nigerian part of the pincers in a way that reflects geography".
- Cameroon and Nigeria had conducted negotiations focused on their entire maritime boundary, which had proved unsuccessful. Applying paragraph 2 of articles 74 and 83 of

UNCLOS, it was therefore appropriate for the Court to perform the entire delimitation requested by Cameroon. Furthermore, the failure of the negotiations was due to Nigeria's bad faith. Nigeria should not be allowed to take advantage of its own wrongful behaviour to prevent Cameroon from achieving a full and final settlement of the dispute before the Court.

- Should the Court refuse to delimit the boundary in the area with respect to which Nigeria argued insufficient negotiations had taken place, it would implicitly uphold a maritime division that Nigeria and Equatorial Guinea had agreed upon with disregard for Cameroon's rights. This would leave a source of major conflict between the two Parties.

**Nigeria** argued that:

- The Court had no jurisdiction over Cameroon's maritime boundary claim because it touched on or affected areas claimed by third States. The maritime delimitation line claimed by Cameroon encroached on areas claimed by Equatorial Guinea and if the Court were to uphold that line vis-à-vis Nigeria, it would, by clear and necessary implication, be rejecting Equatorial Guinea's claims in those areas.
- The Court's lack of jurisdiction was not affected by Equatorial Guinea's intervention since it had not intervened with a view to becoming a Party, and its intervention had not been accepted on that basis.
- The Court must exclude from its Judgment all areas that overlapped with Equatorial Guinea's claims, provided that those claims were credible in law. Equatorial Guinea's claims satisfied the test of credibility because they were within a strict equidistance line.
- The fact that a decision of the Court would not be binding on Equatorial Guinea or Sao Tome and Principe was insufficient since the final judgment would create the impression of finality and operate in practice as a kind of presumption.
- Paragraph 1 of articles 74 and 83 of UNCLOS require that the Parties to a dispute over maritime delimitation should first attempt to resolve it by negotiations, and as this had not occurred in relation to part of the waters included in Cameroon's claim (beyond point G), the Court should refuse to effect a delimitation in those waters.

## **5. Reasoning of the Court**

### **(a) Preliminary objections**

508. The Court initially addressed the first argument presented by Nigeria. The Court accepted that it would be difficult if not impossible to determine the delimitation of the maritime boundary between the Parties as long as title over the Peninsula of Bakassi was not determined. Since both questions were before the Court, it became a matter for the Court to arrange the order in which it addressed the issues in such a way that it could deal substantively with each of them. However, that was a matter which lay within the Court's discretion and which could not be the basis of a preliminary objection. That argument therefore was dismissed.

509. As to the second argument of Nigeria, the Court recalled that, in dealing with the cases brought before it, it should adhere to the precise request submitted to it. What was in dispute between the Parties and what the Court had to decide was whether the alleged absence of sufficient effort at negotiation constituted an impediment for the Court to accept Cameroon's

claim as admissible or not. That matter was of a genuinely preliminary character and had to be decided under article 79 of the Rules of Court.

510. In this connection, Cameroon and Nigeria referred to the United Nations Convention on the Law of the Sea, to which they are both Parties.

511. However, the Court noted that it had not been seized on the basis of article 36, paragraph 1, of the Statute, nor in accordance with Part XV of the United Nations Convention on the Law of the Sea relating to the settlement of disputes arising between the Parties to the Convention with respect to its interpretation or application. Instead, it had been seized on the basis of declarations made under article 36, paragraph 2, of the Statute, which declarations do not contain any condition relating to prior negotiations to be conducted within a reasonable time period. Therefore, the Court could not uphold Nigeria's second argument.

512. The Court found in addition that, beyond point G on the map accompanying the Judgment, the dispute between the Parties had been defined with sufficient precision for the Court to be validly seized of it. It therefore rejected the seventh preliminary objection.

513. The Court then dealt with the eighth and last of the preliminary objections presented by Nigeria. With that objection Nigeria contended, in the context of and supplementary to the seventh preliminary objection, that the question of maritime delimitation necessarily involved the rights and interests of third States and was to that extent inadmissible.

514. The Court noted, as did the Parties, that the problem of rights and interests of third States arose only for the prolongation, as requested by Cameroon, of the maritime boundary seawards beyond point G.

515. What the Court had to examine under the eighth preliminary objection was therefore whether that prolongation would involve rights and interests of third States and whether that would prevent it from proceeding to such prolongation. The Court noted that from the geographical location of the territories of the other States bordering the Gulf of Guinea, and in particular Equatorial Guinea and Sao Tome and Principe, it appeared that rights and interests of third States would become involved if the Court acceded to Cameroon's request. The Court recalled that it had affirmed that one of the fundamental principles of its Statute was that it could not decide a dispute between States without the consent of those States to its jurisdiction. However, it had also stated that it was not necessarily prevented from adjudicating when the Judgment it was asked to give might affect the legal interests of a State which was not a party to the case.

516. The Court could not therefore, in the present case, give a decision on the eighth preliminary objection as a preliminary matter. In order to determine where a prolonged maritime boundary beyond point G would run, where and to what extent it would meet possible claims of other States, and how its Judgment would affect the rights and interests of these States, the Court would of necessity have to deal with the merits of Cameroon's request. At the same time, the Court could not rule out the possibility that the impact of the Judgment required by Cameroon on the rights and interests of the third States might be such that the Court would be prevented from rendering it in the absence of those States, and that consequently Nigeria's eighth preliminary objection would have to be upheld at least in part.

517. The Court concluded that therefore the eighth preliminary objection of Nigeria did not possess, in the circumstances, an exclusively preliminary character.

### (b) Merits

518. While rejecting Cameroon's contention that the reasoning in *Frontier Dispute (Burkina Faso/Republic of Mali)* (*I.C.J. Reports 1986*, p. 554) and the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (*I.C.J. Reports 1994*, p. 6) is necessarily transposable to cases concerning maritime boundaries, the Court concluded that it had jurisdiction over maritime delimitation between the Parties, as long as such a delimitation did not affect the rights of Equatorial Guinea and Sao Tome and Principe. The Court rejected Nigeria's argument that insufficient negotiations had occurred with respect to the area beyond point G.

519. The Court noted that the maritime boundary between Cameroon and Nigeria had not been the subject of negotiations until relatively recently. Thus, apart from the Anglo-German Agreements of 11 March and 12 April 1913 insofar as they refer to the endpoint of the land boundary on the coast, all the legal instruments concerning the maritime boundary between Cameroon and Nigeria post-dated the independence of those two States. The Court based its decision on these "declarations" adopted by the Parties in 1970, 1971 and 1975.

520. In this connection the two countries agreed to establish a "joint boundary commission", which on 14 August 1970, at the conclusion of a meeting held in Yaoundé (Cameroon), adopted a declaration (hereinafter the "Yaoundé I Declaration") whereby Cameroon and Nigeria decided that the delimitation of the boundaries between the two countries would be carried out in three stages, the first of these being the delimitation of the maritime boundary. The work of that Commission led to a second declaration, done at Yaoundé on 4 April 1971 (hereinafter the "Yaoundé II Declaration"), whereby the Heads of State of the two countries agreed to regard as their maritime boundary, as far as the 3-nautical-mile limit, a line running from a point 1 to a point 12, which they had drawn and signed on British Admiralty Chart No. 3433 annexed to that Declaration.

521. Four years later, on 1 June 1975, the Heads of State of Cameroon and Nigeria signed an agreement at Maroua (Cameroon) for the partial delimitation of the maritime boundary between the two States (hereinafter the "Maroua Declaration"). By this declaration they agreed to extend the line of their maritime boundary, and therefore adopted a boundary line defined by a series of points running from point 12 as referred to above to a point designated as G. British Admiralty Chart No. 3433, marked up accordingly, was likewise annexed to that Declaration.

## 6. Decisions

### **(a) Judgment of 11 June 1998 (Jurisdiction and Admissibility)**

522. In its Judgment on the eight preliminary objections the Court found, on the basis of article 36, paragraph 2, of the Statute, that it had jurisdiction to adjudicate upon the dispute between the Parties on their land and maritime boundary and that the Application, as amended, filed by Cameroon on 4 July 2001 was admissible.

523. As regards maritime boundary delimitation in the preliminary objections phase, the Court held that it lay within its discretion to arrange the order in which it would address the issues relating to the title of the Bakassi Peninsula and to the delimitation of the maritime boundary between the Parties. Furthermore, as to the question whether the determination of the maritime boundary beyond point G would affect the rights and interests of third States, the Court found that it did not possess an exclusively preliminary character and would have to be settled during the proceedings on the merits.

**(b) Judgment of 10 October 2002 (Merits)**

524. The Court, accepting Cameroon's contention, began by upholding the validity of the Declarations of Yaoundé II and Maroua, pursuant to which the Heads of State of Nigeria and Cameroon had in 1971 and 1975 agreed upon the maritime boundary between the two countries from the mouth of the Akwayafe to a point G situated at  $8^{\circ} 22' 19''$  longitude east and  $4^{\circ} 17' 00''$  latitude north.

525. Next, in respect of the maritime boundary further out to sea, the Court essentially endorsed the delimitation method advocated by Nigeria. As for the line of delimitation, it adopted the equidistance line between Cameroon and Nigeria, which in its view produced an equitable result in the instant case between the two States.

526. The delimitation thus effected for the most part respects existing oil installations. It preserves Equatorial Guinea's rights, as well as those of Cameroon and Nigeria in regard to their delimitation with Equatorial Guinea. The Court decided as follows:

(a) By thirteen votes to three, the Court found, having addressed Nigeria's eighth preliminary objection, which it declared in its Judgment of 11 June 1998 not to have an exclusively preliminary character in the circumstances of the case, that it had jurisdiction over the claims submitted to it by Cameroon regarding the delimitation of the maritime areas appertaining respectively to Cameroon and to Nigeria, and that those claims were admissible;

(b) By thirteen votes to three, the Court decided that, up to point G, the boundary of the maritime areas appertaining respectively to Cameroon and to Nigeria takes the following course:

- Starting from the point of intersection of the centre of the navigable channel of the Akwayafe River with the straight line joining Bakassi Point and King Point as referred to in point III (C), the boundary follows the "compromise line" drawn jointly at Yaoundé on 4 April 1971 by the Heads of State of Cameroon and Nigeria on British Admiralty Chart 3433 (Yaoundé II Declaration) and passing through 12 numbered points, which the Judgment specified; and
- From point 12, the boundary follows the line adopted in the Declaration signed by the Heads of State of Cameroon and Nigeria at Maroua on 1 June 1975 (Maroua Declaration), as corrected by the exchange of letters between the said Heads of State of 12 June and 17 July 1975; that line passes through points A to G, whose co-ordinates were specified in the Judgment.

(c) Unanimously, the Court decided that, from point G, the boundary line between the maritime areas appertaining respectively to Cameroon and to Nigeria follows a loxodrome having an azimuth of  $270^{\circ}$  as far as the equidistance line passing through the midpoint of the line joining West Point and East Point; the boundary meets this equidistance line at a point X, with co-ordinates  $8^{\circ} 21' 20''$  longitude east and  $4^{\circ} 17' 00''$  latitude north;

(d) Unanimously, the Court decided that, from point X, the boundary between the maritime areas appertaining respectively to Cameroon and to Nigeria follows a loxodrome having an azimuth of  $187^{\circ} 52' 27''$ . Noting, however, that the line so adopted was likely rapidly to encroach on rights of Equatorial Guinea, the Court confined itself to indicating its direction without fixing the Cameroon/Nigeria/Equatorial Guinea tripoint.

## 7. Declaration, Separate Opinions, Dissenting Opinions

### Judgment of 11 June 1998 (Jurisdiction and Admissibility)

#### (a) Separate Opinions

527. With regard to the indication of a boundary, **Judge Oda** pointed out that, apart from the question of the delimitation of the offshore areas in the mouth of the Cross River, and the prolongation of the delimitation of the exclusive economic zone and the continental shelf in the ocean area in the Gulf of Guinea - issues totally dependent on the territoriality of the Bakassi Peninsula - the delimitation of the maritime boundary could not be the object of adjudication by the Court, unless it was requested jointly by the Parties. The simple failure of negotiations between States does not mean that a "legal dispute" has occurred under Article 36 (2) of the Statute.

528. **Judge Higgins**. In its seventh preliminary objection Nigeria claimed that there "is no legal dispute concerning delimitation of the maritime boundary between the two Parties which is at the present time appropriate for resolution by the Court" because, first, it was necessary initially to determine title in respect of the Bakassi Peninsula and second, there was an "absence of sufficient action by the Parties, on a footing of equality, to effect a delimitation 'by agreement on the basis of international law'".

529. Judge Higgins agreed with the response of the Court in rejecting each of these claims on inadmissibility. In her separate opinion she contended, however, that there was another matter which the Court should have addressed *proprio motu*, namely that no dispute appears to exist relating to the maritime boundary, at least beyond point G as designated by Cameroon. This emerges both from the way Cameroon itself formulates its Application, where it asks for a delimitation of the maritime boundary "In order to prevent any dispute arising . . ." and from the absence of any evidence offered in the written or oral pleadings as to the existence of such a dispute. There have been no claims beyond point G that have been put by one party and rejected by the other. Nor can it be the case that the existence of a territorial dispute automatically entitles an applicant State to request the delimitation of the entirety of the maritime boundary.

530. Although it is not normally the task of the Court to suggest additional grounds of inadmissibility beyond those a respondent State chooses to advance, the existence of a dispute is a requirement of the Court's jurisdiction under Article 38 of the Statute and the Court should have addressed the matter *proprio motu*. Therefore, Article 38 is not a provision to be accepted or waived by the Parties at will since it is a matter for the Court.

531. In his separate opinion **Judge Kooijmans** sets out why he voted against paragraphs 1 (g) and 2 of the dispositif. He voted against paragraph 1 (g), as in his opinion the seventh preliminary objection should have been partially upheld, since there does not exist a legal dispute between the Parties as to the continuation of the maritime boundary beyond point G. Although he agreed that the point was not raised specifically by Nigeria, he is of the opinion that the Court should have determined *proprio motu* whether there is a dispute in the sense of the Statute. In the present case Cameroon requested the Court to determine the whole of the maritime boundary without ever before having formulated a specific claim with regard to the more seaward part of that boundary. It was only in the Memorial that its submission was further substantiated. It therefore cannot be said that there is a claim of Cameroon which, at the date of the filing of the Application, was "positively opposed" by Nigeria as the Court according to its case law requires.

532. Since in his view the seventh objection should have been upheld as regards the maritime boundary beyond point G and since the issue of the rights and interests of third Parties (the subject of the eighth preliminary objection) only arises in respect of that part of the boundary, that objection has become without purpose. Judge Kooijmans consequently voted against paragraph 2. But also for other reasons he could not agree with what the Court said with regard to the eighth objection. Although in general an objection dealing with rights and interests of third States does not possess an exclusively preliminary character, it was Judge Kooijmans' view that in the present case the Court, for reasons of judicial propriety, would have done better to uphold it in the preliminary phase. The most important third country involved is Equatorial Guinea. Both Cameroon and Nigeria agreed in 1993 that that State's involvement in the delimitation of the boundary was essential and that negotiations should begin. In view of this recognition by Cameroon of the necessity of negotiations it seems not proper and reasonable to induce Equatorial Guinea to reveal its legal position by means of an intervention under Article 62 of the Statute before such negotiations have even begun.

#### (b) Dissenting Opinion

533. **Judge ad hoc Ajibola** accepted Nigeria's contention that the issue of maritime delimitation would not be admissible in the absence of negotiation and agreement by the Parties on a footing of equality to effect delimitation in accordance with articles 74 and 83 of UNCLOS.

534. Judge ad hoc Ajibola also expounded on the reasons why he voted in favour of upholding Nigeria's eighth objection. Nigeria had argued "that the question of maritime delimitation necessarily involves the rights and interests of third States and is to that effect inadmissible." Judge ad hoc Ajibola believed that in this particular case, it was difficult to effect any maritime delimitation beyond point G without calling into question the interests of other States, particularly Equatorial Guinea and Sao Tome and Principe. Therefore, in accordance with its jurisprudence, the Court cannot decide a dispute between two parties without the consent of those States whose interests are directly affected, unless they intervene in such a matter.

### **Judgment of 10 October 2002 (Merits)**

#### (c) Declaration

535. **Judge Oda** expressed strong reservations concerning the Court's decision in subparagraph IV, on the "maritime boundary" issues, which cannot be considered main issues in the present dispute. He shared very few of the Court's views and only voted in favour of points IV (B), (C) and (D) because the lines drawn therein are not wholly inappropriate and do not in fact cause any harm. He identified both procedural and substantive errors made not only by the Applicant but also by the Court.

536. From the procedural perspective, Judge Oda stressed the fact that in its 1994 Applications Cameroon could not be seen as asking the Court to adjudge on any "legal dispute" concerning a maritime boundary within the meaning of Article 36 (2) of the Court's Statute. It only requested the drawing of a boundary course. In its 1998 Judgment, the Court erred in rejecting Nigeria's preliminary objections and in deciding that a dispute could be unilaterally submitted to the Court by Cameroon. The Applicant, Cameroon, altered its position in later proceedings by asserting its own maritime claim identified by map co-ordinates. This procedural error effected an essential change in the complexion of the entire case. In this light, Judge Oda voted against point IV (A) of the operative part of the Judgment.

537. From the substantive perspective, Judge Oda underlined the failure by the Court and the Applicant to recognize the essential difference between the territorial sea and the area of the continental shelf, which are regulated by two different legal régimes. Judge Oda submitted that on the issue of the boundary within the territorial sea, the difference between the two Parties is, in fact, an issue relating solely to the status of the Bakassi Peninsula (whether the boundary between Cameroon and Nigeria lies to the west or to the east of the Bakassi Peninsula) and not to a maritime boundary. After stating that Bakassi is part of Cameroon, the Court's Judgment should have had nothing more to add. It is senseless for the Court to present the two tables of co-ordinates referring to the territorial sea, as neither Party raised this particular issue.

538. As for the boundary of the continental shelf, the Court rendered a decision establishing a line different from the Parties' respective claim lines. The Court's mistaken treatment of the maritime boundary may derive from its failure to understand the law governing this issue. According to Judge Oda, there is no legal rule or principle that mandates recognition of a given line as the only one acceptable under international law. The concrete boundary line of the continental shelf is to be chosen by negotiation provided that it remained within the bounds of equity. Judge Oda further stated that the 1958 Geneva Convention on the Continental Shelf offers a guiding principle for Parties' negotiations: they should seek an "equitable solution" under the so-called "equidistance (median) line + special circumstance" rule. The 1982 United Nations Convention on the Law of the Sea tried to further clarify the issue in its Article 83 (1), which provides for the delimitation of the continental shelf to be "effected by agreement on the basis of international law . . . in order to achieve an equitable solution."

#### (d) Separate Opinion

539. **Judge ad hoc Mbaye.** As regards the question of maritime boundary delimitation, he was of the view that the most important problem in determining the maritime boundary was the Maroua Declaration, which governed the tracing of the maritime boundary from point 12 to point G and was contested by Nigeria. However, he noted that both Parties had accepted the Yaoundé II Declaration, which governed the delimitation from the starting point to point 12. He further stated that he agreed with the Court in deciding that both Declarations were binding and therefore imposed a legal obligation on Nigeria.

540. As for the maritime boundary delimitation beyond point G, both Parties as well as Equatorial Guinea had sufficiently explained themselves. He stated that the Court had a long history with maritime boundary delimitation and in this context had to determine provisionally an equidistance line and then decide whether there existed special or pertinent circumstances that would render necessary the rectification of that line in order to reach an equitable result. He expressed the view that the Court had not given any effect to the concavity of the Gulf of Guinea, the nature of the coast of Cameroon or to the island of Bioko, all of which constituted pertinent circumstances, in his opinion.

## IV. FISHERIES AND MARINE LIVING RESOURCES

### A. Bering Sea (Fur Seal) Arbitration

|                               |   |
|-------------------------------|---|
| <b>Parties:</b>               | United Kingdom and United States of America   |
| <b>Issues:</b>                | Seal fisheries; exclusive jurisdiction; high seas   |
| <b>Forum:</b>                 | Arbitral Tribunal composed of seven arbitrators based on a Treaty of Arbitration of 29 February 1892  |
| <b>Date of Decision:</b>      | Award of 15 August 1893 and appointment of one commissioner by each party for the determination of claims for damages in keeping with the Treaty signed at Washington on 8 February 1896  |
| <b>Published in:</b>          | <p>Moore, J.B., <u>History and Digest of the International Arbitrations to which the United States has been a Party</u>, Vol. I, Government Printing Office, Washington, 1898, pp. 755-961</p> <p><u>International Environmental Law Reports</u>, Vol.1, 1999, p. 43</p>  |
| <b>Selected commentaries:</b> | <p>Williams, G.O., <u>The Bering Sea Fur Seal Dispute 1885-1911: A Monograph on the Maritime History of Alaska</u>, Alaska Maritime Publications, Eugene, Oregon, 1984</p> <p>Henderson, J.B., "The Fur Seals and the Bering Sea Award", <u>American Diplomatic Questions</u>, The Macmillan Company, New York, 1901</p> <p>Foster, J.W., "Results of the Bering Sea Arbitration", <u>The North American Review</u>, Vol. 161, No. 469, December 1895</p> |

#### 1. Facts

541. When the United States purchased the territory of Alaska from Russia in 1867 it also acquired the rich fur seal industry on the Pribilof Islands in the Bering Sea as well as the responsibility to protect that industry.

542. In 1868, the United States enacted a statute for the protection of the fur seals within the limits of Alaska, including its territorial waters. In order to provide for more effective protection and in particular to prevent foreign vessels from pelagic sealing, the United States later attempted to extend its protective jurisdiction over sealing beyond the three-mile zone.

543. In 1886 and 1887, American cutters outside the three-mile zone seized several British vessels engaging in illegal sealing. A prolonged legal and diplomatic dispute between the United States and the United Kingdom arose from those seizures.

544. On 29 February 1892, a treaty was concluded between the United States and the United Kingdom providing for the submission to an arbitral tribunal of seven members of issues that had arisen between those countries in respect of the preservation of the valuable herd of fur seals of the Pribilof Islands in the Bering Sea. The issues that became the subject of the arbitration arose out of the threatened extinction of the seal herd of the Pribilof Islands through the killing of vast numbers of the females by pelagic sealers.

## 2. Issues

### (a) Questions before the Tribunal

- (i) What exclusive jurisdiction in the sea known as the Bering Sea and what exclusive rights in the seal fisheries therein did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?
- (ii) How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by the United Kingdom?
- (iii) Was the body of water now known as the Bering Sea included in the phrase "Pacific Ocean" as used in the Treaty of 1825 between the United Kingdom and Russia; and what rights, if any, in the Bering Sea were held and exclusively exercised by Russia after the said Treaty?
- (iv) Did all the rights of Russia as to jurisdiction and as to the seal fisheries in the Bering Sea east of the water boundary set out in the Treaty between the United States and Russia of 30 March 1867 pass unimpaired to the United States under that Treaty?
- (v) Has the United States any right, and if so, what right of protection or property in the fur seals frequenting the islands of the United States in the Bering Sea when such seals are found outside the ordinary three-mile limit?
- (vi) If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such a position that the concurrence of the United Kingdom is necessary for the establishment of Regulations for the proper protection and preservation of the fur seal in, or habitually resorting to, the Bering Sea, to determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such Regulations should extend.

### (b) Arguments presented by the Parties

545. The **United Kingdom** alleged that following the protests of both the United States and the United Kingdom, Russia had withdrawn the assertions referred to in its 1821 ukase and that the rights of British and United States subjects to fish and navigate in all parts of the non-territorial waters over which the ukase purportedly extended were recognized by the Treaties of 1824 and 1825.

546. The United Kingdom then contended that the Bering Sea was an open sea in which all nations of the world had the right to navigate and fish: "the rights of navigation and fishing cannot be taken away or restricted by the mere declaration or claim of any or more nations" since "they are natural rights, and exist to their full extent unless specifically modified, controlled, or limited by treaty".

547. The United Kingdom also stated that international law comprised only so much of the principles of morality and justice as nations had agreed should be part of those rules of conduct to govern their relations with one another. In other words, international law rested upon the principle of consent.

548. The United Kingdom disagreed with the authorities produced by the United States to show that under certain conditions wild animals may become subject of property and considered that these authorities were not applicable to the instant case. It claimed that no possession of a seal on the islands was possible until it had been killed; that the United States had not explicitly asserted ownership of the seals through any statute; and that the doctrine of *animus revertendi* did not apply in the case of migratory animals, but only where it had been induced by the effort of man. Furthermore, as to the claim of right to protect the fur seals outside the three-mile limit, the United Kingdom held that it was without precedent and in contradiction of the position assumed by the United States in analogous cases.

549. As to the principle of self-defence claimed by the United States in respect of the fur seal industry on the high seas, the United Kingdom attacked vigorously the authorities the United States had cited. The United Kingdom also rejected the United States' contentions as to the hovering and quarantine acts and the maritime industries since they were exceptional.

550. The **United States** argued that exclusive jurisdiction in the Bering Sea had been accepted by both the United States and the United Kingdom and had passed unimpaired to the United States with the cession of Alaska. This was supported by a Russian ukase (edict) of 1821, under which the United States claimed Russia had asserted territorial rights to the extent of 100 Italian miles over the water adjacent to her coastlines.

551. The United States contended that those rights relating to a property interest in the seals and to the protection of the industry established on the Pribilof Islands were rights that rested on fundamental principles. The United States stated that (i) the law to be applied in this case was international law, the main foundation of which was the law of nature, (ii) that "municipal and international law flow equally from the same source", and (iii) that the rule of the Tribunal should be the "general standard of justice recognized by the nations of the world".

552. The United States then argued that under both municipal law and international law, useful wild animals reclaimed by man and possessed of the *animus revertendi* could become the subject of property.

553. The United States qualified fur seals that were bred on the Pribilof Islands as quasi-domesticated. Since there existed a well-established American industry based on their exploitation, the United States asserted a property right to protect and defend such property by the practical prohibition of pelagic sealing in its waters.

554. Furthermore, the United States claimed that it had complete property in the "seals" not only while on its territory, but during their absence on the high seas through the certainty of their return. This was explained on the basis of the principle of self-defence on the high seas, either in

times of war or peace, such right extending to such part of the seas as might be necessary and appropriate for the particular case, the three-mile limit being an incident to such right and not the limit thereof.

555. The United States cited numerous instances of legislation and regulations enacted by foreign countries to take effect beyond the limits of their usual territorial jurisdiction, such as hovering and quarantine laws, and also legislation to protect maritime industries appurtenant to a territory, such as pearl oyster beds, coral beds and fisheries.

### 3. Decision

556. The Award was rendered on 15 August 1893. The Tribunal held by a vote of 6 to 1:

(a) As to the first point:

By the ukase of 1821, Russia claimed jurisdiction in the sea now known as the Bering Sea to the extent of 100 Italian miles from its coasts and islands, but, in the course of the negotiations, which led to the conclusions of the Treaties of 1824 with the United States and of 1825 with the United Kingdom, Russia admitted that its jurisdiction in the said sea should be restricted to the reach of cannon shot from shore. It would appear that from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in the Bering Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters.

(b) As to the second point:

The United Kingdom did not recognize or concede any claim, upon the part of Russia; as regards exclusive jurisdiction for the seal fisheries in the Bering Sea outside the ordinary territorial waters.

(c) As to the third point:

The body of water now known as the Bering Sea was included in the phrase "Pacific Ocean" as used in the Treaty of 1825 between the United Kingdom and Russia. No exclusive rights of jurisdiction in the Bering Sea and no exclusive rights as to the seal fisheries therein were held or exercised by Russia outside ordinary territorial waters after the Treaty of 1825.

(d) As to the fourth point:

All the rights of Russia as to jurisdiction and as to the seal fisheries in the Bering Sea east of the water boundary, as set out in the Treaty between the United States and Russia of 30 March 1867, did pass unimpaired to the United States under the said Treaty.

(e) As to the fifth point:

The United States did not have any right of protection or property in the fur seals frequenting the islands of the United States in the Bering Sea when such seals are found outside the ordinary three-mile limit.

557. Consequently, pursuant to the Treaty of Arbitration, the Tribunal then exercised its power to enact regulations for the proper protection and preservation of the fur seals in or habitually resorting to the Bering Sea, which were binding on both the United States and the United Kingdom. Essentially, the regulations prohibited the killing of fur seals at any time in the Bering

Sea within a 60-mile zone around the Pribilof Islands and between 7 May and 31 July in both the Pacific Ocean and the Bering Sea. In addition, the regulations provided for operations to be carried out only by means of sailing vessels, with canoes and undecked boats, and prohibited the use of nets, firearms and explosives in the Bering Sea.

## B. North Atlantic Coast Fisheries Arbitration

|                               |   |
|-------------------------------|---|
| <b>Parties:</b>               | United Kingdom and United States of America   |
| <b>Issues:</b>                | Fisheries; bays and high seas   |
| <b>Forum:</b>                 | North Atlantic Coast Fisheries Tribunal of Arbitration, composed of members of the Permanent Court of Arbitration and constituted under a Special Agreement signed at Washington on 27 January 1909   |
| <b>Date of Decision:</b>      | Award of 7 September 1910   |
| <b>Published in:</b>          | <p><u>Foreign Relations of the United States</u>, 1910, Government Printing Office, Washington, 1915, pp. 544-591</p> <p>4 <u>American Journal of International Law</u> (1910), pp. 948-1000</p> <p><u>Reports of International Arbitral Awards</u>, Vol. XI, pp. 167-226</p>   |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Root, E., <u>North Atlantic Coast Fisheries Arbitration at the Hague: Argument on behalf of the United States</u>, Harvard University Press, Cambridge, 1917</li> <li>- Lansing, R., "North Atlantic Coast Fisheries Arbitration", 5 <u>American Journal of International Law</u> (1911), pp. 1-31</li> <li>- Anderson, C.P., "The Final Outcome of the Fisheries Arbitration", 7 <u>American Journal of International Law</u>, (1913), pp. 1-16</li> <li>- Borchardt, E.M., "The North Atlantic Coast Fisheries Arbitration", 11 <u>Columbia Law Review</u> (1911), pp. 1-23</li> <li>- Lammasch, H., "Was the Award in the North Atlantic Fisheries Case a Compromise?", 6 <u>American Journal of International Law</u> (1912), pp. 178-180</li> </ul> |

### 1. Facts

558. Great Britain and the United States of America stipulated in the Treaty of Peace of 1783 that inhabitants of the United States should continue to exercise the privileges enjoyed in common with British subjects in the fisheries of Newfoundland and other parts of the North Atlantic coast.

559. The Treaty of London was signed on 20 October 1818 between Great Britain and the

United States. Article I<sup>15</sup> defined the rights and obligations of inhabitants of the United States as to fishing in certain parts of British North Atlantic coast waters. Differences arose as to the scope and meaning of the article. Beginning with the seizure of American fishing vessels, the controversy over fishing rights continued until 1905, when it reached a critical stage.

560. Negotiations were undertaken and in 1906 the two Governments, for the purpose of allaying friction until some definite adjustment could be reached, agreed upon a *modus vivendi*.

561. The United States of America and Great Britain, both Member States of the Permanent Court of Arbitration, signed, in keeping with the provisions of the General Treaty of Arbitration of 4 April 1908, a Special Agreement on 27 January 1909, according to which questions relating to fisheries on the North Atlantic Coast were to be submitted to an arbitral tribunal.

## 2. Issues

### **(a) Questions before the Arbitral Tribunal**

Article 1 of the 1909 Special Agreement enumerated several questions for the Tribunal to decide:

- (i) The first question was divided by the Tribunal into two main contentions:
  - Whether the right of regulating reasonably the liberties conferred by the Treaty resides in Great Britain;
  - And if so, whether such reasonable exercise of the right is permitted to Great Britain without the accord and concurrence of the United States.
- (ii) Have the inhabitants of the United States, while exercising the liberties reserved in Article I, a right to employ as members of the fishing crew of their vessels persons not inhabitants of the United States?
- (iii) Can the exercise by the inhabitants of the United States of the liberties referred to in Article I be subjected, without the consent of the United States, to the requirements of entry or report at custom houses or the payment of light or harbour or other dues or to any other similar requirement or condition or exaction?
- (iv) Under the provision of the said article that the American fishermen shall be admitted to enter certain bays or harbours for shelter, repairs, wood or water, and for no other purpose whatever, but that they shall be under such restriction as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges thereby reserved to them, is it permissible to impose

<sup>15</sup> Article I reads as follows: "Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry and cure fish on certain coasts, bays, harbours and creeks of His Britannic Majesty's Dominions in America, it is agreed between the High Contracting Parties, that the inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands . . ."

- restrictions making the exercise of such privileges conditional upon the payment of light or harbour or other dues, or entering or reporting at custom houses, or any similar conditions?
- (v) From where must be measured the "three miles of any of the coasts, bays, creeks or harbours" referred to in the said article?
  - (vi) Have the inhabitants of the United States the liberty under the said article or otherwise, to take fish in the bays, harbours and creeks of that part of the southern coast of Newfoundland, which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?
  - (vii) Are the inhabitants of the United States whose vessels resort to the Treaty coasts for the purpose of exercising the liberties referred to in Article I of the Treaty of 1818 entitled to have for these vessels, when duly authorized by the United States in that regard, the commercial privileges on the Treaty coasts accorded by agreement or otherwise to United States trading vessels generally?

### **(b) Arguments presented by the Parties**

- (i) **Great Britain.** On the first question, Great Britain contended that the exercise of the liberty to take fish, which the inhabitants of the United States have forever in common with the subjects of His Britannic Majesty, was subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada or Newfoundland.

As to the second question, Great Britain claimed that the Treaty conferred that liberty only to inhabitants of the United States and that it could prohibit persons from engaging as fishermen in American vessels.

On the fifth question presented to the Tribunal, Great Britain contended that the renunciation applied to all bays generally.

- (ii) **United States of America.** On the first question, the United States contended that the exercise of such freedom was not subject to limitations or restraints by Great Britain, Canada or Newfoundland.

Regarding the second question, the United States claimed: First, that the liberty assured to its inhabitants by the Treaty plainly included the right to use all the means customary or appropriate for fishing upon the sea, not only ships, nets, etc., but also crew. And second, that there was no limit as to the means which the inhabitants could use unless provided for in the Treaty, and that no right to question the nationality of the crew was contained in the Treaty.

As for question five, it was argued that the term "bays" of His Britannic Majesty's Dominions in the renunciatory clause was to be read as including only those bays that were under the territorial sovereignty of Great Britain. It was further argued that the renunciation applied only to bays six miles or less in width, those bays being only territorial bays, because the three-mile rule was a principle of international law applicable to coasts and should be strictly and systematically applied to bays. The

United States Government also argued that the words "coasts, bays, creeks and harbours" were equivalent to the word "coast", whereby the three marine miles would be measured from the sinuosities of the coast and the renunciation would apply only to the waters of bays within three miles.

### **3. Reasoning and Decision of the Arbitral Tribunal**

562. In the first place, the Tribunal stated that the Treaty of 1818 contained no explicit disposition with regard to the right of regulation. Therefore, the Tribunal considered it necessary to interpret the general terms of Article I in conformity with the general import of the instrument, the intention of the Parties, the subject matter of the contracts, the expressions used and the evidence submitted.

563. In the second place, the Tribunal noted that the right to regulate the liberties conferred by the 1818 Treaty was an attribute of sovereignty. Thus, the burden of proving the assertion included in the United States' contention fell on the United States.

564. The Tribunal went through the main arguments put forward by the United States and felt it was unable to agree with the United States' contentions. The Tribunal concluded therefore that Great Britain had the right to make regulations without the consent of the United States as to the exercise of the liberty to take fish referred to in Article I. However, it recalled that Great Britain's right was limited by the 1818 Treaty in that such regulations must be *bona fide* and must not be in violation of the above-mentioned Treaty.

565. On the basis that the liberty to take fish was an economic right attributed by the Treaty to United States' inhabitants without any mention of nationality and considering that the exercise of an economic right includes the right to employ servants, the latter not being limited by the Treaty on the basis of nationality, the Tribunal was of the opinion that United States' inhabitants had the right to employ, as members of their crew, persons not inhabitants of the United States. However, considering that the Treaty did not intend to grant to individual persons the liberty to take fish in certain waters in "common" with individual British subjects, that the United States' inhabitants derived the liberty to take fish from the Treaty and that it was in their interest that this fishing liberty not be granted to by other aliens not entitled by the Treaty to participate in the fisheries, the Tribunal concluded that the non-inhabitants employed as members of the fishing crew of the United States derived no benefit or immunity from the Treaty.

566. The Tribunal was of the opinion that since the exercise of the fishing liberties by United States' inhabitants had no reference to any commercial privileges (which may or may not attach to such vessels by reason of any authority outside the Treaty), they ought not to be subjected to requirements such as to report and enter at custom houses that were only appropriate for the exercise of commercial privileges. However, the Tribunal considered the requirement that American fishing vessels should report, if proper conveniences and an opportunity for doing so were provided, was not unreasonable or inappropriate. Finally, the Tribunal was of the opinion that light and harbour dues, if not imposed on Newfoundland fishermen, should not be imposed on American fishermen while exercising the liberty granted by the Treaty, because this would constitute unfair discrimination.

567. The Tribunal considered that the provision that American fishermen would be admitted to enter certain bays or harbours for shelter, repairs, wood or water was an exercise of the duties of hospitality and humanity, which all civilized nations observed and expected from others, taking

into account the exigencies of the situation. Therefore, to make the exercise of such privileges conditional upon the payment of light, harbour or other dues, or any similar conditions, would not be justified.

568. Question five had arisen from the recommendation by the United States in the Treaty of 1818 on fishing "within three marine miles of any of the coasts, bays, creeks or harbours" of the British Dominions in America, not included in the explicit grant on the coasts of Newfoundland and Labrador.

569. Considering that the Treaty used the general term "bays" without qualification, the Tribunal found that these words were to be interpreted in a general sense as applying to every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the Treaty under the general provisions then prevailing, unless the United States could adduce satisfactory proof. The Tribunal did not feel able to give a definition of "bays". It relied on conditions of national and territorial integrity, defence, commerce and industry, as all of these factors were vitally concerned with the control of the bays penetrating the national coastline. The Tribunal held that there was no principle of international law recognizing any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty. Furthermore, the Tribunal was unable to qualify, by the application of any new principle, its interpretation of the Treaty of 1818 as excluding bays in general from the strict and systematic application of the three-mile rule. The Tribunal decided that in the case of bays, the three miles were to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places, the three marine miles were to be measured following the sinuosities of the coast. However, considering that the answer was not entirely satisfactory as to its practical applicability, the Tribunal added a recommendation under Article IV of the Special Agreement to the effect that at the first point nearest to the entrance of the bay where the width did not exceed 10 miles, a straight line was to be drawn across it and the line of exclusion was to be three miles seaward.

570. It seemed that the intention of the Parties to the Treaty of 1818 was to admit the United States to such fishery. The Tribunal considered that it was incumbent upon Great Britain to produce satisfactory proof that the United States was not so entitled under the Treaty.

571. Great Britain pointed to the fact that, whereas the Treaty granted to American fishermen liberty to take fish "on the coasts, bays, harbours and creeks" from Mount Joly on the southern coast of Labrador", the liberty was limited to the "coast" of Newfoundland and to the "shore" of the Magdalen Islands. It argued that evidence could be found in the correspondence submitted indicating an intention to exclude Americans from Newfoundland bays on the Treaty coast. No value would have been attached at the time by the United States Government to the liberty of fishing in such bays because there was no cod fishery as there was in the bays of Labrador.

572. The Tribunal was of the opinion that American inhabitants were entitled to fish in the bays, creeks and harbours of the Treaty coasts of Newfoundland and the Magdalen Islands. It first considered that the words "part of the southern coast ... from ... to" and the words "western and northern coast ... from ... to" clearly indicate one uninterrupted coastline. There was no reason to read into the words "coasts" a contradistinction to bays in order to exclude bays. In the meaning of the Treaty as in all preceding treaties relating to the same territories, the words "coasts", "harbours", "bays", etc., were used without attaching to the word "coast" the specific meaning of excluding bays. The Tribunal also found that there was insufficient evidence to show

that the enumeration of the component parts of the coast of Labrador were made in order to discriminate between the coast of Labrador and the coast of Newfoundland. Furthermore, it pointed out that the Treaty granted the right to take fish of every kind, not only codfish, and that it is not proved that Americans only took an interest in the cod fishery.

573. The Tribunal decided that United States inhabitants were entitled to have, for those vessels that resorted to the treaty coasts when duly authorized by the United States in that regard, the commercial privileges on the Treaty's coasts, in so far as concerned the present Treaty, provided that they did not exercise their Treaty rights and commercial privileges concurrently.

#### **4. Dissenting Opinion of Dr. Drago**

574. Of the five members of the Tribunal, only Dr. Drago dissented from the majority in respect of the considerations and substantive part of the award concerning question (v). Dr. Drago noted that the Tribunal had not taken 10-mile bays, consistently put into practice by Great Britain in its fishery treaties, into account. He disagreed with the Tribunal's decision that "in case of bays the 3 miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration characteristics of the bay. At all other places the 3 miles are to be measured following the sinuosities of the coast", since neither any rule had been laid out nor had a general principle evolved for the Parties to know what the nature of such configuration was. Therefore, in his view, the dispute had not been satisfactorily resolved by "simply recommending [...] a series of lines, which practical as they may suppose to be, cannot be adopted by the Parties without concluding a new treaty".

### C.      Fisheries Jurisdiction Case

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|-------------------------------|--|
| <b>Parties:</b>               | Iceland and United Kingdom   |
| <b>Issues:</b>                | Extension by coastal State of fisheries jurisdiction; fishery zone; preferential rights and concurrent rights of other States; conservation measures   |
| <b>Forum:</b>                 | International Court of Justice (ICJ)   |
| <b>Date of Decision:</b>      | 2 February 1973 (Jurisdiction)<br>25 July 1974 (Merits)  |
| <b>Published in:</b>          | <p><u>ICJ Reports of Judgments, Advisory Opinions and Orders</u>, 1974, pp. 3-173</p> <p><u>International Law Reports</u>, Vol. 55, pp. 238-408</p>  |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Jónsson, H., <u>Friends in Conflict: the Anglo-Icelandic Cod Wars and the Law of the Sea</u>, C. Hurst &amp; Co., London; Archon Books, Hamden, Conn., 1982</li> <li>- Katz, S.R., "Issues Arising in the Icelandic Fisheries Case", 22 <u>International and Comparative Law Quarterly</u> (1973), pp. 83-108</li> <li>- Churchill, R.R., "Fisheries Jurisdiction Cases: the Contribution of the International Court of Justice to the debate on coastal States' Fisheries Rights", 24 <u>International and Comparative Law Quarterly</u> (1975), pp. 82-105</li> <li>- Pazarci, Hüseyin., <u>La Délimitation du Plateau Continental et les Iles</u>, Faculté des sciences politiques de l'Université d'Ankara, Ankara, 1982</li> </ul> |

#### 1.      Facts

575. In 1948, the Icelandic Parliament passed a law on the scientific conservation of the continental shelf fisheries. The law was aimed at protecting Icelandic fishing resources since the economy of Iceland depends almost entirely on fishing in the vicinity of its coasts. The law empowered the Government to establish conservation zones, where all fisheries would be subject to Icelandic rules and control, to the extent compatible with agreements with other countries.

576. In this connection, in 1958, Iceland proclaimed a 12-mile exclusive fishing zone and prohibited all foreign vessels from engaging in any fishing activity within the new zone. The proclamation was the beginning of a wider policy reflected in a resolution of the Parliament of 5 May 1959, which stated that recognition should be obtained for Iceland's right to the entire continental shelf area in conformity with the policy adopted by the law of 1948.

577. The 1948 law as well as the 1958 proclamation resulted in a dispute with the United Kingdom, whose vessels had traditionally fished in the area. There were a number of incidents between Icelandic naval craft and British fishery protection vessels.

578. On 11 March 1961, the two Governments ended their dispute with an Exchange of Notes constituting an agreement between them. The Notes, *inter alia*, specified that the United Kingdom would no longer object to a 12-mile fishery zone, that Iceland would continue to work for the implementation of its Parliament's resolution of 1959 but would give the United Kingdom six-month notice of any extension of its fisheries jurisdiction and that, in case of a dispute in relation to such extension, the matter would be, at the request of either party, referred to the International Court of Justice.

579. In 1971, the Icelandic Government announced that the agreement on fisheries jurisdiction with the United Kingdom would be terminated and that the limit of exclusive Icelandic fisheries jurisdiction would be extended to 50 miles. In reply, the United Kingdom emphasized that the 1961 Exchange of Notes was not open to unilateral denunciation and that in its view the measure contemplated by Iceland would have no basis in international law.

580. On 14 April 1972, following the failure of negotiations, the United Kingdom applied to the International Court of Justice. Iceland did not appear and did not appoint an agent but, in a number of communications to the Court, contended, among other things, that the 1961 Exchange of Notes was no longer in force and that the Court did not have jurisdiction.

581. Iceland issued, on 14 July 1972, new fisheries regulations extending its fishery limits to 50 miles and prohibiting all fishing activities by foreign vessels inside those limits. The enforcement of the regulations resulted in a series of incidents involving British and Icelandic vessels. On 19 July 1972, the United Kingdom filed a request for interim measures of protection.

582. On 13 November 1973, the two Governments reached an interim agreement by an Exchange of Notes, which provided that British vessels would be entitled, for a 2-year period, to catch no more than 130,000 metric tons of fish per year in the disputed area. The 1973 Exchange of Notes also provided for temporary arrangements "pending a settlement of the substantive dispute and without prejudice to the legal position or rights of either Government".

## 2. Issues

### (a) Questions before the Court

- Whether there was any foundation in international law for Iceland's establishment of a zone of exclusive fisheries jurisdiction extending to 50 miles from the baselines and, if not, whether its claim should be deemed invalid; and
- Whether the conservation of fish stocks in the waters around Iceland might be susceptible in international law to regulation by Iceland's unilateral extension of its exclusive fisheries jurisdiction, or could be regulated, as between Iceland and the United Kingdom, by arrangements agreed between them.

**(b) Arguments presented by the Parties****Jurisdiction**

- (i) The **United Kingdom** claimed that the Court had jurisdiction by virtue of the compromissory clause contained in the 1961 Exchange of Notes.
- (ii) **Iceland**, in a letter addressed to the Court, claimed that the clause did not apply to the dispute; that the 1961 Exchange of Notes had been concluded after British warships had used force to protect trawlers; that the Exchange of Notes was not a permanent agreement (because a compromissory clause cannot be of a permanent nature) and Iceland had exercised her right to terminate it; that since Iceland was now entitled to a 12-mile fisheries limit as of right, the United Kingdom was no longer providing consideration for Iceland's promises; and that changes in the law of the sea and in fishing techniques constituted a fundamental change of circumstances, which rendered the 1961 Exchange of Notes inoperative.

**Merits**

- (i) The **United Kingdom** proceeded with its application, asking the Court to declare in its favour on four points:
  - That Iceland's claim to a 50-mile fishing limit was without foundation in international law and, hence, invalid;
  - That, as against the United Kingdom, Iceland was not entitled to assert an exclusive fisheries jurisdiction beyond the limits agreed to in the 1961 Exchange of Notes;
  - That Iceland could not unilaterally exclude United Kingdom fishing vessels from the disputed area; and
  - That the Parties were under a duty to examine together the need for conservation of fish stocks and, if such a need was proved, to establish a regime which recognized both the preferential rights of Iceland as a coastal State dependent on fishing and the rights of the United Kingdom and other interested States.

The United Kingdom also pointed out that its vessels had been fishing in Icelandic waters for centuries, that they had done so in a manner comparable with their present activities for upwards of fifty years and that their exclusion would have very serious and harmful consequences. The economic dependence and livelihood of whole communities in the United Kingdom that shared the same interest in the conservation of fish stocks as Iceland, which had for its part admitted the existence of the applicant's historic and special interests in fishing in the disputed waters, would be adversely affected by such an exclusion. Moreover, the United Kingdom was of the view that Iceland's 1972 regulations were not opposable to it since those regulations disregarded the established rights of the United Kingdom and the terms of the

1961 Exchange of Notes. The regulations also constituted an infringement on the principle of reasonable regard for the interests of other States set out in article 2 of the 1958 Geneva Convention on the High Seas.

- (ii) **Iceland** did not appear before the Court nor did it file any pleadings on the merits of the dispute.

### **3. Reasoning of the Court**

#### **(a) Interim Measures**

583. The Court considered that Iceland's failure to appear did not constitute by itself an obstacle to the indication of interim measures. It further stated that the request for interim measures, which sought to protect the right of fishing in the area in question, was directly linked to the original Application by the United Kingdom.

584. As regards jurisdiction, the Court found that on a request for interim measures it was not necessary for the Court to satisfy itself conclusively that it had jurisdiction, unless the absence of jurisdiction was manifest. The Court held that the compromissory clause in the 1961 Exchange of Notes accorded it, *prima facie*, jurisdiction to hear the case.

585. The Court indicated interim measures similar to those requested by the United Kingdom on the basis that the immediate implementation of Iceland's new fishery regulations would prejudice the rights the United Kingdom was trying to assert in the case. However, the Court limited the catch of the United Kingdom to 170,000 metric tons of fish per year and not to 185,000 tons, as requested, on the basis of the exceptional dependence of Iceland upon coastal fisheries for its livelihood and economic development.

#### **(b) Jurisdiction**

586. The Court found that the compromissory clause in the 1961 Exchange of Notes was intended to cover the type of dispute in question.

587. The Court rejected Iceland's argument that it had entered into the 1961 Exchange of Notes owing to the use of force exerted by the United Kingdom.<sup>16</sup> If such an argument were proven, the 1961 Exchange of Notes would have been clearly void under the United Nations Charter and article 52 of the Vienna Convention on the Law of Treaties. However, the history of the negotiations, which led up to the 1961 Exchange of Notes, revealed that the agreement was "freely negotiated by the interested Parties on the basis of perfect equality and freedom of decision on both sides. No fact has been brought to the attention of the Court from any quarter suggesting the slightest doubt on this matter".

588. As to Iceland's right to terminate the agreement, the Court found that the compromissory clause made the Exchange of Notes a non-permanent agreement. However, the 1961 Exchange of Notes did not establish a definitive time limit for the extension of Iceland's fisheries jurisdiction. The right to invoke the Court's jurisdiction would only materialize if Iceland made a claim to extend its fishery limits. Therefore, there could be no specification of a time limit for the

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<sup>16</sup> Such an argument was contained in a letter addressed by Iceland to the Court in 1972.

corresponding right of the United Kingdom to challenge such extension and invoke the Court's jurisdiction.

589. Iceland alluded to a change of circumstances with respect to fisheries and fishing techniques as well as to changes regarding "legal opinion on fisheries jurisdiction". It contended that the right of exclusive fisheries jurisdiction to a distance of 12 miles had been increasingly recognized and claimed by States, including the United Kingdom, relieving Iceland of its commitment because of the changed legal circumstances.

590. The Court found that Iceland's contention was not relevant. The object and purpose of the Exchange of Notes was wider in scope than merely deciding upon the Icelandic claim to fisheries jurisdiction up to 12 miles. The Notes also provided a means whereby the Parties could resolve the question of the validity of any further claims.

591. In its statements Iceland made references to "the changed circumstances resulting from the ever increasing exploitation of the fishery resources in the seas surrounding Iceland", basing itself on the principle of termination of a treaty by reason of change of circumstances.

International law admits that a fundamental change in the circumstances, which prompted the Parties to accept a treaty, may, under certain conditions afford the Party affected a ground for invoking the termination or suspension of a treaty. Iceland alleged that developments in fishing techniques constituted such a fundamental change. The United Kingdom contended that the alterations and progress in fishing techniques had not produced the consequences apprehended by Iceland. Therefore the changes in fishing techniques were not of a fundamental and vital character.

592. The Court found that if the alleged changes in fishing techniques did indeed exist, they would only be relevant for the merits stage of the proceedings. As to this stage of the proceedings, the alleged changes could not affect the compellatory clause establishing the Court's jurisdiction.

### (c) Merits

593. The facts requiring the Court's consideration in adjudicating the claim were attested by documentary evidence whose accuracy was not in doubt. As for the law, although it was to be regretted that Iceland had failed to appear, the Court was nevertheless deemed to take notice of international law. Having taken account of the legal position of each Party, the Court considered that it had before it the elements necessary to enable it to deliver a judgment.

594. The Court considered the 1958 Convention on the High Seas. Article 2 of the Convention declared the principle of the freedom of the high seas to "be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas".

595. The question of the breadth of the territorial sea and of the extent of the coastal State's fishery jurisdiction had been left unsettled at the 1958 Conference and were not settled at a second Conference held in Geneva in 1960. However, arising out of the general consensus at that second Conference, two concepts had since crystallized as customary law:

(a) That the fishery zone between the territorial sea and the high seas, within which the coastal State could claim exclusive fisheries jurisdiction, could extend to a 12-mile limit;

(b) That a coastal State, in a situation of special dependence on its fisheries, was to benefit from preferential fishing rights in waters adjacent to the zone of exclusive fishing.

596. The Court noted that the practice of States showed that the latter concept, in addition to receiving increasing and widespread acceptance, was being implemented by agreements. The United Kingdom had expressly recognized the preferential rights of Iceland in the disputed waters beyond the 12-mile limit, and the exceptional dependence of Iceland on its fisheries and its primary need to preserve fish stocks in the interest of rational and economic exploitation were unquestionable. However, the notion of preferential fishery rights for the coastal State in a situation of special dependence, though it implied a certain priority, could not imply the extinction of the concurrent rights of other States. The fact that Iceland was entitled to claim preferential rights did not suffice to justify its claim to exclude British fishing vessels from all fishing beyond the limit of 12 miles agreed to in 1961.

597. The United Kingdom stressed its historical presence in the disputed waters. Therefore, and in order to reach an equitable solution to the dispute, the Court found it necessary to reconcile the preferential fishing rights of Iceland with the traditional fishing rights of the United Kingdom through appraisal of the relative dependence of either State on the fisheries in question. While Iceland did not have the right to exclude unilaterally British vessels from fishing in the disputed area, the United Kingdom had the obligation to respect Iceland's preferential fishing rights in the 12-mile to 50-mile zone.

598. In addition, the Court held that the Parties had the obligation to reach a negotiated settlement in order to take the appropriate measures required for the conservation and development of fishery resources.

599. Consequently, the Court found that Iceland's extension of its exclusive fishery jurisdiction beyond 12 miles was not opposable to the United Kingdom; that Iceland could on the other hand claim preferential rights in the distribution of fishery resources in the adjacent waters; that the United Kingdom also had established rights with respect to the fishery resources in question; and that the principle of reasonable regard for the interests of other States enshrined in article 2 of the 1958 Geneva Convention on the High seas required Iceland and the United Kingdom to have due regard for each other's interests and the interests of other States in those resources.

#### 4. Decisions

600. On 17 August 1972, on interim measures, by fourteen votes to one, the Court indicated **interim measures** substantially similar to those sought by the United Kingdom. In particular:

(a) The United Kingdom and Iceland should ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court;

(b) The United Kingdom and Iceland should ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision on the merits the Court may render;

(c) Iceland should refrain from taking any measures to enforce the Regulations of 14 July 1972 against vessels registered in the United Kingdom and engaged in fishing activities in the waters around Iceland outside the 12-mile fishery zone;

(d) Iceland should refrain from applying administrative, judicial or other measures against ships registered in the United Kingdom, their crews or other related persons because of their having engaged in fishing activities in the waters around Iceland outside the 12-mile fishery zone;

(e) The United Kingdom should ensure that vessels registered in the United Kingdom do not take an annual catch of more than 170,000 metric tons of fish from the "Sea Area of Iceland" as defined by the International Council for the Exploration of the Sea; and

(f) The United Kingdom should furnish Iceland and the Registry of the Court with all relevant information, orders issued and arrangements made concerning the control and regulation of fish catches in the area.

601. On 2 February 1973, on the question of **jurisdiction**, by fourteen votes to one, the Court held that it had jurisdiction under the 1961 Exchange of Notes, which remained a valid and effective treaty.

602. On 12 July 1973, on the continuance of interim measures, by eleven votes to three, the Court held that the **interim measures** indicated in the Order of 17 August 1972 would remain operative until the Court rendered its final Judgments in the case.

603. On 25 July 1974, on the **merits**, by ten votes to four, the Court:

(a) Found that the Icelandic Regulations of 1972 constituting a unilateral extension of the exclusive fishing rights of Iceland to 50 nautical miles from the baselines were not opposable to the United Kingdom;

(b) Found that Iceland was not entitled to exclude unilaterally United Kingdom fishing vessels from areas between the 12-mile and 50-mile limits or unilaterally to impose restrictions on their activities in such areas;

(c) Held that Iceland and the United Kingdom were under mutual obligation to undertake negotiations in good faith for an equitable solution of their differences; and

(d) Indicated certain factors which were to be taken into account in the negotiations (preferential rights of Iceland, established rights of the United Kingdom, interests of other States, conservation of fishery resources, joint examination of measures required).

## 5. Declarations, Separate Opinions, Dissenting Opinions

### (a) Declarations

604. **President Lachs** stated that he was in agreement with the reasoning and conclusions of the Court and did not deem it appropriate to make any comments on the Judgment.

605. **Judge Ignacio-Pinto** declared that the Court had deliberately evaded what was placed squarely before it in the case, namely whether Iceland's claims were in accordance with the rules of international law. In fact, in his view, by concentrating on questions of preferential rights and seeking to prescribe the guiding principles for negotiations between the Parties, the Court had avoided the main issue.

606. **Judge Nagendra Singh**, while fully supporting the Judgment, wanted to make a number of clarifications. He mentioned that the Court did not proceed to pronounce itself on the Applicant's request, which asked the Court to declare that Iceland's extension of its exclusive fishery limit to 50 nautical miles had no basis in international law, because it would amount to asking the Court to find that such extension was *ipso jure* illegal and invalid *erga omnes*. Judge Nagendra Singh observed that the rules of customary maritime law relating to the limit of fisheries jurisdiction were still evolving and, confronted by a widely divergent and discordant State practice, had not so far crystallized. The conventional maritime law, though substantially codified by the Geneva Conferences on the Law of the Sea of 1958 and 1960, has certain aspects admittedly that remain to be settled and these now constitute, among others, the subject of subsequent efforts at codification. The question of the extent of fisheries jurisdiction, which is still one of the unsettled aspects, could not, therefore, be settled by the Court since it could not "render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down".

607. Judge Nagendra Singh noted that it was of some importance to know the precise content of the expression "fisheries jurisdiction" and for what it stands and means. The concept of fisheries jurisdiction does cover aspects such as enforcement of conservation measures, exercise of preferential rights and respect for historic rights since each one may involve an element of jurisdiction to implement them.

608. The contribution that the Judgment makes towards the development of the law of the sea lies in the recognition that it gives to the concept of preferential rights of a coastal State in the fisheries of the adjacent waters; particularly if that State is in a special situation with its population dependent on those fisheries.

609. Lastly, Judge Nagendra Singh stated that the Judgment of the Court, in asking the Parties to negotiate a settlement, had emphasized the importance of resolving the dispute in the adjudication of the case.

(President Sir Muhammad Zafrulla Khan also appended a declaration on jurisdiction.)

### **(b) Joint Separate Opinion**

610. **Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda** stressed that they fully agreed with the Court's decision regarding the non-opposability to the United Kingdom of the Icelandic extension of its fisheries jurisdiction since the Court confined its Judgment to the circumstances and special characteristics of the case, instead of basing it on the main legal contention of the United Kingdom, i.e., that a customary rule of international law exists which imposes a general prohibition on extensions by States of their exclusive fisheries jurisdiction beyond 12 nautical miles from their baselines. They also stated that a decision declaring that the fisheries extension made by Iceland was without foundation in international law, as mentioned by the United Kingdom, would not have been well-founded since there was no established general customary rule on fisheries limits and at the time there was no international usage on the "12-mile limit rule" sufficiently widespread and uniform as to constitute, within the meaning of Article 38, paragraph 1 (b), of the Court's Statute, "evidence of a general practice accepted as law". They therefore concluded that there was a situation of uncertainty as to the

existence of a customary rule prescribing a maximum limit of a State's fisheries jurisdiction and; in this specific case, however, they had been able to concur in a Judgment based on two concepts that they fully supported:

- (a) The preferential rights of the coastal State; and
- (b) The rights of a State where a part of its population and industry have a long-established economic dependence on the same fishery resource.

#### **(c) Separate Opinions**

611. For **Judge Dillard** the Judgment of the Court reflected in some aspects an approach that was soundly grounded. In some other aspects, however, the Judgment was lacking in persuasive force. In his opinion the Court should have used more convincing argumentation to declare that Iceland had materially breached the Exchange of Notes of 1961. The Court should also have given a clearer decision on the first submission of the United Kingdom, which asked the Court to adjudge and declare that the extension of fisheries jurisdiction made by Iceland was without foundation in international law *erga omnes*. In his opinion "the power of the Court ... to specify a duty to negotiate in good faith seem[ed] to be well founded in law."

612. **Judge de Castro**, though voting with the majority, appended a detailed opinion concerning several matters. In particular, as to the burden of proof, he recalled the United Kingdom's argument that Iceland had to prove its rights under international law. He stressed that such an argument was not acceptable because international customary law does not need to be proven and the Court must apply it *ex officio*. He also pointed out many aspects that, in his opinion, the Court did not consider adequately: the texts to be interpreted, the development of the law of the sea, the law to be applied and some procedural questions.

613. **Judge Sir Humphrey Wallock** was in general agreement with the Court's decision. However, in his opinion the Court in its Judgment should have given much more weight to the compromissory clause of 1961. In fact, he alleged that this clause was an integral part of the law applicable between Iceland and the United Kingdom with regard to the extension of Iceland's fishery jurisdiction and, as such, was also part of the law to be applied by the Court in deciding upon the validity of such an extension. Therefore, Iceland's total repudiation of the assurance that it had given in the 1961 Exchange of Notes constituted an additional (and fundamental) ground for finding that Iceland's extension of the fishery jurisdiction in 1972 was not opposable to the United Kingdom. This in itself would have been enough to justify the Court in upholding the second and third submissions of the United Kingdom.

(Judge Sir Gerald Fitzmaurice also appended a separate opinion on jurisdiction.)

#### **(d) Dissenting Opinions**

##### Interim measures

614. **Judge Padilla Nervo** considered that the Court should not indicate interim measures of protection without making at least a provisional determination that it had jurisdiction to hear the case on the merits. Moreover, he thought that it was not at all clear that Iceland had acted contrary to international law and considered that its extension of its fishery limits was the

exercise of a right impliedly recognized by the United Kingdom in the 1961 Exchange of Notes. He added that by indicating interim measures, which gave to the United Kingdom almost everything it had requested, the Court had failed to maintain a proper balance between the Parties.

#### Continuance of Interim Measures

615. **Judge Ignacio-Pinto** considered that circumstances had changed since the interim measures had first been indicated but that the confrontations between Britain and Iceland meant that different interim measures were not warranted.

616. **Judge Gros** advanced the argument that in Iceland's absence the Court should have applied article 53 of its Statute and considered *proprio motu* the role of interim measures in the light of the changed circumstances. He thought the Court should not delay in rendering a judgment on the merits solely to allow the Parties to negotiate a settlement.

617. **Judge Petrén** considered that circumstances had clearly changed and that the Court should have invited the Parties to present their observations on the subject in order to obtain information about these changes and the effect they might have on interim measures.

#### Jurisdiction

618. **Judge Padilla Nervo** repeated the comments he had made during the proceedings on the interim measures, adding that Iceland's action was legitimate.

#### Merits

619. **Judge Gros** thought that Iceland's claim was contrary to international law, but he did not agree with the legal reasoning of the Court. He made, *inter alia*, the following points in his dissenting opinion:

(a) That the purpose of the compromissory clause in the 1961 Exchange of Notes was to refer to the Court any dispute concerning a future extension of Iceland's fishing limits so that the Court could decide whether that extension was permitted by international law. The Court had erred by failing to decide on that central question. The extended limits were contrary to international law and were not opposable to any State;

(b) That the Court was also wrong to hold that the Parties were under a duty to negotiate an equitable settlement. Questions of preferential rights and conservation were not within the compromissory clause of the 1961 Exchange of Notes and the Court therefore had no jurisdiction to decide upon them; and

(c) That the decision on the duty to negotiate was also illusory since the 1973 Exchange of Notes had effectively suspended any duty to negotiate.

620. **Judge Petrén** considered that the Court had failed to answer the most important question and that it had exceeded its jurisdiction by deciding that the Parties were under a duty to achieve an equitable settlement by negotiation. In addition, he considered that the 1961 agreement between the Parties did not confer jurisdiction upon the Court to make any pronouncement with regard to preferential or historic fishing rights as may exist within the waters adjacent to the Icelandic fishery zone.

621. In the view of **Judge Onyeama** the Court should have decided that Iceland's extended fishing limits were without foundation in international law. Also, he was of the opinion that the Court had exceeded its jurisdiction by considering the question of preferential rights, and deciding that the Parties were obliged to negotiate.

#### D.      Fisheries Jurisdiction Case

|                               |   |
|-------------------------------|---|
| <b>Parties:</b>               | Federal Republic of Germany and Iceland   |
| <b>Issues:</b>                | Extension by coastal State of fisheries jurisdiction; fishery zone; preferential rights and concurrent rights of other States; conservation measures  |
| <b>Forum:</b>                 | International Court of Justice (ICJ)  |
| <b>Date of Decision:</b>      | 2 February 1973 (Jurisdiction)<br><br>25 July 1974 (Merits)   |
| <b>Published in:</b>          | <u>ICJ: Reports of Judgments, Advisory Opinions and Orders</u> , 1974, pp. 175-251<br><br><u>International Law Reports</u> , Vol. 56, p. 146  |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Churchill, R.R., “Fisheries Jurisdiction Cases: the Contribution of the International Court of Justice to the debate on coastal States’ Fisheries Rights”, 24 <u>International and Comparative Law Quarterly</u> (1975), pp. 82-105</li> <li>- Briney, R.A., “The Icelandic Fisheries Dispute: A Decision is Finally Rendered”, 5 <u>Georgia Journal of International and Comparative Law</u> (1975), pp. 248-256</li> <li>- Katz, S.R., “Issues Arising in the Icelandic Fisheries Case”, 22 <u>International and Comparative Law Quarterly</u> (1973), pp. 83-108</li> <li>- Favoreu, L., “L'affaire de la compétence en matière de pêches (Royaume-Uni c. Islande et Allemagne fédérale c. Islande)”, 20 <u>Annuaire Français de Droit International</u> (1974), pp. 253-285</li> </ul> |

#### 1.      Facts

622. In 1948, the Parliament of Iceland, the Althing, passed a law concerning the Scientific Conservation of the Continental Shelf Fisheries, which empowered the Government to establish conservation zones where all fisheries would be subject to Iceland’s rules and control, to the extent compatible with treaties with other countries. In 1958, Iceland issued Regulations extending the limits of its exclusive right of fishery around its coasts to 12 nautical miles. In 1959, the Althing declared by a resolution that “recognition should be obtained of Iceland’s right to the entire continental shelf area in conformity with the policy adopted by the Law of 1948”. After refusing to recognize the validity of the new Regulations, the Federal Republic of Germany (hereinafter Germany) negotiated with Iceland and, on 19 July 1961, concluded an Exchange of Notes specifying, among other things, that Germany would no longer object to a 12-mile fishery zone; that Iceland would continue to work for the implementation of the 1959 Resolution concerning the extension of fisheries jurisdiction but would give Germany six-months notice of

such an extension; and that “in case of a dispute in relation to such an extension, the matter shall, at the request of either Party, be referred to the International Court of Justice”.

623. In 1971, the Government of Iceland announced that the agreement on fisheries jurisdiction with Germany would be terminated and that the limit of Iceland’s exclusive fisheries jurisdiction would be extended to 50 miles. Germany was formally notified on 24 February 1972 of that intention and replied that, in its view, the measures contemplated would be “incompatible with the general rules of international law” and that the 1961 Exchange of Notes could not be denounced unilaterally.

624. On 14 July 1972, new Regulations were introduced extending Iceland’s fishery limits by 50 miles as from 1 September 1972 and prohibiting all fishing activities by foreign vessels inside those limits.

625. Germany instituted proceedings against Iceland before the International Court of Justice on 26 May 1972. At the request of Germany, the Court indicated interim measures of protection by an Order dated 17 August 1972 and confirmed them by a further Order dated 12 July 1973.

*(The reader may wish to consult the judgment or by analogy the procedural stages outlined in the preceding summary of the Fisheries Jurisdiction Case (United Kingdom v. Iceland).)*

## 2. Issues

### (a) Questions before the Court

- (i) Whether the Court had jurisdiction;
- (ii) Whether Iceland’s extension of its fisheries jurisdiction to 50 miles was in conformity with international law;
- (iii) Whether Icelandic interference with German fishing vessels was unlawful and; if so, whether compensation was due to Germany.

### (b) Arguments presented by the Parties

**Germany** asked the Court to adjudge and declare that:

- The unilateral extension by Iceland of its zone of exclusive fisheries jurisdiction to 50 nautical miles from the baselines had, as against Germany, no basis in international law;
- The Icelandic Regulations issued for that purpose were not to be enforced against Germany or vessels registered therein;
- If Iceland established a need for conservation measures in respect to fish stocks beyond the limit of 12 nautical miles agreed to in the Exchange of Notes in 1961, such measures may be taken only on the basis of an agreement between the Parties, concluded either bilaterally or within a multilateral framework, with due regard to the special dependence of Iceland on its fisheries and to the traditional fisheries of Germany in the waters concerned; and
- The acts of interference by Icelandic coastal patrol boats with fishing vessels

registered in Germany were unlawful under international law and that Iceland was under an obligation to make compensation to Germany.

626. **Iceland** did not take part in any phase of the proceedings. By a letter of 27 June 1972, Iceland informed the Court that it regarded the Exchange of Notes of 1961 as terminated, that in its view there was no basis under the Statute for the Court to exercise jurisdiction and that, as it considered its vital interests to be involved, it was not willing to confer jurisdiction on the Court in any case involving the extent of its fishery limits. Subsequently, in a letter dated 11 January 1974, Iceland stated that it did not accept any of the statements of fact or any of the allegations or contentions of law submitted by Germany to the Court.

### **3. Reasoning of the Court**

627. Under Article 53 of its Statute, the Court had to determine whether the claim was well founded in fact and law. The facts were supported by documentary evidence. As for the law, the Court was deemed to take notice of international law, which lay within its own judicial knowledge, even though Iceland had failed to appear.

#### **(a) Jurisdiction of the Court**

628. The Court, having in its Judgment of 2 February 1973 affirmed its jurisdiction by virtue of the Exchange of Notes of 1961, which was a treaty in force, emphasized that it would be too narrow an interpretation of its compromissory clause to conclude that it limited the Court's jurisdiction to giving an affirmative or a negative answer to the question of whether the Icelandic Regulations of 1972 were in conformity with international law. It seemed evident that the dispute between the Parties included disagreements as to their respective rights in fishery resources and the adequacy of measures to conserve them. Accordingly, it was within the power of the Court to take into consideration all relevant elements and the Court found that it had jurisdiction to deal with the merits of the dispute.

629. In addition, Germany informed the Court that, as Iceland was declining to take part in the proceedings and to avail itself of the right to have a judge *ad hoc*, Germany did not deem it necessary to insist on the appointment of one. Therefore, the Court did not include upon the bench any judge of the nationality of either of the Parties. Furthermore, the Court decided not to join the proceedings to those instituted by the United Kingdom against Iceland, taking into account that, while the basic legal issues in each case appeared to be identical, there were differences between the positions of the Applicants and their respective submissions and that joinder would be contrary to their wishes.

#### **(b) Applicable rules of international law**

630. The Court took into account the Exchange of Notes of 1961 and the existing rules of international law.

631. In this connection, it should be noted that the first United Nations Conference on the Law of the Sea (Geneva, 1958) adopted a Convention on the High Seas, Article 2 of which declared the principle of the freedom of the high seas, including freedom of navigation, freedom of fishing, etc., to be “exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas”.

632. The question of the breadth of the territorial sea and that of the extent of the coastal State’s fishery jurisdiction had been left unsettled at the 1958 Conference and were not settled at a second Conference held in Geneva in 1960. However, arising out of the general consensus at that second Conference, two concepts had since crystallized as customary law: that of a fishery zone, between the territorial sea and the high seas, within which the coastal State could claim exclusive fisheries jurisdiction, it being generally accepted that that zone could extend to the 12-mile limit; and the concept, in respect of waters adjacent to the zone of exclusive fishing rights, of preferential fishing rights in favour of the coastal State in a situation of special dependence on its fisheries.

633. The concept of preferential fishing rights had originated in proposals submitted at the Geneva Conference of 1958 by Iceland, which had confined itself to recommending that:

“...where, for the purpose of conservation, it becomes necessary to limit the total catch of a stock or stocks of fish in an area of the high seas adjacent to the territorial sea of a coastal State, any other States fishing in that area should collaborate with the coastal State to secure just treatment of such situation, by establishing agreed measures which shall recognize any preferential requirements of the coastal State resulting from its dependence upon the fishery concerned while having regard to the interests of the other States”.

634. At the 1960 Conference the same concept had been embodied in an amendment incorporated by a substantial vote into one of the proposals concerning the fishing zone. The contemporary practice of States showed that the concept, in addition to its increasing and widespread acceptance, was being implemented by agreements, both bilateral and multilateral. In the present case, in which the exclusive fishery zone within the limit of 12 miles was not in dispute, the Court noted that Germany had expressly recognized the preferential rights of the other Party in the disputed waters situated beyond that limit.

635. The Court found, however, that the very notion of preferential fishery rights for the coastal State in a situation of special dependence, though it implied a certain priority, could not imply the extinction of the concurrent rights of the other States. The fact that Iceland was entitled to claim preferential rights did not suffice to justify its claim to exclude unilaterally German fishing vessels from all fishing beyond the limit of 12 miles agreed to in 1961.

636. Germany shared the same interest in the conservation of fish stocks as Iceland, which had for its part admitted the existence of the Applicant’s historic and special interests in fishing in the disputed waters. Consequently, the Court held that Iceland’s 1972 Regulations were not opposable to Germany since they disregarded the established rights of that State and also the Exchange of Notes of 1961. Furthermore, they constituted an infringement of the principle (article 2 of the 1958 Convention on the High Seas) of reasonable regard for the interests of other States, including Germany.

637. In order to reach an equitable solution, the Court noted that the preferential fishing rights of Iceland should be reconciled with the traditional fishing rights of Germany through the appraisal at any given moment of the relative dependence of either State on the fisheries in question, while taking into account the rights of other States and the needs of conservation.

638. According to the Court, the most appropriate method for the solution of the dispute was clearly by negotiation with a view to delimiting the rights and interests of the Parties and regulating equitably such questions as those of catch-limitation, share allocations and related restrictions. The obligation to negotiate flowed from the very nature of the respective rights of the Parties and corresponded to the provisions of the United Nations Charter concerning peaceful settlement of disputes. The task before the Parties would be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other, to the facts of the particular situation and to the interests of other States with established fishing rights in the area.

639. The Court stated that the interim measures indicated in the Order of 17 August 1972 would cease to have effect as from the date of the Judgment. However, the Parties would not be at liberty to conduct their fishing activities in the disputed waters without limitation. The Parties would be under an obligation to pay reasonable regard to each other's rights and to conservation requirements pending the conclusion of negotiations.

### **(c) Compensation claim**

640. In its Memorial and at the oral proceedings, Germany had raised the question of compensation for alleged acts of harassment of its fishing vessels by Icelandic coastal patrol boats. However, the Court was prevented from making an all-embracing finding of liability owing to the limited information and scant evidence presented on the matter.

## **4. Decision**

641. The Court rendered its decision on 25 July 1974 by ten votes to four and:

(a) Found that the Icelandic Regulations of 1972, constituting a unilateral extension of the exclusive fishing rights of Iceland to 50 nautical miles from the baselines, were not opposable to Germany;

(b) Found that Iceland was not entitled unilaterally to exclude German fishing vessels from areas between the 12-mile and 50-mile limits or unilaterally to impose restrictions on their activities in such areas;

(c) Held that Iceland and Germany were under mutual obligation to undertake negotiations in good faith for an equitable solution of their differences;

(d) Indicated certain factors which were to be taken into account in the negotiations (preferential rights of Iceland, established rights of Germany, interests of other States, conservation of fishery resources, joint examination of measures required); and

(e) Found that it was unable to accede to the submission of Germany concerning its claim to be entitled to compensation.

## 5. Declarations, Separate Opinions and Dissenting Opinions

### (a) Declarations

642. **President Lachs** stated that he was in agreement with the reasoning and conclusions of the Court and did not deem it appropriate to make any comments on the Judgment.

643. As regards the compensation claim presented by Germany, **Judge Dillard** maintained that there was no doubt that Iceland's acts of harassment, which were indicated in considerable detail in the proceedings, were unlawful. Those acts were committed *pendente lite* despite obligations assumed by Iceland in the Exchange of Notes of 1961, which the Court had declared to be a treaty in force. According to Judge Dillard, the Court was only asked to indicate the unlawful character of the acts concerned and take note of the consequential liability of Iceland to make reparations. The Court was not asked to assess damages. Judge Dillard, therefore, would have preferred it if the Court had stressed the limited nature of the German submission instead of concluding that it could not accede to the submission in the absence of detailed evidence bearing on each concrete claim.

644. **Judge Ignacio-Pinto** stated that the decision was devoted to fixing the conditions for the exercise of preferential rights, for conservation of fish species, and historic rights, rather than responding to Germany's primary claim, which was for a statement of the law on a specific point. In this connection, it should be observed that Germany did not seek a decision from the Court on a dispute between itself and Iceland on the subject of the preferential rights of the coastal State, the conservation of fish species, or historic rights.

645. Judge Ignacio-Pinto was of the view that the Court had deliberately evaded the question that was placed squarely before it in the case, namely whether Iceland's claims are in accordance with the rules of international law. By not giving an unequivocal answer on that principal claim, the Court failed to perform the act of justice requested of it.

646. In conclusion, Judge Ignacio-Pinto believed that the Court would certainly have strengthened its judicial authority if it had given a positive reply to the claim laid before it by Germany, instead of embarking on the construction of a thesis on preferential rights, zones of conservation of species, or historic rights, on which there has never been any dispute, nor even the slightest shadow of a controversy on the part either of the Applicant or Respondent. The Court should have confined itself strictly to the limits of the jurisdiction conferred on it.

647. **Judge Nagendra Singh**, while fully supporting the Judgment, wanted to make a number of clarifications. He mentioned that the Court did not proceed to pronounce itself on the Applicant's request, which asked the Court to declare that Iceland's extension of its exclusive fishery limit to 50 nautical miles had no basis in international law, because it would amount to asking the Court to find that such extension was *ipso jure* illegal and invalid *erga omnes*. Judge Nagendra Singh observed that the rules of customary maritime law relating to the limit of fisheries jurisdiction were still evolving and, confronted by a widely divergent and discordant State practice, had not so far crystallized. The conventional maritime law, though substantially codified by the Geneva Conferences on the Law of the Sea of 1958 and 1960, had certain aspects admittedly that remained to be settled and these now constituted, among others, the subject of subsequent efforts at codification. The question of the extent of fisheries jurisdiction, which was still one of the unsettled aspects, could not, therefore, be settled by the Court since it could not

“render judgment *sub specie legis ferendae*, or anticipate the law before the legislator had laid it down”.

648. Judge Nagendra Singh noted that it was of some importance to know the precise content of the expression “fisheries jurisdiction” and for what it stands and means. The concept of fisheries jurisdiction did cover aspects such as enforcement of conservation measures, exercise of preferential rights and respect for historic rights since each one may involve an element of jurisdiction to implement them.

649. The contribution that the Judgment made towards the development of the law of the sea lay in the recognition that it gave to the concept of preferential rights of a coastal State in the fisheries of the adjacent waters; particularly if that State was in a special situation with its population dependent on those fisheries.

650. Lastly, Judge Nagendra Singh stated that the Judgment of the Court, in asking the Parties to negotiate a settlement, had emphasized the importance of resolving the dispute in the adjudication of the case.

(President Sir Muhammad Zafrulla Khan also appended a declaration on jurisdiction.)

#### **(b) Joint Separate Opinion**

651. **Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda** stated that what had made it possible for them to concur in the reasoning of the Court and to subscribe to its decision was that, while the Judgment declared the Icelandic extension of its fisheries jurisdiction non-opposable to the Applicant’s historic rights, it did not declare, as requested by the Applicant, that such an extension was without foundation in international law and invalid *erga omnes*. In refraining from pronouncing upon that part of the Applicant’s submission in which it requested the Court to adjudge and declared that the Icelandic Regulations of 14 July 1872 have “no basis in international law”, and in reaching instead a decision on non-opposability to Germany of the Icelandic Regulations, the Judgment was based on legal grounds which were specifically confined to the circumstances and special characteristics of the present case; and it was not based on the Applicant’s main legal contention, namely, that a customary rule of international law exists today imposing a general prohibition on extensions by States of their exclusive fisheries jurisdiction beyond 12 nautical miles from their baselines.

652. The Judges were of the view that to reach the conclusion that there was at the time a general rule of customary law establishing for coastal States an obligatory maximum fishery limit of 12 miles would not have been well-founded. In fact, according to the Judges there was not then an international usage to that effect sufficiently widespread and uniform as to constitute, within the meaning of Article 38, paragraph 1 (b), of the Court’s Statute, “evidence of a general practice accepted as law”.

#### **(c) Separate Opinions**

653. **Judge de Castro** did not understand how the Court could agree to Germany’s claim to reparation. He stated that the Court in its Judgment on a case did not have to make declarations of principle. To say that an illegal act that has caused injury gives rise to an obligation to make

reparation is a mere truism, and therefore there is no point in saying it. But, for the same reason, to say as much would suggest that the Court had, at least *prima facie*, accepted the existence of illegal acts of damage.

654. A claim for reparation, if it is to be admissible before a court, must include a submission of evidence as to the fault of the defendant, and as to the existence and the amount of each head of damage. The possibility must also be considered of balancing of fault on each side, or a set-off of damages. It is after hearing evidence that the Court can be satisfied that the submissions as to reparation are well founded in fact and law.

655. As regards the question of the Court's jurisdiction to entertain the claim for reparation, Judge de Castro did not see how it could be argued from the compromissory clause that the task entrusted to the Court included the question of reparation. The clause had been accepted unwillingly by Iceland and it would appear that there was nothing to justify its being interpreted extensively.

656. **Judge Sir Humphrey Waldeck** was in general agreement with the Judgment. However, he had one reservation and thought that certain aspects of the case should have been given more prominence.

657. The Judgment refers to the Exchange of Notes of 19 July 1961 and draws certain conclusions from it regarding Germany's recognition of Iceland's exceptional dependence on coastal fisheries and regarding Iceland's recognition of Germany's traditional fisheries in the waters around Iceland. The Judgment does not, however, give the 1961 Exchange of Notes the importance that, Judge Waldeck thought, the agreement necessarily had as a treaty establishing a particular legal regime governing the relations between the Parties with respect to fishing in the waters concerned.

658. In addition, Judge Waldeck recalled that Germany had made quite clear its understanding of the scope of the compromissory clause in the course of the proceedings on jurisdiction. In any event, the true legal issue appeared to him to be whether the extension of Iceland's fishery jurisdiction beyond the 12-mile limit agreed to in 1961 was opposable to a State that, like Germany, had not accepted or acquiesced in that extension, and not whether under general international law the extension was objectively invalid *erga omnes*.

659. As regards the compensation claim, Judge Waldeck agreed with the Court that the claim was within its competence. But as far as asking the Court for a final decision pronouncing upon Iceland's obligation to make reparation for particular specified acts of interference, Judge Waldeck agreed with the Court that it was not in a position to render such a decision since the evidence presented by Germany was insufficient. However, insofar as the submission could be understood as claiming a declaration of principle that Iceland was under an obligation to make reparation for any acts of interference established as unlawful in the Judgment, then, Judge Waldeck did not see any difficulty in the Court acceding to the claim. In fact, the Court held that Iceland's unilateral extension of her exclusive fishing rights to 50 miles was not opposable to Germany and that Iceland was not entitled unilaterally to exclude Germany's fishing vessels from the waters to seaward of the fishery limits agreed to in the 1961 Exchange of Notes. Consequently, it follows automatically that the acts enforcing that extension against German fishing vessels were unlawful and engaged Iceland's international responsibility to Germany with respect to such acts. It is a well-established principle of international law that every violation of an international obligation entails a duty to make reparation.

(Judge Sir Gerald Fitzmaurice also appended a separate opinion on jurisdiction.)

#### (d) Dissenting Opinions

660. **Judge Gros** was not in general agreement with the Judgment. As regards the extension by Iceland of its fishery jurisdiction, he indicated that the Court's reply should have been that such extension was not in accordance with existing international law. The Parties conceived the 1961 agreement as a guarantee against a further extension, which was already under contemplation by Iceland, of its fishery limits, which would consist in the matter being referred to the Court on the question whether the extension would be, at the relevant time, in accordance with international law.

661. With respect to the claim for reparation, he could not agree with the Court's decision that it was unable to accede to Germany's submission regarding reparation for the consequences of action taken against its fishing vessels exclusively on the grounds of the way in which the submission had been presented. He stated that the tenable reason for the Court's rejection of the claim should have been that the claim fell outside the subject-matter of the compromissory clause and therefore of the Court's jurisdiction and that it should have been rejected in the Judgment, rather than by means of an argument based on the way the submission had been presented.

662. Lastly, he observed that the way in which the Court had applied Article 53 of the Statute led him to note that the difficulties that were inherent in any investigation of the position taken up by a State which failed to appear, on the law and on the facts, had not been sufficiently overcome, and thus there remained a feeling that a State that had put itself in such a position could be subjected to sanctions. The interpretation of failure to appear had led to action *ultra vires*, as a result of an incorrect interpretation of the commitments entered into by the absent State, for lack of more thorough enquiry into what that State said and, in that context, into what it could have said, which is exactly what is required by article 53.

663. **Judge Petréen** voted against the Judgment as a whole. To him, the essential question before the Court was whether the extension by Iceland, as from 1 September 1972, of its zone of exclusive fisheries jurisdiction from the 12-mile to the 50-mile limit was well-founded in international law. He considered that, when Iceland extended its fishery zone, it did so contrary to the prevailing international law.

664. Moreover, Judge Petren observed that the Court, without the consent of Iceland, imposed upon the Parties the obligation to negotiate between themselves for the solution (which had to include a conservation regime) of their differences concerning their respective fishery rights beyond the 12-mile limit. He was of the opinion that the Court had exceeded its jurisdiction in hinging its Judgment on the establishment of a regime of preferential and historic rights and conservation measures, and the creation of a duty to negotiate for the establishment of such a regime, coupled with an obligation to succeed.

665. As regards the compensation claim, he noted that it had not been included in the German Application instituting proceedings and considered that the German compensation claim did not fall within the scope of the jurisdictional clause of the 1961 Exchange of Notes.

666. **Judge Onyeama** observed that there were at the time of the dispute between the Parties four treaties that contained positive rules of international law concerning the sea: the 1958 High Seas Convention, the Convention on the Territorial Sea and Contiguous Zone, the Convention on Fishing and Conservation of the Living Resources of the High Seas and the Convention on the Continental Shelf. The Convention on the High Seas, whose provisions are recognized as generally declaratory of established principles of international law, provides in its article 2 that the high seas are open to all nations, and no State may validly purport to subject any part thereof to its sovereignty.

667. He disagreed with the Court's statement that "the extension of that fishery zone up to the 12-mile limit from the baselines appears now to be generally accepted" since attempts by some States to extend their fishery limits beyond 12 miles from baselines did not appear to be generally accepted.

668. The Exchange of Notes of 1961 provided that, in the event of a dispute in relation to the extension by Iceland of its fishery jurisdiction beyond the limit then agreed, either Party could refer the dispute to the Court. By repudiating the agreement and refusing to recognize the Court's jurisdiction, Iceland was in breach of the agreement.

669. In his view, the Court was required to decide, as a basic question, whether the Regulations had any basis in international law and, if they did not, to say that they were, therefore, not opposable to Germany. The Court, however, while declaring that the Regulations were not opposable to Germany, and while, in its reasoning, indicating their conflict with the Convention on the High Seas, refrained from deciding the controlling question whether they had any basis in international law.

670. Judge Onyeama was of the opinion that the challenged Icelandic Regulations had no basis in international law since their provisions relating to the extension of Iceland's exclusive fishery jurisdiction were not authorized by any of the above-mentioned four treaties, particularly, the Convention on the High Seas, nor did they accord with the concept of the fishery zone generally accepted at the time.

671. Moreover, the Parties could not have intended the Court to settle questions of preferential and historic rights, conservation and catch-limitation, which are not susceptible of unilateral physical delimitation or extension, but only take effect in a special regime, and which, in Judge Onyeama's view, formed no part of the dispute and negotiations leading up to the 1961 Exchange of Notes between the Parties. Iceland did not ask the Court to adjudicate on conservation measures, and a request to the Court by one Party to a dispute that the Court settle a different dispute cannot take the place of the consent of all Parties, which is a prerequisite for the Court's jurisdiction. Therefore, the Court exceeded its jurisdiction in this matter. The Court should have confined itself to deciding the validity under international law of Iceland's extension of her zone of fishery jurisdiction beyond the 12-mile limit agreed between the Parties in the 1961 Exchange of Notes, which was the only dispute before the Court and over which it had jurisdiction.

672. As regards the compensation claim, he thought that the Court was competent to entertain the claim since the acts of interference complained of arose directly out of Iceland's attempt to enforce its extension of its fisheries jurisdiction before the validity of such extension had been decided by the Court, as agreed in the Exchange of Notes. Claims for compensation for acts done in breach of the agreement constituted by the Exchange of Notes should be deemed to be in the

contemplation of the Parties when they conferred jurisdiction on the Court, and the particular acts in the case appear to form part of what the Exchange of Notes referred to as “a dispute in relation to such extension”.

The decision that the Regulations on which Iceland sought to base its extension of its fisheries jurisdiction beyond the limit agreed in the Exchange of Notes was not opposable to Germany appears to carry the necessary implication that acts done in enforcement of the Regulations against German fishing vessels are contrary to law.

(Judge Padilla Nervo also appended a dissenting opinion on jurisdiction.)

### E. Southern Bluefin Tuna Cases

|                               |   |
|-------------------------------|---|
| <b>Parties:</b>               | Australia, New Zealand and Japan  |
| <b>Issues:</b>                | Fisheries conservation and management; provisional measures   |
| <b>Forum:</b>                 | International Tribunal for the Law of the Sea (ITLOS)   |
| <b>Date of Decision:</b>      | Order of 27 August 1999 (Provisional measures)  |
| <b>Published in:</b>          | <ul style="list-style-type: none"> <li>- 38 <u>International Legal Materials</u> (1999), pp. 1624-1655</li> <li>- 117 <u>International Law Reports</u>, p. 148</li> <li>- <u>ITLOS Reports of Judgments, Advisory Opinions and Orders</u> 1999, p. 280-336</li> </ul>   |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Baldock, J., "Determining the fate of Southern Bluefin Tuna International Tribunal for the Law of the Sea (1999) New Zealand v. Japan; Australia v. Japan, 17 <u>Environmental and Planning Law Journal</u> (2000), pp. 157-164</li> <li>- Churchill, R.R., "The Southern Bluefin Tuna cases (New Zealand v. Japan; Australia v. Japan): Order for Provisional Measures of 27 August 1999", 49 <u>International and Comparative Law Quarterly</u> (2000), pp. 979-990</li> <li>- Evans, M.D., "The Southern Bluefin Tuna dispute: provisional thinking on provisional measures?", 10 <u>Yearbook of International Environmental Law</u>, 1999 (2000), pp. 7-14</li> <li>- Hayashi, M., "The Southern Bluefin Tuna Cases: prescription of provisional measures by the International Tribunal for the Law of the Sea", 13 <u>Tulane Environmental Law Journal</u> (2000), pp. 361-385</li> <li>- Kwiatkowska, B., "Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Order on Provisional Measures (ITLOS Cases Nos. 3 and 4)", 94 <u>American Journal of International Law</u> (2000), pp. 150-155</li> <li>- Legget, K., "The Southern Bluefin Tuna Cases: ITLOS Order on Provisional Measures", 9 <u>Review of European Community and International Environmental Law</u> (2000), pp. 75-79</li> <li>- Schiffman, H.S., "The Southern Bluefin Tuna Case: ITLOS hears its first fishery dispute", 2 <u>Journal of International Wildlife Law and Policy</u> (1999), pp. 318-333</li> </ul> |

## 1. Facts

673. On 30 July 1999 and pending the constitution of an arbitral tribunal under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS), Australia and New Zealand filed separately with the Registrar of the International Tribunal for the Law of the Sea (the Tribunal) requests for the prescription of provisional measures in a case against Japan concerning the conservation of southern bluefin tuna in accordance with article 290, paragraph 5, of UNCLOS. The Applicants demanded that Japan cease immediately its unilateral experimental fishing programme for southern bluefin tuna, which had commenced at the beginning of June 1999.

674. In 1993 the Parties adopted the Convention for the Conservation of Southern Bluefin Tuna<sup>17</sup> (the 1993 Convention). This established a Commission, which, with the assistance of a Scientific Committee, could determine a total allowable catch (TAC) and national allocations (quotas) by a unanimous decision of the three Parties.

675. In 1989, the Parties agreed upon a TAC of 11,750 tonnes, which was maintained under the 1993 Convention until 1997, despite proposals from 1995 by Japan for an increase of 6,000 tonnes. In 1998 and 1999, the Commission was unable to agree on a TAC and Japan decided to commence an “experimental fishing programme” (EFP) of 3,000 tonnes.

676. In their pleadings Australia and New Zealand opposed the EFP, because they considered that the fishing was for commercial purposes, with minimal scientific benefit, and would endanger the continued viability of the stock, which was severely depleted and at its historically lowest levels.

677. By means of diplomatic notes delivered on 31 August 1998, Australia and New Zealand formally notified Japan of the existence of a dispute. The ensuing negotiations were unsuccessful. Japan proposed to settle the dispute by mediation, but insisted on continuing the EFP. Since the other Parties did not agree to mediation, Japan then proposed having the dispute resolved by arbitration under the 1993 Convention. As Japan refused to suspend the EFP pending arbitration, Australia and New Zealand commenced compulsory dispute proceedings under Section 2, Part XV, of UNCLOS.

678. Because the requests submitted by Australia and New Zealand stated that they appeared as Parties in the same interest, the Tribunal, by Order of 16 August 1999, joined the proceedings for provisional measures. Pursuant to article 17 of its Statute, the Tribunal accepted the nomination by Australia and New Zealand of Mr. Ivan Shearer as judge ad hoc.

## 2. Issues

### (a) Questions before the Tribunal

- (i) Whether provisional measures pursuant to Article 290, paragraph 5, of UNCLOS

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<sup>17</sup> Convention for the Conservation of Southern Bluefin Tuna (10 May 1993), 1819 United Nations Treaty Series 360 (entered into force 10 May 1994).

were appropriate;

- (ii) Whether an arbitral tribunal to be created under Annex VII to UNCLOS would have *prima facie* jurisdiction over the dispute; and
- (iii) Whether measures should be taken as a matter of urgency to preserve the rights of the Parties and to avert further deterioration of the southern bluefin tuna stock.

**(b) Arguments presented by the Parties**

- (i) In their final submissions **Australia and New Zealand** requested the following provisional measures:
  - That Japan immediately cease unilateral experimental fishing for southern bluefin tuna;
  - That Japan restrict its catch in any given fishing year to its national allocation, as last agreed in the Commission for the Conservation of Southern Bluefin Tuna, subject to the reduction of such catch by the amount of southern bluefin tuna taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999;
  - That the Parties act consistently with the precautionary principle in fishing for southern bluefin tuna pending a final settlement of the dispute;
  - That the Parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult to resolve the dispute submitted to the Annex VII Arbitral Tribunal; and
  - That the Parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render.
- (ii) **Japan's** final submissions were:
  - That the request of Australia and New Zealand for the prescription of provisional measures should be denied; and
  - That if despite the submissions made by Japan, ITLOS were to determine that the matter was properly before it, then an Annex VII arbitral tribunal would have *prima facie* jurisdiction and that if ITLOS were to determine that it could and should prescribe provisional measures, then, pursuant to article 89(5) of its Rules, ITLOS should grant provisional measures prescribing that Australia and New Zealand urgently and in good faith recommence negotiations with Japan for a period of six months to reach a consensus on the outstanding issues between them, including the conclusion of a protocol for a continued EFP, the determination of a TAC and national allocations for the year 2000. ITLOS should prescribe that any remaining disagreements would be, consistent with the Parties' December 1998 agreement and subsequent Terms of Reference to the EFP Working Group, referred to the panel of independent scientists for their resolution, should the Parties not reach consensus within six months following the resumption of such negotiations.

### 3. Reasoning of the Tribunal

#### (a) Jurisdiction

679. The Tribunal noted that, before prescribing provisional measures under article 290, paragraph 5, of UNCLOS, it had to satisfy itself that *prima facie* the arbitral tribunal to be established under Annex VII would have jurisdiction.

680. Australia and New Zealand alleged that Japan, by unilaterally designing and undertaking an EFP, had failed to comply with its obligations under articles 64 and 116 to 119 of UNCLOS, with provisions of the 1993 Convention and with the rules of customary international law. Furthermore, they invoked, as the basis for jurisdiction of the arbitral tribunal, article 288, paragraph 1, of UNCLOS, which reads as follows:

“A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.”

681. Japan, on the other hand, maintained that the dispute concerned the interpretation or implementation of the 1993 Convention and not the interpretation or application of UNCLOS. It further denied that it had failed to comply with any of the provisions of UNCLOS referred to by Australia and New Zealand.

682. The Tribunal noted that, under article 64, read together with articles 116 to 119, of UNCLOS, States Parties to UNCLOS have the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species such as the southern bluefin tuna.

683. The Tribunal further noted that the conduct of the Parties within the Commission for the Conservation of Southern Bluefin Tuna, established in accordance with the 1993 Convention, and in their relations with non-Parties to that Convention, was relevant to an evaluation of the extent to which the Parties were in compliance with their obligations under UNCLOS; and that the fact that the 1993 Convention applied between the Parties did not exclude their right to invoke the provisions of UNCLOS in regard to the conservation and management of southern bluefin tuna. Hence, in the view of the Tribunal, the provisions of UNCLOS invoked by the Applicants appeared to afford a basis upon which to found the jurisdiction of the arbitral tribunal.

684. As for the contention by Japan that recourse to the arbitral tribunal was excluded because the 1993 Convention provided for a dispute settlement procedure, the Tribunal held that the fact that the 1993 Convention applied between the Parties did not preclude recourse to the procedures in Part XV, section 2, of UNCLOS.

#### (b) Conditions for the prescription of provisional measures under UNCLOS article 290

685. With respect to the respondent’s argument that Australia and New Zealand had not exhausted the procedures for amicable dispute settlement under Part XV, section 1, of UNCLOS, in particular article 281, through negotiations or other agreed peaceful means, before submitting the disputes to a procedure under Part XV, section 2, of UNCLOS, the Tribunal considered that a State Party was not obliged to pursue procedures under Part XV, section 1, when it concluded

that the possibilities of settlement had been exhausted. Consequently, the Tribunal held that the requirements for invoking the procedures under Part XV, Section 2, of UNCLOS had been fulfilled.

686. As for the urgency involved in the situation the Tribunal recalled that under article 290 of UNCLOS, it could prescribe provisional measures to preserve the respective rights of the Parties to the dispute or to prevent serious harm to the marine environment. The Tribunal took note of the Applicants' contention that Japan had violated their rights under articles 64 and 116 to 119 of UNCLOS by unilaterally implementing an EFP and that further catches of southern bluefin tuna, pending the hearing of the matter by an arbitral tribunal, would cause immediate harm to their rights. It also took note of Japan's submission that there was no urgency for the prescription of provisional measures under the circumstances of the case.

687. However, the Tribunal understood "that there is no disagreement between the Parties that the stock of southern bluefin tuna is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern"; and that therefore the Parties should "act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna".

688. Consequently, the Tribunal found that measures should be taken as a matter of urgency to preserve the rights of the Parties and to avert further deterioration of the southern bluefin tuna stock. For those reasons, the Tribunal concluded that provisional measures were appropriate.

#### **(c) Prescription of provisional measures different from those requested**

689. The Tribunal noted that, in accordance with article 89(5) of its Rules of Procedure, it could prescribe measures different than those requested by the Parties to the dispute.

#### **(d) Reports**

690. The Tribunal ordered both Parties to submit reports to the Tribunal on their compliance with the provisional measures prescribed.

### **4. Decision**

691. On 27 August 1999, the Tribunal issued its Order. It prescribed, pending a decision of the arbitral tribunal, the following measures:

**(a) By 20 votes to 2:**

- Australia, Japan and New Zealand shall each ensure that no action is taken which might aggravate or extend the disputes submitted to the arbitral tribunal; and
- Australia, Japan and New Zealand shall each ensure that no action is taken which might prejudice the carrying out of any decision on the merits which the arbitral tribunal may render.

**(b) By 18 votes to 4:**

- Australia, Japan and New Zealand shall ensure, unless they agreed otherwise, that their annual catches do not exceed the annual national allocations at the levels last agreed by the Parties of 5,265 tonnes, 6,065 tonnes and 420 tonnes, respectively;

in calculating the annual catches for 1999 and 2000, and without prejudice to any decision of the arbitral tribunal, account shall be taken of the catch during 1999 as part of an experimental fishing programme.

- (c) By 20 votes to 2:
  - Australia, Japan and New Zealand shall each refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna, except with the agreement of the other Parties or unless the experimental catch is counted against its annual national allocation as prescribed in subparagraph (c).
- (d) By 21 votes to 1:
  - Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna.
- (e) By 20 votes to 2:
  - Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock.
- (f) By 21 votes to 1:
  - The Tribunal decided that each party shall submit the initial report referred to in article 95, paragraph 1, of its Rules not later than 6 October 1999, and authorized the President of the Tribunal to request such further reports and information as he may consider appropriate after that date; and
  - The Tribunal decided, in accordance with article 290, paragraph 4, of UNCLOS and article 94 of the Rules, that the provisional measures prescribed are to be notified by the Registrar through appropriate means to all States Parties to UNCLOS participating in the fishery for southern bluefin tuna.

## 5. Declarations, Separate Opinions, Dissenting Opinions

### (a) Declarations

692. Joint Declaration of **Vice-President Wolfrum and Judges Caminos, Marotta Rangel, Yankov, Anderson and Eiriksson** underlined that, given the poor state of the stock of southern bluefin tuna, a reduction in the catches of all those concerned in the fishery in the immediate short term would assist the stock to recover over the medium to long term. Moreover, they reiterated the finding in the Order that there was a duty to cooperate to that end pursuant to article 64 of UNCLOS.

693. **Judge Warioba** voted against paragraphs 1(c) and (f) of the Tribunal's Order, not because he disagreed with the substance, but because he believed that those issues belonged to the merits of the case.

694. Regarding paragraph 1(c), Judge Warioba noted that the Parties' positions on the TAC were based on their appreciation of scientific evidence. Since the Tribunal admitted that it could not assess the scientific evidence presented by the Parties, it had no basis for prescribing an order that set a TAC. As to paragraph 1(f), Judge Warioba believed that the Tribunal should have confined itself to issues that were the subject matter of the dispute placed before it. According to Judge Warioba, the relationship of the Parties to this dispute did not include non-Parties to the 1993 Convention. Judge Warioba further disagreed with references to the protection of the marine environment in the Order. It was not necessary for the Tribunal to include considerations of the marine environment in every case. The Tribunal can do so only when a party or Parties have requested it or when it considers it absolutely necessary and urgent. In Judge Warioba's opinion, it was not so in the instant case.

### (b) Separate Opinions

695. **Judges Yamamoto and Park** were concerned about the regulatory measures taken by Australia against Japanese fishing vessels in response to Japan's unilaterally-launched experimental fishing programme.

696. They noted that if, in compliance with paragraph 1(d) of the Judgment, "the experimental fishing by any of the Parties, Japan in the instant case, is to be suspended pending a decision by an arbitral tribunal to be constituted, it may be pointed out, in fairness, that the retaliatory measures taken by Australia against Japanese fishing vessels could have been dealt with likewise in the above paragraph of the judgment at least for the period pending the decision of the arbitral tribunal, because, in the absence of the cause that gave rise to the need for the measures, the measures themselves would have no *raison d'être*."

697. In his separate opinion, **Judge Laing** attempted to elucidate his views on the institution of provisional measures and on certain aspects of international environmental law.

698. Judge Laing noted that the Tribunal had not chosen to base its decision on the criterion of "irreparability" applied by other fora because that was not the sole required criterion for the prescription of provisional measures. Instead, the key to UNCLOS provisional measures was "the discretionary element of appropriateness", which was exercised in the light of the purpose of provisional measures: the preservation of the *status quo pendente lite* and the maintenance of peace and good order.

699. Judge Laing then proceeded to explain the concept of urgency in connection with provisional measures. In respect of "procedural urgency", he observed that in its Order the Tribunal had prescribed provisional measures pending a decision of the arbitral tribunal. In his view, this meant that the measures were valid up to the moment prior to the relevant decision of the arbitral tribunal. He agreed with the counsel of Australia that the urgency was a consequence of the activity causing the harm and not necessarily of the harm itself. In his view, there was no formal criterion of substantive urgency. Instead, urgency was a factor that the Tribunal would consider in weighing the question of appropriateness.

700. Regarding the rights of the Parties, Judge Laing believed that they did not need to be of a "particular hierarchical order or restricted class". Although some specific rights might have been cited, he was convinced that the Order also covered additional rights.

701. A factor generally understood to militate against the prescription of provisional measures is the convenience of all the Parties. Thus, in the instant case, the Tribunal did not order the

premature termination of the Respondent's EFP. On the other hand, the Tribunal did not decline to order provisional measures because of the possibly negative impact on the stock from increased fishing by non-Parties to the 1993 Convention. Nevertheless, the Order did take into account the problem of increased fishing by non-Parties, prescribing that the Parties "should" make further efforts to reach agreement with non-Parties. According to Judge Laing it was unclear what benefit would accrue from prescribing such dialogue, especially where the obligation was not couched in patently mandatory terms. Possibly the motivation and justification were based on policies which transcended provisional measures *per se*.

702. Finally, Judge Laing commended the fact that the Tribunal's Order did not refer to the "precautionary principle" but to a "precautionary approach". Among other reasons, he believed that it was not possible, on the basis of the materials available and arguments presented in the request for provisional measures, to determine whether customary international law recognized a precautionary principle. Conversely, it could not be denied that UNCLOS adopted a precautionary approach.

703. In Judge Laing's opinion, adopting an approach rather than a principle appropriately imports a certain degree of flexibility and tends to underscore a reticence to make premature pronouncements about desirable normative structures.

704. **Judge Treves** had some observations on the requirement of urgency for provisional measures. He explained that this requirement was part of the very nature of provisional measures and that it was set out explicitly in Article 290, paragraph 5, of UNCLOS.

705. As to the temporal dimension of the requirement of urgency, Judge Treves believed that such a requirement was stricter when provisional measures were requested under paragraph 5 than when they were requested under paragraph 1. In his view, there was no "urgency" under paragraph 5 if the measures requested could be granted by the arbitral tribunal once established without prejudice to the rights to be protected. In this sense, the only urgency that was relevant was that of paragraph 1 of article 290.

706. Judge Treves continued by elaborating on the qualitative dimension of the requirement of urgency. The fact that in article 290, paragraph 1, of UNCLOS provisional measures may be prescribed "to prevent serious harm to the marine environment" and not only to preserve the rights of the Parties was relevant for establishing the criterion for determining whether there was urgency in the qualitative sense whenever the measures, even though requested for the preservation of the rights of a party, concerned rights whose preservation was necessary to prevent serious damage to the environment.

707. To summarize, Judge Treves stated that it was reasonable to hold that the prevention of serious harm to the southern bluefin tuna stock was the appropriate standard for prescribing measures in this case. This standard could apply to measures for the preservation of the rights of the Parties because these rights concerned the conservation of that very stock.

708. On the facts of this particular case, the urgency concerned the stopping of a trend towards the collapse of the stock. Where there was scientific uncertainty as to the situation of the stock, the need for urgency had to be assessed in the light of prudence and caution.

709. Judge Treves believed that the precautionary approach should be applied in the assessment by the Tribunal of the urgency of the measures it might take and that the requirement of urgency was satisfied only in the light of the precautionary approach.

710. He understood the reluctance of the Tribunal to take a position as to whether the precautionary approach was a binding principle of customary international law. This would not be necessary if one considered that a precautionary approach seemed inherent in the very notion of provisional measures. Finally, the provisions of the UN Fish Stocks Agreement supported the application of the precautionary approach.

711. **Judge ad hoc Shearer** wished to make additional remarks about certain topics discussed in the Order of the Tribunal. As for the issue of jurisdiction, he recalled that it was necessary for the Tribunal to find only that the Annex VII arbitral tribunal would have jurisdiction *prima facie*. However, in his view, the jurisdiction of the arbitral tribunal in the present case went beyond the level of being merely *prima facie* and was to be regarded as being clearly established.

712. Regarding the argument by Japan that the dispute did not relate to the interpretation or application of UNCLOS but rather to the 1993 Convention, Judge ad hoc Shearer considered it highly artificial and without substance. In his opinion, it was clear that the intention of the 1993 Convention was to give effect to the prospective obligations of the Parties under UNCLOS. In fact, a dispute between the Parties regarding their duty to cooperate is a dispute arising under UNCLOS.

713. With respect to provisional measures, Judge ad hoc Shearer expressed the view that he would have supported the prescription of stronger provisional measures than those adopted (e.g., an order finding that Japan was *prima facie* in breach of its international obligations).

714. He went on to discuss whether the precautionary principle could constitute a mandate for action or provide definitive answers to all questions of environmental policy and he concluded that it was doubtful. In any case, the Tribunal had not deemed it necessary to enter into a discussion of the precautionary principle/approach. Nevertheless, he believed that the measures ordered by the Tribunal were tightly based upon considerations deriving from a precautionary approach.

715. Lastly, Judge ad hoc Shearer commented on the power of the Tribunal to prescribe provisional measures not requested by the Parties. He concluded that the Tribunal had no power to order provisional measures without a party's request and without giving the Parties an opportunity to be heard on the proposed measures. In the instant case, however, he found that the Tribunal had not exceeded the powers given to it under article 290 of UNCLOS.

### (c) Dissenting Opinions

716. **Judge Vukas** was not convinced that the requirement of urgency for the prescription of provisional measures was satisfied in the present case. For the reasons stated below, he concluded that no "urgency of the situation" in respect of the southern bluefin tuna stock had been confirmed and that, consequently, there were no "rights of the Parties to the dispute" (article 290, paragraph 1, of UNCLOS) that should be preserved by provisional measures.

717. First, Judge Vukas believed that there was no procedural urgency, as the Tribunal would be constituted within a few months. Second, with or without a measure prescribed by the Tribunal, the experimental fishing programme of Japan in 1999 would end a few days after the decision was rendered. Third, the evidence submitted by the Applicants had failed to convince Judge Vukas that the forthcoming months were decisive for the survival of the southern bluefin tuna. However, it was not only the evidence submitted by the Parties that brought him to that

conclusion. Even more convincing was the attitude of all those who fish for southern bluefin tuna. They did not convince him that they were concerned about the future of the stock, since none of them intended to reduce the pace of its regular catch. Finally, Japan's request for the prescription of two provisional measures was only a counter-request in case *prima facie* jurisdiction was found to exist. Japan denied the existence of the Tribunal's jurisdiction, and it did not claim that the measures it proposed were urgent.

718. **Judge Eiriksson** dissented with respect to paragraphs 1(a) and (b) of the Tribunal's Order because, in his opinion, they were worded too broadly. He opposed laying down a measure, binding in international law, of so general a nature that a party could not be entirely clear when contemplating any given action whether or not it would fall within its scope. Judge Eiriksson would have preferred that the Tribunal confine itself to prescribing measures having clear and specific objectives.

## F. Southern Bluefin Tuna Arbitration

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| <b>Parties:</b>               | Australia, New Zealand and Japan   |
| <b>Issues:</b>                | Fisheries conservation and management; jurisdiction and admissibility  |
| <b>Forum:</b>                 | Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (arbitration administered by the World Bank's International Centre for Settlement of Investment Disputes)   |
| <b>Date of Decision:</b>      | 4 August 2000  |
| <b>Published in:</b>          | <ul style="list-style-type: none"> <li>- 39 <u>International Legal Materials</u> (2000), p. 1359-1401.</li> <li>- 119 <u>International Law Reports</u>, p. 508</li> </ul>  |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Foster, C.E., "The 'Real Dispute' in the Southern Bluefin Tuna case: A Scientific Dispute?" 16 <u>International Journal of Marine and Coastal Law</u> (2001), pp. 571-601</li> <li>- Kwiatkowska, B., "The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award", of the first Law of the Sea Convention, Annex VII Arbitral Tribunal, 16 <u>International Journal of Marine and Coastal Law</u> (2001), pp. 239-294</li> <li>- Kwiatkowska, B., Southern Bluefin Tuna (Australia and New Zealand v. Japan), Jurisdiction and Admissibility, 95 <u>American Journal of International Law</u> (2001), pp. 162-171</li> <li>- Boyle, A.E., "The Southern Bluefin Tuna Arbitration," (2001) 50 <u>International and Comparative Law Quarterly</u>, pp. 447-452</li> <li>- Horowitz, D., Southern Bluefin Tuna Case (Australia and New Zealand v. Japan) (Jurisdiction and Admissibility): The Catch of Poseidon's Trident: The Fate of High Seas Fisheries in the Southern Bluefin Tuna Case, 25 <u>Melbourne University Law Review</u> (2001), pp. 810-830</li> <li>- Morgan, D.L., Implications of the Proliferation of International Legal Fora: The Example of the Southern Bluefin Tuna Cases, 43 <u>Harvard International Law Journal</u> (2002), p. 541-550</li> <li>- Oxman, B.H., Complementary Agreements and Compulsory Jurisdiction, 95 <u>American Journal of International Law</u> (2001), pp. 277-312</li> <li>- Marr, S., "The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources", 11 <u>European Journal of International Law</u> (2000), pp. 815-831</li> </ul> |

## 1. Facts

719. This case was the second stage of the proceedings brought by Australia and New Zealand against Japan, which began with a request for provisional measures heard in August 1999 by the International Tribunal for the Law of the Sea (see preceding case summary in this publication). The first stage concluded with an Order finding that, *prima facie*, an arbitral tribunal to be formed under Annex VII to UNCLOS would have jurisdiction and prescribing certain provisional measures in the light of an urgent need to prevent further deterioration of the stock of southern bluefin tuna.

720. An Arbitral Tribunal under Annex VII to UNCLOS (the Arbitral Tribunal) was constituted in order to consider the merits of the case. However, it first had to decide whether it had jurisdiction over the merits of the dispute. This was the first arbitral tribunal to be constituted under Part XV (“Settlement of Disputes”), Annex VII (“Arbitration”) of UNCLOS.

721. At the request of the Parties, the proceedings before the Arbitral Tribunal were administered by the World Bank’s International Centre for Settlement of Investment Disputes (ICSID). The President of the five-member Arbitral Tribunal was Judge Stephen M. Schwebel, a former President of the International Court of Justice; its other members were Judge Florentino Feliciano, Justice Sir Kenneth Keith, Judge Per Tresselt and Professor Chusei Yamada.

## 2. Issues

### (a) Questions before the Tribunal

The Arbitral Tribunal considered:

- (i) Whether it had jurisdiction to rule on the merits of the dispute; and
- (ii) Whether, in accordance with article 290(5) of UNCLOS, the provisional measures prescribed by the International Tribunal of the Law of the Sea on 27 August 1999 should be revoked.

### (b) Arguments presented by the Parties

- (i) **Australia and New Zealand**, as Applicants, rejected the Respondent’s preliminary objections and made the following final submissions:
  - That the Parties differ on the question whether Japan’s EFP and associated conduct was governed by UNCLOS;
  - That a dispute thus existed on the interpretation and application of UNCLOS within the meaning of Part XV;
  - That all the jurisdictional requirements of that Part had been satisfied; and
  - That Japan’s objections to the admissibility of the dispute were unfounded.
- (ii) **Japan**, as Respondent, maintained its preliminary objections on jurisdiction and admissibility and requested the Arbitral Tribunal to adjudge and declare that:
  - The case had become moot and should be discontinued; alternatively,

- The Arbitral Tribunal did not have jurisdiction over the claims made by the Applicants; alternatively,
- The claims were not admissible.

### **3. Reasoning of the Arbitral Tribunal**

722. The Arbitral Tribunal initially addressed the contention made by Japan that the case had become moot and should be discontinued.

723. Japan maintained that the essence of the dispute turned on its pursuance of an EFP. Since Japan was prepared to limit its EFP catch to 1500 tonnes, an amount proposed by Australia in 1999, the dispute was rendered moot. Australia and New Zealand, on the other hand, replied that the proposed catch limit was an offer that was no longer on the table and that, in any event, their dispute with Japan over a unilateral EFP was not limited to the quantity to be fished but to the quality of the EFP, i.e., the design and execution, which they believed to be flawed. Accepting the arguments of the Applicants and noting that Japan had not agreed to restrict its commercial fishing, the Arbitral Tribunal concluded that the case was not moot.

724. The Arbitral Tribunal then turned to the issue of jurisdiction, specifically, whether the dispute arose only under the 1993 Convention or whether it also arose under UNCLOS. The Arbitral Tribunal found that the dispute arose under both the 1993 Convention and UNCLOS, noting that it was not unusual in international law and State practice for more than one treaty to bear upon a particular dispute.

725. The Arbitral Tribunal noted that “[t]here is frequently a parallelism of treaties, both in their substantive context and in their provisions for the settlement of disputes thereunder. The current range of international legal obligations benefits from a process of accretion and accumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the Parties to the implementing convention.” Furthermore, the provisions of the 1993 Convention did not exhaust the extent of the relevant provisions of UNCLOS. However, the Arbitral Tribunal went on to say that, “to find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT [*the 1993 Convention*] would be artificial.”

726. Nevertheless, the Arbitral Tribunal decided that the holding was not dispositive of the case since it was also necessary to examine a number of articles of Part XV of UNCLOS inasmuch as article 286 provided that there was recourse to compulsory dispute settlement where no settlement had been reached under Section 1.

727. The Arbitral Tribunal noted that article 16 of the 1993 Convention was modelled on article XI of the 1959 Antarctic Treaty.<sup>18</sup> The latter obviously meant to exclude compulsory jurisdiction and other post-UNCLOS treaties also made no provision for compulsory dispute settlement. The Arbitral Tribunal concluded that article 16 intended to exclude compulsory dispute settlement under UNCLOS. It held that this was permitted under article 281 of UNCLOS, which states that where the Parties to a dispute have agreed to seek the settlement of a dispute by a peaceful means of their own choice, the procedures in Part XV only apply where no settlement has been reached by recourse to such means and the agreement between the Parties does not exclude any further procedure.

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<sup>18</sup> The Antarctic Treaty (1 December 1959), 402 United Nations Treaty Series 71 (entered into force 23 June 1961).

728. Having concluded that it lacked jurisdiction to entertain the merits of the dispute, the Arbitral Tribunal did not find it necessary to pass upon questions of admissibility. However, it observed that its analysis of the provisions of UNCLOS suggested that the dispute was not confined to matters of scientific judgment alone.

729. Furthermore, it did not find that the proceedings before ITLOS and before the Arbitral Tribunal were an abuse of process. On the contrary, the Arbitral Tribunal believed them to be constructive as they had led to negotiations for a settlement.

730. Since the Arbitral Tribunal had decided that it lacked jurisdiction, it unanimously revoked the provisional measures issued by the International Tribunal for the Law of the Sea. Nevertheless, the Tribunal stated that the revocation did not mean that the Parties could disregard the effects of those measures. On the contrary, the Arbitral Tribunal emphasized that the prospects for any settlement of the dispute would be promoted by the Parties' abstaining from any unilateral act that might aggravate it.

#### **4. Award**

731. On 4 August 2000, the Arbitral Tribunal rendered the following Award:

(a) By a vote of 4 to 1, the Arbitral Tribunal decided that it was without jurisdiction to rule on the merits of the dispute; and

(b) Unanimously, in accordance with article 290(5) of UNCLOS, the Arbitral Tribunal decided that provisional measures in force by Order of the International Tribunal for the Law of the Sea prescribed on 27 August 1999 were revoked from the day of the signature of the Arbitral Tribunal's Award.

#### **5. Separate Opinion by Justice Sir Kenneth Keith**

732. Justice Sir Kenneth Keith disagreed with the other members of the arbitral tribunal and maintained that the 1993 Convention did not exclude compulsory arbitration under UNCLOS. This conclusion was based upon an interpretation of the ordinary meaning of the two treaties read in their context and in the light of their objects and purposes.

733. Sir Kenneth believed that each of the treaties in issue in the case established substantive obligations as well as obligations relating to dispute settlement and that the one had not excluded or in any relevant way prejudiced the other.

734. Sir Kenneth began an examination of Section 1, Part XV, of UNCLOS by noting that articles 279 and 280 provide that Parties shall settle disputes concerning the interpretation or application of the Convention by any peaceful means of their own choice. If the agreed procedure failed then article 281 provides that the procedures in Part XV apply, except where the agreement between the Parties excludes any further procedure.

735. In the view of Sir Kenneth the two main issues raised by article 281 were:

(a) Have the Parties "agreed to seek settlement of the dispute by a peaceful means of their own choice"; and

(b) Does article 16 "exclude any further procedure"?

736. Although Sir Kenneth admitted that one could argue that the Parties had attempted to settle their dispute by negotiation, he held that the answer to question (a) was "no" in so far as article 16 was concerned.

737. However, Sir Kenneth decided to focus his attention on question (b). On the assumption that article 16 could be considered to be an agreement, Sir Kenneth considered that the answer to question (b) was “no”, and that a bar to the jurisdiction of the Arbitral Tribunal was not established.

738. Returning briefly to question (a) Sir Kenneth pointed out that article 16 of the 1993 Convention did not constitute an agreement on a method; it was merely a list of possibilities from which the Parties could choose a method. Further, as discussed below, article 16 applied only to disputes concerning the 1993 Convention, and did not necessarily extend to disputes concerning UNCLOS. He pointed out that the parallelism and lack of full coincidence of the substantive provisions of the two Conventions also existed for the two sets of procedures for the settlement of disputes in each treaty and concerning each treaty. In his view, the relevant categories of substantive obligations could usefully be distinguished:

- (a) Those that exist under both treaties;
- (b) Those that exist only under the 1993 Convention; and
- (c) Those that do or may exist only under UNCLOS.

739. Australia and New Zealand invoked dispute settlement procedures in respect of the interpretation and application of obligations that existed under (a) and (c); that is, both treaties or only under UNCLOS. That a dispute may concern the interpretation or implementation of the 1993 Convention is relevant to jurisdiction under the separate set of dispute settlement provisions in UNCLOS.

740. For Sir Kenneth, the critical question was whether article 16 excluded dispute settlement under UNCLOS. It obviously does not do so explicitly. But could it do so implicitly? In the words of Sir Kenneth,

“To do that, article 16 would have to be capable of dealing with *all* the disputes relating to Southern Bluefin tuna arising between the CCSBT [the 1993 Convention] Parties and concerning the interpretation and application of the relevant provisions of UNCLOS. And, as well, it would have to *exclude* (impliedly) the UNCLOS procedures.”

741. Sir Kenneth dealt with those two points in turn. First, assuming that Applicants had appropriately invoked obligations not covered by the 1993 Convention, he considered it surprising that procedures for settlement of disputes concerning the 1993 Convention could be applied to disputes arising beyond that Convention. Recalling the provisions of article 16, Sir Kenneth reiterated that they did not amount to an agreed choice of one or more peaceful means of settlement and emphasized that those provisions “do not exclude means to which the Parties have separately agreed in respect of disputes concerning the interpretation or application of other treaties. What they do say is that the binding or indeed any non-binding procedures listed apply only if the Parties agree. If any procedure is agreed to, that procedure applies to disputes concerning the interpretation or implementation . . . of the CCSBT.”

742. Furthermore, Sir Kenneth explained that the fact that the Parties had retained the freedom to exclude compulsory dispute settlement regarding matters such as fixing the TAC under the 1993 Convention should not be interpreted as an expression of purpose by the Parties in relation to their quite distinct obligations under UNCLOS. The same point could probably be made about many, if not all, of the many dispute settlement provisions of maritime treaties to which the Arbitral Tribunal was referred.

743. Moreover, those provisions did not appear to Sir Kenneth to help in the interpretation of article 281(1) of UNCLOS. On the one hand, those provisions contained in instruments adopted since 1982 could not be used as “subsequent practice in the application of the treaty” within the meaning of article 31(3) (b) of the Vienna Convention on the Law of the Treaties.<sup>19</sup> On the other hand, the UNCLOS provisions, including those relating to dispute settlement, are not to be read into the other treaty system – unless of course the Parties through the other treaty have so agreed in accordance with article 288(2). The essential point was that the two treaty regimes (including their dispute settlement procedures) remained distinct.

744. As to the wording of article 281(1) of UNCLOS, Sir Kenneth pointed out that the requirement is that the Parties had agreed to exclude any further procedure for the settlement of the dispute concerning UNCLOS; in other words, article 281(1) required opting-out. In contrast, article 282 required opting-in. Sir Kenneth considered that the word “any” in the final phrase was also significant since it required “the exclusion to be of any other procedure available between the Parties...”.

745. According to Sir Kenneth a strong and particular wording appeared to be required to exclude the obligations to submit a dispute to the UNCLOS binding procedure. Such a need for clear wording, beyond the wording of article 16 of the 1993 Convention, was also supported by other provisions of Part XV of UNCLOS and by the pivotal role compulsory and binding peaceful settlement procedures played in UNCLOS. Additionally, the structure of Part XV of UNCLOS and the details of its Section 3 (“Limitations and Exceptions to Applicability of Section 2”) supported the need for States to include clear wording in their agreements if they wanted to remove themselves from their otherwise compulsory obligations arising under Section 2.

746. Finally, in relation to the object and purpose of UNCLOS as a whole, Sir Kenneth relied on the widely stated and shared understanding in the Conference which prepared UNCLOS, concerning the critical role of the provisions for the peaceful settlement of disputes. He referred specifically not only to speeches made by the President of the Conference, but also to Statements by the Japanese delegation.

747. The objects and purposes of UNCLOS in general and the importance of its comprehensive, compulsory and where necessary, binding dispute settlement provisions in particular, together with the plain wording of article 281(1) of UNCLOS and of article 16 of the 1993 Convention led Sir Kenneth to the conclusion that the latter did not exclude the jurisdiction of the Arbitral Tribunal in respect of disputes arising under UNCLOS.

748. Furthermore, in the view of Sir Kenneth the possibly quite different subject matter of an arbitration under article 16 of the 1993 Convention relating to its “implementation” both supported that conclusion and suggested the possible limits on an assessment by a tribunal of a State’s action by reference to its obligations under articles 64 and 117-119 of UNCLOS and on any relief that might be available were a breach to be established. However, Sir Kenneth believed that at the present stage of the case such limits did not affect the jurisdiction of the Arbitral Tribunal.

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<sup>19</sup> Vienna Convention on the Law of Treaties (23 May 1969), 1155 United Nations Treaty Series 331 (entered into force 27 January 1980).

## G. The *Camouco* Case

|                               |   |
|-------------------------------|---|
| <b>Parties:</b>               | France and Panama   |
| <b>Issues:</b>                | Prompt release; reasonableness of and criteria for a bond; form of bond.  |
| <b>Forum:</b>                 | International Tribunal for the Law of the Sea (ITLOS)   |
| <b>Date of Decision:</b>      | 7 February 2000   |
| <b>Published in:</b>          | <ul style="list-style-type: none"> <li>- 39 <u>International Legal Materials</u> (2000), pp. 666-703</li> <li>- <u>ITLOS Reports of Judgments, Advisory Opinions and Orders</u> 2000, pp. 10-76</li> </ul>  |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Lux, J., Carney, P., "The Camouco Case: Panama v. France (seizure of ship for unlawful fishing)", in 28 <u>International Business Lawyer</u> (2000), p. 461</li> <li>- Evans, M.D., "Bonded Reason", <u>Lloyds Maritime and Commercial Law Quarterly</u>, (2000), p. 315</li> <li>- Fondimare, A., "Affaire du Camouco (Panama c. France), arrêt du 7 février 2000", section Jurisprudence Internationale, <u>Actualité et Droit International</u> (2001)</li> <li>- Oxman B.H., Bantz, V.P., "The Camouco (Panama c. France)", 94 <u>American Journal of International Law</u> (2000), pp. 713-721</li> </ul> |

### 1. Facts

749. On 17 January 2000, the Tribunal received an Application on behalf of Panama against the Government of France for the prompt release of the fishing vessel *Camouco* and its master in accordance with article 292 of the United Nations Convention on the Law of the Sea.

750. The *Camouco* was arrested on 28 September 1999, allegedly for unlawful fishing of Patagonian toothfish and failure to notify its presence in the exclusive economic zone (EEZ) of the Crozet Islands (French Southern and Antarctic Territories) and thus endangering the renewal of the stock. The *Camouco* was flying the Panamanian flag and had been detained, together with its master, by French authorities and escorted to the island of Réunion (Indian Ocean). French authorities seized the vessel, fish catch, navigation and communication equipment and documents of the vessel and crew.

751. On 7 October 1999, the master of the *Camouco* was charged and placed under judicial supervision. He was accused of unlawful fishing in the EEZ of Crozet, failure to declare entry into the EEZ while carrying frozen toothfish on board (French law requires notice by fishing vessels carrying fish on board before entering the EEZ), concealment of the vessel's markings while flying a foreign flag and attempted flight. On 22 October, the owner ("Merce-Pesca, S.A.") and master of the vessel commenced urgent proceedings in a municipal trial court of the Réunion. They alleged that France had violated Article 73(4) of UNCLOS by failing to notify the flag State promptly of the arrest. They asserted that the bond required for the release of the vessel was outrageous in view of its cost and asked for a reduction, failing which they would resort to the Tribunal under article 292 of UNCLOS.

752. On 14 December 1999, the French municipal trial court concerned rejected the request of the master and owner of the *Camouco*, who thereupon lodged an appeal before a municipal appellate court. Pending a decision on the appeal, Panama filed an Application for the prompt release of the vessel and its master with the Tribunal.

## 2. Issues

### (a) Questions before the Tribunal

- (i) Jurisdiction and admissibility;
- (ii) Whether the *Camouco* should be released;
- (iii) The amount of the bond or guarantee.

### (b) Arguments presented by the Parties

- (i) **Panama** claimed that the *Camouco* had been fishing in the Southern seas outside the EEZ of the Crozet Islands. The vessel had changed course to traverse the EEZ owing to bad weather and continued fishing only after it had left the EEZ. Panama requested the Tribunal to:
  - Declare that it had jurisdiction to adjudicate under article 292 of UNCLOS;
  - Declare that Panama's application for prompt release was admissible;
  - Declare that France had violated article 73(4) of UNCLOS by its delay in notifying the Panamanian authorities of the arrest and seizure of the *Camouco* and of the attendant measures taken by the French authorities;
  - Find that France failed to observe the provisions of UNCLOS concerning the prompt release of the master of the *Camouco*;
  - Find that France had failed to observe the provisions of UNCLOS concerning the prompt release of the *Camouco*;
  - Find that the non-observance by France of the provisions of article 73 (3) of UNCLOS constituted unlawful detention since it applied to the master of the *Camouco* measures of a penal character;
  - Demand that France promptly release the *Camouco* and its master against the payment of a guarantee of 950,000 French francs, i.e., 1,300,000 French francs (reasonable bond) minus 350,000 French francs (the price of the seized cargo);

- Order that such guarantee be paid by means of a bank guarantee from a major European bank and entrusted to the care of the International Tribunal for the Law of the Sea for delivery to the French authorities in exchange for the release of the vessel and its master; and
  - Prepare a Spanish translation of the Judgment pursuant to article 64(4) of the rules of procedure of the Tribunal.
- (ii) France alleged that the *Camouco* was engaged in illegal, unregulated and unreported (IUU) fishing, which endangered the renewal of the stock. France requested the Tribunal to reject the submissions made by Panama and to declare and adjudge that:
- The Application by Panama requesting the Tribunal to order the prompt release of the *Camouco* and of its master was not admissible; and
  - As a subsidiary submission, if the Tribunal decides that the *Camouco* is to be released upon the deposit of a bond, that the bond is to be at least 20,000,000 French francs in the form of a certified cheque or bank draft.

### **3. Reasoning of the Tribunal**

#### **(a) Jurisdiction**

753. The Tribunal found that it had jurisdiction to entertain Panama's Application for the prompt release of the *Camouco* and its master after examining the Tribunal's requirements for jurisdiction and inasmuch as France had not contested the Tribunal's jurisdiction in its submission. Accordingly, the Tribunal had jurisdiction to deal only with the question of release under article 292(3) of UNCLOS.

#### **(b) Admissibility**

##### Time-limit for making an application

754. As for the admissibility of the dispute to the Tribunal, the Tribunal found no merit in France's argument that by failing to act promptly, Panama had forfeited its right under article 292 of UNCLOS to request the prompt release of the *Camouco* and its master. In this connection, the Tribunal noted that UNCLOS does not require a flag State to file an application at any particular time after the detention of a vessel or its crew.

##### Exhaustion of local remedies

755. As regards the domestic legal proceedings pending before the municipal court commenced by the owner and master of the vessel and the objection to admissibility of the dispute to the Tribunal until those cases had been adjudicated, the Tribunal observed that it was illogical to read the requirement of exhaustion of local remedies or any analogous rule into article 292 of UNCLOS. Article 292 provides for an independent remedy and not an appeal against a decision of a national court. Indeed, article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period.

### Article 73(3) and (4) of UNCLOS

756. The Tribunal observed that the scope of the jurisdiction of the Tribunal in proceedings under article 292 of UNCLOS encompasses only cases in which “it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security”. Inasmuch as paragraphs 3 and 4, unlike paragraph 2, of article 73 were not such provisions, the submissions concerning their alleged violation were not admissible.

#### **(c) Non-compliance with article 73(2) of UNCLOS**

757. In accordance with article 113(1) of its Rules, the Tribunal dealt with the allegation that the detaining State had not complied with the provisions of UNCLOS for the prompt release of the vessel and its Master upon the posting of a reasonable bond or other financial security, and noted that for the application for release to succeed the allegation had to be well-founded.

##### Posting of a bond

758. The Tribunal underscored that the posting of a bond or other financial security was not necessarily a condition precedent to filing an application under article 292 of UNCLOS.

##### Reasonableness of the bond

759. The Tribunal pointed to its 1997 judgment for the prompt release of the MV *Saiga*, in which it held that the criterion of reasonableness encompassed the amount, nature and form of the bond or financial security and that the overall balance should be a reasonableness test. Moreover, the Tribunal elaborated on a number of factors that it deemed would be relevant in assessing the reasonableness of the bond or financial security, such as the gravity of the alleged offences; the penalties imposed or imposable under the laws of the detaining State; the estimated value of the detained vessel and of the cargo seized; and the amount of the bond imposed by the detaining State and its form. The Tribunal concluded that the bond of 20 million FF imposed by the French court was not reasonable.

##### Detention of the master of the *Camouco*

760. The Parties were in disagreement whether the master was indeed in detention. However, since the master was not free to leave Réunion, the Tribunal considered that it was appropriate to order the release of the master pursuant to article 292 (1) of UNCLOS.

#### **(d) Form and amount of the bond**

761. Based on the above-mentioned factors, the Tribunal decided that the security should be 8,000,000 French francs in the form of a bank guarantee, unless the Parties agreed otherwise. In addition, the Tribunal prescribed that the bank guarantee should specify that it was issued in consideration of France releasing the vessel and its master; that it was issued in relation to the incidents that occurred in the EEZ of the Crozet Islands; and that the issuer undertakes and guarantees to pay to France such sums, up to French francs 8 million, as may be determined in the final judgment, decision of the appropriate municipal forum or by agreement of the Parties.

#### 4. Decision

762. Four months and ten days after the arrest, on 7 February 2000:

(a) The Tribunal found unanimously that it had jurisdiction under article 292 of UNCLOS to entertain Panama's Application;

(b) By a vote of 19 to 2, the Tribunal found that the Application for release was admissible;

(c) By a vote of 19 to 2, the Tribunal ordered France to release the *Camouco* and its master promptly upon the posting of a bond or financial security;

(d) By 15 votes to 6, the Tribunal fixed the amount of the bond at 8 million French francs (approximately US\$ 1.2 million); and

(e) By 19 votes to 2, the Tribunal determined that the bond was to be in the form of a bank guarantee or, if agreed by the Parties, in any other form.

#### 5. Declarations, Separate Opinion, Dissenting Opinions

##### (a) Declarations

763. **Judge Mensah** was of the opinion that the Tribunal's conclusion that the allegation of Panama that France had failed to comply with the provisions of article 73 (2) of UNCLOS, requiring the release of the *Camouco* and its master upon the posting of a bond, was well-founded should have been recorded in the judgment, especially in view of article 113 (1) (2) of the Rules of the Tribunal.

764. **Judge Laing** felt that in applying article 292, the Tribunal should not be unduly concerned with a detaining State's categorization of its actions under its law. Therefore, formulations of domestic law, which, in good faith, deny the apparent objective international reality of arrest or detention or are based on particular domestic concepts, are of limited consequence.

765. According to Judge Laing, the Tribunal was obliged to come to its conclusions about detention and to order prompt release without distraction or equivocation if, given the standard of appreciation that the Tribunal applies in prompt release proceedings, it concluded that the allegation of detention was well-founded. In this connection, he stated that the prompt release institution is undergirded somewhat by the vulnerable freedom of the high seas, including, among others, the freedom of navigation. These are counterbalanced and reinforced by various other legal institutions favouring coastal States, including that concerning the exclusive economic zone. He felt that it was regrettable that the Tribunal did not make a categorical finding that there had been detention, which would have contributed to a better understanding of article 292 and the development of the procedures of prompt release from detention. Judge Laing concluded by stating that the judgment and his declaration revealed that prompt release proceedings evidently concern several aspects of the interpretation of international and domestic institutions. As long as each is held to apply within its own sphere, the potential for the appearance of conflict between the two will be diminished and the conditions for a harmonious balance will be strengthened.

766. As for the reasonableness of the bond, Judge Laing was of the view that the Tribunal should carefully develop its jurisprudence on the issue of reasonableness so that such values as consistency and proportionality will loom large.

767. **Judge Ndiaye** did not agree with the majority on the amount of the bond. In his opinion, there being no prescribed standards, in order to arrive at an objective criteria for determining the amount of a reasonable bond one had to resort to the application of the laws and regulations of the coastal or port State.

### (b) Separate Opinion

768. **Vice-President Nelson** was of the view that the mechanism for prompt release of vessels was designed to isolate the proceedings from those taking place in the domestic forum and this was a logical consequence arising from the very nature of the proceedings. In this connection, he remarked that in the oral pleadings France had stated that the Tribunal should "...take great care not to interfere with the functions of the French courts seized of the same question" as the one before the Tribunal, i.e., that the Tribunal may have to refrain from rendering a judgment on the prompt release of the vessel while the same matter was before the local courts. In his opinion, such an approach would run counter to the object and purpose of article 292. In other words, the Tribunal was only competent to pronounce itself on the prompt release issue under article 292 of UNCLOS and nothing else.

769. As for the reasonableness of the bond, he agreed with the majority that the bond had to be reasonable in the sense of being fair and equitable. However, he thought that in order to arrive at what was reasonable the Tribunal should have also looked at such factors as the context of "illegal, unreported and unregulated" fishing in the Antarctic Ocean and more especially in the exclusive economic zone of the islands where the facts of the case occurred.

### (c) Dissenting Opinions

770. **Judge Anderson** did not agree with the judgment because he felt that greater significance should have been accorded to the values protected under Part V of UNCLOS, such as the conservation of the living resources of the sea and the effective enforcement of national fisheries laws and regulations.

771. As regards the bond, Judge Anderson was of the view that the local court should be accorded wide discretion in fixing the amount of the security for release pending trial. In other words, the Applicant had to show compelling grounds for reducing the amount of the security fixed by a national court under local law in order to succeed under article 292 of UNCLOS. Furthermore, the appreciation of "reasonableness" under article 73(2) of UNCLOS, according to Judge Anderson, was a difficult concept to determine unless the relevant facts and circumstances were taken into account, which was not done in the Judgment. He did not consider that the amount of security ordered by the national courts in the case exceeded their margin of appreciation.

772. In addition, Judge Anderson remarked that it was unprecedented for the same issue to be submitted in quick succession first to a national court of appeal and then to an international tribunal, and for the issue to be actually pending before two instances at the same time. That situation was not conducive to efficient administration of justice and smacked of "forum hopping". An international tribunal could best adjudicate when the national legal system has been used not partially, as in the instant case, but completely and exhaustively ("exhaustion of local remedies", article 295, UNCLOS).

773. **Judge Vukas** did not share the opinion of the Tribunal that the Application by Panama was admissible. He did not believe that the inadmissibility of the Application by Panama was

based on estoppel, but on misinterpretation by Panama of the general concept of prompt release in UNCLOS and of the main provisions of article 292.

774. According to Judge Vukas, Panama acted against the doctrine of litispendence, i.e., two courts should not exercise concurrent jurisdiction in respect of the same case, same Parties or same issue. Moreover, Judge Vukas did not understand why Panama addressed the Tribunal 100 days from the time of detention of the vessel. Judge Vukas was of the view that it was impossible to foresee all complications resulting from two different judgments, notwithstanding the appealing conclusion that the international judgment prevails over the national judgment.

775. **Judge Wolfrum** considered the bond of 8,000,000 French francs to be far too low to be reasonable within the terms of article 292 of UNCLOS. In addition, he disagreed with the judgment on two points. He did not agree with the reasoning of the Tribunal on the unreasonableness of the bond set by the French courts. He did not agree on the powers of the Tribunal to set aside national measures concerning the enforcement of national laws and regulations on the management of marine living resources in the exclusive economic zone.

776. As regards the bond, Judge Wolfrum expressed the view that the Judgment did not give appropriate guidance on what basis it assessed a bond set by national authorities, on what are the possible reasons to declare a national bond to be unreasonable and on what are the criteria used to determine the amount of the bond set by the Tribunal. Therefore, the Judgment lacks objective analysis and borders on subjective justice.

777. As for the limitations of the Tribunal to pronounce itself on measures under national law, Judge Wolfrum advanced the argument that the Judgment made no reference to the discretionary powers of coastal States concerning the conservation and management of marine living resources in their exclusive economic zone and of the corresponding laws on enforcement. Such discretionary powers by the coastal State limit the powers of the Tribunal on deciding whether a bond set by national authorities was reasonable or not. It was not the role of the Tribunal to challenge the decisions of French courts in a way that would make the Tribunal a court of third or fourth instance, which it is not. In this connection, Judge Wolfrum mentioned that the Tribunal should have taken into consideration that UNCLOS restricts challenging the exercise of discretionary powers of coastal States and of the International Seabed Authority.

778. **Judge Treves** expressed the opinion that two questions were not clearly distinguished in the Judgment: whether the allegation concerned non-compliance by the detaining State with the prompt release of the vessel and crew upon the posting of a reasonable bond or other financial security and whether the allegation was well-founded. According to him, the Judgment jumps from the admissibility of the Application to the ordering of the prompt release of the vessel and its master. Therefore, Judge Treves thought it would have been preferable to include in the operative part of the Judgment a mention of the non-compliance by the detaining State with article 73(2) of UNCLOS.

779. As regards the bond, Judge Treves' view was that the notion of a "reasonable bond" should be an international notion. For the Tribunal, the task to be undertaken was to determine an amount for the bond that could reconcile the need of the State that detained the ship to have a guarantee with the need of the flag State to obtain the release of the ship and its master. Lastly, Judge Treves stated that the amount of the bond fixed by the Tribunal was considerably lower than the amount that would have permitted to take into consideration a reasonable value of the ship and other reasons as well as the likelihood that the criminal responsibility of the company, owner of the ship, might be established.

## H. The *Monte Confurco* Case

|                               |  |
|-------------------------------|--|
| <b>Parties:</b>               | France and Seychelles  |
| <b>Issues:</b>                | Prompt release; reasonableness of the bond   |
| <b>Forum:</b>                 | International Tribunal for the Law of the Sea (ITLOS)  |
| <b>Date of Decision:</b>      | 18 December 2000   |
| <b>Published in:</b>          | <p>- <u>ITLOS Reports of Judgments, Advisory Opinions and Orders</u><br/>2000, p. 86-144</p> <p>- 4 <u>International Tribunal for the Law of the Sea Yearbook</u><br/>(2000), p. 41</p> <p>- 105 <u>Revue Générale de Droit International Public</u> (2001),<br/>pp. 229-234</p>   |
| <b>Selected commentaries:</b> | <p>Goy, R., "Trois affaires de mainlevée de saisie de navires de pêche contre la France devant le TIDM: la jurisprudence des légis, Affaires du Camouco, du Monte Confurco et du Grand Prince," 14 <u>Collection Ressources Maritimes</u> (2001),<br/>pp. 75-127</p> <p>Lowe, A.V., "The International Tribunal for the Law of the Sea: Survey for 2000" 16 <u>International Journal of Marine and Coastal Law</u> (2001), pp. 549-570</p> <p>Franckx, E., "'Reasonable Bond' in the Practice of the International Tribunal for the Law of the Sea", 32 <u>California Western International Law Journal</u> (2001-2002), pp. 303-342</p> |

### 1. Facts

780. On 27 November 2000, Seychelles instituted proceedings with the International Tribunal for the Law of the Sea against France under article 292 of the United Nations Convention on the Law of the Sea (UNCLOS) for the prompt release of the *Monte Confurco* and its Master.

781. On 8 November 2000, the fishing vessel *Monte Confurco*, registered in the Republic of the Seychelles, was apprehended by the French frigate *Floréal* in the exclusive economic zone (EEZ) of the Kerguelen Islands (French Southern and Antarctic Territories) for alleged illegal fishing and failure to announce its presence in the EEZ of the Kerguelen Islands. The *Monte Confurco* had been on a long-line fishing expedition for toothfish in international waters. On the same day, French naval authorities escorted the *Monte Confurco* to Port-des-Galets, Réunion. The Master of the vessel was placed under judicial supervision.

782. On 22 November 2000, the district court of Saint-Denis, Réunion, ordered that the *Monte Confurco* could be released upon the posting of a bond of 56,400,000 French francs (FF) in cash, cheque or banker's draft to be paid into the Deposits and Consignments Office.

## 2. Issues

**(a) Questions before the Tribunal**

- (i) Admissibility of the application;
- (ii) Reasonableness of the bond or guarantee.

**(b) Arguments presented by the Parties**

(i) **Seychelles**

Seychelles requested the Tribunal:

- To declare that the Tribunal had jurisdiction under article 292 of UNCLOS to hear its Application;
- To declare the Application admissible;
- To declare that France had contravened article 73(4) of UNCLOS by not properly giving notice of the arrest of the vessel *Monte Confurco* to Seychelles; and
- To declare that the guarantee set by France was not reasonable as to its amount, nature and form.

As regards the Master of the *Monte Confurco*:

- To find that France had failed to observe the provisions of UNCLOS concerning prompt release of masters of arrested vessels;
- To require France to release promptly the Master, without bond, in light of the presence of the ship, cargo, etc., as a reasonable guarantee, given the impossibility of imposing penalties of imprisonment against him and the fact that he is a European citizen; and
- To find that the failure by France to comply with the provisions of article 73(3) in applying to the Master measures of a penal character constituted a *de facto* unlawful detention.

As for the vessel, to order its release upon posting of a guarantee in the maximum amount of 2,200,000 FF, based upon:

- 200,000 FF for failure to notify presence; and
- 2,000,000 FF for a presence of 24 hours in the EEZ without giving notice, and up to four tonnes of catch theoretically taken in the worst cases, as the sole admissible evidence of presumption.

With regard to the nature of the bond, that the Tribunal consider that the value of the cargo seized, the fishing tackle seized, the bait and the gas oil constitute part of the guarantee, the value of the foregoing being 9,800,000 FF;

That the Tribunal choose between a financial instrument (“*constitution financière*”) issued by a European bank or a guarantee comprised of the value of an equivalent number of tons or other items according to the calculations of Seychelles; and

As for the form of the financial bond, as a subsidiary measure, in the event that the Tribunal should choose to set a symbolic financial bond, the Applicant requested that the Tribunal note its desire for a bank guarantee by a leading European bank, of the same content as the guarantee already posted with France in the *Camouco* case in consideration of the release of the vessel.

At the hearing, the Agent for Seychelles stated that the Master of the ship had entered the EEZ of the Kerguelen Islands, heading in the direction of Williams Bank. However, since his fax machine was not functioning, the Master was unable to notify the French authorities of the vessel's presence in the EEZ, in keeping with articles 2 and 4 of French Law No. 66-400 of 18 June 1966, as amended. The Agent disputed the allegation that the *Monte Confurco* had been engaged in illegal fishing. He maintained that the fish on board the vessel had been caught in international waters. The Agent for Seychelles also requested the immediate release of the Master, who was being detained in Réunion, and the release of the vessel upon the posting of a reasonable bond, arguing that the bond set by the French authorities was not reasonable.

(ii) **France**

France requested the Tribunal, rejecting the second submission made by the Seychelles, to declare and adjudge:

- That the bond set by the competent French court for the release of the *Monte Confurco* was reasonable in the circumstances of the case and in the light of all the relevant factors; and
- That the Application submitted to the Tribunal on 27 November 2000 by Seychelles was inadmissible.

The Agent for France contended that the *Monte Confurco* had been discovered in the EEZ without having given notification of its presence and its catch, even though the vessel was equipped with radio-telephone and an INMARSAT station. Also, it was alleged, *inter alia*, that the vessel did not stop when ordered to do so.

In addition, the Agent for France referred to an increase in illegal fishing in the area concerned and the means used by vessels to avoid detention or punishment. He also emphasized the environmental danger to the stock of toothfish in the waters of the southern Indian Ocean. In this connection, the expert called by France stated that overexploitation of the species could have serious consequences for the stock, especially as it had a long maturation phase. He also expressed the opinion that it was not possible for the *Monte Confurco* to have been fishing where it claimed to have fished, owing to the great depths in the areas concerned. However, on cross-examination by the Agent for Seychelles, the expert asserted that Spanish fisherman had developed techniques that allowed fishing in waters up to a depth of 2,500 metres.

**3. Reasoning of the Tribunal**

**(a) Jurisdiction**

783. The Tribunal examined the question whether it had jurisdiction to entertain the Application by Seychelles by reviewing article 292 of UNCLOS, which sets out the requirements that must be satisfied to establish the jurisdiction of the Tribunal.

784. The Tribunal noted that both France and Seychelles are States Parties to UNCLOS. Moreover, the status of Seychelles as the flag State of the *Monte Confurco* at the time of the incident and thereafter was not disputed. The Parties had not agreed to submit the question of release from detention to any other court or tribunal within 10 days of the time of detention. The Application was duly made on behalf of Seychelles pursuant to article 292, paragraph 2, of UNCLOS and satisfied the requirements of articles 110 and 111 of the Rules of the Tribunal. Accordingly, the Tribunal found that it had jurisdiction to entertain the Application by Seychelles.

**(b) Non-compliance with article 73, paragraphs 3 and 4, of UNCLOS**

785. Seychelles alleged that the placement of the Master of the *Monte Confurco* under court supervision constituted a *de facto* detention and a grave violation of his personal rights, contrary to article 73, paragraph 3, of UNCLOS. Seychelles further alleged that it was not given proper notification of the arrest of the vessel in accordance with article 73, paragraph 4, of UNCLOS.

786. France stated that, under article 292 of UNCLOS, the Tribunal's competence does not extend to the adjudication of the allegations made by Seychelles. Furthermore, France denied that court supervision was tantamount to detention, since such supervision did not deprive the Master of the vessel of his liberty.

787. Consequently, the Tribunal found that, as it had held in the *Camouco* case, in proceedings under article 292 of UNCLOS, submissions concerning alleged violations of article 73, paragraphs 3 and 4, of UNCLOS are not admissible.

**(c) Non-compliance with article 73, paragraph 2, of UNCLOS**

788. The Tribunal noted that Seychelles alleged that there had been non-compliance with article 73, paragraph 2, of UNCLOS, which provides for the prompt release of a vessel and its crew upon the posting of a reasonable bond or other financial security.

Reasonableness of the bond: relevant factors

789. Seychelles submitted that the bond set by the French municipal court in the amount of 56,400,000 FF for the release of the *Monte Confurco* and its Master did not comply with article 73, paragraph 2, of UNCLOS as it was unreasonable. The Tribunal noted the Applicant's submission that the detaining State had not complied with article 73, paragraph, 2, of UNCLOS and that the bond set by the French court in the amount in question was "not reasonable". Consequently, Seychelles requested the Tribunal under article 292 of UNCLOS to fix a reasonable bond. However, France considered the bond set by the municipal court to have been reasonable.

790. In this connection the Tribunal observed that pursuant to article 113 of its Rules, it was required to decide whether or not the Applicant's allegation was well-founded in order to proceed with the determination of the amount, nature and form of the bond or financial security to be posted for the release of the vessel or crew.

791. The Tribunal then examined whether the bond imposed by the French court was reasonable and noted that the balance of interests emerging from articles 73 and 292 of UNCLOS provided the guiding criterion for the Tribunal in its assessment of the reasonableness of the bond.

792. The Tribunal noted that article 73 identified two interests: the interest of the coastal State

to take appropriate measures as may be necessary to ensure compliance with the laws and regulations adopted by it; and the interest of the flag State in securing prompt release of its vessels and crews from detention. Prompt release was subject only to a reasonable bond. The object of article 292 of UNCLOS was to reconcile the interest of the flag State to have its vessel and crew promptly released with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties.

793. The Tribunal expressed the view that the amount of the bond should not be excessive and unrelated to the gravity of the alleged offences. The Tribunal referred to factors specified in the *Camouco* case which were relevant in an assessment of the reasonableness of bonds or other financial security. In the Tribunal's view, this was a non-exhaustive list of factors which complemented the criterion of reasonableness specified in the M/V *Saiga* case.

#### Application of relevant factors in the present case

794. The Tribunal then proceeded to apply the various factors to the present case, i.e., gravity of the alleged offences, range of penalties imposable under French law for the alleged offences, value of the *Monte Confurco* and of the fish and fishing gear seized. The alleged offence committed in the present case relates to the conservation of the fishery resources in the exclusive economic zone, particularly illegal fishing of toothfish by Seychelles. Seychelles argued that the only offence committed by the Master of the vessel was his failure to notify the entry of the *Monte Confurco* into the exclusive economic zone of the Kerguelen Islands and the tonnage of fish it carried on board, and that the vessel did not fish in the said zone. After reviewing the various factors in the case, the Tribunal, as it had done in the M/V *Saiga* case, assessed the reasonableness of the bond and found that the bond was not reasonable.

795. The Tribunal found that the bond of 56,400,000 FF imposed by the French court was not reasonable pursuant to article 292 of UNCLOS. Accordingly, the Application concerning the allegation of non-compliance with article 73, paragraph 2, of UNCLOS was admissible and the allegation well-founded.

#### Detention of the Master

796. The Parties were in disagreement whether the Master of the vessel was in detention. The Tribunal noted that the Master was not in a position to leave Réunion and considered that, in the circumstances of the case, it was appropriate to order the release of the Master in accordance with article 292, paragraph 1, of UNCLOS.

#### **(d) Form and amount of the bond or other financial security**

797. The Tribunal was of the view that the security should be in the amount of 18,000,000 FF. In considering the overall balance of amount, form and nature of the bond or financial security, the Tribunal held that the monetary equivalent of the 158 tonnes of fish on board the *Monte Confurco* held by French authorities, i.e., 9,000,000 FF was to be considered as security to be held or, eventually, returned by France to Seychelles. The remaining security, in the amount of 9,000,000 FF, should be, unless the Parties agree otherwise, in the form of a bank guarantee, to be posted with France. In this connection the Tribunal noted that in the *Camouco* case it decided that the bond should be in the form of a bank guarantee and that no difficulty was encountered in the implementation of the judgment. Therefore, the claim by France that cash or certified cheque was the only possible form for the bond did not seem reasonable to the Tribunal.

798. The bank guarantee was to state that it was issued in consideration of France releasing the *Monte Confulco* and its Master in relation to the incidents dealt with in the order dated 22 November 2000 of the court of first instance at Saint-Paul and that the issuer guarantees to pay to France up to 9,000,000 FF, as may be determined by a final judgment or decision of the appropriate domestic forum in France or by agreement of the Parties. Such payment would be due promptly after receipt by the issuer of a written demand by the competent authority of France accompanied by a certified copy of the final judgment, decision or agreement.

#### 4. Decision

799. On 18 December 2000, the Tribunal decided as follows:

- (a) Unanimously, that it had jurisdiction under article 292 of UNCLOS to entertain Seychelles' Application;
- (b) Unanimously, that Seychelles' claims that France failed to comply with article 73, paragraphs 3 and 4, of UNCLOS were inadmissible;
- (c) Unanimously, that the Application by Seychelles with respect to the allegation of non-compliance with article 73, paragraph 2, of UNCLOS was admissible;
- (d) By 19 votes to 1, found that the allegation made by Seychelles was well-founded;
- (e) By 19 votes to 1, decided that France was to release promptly the *Monte Confulco* and its Master upon the posting of a bond or other security to be determined by the Tribunal;
- (f) By 17 votes to 3, determined that the bond or other security would consist of:
  - (i) an amount of 9,000,000 FF as the monetary equivalent of the 158 tonnes of fish seized by the French authorities; and
  - (ii) a bond in the amount of 9,000,000 FF;
- (g) Unanimously, determined that the bond was to be in the form of a bank guarantee or, if agreed to by the Parties, in any other form; and
- (h) By 18 votes to 2, decided that the bank guarantee was to be invoked only if the monetary equivalent of the security held by France was not sufficient to pay the sums as may be determined by a final judgment or decision of the appropriate domestic forum in France.

#### 5. Declarations, Separate Opinion, Dissenting Opinions

##### (a) Declarations

800. **Judge Mensah** agreed with the Tribunal's conclusions and decisions. Nonetheless, he was perplexed by a number of statements contained in the Judgment which he thought were neither necessary nor warranted in the context of prompt release proceedings under article 292 of UNCLOS. For example, in paragraph 88 of the Judgment the Tribunal appears to be criticizing the basis on which the court of first instance at Saint-Paul determined the part of the fish on board the vessel that it took into account in fixing the bond to be posted for the release of the vessel and its Master. For that reason, Judge Mensah argued that the Tribunal should exercise restraint in making statements that might probably imply criticism of the procedures and decisions of municipal courts. Such criticism was not necessary for the decisions of the Tribunal on the issue of the release of a ship or its crew upon the posting of a reasonable bond.

801. **Judge Vukas**, although voting in favour of the Tribunal's findings contained in the Judgment, dissociated himself from all statements or conclusions in the Judgment that are based on the proclaimed exclusive economic zone of the Kerguelen Islands.

802. He was of the opinion that it was questionable whether the establishment of an exclusive economic zone off the shores of uninhabitable and uninhabited islands was in accordance with the reasons which motivated the Third United Nations Conference on the Law of the Sea to create that specific legal regime and with the letter and spirit of the provisions on the EEZ, as set out in UNCLOS.

803. As regards reasonableness, **Judge Ndiaye** expressed the view that reasonableness is determined essentially in terms of the factual and relevant circumstances of a case. Also, he stated that reasonableness may be observed from the outcome or be ascertained.

804. In this connection, Judge Ndiaye mentioned that in prompt release proceedings there was a tendency for applicants always to allege that the bond or financial security set by the arresting State was exorbitant. The bond should be proportionate to the violation alleged and should not take on a punitive or deterrent character. If not, challenges to the amount of a bond could turn the Tribunal into an appeals forum from decisions rendered by municipal courts, which it is not.

### (b) Separate Opinion by Vice-President Nelson

805. Judge Nelson observed that the powers given to the Tribunal to order the prompt release of a vessel and crew upon the posting of a reasonable bond under article 292 of UNCLOS constituted “an interference” with the judicial authorities of the coastal State. However, that power was limited to a specific number of cases as set forth in articles 73, 220 and 226 of UNCLOS. In addition, in prompt release proceedings the Tribunal has no jurisdiction as to the merits of the case. Consequently, in such proceedings the sole task of the Tribunal would be to determine a reasonable bond.

806. As regards France’s argument that in the French text of article 73, paragraph 2, the adjective “reasonable” was not the same as “suffisante”, Judge Nelson referred to the nuances in meaning of “reasonable” in the English and French authentic texts of UNCLOS. He noted that although the French text uses the word “suffisante” for “reasonable” it should be concluded that both words have the same meaning or at least must be presumed to have the same meaning.

### (c) Dissenting Opinions

807. **Judge Anderson** made several observations.

808. As regards the question of admissibility, Judge Anderson agreed that the complaints under article 73, paragraphs 3 and 4, of UNCLOS were inadmissible although the application under article 73, paragraph 2, was admissible. He welcomed the clarity of the Judgment in that respect.

809. As for the merits of the allegation under article 73, paragraph 2, Judge Anderson thought that the Judgment should have concentrated more on the question whether or not the allegation of non-compliance with article 73, paragraph 2, of UNCLOS had been made.

810. Judge Anderson observed that the expert evidence in paragraph 54 of the Judgment was to the effect that the toothfish could not be caught in places where the Master of the vessel claims to have been fishing before entering the exclusive economic zone around the Kerguelen Islands. Judge Anderson accepted the presumption that in the event of non-notification of the quantity of fish on board a fishing vessel when it entered an exclusive economic zone, all fish on board the vessel are to be presumed to have been caught in that EEZ. Therefore, he did not agree with the conclusion of the Tribunal.

811. As for remedies, Judge Anderson expressed the view that in fixing the amount of the additional security the Tribunal should have taken into account that the fish and gear on board the vessel had already been secured under the applicable law. Therefore, it was unnecessary for the Tribunal to determine that something that was already secure could be considered as security.

812. Lastly, he did not agree with the part of the Judgment that referred to when the bank guarantee could be invoked since a bank guarantee is a legal document taking effect according to its national law.

813. **Judge Laing** did not agree with the amount of the bond, which he thought should have been under 9 million FF. He also mentioned that reasonableness must be grounded on the fact that prompt release is an independent and autonomous international institution and set of concepts. In prompt release cases, the Tribunal should take cognizance of the mindset of the national bond-setting judge, who is striving to comprehend the essence of such dynamic and evolving international concepts and institutions as the exclusive economic zone, prompt release and even residual but crucial elements of the high seas regime.

814. He also stated that illegal fishing could be proved in some States by presumptions. However, in the present case, he did not discern any proof of a substantial violation of the proscription of illegal fishing in the exclusive economic zone.

815. **Judge Jesus** expressed the view that the Tribunal did not have a clear understanding of what it was called upon to do in the present case concerning the prompt release of the *Monte Confurco* under article 292 of UNCLOS. Therefore, he did not agree with the approach retained by the majority in determining what constituted the reasonable bond.

816. According to Judge Jesus the majority decision in the *Monte Confurco* failed to preserve a balance between two different and opposing interests (articles 73 and 292 of UNCLOS): the rights of the coastal State to take action for the protection of its sovereign rights over living resources and the flag's States right to seek relief from an unnecessary prolonged arrest and detention of a vessel, which could lead to heavy losses to the vessel's operator.

817. Judge Jesus did not believe that it was within the purview of the Tribunal to encroach upon the exclusive jurisdiction of the municipal courts on the merits of the case. The only determination required from the Tribunal in a prompt release procedure was to determine if the bond imposed by the municipal court was or was not reasonable. However, Judge Jesus was of the view that in making a determination as to the reasonableness of the bond the Tribunal had taken into consideration the merits of the case.

818. Judge Jesus also stated that there was no obligation placed on the owner of the vessel to post a bond. The owner could do so or he could await the decision of the municipal court and risk only the value of the assets seized.

819. Lastly, Judge Jesus mentioned that he did not understand the rationale of the majority decision in considering as part of the bond or security the value of the fish seized by France since the applicable French legislation makes it subject to confiscation.

## V. CRIMINAL JURISDICTION AND FLAG STATE JURISDICTION ON THE HIGH SEAS

### A. The Case of the S.S. *Lotus*

|                               |  |
|-------------------------------|--|
| <b>Parties:</b>               | France and Turkey  |
| <b>Issues:</b>                | Jurisdiction: criminal jurisdiction and flag State jurisdiction on the high seas   |
| <b>Forum:</b>                 | Permanent Court of International Justice   |
| <b>Date of Decision:</b>      | 7 September 1927   |
| <b>Published in:</b>          | Permanent Court of International Justice, <u>Collection of Judgments</u> , Series A., No.10, 1927, pp. 1-108   |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Walther, H., L'affaire du "Lotus" ou de l'abordage hauturier en droit pénal international, <u>Les éditions internationales</u>, Paris, 1928</li> <li>- Canonne, G., <u>Essai de droit pénal international: l'affaire du "Lotus"</u>, Recueil Sirey, Paris, 1929</li> <li>- Brierly, J.L., "The <i>Lotus</i> Case", 44 <u>Law Quarterly Review</u> (1928), p. 154</li> </ul> |

#### 1. Facts

820. On 2 August 1926, a collision occurred on the high seas between the French mail steamer *Lotus*, proceeding to Constantinople, and the Turkish collier, "Boz-Kourt". The "Boz-Kourt" sank and eight Turkish nationals perished.

821. On 3 August, the *Lotus* arrived in Constantinople, where the Turkish authorities proceeded to hold an enquiry into the collision. They instituted joint criminal proceedings in accordance with the Turkish law against the captain of the "Boz-Kourt", and the officer on watch on board the *Lotus* at the time of the collision, Lieutenant Demons, a French citizen, on a charge of manslaughter.

822. The case was first heard on 28 August 1926 before the Criminal Court of Istanbul. Lieutenant Demons' objection to the jurisdiction of the Court was overruled. On 15 September, the Criminal Court of Istanbul sentenced Demons to a short term of imprisonment and a fine.

823. The proceedings had been instituted in pursuance of Turkish legislation. According to the French Government, the Criminal Court claimed jurisdiction under Article 6 of the Turkish Penal Code.<sup>20</sup>

824. The French Government protested against the arrest of Lieutenant Demons and against the assumption of jurisdiction by the Turkish Court.

825. By a special agreement, signed at Geneva on 12 October 1926 between the French and Turkish Governments and filed with the Registry of the Court in accordance with article 40 of the Statute and article 35 of the Rules of the Court, the latter submitted to the Permanent Court of International Justice the question of jurisdiction that had arisen between them as a result of the collision.

## 2. Issues

### (a) Questions before the Court

- (i) Has Turkey, contrary to article 15 of the Convention of Lausanne of 24 July 1923<sup>21</sup> on conditions of residence, business and jurisdiction, acted in conflict with the principles of international law and, if so, which principles, by instituting joint criminal proceedings in pursuance of Turkish law against Lieutenant Demons, in consequence of the loss of the "Boz-Kourt" having involved the death of eight Turkish sailors and passengers?
- (ii) Should the reply be in the affirmative, is any pecuniary reparation due to Lieutenant Demons according to the principles of international law and, if so, what should it be?

### (b) Arguments presented by the Parties

- (i) **France.** The French Government contended that jurisdiction to entertain criminal proceedings against Lieutenant Demons belonged exclusively to the French Courts. In order to have jurisdiction, Turkey should be able to point to some title of jurisdiction recognized by international law.

France then argued that international law does not allow a State to take proceedings with regard to offences committed by foreigners abroad simply by reason of nationality of the victim.

France also claimed that international law recognizes the exclusive jurisdiction of the State whose flag is flown as regards everything which occurs on board a ship on the high seas and stated that this principle was especially applicable in a collision case.

- (ii) **Turkey** contended that Article 15 of the Lausanne Convention allowed Turkey

<sup>20</sup> Article 6 of the Turkish Penal Code provided that: "Any foreigner who [...] commits an offence abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribed a penalty [...], shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey [...]."

<sup>21</sup> Article 15 of the Convention provides that: "Subject to the provisions of Article 16, all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law."

jurisdiction whenever such jurisdiction did not come into conflict with a principle of international law.

### **3. Reasoning of the Court**

826. The Court first established that the question submitted to it was whether the principles of international law prevented Turkey from instituting criminal proceedings against Lieutenant Demons under Turkish law.

827. The Court found that the French contention that Turkey, in order to have jurisdiction, should be able to point to some title of jurisdiction recognized by international law was opposed to generally accepted international law, as referred to by Article 15. It stated that the first restriction imposed by international law upon a State was that it could not exercise its power in any form in the territory of another State. However, this did not imply that international law prohibits a State from exercising jurisdiction in its own territory in respect of any case that relates to acts that have taken place abroad and in which it cannot rely on some permissive rule of international law.

828. The Court found that Turkish jurisdiction was justifiable not because of the nationality of the victims but because the effects of the offence were produced on a Turkish ship, and consequently, in a place "assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged". Once it was admitted that the effects of the offence were produced on the Turkish vessel, it became impossible to hold that there was a rule of international law that prohibited Turkey from prosecuting Lieutenant Demons simply because the author of the offence was on board the French ship.

829. As for the argument reserving jurisdiction exclusively to the State whose flag is flown, the Court concluded that the French Government had not conclusively proved this to be true. The Court found that nothing supported the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights that it exercises in its own territory. The Court, after reviewing precedents reserving jurisdiction exclusively to the State whose flag is flown, found that in several cases the principle of the exclusive jurisdiction of the country whose flag the vessel flies was not regarded as a general principle of law. Moreover, the Court stated that none of the cases were related to offences affecting two ships flying the flags of two different countries. Therefore, it was impossible to make any deduction that would be applicable to the present case.

830. The Court then addressed the last argument advanced by the French Government that according to international law criminal proceedings arising from collision cases are within the exclusive jurisdiction of the State whose flag is flown. France claimed that questions of jurisdiction in collision cases were rarely encountered in the practice of criminal courts. Therefore, prosecutions only occurred before the courts of the State whose flag is flown, which proved a tacit adherence by States to the rule of positive international law barring prosecutions by other States. The Court rejected this argument. Even if the facts alleged were true, they would merely show that States had often abstained from instituting criminal proceedings, not that they felt obligated to do so.

#### 4. Decision

831. Judgment was rendered on 7 September 1927. By the President's casting vote - the votes being equally divided - the Court held that:

- (a) Turkey, by instituting criminal proceedings against Lieutenant Demons, had not acted in conflict with the principles of international law;
- (b) Consequently, there was no occasion to give judgment on the question of the pecuniary reparation.

#### 5. Dissenting Opinions

832. Former **President Loder** criticized the Court for accepting Turkey's view according to which under international law everything that is not prohibited is permitted. Then he stated that the criminal law of a State could not extend to offences committed by a foreigner in foreign territory without infringing the sovereign rights of the foreign State concerned. Similarly, the criminal law of a State could not extend to a foreigner who happened to be in the territory after the commission of an offence since "the subsequent presence of the guilty person could not have the effect of extending the jurisdiction of the State". Judge Loder disagreed with the alleged "connexity" between the movements of the vessels as a ground for Turkey's jurisdiction since "connexity" does not create jurisdiction. He concluded that Turkey had acted in contravention of the principles of international law in arrogating to itself jurisdiction in the present case.

833. **Judge Weiss** based his dissenting opinion on two principles of international law fundamental to the present case. First, he recalled the principle of the sovereignty of States that Turkey would have applied beyond its due limits making its action to be felt in a field outside its proper scope. According to Judge Weiss, the criminal jurisdiction of a State is based on and limited by the territorial area over which it exercises sovereignty.

834. On the basis of the principle of the freedom of the high seas, he asserted that vessels and crew are answerable only to the law of the flag State. Judge Weiss rejected other titles to jurisdiction put forward by Turkey. In his view, the theory of "connexity" was not applicable for it implies extension of jurisdiction only in the relation between two or more courts of the same instance sitting within the boundaries of the same State and, in any event, the concept is completely foreign to international relations.

835. **Lord Finlay** felt that it was impossible to apply the principle of locality to the case for the purpose of ascertaining what court had jurisdiction: "criminal jurisdiction for negligence causing a collision is in the courts of the country of the flag, provided that if the offender is of a nationality different from that of his ship, the prosecution may alternatively be in the courts of his own country". Furthermore, he did not agree with Article 6 of the Turkish Penal Code being a ground for the trial before Turkish courts. In his opinion, Article 6 was a law passed for the protection of nationals and assumption of jurisdiction for protection had never been recognized as part of international law.

836. **Judge Nyholm** stated that contrary to the Judgment it could not be maintained that, failing a positive restrictive rule, States would leave each other free to edict their legislations as they thought fit and to act accordingly. Consequently, the jurisdiction of the Turkish courts based on Article 6 of the Turkish Penal Code had to be considered as an extension of the territorial principle not compatible with the territorial principle as established at the time.

837. **Judge Moore** differed from the Court in that he thought that even though the Court was not empowered by the compromise to enquire into the regularity of the proceedings under Turkish law or into the question of applicability of the terms of Article 6 to the facts in the case, it had to take the article and its jurisdictional claim simply as they stood.

838. He felt that the criminal proceedings as they rested on Article 6 were in conflict with a few principles of international law, among them: (i) that the jurisdiction of a State over the national territory is exclusive; and (ii) that a State cannot rightfully assume to punish foreigners for alleged infractions of laws to which they were not, at the time of the alleged offence, in any way subject.

839. **Judge Altamira** found that Turkey had acted in contravention of international law in imposing further exceptions to the principle of territoriality, by virtue of the admitted freedom in internal legislation but without the requisite consent.

## VI. NAVIGATION

### A. The *I'm Alone* Case

|                               |  |
|-------------------------------|--|
| <b>Parties:</b>               | Canada and the United States of America  |
| <b>Issues:</b>                | Hot pursuit on the high seas   |
| <b>Forum:</b>                 | Appointment of two commissioners under Article IV of the Liquor Convention of 23 January 1924 between The United States of America and the United Kingdom  |
| <b>Date of decision:</b>      | 5 January 1935   |
| <b>Published in:</b>          | <u>Reports of International Arbitral Awards</u> , Vol. III, 1949, pp. 1613-1618  |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Hyde, C.C., "The Adjustment of the "<i>I'm Alone</i>" Case", 29 <u>American Journal of International Law</u> (1935), pp. 296-301</li> <li>- Garner, J.W., "Hot Pursuit: Illegal Sinking of Vessel on the High Sea - The <i>I'm Alone</i> Case", 16 <u>British Year Book of International Law</u> (1935), pp. 173-175</li> <li>- Fitzmaurice, G.G., "The Case of the <i>I'm Alone</i>", 17 <u>British Year Book of International Law</u> (1937), pp. 82-111</li> <li>- Maidment, S., "Historical Aspects of the Doctrine of Hot Pursuit", 46 <u>British Year Book of International Law</u> (1972-1973), pp. 365-381</li> </ul> |

#### 1. Facts

840. On 22 March 1929 the *I'm Alone*, a British schooner of Canadian registry, was sunk by gunfire from a United States coast guard vessel at a point on the high seas more than 200 miles from the coast of the United States.

841. The *I'm Alone*, engaged in the smuggling of alcoholic liquor into the United States, had originally been hailed by the United States coastguard vessel "Wolcott" at a point the exact location of which was never determined, but admittedly beyond the limit of 3 miles from the coast of the United States. The *I'm Alone* had refused to stop or allow herself to be boarded, and made out to sea with the "Wolcott" in pursuit.

842. After two days of pursuit, the "Wolcott" was joined by the "Dexter", by which the *I'm Alone* was actually sunk. The "Wolcott", however, remained in the pursuit throughout.

843. The sinking was not accidental, but was intentionally carried out on the ground that the *I'm Alone* refused to stop and allow herself to be boarded and searched. The vessel and her cargo, together with the personal effects of her captain and crew, were lost. With the exception of one man who was drowned, the coast guard vessel rescued the entire captain and crew.

844. In August 1929, the United States and Canada agreed to appoint two commissioners to consider the claim of Canada in respect of the sinking of the vessel. This action was pursuant to the provisions of article IV of the Convention concluded on 23 January 1924 between the United States and Great Britain.<sup>22</sup>

## 2. Issues

### **(a) Questions before the Commissioners**

- (i) Whether the Commissioners may inquire into the beneficial or ultimate ownership of the *I'm Alone* or of the shares of the corporation that owned the ship. If the Commissioners are authorized to make this inquiry, a further question arises as to the effect of indirect ownership and control by citizens of the United States upon the claim.
- (ii) Whether the Government of the United States under the Convention has the right of hot pursuit where the offending vessel is within an hour's sailing distance of the shore at the commencement of the hot pursuit and beyond that distance at its termination.
- (iii) Whether the Government of the United States under the Convention has the right of hot pursuit of a vessel when the pursuit commenced within the distance of twelve miles established by the revenue laws of the United States and was terminated on the high seas beyond that distance.
- (iv) Whether the Government of the United States was legally justified in sinking the *I'm Alone* (this question was based upon the assumption that the United States Government had the right of hot pursuit in the circumstances and was entitled to exercise the rights under Article II of the Convention<sup>23</sup> at the time when the "Dexter" joined the "Wolcott" in the pursuit of the *I'm Alone*).

### **(b) Arguments presented by the Parties**

<sup>22</sup> Article IV provided in part that:

"Any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by article 2 of this Treaty or on the ground that it has not been given the benefit of article 3 shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the high contracting Parties".

<sup>23</sup> Article II of the Liquor Convention of 1924 reads as follows:

(1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that inquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavouring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such inquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offence against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavouring to commit the offence. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions, by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised."

845. It was common ground between the Parties that the initial position of the *I'm Alone*, whether inside or outside the conventional limits, was outside the three-mile limit of United States territorial waters affirmed in article I of the Convention.

- (i) **Canada.** The Canadian Government based its claim on the fact that the *I'm Alone* was a vessel of Canadian registry, owned by a company incorporated in Canada. The Canadian Government concluded that the Commissioners could not inquire into the ultimate or beneficial ownership of the *I'm Alone* at all.

The Canadian Government contended that at the time when the "Wolcott" originally sought to board the *I'm Alone*, the latter was outside the conventional limits, i.e., the distance from the coast which she could cover in one hour, as provided in article II (3) of the Convention.

Moreover, the Canadian Government contended that, even assuming the *I'm Alone* was initially within conventional limits, nevertheless, since she was admittedly outside territorial waters, there was no right to pursue her beyond the conventional limits. The right of "hot pursuit" conferred by the general rules of international law is only applicable where the pursuit began from within territorial waters. If there was any right of hot pursuit from a point within conventional but outside the territorial water limits, it must be conferred by the Convention itself, and the Convention in fact conferred no such right.

It further contended that the pursuit was not in any event "hot and continuous", as required by international law, since the *I'm Alone* had eventually been sunk by a vessel which had only come up at a late stage, when the *I'm Alone* was far outside the conventional limits, and which had not started the pursuit or had any but a small share in it.

The Canadian Government contended that even assuming the pursuit of the *I'm Alone* to have been justified, the act of sinking her was illegal. The Convention gave the power to board, examine, search and in the last resort, arrest. By implication, those powers might carry with them the right to use a legitimate degree of force in order to achieve the ends in question, but the sinking of the vessel, was not, however, effected accidentally in the course of using legitimate force but was intentional and deliberate.

- (ii) The **United States** contended that the *I'm Alone* was not entitled to be regarded as a British ship because the ultimate or beneficial ownership and control of the vessel was in the hands of United States citizens who operated her for the express purpose of smuggling alcoholic liquor into the United States in contravention of local law. It argued that the Commissioners were not precluded from inquiring into the question of the ultimate or beneficial ownership of the vessel.

The United States contended that the initial position of the *I'm Alone* was nearer the shore and within the conventional limits, and that her speed was much greater than the estimate given on the Canadian side.

The United States contended that under the general principles of international law, conventional limits must be deemed to be assimilated into territorial waters for the purpose of applying the doctrine of hot pursuit.

The United States alleged that the right of hot pursuit from any point within the conventional limits was a necessary inference from the terms of the Convention itself, and that otherwise, the rights purported to be conferred on the United States by the Convention would be largely illusory.

The United States took the view, on the question of the hot and continuous nature of the pursuit, that since the "Wolcott" was in pursuit throughout, from start to finish, the continuous nature of the pursuit was not affected by the fact that the "Wolcott" was subsequently joined by another vessel by whom the actual sinking was carried out.

The United States contended that the right in the last resort to sink a vessel, which refused to stop or to allow herself to be boarded, when hailed within the conventional limits, was a necessary implication of the terms of the Convention.

### **3. Reasoning of the Commissioners and Decision**

846. In their Joint Final Report of January 5, 1935, the Commissioners declared that they found as a matter of fact that, from September 1928 down to the date when she was sunk, the *I'm Alone*, although a British ship of Canadian registry, was *de facto* owned, controlled and, at the critical times, managed and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert, who were entirely, or nearly so, citizens of the United States. They employed her for the purpose of carrying intoxicating liquors from British Honduras designed for illegal introduction and sale in the territory of the United States. It was said that the possibility that one of the group of such persons might not have been of American nationality was regarded as of no importance in the circumstances of the case. The Commissioners declared that "in view of the facts, no compensation ought to be paid in respect of the loss of the ship or the cargo".

847. On the second question, that of hot pursuit from within conventional but not territorial waters, the Commissioners stated that they were not yet in agreement, nor had they reached disagreement. In view of their ultimate response to the third question confronting them, the Commissioners seemingly found it unnecessary in their Joint Final Report to answer the second question.

848. The third question was based upon the assumption that the United States had the right of hot pursuit in the circumstances and was entitled to exercise the right under Article II of the Convention at the time when the "Dexter" joined the "Wolcott" in the pursuit of the *I'm Alone*. The precise issue was "whether in the circumstances, the Government of the United States was legally justified in sinking the *I'm Alone*.

849. The Commissioners said that the "United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur accidentally, as the result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless". The Commissioners considered that the sinking of the vessel was not justified by anything in the Convention nor in any principle of international law. The Commissioners also recommended that the United States ought formally to acknowledge its illegality and to apologize to His Majesty's Canadian Government, therefore,

and further, that as a material amend in respect of the wrong, the United States should pay the sum of \$25,000 to His Majesty's Canadian Government.

### B. The M/V SAIGA Cases (Nos. 1 & 2)

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|-------------------------------|---|
| <b>Parties:</b>               | Guinea and Saint Vincent and the Grenadines   |
| <b>Issues:</b>                | Customs jurisdiction in the exclusive economic zone; hot pursuit; arrest; use of force; prompt release; provisional measures; reparation; financial security; costs   |
| <b>Forum:</b>                 | International Tribunal for the Law of the Sea (ITLOS)   |
| <b>Date of Decision:</b>      | <ul style="list-style-type: none"> <li>- <i>SAIGA</i> No. 1 (Prompt Release) - Judgment of 4 December 1997;</li> <li>- <i>SAIGA</i> No. 2 (Provisional Measures) - Order of 11 March 1998; (Merits) - Judgment of 1 July 1999</li> </ul>  |
| <b>Published in:</b>          | <ul style="list-style-type: none"> <li>- <u>ITLOS Reports of Judgments, Advisory Opinions and Orders</u> 1997, pp. 13-68 (prompt release)</li> <li>- <u>ITLOS Reports of Judgments, Advisory Opinions and Orders</u> 1998, pp. 24-68 (provisional measures)</li> <li>- <u>ITLOS Reports of Judgments, Advisory Opinions and Orders</u> 1999, pp. 10-25 (merits)</li> <li>- 37 <u>International Legal Materials</u> (1998), pp. 360-404 (prompt release); 38 <u>International Legal Materials</u> (1999), pp. 1323-1442 (merits)</li> <li>- <u>International Law Reports</u>, Vol. 110, p. 736 (prompt release); Vol. 117, p. 111 (provisional measures); Vol. 120, p. 143 (merits)</li> </ul>   |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- de La Fayette, L., "The M/V 'Saiga' (No. 2) Case (St.Vincent and the Grenadines v. Guinea) Judgement", 49 <u>International and Comparative Law Quarterly</u>, (2000), pp. 467-475</li> <li>- de La Fayette, L., "ITLOS and the Saga of the <i>Saiga</i>: Peaceful Settlement of a Law of the Sea Dispute", 15 <u>International Journal of Marine and Coastal Law</u> (2000), p. 355</li> <li>- Kwiatkowska, B., "Inauguration of the ITLOS Jurisprudence: The Saint Vincent and the Grenadines v. Guinea M/V Saiga Cases", 30 <u>Ocean Development and International Law</u>, (1999), pp. 43-77</li> <li>- Lowe, A.V., "The M/V Saiga: The First Case in the International Tribunal for the Law of the Sea", 48 <u>International and Comparative Law Quarterly</u>, (1999), pp. 187-199</li> <li>- Laing, E.A., "A perspective on provisional measures under UNCLOS", 29 <u>Netherlands Yearbook of International Law</u> (1998), pp. 45-70</li> </ul> |

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- Bellayer-Roille, A., "L'arrêt du tribunal international du droit de la mer du 1er juillet 1999: Affaire du navire *Saiga* n°2", 19 Annuaire de droit maritime et océanique (2001), pp. 111-157

## **I. The M/V *Saiga* (Case No. 1): Prompt Release**

### **1. Facts**

850. The *Saiga* was an oil tanker, provisionally registered in Saint Vincent and the Grenadines on 12 March 1997. A Permanent Certificate of Registration was issued on 28 November 1997 by the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines on behalf of that State. The Master and crew of the ship were all of Ukrainian nationality; there were also three Senegalese nationals employed as painters. The *Saiga* supplied gas oil (diesel) as bunker fuel and occasionally water to fishing and other vessels off the coast of West Africa.

851. On 27 October 1997, the *Saiga* supplied gas oil to three fishing vessels, two flying the flag of Senegal, and the third flying the flag of Greece. This occurred approximately 22 nautical miles from the Guinea island of Alcatraz. All three fishing vessels were licensed by Guinea to fish in its exclusive economic zone (EEZ). The *Saiga* then sailed in a southerly direction to supply gas oil to other fishing vessels at a pre-arranged place. It later changed course and sailed towards another location beyond the southern border of the EEZ of Guinea.

852. On 28 October 1997, the *Saiga* was south of the southern limit of the EEZ of Guinea, awaiting the arrival of fishing vessels to which it was to supply gas oil. It was attacked by a Guinean patrol boat, whose officers boarded the ship and arrested it. The ship and its crew were brought to Conakry, Guinea, where its Master was detained, while the travel documents of the members of the crew were taken by the authorities of Guinea and armed guards were placed on board the ship. On 1 November 1997, two injured persons from the *Saiga* were permitted to leave Conakry for Dakar for medical treatment. Between 10 and 12 November 1997, the cargo of gas oil on board the ship was discharged on the orders of the Guinean authorities. The Master and six crew members remained in Conakry until the ship was released on 28 February 1998, the other members of the crew having been released previously.

853. On 13 November 1997, an Application was filed with the Registrar of the Tribunal under article 292 of UNCLOS by Saint Vincent and the Grenadines for the prompt release of the *Saiga* and its crew.

## 2. Issues

### (a) Questions before the Tribunal

- (i) **Saint Vincent and the Grenadines** requested the Tribunal to determine that the vessel, her cargo and crew be released immediately without requiring that any bond be provided. However, Saint Vincent and the Grenadines declared itself prepared to provide any security reasonably imposed by the Tribunal to the Tribunal directly and asked that the Tribunal not determine that Saint Vincent and the Grenadines should provide any security to Guinea.
- (ii) **Guinea** declared that it had committed no illegal act and no violation of procedures; it sought to protect its rights. Therefore, Guinea requested the Tribunal to dismiss Saint Vincent and the Grenadines's action.

### (b) Arguments presented by the Parties

- (i) **Saint Vincent and the Grenadines** observed that under the Convention a coastal State was entitled to exercise limited and specific rights as a sovereign within its exclusive economic zone as prescribed in the Convention, in particular in article 56. In this regard, it was submitted that Guinea had erred in two respects:
  - First, Guinea had failed to comply with the relevant provisions for the prompt release of the vessel and her crew upon the posting of a reasonable bond or other financial security. Second, Guinea had wrongly purported to exercise sovereign jurisdiction within its exclusive economic zone beyond what is permitted by the Convention, with the effect that it had interfered with the rights of others in its exclusive economic zone, including those of the *Saiga* flying the flag of Saint Vincent and the Grenadines.

It was therefore submitted that the Tribunal determine that Guinea had failed to comply with the provisions of article 73(2) of UNCLOS by not promptly releasing the *Saiga* and her crew upon the posting of a reasonable bond or other security, no such reasonable bond or other security having even been sought.

It was further submitted that the Tribunal determine the amount, nature and form of bond or financial security to be posted for the release of the *Saiga* and her crew. Moreover Saint Vincent and the Grenadines submitted that it was also within the jurisdiction of the Tribunal to order that the *Saiga* be returned to her original state (i.e., with a cargo of gas oil on board) at the time of her prompt release and before any further bond or financial security was to be provided to secure her release.

- (ii) **Guinea** submitted that the Agent of Saint Vincent and the Grenadines was not authorized in accordance with article 110(2) of the Rules of the Tribunal and that it was doubtful whether Tabona Shipping Company Ltd. was the owner of the M/V *Saiga*.

It was also submitted that Article 73 of UNCLOS did not apply and there was no violation of this article by the Government of Guinea. Article 292 also did not apply. In Guinea's view, articles 292 and 73 (2) only applied if a reasonable bond or other financial security had been posted or at least had been offered to the detaining State by the State Party whose vessel has been detained, or by the owner of the vessel. No security or bond had been offered on behalf of the M/V *Saiga*.

Guinea further submitted that, if the Tribunal decided it had competence in the case, it should determine that the allegation made by Saint Vincent and the Grenadines was not well-founded. When arresting the M/V *Saiga* outside the limits of its jurisdiction, Guinea acted under article 111 of the Convention, exercising its right of hot pursuit.

### **3. Reasoning of the Tribunal**

#### **(a) Jurisdiction**

854. The Tribunal started by addressing the issue of jurisdiction. Firstly, it noted that Saint Vincent and the Grenadines and Guinea were both States Parties to UNCLOS. Secondly, it observed that under article 292 of UNCLOS an application could be submitted to the Tribunal failing agreement of the Parties to submit the question of release from detention to another court or tribunal within 10 days from the time of the detention. The Tribunal found that the Application had met that requirement.

855. The Tribunal then proceeded to address Guinea's submission that the Agent of Saint Vincent and the Grenadines was not authorized in accordance with article 110 (2) of the Rules of the Tribunal, and Guinea's doubts regarding the identity of the owner of the vessel. It was pointed out that pursuant to article 110 of the Rules of the Tribunal, an application for prompt release of a vessel and its crew could be made by or on behalf of the flag State of the vessel. In this regard, the Tribunal decided, since the Registrar of the Tribunal had received copies of the authorization by the authorities of Saint Vincent and the Grenadines and had ostensibly inspected it, to dismiss Guinea's objection. As far as the ownership of the vessel was concerned, the Tribunal noted that this question was not a matter for its deliberation under article 292 of UNCLOS. Moreover, Guinea had not contested that Saint Vincent and the Grenadines was the flag State of the vessel. The Tribunal therefore found that it had jurisdiction under article 292 to entertain the Application.

#### **(b) Admissibility**

856. The Tribunal proceeded to deal with the issue whether the Application was admissible in light of the other requirements set out in article 292 of UNCLOS. Article 292 (3) in fact required that proceedings be conducted and concluded "without delay" and that domestic proceedings and other international proceedings be taken into consideration. It was recalled that the Rules of the Tribunal, in particular article 112, gave effect to the provision that applications for release be dealt with without delay.

857. In regard to the relationship of the proceedings under article 292 of UNCLOS to domestic proceedings, the Tribunal considered that article 292, paragraphs 3 and 4, had to be read together to the effect that the States which were Parties to the proceedings before the Tribunal were bound by its judgment insofar as the release of the vessel and the bond or other security were

concerned. The domestic courts of the States concerned, in considering the merits of the case, were not bound by any findings of fact or law that the Tribunal may have made in order to reach its conclusions.

858. The Tribunal further explained that the independence of proceedings under article 292 of UNCLOS vis-à-vis other international proceedings emerged from article 292 itself and from the Rules of the Tribunal (section E, Part III). Under those provisions, the proceedings for prompt release were clearly not incidental to proceedings on the merits. They were separate, independent proceedings. The Tribunal decided that it was not precluded from considering the aspects of the merits it deemed necessary in order to reach its decision on the question of release, but it had to do so with restraint.

859. The Tribunal proceeded to set the standard of appreciation of the allegations of the Parties. In view of the possibility that the merits of the case might be submitted to an international court or tribunal, and of the accelerated nature of the prompt release proceedings, the Tribunal considered appropriate an approach based on assessing whether the allegations made are arguable or are of a sufficiently plausible character in the sense that the Tribunal may rely upon them for the present purposes. By applying such a standard, the Tribunal did not foreclose that if a case were presented to it requiring full examination of the merits it would reach a different conclusion.

860. As regards the requirement of alleged non-compliance with the provisions of UNCLOS for the prompt release of vessels upon the posting of a reasonable bond or other financial security, the Tribunal considered the question of the applicability of article 73.

861. In this connection, the Tribunal considered the issue whether “bunkering” (refuelling) of a fishing vessel within the exclusive economic zone of a State should be considered as an activity the regulation of which fell within the scope of the exercise by the coastal State of its sovereign rights in the exclusive economic zone. If this were the case, violation of a coastal State’s rules concerning such bunkering would amount to a violation of the laws and regulations adopted for the regulation of fisheries and other activities concerning living resources in the exclusive economic zone. The arrest of a vessel and crew allegedly violating such rule would fall within the scope of article 73(1) of UNCLOS and the prompt release of the vessel and crew upon the posting of a reasonable bond or other security would be an obligation of the coastal State under article 73(2). In case such prompt release was not effected by the coastal State, article 292 could be invoked.

862. The Tribunal stated that arguments could be advanced both in support of and against the qualification of “bunkering of fishing vessels” as an activity the regulation of which could be assimilated into the regulation of the exercise by the coastal State of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone. In this regard, the Tribunal decided that it was not necessary to come to a conclusion as to which of these two approaches was better founded in law. For the purpose of the admissibility of the application for prompt release of the M/V *Saiga* it was sufficient to note that non-compliance with article 73 (2) of UNCLOS had been “alleged” and to conclude that the allegation was arguable or sufficiently plausible.

863. In the opinion of the Tribunal, Guinea's allegation based on the right of hot pursuit did not meet the same requirements of arguability as the contention considered above. In fact, the arguments put forward in order to support the existence of the requirements for hot pursuit and, consequently, for justifying the arrest, were not tenable, even *prima facie*. Although the Tribunal did not consider itself to be called upon to decide whether the arrest of the M/V *Saiga* was legitimate, it believed it had to determine whether the detention consequent to the arrest was in violation of a provision of UNCLOS "for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security".

864. Having established that the allegation by Guinea that the infringement by the M/V *Saiga* took place in the contiguous zone and that the vessel was captured legitimately after hot pursuit in accordance with article 111(1) of UNCLOS was not supported by sufficient evidence, the Tribunal concluded that, for the purposes of the present proceedings, Guinea's action could nevertheless be seen within the framework of article 73 of UNCLOS.

865. The main provisions that the Tribunal considered to be relevant, in order to reach that conclusion, were those upon which the authorities of the detaining State relied at the time of arrest: article 40 of the Maritime Code and Law 94/007/CTRM of 25 March 1994, which prohibits unauthorized import, transport and distribution of fuel in the Republic of Guinea (article 1). From the pleadings and documents submitted by Guinea indications emerge that the violation of which the M/V *Saiga* was accused was seen as a violation concerning its rights in the exclusive economic zone. In this connection it was also recalled that Guinea, in rejecting in its pleadings the argument of Saint Vincent and the Grenadines that article 73 applied, did not challenge directly the applicability of article 73 but rather confined itself to the argument that a bond had not been posted or offered.

866. The Tribunal explained that it preferred using the argument based on the provisions of article 73 of UNCLOS rather than that put forward by Guinea, based on article 111 of UNCLOS because, given the choice between a legal classification that implied a violation of international law and one that avoided such implication, it opted for the latter.

867. Guinea's subsidiary argument that it arrested the vessel in compliance with Security Council Resolution 1132(1997) of 8 October 1997 was dismissed.

868. To conclude, the Tribunal had to consider the submission of Guinea that article 73 of UNCLOS could not form a basis for the Application because a bond or other security had not been offered or posted.

869. The Tribunal considered that in order to invoke article 292 it was not necessary that the posting of a bond or other security be effected in fact, even when UNCLOS provided for the infringement which was the basis for the application. Thus, an infringement of article 73 (2) of UNCLOS was possible even when no bond had been posted.

870. In any event, in the case under consideration Guinea had not notified regarding the detention, as provided for in article 73 (4) of UNCLOS; it had refused to discuss the question of a bond and the 10-day time-limit relevant for the application for prompt release had elapsed without indication of any willingness to consider the question. Under these circumstances, the Tribunal could not hold Saint Vincent and the Grenadines responsible for the fact that a bond had not been posted.

871. For the above reasons, the Tribunal found that the application was admissible, that the allegations made by Saint Vincent and the Grenadines were well-founded for the purposes of the proceedings and that, consequently, Guinea was under an obligation to release promptly the M/V *Saiga* and the members of its crew currently detained or otherwise deprived of their liberty.

872. Such release had to be effected upon the posting of a reasonable bond or other financial security. In this regard the Tribunal did not support the request of Saint Vincent and the Grenadines that no bond or financial security (or only a “symbolic bond”) should be posted.

#### (c) Reasonableness of the bond: form and amount

873. According to article 113 (2) of the Rules of the Tribunal, the Tribunal then proceeded to determine the amount, nature and form of the bond or financial security to be posted, which had to be “reasonable”, as required by article 292, paragraph 1, of UNCLOS. In the opinion of the Tribunal, the criterion of reasonableness encompasses the amount, form and nature of the bond or financial security.

874. It was reasonable, in the view of the Tribunal, to consider the gas oil discharged by Guinea as a security to be held and, as the case may be, returned by Guinea, in kind or in its equivalent in United States dollars at the time of judgment. The Tribunal also considered reasonable that to this security there should be added a financial security in the amount of four-hundred-thousand (400,000) United States dollars, to be posted in accordance with article 113 (3) of the Rules of the Tribunal, in the form of a letter of credit or bank guarantee, or, if agreed by the Parties, in any other form.

### 4. Decision

875. On 4 December 1997, the Tribunal delivered its Judgment (*Saiga* case no. 1).

- a) The Tribunal found unanimously that it had jurisdiction under article 292 of UNCLOS to entertain the Application filed by Saint Vincent and the Grenadines on 13 November 1997.
- b) By 12 votes to 9 the Tribunal decided that the application was admissible;
- c) By 12 votes to 9 the Tribunal ordered that Guinea promptly release the *Saiga* and its crew upon the posting of a reasonable bond or security by Saint Vincent and the Grenadines;
- d) The Tribunal decided the security should consist of the gas oil discharged from the *Saiga* by the authorities of Guinea plus an amount of US\$ 400,000 to be posted in the form of a letter of credit or bank guarantee or, if agreed by the Parties, in any other form.

### 5. Dissenting Opinions

876. **President Mensah** was not able to concur with the reasoning and conclusions of the Tribunal that the application was admissible and that Guinea had to promptly release the *Saiga* and its crew from detention. As he did not agree that this was a case in which an order of the Tribunal for the prompt release of the vessel or its crew under article 292 of UNCLOS was justified, he could not support the decision to order the Applicant to post a bond or security for such release nor the determination of the amount, nature and form of the security.

877. He agreed with the dissenting opinions of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye. He also agreed with the dissenting opinion of Judge Anderson and in particular with the view therein contained that proceedings under article 292 of UNCLOS are not preliminary or incidental but definitive proceedings in which a court or tribunal is required to decide whether a case has been made that the allegation of non-compliance is well-founded. He also endorsed the reasoning and conclusions contained in the dissenting opinion of Vice-President Wolfrum and Judge Yamamoto. In particular, he agreed with their views concerning the unwarranted *obiter dictum* in the Judgment on the issue whether “bunkering of a fishing vessel is an activity the regulation of which falls within the competence of the coastal States when exercising their sovereign rights concerning exploration, exploitation, conservation or management of living marine resources of the exclusive economic zone.”

878. He fully concurred in the opinion of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye that the Tribunal could not order the prompt release of an arrested vessel under article 292 merely on the “allegation” of the flag State that the detaining State has not complied with a provision of UNCLOS for prompt release upon the posting of a bond. Therefore, he agreed with their conclusion that the allegation of Saint Vincent and the Grenadines, that Guinea had failed to comply with the provisions of article 73 of UNCLOS was not well-founded.

879. He carefully examined the reasons given by the Judgment for the conclusion that the *Saiga* was arrested for contravening the fisheries laws of Guinea and not for contravening its customs laws, as submitted by Guinea, but he was not able to accept them. In particular, he did not consider that the importance attached to article 40 of the Maritime Code of Guinea in reaching that conclusion was justified.

880. All the ascertainable facts surrounding the arrest of the *Saiga* by the customs authorities of Guinea pointed to the fact that those actions were indeed based on a particular law or laws which the officials concerned considered, rightly or wrongly, to be applicable to the situation. Accordingly it was, in his view, not right for the Tribunal to declare that laws on which they clearly based themselves in arresting the vessel did not in fact form the basis of their actions. He considered it even less justifiable for the Tribunal to decide that other laws of Guinea should be deemed to have been the laws which were in fact being applied.

881. President Mensah reached two conclusions. The first was that the Tribunal was claiming the right, not only to disregard completely the choice of law which a State had, clearly in good faith (whether or not justifiably), made in taking its actions, but actually to determine the laws on which the State should have based itself, solely on the grounds that the Tribunal considers that the laws preferred by it would be more likely to justify the actions of the State under international law than those upon which the State itself decided to base its actions.

882. The second conclusion to be drawn dealt with the preference expressed by the Tribunal for the classification of the arrest of the *Saiga* as falling under article 73 and the characterization of the action as “smuggling” by Guinea. The Tribunal was clearly implying that the classification of bunkering as a customs offence was a violation of international law, whereas the classification of bunkering as coming under article 73 avoided such an implication.

883. In President Mensah’s view it was not appropriate for the Tribunal to pronounce itself, even by implication, on an issue of such fundamental importance as the scope and extent of

coastal State legislation for fisheries control in the exclusive economic zone permissible under article 73 of the Convention. That question was not at issue in the present case, either in specific or general terms.

884. In the Judgment, the Tribunal had chosen to disregard completely the charges which Guinea had made against the *Saiga* right from the very beginning of the case. Instead, the Tribunal substituted a basis for the accusation against the *Saiga* which had not been used or even alluded to by any of the officials in Guinea. In the view of President Mensah this amounted to the Tribunal arrogating to itself a power and competence which it did not have and did not need to have in order to discharge its mandate.

885. **Vice-President Wolfrum and Judge Yamamoto** did not agree with operative paragraphs 2 to 5 of the Judgment. They questioned whether article 292 of UNCLOS had been properly invoked by Saint Vincent and the Grenadines. In accordance with article 113 of its Rules, the Tribunal had to determine whether or not the allegation made by the applicant that the detaining State had not complied with a provision of UNCLOS for the prompt release of the vessel or the crew was well-founded.

886. They did not consider that a mere allegation that the detaining State had not complied with the provisions of article 73 of UNCLOS would satisfy the condition for the application of UNCLOS, article 292. A genuine connection between the detention of the vessel and its crew and the laws and regulations of the detaining State relating to article 73 had to be established by Saint Vincent and the Grenadines. Without such a connection, the Tribunal had to conclude that the allegation that Guinea had failed to comply with article 73 was unfounded.

887. In this regard, they had serious reservations with the approach of the so-called “standard of appreciation” used in the Judgment (i.e., it was sufficient that the allegations made were “arguable” or “sufficiently plausible”). They were concerned that the Judgment, by defining the “standard of appreciation”, was likely to transform the procedure under UNCLOS article 292 into one which was similar to a procedure for provisional measures (UNCLOS article 290).

888. They also pointed out that the “standard of appreciation” adopted by the Judgment had, in reality, the effect of vesting Saint Vincent and the Grenadines with the right to determine how the measures of Guinea were to be characterized. This was difficult to reconcile with the principle that it is, first of all, for the State concerned itself to decide upon the characterization of its laws and regulations and the measures taken thereunder.

889. Saint Vincent and the Grenadines had not established, in their opinion, that the *Saiga* was arrested on the basis of laws and regulations of Guinea within the meaning of UNCLOS article 73(2). It was not relevant whether Guinea could have or even should have invoked a different national legal basis for its action. It was neither for Saint Vincent and the Grenadines nor for the Tribunal to determine the course of action of Guinea.

890. They therefore came to the conclusion that the connection between the detention of the *Saiga* and the laws and regulations of the Respondent relating to UNCLOS article 73 had not been sufficiently established and, accordingly, that the allegation should have been dismissed.

891. They went on to note that the Judgment took no position on the so-called non-restrictive interpretation of UNCLOS article 292. They underlined that according to a purely textual analysis of article 292 the procedure applied only where the Convention contained specific provisions concerning the prompt release of vessels. Article 292 constituted a unique procedure -

a special case of interference with the coastal State's judicial authorities - which must as a consequence be interpreted with caution and restraint. The restrictive nature of the procedure was further mirrored in a significant limitation of the jurisdictional power of the Tribunal which precluded it, when deciding upon the question of prompt release, from going into the merits (article 292(3)), this aspect being left for the appropriate domestic forum to decide upon.

892. Other concerns prompting their dissent were some of the arguments contained in the Judgment concerning the question whether bunkering of a fishing vessel is an activity the regulation of which fell within the competence of coastal States when exercising their sovereign rights concerning exploration, exploitation, conservation or management of the living resources of the exclusive economic zone. Although the Judgment qualifies the respective considerations as an *obiter dictum*, its findings implied that regulations concerning the bunkering of fishing vessels in the exclusive economic zone were covered by the respective competences of the coastal States referred to.

893. From a purely textual analysis, they doubted whether services rendered to fishing vessels fell under "the laws and regulations" referred to in UNCLOS article 73(1), which were qualified in paragraph 3 of the same provision as "fisheries laws and regulations". It was a matter of concern for the two Judges that this issue was addressed in the Judgment in general terms, outside its proper context, in a procedure under article 292 of UNCLOS and without the case calling for it to do so, since the arguments advanced might prejudice future decisions of the Tribunal.

894. **Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye** were unable to concur in all the conclusions of the Tribunal in operative paragraphs 2 to 5 of the Judgment. In their view, the principal point to be considered by the Tribunal in deciding on the Application was whether it fell within the ambit of UNCLOS article 292.

895. Undoubtedly, if article 73 were applicable, article 292 could be invoked as a basis of the allegation referred to therein. Recalling the conditions contained in article 292(1), for an order for the prompt release of an arrested vessel or its crew to be made by the Tribunal, it had to be determined whether Saint Vincent and the Grenadines had made an allegation that Guinea had not complied "with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security." Only if the Tribunal concluded that the allegation of Saint Vincent and the Grenadines was well-founded, would it be competent to order the release of the vessel or its crew upon the posting of a reasonable bond or other financial security, as provided for in article 292.

896. Article 113, paragraph 1, of the Rules of the Tribunal also required the Tribunal to "determine" that the allegation was "well-founded." Therefore, a mere allegation that the detaining State had not complied with the provisions of article 73 was not sufficient. A direct connection had to be established between the allegation and the actions of the coastal State in the application of article 73. Without such a connection, the Tribunal must conclude that the allegation was not "well-founded". The burden of proof lay on Saint Vincent and the Grenadines. Furthermore, the determination of the Tribunal must be based on an examination of facts submitted by the Parties and not independently of them.

897. In their view, the Application did not satisfy the requirements of article 292 of UNCLOS and of article 113(1) of the Rules of the Tribunal. In fact, there was no evidence that the actions taken by the authorities of Guinea against the *Saiga* were under the laws and regulations of

Guinea concerning the exploration, exploitation, management and conservation of marine living resources or the prevention of illegal fishing. The Respondent had from the very outset clearly and consistently maintained that the *Saiga* was arrested for the offence of smuggling in the sense of illegally supplying oil to fishing vessels in contravention of its customs legislation.

898. Saint Vincent and the Grenadines did not explain how Guinea had not complied with the provisions of article 73. No evidence was produced that the authorities of Guinea had proceeded against the vessel as part of an anti-bunkering operation to protect fish stocks in the EEZ of Guinea.

899. On the other hand, Guinea had denied that it had taken the measures under UNCLOS article 73 (1). In fact, it had consistently submitted that it had proceeded against the *Saiga* on account of an act of smuggling under the relevant Guinean laws and that, although the arrest took place outside its waters, it was a valid arrest because it was an exercise by the Guinean authorities of the right of hot pursuit in accordance with UNCLOS article 111(1).

900. If Guinea thought that its action was connected with the enforcement of its customs laws, its case on the merits before the court or tribunal competent to hear the case would stand or fall on that basis.

901. In the Judges' opinion, it was neither necessary nor appropriate for the Tribunal to comment on the validity or otherwise of Guinean actions under international law or to advise Guinea on how it might defend its actions under international law. Accordingly, they concluded that the allegation of Saint Vincent and the Grenadines that Guinea had failed to comply with article 73 of UNCLOS was not "well-founded."

902. Saint Vincent and the Grenadines further argued that the detention of the *Saiga* had contravened UNCLOS article 56(2). In as much as the actions of the Respondent had no connection with article 73, they considered it necessary to examine the contention that contravention of UNCLOS article 56 would be an appropriate basis for an Application to the Tribunal under article 292.

903. They were unable to accept this argument on the basis of article 292, which clearly only applied where the Convention contained specific provisions concerning the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security.

904. For all these reasons, the Judges were unable to accept the request of Saint Vincent and the Grenadines and they declared that the Application filed by Saint Vincent and the Grenadines was not admissible under article 292 of the Convention.

905. **Judge Anderson** did not agree with operative paragraphs 2 to 5 of the Judgment. In his opinion the task of the Tribunal, in accordance with the terms of that article and article 113 (1) of its Rules, was to "determine whether or not the allegation made by the Applicant that the detaining State has not complied" with, in this case, the provision contained in article 73 (2) "for the prompt release of the vessel or its crew upon the posting of a reasonable bond ... is well-founded."

906. In Judge Anderson's view, the majority's approach in respect of the standard of appreciation was mistaken, since the Tribunal's limited jurisdiction was exclusive the normal standard of appreciation should apply.

907. Judge Anderson stated that proceedings under article 292 formed a discrete case, not a first phase in a case which proceeds on to the merits. Such proceedings were not preliminary or incidental and, in accordance with the Rules of the Tribunal, they concluded, not with an order, but with a judgment. They were definitive proceedings in which the court or tribunal had to decide whether Saint Vincent and the Grenadines' initial allegation was well-founded or not.

908. In his opinion, the charges against the *Saiga* could not properly be characterised as falling within the ambit of article 73. In the first place, the *Saiga* was a tanker and off-shore support vessel, not a fishing vessel. Secondly, before the Tribunal, Guinea had explained the arrest in terms of smuggling, contraband and the importance to its national economy of safeguarding customs revenues from petroleum products. Most importantly, the charges set out in the Procès-Verbal issued by the customs authorities had been laid under legislation dealing with smuggling. There was insufficient justification in this case for changing Guinea's own description of the charges from smuggling to fisheries offences.

909. Judge Anderson's overall conclusion was that the *Saiga* was not an "arrested vessel" within the meaning of article 73(2). Since no other article of the Convention was applicable, it followed that the Saint Vincent and the Grenadine's allegation was not well-founded within the meaning of article 113 of the Rules, and that there was an insufficient basis in law for the decision concerning the release of the vessel under article 292(4).

910. He explained that since article 292 represented a self-contained, special procedure, separate from the other provisions for the settlement of disputes contained in Part XV of the Convention, his dissenting opinion should not be taken as expressing any opinions whatsoever on the merits of those issues, which may still be the subject of further proceedings before a court or tribunal under Part XV of the Convention.

## II. The M/V *Saiga* (Case No. 2)

### A. Provisional Measures

#### 1. Facts

911. Notwithstanding the Judgment of the Tribunal in the *Saiga* Case No. 1, criminal proceedings were subsequently instituted by the Guinean authorities against the Master before the Tribunal of First Instance in Conakry. Additionally, Saint Vincent and the Grenadines was named as civilly responsible. The Tribunal of First Instance in Conakry found the Master guilty of the crimes of contraband, fraud and tax evasion. It imposed on him a fine and ordered the confiscation of the vessel and its cargo as a guarantee for payment of the penalty. The Master appealed to the Court of Appeal against his conviction, and was found guilty of the offence of "illegal import, buying and selling of fuel in the Republic of Guinea". The Court imposed a suspended sentence of six months imprisonment on the Master, as well as a fine, and ordered that he bear the costs of all fees and expenses. The Court of Appeal also ordered the confiscation of the cargo and the seizure of the vessel as a guarantee for payment of the fine.

912. On 13 January 1998, Saint Vincent and the Grenadines filed with the Registrar of the Tribunal a request for the prescription of provisional measures in accordance with article 290 of UNCLOS pending the constitution of an Annex VII arbitral tribunal concerning the arrest and detention of the vessel *Saiga*. Furthermore, by a letter dated 20 February 1998, Guinea notified the Tribunal of the Exchange of Letters of the same date (hereinafter “the 1998 Agreement”) constituting an agreement between Guinea and Saint Vincent and the Grenadines, both of which are Parties to UNCLOS, to transfer the pending arbitration proceedings, previously instituted by Saint Vincent and the Grenadines, to the International Tribunal for the Law of the Sea.

## 2. Issues

### (a) Questions before the Tribunal

Whether to adopt provisional measures.

### (b) Arguments presented by the Parties

913. (i) **Saint Vincent and the Grenadines** requested the Tribunal to adopt provisional measures aimed at bringing forthwith into effect the measures necessary to comply with the Judgment of the International Tribunal for the Law of the Sea of 4 December 1997. In particular it requested that Guinea: release the *Saiga* and her crew; suspend the application and effect of the Judgment of 17 December 1997 of the Tribunal de Première Instance of Conakry and/or the Judgment of 3 February 1998 of the Cour d’Appel of Conakry; cease and desist from enforcing, directly or indirectly, the Judgment of 17 December 1997 and/or the Judgment of 3 February 1998 against any person or governmental authority; cease and desist from applying, enforcing or otherwise giving effect to its laws on or related to customs and contraband within the exclusive economic zone of Guinea or at any place beyond that zone against vessels registered in Saint Vincent and the Grenadines and engaged in bunkering activities in the waters around Guinea outside its 12-mile territorial waters.

914. It was further requested that Guinea cease and desist from interfering with the rights of vessels registered in Saint Vincent and the Grenadines, including those engaged in bunkering activities, to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to freedom of navigation as set forth in articles 56(2) and 58 and related provisions of UNCLOS; and to cease and desist from undertaking hot pursuit of vessels registered in Saint Vincent and the Grenadines, including those engaged in bunkering activities, except in accordance with the conditions set forth in UNCLOS article 111, including in particular the requirement that such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted.

915. (ii) **Guinea** requested the Tribunal to declare that the request of Saint Vincent and the Grenadines for the prescription of provisional measures as per number 52 of the reply of Saint Vincent and the Grenadines of 13 February 1998 or in a possible later revised draft should be rejected in total. Furthermore, the Tribunal was asked to adjudge and declare that Saint Vincent and the Grenadines must pay the costs for the proceedings which have been held as a

consequence of the request of Saint Vincent and the Grenadines for the prescription of provisional measures.

### **3. Reasoning of the Tribunal**

916. The Tribunal noted that the Parties disagreed as to whether the Tribunal had jurisdiction. According to Saint Vincent and the Grenadines, the Tribunal had jurisdiction under UNCLOS article 297(1), and, according to Guinea, the Request of Saint Vincent and the Grenadines concerned a dispute covered by UNCLOS article 297(3(a)) and was not subject to the jurisdiction of the Tribunal. The Tribunal concluded that, on one hand, it did not need to satisfy itself that it had jurisdiction on the merits of the case. On the other, it could not prescribe such measures unless the provisions invoked by the Applicant appeared *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded. It concluded that article 297 (1), invoked by Saint Vincent and the Grenadines, appeared *prima facie* to afford a basis for the jurisdiction of the Tribunal.

917. The Tribunal considered the fact that after it began its deliberations on the present Order, it was informed by letter dated 4 March 1998 sent on behalf of the Agent of Saint Vincent and the Grenadines that the *Saiga* had been released. In addition, the information received from the Parties confirmed that the *Saiga*, its Master and crew had been released in execution of the Tribunal's Judgment of 4 December 1997. The Tribunal concluded that, following the release of the vessel and its crew, the prescription of a provisional measure for their release would serve no purpose.

918. The Tribunal considered that the rights of the Applicant would not be fully preserved if judicial or administrative measures were taken against the vessel, its crew, its owners or operators, and that the parties should make every effort to prevent aggravation or extension of the dispute. The Tribunal noted that, in accordance with article 89, paragraph 5, of the Rules it could prescribe measures different in whole or in part from those requested.

### **4. Decision**

919. On 11 March 1998, the International Tribunal for the Law of the Sea delivered its unanimous Order prescribing provisional measures concerning the continued detention of the *Saiga* and its crew, and the possibility of further actions against them and other vessels registered in Saint Vincent and the Grenadines in accordance with article 290, paragraph 1, of UNCLOS. The Order:

- a) prescribed that Guinea should refrain from taking or enforcing any judicial or administrative measures against the *Saiga*, its Master and the other members of the crew, its owners or operators, in connection with the incidents leading to the arrest and detention of the vessel on 28 October 1997 and to the subsequent prosecution and conviction of the Master;
- b) recommended that Saint Vincent and the Grenadines and Guinea endeavour to find an arrangement to be applied pending the final decision. To this end, the two States were to ensure that no action was taken by their respective authorities or vessels flying their flag which might aggravate or extend the dispute submitted to the Tribunal; and

- c) reserved for consideration in its final decision the submission made by Guinea for costs in the present proceeding.

## 5. Declarations, Separate Opinion

### (a) Declarations

920. **Judge Vukas** disagreed with the decision of the Tribunal to formulate the second part of its order for provisional measures as a recommendation. In fact under all the rules on provisional measures in the Convention (article 290), the Statute of the International Tribunal was not entitled to take any other decisions, or make any suggestions or recommendations, besides the prescription of provisional measures. He also underlined that, while Parties to the dispute were under an obligation to comply with the prescribed measure, the legal nature of the measures recommended by the Tribunal was unclear.

921. In relation to the request of the Tribunal that the parties submit reports on their compliance with the Order, he highlighted the vagueness of such request. The Tribunal in fact was entitled to request reports only in respect of compliance with provisional measures and not with recommendations.

922. **Judge Warioba** voted in favour of the provisional measures ordered by the Tribunal with some hesitation because he considered them to be unnecessarily wide and going beyond the circumstances and the Request of Saint Vincent and the Grenadines.

923. In particular he was disturbed by the way in which the Tribunal had used its discretion to prescribe measures different in whole or in part from those requested. This discretion was available to the Tribunal, but should have been exercised only in situations when there were compelling reasons borne out by facts. The circumstances of this case lacked that criterion.

### (b) Separate Opinion

924. In his separate opinion **Judge Laing** explained his position on several aspects of the case in view of the novelty of article 290 and the differences between the provisions on prescription of provisional measures in the Convention and those of the Statute of the International Court of Justice. In his opinion it was important that these differences, and related matters, be addressed early in the Tribunal's life.

925. He undertook a detailed analysis of issues relating to, *inter alia*, the appropriateness of the measures prescribed, the preconditions for prescription of measures (e.g. issues of jurisdiction) and the circumstances justifying measures (e.g., the circumstance of preservation of the respective rights of the parties, the various paraphrases of the preservation circumstance and the circumstance of prevention of serious harm to the marine environment).

926. He reached the conclusion that the Tribunal had taken a careful step, ordering a provisional measure only on the possible application of judicial or administrative measures relating to the vessel's arrest and detention and the master's subsequent prosecution and conviction. The particular right which was the subject of prescription was the non-application of laws and state action thereunder which, although apparently valid under domestic law, would, if applied, seem to be inconsistent with the Convention and international law.

927. In relying on article 290, paragraph 1, of the Convention, the Tribunal had solely prescribed the measure designed to preserve such right. The Tribunal decided to consider that the function of non-aggression/non-extension measures was a completely subsidiary aspect of the institution of protection of rights. While he agreed with that approach, in his view the Tribunal showed excessive caution in not categorically prescribing measures of non-aggression/non-extension, even if that entailed mandating specific actions that the parties should take. That could have been achieved, even without “prescribing” a measure, with language less tentative than that of a recommendation.

## B. Merits

### 1. Facts

928. A request for the prompt release of the ship *Saiga* and its crew from detention was the subject of the first judgment of the Tribunal on 4 December 1997. The second *Saiga* case concerned a dispute between Saint Vincent and the Grenadines and Guinea arising from the arrest and detention of the vessel *Saiga* by Guinean authorities. The dispute was originally submitted by Notification of 22 December 1997 to an arbitral tribunal to be constituted in accordance with Annex VII to UNCLOS. The Parties subsequently agreed (1998 Agreement), to transfer the dispute to the Tribunal. During the first phase of the second case, Saint Vincent and the Grenadines requested the Tribunal to prescribe provisional measures pending the constitution of an UNCLOS Annex VII arbitral tribunal. The second phase of the case consisted of the dispute on the merits and dealt with the interpretation and application of UNCLOS. The parties raised a number of questions covering a wide range of issues relating to activities in the 200-mile exclusive economic zone.

### 2. Issues

#### (a) Questions before the Tribunal

- (i) **Saint Vincent and the Grenadines** requested that the Tribunal adjudge and declare that: the actions of Guinea violated its right and the right of vessels flying its flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea, as set forth in articles 56(2) and 58 and related provisions of UNCLOS; that the customs and contraband laws of Guinea should in no circumstances have been applied or enforced in the EEZ of Guinea; that Guinea did not lawfully exercise the right of hot pursuit under article 111 of UNCLOS in respect of the *Saiga*, and was liable to compensate the *Saiga* according to article 111(8) of UNCLOS; that Guinea had violated articles 292(4) and 296 of UNCLOS in not releasing the *Saiga* and her crew immediately upon the posting of the guarantee of US\$400,000 on 10 December 1997 or upon the subsequent clarification from Crédit Suisse on 11 December 1997; that the citing of Saint Vincent and the Grenadines in proceedings instituted by the Guinean authorities in the criminal courts of Guinea in relation to the *Saiga* violated the rights of Saint Vincent and the Grenadines under UNCLOS; that Guinea should immediately repay to Saint Vincent and the Grenadines the sum realized on the sale of the cargo of the *Saiga* and return the bank guarantee provided by Saint Vincent and the Grenadines; that Guinea should pay damages as a result of such violations with

interest thereon; and that Guinea should pay the costs of the arbitral proceedings and the costs incurred by Saint Vincent and the Grenadines.

- (ii) **Guinea** asked the Tribunal to adjudge and declare that: the claims of Saint Vincent and the Grenadines were dismissed as non-admissible and thus Saint Vincent and the Grenadines should pay the costs of the proceedings and the costs incurred by Guinea. Alternatively, that the actions of Guinea did not violate the right of Saint Vincent and the Grenadines and of vessels flying her flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea, as set forth in articles 56 (2) and 58 and related provisions of UNCLOS; that Guinean laws could be applied for the purpose of controlling and suppressing the sale of gas oil to fishing vessels in the customs radius according to article 34 of the Customs Code of Guinea; that Guinea did lawfully exercise the right of hot pursuit under article 111 of UNCLOS in respect to the *Saiga* and was not liable to compensate the *Saiga* according to article 111 (8) of UNCLOS; that Guinea had not violated articles 292 (4) and 296 of UNCLOS; that the mentioning of Saint Vincent and the Grenadines in Guinea's National Courts did not violate the rights of Saint Vincent and the Grenadines under UNCLOS; that Guinea was not under an obligation to immediately return to Saint Vincent and the Grenadines the equivalent in United States dollars of the discharged gas oil; that Guinea had no obligation to pay damages to Saint Vincent and the Grenadines; and that Saint Vincent and the Grenadines should pay the costs of the proceedings and the costs incurred by Guinea.

## **(b) Arguments presented by the Parties**

### **(i) Saint Vincent and the Grenadines**

#### Challenges to admissibility

929. In response to Guinea's challenges to the admissibility of the claims set out in the Application, Saint Vincent and the Grenadines objected that Guinea did not have the right to raise any challenges to admissibility. The terms of the 1998 Agreement, whose provisions permitted Guinea to raise only the objection to jurisdiction and precluded objections to admissibility, were recalled in support of these contentions. Besides, it was further argued that Guinea had lost the right to raise objections to admissibility because it had failed to meet the time-limit of 90 days.

930. *The registration of the Saiga.* Guinea's assertion that the expiry of the Provisional Certificate of Registration implied that the ship was not registered or that it had lost the nationality of Saint Vincent and the Grenadines was disputed on the basis of a number of provisions of its Merchant Shipping Act. Under that Act, the Provisional Certificate remained in force after 12 September 1997 and at all times material to the present dispute.

931. *Genuine link.* Saint Vincent and the Grenadines believed that nothing in UNCLOS supported the contention that the existence of a genuine link between a ship and a State was a necessary precondition for the grant of nationality to the ship, or that the absence of such a genuine link deprived a flag State of the right to bring an international claim against another State in respect of illegal measures taken against the ship. The assertion of Guinea that there was no genuine link between the *Saiga* and Saint Vincent and the Grenadines was also challenged.

Several elements were put forward as evidence of this link: the owner of the *Saiga* was represented in Saint Vincent and the Grenadines by a company formed and established in that State; the *Saiga* was subject to the supervision of the Vincentian authorities to secure compliance with a number of international conventions of the International Maritime Organization, to which Saint Vincent and the Grenadines was a party; arrangements had been made to secure regular supervision of the vessel's seaworthiness through surveys, on at least an annual basis.

932. *Exhaustion of local remedies.* Saint Vincent and the Grenadines challenged the objection of Guinea and pointed out that the rule on the exhaustion of local remedies did not apply in the present case, since the actions of Guinea against the *Saiga* violated its rights as a flag State under UNCLOS, including the right to have its vessels enjoy the freedom of navigation and other internationally lawful uses of the sea related to that freedom, as set out in articles 56 and 58 and other provisions of UNCLOS.

933. It was further contended that the rule that local remedies must be exhausted applied only where there was a jurisdictional connection between the State against which a claim is brought and the person in respect of whom the claim is advanced. This connection was absent in the present case because the arrest of the ship took place outside the territorial jurisdiction of Guinea and the ship was brought within the jurisdiction of Guinea by force, after an alleged hot pursuit that did not satisfy the requirements set out in UNCLOS. In fact, the activity engaged in by the *Saiga* did not affect matters over which Guinea has sovereign rights or jurisdiction within the EEZ pursuant to article 56 of UNCLOS. Accordingly, the presence of the *Saiga* in the EEZ did not establish a jurisdictional connection with Guinea.

934. Finally, Saint Vincent and the Grenadines argued that there were no local remedies which could have been exhausted by the persons who suffered damages as a result of the measures taken by Guinea against the *Saiga*. In any case, such remedies, if any, were not effective.

935. *Nationality of claims.* In opposing Guinea's objection, Saint Vincent and the Grenadines maintained that the rule of international law that a State is entitled to claim protection only for its nationals did not apply to claims in respect of persons and things on board a ship flying its flag. As flag State of the *Saiga*, Saint Vincent and the Grenadines had the right to bring claims in respect of violations against the ship and all persons on board or interested in its operation.

#### Arrest of the *Saiga*

936. Saint Vincent and the Grenadines asserted that the arrest of the *Saiga* and the subsequent actions of Guinea were illegal. It contended that the arrest of the *Saiga* was unlawful because the ship did not violate any laws or regulations of Guinea that were applicable to it. It further maintained that, if the laws cited by Guinea did apply to the activities of the *Saiga*, those laws, as applied by Guinea, were incompatible with UNCLOS.

937. The *Saiga* could not have contravened Law L/94/007 since it did not at any time enter the territorial sea of Guinea or introduce, directly or indirectly, any gas oil into the customs territory of Guinea, as defined by the Customs Code of Guinea.

938. Furthermore, the extension of the customs laws of Guinea to the EEZ was contrary to UNCLOS. Article 56 of UNCLOS did not give the right to Guinea to extend the application of its customs laws and regulations to that zone. Consequently, the measures taken by Guinea against the *Saiga* were unlawful. It was also asserted that Guinea had violated the rights of Saint

Vincent and the Grenadines to enjoy the freedom of navigation or other internationally lawful uses of the sea in the EEZ, since the supply of gas oil by the *Saiga* came within the exercise of those rights.

#### Hot pursuit

939. Saint Vincent and the Grenadines contended that, in arresting the *Saiga*, Guinea did not lawfully exercise the right of hot pursuit under article 111 of UNCLOS for a number of reasons: the authorities of Guinea did not have “good reason” to believe that the *Saiga* had committed an offence that justified hot pursuit in accordance with UNCLOS; the alleged pursuit was commenced while the ship was well outside the contiguous zone of Guinea; the pursuit was interrupted; and no visual and auditory signals were given to the ship prior to the commencement of the pursuit.

#### Use of force

940. Saint Vincent and the Grenadines claimed that Guinea had used excessive and unreasonable force in stopping and arresting the *Saiga*.

#### Schedule of summons

941. Saint Vincent and the Grenadines contended that Guinea had violated its rights under international law by citing Saint Vincent and the Grenadines as “civilly liable” in the schedule of summons issued in connection with the criminal proceedings against the Master of the *Saiga* before the Tribunal of First Instance of Conakry.

#### Compliance with the Judgment of 4 December 1997

942. Saint Vincent and the Grenadines claimed that Guinea had violated articles 292 (4) and 296 of UNCLOS by failing to release the *Saiga* promptly after the posting of the security, in the form of a bank guarantee, in compliance with the Judgment of the Tribunal of 4 December 1997.

#### Reparation

943. Saint Vincent and the Grenadines requested the Tribunal to declare Guinea liable under article 111 (8) of UNCLOS and under international law for damages for the violation of its rights. Compensation was claimed for material damage in respect of natural and juridical persons. This included damage to the ship, financial losses of the shipowners, the operators of the *Saiga*, the owners of the cargo, and the Master, members of the crew and other persons on board the ship; compensation was also claimed in respect of loss of liberty and personal injuries, including pain and suffering. Interest at the rate of 8% on the damages awarded for material damage was also claimed.

944. The Tribunal was also requested to award compensation for the loss of registration revenue resulting from the illegal arrest of the *Saiga* by Guinea, and for the expenses resulting from the time lost by its officials in dealing with the arrest and detention of the ship and its crew.

### Financial security

945. Saint Vincent and the Grenadines identified the security provided by it, pursuant to the Judgment of the Tribunal on the prompt release of the *Saiga* and its crew (*Saiga* No.1), as one of the losses for which it sought reparation. It therefore requested that Guinea be ordered to pay the sum realized by Guinea on the sale of the cargo of the *Saiga* and to return the bank guarantee it had provided to Guinea as part of the security ordered by the Tribunal.

#### **(ii) Guinea**

##### Objections to challenges to admissibility

946. Guinea raised a number of challenges to the admissibility of the claims set out in the application (see below). In reply to Saint Vincent and the Grenadines' objection to these challenges, Guinea replied that the 1998 Agreement did not preclude its right to raise objections to admissibility. It was further submitted that, in any case, the objections were made within the time-limit specified.

947. The registration of the *Saiga*. Guinea raised the objection that Saint Vincent and the Grenadines did not have legal standing to bring claims in connection with the measures taken by Guinea against the *Saiga*, because on the day of its arrest the ship was "not validly registered under the flag of Saint Vincent and the Grenadines". Consequently, Saint Vincent and the Grenadines was not legally competent to present claims either on its behalf or in respect of the ship, its Master and the other members of the crew, its owners or operators.

948. *Genuine link*. Guinea also objected that as there was no genuine link between the *Saiga* and Saint Vincent and the Grenadines, Guinea was not bound to recognise the Vincentian nationality of the *Saiga*, which was a prerequisite for the claim of Saint Vincent and the Grenadines in international law. Guinea contended that a State cannot fulfil its obligations as a flag State under UNCLOS with regard to a ship unless it exercises prescriptive and enforcement jurisdiction over the owner or, as the case may be, the operator of the ship.

949. *Exhaustion of local remedies*. Guinea objected that certain claims advanced by Saint Vincent and the Grenadines in respect of damage suffered by natural and juridical persons, as a result of the measures taken by Guinea against the *Saiga*, were inadmissible because the persons concerned (e.g., the Master of the *Saiga*, the owners of the *Saiga* and the owners of the cargo of gas oil) had not exhausted local remedies, as required by article 295 of UNCLOS.

950. *Nationality of claims* – Guinea argued that certain claims of Saint Vincent and the Grenadines related to violations of the rights of persons who were not nationals of Saint Vincent and the Grenadines. According to Guinea, since such claims were claims of diplomatic protection, Saint Vincent and the Grenadines was not competent to institute them on behalf of non-nationals.

##### Arrest of the *Saiga*

951. Guinea contended that its actions were not in violation of the rights of Saint Vincent and Grenadines. The main charge against the *Saiga* was that it had violated article 1 of Law L/94/007 by importing gas oil into the customs radius of Guinea. Guinea justified this action by maintaining that the prohibition in article 1 of Law L/94/007 "can be applied for the purpose of

controlling and suppressing the sale of gas oil to fishing vessels in the customs radius according to article 34 of the Customs Code of Guinea”.

952. Guinea also observed that the violation by the *Saiga* of its laws had been authoritatively established by the Court of Appeal. In its view, that decision could not be questioned because the Tribunal had no competence to consider whether the internal legislation of Guinea had been properly applied by the Guinean authorities or its courts.

953. Guinea denied that the application of its customs and contraband laws in its customs radius was contrary to UNCLOS or in violation of any rights of Saint Vincent and the Grenadines. In any event, the provision of gas oil in the custom radius of Guinea was not part of the freedom of navigation under UNCLOS or an internationally lawful use of the sea related to the freedom of navigation but a commercial activity that did not fall within the scope of article 58 of UNCLOS. For that reason, Guinea asserted that its action against the *Saiga* was taken because the *Saiga* was engaged in “unwarranted commercial activities” in its EEZ. In Guinea’s view, since the EEZ is a zone with its own legal status, rights or jurisdiction that UNCLOS does not expressly attribute to coastal States, the EEZ does not automatically fall under the freedom of the high seas.

954. To justify the application and enforcement of its customs and contraband laws to its customs radius Guinea relied on article 58(3) of UNCLOS. The “other rules of international law” therein mentioned according to Guinea included: “the inherent right to protect itself against unwarranted economic activities in its EEZ that considerably affect its public interest”; the “doctrine of necessity”; or “the customary principle of self-protection in case of grave and imminent perils which endanger essential aspects of its public interest”. The main public interest which Guinea claimed to be infringed, besides fisheries and environmental interests, was the considerable fiscal losses that a developing country like it had to endure on account of illegal off-shore bunkering in its EEZ. Guinea’s contention was that the customary international law principle of “public interest” gave it the power to impede any economic activities in its EEZ undertaken under the guise of navigation but that were different from communication.

#### Hot pursuit

955. Guinea contended that it had lawfully exercised the right of hot pursuit under article 111 of UNCLOS. Guinea denied that the pursuit was vitiated by any irregularity and maintained that the officers engaged in the pursuit had complied with all the requirements set out in article 111 of UNCLOS.

956. In some of its assertions, Guinea contended that the pursuit was commenced on 27 October 1997, soon after the authorities of Guinea had information that the *Saiga* had committed or was about to commit violations of the customs and contraband laws of Guinea, and that the pursuit was continued throughout the period until the ship was spotted and arrested on the morning of 28 October 1997. In other assertions, Guinea contended that the pursuit commenced in the early morning of 28 October 1997, when the *Saiga* was still in its EEZ.

#### Use of force

957. Guinea denied that the force used in boarding, stopping and arresting the *Saiga* was either excessive or unreasonable. Guinea maintained that gunfire was used as a last resort, and placed

the responsibility for any damage resulting from the use of force on the Master and crew of the ship.

#### Schedule of summons

958. Guinea contended that the citation of Saint Vincent and the Grenadines in the schedule of summons did not have any legal significance and was without practical effect.

#### Financial Security and Reparation

959. Guinea contended that there was no obligation for Guinea to return the bank guarantee and to pay damages to Saint Vincent and the Grenadines.

#### Costs

960. Both parties requested the Tribunal to award legal and other costs.

### **3. Reasoning of the Tribunal**

#### **(a) Jurisdiction**

961. There was no disagreement between the Parties regarding the jurisdiction of the Tribunal. Nevertheless, the Tribunal had to satisfy itself that it had jurisdiction to deal with the case as submitted. In its Order dated 20 February 1998, the Tribunal stated that, having regard to the 1998 Agreement and article 287 of UNCLOS, it was “satisfied that Saint Vincent and the Grenadines and Guinea have agreed to submit the dispute to it”. The Tribunal found that an “objection as to jurisdiction” made by Guinea in the 1998 Agreement, raised in the phase of the proceedings relating to the Request for the prescription of provisional measures, did not affect its jurisdiction to deal with the dispute. The Tribunal thus found that the basis of its jurisdiction in the present case was the 1998 Agreement, which transferred the dispute to the Tribunal, together with articles 286, 287 and 288 of UNCLOS.

#### **(b) Objections to challenges to admissibility**

962. The Tribunal found that the reservation of Guinea’s right in respect of the specific objection as to jurisdiction contained in the 1998 Agreement did not deprive it of its general right to raise objections to admissibility, provided that it did so in accordance with the Rules and consistently with the Agreement between the Parties that the proceedings be conducted in a single phase.

963. In relation to the contention that the objections by Guinea were not receivable because they were raised after the expiry of the time-limit specified, the Tribunal observed that the time-limit did not apply to objections to jurisdiction or admissibility, which were not requested to be considered before any further proceedings on the merits. The Tribunal thus found that the objections to admissibility raised by Guinea were receivable and could be considered.

### (c) Challenges to admissibility

964. *The registration of the Saiga.* In order to establish whether the *Saiga* had the nationality of Saint Vincent and the Grenadines at the time of its arrest, the Tribunal recalled article 91 of UNCLOS, which embodies the well-established rule of general international law that each State has exclusive jurisdiction over the granting of its nationality to ships. Under that article, it is for Saint Vincent and the Grenadines to fix the conditions for the granting of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag.

965. The Tribunal considered that the nationality of a ship was a question of fact to be determined on the basis of evidence adduced by the Parties. On the basis of the evidence before it, the Tribunal decided that it had not been established that the Vincentian registration or nationality of the *Saiga* had been extinguished in the period between the date on which the Provisional Certificate of Registration was stated to expire and the date of issue of the Permanent Certificate of Registration. Additionally, the consistent conduct of Saint Vincent and the Grenadines provided sufficient support for the conclusion that the *Saiga* retained the registration and nationality of Saint Vincent and the Grenadines at all times material to the dispute.

966. In view of Guinea's failure to question initially the assertion of Saint Vincent and the Grenadines that it was the flag State of the *Saiga*, when it had every reasonable opportunity to do so, Guinea could not subsequently challenge the registration and nationality of the *Saiga*.

967. For these reasons, the Tribunal rejected Guinea's objection that the *Saiga* was not registered in Saint Vincent and the Grenadines at the time of its arrest and that, consequently, the *Saiga* did not have Vincentian nationality at that time.

968. *Genuine link.* In the opinion of the Tribunal, in order to establish whether a genuine link existed between a State and a ship, as provided for under article 91(1) of UNCLOS, two questions needed to be addressed: whether the absence of a genuine link between a flag State and a ship entitled another State to refuse to recognize the nationality of the ship; and whether a genuine link existed between the *Saiga* and Saint Vincent and the Grenadines at the time of the incident.

969. With regard to the first question, although the provisions of UNCLOS did not address it expressly, the Tribunal recalled that the proposal that the existence of a genuine link should be a basis for the recognition of nationality was not adopted in the 1958 Convention on the High Seas. UNCLOS followed the approach of the 1958 Convention. It did not contain provisions entitling a State to refuse to recognize the right of the ship to fly the flag of the flag State.

970. The Tribunal concluded that the purpose of the provisions of UNCLOS on the need for a genuine link between a ship and its flag State was to secure more effective implementation of the duties of the flag State. This condition was strengthened by the 1986 United Nations Convention on Conditions for Registration of Ships, the FAO Compliance Agreement and the 1995 United Nations Fish Stocks Agreement.

971. With regard to the second question, the Tribunal found that the evidence adduced by Guinea was not sufficient to justify its contention that there was no genuine link between the ship and Saint Vincent and the Grenadines at the material time. The Tribunal therefore rejected the objection to admissibility based on the absence of a genuine link between the *Saiga* and Saint Vincent and the Grenadines.

972. *Exhaustion of local remedies.* The Tribunal considered that, under article 295 of UNCLOS, whether local remedies must be exhausted was to be determined by international law. All the violations alleged by Saint Vincent and the Grenadines were direct violations of that State's rights and not breaches of obligations concerning the treatment to be accorded to aliens. Damage to the persons involved in the operation of the ship arose from those violations. As a consequence, in the view of the Tribunal, the claims in respect of such damage were not subject to the rule that local remedies must be exhausted. The Tribunal further held that even if some of the claims did not arise from direct violations of the rights of Saint Vincent and the Grenadines, there was no jurisdictional connection between Guinea and the natural and juridical persons in respect to whom Saint Vincent and the Grenadines made claims (see below regarding Guinea's right to apply its customs laws). Accordingly, on this ground also, the rule that local remedies must be exhausted did not apply.

973. *Nationality of claims.* The Tribunal found that under UNCLOS (articles 94, 217, 106, 110 (3) and 111 (8)) the ship is considered as a unit, as regards the obligations of the flag State and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of UNCLOS. Thus the ship, everything on it and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationality of such persons is not relevant.

974. The Tribunal also called attention to a significant aspect relating to modern maritime transport: the transient and multinational composition of ships' crews and the multiplicity of interests that may be involved in the cargo on board a single ship. The Tribunal considered that if each person sustaining damage were obliged to look for protection from the State of which such person was a national, undue hardship would ensue. The Tribunal was, therefore, unable to accept Guinea's contention that Saint Vincent and the Grenadines was not entitled to present claims for damages in respect of natural and juridical persons who were not nationals of Saint Vincent and the Grenadines.

#### (d) Arrest of the "Saiga"

975. The Tribunal declared the judgment of the Permanent Court of International Justice in the *Case Concerning Certain German Interests in Polish Upper Silesia*,<sup>24</sup> and came to the conclusion that there was nothing to prevent it from considering the question whether or not Guinea was acting in conformity with UNCLOS and general international law in applying its national law.

976. To deny the competence of the Tribunal to examine the applicability and scope of national law was not in conformity with certain provisions of UNCLOS, such as article 58 (3). Under that article the rights and obligations of coastal and other States arise both from the provisions of UNCLOS and from national laws and regulations "adopted by the coastal State in accordance with the provisions of this Convention". The Tribunal therefore considered that it was competent to determine the compatibility of such laws and regulations with UNCLOS.

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<sup>24</sup> *Certain German Interests in Polish Upper Silesia*, Merits, Judgment No. 7, 1926, P.C.I.J.( Series A), No. 7, p. 19.

977. The Tribunal then had to determine whether the laws applied or the measures taken by Guinea against the *Saiga* were compatible with UNCLOS. Under UNCLOS, a coastal State was entitled to apply customs laws and regulations in its territorial sea (articles 2 and 21) and in the contiguous zone in accordance with article 33 (1). In the EEZ, the coastal State had jurisdiction to apply customs laws and regulations only in respect of artificial islands, installations and structures (article 60 (2)).

978. The Tribunal then proceeded with an analysis of the two main concepts referred to in the submissions of Guinea: “public interest” or “self-protection”, invoked to expand the scope of its jurisdiction in the EEZ; and “state of necessity”, relied on to justify measures that would otherwise be wrongful under UNCLOS.

979. Recourse to the principle of “public interest”, as invoked by Guinea, would curtail the rights of other States in the EEZ and would be incompatible with the provisions of articles 56 and 58 of UNCLOS regarding the rights of the coastal State in the EEZ.

980. The Tribunal then considered whether the otherwise wrongful application by Guinea of its customs laws to the EEZ could be justified by a “state of necessity”. In the *Case Concerning the Gabčíkovo-Nagymaros Project* the International Court of Justice held that two conditions needed to be met cumulatively for the defence based on “state of necessity”: the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and the act did not seriously impair an essential interest of the State towards which the obligation existed.<sup>25</sup>

981. The Tribunal held that no evidence had been produced by Guinea to show that its essential interests were in grave and imminent peril. In any case, it could not be suggested that the only means of safeguarding that interest was to extend its customs laws to parts of the EEZ. The Tribunal, therefore, found that by applying its customs laws to parts of the EEZ Guinea acted in a manner contrary to UNCLOS. Accordingly, the arrest and detention of the *Saiga*, the prosecution and conviction of its Master, the confiscation of the cargo and the seizure of the ship were contrary to UNCLOS.

982. The Tribunal was also requested by both Parties to the dispute to make declarations regarding the rights of coastal States and other States in connection with offshore bunkering. The Tribunal, noting that there was no specific provision on the subject in UNCLOS, considered that the issue that needed to be decided was whether the actions taken by Guinea were consistent with the applicable provisions of UNCLOS. The Tribunal found that it did not have to make any findings on the question of bunkering on the EEZ.

#### (e) Hot pursuit

983. The Tribunal noted that a number of conditions for the exercise of the right of hot pursuit under article 111 of UNCLOS were not fulfilled. These conditions are cumulative, and each of them has to be satisfied for the pursuit to be legitimate under UNCLOS.

984. With regard to the pursuit alleged to have commenced on 27 October 1997, the evidence before the Tribunal indicated that the authorities of Guinea could have had no more than a

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<sup>25</sup> *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, pp. 40 and 41, paragraphs 51 and 52.

suspicion that a tanker had violated the laws of Guinea in the EEZ. It was also noted that, in the circumstances, no visual or auditory signals to stop could have been given to the *Saiga*. Furthermore, the alleged pursuit was interrupted. In relation to the pursuit alleged to have commenced on 28 October 1998, the evidence adduced by Guinea did not support its claim that the necessary auditory or visual signals to stop were given to the *Saiga* prior to the commencement of the alleged pursuit, as required by article 111(4) of UNCLOS. The Tribunal noted that its conclusion would have been the same if Guinea had based its action against the *Saiga* on an infringement of its customs laws in the contiguous zone.

985. Moreover, having concluded that no laws or regulations of Guinea applicable in accordance with UNCLOS were violated by the *Saiga*, the Tribunal held that there was no legal basis for the exercise of the right of hot pursuit by Guinea.

#### **(f) Use of force**

986. The Tribunal held that international law, applicable by virtue of article 293 of UNCLOS, required that the use of force must be avoided as far as possible and, if unavoidable, it must not go beyond what was reasonable and necessary in the circumstances. Considerations of humanity must also apply in the law of the sea, as they do in other areas of international law.<sup>26</sup>

987. The Tribunal reached the conclusion that whatever the circumstances of the case, there was no excuse for the fact that the officers fired at the ship with live ammunition from a fast-moving patrol boat without issuing any of the signals and warnings required by international law and practice. The Guinean officers also used excessive force on board the *Saiga*, attaching little or no importance to the safety of the ship and the persons on board. Considerable damage was done to the ship and its equipment and, more seriously, the indiscriminate use of gunfire caused severe injuries to two of the persons on board.

988. For these reasons, the Tribunal found that Guinea used excessive force and endangered human life before and after boarding the *Saiga*, and thereby violated the rights of Saint Vincent and the Grenadines under international law.

#### **(g) Schedule of summons**

989. The Tribunal considered that, while the naming of Saint Vincent and the Grenadines in connection with the criminal proceedings against the Master of the *Saiga* was inappropriate, it did not constitute a violation of any right of Saint Vincent and the Grenadines under international law.

#### **(h) Compliance with the judgment of 4 December 1997**

990. The Tribunal observed that there was a delay of at least 80 days between the date on which the bank guarantee was communicated by Saint Vincent and the Grenadines to Guinea and

<sup>26</sup> The Tribunal based its finding on the *S.S. I'm Alone* case, Canada/United States, 1935, *U.N.R.I.A.A.*, Vol. III, p. 1609; and *The Red Crusader* case, Commission of Enquiry, Denmark - United Kingdom, 1962, *LL.R.*, Vol. 35, p. 485. The Tribunal further noted that the basic principle concerning the use of force in the arrest of a ship at sea has been reaffirmed by article 22, paragraph 1(f), of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

the release of the ship and its crew. The Deed of Release expressly stated that it was in execution of the Judgment of 4 December 1997.

991. The Tribunal held that although a release occurring 80 days after the posting of the bond could not be considered as a prompt release, a number of factors had contributed to the delay in releasing the ship and not all of them were the fault of Guinea. Therefore, the Tribunal found that Guinea did not fail to comply with the Judgment of 4 December 1997 or with articles 292 (4) and 296 of UNCLOS.

#### (i) **Reparation**

992. Relying on articles 111 (8) and 304 of UNCLOS, as well as on the *Chorzów Factory* case<sup>27</sup> and the work of the International Law Commission on State Responsibility<sup>28</sup>, the Tribunal held that Saint Vincent and the Grenadines was entitled to reparation for damage suffered directly by it as well as for damage or other loss suffered by the *Saiga*, including all persons involved or interested in its operation. Damage or other loss suffered by the *Saiga* and all persons involved or interested in its operation comprised injury to persons, unlawful arrest, detention or other forms of ill-treatment, damage to or seizure of property and other economic losses, including loss of profit.

993. The Tribunal found that interest should also be paid in respect of monetary losses, property damage and other economic losses. However, it did not apply a uniform rate of interest in all instances.

994. Compensation in the total amount of US\$ 2,123,357 was awarded.

995. The Tribunal considered that its declaration that Guinea acted wrongfully and violated the rights of Saint Vincent and the Grenadines constituted adequate reparation with regard to the claims of Saint Vincent and the Grenadines for compensation for violation of its rights in respect of ships flying its flag.

996. The Tribunal finally decided not to accede for lack of evidence to the requests for compensation made by Saint Vincent and the Grenadines in relation to a decrease in registration activity under its flag, with resulting loss of revenue caused by the arrest of the *Saiga*. The Tribunal also considered that any expenses incurred by Saint Vincent and the Grenadines in respect of its officials must be borne by it as having been incurred in the normal functions of a flag State.

#### (j) **Financial security**

997. The Tribunal awarded damages for the part of the loss due to the discharge of the gas oil in Conakry. With respect to the bank guarantee provided by Saint Vincent and the Grenadines, the Tribunal considered that it was to be treated as no longer effective. Accordingly, it ordered Guinea to return the relevant document forthwith.

<sup>27</sup> *Factory at Chorzów*, Merits, Judgment No.13, 1928, P.C.I.J.(Series A), No. 17.

<sup>28</sup> Article 42, paragraph 1, of the Draft Articles of the International Law Commission on State Responsibility.

**(k) Costs**

998. The Tribunal decided there was no need to depart from the general rule that each party shall bear its own costs. Accordingly, with respect to both phases of the proceedings, it decided that each party should bear its own costs.

**4. Decision**

999. The Tribunal rendered its Judgment on 1 July 1999. The Tribunal decided that:

- (a) Unanimously, it had jurisdiction over the dispute;
- (b) Unanimously, Guinea was not debarred from raising objections to the admissibility of the claims of Saint Vincent and the Grenadines;
- (c) By 18 votes to 2, it rejected Guinea's contention that the *Saiga* was not registered in Saint Vincent and the Grenadines at the time of its arrest;
- (d) By 18 votes to 2, it rejected Guinea's contention that there was no genuine link between Saint Vincent and the Grenadines and the *Saiga* at the time of its arrest;
- (e) By 18 votes to 2, it rejected Guinea's contention that local remedies were not exhausted;
- (f) By 18 votes to 2, it rejected Guinea's contention that the persons in respect of whom Saint Vincent and the Grenadines brought the claims were not its nationals;
- (g) By 18 votes to 2, Guinea had violated the rights of Saint Vincent and the Grenadines under UNCLOS in arresting the *Saiga*, in detaining the *Saiga* and members of its crew, in prosecuting and convicting its Master and in seizing the *Saiga* and confiscating its cargo;
- (h) By 18 votes to 2, in arresting the *Saiga* Guinea acted in contravention of the provisions of UNCLOS on the right of hot pursuit and thereby violated the rights of Saint Vincent and the Grenadines;
- (i) By 18 votes to 2, in stopping and arresting the *Saiga* Guinea used excessive force contrary to international law and in violation of the rights of Saint Vincent and the Grenadines;
- (j) By 18 votes to 2, it rejected the claim by Saint Vincent and the Grenadines that Guinea violated its rights under international law by naming it as civilly responsible in a schedule of summons;
- (k) By 17 votes to 3, it rejected the claim by Saint Vincent and the Grenadines that Guinea violated its rights under UNCLOS by failing to release promptly the *Saiga* and members of its crew in compliance with the Judgment of the Tribunal of 4 December 1997;
- (l) By 18 votes to 2, Guinea should pay compensation to Saint Vincent and the Grenadines in the sum of US\$ 2,123,357 with interest, as indicated in paragraph 175; and
- (m) By 13 votes to 7, each party should bear its own costs.

## 5. Declarations, Separate Opinions, Dissenting Opinions

### (a) Joint Declarations by Judges Caminos, Yankov, Akl, Anderson, Vukas, Treves and Eiriksson

1000. The Judges were unable to support the decision on the question of costs for two reasons. First, the Parties agreed, in the 1998 Agreement, that the successful party should be awarded costs. Second, the case resulted in the award of compensation to eliminate the consequences of acts found to have been contrary to UNCLOS. In the opinion of the Judges, it would have been consistent with that aim to also award costs to Saint Vincent and the Grenadines.

1001. The Judges believed that, although the Tribunal had not yet elaborated specific rules or procedures, certain general principles and the information provided by each party could have been used to award costs.

### (b) Separate Opinions

1002. **President Mensah** in his separate opinion stated that, although he supported the decision of the majority, he had serious doubts about the registration status and nationality of the *Saiga* at the time of the incident which gave rise to the dispute. He agreed with the dissenting opinions of Judges Warioba and Ndiaye and the separate opinion of Vice-President Wolfrum on that issue. In his view the *Saiga* was not a ship entitled to fly the flag of Saint Vincent and the Grenadines on 28 October 1997 because, on that day, its provisional registration had expired and no other registration had been granted to it under the laws of Saint Vincent and the Grenadines.

1003. He was able, nevertheless, to support the decision to reject Guinea's contention that Saint Vincent and the Grenadines did not have legal standing to bring the dispute to the Tribunal. He joined in the decision to deal with the merits of the case because he agreed that it would not be consistent with justice if the Tribunal decided otherwise, having regard to the particular circumstances of the case. His decision, in effect, disregarded what was no more than a technical defect in order to do greater justice.

1004. In coming to this conclusion, he nevertheless expressed his concerns regarding certain unusual features of the legislation of Saint Vincent and the Grenadines and the administrative practices of its Maritime Authorities concerning the issuance of documents to ships.

1005. **Vice-President Wolfrum** in his separate opinion explained the grounds for his disagreement and provided for alternative reasons for the holdings of the Judgment. He focused in particular on the following issues: the appreciation of evidence as developed and applied in the Judgment; the reasoning concerning registration and nationality of the *Saiga*; interpretation and application of the principle of the exhaustion of local remedies; relationship between UNCLOS and national law as well as the competence of the Tribunal to establish violations of national law.

1006. *Appreciation of evidence.* Vice-President Wolfrum underlined that the Tribunal, in referring to the principles on the appreciation of evidence to be applied in the case, did not really reveal which mode concerning the appreciation of evidence it considered to be appropriate. He believed that the system for appreciation of evidence should be clearly identified and fully

reasoned. This could be a mandatory conclusion to be drawn from the principle of fair trial, an established principle of international law.

1007. Two issues needed to be considered: which of the Parties had the burden of proof; and what was the standard of appreciation to be used in assessing the evidence produced.

1008. In his opinion the rule used in all main legal systems that the burden of proof lies on the party who asserts the facts, should apply also in international tribunals. This rule was reaffirmed by the International Court of Justice in several cases.<sup>29</sup> However, the Judgment did not implement this approach consistently.

1009. In relation to the standard of proof, he pointed out that international tribunals enjoy some discretion concerning the standard of proof they apply, namely, whether they consider a fact to be proven. Nevertheless, there must be a criterion against which the value of each piece of evidence as well as the overall value of evidence in a given case is to be weighed and determined. This criterion or standard should be spelled out clearly, applied equally and deviations therefrom should be justified.

1010. In Vice-President Wolfrum's opinion the Judgment did not establish the general standards of proof it applied and different formulas were used.

1011. *Registration.* Vice-President Wolfrum disagreed with the Tribunal on the point that the Vincentian registration or nationality of the *Saiga* was not extinguished and that the consistent conduct of Saint Vincent and the Grenadines provided sufficient support for the conclusion that the *Saiga* retained the registration and nationality of Saint Vincent and the Grenadines at all times material to the dispute. His disagreement was based on two grounds: the statements and the respective reasoning did not adequately reflect the role of flag States concerning registration of ships and the significance that UNCLOS attaches to proper documentation of registration; and the statements were based upon an assessment of facts which he did not share. In his view the evidence before the Tribunal clearly indicated that the *Saiga* was not registered with Saint Vincent and the Grenadines at the time of its arrest.

1012. He agreed with the Tribunal statement that in the particular circumstances of the case it would be unreasonable and unjust if the Tribunal were not to deal with the merits of the case, but pointed out that it would have been appropriate to explain the reasons for such a conclusion more in depth.

1013. *Exhaustion of local remedies.* Vice-President Wolfrum agreed with the Judgment that Guinea could not successfully challenge the admissibility of certain claims advanced by the Applicant by claiming that the local remedies had not been exhausted. However, he disagreed with the Tribunal that the subject matter of the case was one which only encompassed direct violations of the rights of Saint Vincent and the Grenadines, which under international law are exempted from the rule that local remedies must be exhausted. In qualifying the claims made and exempting them from the scope of the rule of exhaustion of local remedies, the Judgment deviated without appropriate reasoning from the jurisprudence of the International Court of Justice.

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<sup>29</sup> See *Nicaragua case*, I.C.J. Reports 1984; *Frontier Dispute case*, I.C.J. Reports 1986; *Temple of Preah Vihear case*, I.C.J. Reports 1962.

1014. The crucial question to be decided was whether this was a case whose subject matter was the alleged violation of the rights of a State, or whether its subject matter also covered alleged violations of rights of individuals. In his view, it was questionable to qualify claims resulting from infringements upon the right of freedom of navigation as interstate disputes. However, he agreed with the Judgment that Guinea could not successfully invoke the exhaustion of the local remedies rule, since the concept did not apply in cases where the State acted outside the scope of its jurisdiction.

1015. *Relationship between UNCLOS and national law.* In Vice-President Wolfrum's opinion the Tribunal's statement on its competence to determine the compatibility of national laws and regulations with UNCLOS should be interpreted in a broad manner.

1016. He recalled the framework character of UNCLOS and the fact that States, in particular coastal States, international organizations or international conferences are requested to further develop it through the adoption of respectively national laws and international rules and regulations. Those rules, to the extent that they are in accordance with UNCLOS, supplement the latter and hence they are covered by the jurisdiction of the Tribunal.

1017. *Costs.* He agreed with the Judgment on refraining from awarding costs to the successful party on the basis that the Tribunal had not yet established general rules and criteria concerning the assessment of costs and its distribution. If such rules and criteria had been established he would have agreed to award reasonable costs and necessary expenses to the successful party.

1018. **Judge Zhao** voted in favour of the Judgment although he had a separate opinion concerning the issue of bunkering and freedom of navigation.

1019. In his opinion, although the Applicant stated that some States or regions regarded offshore bunkering as one of their principal activities, this did not mean that bunkering had become a universal practice of States. In fact, bunkering could hardly be considered as a lawful global industry involving all the major companies.

1020. In relation to the Applicant's submission that bunkering was an aspect of the high-seas freedom of navigation or an internationally-lawful use of the sea related thereto, under article 58 (1) of UNCLOS, he pointed out that bunkering of fishing vessels in the EEZ did not constitute "navigation" under UNCLOS. Besides, uses of the sea with regard to which UNCLOS did not expressly attribute rights or jurisdiction in the EEZ to the coastal State did not automatically fall under the freedom of the high seas.

1021. He concluded that bunkering should not have been regarded as falling within the high-seas freedom of navigation or related to it.

1022. **Judge Nelson**, while in agreement with the Tribunal's Judgment, had reservations on a few points and observations on others.

1023. *Admissibility.* Judge Nelson agreed with the Tribunal that the object and purpose of the 1998 Agreement was to transfer to the Tribunal the same dispute that would have been the subject of the proceedings before the arbitral tribunal and that each party would have retained the general right to present its contentions, which would presumably cover Guinea's right to present objections to admissibility. However, he could not agree with the implication that the transfer of the dispute to the Tribunal somehow also carried with it the right for Guinea to raise objections other than the objections specifically mentioned in the 1998 Agreement. In his opinion the dispute had been transferred, but the faculty of making other objections had not been.

1024. *Registration.* In Judge Nelson's opinion, and on the basis of the facts presented to the Tribunal, the provisional registration could not be valid for longer than one year. He therefore concluded that in the case of the registration of the *Saiga* there had been at least some irregularity, such as the failure to extend the provisional registration or to obtain a permanent certificate after the expiry of the provisional registration, which may have compromised the validity of the registration. As a result, he disagreed with the finding in the Judgment that the Vincentian registration or nationality of the *Saiga* was not extinguished in the relevant period.

1025. However, he supported the conclusion that in the particular circumstances of the case the consistent conduct of Saint Vincent and the Grenadines provided sufficient support for the fact that the *Saiga* retained the registration and nationality of Saint Vincent and the Grenadines.

1026. He believed that the question of whether the Tribunal was debarred from questioning the regularity and validity of the registration of the *Saiga* could have been raised. In this regard he commented on the views that the regularity and validity of a registration can be questioned only by the registering State, that other States and their courts are allowed competence to ascertain if the ship's documentation is properly completed and that the flag that is flown really indicates the ship's nationality.

1027. Accordingly, the Tribunal was entitled to examine the regularity and validity of the registration of the *Saiga* and the matter did not fall within the exclusive domain of Saint Vincent and the Grenadines.

1028. In relation to the issue of customs legislation within the EEZ, he underlined that the function of international courts and tribunals was to interpret and not to revise treaties. If the approach advocated by Guinea, based on the *travaux préparatoires* for UNCLOS, were to be followed the Tribunal would be engaged in the task of revising and not interpreting UNCLOS. This was not considered to be acceptable.

1029. **Judge Chandrasekhara Rao**, while endorsing the operative holdings of the Tribunal in the Judgment, considered it necessary to append a separate opinion to emphasize certain aspects, which he considered essential from the legal standpoint. In particular, he disagreed with the Tribunal on two issues: registration of the *Saiga* and the exhaustion of local remedies.

1030. *Registration of the Saiga.* On the question of the registration of the *Saiga*, he did not agree with the inferences drawn by the Tribunal from the facts relating to the question of whether Saint Vincent and the Grenadines was the flag State in relation to the *Saiga* at the relevant time.

1031. Since the expiration of the Provisional Certificate of Registration on 12 September 1997 was not a contentious issue, Judge Chandrasekhara Rao questioned the basis for the Judgment to hold that the registration of the *Saiga* under the laws of Saint Vincent and the Grenadines had not been extinguished in the relevant period. In his view the evidence before the Tribunal showed that it was illogical to hold that a provisional certificate issued for a period of six months would continue to be valid for a one-year period even when it failed to receive extension and without regard to the "circumstances" of the case.

1032. Judge Chandrasekhara Rao was thus of the opinion that Saint Vincent and the Grenadines was not, at the relevant time, the flag State of the *Saiga* for purposes of UNCLOS. The question remained whether the Vincentian claims were inadmissible vis-à-vis Guinea. The conduct of both the Parties, following the arrest of the *Saiga*, was relevant in this regard. On the one hand, Saint Vincent and the Grenadines had always acted as if it were the flag State of the *Saiga*, on

the other, Guinea did not raise the question of the ship's lack of registration at any time in the dispute prior to the case being brought before the Tribunal. Principles of fairness clearly required that a State not be allowed to act inconsistently, especially when it would have caused prejudice to others.

1033. *Non-exhaustion of local remedies.* In relation to the Guinean objection to the admissibility of the Vincentian claims based on non-exhaustion of local remedies, he did not agree with the Judgment. In particular, he disagreed with upholding the Vincentian argument that the local remedies rule did not apply in this case because Guinea's actions amounted to a direct violation of Vincentian rights under UNCLOS and general international law.

1034. Judge Chandrasekhara Rao underlined that, on the basis of UNCLOS, this was a case of a ship's entitlement to compensation. In principle, therefore, the local remedies in Guinea were required to be exhausted by the persons affected by the arrest of the *Saiga* before Saint Vincent and the Grenadines could bring its claims to the Tribunal. However, he agreed with the Judgment that, based on the facts, the Parties concerned were not obliged to exhaust local remedies. Consequently, the Guinean objection based on the non-exhaustion of local remedies deserved to be dismissed.

1035. **Judge Anderson** explained that he voted for a number of operative paragraphs of the Judgment for different reasons than those set out in the Judgment.

1036. *Nationality of the Saiga.* Judge Anderson considered the question of the nationality of the *Saiga* to have arisen indirectly from the issue of *locus standi* to bring claims before the Tribunal. This issue led to the detailed consideration of technical questions of nationality and ship registration, not connected with the reasons for the arrest.

1037. He underlined that the law of the sea had long recognised the quasi-exclusive competence of the flag State over all aspects of the granting of its nationality to ships, as codified in UNCLOS, particularly in articles 91 and 94. Consequently, the scope, both substantively and procedurally, for other States to challenge the regularity and validity of a particular registration was strictly limited.

1038. On that issue he thought that the Tribunal was called upon to establish whether Saint Vincent and the Grenadines' standing, based on the Vincentian nationality of the ship, had been sufficiently established to the satisfaction of the Tribunal or whether, on the other hand, the objection of Guinea had been substantiated.

1039. He concluded that Saint Vincent and the Grenadines was able to establish, on the balance of probabilities and having regard to the predominant role of the registering State in the matter of nationality, that the *Saiga* possessed Vincentian nationality on the relevant dates. The consistent conduct of Saint Vincent and the Grenadines supported that conclusion. On the other hand, the conduct of Guinea prior to the delivery of its Counter-Memorial was inconsistent with its subsequent objection to Saint Vincent and the Grenadines' standing before the Tribunal. In Judge Anderson's view, the Judgment should therefore be read in the context of the respective conduct of the Parties and the general principle of fairness in international legal proceedings.

1040. He associated himself with the separate opinion of Vice-President Wolfrum regarding his criticisms of the administrative practice of Saint Vincent and the Grenadines in the matter of provisional registration.

1041. *Arrest of the Saiga.* Judge Anderson pointed out that he agreed with the Judgment to the effect that the arrest of the *Saiga* in respect of its bunkering activity on 27 October 1997 violated the rights of Saint Vincent and the Grenadines. In his opinion, coastal States were not empowered by UNCLOS to treat bunkering in its contiguous zone or EEZ as amounting *ipso facto* to the illegal import of dutiable goods into their customs territory, without further proof of matters such as the entry of the goods into their territory or territorial sea. In this regard, he was of the opinion that Guinea went beyond articles 33 and 56 and failed to respect article 58 of UNCLOS.

1042. He also endorsed the decision in the Judgment not to make any general findings on questions of bunkering in the EEZ. In his opinion, the Tribunal was right to confine its decision to the particular question of the application of customs and fiscal legislation to bunkering in the EEZ and to leave aside the many other possible questions regarding the legality of bunkering as an activity.

1043. *Hot pursuit.* Judge Anderson fully shared the finding in the Judgment that the conditions set out in article 111 of UNCLOS must be met cumulatively. In his opinion, while Guinea satisfied some of the requirements under article 111, other conditions were not satisfied.

1044. **Judge Vukas** did not fully share the attitude of the Tribunal in respect of the main submissions of the Parties. He explained that the disagreement between the Parties concerned the interpretation and application of some of the provisions of UNCLOS, to which they both were States Parties. In particular, the Parties differed on the alleged violation of the rights of Saint Vincent and the Grenadines under articles 56(2) and 58 and related provisions of UNCLOS. In his opinion, the opposite claims of the Parties should primarily be analyzed and evaluated on the basis of the provisions of UNCLOS.

1045. *Arguments of the Parties:* After a summary of the arguments and the final submissions of both Parties he expressed the view that the notion of “public interest” advanced by Guinea as the legal basis for its actions could not be introduced as a reason for departing from the rules establishing the régime at sea. Moreover, in relation to Guinea’s argument based on the “doctrine of necessity in general international law” permitting acts of “self-protection” or “self-help”, he underlined that he agreed with the conclusions in the Judgment.

1046. *The relevant provisions of UNCLOS.* Judge Vukas pointed out that the drafting history and the content of Part V of UNCLOS did not provide valid reasons for considering bunkering of any type of ship as an illegal use of the EEZ. He believed that bunkering should be considered an “internationally lawful use of the sea” in the sense of article 58(1) of UNCLOS. This claim could be easily defended from the point of view of navigation as well as international law.

1047. *Developments after UNCLOS III.* Furthermore, Judge Vukas underlined that the practice of States in the twenty years after the establishment of the régime of the EEZ at UNCLOS III showed that in their national legislation States did not depart from the provisions of UNCLOS concerning the rights, jurisdiction and the duties of coastal States nor on the rights and duties of other States in their EEZ.

1048. He referred to the possibility for future development of additional rules relating to the EEZ régime through consistent State practice. In fact, he observed that article 59 of UNCLOS was a confirmation of the awareness of States participating in UNCLOS III that the specific legal

régime they had established did not attribute all possible rights and jurisdiction to the coastal States or to other States.

1049. **Judge Laing** agreed with the Tribunal's conclusions but found it necessary to provide a more elaborate exposition of the nature and status of the freedom of navigation in the EEZ. This required an exposition of the nature and status of the EEZ and a general appreciation of national claims related to it, including an examination of the respective rights, jurisdiction and functions of a flag State and a coastal State in the EEZ against the background of the freedom of navigation. He concluded with some preliminary questions relating to offshore bunkering, prompt release and the settlement of disputes between developing countries.

1050. *Contiguous zone*. The first set of substantive questions that Judge Laing analyzed concerned the contiguous zone, given the fact that occasionally Guinea relied on violations occurring in the contiguous zone as a basis for hot pursuit.

1051. He pointed out that conduct occurring in the contiguous zone could be punished as long as the vessel was apprehended in the course of the exercise of some legitimate means of control. Under article 33, the coastal State has the right to exercise whatever authority it possessed within the contiguous zone only in the course of contemporaneous apprehension or after a successful hot pursuit properly commenced in the contiguous zone. Judge Laing concluded that based on the facts, Guinea appeared to have well exceeded the limited scope of its authority.

1052. *Freedom of navigation*. Judge Laing agreed with the Tribunal's finding that Guinea's customs and related laws were not applicable. That was due to incompatibility with Part V of UNCLOS and unacceptability of the alleged special justifications of public interest and state of necessity for extension of Guinea's laws into the customs radius portion of its EEZ.

1053. He undertook a detailed exploration of the flag State's freedom of navigation in the EEZ, through the interpretation of articles 58 and 87. In interpreting those articles, he primarily examined aspects of Parts V and VII and their immediate context. He also examined the broader context of various other Parts and provisions of UNCLOS, including those dealing with the territorial sea and contiguous zone. Supplementary means of interpretation, such as the historical background of the principle of high seas freedom of navigation, were also considered, as well as the historical and juridical basis of the contemporary global economic and general order.

1054. He concluded that the rights and jurisdiction of coastal and flag States under UNCLOS are concurrent and that neither has *prima facie* pre-eminence. The institution of the EEZ had not diminished the well-established freedom of navigation. On the evidence presented, he found that Guinea violated the freedom of navigation of Saint Vincent and the Grenadines. However he concluded that fuller evidence and arguments would have been required in order to determine whether the vessel in question was involved in activities encroaching on specific and clearly identified aspects of the coastal State's jurisdiction over the EEZ under UNCLOS.

1055. *Offshore bunkering*. Judge Laing noted that in the absence of a full argument and data, he was unable to make a finding about attribution or specifically identifying ownership of rights in relation to offshore bunkering. Nevertheless, he thought it was necessary to recall that by virtue of the prevailing global economic order all States had a right to free general and maritime economic access and non-discrimination. He concluded that, *prima facie*, the available evidence was not inconsistent with at least a measure of tolerance of the use of the EEZ by all States that are legitimate users of non-territorial waters, within their respective functional or other spheres.

1056. *Prompt release.* Judge Laing recalled that the Tribunal had ruled against Saint Vincent and the Grenadines' claim for damages for Guinea's alleged delayed compliance with the Tribunal's Judgment on prompt release upon provision of specific financial security. He explained that several factors, attributable to both Parties, contributed to the delay in releasing the ship.

1057. In his opinion the decision of the Tribunal to fix the amount and broadly determine the "nature and form" of the security, leaving the details to the Parties, was not reasonable and created considerable scope for delay. It was evident to Judge Laing that, in the future, the objectives of expediting prompt release and ensuring reasonableness would be facilitated, *inter alia*, if Parties asked for the Tribunal's participation in various aspects of the post-judgment task of coming to agreement on the security.

1058. *The settlement of disputes between developing countries.* Judge Laing observed that some of the appeals by Guinea (such as the arguments based on state of necessity and public interest) were based on the serious and understandable difficulties of a developing country to benefit from many aspects of UNCLOS, to compete in the international marketplace and to defend its international economic interests. He recalled that in this regard UNCLOS dedicates particular attention to the special interests and needs of developing countries. He also recalled that in this case both Parties were developing countries.

1059. On the other hand, Guinea's invocation of such notions as public interest and state of necessity were described by Judge Laing as an attempt to escape the terms of the governing treaty. He noted that such assertions were subject not only to normal interpretative scrutiny, but were also considered in the context of numerous provisions of UNCLOS which represented significant and change-resistant compromises and which thus have an elevated status in the hierarchy of juridical norms that are resistant to derogation.

### (c) Dissenting Opinions

1060. In **Judge Warioba's** opinion the Judgment as a whole lacked transparency. He believed that the summary of evidence and arguments of the Parties was inadequate and not objective. In his opinion, the reasoning of the majority departed from the evidence and arguments of the Parties and was vague to the extent of making the Judgment lack transparency.

1061. *Nationality of the Saiga.* On the question of nationality of the *Saiga*, he provided a thorough review of the provisions contained in article 91 of UNCLOS, the Merchant Shipping Act of 1982 of Saint Vincent and the Grenadines as well as the evidence presented by the Parties. On that basis, he concluded that the *Saiga* did not have the nationality of Saint Vincent and the Grenadines when it was arrested in October 1997. Firstly, the *Saiga* was not deleted from the Registry of Malta. Secondly, the provisional registration of the *Saiga* expired on 12 September 1997 and it was not renewed. Therefore, from 12 September 1997 the *Saiga* did not possess Vincentian nationality until 28 November 1997. So, when it was arrested on 28 October 1997, it did not have the right to fly the flag of Saint Vincent and the Grenadines.

1062. Concerning the Tribunal's argument that Saint Vincent and the Grenadines had operated at all times as the flag State, Judge Warioba pointed out that this seemed an attempt to amend UNCLOS by introducing new conditions outside the scope of article 91. In fact, the finding that the consistent behaviour of a State should lead other States to accept it as a condition of registration would be a violation of the principle of exclusive jurisdiction enshrined in that

article. Moreover, the Tribunal's argument relating to the behaviour of Guinea seemed an attempt to introduce the notions of estoppel, preclusion or acquiescence. Clearly, these principles did not apply in relation to the provisions of article 91 of UNCLOS, which were so clear on registration and nationality of ships.

1063. In relation to the Tribunal's view that there was a need to go into the merits in order to achieve justice, Judge Warioba felt that the Tribunal brushed aside important issues of procedure in order to deal with the merits, without properly explaining the justification. Besides, the Tribunal requested and received documentary evidence, which should have been evaluated in order to come to the proper conclusion. Instead, the Tribunal had relied mainly on the behaviour of the Parties and the need to deal with the merits.

1064. *Non-exhaustion of local remedies.* Judge Warioba also differed with the Tribunal on the issue of non-exhaustion of local remedies.

1065. In relation to the Tribunal's argument that the claims of Saint Vincent and the Grenadines concerned direct violations of the rights of the State, he pointed out that the Tribunal did not examine whether these claims had been substantiated. The claims were taken at face value without the evaluation of the evidence. He agreed with the separate opinion of Vice-President Wolfrum and Judge Rao that the facts showed that the rights which could have been violated were the rights of a ship embodied in article 111(8) of UNCLOS. In fact, this was in his opinion clearly a case of diplomatic protection and not of direct injury to Saint Vincent and the Grenadines and therefore the rule on the exhaustion of local remedies should have applied.

1066. He also disagreed with the Tribunal's finding that there was no jurisdictional connection between Guinea and the *Saiga*. In reaching its conclusion the Tribunal had accepted the argument of Saint Vincent and the Grenadines that the laws of Guinea could not apply to the *Saiga* and therefore laid emphasis on the point that the *Saiga* did not import gas oil into the territory of Guinea. The facts however pointed in a different direction. Quite regrettably, in Judge Warioba's opinion, the Judgment of the Tribunal also omitted mention of the evidence and arguments on smuggling along the west coast of Africa.

1067. In fact, he explained that the laws which were relied upon by Guinea had the intention of suppressing smuggling or contraband. The questions which had to be posed were whether Guinea could apply these laws in the EEZ and whether it was prohibited under UNCLOS from including customs matters in the licensing of fishing vessels. In his opinion it was not prohibited, in particular under article 62 of UNCLOS. It was not incompatible for a State to make laws to earn revenue and, if its source of revenue was threatened, to establish the necessary laws and regulations to deal with the situation.

1068. In conclusion, the evidence showed clearly that Guinea could properly apply customs and contraband laws against the *Saiga* when it undertook bunkering activities in the EEZ. The evidence also showed that there was a jurisdictional connection between the *Saiga* and Guinea.

1069. In relation to Saint Vincent and the Grenadines' argument on the ineffectiveness of local remedies, in his opinion, he believed that if the Tribunal had proceeded to determine the issue, the argument of Saint Vincent and the Grenadines would have failed.

1070. Having reached the conclusion that Saint Vincent and the Grenadines was not the flag State at the time of the arrest of the *Saiga* and that local remedies were not exhausted, he did not consider it necessary to examine the issues on the merits.

1071. In **Judge Ndiaye's** view, Guinea's argument that the *Saiga* was not duly registered should have been sustained by the Tribunal. Similarly, the questions relating to jurisdiction and to the objections raised by Saint Vincent and the Grenadines to the challenges to admissibility should have been dealt with otherwise for a number of reasons.

1072. *Jurisdiction*. He underlined that the proceedings between Saint Vincent and the Grenadines and Guinea were introduced through the 1998 Agreement. That Agreement provided the basis for the jurisdiction of the Tribunal. Therefore, he could not support the Tribunal's decision to base its jurisdiction on another footing.

1073. *Admissibility*. Judge Ndiaye recalled Guinea's challenges to the admissibility of the claims of Saint Vincent and the Grenadines (relating to the nationality of the vessel *Saiga*, diplomatic protection of aliens and to non-exhaustion of local remedies) and Saint Vincent and the Grenadines' questions on the right of Guinea to raise such objections to admissibility.

1074. He concluded that, in considering the question of admissibility, the Tribunal should have relied on the 1998 Agreement by interpreting and applying its provisions with the aim to give effect to them in their context, according to their natural and ordinary meaning.

1075. In this regard, after having recalled the wording of paragraph 2 of the 1998 Agreement, Judge Ndiaye pointed out that the Tribunal should have interpreted the paragraph as meaning that the Parties wished the objections to admissibility to be joined to the merits.

1076. *The objections*. He recalled that the first objection to admissibility advanced by Guinea pertained to the nationality of the *Saiga*. After a thorough examination of the evidence produced by the Parties, including the Provisional Certificate of Registration, the Permanent Certificate of Registration, the official brochure of the Maritime Administration concerning procedures for registration, the certificate of the Deputy Commissioner for Maritime Affairs, the 1982 Merchant Shipping Act and the non-production of the Maltese certificate of deletion, he concluded that the *Saiga* was not validly registered on the relevant date of the arrest.

1077. He then turned to the Tribunal's reasoning on the conduct of the Parties. In particular he analysed the Tribunal's argument that Saint Vincent and the Grenadines always behaved as the flag State of the *Saiga*, while Guinea's opposition to the *Saiga*'s nationality was a new fact introduced at that stage in the proceedings, which was unknown to the Tribunal at the time of the first *Saiga* case concerning prompt release of the vessel and in the phase of the proceedings pertaining to the request for prescription of provisional measures. He disagreed with the Tribunal's finding that, while the evidence supported the admissibility of the Guinean objection to the nationality of the *Saiga*, in the particular circumstances it would not be doing justice if it did not consider the merits of the case.

1078. He pointed out that the approach of the Tribunal in reaching such conclusions was lacking in clarity. The Judgment referred to the principles by which the evidence was evaluated without explaining the method actually used.

1079. In his view, everything tended to support the admissibility of the Guinean objection and consequently the Tribunal should have declared that the *Saiga* was a ship without nationality at the time of its arrest. In keeping with the principle of continuous nationality, the Tribunal should have held that Saint Vincent and the Grenadines could not exercise rights on behalf of the *Saiga* because it was the nexus of nationality between the State and the vessel which alone conferred upon a State the right of diplomatic protection.

### C. The *Volga* Case

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|-------------------------------|--|
| <b>Parties:</b>               | Australia and Russian Federation   |
| <b>Issues:</b>                | Prompt release   |
| <b>Forum:</b>                 | International Tribunal for the Law of the Sea (ITLOS)  |
| <b>Date of Decision:</b>      | 23 December 2002   |
| <b>Published in:</b>          | <ul style="list-style-type: none"> <li>- <a href="#">ITLOS Reports of Judgments, Advisory Opinions and Orders 2002</a>, p. 10</li> <li>- 42 <a href="#">International Legal Materials</a> (2003), p. 159</li> <li>- 33 <a href="#">Environmental Policy and Law</a> (2003), p. 14</li> </ul>   |
| <b>Selected commentaries:</b> | <ul style="list-style-type: none"> <li>- Rothwell, D.R., Stephens, T., "Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests", 53 <a href="#">International and Comparative Law Quarterly</a> (2004) pp. 171-187</li> <li>- Piotrowicz, Ryszard, "The Song of the Volga Boatmen-Please Release Me", (2003) 77 <a href="#">Australian Law Journal</a>, pp. 160-163</li> </ul> |

#### 1. Facts

1080. On 2 December 2002, an Application was submitted to the International Tribunal for the Law of the Sea by the Russian Federation against Australia under article 292 of the United Nations Convention on the Law of the Sea (UNCLOS) for the release of the *Volga*, a long-line fishing vessel flying the flag of the Russian Federation, and three members of its crew.

1081. On 7 February 2002, the *Volga* was arrested by Australian military personnel beyond the limits of the exclusive economic zone (EEZ) of the Australian territory of Heard Island and the McDonald Islands for alleged illegal fishing in the Australian EEZ.

1082. The *Volga* was escorted to the western Australian port of Fremantle, where it arrived on 19 February 2002. Australian authorities seized the vessel, including the catch, nets and equipment. The master and the crew of the *Volga* were detained pursuant to the applicable Australian laws. For bonding purposes, a surveyor determined the value of the *Volga* to be at US\$1 million and at approximately AU \$147,460 for fuel, lubricants and equipment. On 6 March 2002, the chief mate, the fishing master and the fishing pilot, all three Spanish nationals, were charged with criminal offences. They were admitted to bail on the condition that they each deposit in cash AU \$75,000. The owner of the *Volga* provided the amount concerned. The three Spanish crew members were not allowed to leave the area of Perth, Western Australia, while the other crew members were repatriated to their respective countries of origin.

1083. On 20 May 2002, the Australian authorities sold the vessel's catch for AU \$1,932,579.28. On 21 May 2002, the owner of the *Volga* instituted proceedings to prevent the forfeiture of the vessel.

1084. On 30 May 2002, the three crew members who remained in Australia obtained a variation of the bail conditions to return to Spain, pending the hearing on the criminal charges brought against them. On 14 June 2002, the Supreme Court of Western Australia ordered a variation of the bail so as to require a deposit of AU \$275,000 (instead of AU \$ 75,000) from each of the three crew members. An appeal was lodged against that decision.

1085. Following a request by counsel for the owner, the Australian authorities informed the counsel that they would require a security amounting to AU\$ 3,332,500 for the release of the vessel, on the basis of three elements: the assessed value of the vessel, fuel, lubricants and fishing equipment; potential fines; carriage of a fully operational VMS (Vessel Monitoring System) and observance of the CCAMLR (Convention for the Conservation of Antarctic Marine Living Resources) until the conclusion of legal proceedings.

1086. After the Tribunal had begun its deliberations, it was informed by the Agent of Australia that, on 16 December 2002, the Full Court of the Supreme Court of Western Australia had upheld the appeal of the three members of the crew of the *Volga* from the decisions of 14 June 2002 of the Supreme Court of Western Australia in relation to their bail conditions. The Full Court ordered that the three members of the crew be permitted to leave Australia and return to Spain subject to certain conditions (bail to be deposited, passport and seaman's papers to be surrendered to the Australian Embassy in Madrid, and requirement to report monthly to the Australian Embassy in Madrid or consular official nominated by the Australian Embassy in Madrid).

## 2. Issues

### **(a) Questions before the Tribunal**

- (i) The **Russian Federation** asked the Tribunal for the following:
  - A declaration that the Tribunal had jurisdiction under article 292 of UNCLOS to hear the application;
  - A declaration that the application was admissible;
  - A declaration that the Respondent had contravened article 73(2) of UNCLOS in that conditions set by the Respondent for the release of the Volga and three crew members were either not permitted or were not reasonable under the article;
  - An order that the Respondent release the Volga and its crew if a bond or security was provided by the owner of the vessel in an amount not exceeding AU \$500,000, or in such other amount as the Tribunal considered reasonable;
  - An order as to the form of the bond or security referred to above; and
  - An order that the Respondent pay the costs of the Applicant in connection with the application.
- (ii) **Australia** requested the Tribunal to reject the application made by the Applicant.

**(b) Arguments presented by the Parties**

- (i) The **Russian Federation** argued that the bond sought by Australia was not reasonable, as it imposed conditions for the release of the vessel and the three members of the crew that were neither permissible nor reasonable under article 73 (2) of UNCLOS.
- (ii) **Australia** maintained that the bond was reasonable, having regard to the value of the vessel, its fuel, lubricants and fishing equipment; the gravity of the offences and potential penalties; the level of international concern over illegal fishing; and the need to secure compliance with Australian laws and international obligations pending the completion of domestic procedures. In assessing the reasonableness of the bond or other security, due account must be taken of the terms of the bond or security set by the detaining State, having regard to all the circumstances of the particular case.

Australia also argued that continuing illegal fishing in the area covered by the CCAMLR (Convention on the Conservation of Antarctic Marine Living Resources) had already resulted in a serious depletion of stocks of Patagonian toothfish, which was a matter of international concern.

**3. Reasoning of the Tribunal**

1087. The Tribunal confirmed, unanimously, that it had jurisdiction under article 292 of UNCLOS to entertain the Application made by the Russian Federation, and that the Application with respect to the allegation of non-compliance with article 73 (2) of UNCLOS was admissible.

1088. With respect to the bond, the Tribunal referred to the Camouco case in which it had indicated factors relevant when the reasonableness of bonds or other financial securities is assessed. Those factors included, inter alia, the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, and the amount of the bond imposed by the detaining State as well as its form. However, the Tribunal reiterated its statement made in the Monte Confurco case that this list of factors was not exhaustive.

1089. Although taking note of Australia's submission, the Tribunal emphasized that in the present case it was called upon to assess whether the bond set by Australia was reasonable in terms of article 292 of UNCLOS. The Tribunal recalled that the purpose of the procedure provided for in article 292 was to secure the prompt release of a vessel and its crew on the posting of a reasonable bond, pending completion of the judicial procedures before the courts of the detaining State. Among the factors to be considered in making the assessment are the penalties that may be imposed for the alleged offences under the laws of Australia. It is by reference to these penalties that the Tribunal may evaluate the gravity of the alleged offences. Australia had pointed out that the penalties provided for under its law in respect of the offences with which the members of the crew were charged indicated that the offences were grave.

1090. The Tribunal took note of the concern of the Respondent with regard to the depletion of stocks of Patagonian toothfish in the Southern Ocean. It understood "the international concerns about illegal, unregulated and unreported fishing and appreciates the objectives behind the measures taken by States, including the States Parties to CCAMLR, to deal with the problem". However, the Tribunal emphasized that in prompt release proceedings it is called upon to decide solely if the bond set was reasonable in terms of article 292 of UNCLOS.

1091. According to the laws of Australia, the maximum total of fines imposable on the three crew members was AU \$1,100,000 and the vessel, its equipment and catch were liable to forfeiture.

1092. The bond sought by Australia in the amount of AU \$3,325,500 consisted of three components:

- (a) AU \$1,920,00 in respect of security to cover the assessed value of the vessel, fuel, lubricants and fishing equipment;
- (b) AU \$412,500 to secure the payment of potential fines imposed in the criminal proceedings on the crew members; and
- (c) AU \$1 million relating to the carriage of a fully operational VMS (vessel monitoring system) and observance of CCAMLR conservation measures.

1093. As for the three crew members, the Tribunal noted that the Full Court of the Supreme Court of Western Australia upheld the appeal of the three officers of the Volga on 16 December 2002 and ordered that they be permitted to leave Australia upon the amount of bail already posted and was informed that the officers left Australia on 20 December 2002. The Tribunal considered that since the three crew members had departed from Australia setting a bond in respect of them no longer served any practical purpose.

1094. With respect to the imposition of non-financial conditions, one of the main issues in the Tribunal's decision was the question whether Australia was entitled to make the release of the Volga conditional on the fulfilment of two conditions: that the vessel carry a VMS and that information concerning particulars about the owner and ultimate beneficial owner of the ship be submitted to its authorities.

1095. The question was not, explained the Tribunal, to consider whether a coastal State is entitled to impose such conditions in the exercise of its sovereign rights under UNCLOS. In the proceedings the only question to be decided was whether the "bond or other security" mentioned in article 73(2) of UNCLOS may include such conditions. These and similar words also appeared in article 292 and other articles of UNCLOS. Therefore, the expression should be interpreted as referring to a bond or security of a purely financial nature. Where the Convention envisages the imposition of conditions additional to a bond or other financial security, it expressly states so. Thus, non-financial conditions cannot be considered a bond or other financial security for the purpose of applying article 292 in respect of an alleged violation of article 73(2) of UNCLOS.

1096. As for the release of the vessel, the Tribunal stated that the amount of AU \$ 1,920,000 sought by the Respondent for the release of the vessel, which represents the full value of the vessel, fuel, lubricants and fishing equipment and is not in dispute between the Parties, is reasonable in terms of article 292 of UNCLOS. However, the Tribunal considered that the non-financial conditions set down by the Respondent with regard to the vessel carrying a VMS and the submission of information about the owner of the ship could not be considered as components of the bond or other financial security for the purposes of article 292 of UNCLOS.

1097. The AU \$1 million amount, which the Tribunal in its decision referred to as a "good behaviour bond", could not be considered as a bond or security within the meaning of article 73 (2) read in conjunction with article 292. Article 73 (2) concerns a bond or security for the release of an "arrested" vessel, which is alleged to have violated the laws of the detaining State. Article 73, as a whole, envisages enforcement measures in respect of violation of a coastal

State's laws and regulations alleged to have been committed. A "good behaviour bond" to prevent future violation is not a proper bond or security within the meaning of article 73 (2) of UNCLOS.

1098. Russia had submitted that in assessing the reasonableness of a bond, the Tribunal should take into account the circumstances of the seizure of the vessel. The Tribunal also stated that the circumstances of the seizure of the *Volga* were not relevant to the proceedings for prompt release under article 292. With regard to the proceeds of the catch found on board the *Volga* at the time of the arrest, the Tribunal declared that, although the proceeds represent a guarantee to the Respondent, they have no relevance to the bond to be set for the release of the vessel and that accordingly the question of inclusion in or exclusion from the bond did not arise.

1099. The Tribunal refused to take into account the proceeds of sale of the catch. Under the laws of Australia, the catch is subject to confiscation, if the domestic courts find that it was illegally caught within the exclusive economic zone. On the other hand, Australia may be obliged to return the proceeds to the owner of the *Volga* if the domestic courts conclude that the fish was not caught within the exclusive economic zone. In effect, the catch and the vessel, the fuel, lubricants and the equipment on board, all form part of the guarantee Australia needed to ensure that the final decisions of the domestic courts could be fully enforced. A bond or other financial security is required only to ensure full protection of Australia's potential right in the vessel and a possible fine against the members of the crew. No such bond is necessary in respect of the catch since Australia held the proceeds of the sale.

#### 4. Decision

1100. On 23 December 2002, the Tribunal decided as follows:

- (a) Unanimously, that the Tribunal had jurisdiction under article 292 of UNCLOS to entertain the Application made by the Russian Federation on 2 December 2002;
- (b) Unanimously, that the Application with respect to the allegation of non-compliance with article 73(2) of UNCLOS is admissible;
- (c) By 19 votes to 2, that the allegation made by the Applicant that the Respondent had not complied with the provisions of UNCLOS for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security was well-founded;
- (d) By 19 votes to 2, that Australia should promptly release the *Volga* upon the posting of a bond or other security to be determined by the Tribunal;
- (e) By 19 votes to 2, that the bond or other security for the release of the vessel was to be set at AU \$1,920,000 to be posted in Australia;
- (f) Unanimously, that the bond should be in the form of a bank guarantee from a bank present in Australia or having corresponding arrangements with an Australian bank or, if agreed to by the Parties, in any other form; and
- (g) Unanimously, that each party should bear its own costs.

## 5. Declarations, Separate Opinion, Dissenting Opinions

### (a) Declarations

1101. **Vice-President Vukas** dissociated himself from all statements or conclusions in the Judgment which are based on the proclaimed exclusive economic zone around Heard Island and MacDonald Islands.

1102. According to him, an exclusive economic zone has been proclaimed by Australia off the coasts of two uninhabited islands which are much smaller than the Kerguelen Islands in the *Monte Confurco* case. As he had maintained in the latter case, he did not agree in the instant case with the appropriation of vast areas of the oceans by some States which possess tiny uninhabited islands thousands of miles from their own coasts.

1103. Vice-President Vukas expressed the view that the establishment of an exclusive economic zone around rocks and other small islands served no useful purpose and that it was contrary to international law. In this connection he referred to a 1971 statement by Ambassador Arvid Pardo in the United Nations Seabed Committee to the effect that:

“if a 200 mile limit of jurisdiction could be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean space beyond national jurisdiction would be gravely impaired.”<sup>30</sup>

1104. **Judge Marsit** stated that the case demonstrated that, if the charges complained of by Australia proved to be true, that it was far from easy to protect the resources of the maritime areas from any serious, repeated attack. If a country such as Australia or France was not always able to provide such protection, what about new developing countries, regardless of whether they open onto oceans or smaller seas?

1105. Lastly, Judge Marsit mentioned that it would be desirable for the Tribunal to pronounce itself clearly and explicitly at some stage or other on the meaning and significance of the expression “reasonable bond”, which must invariably take into account not only the interests of the Parties involved in a case but also the impact or effect of the jurisprudence of the Tribunal on any future cases that may affect one or more developing countries.

### (b) Separate Opinion

1106. **Judge Cot** had some observations in the context of illegal fishing and the “margin of appreciation” of the coastal State.

1107. As for illegal fishing, he believed that it was necessary to clarify the difficulties encountered by States in combating illegal, unregulated and unreported fishing in the Southern Ocean and the necessary margin of appreciation that must be acknowledged in defining and implementing the means for tackling the problem.

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<sup>30</sup> UN Seabed Committee, Doc. A/AC. 138/SR.57, p. 167.

1108. He mentioned that there was a tidy profit to be made from illegal fishing, that the cost of combating illegal fishing was considerable for the coastal State and that international organizations had called upon their Member States to take measures against illegal fishing.

1109. The measures taken by Australia, both in terms of prevention and enforcement, clearly fall within the scope of the efforts made by international organizations to combat illegal, unreported and unregulated fishing. They came under article 56 of UNCLOS and have been taken in pursuance of the sovereign rights exercised by coastal States for the purpose of exploring, exploiting, conserving and managing the natural resources of the exclusive economic zone.

1110. The Tribunal has a duty to respect the implementation by the coastal State of its sovereign rights with regard to the conservation of living resources, particularly as these measures should be seen within the context of a concerted effort within FAO and CCAMLR. In taking these measures, Australia is upholding not only its legitimate right to explore and exploit the resources of its exclusive economic zone. It takes conservation measures within the framework of an international system of authorization in order to protect a common heritage. While the coastal State does not have the right to take measures that are arbitrary or would contravene an obligation under international law, it has a considerable margin of appreciation within that framework.

1111. With respect to the question of the margin of appreciation, Judge Cot stated that the concept of margin of appreciation was well known to international courts. International courts constantly use the concept of margin of appreciation, often implicitly or unwittingly.

1112. The concept of “margin of appreciation” is closely related to that of “reasonableness”. This latter concept implies the existence of a discretionary power that must be curbed. Reasonableness appears thus to be both an instrument for preserving the margin of appreciation of States and an instrument for courts to control the exercising of the discretionary power of the State.

1113. It will be noted that aspects considered in the definition of reasonableness include the concept of proportionality and the obligation for the State to ensure that its conduct is proportional to the aim being legally pursued, account being taken of the rights and freedoms granted to others or acknowledged under international law. In the *Volga* case, no freedom was at issue. The *Volga* was not exercising its freedom to fish on the high seas and its passage within the exclusive economic zone was anything but innocent. It could not therefore rely on special protection on the grounds that a freedom was being threatened.

1114. The margin of appreciation applies both to the measures taken by the coastal State under article 73, paragraph 1, of the Convention, and to the amount of the bond referred to in paragraph 2 of that article. Provided that the bond is not “unreasonable”, the Tribunal does not have to substitute its discretion for that of the coastal State. It has no intention of being an appellate forum against a decision of a national court; nor is it the hierarchical superior of an administrative or government authority.

1115. The court’s control over what constitutes a “reasonable bond” comes under what may be referred to as a “minimum control” in certain legal systems. The control of legality is exercised in particular with regard to errors in law. In deciding to combine release of the vessel with a bond imbued with a penal overtone, intended to ensure the good behaviour of the vessel during

the period pending the decision of the Australian courts, the Australian authorities committed an error of law with regard to the lawful nature of the reasonable bond as provided for in articles 73 (2) and 292 of UNCLOS.

1116. Attaching conditions to the bond or financial security would inevitably have the effect of complicating and slowing down the procedure, which would lose its prompt character and would be tantamount to deflecting the article 292 procedure from its purpose and distorting its meaning. Accordingly, Judge Cot did not consider that Australia was entitled to include “a good behaviour bond” in the amount of the reasonable bond leading to the prompt release of the vessel and crew.

### (c) Dissenting Opinions

1117. **Judge Anderson** had difficulty with the validity of non-financial conditions in bail bonds. The question for him was whether or not a coastal State was entitled to include in a bond or other security for the release of a vessel and its crew conditions which are non-financial in nature.

1118. Judge Anderson’s reading of the plain words of article 73 in their context and in the light of the object and purpose showed that the article contained no explicit restriction upon the imposition of non-financial conditions for release of arrested vessels. UNCLOS does limit the rights of a coastal State in the matter of enforcement in express terms: article 73 (3) prohibits imprisonment and corporal punishment.

1119. The legislation of many States empowers courts to impose conditions of bail upon persons who are released from detention pending trial. The conditions as to the deposit of passports with the Australian Embassy in Spain are typical examples of bail conditions, designed to ensure the return of the accused to face trial and to prevent illegal fishing in Australia in the interim. Judge Anderson was of the view that it would require clear words in UNCLOS to exclude all non-financial bail conditions and such words are not there. All that UNCLOS requires is that every term of the agreement represented by the bond or other security, including the amount of money, the conditions and the form of the security, be reasonable in the circumstances of the case. Consequently, the good behaviour bond represents a type of “bond” within the meaning of article 73(2). It is the financial and the non-financial conditions about good behaviour that serve a legitimate purpose, i.e., deterring further poaching in the EEZ pending the determination of the legal proceedings. It balances the undoubted benefit that the owner of the vessel gains from its release-renewed access to fishing grounds. Therefore, the good behaviour bond and the conditions sought by Australia were not, in Judge Anderson’s opinion, unreasonable within the terms of article 73 (2) of UNCLOS. The amount might have been on the high side, but it does not exceed the “margin of appreciation” to be accorded to domestic courts and domestic authorities.

1120. **Judge ad hoc Shearer** was unable to concur with the decision of the Tribunal to lower the amount of the bond set by the Australian authorities. He would have preferred an order in terms of that requested by Australia, namely that the application by the Russian Federation be dismissed. Consequently, he considered that the amount and terms of the bond imposed by Australia should have been upheld.

1121. In his view the facts and surrounding circumstances of the case should have been accorded greater weight by the Tribunal in assessing the reasonableness of the bond under articles 73(2) and 292 (1) of UNCLOS.

1122. The Tribunal in its judgment was reluctant to state or enter into an evaluation of the facts other than those directly concerned with the reasonableness of the bond for prompt release. In Judge ad hoc Shearer's opinion the Tribunal erred too much on the side of reticence.

1123. Lastly, Judge ad hoc Shearer observed that the provisions of articles 73 and 292 of UNCLOS were designed to achieve a balance between the interests of flag States (and especially flag States of fishing vessels) and coastal States in their rights of management and conservation of their EEZs. It is still thought by some that this balance should be preserved as it was conceived at the time of the Third United Nations Conference on the Law of the Sea. But it should be recognized that circumstances have changed. Few vessels are State-owned. The problems today arise from privately-owned fishing vessels, often operating in fleets, pursuing rich rewards in illegal fishing and in places where detection is often difficult. Fishing companies are highly capitalized and efficient, and some of them are unscrupulous. The flag State is bound to exercise effective control of its vessels, but this is often made difficult by frequent changes of name and flag by those vessels. It is notable that in recent cases before the Tribunal, including the present case, although a State agent has represented the flag State, the main burden of presentation of the case has been borne by private lawyers retained by the vessel's owners. Accordingly, a new balance has to be found between vessel owners, operators and fishing companies on the one hand, and coastal States on the other.

## VII. MARINE ENVIRONMENT

### A. The Mox Plant Case

|                             |   |
|-----------------------------|---|
| <b>Parties:</b>             | Ireland and United Kingdom  |
| <b>Issues:</b>              | Jurisdiction; prescription of provisional measures  |
| <b>Forum:</b>               | International Tribunal for the Law of the Sea (ITLOS)   |
| <b>Date of Decision:</b>    | Order of 3 December 2001  |
| <b>Published in:</b>        | <ul style="list-style-type: none"> <li>- <a href="#">ITLOS Reports of Judgments, Advisory Opinions and Orders 2001</a>, pp. 95-149</li> <li>- <a href="#">41 International Legal Materials (2002)</a>, pp. 405-437</li> </ul> |
| <b>Selected commentary:</b> | Kwiatkowska, B., "The Ireland-United Kingdom (Mox Plant) Case: Applying the Doctrine of Treaty Parallelism", <a href="#">18 International Journal of Marine and Coastal Law (2003)</a> , pp. 1-58                             |

#### 1. Facts

1124. On 9 November 2001, a Request for the prescription of provisional measures, pending the constitution of an arbitral tribunal provided for in Annex VII to UNCLOS (United Nations Convention on the Law of the Sea), was filed by Ireland with the International Tribunal for the Law of the Sea in accordance with article 290 (5) of UNCLOS concerning a dispute with the United Kingdom. The dispute involved the commissioning of the MOX Plant facility to reprocess spent nuclear fuel into mixed oxide fuel or MOX. The MOX Plant is located at Sellafield on the west coast of Cumbria, facing onto the Irish Sea. Ireland was concerned about the impact on the marine environment of the Irish Sea of accidental or intended radioactive discharges from the facility.

1125. The United Kingdom Government had granted final authorization to operate the MOX Plant on 3 October 2001, having reached the conclusion that the MOX Plant was economically justified, clearing the way for the future commissioning of the facility. The authorization process began in the early 1990's. Following an Environmental Statement (ES), the United Kingdom Government authorized the construction of the facility in 1993. Construction was completed in 1996 and British Nuclear Fuels sought further authorization for the full operation of the facility. Between April 1997 and August 2001, five rounds of public consultations on the MOX Plant were held. During those consultations, Ireland made several requests for further information on the future operation of the facility, including its operational life-span and the amount of spent fuel to be reprocessed. This information had been withheld during the consultations owing to commercial confidentiality. The United Kingdom Government refused to accede to Ireland's request.

1126. Ireland notified the United Kingdom of its claim on 25 October 2001. Pending the constitution of an UNCLOS Annex VII arbitral tribunal, Ireland sought an order of provisional measures from the International Tribunal for the Law of the Sea (see Issues section below).

## 2. Issues

### **(a) Questions before the Tribunal**

- (i) Would the UNCLOS Annex VII arbitral tribunal *prima facie* have jurisdiction?
- (ii) Does the urgency of the situation require the prescription of provisional measures to prevent irreversible prejudice to the rights of either party or serious harm to the marine environment?
- (iii) If so, should the UK be required to suspend the authorization of the Mox Plant and be assured that there were no transports of radioactive material to and from the plant through waters over which it exercised sovereignty or sovereign rights?

### **(b) Arguments presented by the Parties**

- (i) **Ireland** contended that the operation of the MOX Plant would irrevocably violate its rights under the UNCLOS, including articles 123, 192 to 194, 197, 206, 207, 211, 212 and 213. It claimed that the United Kingdom had failed to take the necessary measures to prevent, reduce and control pollution of the Irish Sea from the MOX Plant by refusing to conduct an environmental impact assessment and refusing to co-operate with Ireland through the exchange of information.
  - Ireland maintained that the provisions of UNCLOS have a separate identity to similar provisions under other treaties and the dispute solely concerns the interpretation or application of UNCLOS and not the 1992 OSPAR Convention, the EC Treaty or the Euratom Treaty. Neither the OSPAR arbitral tribunal nor the European Court of Justice would have jurisdiction over all the matters in the dispute.
  - Ireland contended it only brought the claim once the United Kingdom had failed to indicate its willingness to consider the immediate suspension of the authorization to operate the MOX Plant.
  - It claimed that the danger of radioactive discharges, arising from the operation of the MOX Plant, accidents or terrorist attacks, would have irreversible consequences for the marine environment of the Irish Sea. Accordingly it would not be possible to return to the position that existed before the operation of the MOX Plant. Ireland submitted that the precautionary principle places the burden of proof on the United Kingdom to demonstrate that no harm would arise from the operation of the MOX Plant.

- (ii) The **United Kingdom** claimed that article 282<sup>31</sup> of UNCLOS denies an Annex VII arbitral tribunal jurisdiction over the dispute. It argued that the dispute was governed by the compulsory dispute settlement provisions of the 1992 OSPAR Convention, the EC Treaty and the Euratom Treaty. Ireland had already submitted a dispute under the 1992 OSPAR Convention and it had publicly stated its intention to bring proceedings before the European Court of Justice.
- Furthermore, the United Kingdom contended that the dispute was premature given that the Parties had not exchanged views as required by article 283<sup>32</sup> of UNCLOS. It maintained that the correspondence between the two States did not amount to an exchange of views within the meaning of that article.
  - According to the United Kingdom, the commissioning of the MOX Plant would not cause irreversible damage to the marine environment of the Irish Sea. It put forward evidence demonstrating that the risk of pollution from the operation of the plant would be infinitesimally small. With regard to the security risks from a terrorist attack, the United Kingdom maintained that extensive precautions had already been taken.
  - Finally the United Kingdom stated that there would be no export of MOX fuel from the Plant until the summer of 2002 and that there was to be no import to the THORP Plant of spent nuclear fuel pursuant to contracts for conversion at the MOX Plant within that period. Therefore there was no urgency in the prescription of provisional measures and Ireland's request should be rejected. Furthermore, the United Kingdom requested the Tribunal to order Ireland to bear its costs of the proceedings.

### 3. Reasoning of the Tribunal

#### (a) Jurisdiction

1127. The Tribunal noted that before prescribing provisional measures it must satisfy itself that *prima facie* the UNCLOS Annex VII arbitral tribunal would have jurisdiction. It agreed with Ireland that even if the obligations of the 1992 OSPAR Convention, the EC Treaty and the Euratom Treaty were identical to those in UNCLOS, the obligations have a separate existence under each treaty. Furthermore the interpretation of identical obligations will differ according to the respective context, the object and purpose of each treaty, the subsequent practice of the Parties to each treaty, and the respective *travaux préparatoires*. Accordingly, it held that, as the dispute concerned the interpretation and application of UNCLOS and no other agreement, article 282 was inapplicable.

<sup>31</sup> Article 282 provides that "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree."

<sup>32</sup> Article 283 (1) provides that "When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."

1128. The Tribunal also dismissed the objection to jurisdiction under article 283. The correspondence between Ireland and the United Kingdom amounted to an exchange of views. It noted that a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching an agreement have been exhausted.

### **(b) Prescription of Provisional Measures**

1129. The Tribunal noted that it could prescribe provisional measures under article 290(5)<sup>33</sup> of UNCLOS if the urgency of the situation so requires. Emphasizing the assurances made by the United Kingdom regarding the future operation of the facility and the short period of time before the constitution of the Annex VII arbitral tribunal, the Tribunal did not find that the urgency of the situation required the prescription of the provisional measures Ireland requested.

1130. Yet the Tribunal noted that it was able to prescribe measures different to those requested by the Parties to the dispute in accordance with article 89(5) of its Rules of Procedure. Recalling the duty of co-operation, a fundamental principle in the prevention of pollution of the marine environment both under Part XII of UNCLOS and general international law, and considering that prudence and caution necessitate such cooperation, the Tribunal required Ireland and the United Kingdom to co-operate in exchanging information concerning risks or effects of the operation of the MOX Plant and in devising ways of dealing with them. Both Parties to the dispute were ordered to submit reports to the Tribunal on their compliance with the provisional measures.

## **4. Decision**

1131. On 3 December 2001, the Tribunal:

(a) Unanimously,

*Prescribed*, pending a decision by the UNCLOS Annex VII arbitral tribunal, a provisional measure under article 290(5) of UNCLOS to the effect that Ireland and the United Kingdom were to co-operate and, for this purpose, enter into consultations forthwith in order to:

- Exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX Plant;
- Monitor risks or the effects of the operation of the MOX Plant for the Irish Sea;
- Devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX Plant.

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<sup>33</sup> Article 290(5) provides that “Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.”

(b) Unanimously,

*Decided* that Ireland and the United Kingdom were each to submit the initial report referred to in article 95(1) of the Tribunal's Rules not later than 17 December 2001, and authorized the President of the Tribunal to request such further reports and information as he may consider appropriate after that date.

(c) Unanimously,

*Decided* that each party was to bear its own costs.

## 5. Declaration, Separate Opinions

### (a) Joint Declaration

1132. **Judges Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson and Jesus** suggested that the dispute was characterized by the almost complete lack of agreement on the scientific evidence. Given this scientific uncertainty, one might have expected the Tribunal to prescribe provisional measures, as it did in the *Southern Bluefin Tuna Cases*. In the circumstances of the case, this was not necessary due to the undertakings given by the United Kingdom. The most effective measure was a requirement that the Parties co-operate, given the almost complete lack of co-operation. Improved co-operation may even result in a common understanding of the scientific evidence and a common appreciation of preventative measures.

### (b) Separate Opinions

1133. **Vice-President Nelson** dealt with the role of article 282 of UNCLOS. He emphasized that Parties are free to settle disputes by any peaceful means of their own choice, as expressed in article 280. The peaceful settlement of disputes is the objective of section I, Part XV, of UNCLOS. The Parties are not obliged to use the procedures provided in UNCLOS.

1134. Article 282 constitutes a hurdle that must be overcome before section 2 of that Part can be invoked. Vice-President Nelson agreed with the decision on the facts, with the reservation that the narrow interpretation given by the Tribunal might render article 282 or article 281 ineffective.

1135. **Judge Mensah** was of the view that the situation dealt with in article 290(5) of UNCLOS on the prescription of provisional measures was different in two ways from that in paragraph 1 of the same article. Firstly, under paragraph 5, the Tribunal requested to prescribe provisional measures will not deal with any substantive aspects of the dispute. Secondly, it only has the competence to prescribe provisional measures pending the constitution of the arbitral tribunal to which the dispute on the merits is to be submitted. The temporal difference imposes a condition of constraint on the Tribunal. It follows that the conditions for prescribing provisional measures under paragraph 1 are not the same considerations under paragraph 5. Thus the Tribunal may not find it appropriate to prescribe measures even where there is evidence of prejudice of rights or harm in the future, but following the constitution of the arbitral tribunal. Therefore, the Tribunal was correct in not ascribing too much importance to the long-term potential risks of damage. It was only required to consider whether any irreparable harm to the rights of Ireland or the marine environment would occur before the constitution of the UNCLOS Annex VII arbitral tribunal.

1136. Judge Mensah further noted that there would be no irreparable prejudice to the procedural rights of Ireland. It would be within the competence of the Annex VII arbitral tribunal to order the United Kingdom to decommission the MOX Plant or comply with any procedural requirements before the further operation of the facility.

1137. On the issue of jurisdiction, **Judge Anderson** added that the question was whether articles 282 or 283 “obviously exclude” the jurisdiction of the arbitral tribunal. The application of article 282 involves complicated questions of fact and law. Judge Anderson had some doubts about the reasoning of the Tribunal with regard to jurisdiction.

1138. Judge Anderson also doubted whether the provisional measures prescribed by the Tribunal were appropriate. He would have preferred an approach that declined the requests of Ireland, whilst encouraging further consultation between the Parties.

1139. With respect to the first request of Ireland, Judge Anderson would have been prepared to go further than the Tribunal to support a finding that it had not been shown that either any irreparable prejudice to the Applicant or any serious harm to the marine environment would have been caused. The second request to prohibit vessels carrying radioactive materials to and from the MOX Plant would have raised issues relating to the rights of third States, for example rights of passage and navigation.

1140. According to **Judge Wolfrum**, the United Kingdom’s argument on article 282 does not take into account the actual wording, nor the context or objective of section I, Part XV, of UNCLOS. Parallelism of treaties, both in their substantive provisions and their procedures for the settlement of disputes is a reality, but the 1992 OSPAR Convention and the EC Treaty set out procedures to settle disputes under those treaties, not under UNCLOS. This interpretation does not render article 282 redundant as Parties may agree upon a system of dispute settlement different to that contained in section 2, Part XV, of UNCLOS.

1141. Judge Wolfrum would have preferred it if the Tribunal had stated that it would not have been within the competence of the Tribunal to prescribe provisional measures given the circumstances of the case. In the opinion of Judge Wolfrum, the Tribunal could not have applied the precautionary principle as it would have required the Tribunal to assess the merits of the case. The limitation that provisional measures should not anticipate a judgment on the merits cannot be overruled by the precautionary principle.

1142. The duty to co-operate is an inherent principle of Part XII of UNCLOS as well as of international customary law for the protection and preservation of the marine environment. It denotes an important shift in the general orientation of the international legal order, ensuring that the community interest is taken into account by individual States.

1143. **Judge Treves**. The agreements to which article 282 of UNCLOS refers are those agreements for the settlement of disputes which specifically relate to the interpretation or application of UNCLOS or agreements for the settlement of disputes in general, for example, an acceptance of the compulsory jurisdiction of the International Court of Justice. Article 282 simply expresses a preference between different means of compulsory adjudication. It must be balanced with the general freedom of States to choose the means of dispute settlement available to them. A broad interpretation, as rejected by the Tribunal, would not achieve this balance.

1144. The consequence of deciding that the arbitral tribunal would lack jurisdiction on the basis of article 282 includes the possibility that a dispute concerning UNCLOS would have been considered by several different tribunals. This would have been incompatible with the very purpose of article 282.

1145. **Judge Jesus** disagreed with the reasoning of the Tribunal on article 282 and the relationship between UNCLOS and the OSPAR Convention. Though in agreement that the OSPAR Convention did not apply in the circumstance of the case, Judge Jesus had different reasons, namely that the claims made by Ireland under the OSPAR Convention were different and narrower than those before the UNCLOS Annex VII arbitral tribunal. In other words, it was a different dispute.

1146. Judge Jesus contended that the OSPAR Convention was a regional agreement within the meaning of article 282 and if the dispute was the same, then the dispute procedure under the OSPAR Convention would prevail. Judge Jesus stated that the interpretation given to article 282 by the Tribunal had the effect of denying its implementation.

1147. **Judge ad hoc Székely** voted for the Order, despite disagreeing with the decision of the Tribunal. There was a contradiction in the reasoning of the Tribunal in its refusal to grant the provisional measures requested by Ireland, whilst granting alternative provisional measures. Why did the Tribunal require Ireland and the United Kingdom to enter into consultation, if the urgency of the situation was insufficient for the provisional measures requested by Ireland? In taking this action, the Tribunal recognized that the commissioning of the MOX Plant could have the effect that Ireland was trying to prevent. These alternative provisional measures require the United Kingdom to give Ireland an opportunity to have its views considered before the commissioning of the MOX Plant. Although Judge *ad hoc* Székely would have preferred to grant the provisional measures requested by Ireland, the alternative provisional measures granted by the Tribunal had similar effects.

1148. The Tribunal made the mistake of looking at the MOX Plant in isolation from the rest of the Sellafield complex. It also failed to consider arguments of the poor safety record at Sellafield, which was itself an important indication of the risks of commissioning the MOX Plant.

1149. The Irish argument on article 206 of UNCLOS alone should have been sufficient to find that provisional measures were necessary. The Tribunal failed to take into account the failure of the United Kingdom to undertake an environmental impact assessment or the consequent failures to prevent pollution of the marine environment. The decision resembled a diplomatic exercise rather than a judicial one.

1150. The decision to give the United Kingdom the benefit of the doubt was without any basis in law or science. The Tribunal accepted the arguments of the United Kingdom without any sort of substantiating evidence. It should have been more responsive to Ireland's submissions on the precautionary principle, given the scientific uncertainty in the case. Judge *ad hoc* Székely suggested, however, that the alternative provisional measures ordered by the Tribunal did derive from the application of the precautionary approach.

## B. The Mox Plant Arbitration

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|-----------------------------|--|
| <b>Parties:</b>             | Ireland and United Kingdom   |
| <b>Issues:</b>              | Marine environment, jurisdiction, admissibility; prescription of provisional measures  |
| <b>Forum:</b>               | Arbitral proceedings initiated pursuant to Annex VII to UNCLOS under the auspices of the Permanent Court of Arbitration                                |
| <b>Date of Decision:</b>    | Award of 24 June 2003  |
| <b>Published in:</b>        | 42 <u>International Legal Materials</u> (2003), pp. 1187-1199  |
| <b>Selected commentary:</b> | Churchill, R.R., Scott, J., "The MOX Plant Litigation: The First Half-Life", 53 <u>International and Comparative Law Quarterly</u> (2004), pp. 643—676 |

### 1. Facts

1151. The facts are as stated in the preceding summary of *The Mox Plant Case* brought before the International Tribunal for the Law of the Sea. However, Ireland subsequently amended its statement of claim to make clear that "Ireland's claim is not confined to the immediate consequences arising directly from the Mox Plant alone, considered in isolation from the rest of the Sellafield complex, but extends to all the consequences that flow from the establishment and operation of the Mox Plant...."

### 2. Issues

#### (a) Questions before the Arbitral Tribunal

- (i) Does the Arbitral Tribunal have jurisdiction to decide the merits of the dispute as pleaded by Ireland;
- (ii) Apart from UNCLOS, what additional treaties, customary rules and principles of international law are applicable before the Arbitral Tribunal; and
- (iii) The Arbitral Tribunal having decided to postpone a hearing on the merits, what provisional measures, if any, should be ordered pending a further hearing.

#### (b) Arguments presented by the Parties

- (i) **Ireland** asserted that UNCLOS imposed on the United Kingdom obligations concerning the protection of the marine environment; the prevention and control of pollution from the plant and from associated shipping movements; environmental impact assessment (EIA) and co-operation between the two States.

In its application on the merits Ireland sought (i) a declaration that the United Kingdom was in breach of various articles of UNCLOS, including articles 123, 193, 194, 197, 206, 207, 211, 213 and 300; and (ii) an order that the United Kingdom refrain from authorising operation of the Mox Plant and related shipping of radioactive materials until an EIA had been conducted showing zero discharge of radioactivity and a plan to contain the risk of terrorist attack had been agreed by the two States.

In its additional request for provisional measures Ireland sought an order as follows:

- No discharges of liquid waste into the Irish Sea;
- Aerial discharges not to exceed 2002 levels;
- Prior notification and consultation on any proposal for additional spent fuel reprocessing or mox fuel manufacture;
- Prior notification of shipments of radioactive substances by sea to or from the Mox and THORP Plants, and daily reports on the route and progress of the vessel;
- Provision of information on various matters of concern to Ireland on a confidential basis;
- Co-operation on emergency planning and shipments; and
- No steps or decisions to be taken which would preclude giving effect to an environmental impact assessment.

Ireland contended that the Tribunal did have jurisdiction to determine the merits. It also argued that pursuant to article 293(1) of UNCLOS other relevant treaties and rules of international law were applicable in the proceedings, including the 1992 OSPAR Convention and certain rules of customary international law.

- (ii) The **United Kingdom** denied that it was in breach of any articles of UNCLOS or of any other treaty or rule of international law. On jurisdiction and admissibility, it also argued (i) that the Arbitral Tribunal had no jurisdiction to apply other agreements and instruments invoked by Ireland; (ii) that Ireland had failed to make out a case arising substantially under UNCLOS; and (iii) that because the matters in dispute fell mainly within the competence of the European Community and were subject to the exclusive jurisdiction of the European Court of Justice, Ireland and the United Kingdom lacked standing respectively to sue and be sued on them before an UNCLOS arbitral tribunal, which therefore had no jurisdiction. The United Kingdom argued that the award of provisional measures was unnecessary and would cause serious prejudice if Ireland's claims were not subsequently upheld. It gave certain assurances and undertakings in regard to additional contracts, shipments and co-operation.

### **3. Reasoning of the Arbitral Tribunal**

#### **(a) On jurisdiction and admissibility**

1152. The Arbitral Tribunal affirmed that *prima facie* it had jurisdiction over the dispute between the Parties concerning the Mox Plant and that the dispute concerned interpretation and application of various provisions of UNCLOS on the basis of which Ireland presented its claims.

1153. However, before proceeding to hear arguments on the merits of the dispute the Arbitral Tribunal held that it must be satisfied that there were no substantial doubts as to its jurisdiction.

1154. The relevance of the 1992 OSPAR Agreement for the Protection of the Marine Environment of the North-East Atlantic did not alter the character of the dispute as one essentially involving UNCLOS, nor did it deprive the Arbitral Tribunal of jurisdiction under UNCLOS articles 281 and 282.

1155. The Arbitral Tribunal agreed with the United Kingdom that there is a cardinal distinction between the scope of its jurisdiction under article 288(1) and the law to be applied under article 293 of UNCLOS. It also held that claims arising directly under other instruments may be inadmissible in UNCLOS proceedings. In any event, it did not agree that Ireland had failed to state an UNCLOS case.

1156. There is a real possibility that the European Court of Justice (ECJ) may be seized of the question whether competence in regard to some or all of the matters in dispute has been transferred to the European Community, and whether in such a case, as between two EC member States, the ECJ has exclusive jurisdiction over interpretation and application of UNCLOS. It cannot be said with certainty that the ECJ would reject this view. But, if such a view were sustained, an UNCLOS Tribunal would have no jurisdiction by virtue of article 282.

1157. There being substantial doubts whether the jurisdiction of the Arbitral Tribunal can be firmly established, it would be inappropriate to hear the merits. Considerations of mutual respect and comity should prevail between judicial institutions. Further proceedings were therefore suspended.

#### **(b) On provisional measures**

1158. On the present state of the evidence, Ireland had not established that serious harm would be caused to the marine environment or would be likely to result from continued operation of the Mox Plant pending a determination on the merits.

1159. It must be shown that provisional measures to protect the rights of Parties are urgently required to prevent irreparable harm to the claimed rights. In relation to discharges from the Mox Plant and environmental impact assessment this had not been shown.

1160. The Parties were already bound to co-operate in accordance with the ITLOS provisional measures order. The Arbitral Tribunal further recommended that the Parties should seek to establish and review arrangements on co-operation, consultation and inter-governmental co-ordination.

#### 4. Decision

1161. On 24 June 2003, the Arbitral Tribunal unanimously issued the following Award pursuant to articles 1 and 8 of its rules of procedure and article 290 of the Convention:

- (a) Further proceedings in the case were suspended until not later than 1 December 2003;
- (b) Provisional measures prescribed by ITLOS in its Order of 3 December 2001 were affirmed;
- (c) The request for additional provisional measures was rejected in so far as it concerned discharges and environmental impact assessment;
- (d) No further order was required as to co-operation and the provision of information;
- (e) The Parties were called on not to aggravate or extend the dispute;
- (f) The Parties were requested to take steps to expedite resolution of outstanding issues through the European Community; and
- (g) The Parties were to report to the Arbitral Tribunal and each other on compliance;
- (h) The Registrar was to provide copy of the order to the European Commission.