

**THE APPLICATION OF THE LAW OF THE SEA and the
CONVENTION ON THE MEDITERRANEAN SEA**

Mazen Adi

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Oceans and Law of the Sea
Division for Ocean Affairs and the Law of the Sea

**DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA
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ABSTRACT

This study is composed of two parts. The first will be a systematic examination of the chronology of the development of the delimitation of maritime boundaries, with particular reference to the Law of the Sea Convention as it relates to the status of the enclosed and semi-enclosed seas. The second part will depart from this chronological development. It will look closely at the decisions of the International Courts and Arbitration systems in cases which concern Mediterranean waters in a regional study of the evolution of delimitation parameters and baselines in this zone during the last 40 years. This evolution, as will be seen, has been marked and marred, despite intense and persistent examination of the issues on a case-by-case and universal level, by a lack of clarity and an effective general application.

The 20th century witnessed an increase in the coastal States jurisdiction claims over their offshore territory. Prior to the mid twenty century coastal State jurisdiction rarely extended more than three nautical miles offshore. This limit is obviously inadequate for the technical and political developments which have since taken place. A whole gamut of new problems and solutions have presented themselves in the intervening period, and appropriate responses and a set of guidelines for maritime delimitation is urgently required. Regional cooperation will be fostered through open cooperation channels and a commitment to finding solutions. Along with a clear codification of internationally accepted and acceptable parameters and responsibilities, a key assumption and requisite for the successful settlement of questions or eventual disputes is a forum where parties are able to place their cases for judgement. This study will, in the second half, look also at the negotiating table as an alternative to the time-consuming and expensive judicial process.

DISCLAIMER

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Part one

Delimitation of Maritime Boundaries and the status of the Enclosed and Semi-enclosed seas

1.1 Section A - Historic background of the Delimitation of Maritime Boundaries

Historically, international law and order on the seas and oceans of the world has been called upon to provide regulation of the diverse interests of all nations.

The law of the sea in one of the oldest branches of international law, however, the most important source of codification and progressive development of this law were the three United Nations Conferences held in 1958, 1960 and from 1973 to 1982 respectively . The development of the law of the sea has had a long and confused history, being influenced by the opinions of authors, the practice of States, and the proceedings of conferences and their consequent Conventions. Over time, it has become accepted that coastal States are entitled to claim sovereignty and jurisdiction over the adjacent sea and the seabed. These claims have been made for various purposes. The security and defense factor was the first that led States to start this process, but the development of new weapons has made that rational obsolete.¹ For example, England sought to enforce offshore customs zones in the Eighteenth and Nineteenth centuries by way of the various Hovering Acts² to combat the smuggling of European goods, but in the twentieth century the emphasis has been on the development of various resource zones.

The year 1930 witnessed the first attempt to address the issue of codifying the law of the sea in the twentieth century, within multilateral fora, when the Assembly of the League of Nations decided to hold a conference in March 1930 in Den Hague. The Conference was called to consider some of the problems of international maritime law and to codify maritime boundaries delimitation rules. Fifty-one countries took part in the Conference. Problems relating to the width

¹ Donald Rothwell, *The law of maritime boundary delimitation between States: a history of its development to the present day*. L.L.M. dissertation, University of Alberta, Canada, 1984. Retrieved October 14, 2008, from Dissertations & Theses: Full Text database. (Publication No. AAT ML24771).

² The “Hovering Acts” refer to the numerous pieces of English legislation passed in the Eighteenth and Nineteenth Centuries to combat the smuggling of goods from ships who “hovered” off the English coast.

and sovereignty of territorial waters, the necessity for regulation of use and exploitation of natural resources of the World Ocean, defining adjacent zones, etc. were considered.

The preparatory Committee for the Hague Conference had requested the Conference participants to consider what should be the situation with regard to the delimitation of the territorial sea in the case where the opposite coasts of a strait belonged to two or more States: Many of the answers proposed that the limit of the territorial water of each State should be: “midway between the two shores”,³ that sovereign rights should extend to the median line,⁴ the centre line⁵ or midway.⁶ As a result, the preparatory Committee for the Conference presented its draft proposal on opposite delimitation. This draft did not gain the approval of the delegations. Consequently, the report of the Committee stated that

it has been thought better not to draw up any rules regarding the drawing of the line of demarcation between the respective territorial seas in straits lying within the territory of more than one coastal State and of a width less than the breadth of the two belts of territorial sea.⁷

Disagreement between the participants and the reluctance of large colonial nations to consider the interests of other smaller, nations, especially with regard to the delimitation of the territorial seas, meant that no result came from the Hague Conference. The conference, nevertheless, gave a positive indication that the center or median line was the appropriate line in the case of delimitation of territorial seas between opposite States,⁸ and it enabled nations to update their positions on problems of sovereignty over the world’s oceans, which thereafter facilitated the

³ Rosenne, S.,ed., League of Nations: Conference for the Codification of International Law. Volume II 1930, South Africa-. 273 (1975)

⁴ Ibid, Germany, Denmark, the Netherlands, Sweden

⁵ Ibid, Romania

⁶ Ibid, Australia, Great Britain

⁷ Ibid, 1422.

⁸ Rothwell, 55.

development of the rules and norms of international maritime law.⁹

After the end of the Second World War and with the establishment of the United Nations, the International Law Commission was responsible for the codification of international law and for its development. However, the initial studies of the International Law Commission into the complicated problems of maritime delimitation, demonstrated that no single rule of law existed to regulate this new field of international relations. The only obligation in force was an obligation, hardly a law, for States to delimit their maritime jurisdiction over the territorial sea and the continental shelf through agreements whereby all parties aimed for an equitable result. A law of maritime delimitation was very slow in developing. There existed to date only a legal obligation to negotiate. There were, in the absence of rules of law, no substantive norms governing maritime delimitation, and a pervading reluctance to contemplate a judicial or arbitral settlement which would be applied by the judge or arbitrator. An *ex aequo et bono* solution appeared to be the only alternative of participants.¹⁰

The Commission selected and appointed codification of the regime of the high seas as a priority topic at its first session in 1949. The Commission considered this topic at its second, third, fifth, seventh and eighth sessions, in 1950, 1951, 1953, 1955 and 1956, respectively. During its second session, in 1950, the Commission examined the various questions falling within the scope of the general topic of the regime of the high seas, including the contiguous zones, sedentary fisheries and the continental shelf and a draft Articles on the subjects of the continental shelf; resources of the sea; sedentary fisheries; and contiguous zone were provisionally adopted.¹¹ At its fifth session, in 1953, the Commission once again looked at provisional draft Articles and took into

⁹ The history of the law of the sea. <http://www.oceansatlas.org/unatlas/-ATLAS-/chapter14.html>

¹⁰ Prosper Weil, *The law of maritime boundaries – reflections*. Grotius Publications Limited, 1989. 6.

¹¹ Law of the Sea: Régime of the High Seas. <http://www.un.org/law/ilc/>

account the comments of participating Governments. Final drafts were prepared on the following three questions: continental shelf; fisheries; and contiguous zone.

The Commission recommended that the Assembly adopt by resolution the part of the report covering the draft Articles on the continental shelf. As the Commission had not yet adopted draft Articles on the territorial sea, it recommended that the General Assembly take no action with regard to the draft Article on the contiguous zone since the report covering the Article was already published.¹²

However, the General Assembly decided to defer action until all the problems relating to the regime of the high seas and the regime of territorial waters had been studied by the Commission and reported upon by it to the Assembly. Again in 1954 the question of the continental shelf was brought before the Assembly at its ninth session. And again the Assembly deferred action and requested the Commission to submit its final report on the regime of the high seas, the regime of territorial waters and all related problems in time for their consideration by the Assembly at its eleventh session, in 1956.¹³ At its eighth session in 1956, the Commission adopted a final draft on the law of the sea, containing seventy-three Articles and commentaries there to. The Commission noted that, in order to give effect to the project as a whole, it would be necessary to have recourse to conventional means. Accordingly, in submitting the final draft to the General Assembly in 1956, it recommended that the General Assembly should summon an international conference of plenipotentiaries.

The First United Nations Conference on the Law of the Sea was held in the spring of 1958 in Geneva, Switzerland and was based on the careful background work and drafts prepared over an extended period by the International Law Commission. the work of the Commission facilitated the rapid conclusion of a highly successful Conference that produced four keystone conventions:

¹² Ibid.

¹³ Ibid.

the Convention on the Territorial Sea and the Continuous Zone, the Convention on the Continental Shelf, the Convention on the High Seas, and the Convention on Fishing and Conservation of the Living Resources of the High Seas, as well as an Optional Protocol on the Settlement of Disputes.¹⁴ The United Nations First Conference contributed to the agreement on the doctrine of the Continental Shelf. This doctrine was addressed by the United States President Truman Proclamation in 1945.¹⁵ Even though, the First United Nations Conference of the Law of the Sea (UNCLOS I) was able to produce four important legal instrument governing many aspects in the law of the sea, but it did not offer a solution to two major issues: the width of the territorial sea, and the extent of coastal State fisheries jurisdiction. These outstanding issues were left by the first Conference were discussed at the UN Second Conferences on the Law of the Sea in Geneva in the spring 1960. The Conference was attended by 88 nations and observers from 24 specialized UN institutions and Government agencies, but it failed to reach an agreement on any of the proposals on the two questions before it.

After the end of the Second Conference, individual States independently began to expand the limits of their territorial waters. In December 1966, Argentina became the first nation to declare its territorial waters jurisdictional limits to be 200 nautical miles. Soon after, Brazil, Nicaragua, Panama, Peru, Salvador, Uruguay, Chile and Ecuador followed with 200-mile territorial waters claims of their own. Some African countries also established these claims: Benin, Gambia,

¹⁴ United Nations Convention on the Law of the Sea, 1982: a commentary. (The Hague: Martinus Nijhoff) . (The Hague: Martinus Nijhoff) Volume II, Center for Oceans Law and Policy, University of Virginia School of Law.

¹⁵ The Truman Proclamation reads: "*having concern for the urgency of conserving and prudently utilizing its mineral resource, the government of the United States regards the natural resources of the sub-soil and sea-bed of the continental shelf beneath the high seas but contiguous to the coast of the United States as appertaining to the United States, Subject to its jurisdiction and control*" see Truman Proclamation No. 2667 of September 1945. See also A.L. Hollick, "U.S Oceans Policy: the Truman Proclamation" *American Journal of International Law* 17(1976) : 23-35.

Congo, Liberia and Somalia were among them.¹⁶

The failure of the First Conference to find solutions to many of the problems including the width of the territorial seas and the establishment of an equitable international regime for the seabed and the ocean floor and the subsoil beyond the limits of national jurisdiction, was the impetus behind the General Assembly's decisions in its Resolution 2750 of 17 December 1970. This Resolution called for a Conference to be convened in 1973. This conference on the law of the sea would examine the above listed problems and would also deal with issues concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits and contiguous zone), fishing and conservation of the living resources of the high seas (including the question of preferential rights of coastal States), the preservation of the marine environment (including, *inter alia*, the prevention of pollution) and scientific research.¹⁷

This UN Conference presided from December 1973 until December 1982. Delegations from more than 150 countries, both coastal and land-locked, and observers from a number of States, territories and political action movements, attended these sessions. Also involved were 12 specialized institutions and organizations, 19 intergovernmental and a number of government agencies.¹⁸

When UNCLOS III began there was no draft text for the delegations to discuss, even after the five years of preliminary negotiations of the Sea-Bed Committee. This Committee, established by the General Assembly in 1968 and entrusted to consider a new law of the sea, did not contribute in producing a draft capable of forming the basis for multilateral diplomatic

¹⁶ The history of the law of the sea. <http://www.oceansatlas.org/unatlas/-ATLAS-/chapter14.html>

¹⁷ Law of the Sea: Régime of the High Seas. <http://www.un.org/law/ilc/>

¹⁸ The history of the law of the sea. <http://www.oceansatlas.org/unatlas/-ATLAS-/chapter14.html>

negotiations. The majority of the work of the Conference was dedicated to three Main Committees. In addition there was an informal group on the settlement of disputes which later became the fourth Committee.

The Second Committee at UNCLOS III dealt with issues related to the general law of the sea, including in particular the Territorial Sea, Straits, Economic Zone, Continental Shelf, High Seas, Land-Locked States' Access, Archipelagoes, Regime of Islands, Enclosed or Semi-Enclosed Seas.¹⁹

The Second Committee produced, after two complete revisions, thirteen informal working papers, a document that included the main trends in the subjects allocated to it. This document included 400 provisions and many other alternatives. At a March 1975 meeting in Geneva, the Conference decided that the Chairman of each Main Committee should prepare an informal "Single negotiating text" (SNT) on the items before his Committee, and these SNTs were circulated at the end of the Geneva Session. The Chairman of the Second Committee, Reynaldo Galindo Pohl (El Salvador), entrusted his rapporteur Satya Nandan (Fiji) to prepare the SNT.²⁰ Due to a lack of time during the Geneva Session, the SNTs were not discussed by the delegations. However, some preliminary reactions were expressed. During the 1976 session the SNTs were discussed Article by Article in the three main committees, and a general discussion took place in the plenary on the settlement of disputes.

Afterwards, the SNTs were revised by the Committee Chairman to form a "Revised Single Negotiating Text" (RSNT). The 1977 session resulted in an informal Composite Negotiating Text (ICNT) which depended mainly on the RSNT with some refinements, in spite of the

¹⁹ United Nations Convention on the Law of the Sea, 1982: a commentary. (The Hague: Martinus Nijhoff) Volume I: xxvi. Center for Oceans Law and Policy, University of Virginia School of Law.

²⁰ Ibid. 116

disagreement on the deep sea-bed issues.

The informal text of the Draft Convention was produced in 1980, and in 1981 the official Draft was issued and the Conference formally opened the Convention for signature in December 1982 in Montego Bay, Jamaica.²¹

At the final UNCLOS meeting in Montego Bay (Jamaica) on 10 December, 1982, the new Convention was immediately signed by representatives of 119 nations, including the USSR.

Several developed nations, including the USA, Germany and Great Britain, refused to sign the UNCLOS 1982 declaring that its key rules limit "freedom of action" by private companies. And due to their dissatisfaction with the Convention's deep sea-bed mining regime, other countries like Turkey and Venezuela, for different reasons, did not sign. These reasons included concerns over the provisions on settlement of ocean boundary disputes between opposite and adjacent States.

²¹ Ibid. xxviii

Section B - Maritime Zones set by the LOSC the rights and duties of the States in these zones

The United Nations law of the sea Convention of 1982 (UNCLOS) outlined the rights and duties of coastal States with respect to resources, both living resources such as fisheries and non-living resources such as oil and gas. In addition to rights that the coastal States have in their national zones, the Convention recognized the rights and duties of States in the international zones such as the high seas and the international sea bed area, which are beyond their national jurisdiction.

The establishment of maritime zones by States in accordance with the UNCLOS 1982 may create situations of overlapping claims, then requiring maritime boundary delimitation. The following section will describe the maritime zones, and the rights and duties of the States in those zones.

Internal waters

Article 8 of the UNCLOS defines internal waters as “Except as provided in Chapter VII (Archipelagic States), waters on the landward side of the baseline of the territorial sea”. In this respect it is linked to Article 7(3) which requires that sea areas within straight baselines “must be sufficiently closely linked to the land domain to be subject to the regime of internal waters”.²² Straight baselines closing bays and river mouths, and straight baselines drawn along coasts which are deeply indented and cut into or fringed with islands, will create areas of internal waters between the straight baselines and the low-water line along the mainland or island coast.²³

Coastal States exercise full sovereignty over their internal waters, which form an integral part of

²²United Nations Convention on the Law of the Sea, 1982: a commentary. (The Hague: Martinus Nijhoff) Volume II : 105. Center for Oceans Law and Policy, University of Virginia School of Law.

²³ Victor Prescott and Clive Schofield, *The Maritime Boundaries of the World*.

their territory. Foreign aircraft do not have automatic fly over rights, alien fishing or other resource extraction rights do not exist, and there is no right to conduct marine scientific research without the coastal State's permission. Foreign vessels have no right of passage through the internal waters, except "where the establishment of a straight baseline system has the effect of enclosing as internal waters areas which had not previously been considered as such, and were used for international navigation".²⁴

Article 8(2) states that a right of innocent passage exists in waters enclosed as internal waters by the drawing of straight baselines, where such waters have not previously been considered as internal waters.²⁵ As a result, the right of innocent passage is preserved in the internal waters and identical to the case in the territorial waters in terms of alien navigation. An example of this is the passage between the Outer and Inner Hebrides, known as the Minch, off the northwestern coast of Scotland.²⁶

Archipelagic Waters

Archipelagic waters are defined in Article 49 of UNCLOS. They comprise the waters enclosed by archipelagic baselines of an archipelagic State regardless of their depth or distance from the coast.²⁷ This Article also gives the archipelagic State sovereignty over the archipelagic waters enclosed by its archipelagic baselines, the air space over those waters, their bed and subsoil, and resources contained therein. In addition, Article 49 provides that the status of archipelagic waters is not affected by the regime of archipelagic sea-lanes passage.²⁸

²⁴ Ibid.

²⁵ United Nations Convention on the Law of the Sea 1982: a commentary. (The Hague: Martinus Nijhoff) . Volume II :105. Center for Oceans Law and Policy, University of Virginia School of Law.

²⁶ Prescott et al., 10.

²⁷ Ibid. 11.

²⁸ United Nations Convention on the Law of the Sea 1982: a commentary. (The Hague: Martinus Nijhoff) . Volume II: 438. Center for Oceans Law and Policy, University of Virginia.

The sovereignty of the archipelagic States is not unconditional. Article 51 qualified this sovereignty by stating in paragraph 1 that “without prejudice to Article 49 an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighboring States in certain areas falling within archipelagic waters.” It also added that “at the request of any of the States involved the terms and conditions governing such activities, including their nature, extent and the areas to which they may apply, may be regulated through bilateral agreements between them.”

The vessels have the right of innocent passage within archipelagic waters. Article 52 of UNCLOS prescribes the general rule for passage through archipelagic waters i.e. for innocent passage. In addition to the right of innocent passage, vessels have the right of archipelagic sea-lane passage within either defined archipelagic sea lanes, or through routes used for international navigation through the archipelagic waters from one part of the EEZ or high seas to another part of the EEZ or high seas.²⁹

Territorial Sea

Article 3 of the 1982 Convention states that every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles (nm), measured from the baselines as laid down in the Convention, and Article 4 provides that the outer limit of the territorial sea of each State is the line every point of which is at distance from the nearest point of the baseline equal to the breadth of the territorial sea.

The international consensus on the 12 nm territorial sea limit was one of the achievements of UNCLOS III, and was a culmination of a process which began with the conference for the Codification of International Law convened by the League of Nations in 1930, and continued

²⁹ Victor Prescott et al, 12.

during UNCLOS I and UNCLOS II.³⁰

Although Article 3 of the 1982 Convention permitted coastal States to have a maximum breadth of their territorial water of 12nm, this breadth cannot always be definite. Article 12 of the Convention provided that a roadstead which is situated astride the outer limit of the territorial sea is included entirely in the territorial sea. A roadstead which is wholly detached from the territorial sea also clearly forms part of the territorial sea, albeit it a detached part.³¹ The territorial sea can also be less than 12 nm in the case of opposite or adjacent coasts of two States.

Article 15 of the UNCLOS reads

[w]here the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured.

The coastal States have full sovereignty over their territorial seas, thus activities such as fishing, mineral extraction, the laying of submarine pipelines and cables and marine scientific research are prohibited without the express consent of the coastal State. The right of innocent passage is preserved for vessels belonging to all States in the territorial seas (Article 17), however, the right of over flight for foreign aircraft is subject to the consent of the coastal State.

The concept of ‘innocent passage’ through the territorial sea is derived from Articles 18 and 19 of the 1982 Convention and it means the continuous and expeditious transit, through territorial waters or internal waters, en route to or from the high seas, in a manner which does not prejudice the peace, good order and security of the coastal State.

This provision has its roots in the work of the 1930 Hague Conference which defined the passage

³⁰ United Nations Convention on the Law of the Sea 1982: a commentary. (The Hague: Martinus Nijhoff) . Volume II :77. Centre for Oceans Law and Policy, University of Virginia School of Law.

³¹ Ibid. 125.

as “not innocent” in the following terms: “passage is not innocent when a vessel makes use of the territorial sea of a Coastal States for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interest of that State.”³² The coastal State has the right to prevent passage which is not innocent and Article 19 of the Convention lists some of the acts that may negate the right of innocent passage as follows:

- a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind;
- (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
- (e) the launching, landing or taking on board of any aircraft;
- (f) the launching, landing or taking on board of any military device;
- (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- (h) any act of wilful and serious pollution contrary to this Convention;
- (i) any fishing activities;
- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
- (l) any other activity not having a direct bearing on passage.

Article 21 of the Convention complements Article 19 in enumerating the matters concerning which the coastal States is entitled to adopt laws and regulations relating to innocent passage through its territorial sea in respect of the issues such as “the safety of navigation, protection of navigational aids, conservation of living resources [...]”

³² Ibid. 166.

In addition to this statement, Article 20 of the Convention requires that submarines and other underwater vehicles navigate on the surface and show their flag when in the territorial sea.

Contiguous Zone

The contiguous zone is the a band of water seaward of the territorial sea where the coastal State has the right to exercise the necessary control in order to prevent and punish infringement within its territorial sea of its customs, fiscal, immigration or sanitary laws and regulations. Article 33 of the 1982 Convention defines the Contiguous Zone as:

1- In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(b) Punish infringement of the above laws and regulations committed within its territory or territorial sea.

2- The contiguous zone may not extend beyond 24 nm from the baseline from which the breadth of the territorial sea is measured.

Article 24 of The 1958 Convention on the Territorial Sea and Contiguous Zone provided for States to claim a zone contiguous to the territorial sea up to a 12 nm breadth, although Article 33 of the 1982 Convention retained this right, it extended the allowable outer limit of the Contiguous zone to 24 nm. The contiguous zone, as in the case of the territorial sea, can be claimed from any legitimate territorial sea baseline.

The objectives of coastal States in establishing a contiguous zone is different than their objectives when establishing their territorial sea and Exclusive Economic Zone. In the contiguous zone, foreign aircraft have over flight rights whilst foreign vessels have unfettered navigation rights, provided that they have not infringed the coastal State's customs, fiscal, immigration and sanitation legislation as it applies to that State's territory or territorial sea. The

fishing rights are granted to foreign vessels in this zone as long as the above mentioned regulations have not been violated and in the unlikely event that the coastal State in question has not claimed either an exclusive economic zone or exclusive fishing zones.³³

Exclusive Economic Zone

Part V (Article 55 to 75) of the 1982 Convention established the legal framework of the regime for the Exclusive Economic Zone (EEZ). This concept is considered to be the most important part of the Convention, and it gained general international acceptance during the negotiations leading to the adoption of the convention. It was, however, fundamentally a compromise competing coastal State resource interests, and the interests of those States looking to preserve navigation rights.³⁴

The 1982 Convention defines the EEZ as being the “the area beyond and adjacent to the territorial sea subject to the legal regime established by Part V of the Convention(Article 55)”, and it gives coastal States the right to establish an exclusive economic zone which may extend upon to 200 nautical miles from the baselines from which the territorial sea is measured (Article 57). The establishment of this zone gives the coastal State considerable sovereign rights with respect to the living and non-living resources, and “with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from water, currents and winds” Article 56 therefore sets out the general scope of the coastal States’ rights, jurisdiction and duties in addition to the sovereign rights of the coastal State in the EEZ for the purpose of exploration and exploitation. It should be noted, therefore, that States in the EEZ do

³³ Prescott et al., 18.

³⁴ Ibid. 19.

not have ‘sovereignty’ according to Article 56, but they do have ‘sovereign rights’, ‘jurisdiction’ and ‘duties’.³⁵

In parallel with those rights, the Convention preserves many rights of other States in the EEZ, whether coastal or land-locked. Articles 58, 59 and 60 deal with the relationship between the rights and jurisdiction of the coastal State and of other States in the EEZ: Article 58 addresses the rights and duties of other States in the EEZ; Article 59 establishes principles for the resolution of conflicts in cases where the provisions of the Convention do not specifically attribute rights or jurisdiction to either the coastal State or to other States; and Article 60 gives the coastal State a certain competence which goes beyond its sovereign rights over resources. These include jurisdiction with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.³⁶

As a result, in EEZs all States enjoy a freedom of navigation and overflight, as well as the freedom to lay submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines.³⁷

The majority of the remaining Articles of Part V of the Convention deal with the living resources in the EEZ. The broad authority of the coastal State, its rights and responsibilities, over the conservation and utilization of living resources is set out in Articles 61 and 62. According to Article 61 The coastal States have sovereign rights over the living resources of the EEZ.

³⁵ Ibid. 20.

³⁶ The Law of the Sea, National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone. Office of the Special Representative of the Secretary General for the Law of the Sea, United Nations (1986): iv

³⁷ Ibid.

Paragraph (1), however, provides that the coastal state “shall determine the allowable catch of the living resources in its EEZ”. The Article goes on to state that the coastal States must ensure that the maintenance of the living resources in the EEZ is not endangered. To this end, the coastal States must ensure that the population of harvested species are maintained or restored at levels which can produce the maximum sustainable yield as qualified by relevant environmental and economic factors, avoiding over-exploitation. Article 62 lists the obligations of coastal States in promoting “the objective of optimum utilization of the living resources in the EEZ” in addition to their obligation to “determine its own capacity to harvest such resources” where the coastal States do not have the capacity to harvest the entire allowable catch, they could, by agreement, grant access to the other States to the surplus of the allowable catch.

The problem of shared stocks is addressed in Article 63, and separate Articles provide a framework for the conservation and management of highly migratory species (Article 64), marine mammals (Article 65) anadromous stocks (Article 66) and catadromous species (Article 67).³⁸

In the exercise of coastal State sovereign rights over the living resources of the EEZ, Article 73 of the Convention empowers them to take a wide range of enforcement measures as may be necessary to ensure compliance with its laws and regulations.

Continental Shelf

The Truman Proclamation of 1945 opened the way for States to extend their claims to the continental shelf.

³⁸ United Nations Convention on the Law of the Sea 1982: a commentary. (The Hague: Martinus Nijhoff) Center for Oceans Law and Policy, University of Virginia School of Law Volume II p 125, Published by Martinus Nijhoff p 505,506

The 1958 Convention on the Continental Shelf granted states sovereign exploration, describing the continental shelf as

(a)[...]the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea. To a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.³⁹

The 1982 Convention codified the same sovereign rights to states, but defined the maximum allowable claim differently. Article 76 of the 1982 Convention provides a rather complex definition of the continental shelf by stating that the continental shelf comprise the seabed and subsoil beyond the territorial sea of a coastal states

throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines [...] where the outer edge of the continental margin does not extend up to the distance.

Where the continental margin extends beyond 200 nm from the baselines, the maximum allowable claim depends upon the geology and geomorphology of the area. However if a State wishes to claim a continental shelf beyond the 200 nm from the baseline, it should request the approval of the Commission on the Limits of the Continental Shelf (CLCS).

Article 77 specified the rights of the coastal States in the continental shelf, however, Article 88 states that such rights “must not infringe or result in any unjustifiable interference with navigation and freedoms nor the legal status of the superjacent waters or of the airspace above

³⁹ [United Nations Convention on the Law of the Sea 1982: a commentary](#). (The Hague: Martinus Nijhoff), Center for Oceans Law and Policy, University of Virginia School of Law Volume II p 125, Published by Martinus Nijhoff p 841

them, and explicitly protects such rights as defined elsewhere in the Convention". The right to lay submarine pipelines and cables on the continental shelf is governed by article 79.⁴⁰

⁴⁰ Prescott *et al.*, 25.

The case of the Mediterranean

1.2 Introduction

Before looking at problems specific to the Mediterranean, the area of special interest for this study, it will be necessary to investigate the maritime legal status of the Mediterranean waters. The waters have been variously defined in the geographical and political sense, and in the minds of those dependent on its resources and its protection. The definition of the Mediterranean in the 'narrow' sense refers to the whole maritime area outside the Dardenelles, whereas the 'broad' definition includes the Black Sea and the Sea of Azov. The Mediterranean may also be defined as the whole, in an undivided basin, of the waters enclosed by the Atlantic Ocean, and therefore as an interior enclosed sea. The complexity of the definition warrants a closer look at the system for categorizing a sea as open, enclosed, or semi-enclosed, as delimitation issues will require differing solutions, dependent on the definition of the maritime zone. It is clear that the uniqueness of the Mediterranean, a body of water surrounded by 21 states, dotted by a multitude of island groups, and used for several millennium as a principal source of food, transport medium, and a zone of political and cultural contest, requires close attention from the legal world.

Section C - The legal regime of the Enclosed or Semi-enclosed Seas

Part IX of the Law of the Sea convention addressed the subject of the “Enclosed and Semi-Enclosed seas”. The inclusion of Article 122 and 123 in the Convention dealing with enclosed and semi-enclosed seas represents the recognition of seas which have a special geographical situation requiring cooperation between the States bordering them in many areas including the management of the marine environment activities.⁴¹

During UNCLOS III, the subject of the enclosed and semi-enclosed seas was discussed in the light of the concerns that if a coastal State’s jurisdiction in enclosed and semi-enclosed seas were to be extended, this would in all likelihood impose restrictions on the freedom of navigation in those seas for the other States using these seas for navigation.

[T]he sentiment was also expressed that the concept of a 200-mile exclusive economic zone was inappropriate in such seas, other problems mentioned as requiring attention in enclosed and semi-enclosed seas including the delimitation of maritime areas, the management of natural resources, the protection and preservation of the marine environment, and the conduct of marine scientific research.”⁴²

Despite these concerns, no restrictions on the rights of third States in the enclosed or semi-enclosed seas were proposed during UNCLOS III. However, the Conference did attempt to elaborate on the particularity of those seas, as acknowledged in the statement of Ambassador Z. Perisic, Chairman of the Yugoslav delegation, who addressed the special character of the enclosed and semi-enclosed seas referring to the special characteristics of such seas as essential reasons for inserting special rules into the Convention. Among these reasons, he listed the complexity of navigation in these seas and in outlets connecting them with the open seas, due to their small surface and poor connection with other seas, and, as a result of this connection to

⁴¹ United Nations Convention on the Law of the Sea 1982: a commentary. (The Hague: Martinus Nijhoff) , Center for Oceans Law and Policy, University of Virginia School of Law Volume III p 125, Published by Martinus Nijhoff p 343

⁴² Ibid.

other seas, the growing danger from all types of pollution. An additional concern was the perceived need for special precautionary measures relating to the management, conservation and exploitation of the living resources of such seas.⁴³ Other States argued during the discussion that the particular characteristics and problems of individual enclosed and semi-enclosed seas could only be adequately addressed within the framework of regional or sub regional agreements. The representative of Sweden for example underlined the reasons for including the topic of the enclosed and semi-enclosed seas in the Convention by stating that

[T]he main reason for including item 17 in the agenda was that there were basic differences between States situated along the oceans on the one hand and those bordering enclosed and semi-enclosed seas on the other. Those differences could be of a political, economic, geological or ecological nature. Each enclosed sea had its own particular problems and each case warranted its specific solution.⁴⁴

The special regime for the enclosed and semi-enclosed seas was seen by some States requiring a regime different from the general rules applied to the open ocean. However, the States adjacent to the enclosed or semi-enclosed seas considered this differentiation as not acceptable, because the general regime being established for the oceans did serve their interests especially with respect to protecting navigation rights. This difference in the global regime could be reached under regional agreements between the States concerned.⁴⁵

During the negotiations in the Second Committee, many proposals and points of views regarding the definition and the legal status of enclosed and semi-enclosed seas were expressed. Some of

⁴³ Budisavl Vukas, "The Mediterranean: an Enclosed or Semi-enclosed sea?" in Budisavl Vukas, ed., *The legal regime of Enclosed and Semi-enclosed seas: the particular Case of the Mediterranean* (Zagreb: 1988): 51.

⁴⁴ United Nations Convention on the Law of the Sea 1982: a commentary. (The Hague: Martinus Nijhoff), Center for Oceans Law and Policy, University of Virginia School of Law Volume III p 125, Published by Martinus Nijhoff p 344 quoting from the Second Committee 38th meeting (1974), Para. 22 II Off. Rec275

⁴⁵ United Nations Convention on the Law of the Sea 1982: a commentary. (The Hague: Martinus Nijhoff), Center for Oceans Law and Policy, University of Virginia School of Law Volume III p 125, Published by Martinus Nijhoff p 344

these proposals found their way in to the Convention. With regard to the definition, the Iranian delegation introduced a proposal which pointed out the differences between the enclosed and semi-enclosed seas by stating that

there were a great number of enclosed or semi-enclosed seas, gulfs and bays throughout the world, and somewhere bordered by a single State, others, such as the Sea of Okhotsk, the East China Sea, the South China Sea, the Mediterranean, the Celebes Sea, the Persian Gulf, the Red Sea, the Black Sea and the Baltic Sea, were surrounded by two or more States. It was the latter category of enclosed and semi-enclosed seas, and particularly the smaller ones bordering by several States, that presented the most acute problems; and those problems could not be solved by global norms only.⁴⁶

The case described was the description of about one half of the countries participating in the Conference. Many of the seas in question suffered serious problems, such as pollution and the mismanagement of living resources.

Despite the different points of view expressed during the negotiations, the Conference was able to agree on the formulation of part IX, which includes Articles 122 and 123, However, provisions for special delimitation of zones and for special navigation issues were not mentioned in connection to the enclosed and semi-enclosed seas, and the Convention's provisions dealing with the delimitation and navigation were left to be applied to the enclosed and semi-enclosed seas as they were to other seas and oceans.

Analysis of Articles 122 and 123

Article 122 of the Law of the Sea Convention defines the enclosed and semi-enclosed sea as “a gulf, basin or sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States”. The definition in

⁴⁶ Ibid., quoting from the Second Committee 43rd meeting (1974), para. 22 II Off. Rec. 296

the second part of a “semi-enclosed sea” would appear to overlap with that of “enclosed seas”.⁴⁷

The key aspects of this definition include :

- the concept of sea surrounded by land;
- the defining characteristic of two or more States
- the connection to other marine areas; and
- the existence of territorial seas and Exclusive Economic Zones.

Among the contributions to the second session of the Conference was one by Iraq, which proposed a definition of “semi-enclosed sea” as a sea which constitutes part of the high seas, that is, that an inland sea, which is surrounded by two or more States, may also provide a corridor of the high seas between opposite and adjacent States, and which may be connected with other parts of the high seas by a narrow outlet. Another proposal was presented by Iran which provided definitions for both the “enclosed sea” and “semi-enclosed sea” and which reads as follows: “For the purpose of these Articles:

The term “enclosed sea” shall refer to a small body of inland waters surrounded by two or more States which is connected to the open seas by a narrow outlet.

The term “semi-enclosed seas” shall refer to a sea basin located along the margins of the main ocean basins and enclosed by the land territories of two or more States.”

In defending this proposal, the Iranian delegation noted that the term “enclosed sea” should not be confused with the term “closed sea” and the term should be used in the strictest sense and

⁴⁷ Ibid. 348 para. 122.1.

only in reference to small bodies of water such as the Persian Gulf and the Baltic Sea.⁴⁸

However, an emphasis on ‘the strictest sense’ would appear to exclude, from the onset, a wide range of water bodies which a broad yet clear definition would include.

During the fourth session of the negotiations in (1976), the Netherlands tabled an informal proposal that required “enclosed and semi-enclosed seas” to have only a narrow outlet and to consist entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.⁴⁹ Many other proposals were presented during the negotiations, and the majority of them attempted to put more closely restrict the definition of enclosed and semi-enclosed seas. Finally, the Chairman of the Second Committee, R. Galindo Pohl from El Salvador, presented a draft of a single definition of an “enclosed or semi- enclosed sea” which later became Article 122. This definition settled for a vague and broad definition to the enclosed and semi-enclosed seas.⁵⁰

The definition of an enclosed and semi-enclosed sea as codified in Article 122 is so worded that many bodies of water may in consequence defined as either enclosed or semi-enclosed seas. However, it did not give a clear definition of the degree of enclosure and size, which permits relatively large seas to be included, such as the Mediterranean. One of criterions of the definition of the enclosed and semi-enclosed sea is that it be “surrounded by two or more States”. Thus, if all the coast of a gulf, basin or sea belongs to one coastal State it shall not be considered an “enclosed or semi-enclosed sea” even if it meets other criterions required by Article 122. It therefore excludes bodies of water such as the Hudson Bay, and most of the polar seas. This

⁴⁸ United Nations Convention on the Law of the Sea 1982: a commentary. (The Hague: Martinus Nijhoff), Center for Oceans Law and Policy, University of Virginia School of Law Volume III p 125, Published by Martinus Nijhoff p 349

⁴⁹ Ibid. 350.

⁵⁰ Budisavl Vukas, “The Mediterranean: an Enclosed or Semi-enclosed sea?” in Budislav Vukas, ed., *The legal regime of Enclosed and Semi-enclosed seas: the particular Case of the Mediterranean* (Zagreb: 1988): 52.

exclusion can also cause serious complications in the case of the European seas.

The exclusion of all the seas surrounded by the coasts of one state only from the notion of enclosed or semi-enclosed seas is justified because the only requirement according to Part IX as regards such seas-increased co-operation of the coastal States- is in such case irrelevant.⁵¹

The other criteria of the definition set by Article 122 is that the sea in question must consist “entirely or primarily” of territorial seas or exclusive economic zones of two or more States, and to be “connected to another sea or the ocean by a narrow outlet”. The “narrow outlet” that connects an enclosed or semi-enclosed sea with another sea or the oceans can be a natural outlet such as a strait, or a manmade outlet such as a canal.⁵² But the term strait was deliberately not used, in order to prevent confusion with Part III of the Convention, which deals specifically with “Straits used for international navigation.”⁵³ The Treaty does, however, cover a narrow outlet if it is a canal (such as the Suez Canal or Panama Canal).⁵⁴

The definition of a sea as enclosed or semi-enclosed sea is only applicable in the case a connecting passage of water with another sea or oceans exists, via a narrow outlet, is present and with the argument that every such sea, due to their poor connection with other seas, is particularly vulnerable and deserves special protection.⁵⁵ Article 122 considers a sea as an enclosed or semi-enclosed sea, all seas which consist entirely or primarily of territorial seas or exclusive economic zones of two or more States. “According to this requirement, rather large

⁵¹ Ibid. . 53.

⁵² United Nations Convention on the Law of the Sea 1982: a commentary. (The Hague: Martinus Nijhoff) , Center for Oceans Law and Policy, University of Virginia School of Law Volume III p 125, Published by Martinus Nijhoff p352

⁵³ Budisavl Vukas, “The Mediterranean: an Enclosed or Semi-enclosed sea?” in Budislav Vukas, ed., *The legal regime of Enclosed and Semi-enclosed seas: the particular Case of the Mediterranean* (Zagreb: 1988): 53.

⁵⁴ United Nations Convention on the Law of the Sea 1982: a commentary. (The Hague: Martinus Nijhoff) , Center for Oceans Law and Policy, University of Virginia School of Law Volume III p 125, Published by Martinus Nijhoff p352

⁵⁵ Budisavl Vukas, “The Mediterranean: an Enclosed or Semi-enclosed sea?” in Budislav Vukas, ed., *The legal regime of Enclosed and Semi-enclosed seas: the particular Case of the Mediterranean* (Zagreb: 1988): 53.

seas such as the Norwegian Sea, the Greenland Sea or the Tasmanian Sea cannot be considered enclosed or semi-enclosed seas as they primarily consist of the territorial seas and economic zones of the coastal States.”⁵⁶

Cooperation, Consultation and Negotiation

The subject of ways to foster or condition cooperation, and hopefully to then avoid disputes, was introduced specifically at the second session of the Conference, in 1974. A proposal tabled by Turkey suggested that “States may hold consultation among themselves with a view to determining the manner and method of application appropriate for their region[...].” Iraq on the other hand proposed a more specific proposal by naming the issues on which States bordering enclosed and semi-enclosed seas should co-operate such as “management, conservation and exploitation of marine living resources”⁵⁷

At the third session of in 1975, the co-operation of coastal States was envisaged more specifically, by the Informal Single negotiating text (ISNT). The provisions of the ISNT incorporated many previous proposals in this matter and it read: “States bordering enclosed and semi-enclosed seas shall co-operate with each other in the exercise of their rights and duties under the present Convention. To this end they shall, directly or through an appropriate regional organization: (a) Co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea [...].”⁵⁸ The final Article, Article 123, lists these duties as:

- (a) the coordination of the management, conservation, exploration and exploitation of the living resources of the sea;
- (b) the coordination and implementation of measures for the protection and

⁵⁶ Ibid. . 54.

⁵⁷ United Nations Convention on the Law of the Sea 1982: a commentary. (The Hague: Martinus Nijhoff) , Center for Oceans Law and Policy, University of Virginia School of Law Volume III p 357-358, Published by Martinus Nijhoff

⁵⁸ Ibid. 360, quoting from A/CONF.62/WP.8/Part II (ISNT,1975), Articles 134 and 135, IV Off. Rec.152,171 (chairman, Second Committee)

- preservation of the marine environment, scientific research policies, and to undertake where appropriate joint programmes of scientific research in the area;
- (c) the inclusion, through invitation, of other interested States or international organizations in projects which are conducted as a result of the provisions of the Article.

The Revised Single Negotiating Text (RSNT) changed the nature of the State's co-operation from mandatory obligation to a declaratory provision which encouraged States bordering an enclosed or semi-enclosed sea to cooperate. This deviation is highlighted through the replacement of the word 'should' in the introduction of Article 123 in the ISNT to 'endeavour' in the RSNT.

Section D - The legal status of Mediterranean Sea and cooperation between the States on the Mediterranean

The Mediterranean is a geographically and politically strategic zone. It separates the African Continent from Europe. Any investigation of the Mediterranean must also, perforce, take into account that this sea witnessed the emergence of the Greek, Roman, Ottoman, French, and Italian Empires along its shores. Contention and conflict have been almost endemic to the zone, over its long populated past.

The strategic relevance of the sea has not diminished over time, and with expanding technical and scientific innovation, the sea has if anything increased in importance to the contiguous States. The West and the former Soviet Block both attached great importance to the Sea during the long years of the Cold War. Each of the two superpowers sought to expand and enhance its power over the Sea, in their bids to establish their spheres of influence. Disputes over Maritime and territorial issues which involved coastal States were often supported by one of the two conflicting powers. Major among these disputes were those between Greece and Turkey, Cyprus and Turkey, Spain and the United Kingdom and Israel and its neighbouring Arab States. The following chapter will concentrate on the legal status of the Mediterranean, in order to frame our expectations of the type and extent of cooperation that may exist in the sea's zone.

As a priority, we have to identify whether the Mediterranean is an enclosed or Semi-Enclosed according to the International-Legal framework and the 1982 Law of the Sea Convention. To address this question, we need to look first at the applicability of Article 122 to the Mediterranean, applying the premises contained in the definition set out in the Article. The Mediterranean is a body of water surrounded by twenty-one States and is connected to the Atlantic Ocean only by the strait of Gibraltar. This geographical condition appears to satisfy the

conditions referred to in the definition. As shown in negotiations over Article 122 illustrated in the previous part of this chapter, many States argued in favour of defining the Mediterranean as an Enclosed or Semi-Enclosed Sea. In the opinion of L.M. Alexander, semi-enclosed seas should only be considered “Primary seas” and not parts thereof. According to this argument, the Mediterranean would be considered a Semi-Enclosed Sea, but its constituent parts would not.⁵⁹ However, many States continue to oppose this trend and consider both the Mediterranean, as well as the smaller seas that form it to be enclosed or semi-enclosed in the light of Part IX of the Law of the Sea Convention. Finally, it has been a common and legal understanding that the Mediterranean sea fulfils the definition of semi-enclosed sea as set out in Article 122. It worth mentioning here that the International Court of Justice during its consideration of the continental shelf between the Libyan Arab Jamahiriya and Malta considered the Mediterranean as a semi-enclosed sea.

Furthermore, as stated earlier, the special characteristics of Mediterranean would then stress the importance of enhancing cooperation among the coastal States. Close attention should be paid to Article 123 of Law of the Sea as it relates to cooperation among States bordering enclosed and semi-enclosed sea, when studying the Mediterranean. Cooperation among Mediterranean coastal States was in fact launched way before the adoption of the Law of the Sea UNCLOS III. In 1949 the Fisheries Council for the Mediterranean was established within the Food and Agriculture Organization (FAO). Specific provisions for the protection of the Mediterranean from pollution have been agreed upon in General Conventions (for example, the 1954 International Convention designed to protect the sea from oil pollution), in regional treaties (the 1974 Barcelona Convention and related Protocol), and in sub-regional agreement (e.g. the 1974 Italo-Yugoslav

⁵⁹ L.M.Alexander, in Vukas, 55.

agreement on cooperation for the protection of the waters of the Adriatic sea and coastal zones for pollution).⁶⁰

Article 123 of UNLOSC III encouraged States to work together through “an appropriate regional organization” to coordinate the activities listed in the Article, but it is in fact a confirmation and underlining of concerns already voiced in previous international agreements, providing a legal framework now binding on all States.

The main threat that endangers the well-being of the Mediterranean and the surrounding populations and natural resources is due to activities which cause pollution in the marine environment, and therefore one of the major issues that need to be addressed on an inter/State cooperative level is the control of exploration and exploitation activities in the sea. The existence of a considerable amount of gas and oil in the Mediterranean submarine areas has led to extensive survey, research, and mining activity in the Mediterranean sea, especially in the recent years. These enterprises place the maritime environment under enormous stress, and they require a high level of cooperation. This cooperation was one of the main issues discussed during the Conference of Plenipotentiaries of the Coastal States of the Mediterranean Region on the Protection of the Mediterranean Sea (2-16 February, 1976). The Conference adopted three important agreements:

- 1- The Convention for the Protection of the Mediterranean Sea against Pollution
- 2- The Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft;

⁶⁰ Mirjam Skrk, “Exclusive Economic Zones in Enclosed or Semi- Enclosed Seas” in Budislav Vukas, ed., *The legal regime of Enclosed and Semi-enclosed seas: the particular Case of the Mediterranean* (Zagreb: 1988): 62.

3- The Protocol concerning Co-operation in Combating Pollution of the Mediterranean Sea by oil and other harmful substances⁶¹

The umbrella agreement for this trio of statements is The Convention for the Protection of the Mediterranean Sea against Pollution. It established an overall legal framework of regional cooperation for the protection of the Mediterranean against pollution.⁶² Article 7 of the Convention is devoted to pollution from seabed activities. It obliges the Contracting parties to take “all appropriate measures to prevent, abate and combat pollution of the Mediterranean Sea area resulting from exploration and exploitation of the continental shelf and the sea-bed and its subsoil”.⁶³

The Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft defines dumping as “any deliberate disposal at sea of wastes and other matter from ships or aircraft”. The Protocol allowed an exception to this definition of dumping, stating that waste or other matter produced as a result of the exploration and exploitation of the seabed to not be included in the listing of prohibited waste products.⁶⁴ It can be immediately seen that the limited list of ‘qualifying’ waste is predestined to be the source of intense debate. Another built-in hurdle to cooperation is to be found in the Protocol concerning pollution of the Mediterranean Sea by oil and other harmful substances. In emergencies, the States are obliged to take the “necessary measures in cases of grave and imminent danger to the marine environment” resulting from discharge of oil or other harmful substances.⁶⁵ Unfortunately, the definition of

⁶¹ Vid Vudasovic, “Barcelona Convention as an important component of the Mediterranean Action Plan” in Budislav Vukas, ed., *The legal regime of Enclosed and Semi-enclosed seas: the particular Case of the Mediterranean* (Zagreb: 1988): 276.

⁶² Maja Sersic, “Protection of the Mediterranean Sea against Pollution resulting from exploration and exploitation of the seabed and its subsoil” in Budislav Vukas, ed., *The legal regime of Enclosed and Semi-enclosed seas: the particular Case of the Mediterranean* (Zagreb: 1988): 285.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

what constitutes an emergency or “grave and imminent danger” is subjective, and a clear, or even possible, legal framework for the cooperation between the coastal States regarding the conservation and management of the non-living resources of the Mediterranean was not established on this occasion. The problems of overlapping claims and territorial disputes regarding areas of responsibility were not addressed. It may be that the Mediterranean would have been better served with the formulation of Protocols relating to the obligation to cooperate in cases of development and exploitation of specific activities or resources, in an attempt to avoid the problem of too broad and exclusive Protocols.

The drafting of the Barcelona Convention and Protocols was influenced by the Mediterranean Action Plan (MAP), which was in turn the result of the UNEP Regional Seas Programme, created in accordance with the Stockholm Ministerial Conference Action Plan (1972). The MAP was adopted in 1975, and was the first regional action plane adopted as a Regional Seas Programme under the umbrella of the UNEP.

The main objectives of the MAP were to assist Mediterranean countries in their assessment and control of marine pollution, the formulation of their national environment policies, and the improvement of the ability of governments to identify better options for alternative patterns of development, optimizing the choices for allocation of resources.

The MAP took the problems of marine pollution control as their first task, but experience soon demonstrated that socio-economic trends, inadequate development planning and management were the main causes of most environmental problems, and these were the focus areas of a resulting shift in emphasis. The MAP adjusted its priorities gradually, placing ever more

importance on aspects of, among other points, integrated coastal zone planning and management as the key tools through which solutions could be sought.⁶⁶

Twenty years after the original MAP, the Action Plan for the Protection of the Marine Environment and the Sustainable Development of the Coastal Areas of the Mediterranean (MAP Phase II) was formulate. This second document looked at the shortcomings and successes of MAP Phase I, taking into account recent developments.

MAP currently involves 21 countries bordering the Mediterranean, as well as the European Community. In a unified effort, this group has resolved to tackle challenges of environmental degradation in the sea, coastal areas and inland. Another priority is the establishment of links between sustainable resource management projects with those of research and development, in order to protect the Mediterranean region and contribute to an improved Mediterranean quality of life.

In 2002 the European Union released a document giving details of a Community Action Plan for the conservation and sustainable exploitation of fisheries resources in the Mediterranean. The document advocated the declaration of 200 nautical mile fishery protection, in an attempt to improve fisheries management in the Mediterranean. The document also underlined to importance of a high level of cooperation in the Mediterranean, in order to achieve a conservation and management of resources which would benefit all parts, environmental, industrial, and human. Although the document addresses those States which border the

⁶⁶ The Action Plan, Barcelona Convention and protocols <http://www.unepmap.org>

Mediterranean or are members of the EU,⁶⁷ it may also be seen as an indicator of trend and intention, with an extension to an international environment, and in support of efforts made on a global level.

⁶⁷ Note on maritime jurisdiction in the Mediterranean Sea FAO. Accessed under <http://www.fao.org/docrep/008/y5880e/y5880e09.htm>

Part two

Maritime Boundary Disputes and Resolution

A review of cases relevant to the Mediterranean.

2.1 Introduction

The United Nations Convention on the Law of the Sea 1982 established a number of maritime zones such as the Territorial Sea, the Exclusive Economic Zone and the Continental Shelf. In each of these zones, States have different rights and duties. Their maritime zones, the territorial sea and the contiguous zone, are very important to coastal States for reasons of navigation, exploration, fishery and natural resource protection, the control and policing of pollution and polluters, search and rescue operation, and the advance of scientific research. An increasing concern is the security of the border State, in view of the growth of terrorism and smuggling and illegal immigration.

2.2 Negotiation or the Courts?

The system of international agreements and mechanisms built up particularly since the Bretton Woods meetings⁶⁸ and the Chicago Convention on International Civil Aviation in 1944,⁶⁹ the Charter of the United Nations in 1945,⁷⁰ the General Agreement on Tariffs and Trade in 1947, and the four Geneva Conventions on the *jus in bello* in 1949,⁷¹ has not necessarily proved adequate in addressing the modern push towards ever-greater exploitation and control of natural resources, particularly petrochemical, gas and those associated with new technologies. Political and financial ambitions force a rethinking of the conventional approach- that of a system of not particularly clear definitions – in view of the fact that the definitions of territory, rooted in access possibilities, are often defined in *response* rather than in *anticipation* of technological, political, environmental and economic circumstances. As Oxman notes

Perhaps those who conceived the outcomes at Bretton Woods and Chicago in 1944 and San Francisco in 1945 might have come up with something different from the Truman Proclamation [...] Perhaps they would have wondered why it was proposed that the world's largest consumer of energy, and one of the few sources of the necessary capital and technology at the time, cede control over perhaps 90 percent of the world's exploitable undersea hydrocarbons to foreign States, including some that might not provide a hospitable investment climate for Americans or others.⁷²

Processes of policy definition, system construction and institutional foundation require time spans which usually do not allow, on an international level in any case and often on regional and State levels, for quick response and resolution mechanisms based on negotiation and mediation.

⁶⁸ *Articles of Agreement of the International Monetary Fund*, July 22, 1944, 60 Stat. 1401, 2 UNTS 39; *Articles of Agreement of the International Bank for Reconstruction and Development*, July 22, 1944, 60 Stat. 1440, 2 UNTS

⁶⁹ *Convention on International Civil Aviation*, Dec. 7, 1944, 61 Stat. 1180, 15 UNTS 295 [referred to in this text as the Chicago Convention].

⁷⁰ *General Agreement on Tariffs and Trade*, Oct. 30, 1947, TIAS No. 1700, 55 UNTS 187.

⁷¹ *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; *Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea*, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85; *Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; *Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

⁷² Bernard H. Oxman, "The Territorial Temptation: A Siren Song at Sea" *The American Journal of International Law*, 100: 4 (Oct., 2006): 834.

The temptation, in response to a violation, is to respond with a *modus operandum* which relies more on threat and physical response than the time consuming processes of talks at the table. Disputes and legal grey zones are not limited to the material wealth of the sea or its control. Coastal sovereignty and jurisdiction is linked to coastal security. As States grapple with the problems of smugglers, the drug trade, the arrival of a terrorist threat from the sea, and a coastal ‘open door’ for refugees or boat-borne migrants, the definitions of territorial limits becomes a problem miles beyond academic.

We do not need to search in the hallowed corridors of the international judicial system, nor is it necessary to peek behind the doors of the negotiation rooms, to find examples of the complications which arise from unclear or even unfair delimitation questions. Two forms of maritime stress present themselves to us on an almost daily basis: illegal immigration and people smuggling, and the pollution of common waters, too oft repeated as the nightly television drama or headline catcher for the viewing public, and too oft used (abused?) by politicians and interest groups to further local issues and global distress.

Rescue at sea of persons in distress has taken on new dimensions since the days of the “Boat People” in the Post-Viet Nam War period. A response to distress at sea “is first and foremost a humanitarian one”;⁷³ legal aspects are generally of second or even lower priority. The travails of those who seek a solution to want though a life in economically, politically, and culturally advantageous but geographically distant locations, and the exposure of these migrants to exploitation by smuggler organizations and to environmental challenges (un-seaworthy boats, long journeys by foot over hostile territory, hunger, violence) present a whole range of new challenges to rescue, protection and processing mechanisms. A response to a small boat in

⁷³ Luca Dall'Oglio, Permanent Observer to the United Nations, at the Ninth Meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea General Assembly, New York, USA on 26.6.08, for the International Organization for Immigration.

distress off a Mediterranean coastline will initiate a series of responses, coordinated and otherwise, by political, economic and religious stakeholders.⁷⁴ The danger is great that these victims may become elements of a larger negotiation sphere, with the problem of their 'disposal' then becoming an element in a new version of the child's game *Fish*, where they are bargained back and forth over the table as material resources or burdens, dependent on the daily point of view of all negotiation parties.

Another form of stress within the Mediterranean that presents itself is that of pollution control and responsibility. Preventative measures and recognition of conservation responsibilities, and the subsequent policing through local, national and international agencies, depend on a clear codification of limits and borders. Cooperation within the Mediterranean for the protection, exploitation and security of the waters involves more than 20 States, with an extremely wide range of socio-economic, political, religious and cultural backgrounds. In general, the bordering States have claimed a 12 mile territorial sea from their coastlines. The waters to the north east of the Tunisian coast were the subject of a delimitation agreement between Italy and Tunisia on 20 August 1971.⁷⁵ The agreement defined the territorial limits of both States regarding the islands in the waters between them. The basis for measurements of the boundary between the two States was a median line, every point of which is equidistant from the nearest points on the baselines

⁷⁴ Examples of these situations abound. The Island of Lampedusa, Italian territory in the Mediterranean 205 km from Sicily and 1133km from Tunisia, receives the major part of the so-called 'boat people', including asylum seekers, originating from the African coast. In January 2009 there were almost 200 people in the reception centre on the island, in housing for 850. *La Stampa*, *La Corriera della Sera*, and other Italian newspapers regularly report new landings. The United Nations Refugee Agency (UNHCR) is working, in conjunction with the Italian Government, the European Commission, to seek a solution to the grave human crisis. Fortress Europe, a web site which monitors deaths on European borders, reports more than 1,500 deaths, most of them bodies counted along the coasts of Northern Africa, Malta, Spain, Italy, Greece and other States. Volunteers organized under the Red Cross and Red Crescent movements continue to attempt to alleviate the emergency. (http://www.redcross.int/EN/mag/magazine2006_2/12-14.html)

⁷⁵ *Agreement between the Government of the Republic of Tunisia and the Government of the Italian Republic concerning the Delimitation of the Continental Shelf between the two Countries. 20 August 1971.* <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/LBY.htm>

from which the breadth of the seas between them is measured. The exception to this was the islands of Lampedusa, Lampione, Linosa and Pantelleria. For these islands, the boundary was given as either 12 or 13 miles, depending on the island, in a curve toward Tunisia, to delineate the extent of Italian territory.⁷⁶

⁷⁶ Agreement regarding the Delimitation of the Continental Shelf between Italy and Tunisia, 20 August, 1971, <http://www.jag.navy.mil/documents/italy.doc>

2.3 Dispute Settlement over Maritime Boundaries set by the LOSC

The definitions of knowledge regarding the littoral have in the past been founded in the physical sciences, referring to rock formations, depth, distance and slope. Increasingly, the definitions of territorial claim have been influenced by biological classifications, those regarding habitats, ecosystems, environments, migrations and floral/fauna realms. The sophistication of our knowledge allows a progressive sophistication in evaluation and subsequent potential for use/abuse of the marine territory. Classification and limitation of territory has direct consequences in access and exploitation, leading to increased need for systems of negotiation in order to maintain international security and peace.

We will look here at International Court of Justice (ICJ) decisions regarding the delimitation of maritime boundaries as they occurred chronologically, in order to understand the background of decisions made in our particular case of study, boundary decisions regarding Tunisia, Libya and Malta. These disputes illustrate the difficulties faced by the (ICJ) in formulating an equitable and fair list of criteria for the fixing of demarcation lines in maritime delimitation. Then we will examine the consequences of these decisions for more recent disputes and claims relating to the States of Tunisia, Malta and Libya. (why this in relation to the overall thesis?)

2.3.1 Evolution of the Legislation and Problems of Definition Criteria: Examples from relevant cases

Article 1 of the 1958 Convention on the Continental Shelf speaks of exploitability as a criterion for the definition of the outer limit of the continental shelf. It refers to

[...] the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters, or beyond that limit, to where the depth of the superjacent waters admits of the exploration of the natural resources of the said areas.⁷⁷

⁷⁷ *Convention on the Continental Shelf*, April 29, 1958, 15 UST 471, 499 UNTS 311, Article 1.

The problems involved in this definition are, and should have been clear to the framers. The lack of foresight in assuming a static State of exploration technology is only the most obvious fault. This could suggest that, in the case of improved exploration possibilities, the continental shelf would, for legal purposes, extend to mid ocean.

The 1958 Geneva Convention of the Territorial Sea provides in Article 12(1) that:

1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

Article 24(3) reads

3. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.

The 1958 Conventions generally codified customary law. Although theoretically only binding on those States which were parties to the customary law of base, many of the provisions can be used as evidence of customary law against States which are not party to them. However, the 1958 Geneva Convention on the Continental Shelf defined the continental shelf, for the purposes of the baseline measurements, as the submarine areas **adjacent** to the coastline, and mid ocean areas cannot be regarded as the equivalent of an area which is adjacent to a coastal State. The claims of States with a flat coast, for example Belgium, cannot logically be judged under the same criteria as with the coastal claims of States with deeply indented coasts, for example,

Norway. A baseline was needed, and provision for exceptional cases would have to be made within the legal framework. The difficulties of adjacent delimitation, where the two States are adjacent to each other, and delimitation where the States face each other across a body of water, obviously required differing approaches.

The basis for decisions regarding maritime boundaries was found in Article 6 of the Geneva Convention on the Continental Shelf, which provides that:

- (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 shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary line 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 is justified by special circumstances, the boundary shall be determined by the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.⁷⁸

There is no reference to the relevance of geographical or geomorphologic factors in a bilateral delimitation.

A case before the Court is evidence of the failure of the negotiation process. Successful negotiation, and avoidance of the lengthy, costly, and politically precarious legal path taken when a decision is made to take a dispute to the Court, relies on clear guidelines as to the baseline to be used, the special circumstance which are relevant, and a clear understanding of what each party requires, is able to compromise on, and cannot relinquish. Questions which must be resolved on the way to a decision, and which could possibly be resolved within the confines of the negotiation chambers, include the geographic qualities of the coast (is it flat, curved,

⁷⁸ Ibid. Art. 6.

straight etc), the geomorphologic elements of the coast (continental shelf, deep sea bed, channel waters etc), the economic factors (what are the immediate and possible resource gains to be had from the area under dispute, what rights of passage for commercial shipping are affected, what fishing or other exploitation rights already exist etc), the political history and contemporary situation, with the repercussions for third or more States, what effect would the decision have on the settlements and people of the coastal or island zone under discussion. These are only some of the many factors which could be examined. Successful negotiation requires the prioritizing of the various factors *before* arrival at the negotiation table, and the ability to compromise *at* the table. Settlement of a dispute through the procedures of arbitration, the International Law of the Sea Tribunal, or the International Court of Justice is made through the legal process, but when most delimitation occurs between two adjacent or opposite States with overlapping claims, these claims would be best, for future relations between the States, resolved by utilizing the political processes, and for this negotiation between the States is the best solution. A negotiation between two States allows each State to ask for consideration of elements of the situation which are unique and important to that States, but which may not have any legal standing, and would be ignored in a Court or Tribunal solution. The flexibility of the negotiation process, the possibility of an agreement 'made-to-measure', make it an option with far superior aspects than that of a decision handed down by a Court which is obliged to examine strictly legal factors. Negotiations in future cases will rely on legal precedence and an examination of the successive layering and interpretation of the decisions to date will provide a basis for the structuring of a delimitation argument in future. Our study will commence with a look at the post-1958 cases which illustrate the development of maritime delimitation guidelines useful for the Mediterranean.

North Sea Cases

The judgment of the first important case for our study, *North Sea Shelf* cases of 1969⁷⁹, declared that the equidistance principle as codified in the 1958 Geneva Convention on the Continental Shelf did not represent customary law. Issues of delimitation and boundary definition in the cases involving the Federal Republic of Germany with the Netherlands, and then with Denmark, were considered by the Court in one session, in order to assess two questions of geographic importance related to each other. The original disputes concerned Agreements between the Federal Republic of Germany and the Netherlands (1 December 1964) and Denmark (9 June 1965) regarding delimitation of the common continental shelf zones. The Agreements had been made on the basis of the principle of equidistance. However, further and subsequent extensions to the claimed zones based on the same principle proved unacceptable to the Federal Republic, which claimed that it was disadvantaged through the principle of equidistance, and that the principle of proportionality should be used, where delimitation of the continental shelf would be calculated based on the proportion of coastal exposure.⁸⁰ At the time of the Judgement, both the monarchies had both signed and ratified the Geneva Convention on the Continental Shelf, and although the Federal Republic of Germany had signed the Convention, it had not yet ratified it. The nature of the North Sea was analysed as a complete geographical unit. It was seen that even States within the same zone and on the same waters could not use a particular method of delimitation in order to ensure equitable results. The ICJ stated that “there is no legal limit to the considerations which States may take account of for the purposes of making sure that they apply

⁷⁹ *North Sea Continental Shelf* (Federal Republic of Germany / Denmark and Federal Republic of Germany/Netherlands.), 1969 I.C.J. 3 51, 52 (Feb. 20)

⁸⁰ Rene Jean Dupuy et al, *A Handbook on the New Law of the Sea*. The Hague, Martinus Nijhoff Publishers, 1991. P. 128-129.

equitable procedures.”⁸¹ The principles to be used in defining limits for the case were then defined by the Court in paragraphs 37 to 101 of the Judgement, but that in fact, no single method was in all circumstances obligatory. These were: the configuration of the coast itself, including particular features, the physical, geological, and natural resources particular to the continental shelf, and the reasonable proportionality between the extent of continental shelf and length of the parties’ coasts considering actual or potential effects of other continental shelf delimitations between adjacent States in the same region. The terms that the Court used in relation to their decision were “equitable principles”, “natural prolongation”, “relevant circumstances”, and “non-encroachment”. In emphasizing the validity of natural prolongation and non-encroachment, the Court appeared also to be stating the principle that land dominates sea.

The Judgement undermined the importance of the equidistance-special circumstances rule of the 1958 Convention on the Continental Shelf when determining delimitation. In paragraphs 21 to 24 of the Judgement, looked at the “mandatory” aspect of the equidistance principle, and noted the convenience of the principle. However, in considering the legal position of the principal, it was then decided that the equidistance principle did not form Customary International Law, nor was it inherent in the Basic Doctrine of the Continental Shelf.⁸² It would be one only of the many methods of delimitation at the disposal of the Parties in reaching an agreement in accordance with equitable principles and taking into account all relevant circumstances. The role of the Court was to supply an indication as to possible ways States might apply the methods.⁸³

After the decision, Germany, the Netherlands, and Denmark agreed on an equidistant line adjusted for the equitable considerations listed above.

⁸¹ *North Sea Cases*, para. 93. This introduces the possibility of political, military, security and humanitarian factors in future negotiations and decisions.

⁸² *North Sea Cases*, paras. 37-82.

⁸³ *North Sea Cases* Summary of Judgement, p.75.

1977 saw the *Anglo-French Continental Shelf* arbitration, where the maritime boundary was established between the United Kingdom and France, regarding the Channel Islands.⁸⁴ When considering the effect of the islands on the continental shelf between the two States, the Court of Arbitration that “the existence of the Channel Islands close to the French coast, if permitted to divert the course of the mid-Channel median line, effects a radical distortion of the boundary creative of inequity.”⁸⁵ The Court also stated that

The appropriateness of then equidistance method or of any other method for the purposes of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case.⁸⁶

France argued that the physical presence of the islands close its mainland was a special circumstance. It based its claim on geography and geology, but also referred to ‘law’, and cited security, and defence issues, navigational and economic factors, and argued for the natural prolongation and proportionality of the water zone.

The United Kingdom maintained that the Hurd Deep fault zone were a geographical and geomorphologic factors to be considered, and that by virtue of the size, economic importance and political situation, the islands could not be treated as a special circumstance in France’s favour. The United Kingdom stated that “special circumstances can only mean an exceptional geographical configuration in the sense of a geographical configuration which is highly unusual.”⁸⁷ The Court discarded the Hurd fault as a relevant geographical formation, stating that

⁸⁴ *Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf*, Cmnd. 7438 (1979), *ILM* 18 (1979), 397-494.

⁸⁵ From the Reports of International Arbitration Awards, Vol XVIII, p. 94.

⁸⁶ *Anglo-French Case*, para. 70.

⁸⁷ *Anglo-French Case*, para. 226.

their location was “simply...a fact of nature”, and that this was no reason to give it any particular importance as a boundary marker.⁸⁸

Considerations of relevance were the following:

- 1.The strategic defence interests of the French Republic. The islands are much closer to the French coast than to the English coast;
- 2.The history of the population of the islands and the political and economic relevance of the islands; and
- 3.The proportionality principle.

The Court also made clear that the proportionality principle was “to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principal providing an independent source of rights to areas of continental shelf.”⁸⁹ In consequence of this line of argument, the Court of Arbitration awarded a zone of no more than twelve miles of sea bed and subsoil to the north and west of the islands, creating a median line boundary between the United Kingdom and the French Republic, and a twelve mile enclave around the islands.

The *Anglo-French Arbitration Award* conformed with the 1969 ICJ Judgment, held that the rule of equitable principles applied under both customary law and as well under the conventional rule in Article 6 of the 1958 Convention. The Court was extremely reluctant in this case to decide on the importance or possible relevance of any circumstance in particular and in general as a point of measurement for future delimitation issues, and therefore left wide open the possibility that almost, even spurious, claims could be made. The urgent need for clarity was in conflict with the intricate nature of the problem: is every case then unique? And what hope does this offer for the future of negotiations of delimitation issues?

⁸⁸ *Anglo-French Case*, paras. 107-108.

⁸⁹ *Delimitation of the Continental Shelf (United Kingdom of Great Britain and Northern Ireland and the French Republic)*, Decision of 30 June 1977, 54 ILR, P.6 at p.68 (para.101)

The cases made obvious that the reaching of an 'equitable solution' would in most cases be difficult and necessarily a process which would involve negotiations and compromises based on the individual situations. It also made clear the danger that each case should be examined within its own particular context, and that unique cases are unable to be used as precedent cases for general judgments. The question then arises how 'special' must a special circumstance be in order to justify an exception? how is relevancy measured?

Tunisia/Libya Delimitation Case: Historical background and context

The 1969 *North Sea Continental Shelf* cases, the *Anglo-French Continental Shelf* arbitration above, and the developments of UNCLOS III all played a role in the ICJ decisions in the *Tunisian-Libyan Continental Shelf* Case. The Conference had opened on 3 December, 1973, and finally closed on 24 September, 1982, after nine long years of controversial, complex, and extremely delicate negotiations.⁹⁰

The dispute arose after Libya Arab Jamahiriya granted a concession in 1968 to mine in the Mediterranean Sea continental shelf in a zone which had also been claimed by Tunisia. The significance of the case as a baseline for subsequent disputes means that a closer look at the geographical, political, and economic aspects of the claimants is in order.

Libya and Tunisia have a land boundary which ends on the coast of the Mediterranean at Ras Ajdir. The Tunisian coast to the north-west is the Gulf of Gabes. The bay has its other outer point at Ras Kaboudia. The island of Jerba lies off the Tunisian coast, and a further island group, the Kerkennahs, lies within the Gulf. The coastline to the south of Ras Ajdir is Libyan, in a south west direction to Tripoli.

⁹⁰ *United Nations Conference on the Law of the Sea* www.un.org/Depts/los

Tunisia's relations with Libya had been erratic since Tunisia annulled a brief agreement to form a union in 1974, the Treaty of Jerba, designed to merge the two countries into the Islamic Arab Republic. Within weeks after signing the accord, the Tunisian leader, Bourguiba, under pressure from Algeria and from members of his own Government, retreated to a more gradualist approach toward Arab unity. Diplomatic relations were broken in 1976, but restored in 1977. The territorial dispute between Libya and Tunisia over partition of the oil-rich Gulf of Gabes, decided by the ICJ in Libya's favour in 1982,⁹¹ provided a further source of irritation. Tunisian-Libyan relations reached a low point in January 1980, when some 30 commandos (entering from Algeria but apparently aided by Libya) briefly seized an army barracks and other buildings at Gafsa in an abortive attempt to inspire a popular uprising against Bourguiba. In 1981, Libya vetoed Tunisia's bid to join the Organization of Arab Petroleum Exporting Countries (OAPEC) and expelled several thousand Tunisian workers. In August 1982, following the evacuation of the Palestine Liberation Organization (PLO) from Lebanon, Tunisia admitted PLO Chairman Yasir Arafat and nearly 1,000 Palestinian fighters.

Tunisia/Libya Delimitation Case: Detail

The first off-shore oil exploration permits in the area were granted by Tunisia in 1964, followed by those from Libya in 1968. Since 1964, a very significant volume of hydrocarbon exploration and drilling has occurred in the off-shore area. A 1966 concession granted by Tunisia had an eastern perimeter at a bearing of around 26°, almost perpendicular to the general direction of the

⁹¹ Judgment of 24 February 1982 in the Case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Tunisia v. Libyan Arab Jamahiriya) <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=c4&PHPSESSID=ca4f1f3b36f374c8fc0a6261a2b25867&case=63&code=tl&p3=5>

coast near Ras Ajdir. The Libyan concessions of 1968 ran to the same line, and further concessions granted later followed the same 26° line.

In 1973, Tunisia advised the United Nations of national legislation which defined the extent of the Tunisian territorial sea from the Tunisian-Algerian border to the Tunisian-Libyan border.⁹²

The Act established a limit of 12 nautical miles around the Kerkennah Islands. This Act was followed in 1973 by a National Decree concerning baselines⁹³ measuring the breadth of the Tunisian territorial sea from Algeria to Libya, including the islands off the Tunisian coast and enclosing the Gulfs of Tunis and Gabes. A Special Agreement⁹⁴ between the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya was lodged with the United Nations on 10 June 1977 after signature in Tunis, regarding the question of the continental shelf between the two countries.⁹⁵ Both Tunisia and Libya claimed an extension of the area in a claim before the Court submitted in December 1978. The Special Agreement had been written in Arabic, then translated by Tunisia into French, and Libya into English, and Herman points out the differences, slight but significant, that the translation from one language may have caused.⁹⁶ Both States claimed title, using the argument of natural prolongation of the mainland, to an area of continental shelf which each considered a natural extension of their own State.

The Special Agreement presented the Court with two questions to be resolved. Firstly, the Court needed to decide the principles and rules of international law which might be applied for the

⁹² Act No. 73-49 delimiting the territorial waters, of 2 August 1973.

<http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/LBY.htm>

⁹³ Decree No. 73-527 of 3 November 1973

⁹⁴ A Special Agreement is one of two methods for bringing a case before the Court. It is an agreement to allow the Court's opinion to rule, and is such the basis of the Court's jurisdiction in such cases. Art. 40 of the Statute of the Court, and Arts. 45, 46 of the Rules of the Court.

⁹⁵ Special Agreement for the submission to the International Court of Justice of difference, 23 May 1976 (entry into force: 20 March 1982; registration #: 21035; registration date: 19 April 1982.

<http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/LBY.htm>

⁹⁶ Lawrence L. Herman, "The Court giveth and the Court taketh away." *The International Comparative Law Quarterly* 33:4 pp. 827.

delimitation of this particular stretch of continental shelf. This was indeed the specific request of the States:

What are the principles and rules of international law which may be applied for the delimitation of the area of the continental shelf appertaining to the republic of Tunisia and the area of the continental shelf appertaining to the Socialist People's Libyan Arab Jamahariya and, in rendering its decision, to take account of equitable principles and the relevant circumstances which characterize the area, as well as recent trends admitted at the Third Conference on the Law of the Sea (Article 1).⁹⁷

The case presented, in addition to its interest for the parties and for States in the Mediterranean, an opportunity for the Court to present guidelines concerning the delimitation process, to declare the applicable law and to clarify a practice to be observed in similar cases. Neither State was a signatory to the 1958 Geneva Convention on the Continental Shelf, and the States differed in their opinion of the extent of the mandate before the Court. Tunisia asked the Court to resolve the issues that the States may face in the implementation of the Judgment, but did not give the Court the right to specify the coordinates of the delimitation. In other words, the method of implementation took first place. For Libya, it was more important that the Court indicate the factors to be considered in the drawing of the line of delimitation. The method of delimitation to be applied was not requested.

Both parties had based their claims on the principal of prolongation, presenting arguments for their cases citing relevant circumstances. Tunisia placed an emphasis on the geographical and geomorphologic features of the zone, citing economic and historic factors in addition.⁹⁸ It was pointed out that the natural prolongation of the coast in the boundary area in question was eastward, and therefore an extension of the mainland, a "submerged Tunisia"⁹⁹ was at stake.

⁹⁷ *Continental Shelf, (Tunisia/Libya)*1982. ICJ Rep. At 21, para. 21.

⁹⁸ *Ibid.* para. 76.

⁹⁹ *Ibid.* at 73, para. 99.

Reference was made to the existence of historic fishing and sponge zones, used by Tunisian fishermen, and then claimed by Tunisia as Tunisian through customary law.

Libya initially presented an argument based on geographical and geomorphologic features only.¹⁰⁰ This was then expanded with arguments based on potential third State delimitations, the legislative histories of the parties, and the natural resources of the zone. It was again claimed that the land under the sea was a natural prolongation of the mainland, this time in a northern direction. The Court was asked to discount the east facing Tunisian coast as an “incidental special feature”¹⁰¹ that should be discounted in any delimitation judgment. The true line of the Tunisian coast, according to the Libyan Memorial, was east to west, and the application of the equidistance method would be inequitable due to the effect of the ‘bulge’ of the Sahel coastline and the position of the Tunisian islands.

In effect, both States agreed that the concept of natural prolongation should then be the governing principle of the delimitation, and that this would be in agreement with equitable principles because the natural and inherent sovereignty of State would thereby be respected.

In its Judgment, handed down by a majority of 11 judges to 4, the Court rejected the arguments of each of the parties in support of differing lines of delimitation. The pre-eminence of natural prolongation was not confirmed. The Court concluded that since the prolongation of each of the States resulted in the creation of a common seabed, natural prolongation could not be considered the indicator nor a factor of second place importance for the delimitation.¹⁰² Additional scientific

¹⁰⁰ Ibid. para.77.

¹⁰¹ Libyan Memorial, quoted in *Continental Shelf, (Tunisia/Libya)*1982. ICJ Rep. at 31, para. 15.

¹⁰² CASE CONCERNING THE CONTINENTAL SHELF (TUNISIA/LIBYAN ARAB JAMAHIRIYA) Judgment of 24 February 1982, paras 51-68. <http://www.icj-cij.org/docket/index.php?sum=330&code=tl&p1=3&p2=3&case=63&k=c4&p3=5>

arguments had been presented by each State. However, after evaluating the reams of scientific or similar evidence based on geomorphology and bathymetry submitted by the parties, the Court found none of the arguments inconclusive and insufficient to prove any marked disruption or discontinuance of the seabed sufficient to give indication of an indisputable limit to the two continental shelves. The Hurd fault of the Anglo-French case comes here to mind.

The ICJ held that the delimitation was to be effected considering the following relevant circumstances: (1) the parties' coastal configurations, and changes in coastal direction (2) islands and islets off the Tunisian coast, (3) the land frontier of the parties, and low tide elevations, (4) conduct of parties in granting petroleum concessions, including the historical conduct regarding maritime limits, and (5) proportionality between length of coasts and extent of continental shelves, including the geomorphologic configurations of the seabed.¹⁰³ The question of historic rights was left open, the Court declining to commit itself.¹⁰⁴

Of note is that purely economic factors were rejected, as was the appeal based on the economic inequality of the two States.¹⁰⁵ The Court stated that:

In their pleadings, as well as in their oral arguments, both Parties appear to have set so much store by economic factors in the delimitation process that the Court considers it necessary here to comment on the subject.¹⁰⁶

The reason for not accepting the economic arguments then followed:

They are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource.¹⁰⁷

¹⁰³ *Continental Shelf, (Tunisia/Libya)*1982. ICJ Rep. paras. 78-81

¹⁰⁴ Ibid. para. 105.

¹⁰⁵ Ibid. para. 107.

¹⁰⁶ Ibid. para. 106.

¹⁰⁷ Ibid. para. 107.

In the 1969 *North Sea Cases*, the ICJ had considered the effects of natural resources in an area shared between the parties and divided by the delimitation line. The Court at the time concluded:

The Court does not consider that unity of deposit constitutes anything more than a factual element which it is reasonable to take into consideration in the course of the negotiations for a delimitation. The Parties are fully aware of the existence of the problem as also of the possible ways of solving it.¹⁰⁸

It would almost appear that the Court with this comment was sending the parties back to the negotiation table, to work out a joint development scheme. For such schemes, where the exploitation of a particular area is to be regulated, the general practice is to use the border coordinates. This type of arrangement is, of course, not confined to the boundary States as signatories, and is just as likely to also involve third party States.

Tunisia's claim based on historic fishing rights were considered by the Court, and it was observed that "the notion of historic rights or waters and that of the continental shelf are governed by distinct legal regimes [...] both may sometimes coincide in part or in whole...such coincidence can only be fortuitous".¹⁰⁹ The Court did, however, allow a 'historic' element to have relevance; the delimitation line eventually handed down was based on the history of recent concessions for oil exploration, where the States had limited their claims to the 26° line.

Acknowledging that the parties had stressed the importance for a delimitation based on equitable principles, and the emphasis given to this principle in the *North Sea Cases*, the Court detailed which delimitation principles it felt should be considered in this case. The need for a practical and not abstract approach was underlined. It was then in this context that the natural coastlines were considered as factors. The Court noted that:

¹⁰⁸ *North Sea Continental Shelf Cases*, 1969. ICJ Rep. pp.51-52, para. 97.

¹⁰⁹ *Continental Shelf, (Tunisia/Libya)*1982. ICJ Rep. para. 100, and paras. 35-36.

...identification of natural prolongation may, where the geographical circumstances are appropriate, have an important role to play in defining an equitable delimitation,... but...the satisfying of equitable principles and the identification of the natural prolongation...are not to be placed on a plane of equality.¹¹⁰

Equidistance, in the majority Judgement, “may be applied if it leads to an equitable solution.” In addition, “...equidistance is not, in the view of the Court, either a mandatory legal solution, or a method having some privileged status in relation to other methods”¹¹¹

The strength, and the weakness, of the equidistance method lies in the distortion presented by land masses which clearly ‘intrude’ into the other party’s zone. The Kerkennah Islands, the prime geographical formation off the Tunisian coast, complicated the equidistance measurement for the *Tunisia-Libya* case. The 1982 Convention, in Article 121(3), entitled islands to a maritime area and an exclusive economic zone, which dramatically increased the number of potential delimitation claims to come before the Court. In the case of the Tunisian islands, in view of the developments during the Conference, the Kerkennah Islands, close to the Tunisian Mainland and separated from it by shallow waters and supporting a significant population with a fishing and maritime tradition, prompted a ‘half effect’ solution.

Maritime delimitation negotiations usually involve only two parties. However, nearly half of them involve a third State, if only as potentially affected by the delimitation, and, of course, any agreement must comply with existing agreements regarding boundaries in the area to be delimited. Historic occupation and exploitation of a zone, by any of the parties, raises the question of the possession of historic title by way of *ipso facto* and *ab initio*. The absence of agreement, and the results of unilateral moves, were examined as special circumstances to determine a delimitation line. The Court dismissed the relevance of a line drawn by Libya in

¹¹⁰ *Continental Shelf, (Tunisia/Libya)*1982., quoting *North Sea*, ICJ Rep. at 32, para. 46.

¹¹¹ *Continental Shelf, (Tunisia/Libya)*1982. ICJ Rep. para. 79.

1955 as an attachment to its Petroleum Registration.¹¹² A further claim for relevance of a 45° and a due north line was supported by both parties, based on historical reasons. Tunisia claimed to have used the line as part of its fishing regulations as far back as 1904. However, the Court found that the line had formed part of the official regulation only during the period 1951-1963. The decision was unilateral, and therefore dismissed as irrelevant. Any boundary negotiated and adopted between two or more States is political in nature, but the drawing of the line itself should in no way reflect a political pressure or the power of a 'bigger' State in intimidating a 'smaller' State. The Court was clear on this distinction, when rejecting the unilateral lines.

The Court tested the application of the proportionality principle to the delimitation area. It was calculated, using the same method of measurement for both coasts, that the resulting delimitation ratio of the sea bed would be 40:60 in Tunisia's favour, whereas, when the relative coastline ratios were measured, this was found to be 31:69. The aim of the Court was to reach an *equitable* result, and it described its own view of its responsibility by stating:

The result of the application of equitable principles must be equitable... It is, however, the results which are predominant: the principles are subordinate to the goal...The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result...it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result...There can be no doubt that it is virtually impossible to achieve an equitable solution in any delimitation without taking into account the particular relevant circumstances of the area.¹¹³

In order to limit accusations that the Court was resorting to a decision on *ex aequo et bono* grounds, which, lacking any agreement by the parties, is expressly forbidden by the Statute of the

¹¹² Ibid. para. 92.

¹¹³ Ibid. 59-60.

Court.¹¹⁴ In the continuation of the paragraph above, and anticipating any claim that the notion of equity had now been stretched to include an assessment of a limitless number of factors in each individual delimitation case, the Court underlines that the application of equitable principles is to be distinguished from a decision *ex aequo et bono*. The parties were assured that the task at hand was different, and that “this is very far from being an exercise of discretion or conciliation, nor is it an operation of distributive justice.”

In the Judgment, the Court proposed a delimitation line which was in two stages. The first involved the line from the land frontiers. This line was drawn at a bearing of 26° with the meridian, perpendicular to the coast. This ‘historic’ limit of their respective offshore petroleum concessions and was in fact treated as a ‘*de facto*’ baseline. A criticism could be made over the acceptance of a situation as ‘historic’ that had existed for at the most 8 years. In fact, the Court noted that the parties had not pointed out the existing situation as a potential delimitation solution, given that, although the line was drawn by the parties separately, and Tunisia, as first State, had set the limit of their concessions at this line without ensuing protest from Libya. The Court saw this line a proof that “the line or lines that the Parties themselves may have considered equitable or acted upon as such – if only as an interim solution affecting part only of the area to be delimited.”¹¹⁵ The line, however, had a further historical significance. The same 26° line had been used by Italy and France when, as colonial powers over Libya and Tunisia, they had enforced a delimitation for fishing activities pursued by the parties.

This line was extended into the sea at an angle which followed that of the oil concessions granted by the States. The second was that which gave effect to the Gulf of Gabes and the Islands in the Gulf. The Court declined to treat the islands as a natural extension of the mainland, with the

¹¹⁴ Statute of the Court of International Justice, Chapter II, Article 38, 2.

¹¹⁵ *Ibid.* para. 118.

reasoning that this would give undue weight to their geographical formation, and a compromise, similar to that used in past cases.¹¹⁶ In this case, the effects given to the islands were dependent on considerations of equity. The disproportionate effect of the islands in the delimitation when related to the length of the coastline called for a reduced effect on the final delimitation line. This line was the bisector of a line drawn from the most western point in the Gulf of Gabes to bisect a line drawn from the same point to the limit of the Island group.

The *Tunisia/Libya* case, examined for relevance for future cases and for new developments in determining delimitation, reveals several interesting points. The first is that the rule that delimitation should follow equitable principles, taking into account relevant circumstances but also prioritizing those same circumstances. Unfortunately, this rule is at the same time so general and lacking in sufficient specifics regarding relevance and circumstances as to be a source of legal debate rather than clarification in future cases. The *Tunisia/Libya* case repeated the opinion of the Court seen in the *North Sea* cases which confirmed the principle of proportionality as a tester of the equitable character of the delimitation. A third point to come out of the Judgment is that a delimitation which is in accordance with equitable principles is obliged to respect the natural prolongation of the coastal into the continental shelf and under the sea. The resulting line must give lesser or reduced effect to any particular geographic feature which potentially could result in a line which cuts the coast of one of the parties off from the maritime area lying immediately before its coast. The final point of interest to the Court in delimitation, as underlined by the *Tunisia/Libya* case, is the weight to be given to a line which both parties have voluntarily accepted for exploitation, traffic, or other reasons, over a long period of time.

¹¹⁶ For example, the delimitation negotiated between Australia and Papua New Guinea in 1978, where the islands were given a reduced effect based on equidistance, or when another method is used, such as in the Kenya-Tanzania (1975, 1976) or Argentina-Chile (1978) Agreements.

It would be too much to hope that these points would have the potential to have universal application and relevance for every future delimitation case. However, they did establish a starting point, a framework that was based on an evolution of delimitation which appeared to move in the direction of clarity, if not complete. Decisions of the ICJ and the Arbitration Court had, despite a slow move towards a development of a list of relevant criteria and the treatment of special circumstances, been able to define just *how* delimitation should be arrived at, when submitted to third party settlement procedures. One significant factor not to be ignored in the *Tunisia/Libya* case is that the Court was willing, despite a lack of formalization in the form of a Convention, to acknowledge the importance of the work done during the UNCLOS III.

Let us move now to the next case of relevance in the Mediterranean, the *Malta/Libya* case of 1985.

Malta/Libya Delimitation Case: Historical background and context

A Special Agreement for the Submission to the International Court of Justice dated 23 May, 1976,¹¹⁷ was submitted by the Socialist People's Libyan Arab Jamahiriya and the Republic of Malta, requesting a decision on a dispute concerning the delimitation of the continental shelf in the Mediterranean between the two States.

Malta is a group of islands and rock, inhabited and uninhabited, which lie about 80 kilometres south of the Italian island of Sicily, and approximately 345 kilometres north of the Libyan coast. The proximity to the Italian island meant that the Court was also obliged to avoid conflicting with the competing claims from Italy. Malta, an island State, requested a line of delimitation

¹¹⁷ Special Agreement for the submission to the International Court of Justice of difference, 23 May 1976 (entry into force: 20 March 1982; registration #: 21035; registration date: 19 April 1982.
<http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/LBY.htm>

drawn equidistant between itself and Libya. Libya, which has by far the greater coastal exposure, maintained that a deep sea canyon zone, or rift zone, in the sea bed closer to Malta constituted a 'natural' boundary between the States and therefore would suffice as a dividing line for delimitation purposes.¹¹⁸

The Special Agreement provided that the Court would decide what principles of law would be applicable to the dispute, and how those principles must be applied. Again, as in the previous case, the Court was limited in the scope of its decision, because the Special Agreement asked for a *what* and not a *how*. The 1982 Convention of the Sea had not yet entered into force, but both parties had signed it, joining the overwhelming majority of all other States. While the Convention did recommend that delimitation of areas under dispute should be decided on the basis on the equitable principle, it was silent on the method to be used in defining the line of delimitation.

In *Libya-Malta* Court, in applying the equitable principles, explicitly rejected the Libyan plea that the natural prolongation in combination with the special geographic features should provide the basis for the delimitation. The Court based its rejection on the provisions of the new 1982 Convention. These state that all States are entitled to a 200-nautical-mile exclusive economic zone:

The Exclusive Economic Zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention. (Part V, Article 55 of the Convention states)

¹¹⁸ CASE CONCERNING THE CONTINENTAL SHELF (LIBYAN ARAB JAMAHIRIYA/MALTA) Judgment of 3 June 1985. paras. 36-41 <http://www.icj-cij.org/docket/index.php?sum=353&code=lm&p1=3&p2=3&case=68&k=a8&p3=5>

The Court stated that geographic data could be of relevance if the border States were separated by more than 400 miles. However, the new international law which the 1982 Convention represented meant that title to the maritime zone in this case clearly depends on the distance from the coasts, “the geological or geomorphological characteristics of those areas are completely immaterial.”¹¹⁹

The 1985 *Libya-Malta Continental Shelf* case saw the ICJ draw a provisional equidistant line and then adjust the line taking into consideration the length of the parties’ respective coasts, which resulted in the lines being moved much closer to Malta. The ICJ’s rejection of Libya’s argument, that the parties’ respective landmasses should be considered, is noteworthy. At the time of the dispute’s adjudication, neither Libya nor Malta was a party to the Convention.

¹¹⁹ *Libya-Malta*, <http://www.icj-cij.org/docket/index.php?sum=353&code=lm&p1=3&p2=3&case=68&k=a8&p3=5>

CONCLUSION

The evolution of the delimitation process through international courts and arbitration processes has not been very successful in telling us just how a delimitation is to be arrived at, nor has it developed into a predictable process for the claimants. The perceptions of what constitutes a 'relevant circumstance' has varied from case to case handled through third party settlement procedures. The actions of the Courts and Arbitrators are, if anything, an excellent argument for expanding and exploiting every possibility offered for round-table negotiation between the parties. The Convention of 1958, for all its faults and short-sightedness, did provide one opportunity for States to reach agreement on delimitation based on mutual understanding and a separate contract between them. The presence of the phrase *failing agreement between them to the contrary* in both Article 12, regarding the limits of the territorial sea, and Article 24 and the contiguous zone, should encourage States to use all the possibilities offered by the negotiating table, before contemplating presenting the case before a Court or Arbitrator.

The *North Sea Cases* allowed the Court to determine the applicable rules of law. How those rules were to be applied in practice was not of major issue. The Court ruled that delimitation should be effected through agreement in accordance with equitable principles, taking into account all the relevant circumstances so as to give each party as much of the continental shelf through prolongation measurements as possible. The extension of national territory beyond the landmass into and under the sea. The difficulties of this general norm were seen in the *Anglo-French* case, where the distant location of the islands caused the United Kingdom's claim to lean on other principles. In this case, the Court was asked to determine the exact position of the boundary, and therefore the decision was one which justified a line, rather than state a general principle.

The *Tunisia-Libya* case presented an opportunity for clarity in delimitation guidelines, because the request was twofold, to declare the applicable law and to give instruction on the application of principles and rules, “so as to enable the experts of the two countries to delimit these areas without difficulty.”¹²⁰ Each of the parties had agreed before Judgment on the principle of natural prolongation as the preeminent factor in the delimitation. However, as seen above, this was not confirmed by the Court. This is another inherent ‘danger’ in resorting to the Courts instead of giving greater emphasis and weight to the negotiation process: the case was decided using arguments which neither party had predicted. The three cases groups above, the *North Sea Cases*, the *Anglo-French Case*,*(ref needed)* and the *Tunisia-Libya Case* all illustrate that the law on maritime delimitation to 1882 remained unclear. An impression of ad hoc solutions remains after reading the ups and downs of the importance of equitable principles and equidistance special circumstances.

In conclusion, the International Court has an unfortunately uneven history in delimitation. The Court has not consistently applied any uniform set of criteria to the above major cases. The proportionality principle seems to have been the only consistently relevant factor referred to by the Court. The coastal configuration which had been important in the *North Sea Cases* was not considered in *Libya-Malta*. Equitable division of natural resources was dismissed as relevant in both *Tunisia-Libya* and *Libya-Malta*, yet the *de facto* lines were based, in *Tunisia/Libya*, on a division which was directly related to a division of natural resources. As noted above, all boundary decisions have a political nature. In any negotiation, it is difficult to isolate the political from the other elements. The clear and undisputed advantage that negotiation has over

¹²⁰ *Tunisia-Libya*, paras. 23, 25.

submission to third party settlement is the opportunity to present and yet block or limit publication of the expressed political views and reasoning.

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Settlement of disputes mechanism

Recapitulative tables

1. Settlement of disputes mechanism under the Convention: Choice of procedure under article 287 and optional exceptions to applicability of Part XV, Section 2, of the Convention under article 298 of the Convention

Articles 287 and 298 of the Convention read as follows:

<p><i>Article 287</i> <i>Choice of procedure</i></p> <p>1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:</p> <ul style="list-style-type: none">(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;(b) the International Court of Justice;(c) an arbitral tribunal constituted in accordance with Annex VII;(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein. <p>2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.</p> <p>3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.</p> <p>4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.</p> <p>5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.</p> <p>6. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.</p> <p>7. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.</p> <p>8. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.</p> <p style="text-align: center;"><i>Article 298 Optional exceptions to applicability of section 2</i></p> <p>1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:</p> <ul style="list-style-type: none">(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;(ii) after the conciliation commission has presented its report, which shall State the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise

agree;

(iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;

(b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;

(c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.

Note: The official texts of declarations and statements, which contain the choice of procedure under article 287 of the Convention and optional exceptions to applicability of Part XV, Section 2, under article 298 of the Convention, are available at the web site of the Treaty Section of the Office of Legal Affairs of the United Nations at:

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty6.asp#Declarations>

State	Choice of procedure Declarations under article 287 (numbers indicate the order of preference) 121[1]				Optional exceptions to applicability of Part XV, Section 2, of the Convention (Declarations under article 298)
	International Tribunal for the Law or the Sea	International Court of Justice (ICJ)	An arbitral tribunal constituted in accordance with Annex VII	A special arbitral tribunal constituted in accordance with Annex VIII	Declarations indicating that the State does not accept any one or more of the procedures provided for Part XV, Section 2 (compulsory procedures entailing binding decisions) with respect to one or more of the following categories of disputes:
Algeria (upon ratification)	NOTE: The People's Democratic Republic of Algeria does not consider itself bound by the provisions of article 287, paragraph 1 (b), of the [said Convention] dealing with the submission of disputes to the International Court of Justice. The People's Democratic Republic of Algeria declares that, in order to submit a dispute to the International Court of Justice, prior agreement between all the Parties concerned is necessary in each case.				---
Argentina (upon ratification)	1	-	-	2	Disputes specified in article 298, paragraph 1 (a), (b) and (c), of the Convention;
Australia (22 March 2002)	1	1			Disputes referred to in article 298, paragraph 1 (a), of the Convention;
Austria (upon ratification)	1	3	-	2	---
Belarus (upon ratification)	In respect of the prompt release of detained vessels or their crews	-	1	1 For disputes relating to fisheries, the protection and preservation of the marine environment, marine scientific research	Disputes referred to in article 298, paragraph 1 (b) and (c) of the Convention;

				and navigation, including pollution from vessels and by dumping	
Belgium (upon ratification)	1	1	-	-	---
Canada (upon ratification)	1	-	1	-	Disputes referred to in article 298, paragraph 1 (a), (b) and (c) of the Convention;
Cape Verde (upon ratification)	1	2	-	-	Disputes referred to in article 298, paragraph 1 (b), of the Convention;
Chile (upon ratification)	1	-	-	2	Disputes referred to in article 298, paragraph 1 (a), (b) and (c) of the Convention;
China (on 25 August 2006)	No choice under article 287 made				Disputes referred to in article 298, paragraph 1 (a), (b) and (c) of the Convention;
Croatia (on 4 November 1999)	1	2	-	-	---
Cuba (upon ratification)	-	Cuba rejects the ICJ jurisdiction for any types of disputes	-	-	Consequently, Cuba does not accept the jurisdiction of the International Court of Justice with respect to the provisions of articles 297 and 298;
Denmark (upon ratification)	-	1	Not accepted for any of the categories of disputes mentioned in article 298	-	Does not accept an arbitral tribunal constituted in accordance with Annex VII for any of the categories of disputes mentioned in article 298
Egypt (upon ratification)	-	-	1	-	---
Equatorial Guinea (on 20 February 2002)	No choice under article 287 made				Disputes referred to in article 298, paragraph 1 (a), of the Convention;
Estonia (upon accession)	1	1	-	-	---
Finland (upon ratification)	1	1	-	-	---
France (upon ratification)	No choice under article 287 made				Disputes referred to in article 298, paragraph 1 (a), (b) and (c) of the Convention;
Germany (upon accession)	1	3	2	-	---
Greece (upon ratification)	1	-	-	-	---
Guinea-Bissau (upon ratification)	-	Guinea-Bissau rejects the ICJ jurisdiction for any types of disputes;	-	-	Consequently, Guinea-Bissau does not accept the jurisdiction of the International Court of Justice with respect to articles 297 and 298;
Honduras (on 18 June 2002)	-	1	-	-	---
Hungary (upon ratification)	1	2	-	3 for all the categories of disputes specified therein	---

<u>Iceland</u> (upon ratification)	No choice under article 287 made				Iceland declared that under article 298 of the Convention the right is reserved that any interpretation of article 83 shall be submitted to conciliation under Annex V, section 2, of the Convention;
<u>Italy</u> (upon ratification and on 26 February 1997)	1	1	-	-	Disputes referred to in article 298, paragraph 1 (a), of the Convention;
<u>Latvia</u> (on 31 August 2005)	1	1	-	-	---
<u>Lithuania</u> (upon accession)	1	1	-	-	---
<u>Mexico</u> (on 6 January 2003)	1	1	-	1	Disputes referred to in article 298, paragraph 1 (a), and (b) of the Convention;
<u>Netherlands</u> (upon ratification)	-	1	-	-	---
<u>Nicaragua</u> (upon ratification)	-	1	-	-	With respect to the categories of disputes referred to in article 298, paragraph 1 (a), (b) and (c) of the Convention, Nicaragua accepts only the jurisdiction of the International Court of Justice
<u>Norway</u> (upon ratification)	-	1	-	-	Norway does not accept an arbitral tribunal constituted in accordance with Annex VII for any of the categories of disputes referred to in article 298;
<u>Oman</u> (upon ratification)	1	1	-	-	---
<u>Palau</u> (on 27 April 2006)	No choice under article 287 made				Disputes referred to in article 298, paragraph 1 (a), of the Convention;
<u>Portugal</u> (upon ratification)	1	1	1	1	Disputes referred to in article 298, paragraph 1 (a), (b) and (c), of the Convention;
<u>Republic of Korea</u> (on 18 April 2006)	No choice under article 287 made				Disputes referred to in article 298, paragraph 1 (a), (b) and (c) of the Convention;
<u>Russian Federation</u> (upon signature and ratification)	In matters relating to the prompt release of detained vessels and crews		1	1 For disputes relating to fisheries, the protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and dumping	Disputes referred to in article 298, paragraph 1 (a), (b) and (c) of the Convention;
<u>Slovenia</u> (on 11 October 2001)	-	-	1	-	Slovenia does not accept an arbitral tribunal constituted in accordance with Annex VII for any of the categories of disputes referred to in article 298.
<u>Spain</u> (on 19 July 2002)	1	1	-	-	Disputes referred to in article 298, paragraph 1 (a), of the

					Convention;
<u>Sweden</u> (upon ratification)	-	1	-	-	---
<u>Trinidad and Tobago</u> (2007)	1	2	-	-	---
<u>Tunisia</u> (upon ratification and on 22 May 2001)	1	-	2	-	Disputes referred to in article 298, paragraph 1 (a), (b) and (c) of the Convention;
<u>Ukraine</u> (upon ratification)	In respect of the prompt release of detained vessels or their crews	-	1	1 For disputes relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and by dumping	Disputes referred to in article 298, paragraph 1 (a) and (b), of the Convention, unless otherwise provided by specific international treaties of Ukraine with relevant States;
<u>United Kingdom of Great Britain and Northern Ireland</u> (on 12 January 1998 and 7 April 2003)	-	1	-	-	Disputes referred to in article 298, paragraph 1 (b) and (c), of the Convention;
<u>United Republic of Tanzania</u> (upon ratification)	1	-	-	-	---
<u>Uruguay</u> (upon ratification)	1	-	-	-	Disputes referred to in article 298, paragraph 1 (b), of the Convention.

2. Settlement of disputes mechanism under the Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks

Choice of procedure under article 30 of the Agreement and optional exceptions

Article 30 of the Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks reads as follows:

<p><i>Article 30</i> <i>Procedures for the settlement of disputes</i></p> <p>1. The provisions relating to the settlement of disputes set out in Part XV of the Convention apply <i>mutatis mutandis</i> to any dispute between States Parties to this Agreement concerning the interpretation or</p>

- application of this Agreement, whether or not they are also Parties to the Convention.
2. The provisions relating to the settlement of disputes set out in Part XV of the Convention apply *mutatis mutandis* to any dispute between States Parties to this Agreement concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties, including any dispute concerning the conservation and management of such stocks, whether or not they are also Parties to the Convention.
 3. Any procedure accepted by a State Party to this Agreement and the Convention pursuant to article 287 of the Convention shall apply to the settlement of disputes under this Part, unless that State Party, when signing, ratifying or acceding to this Agreement, or at any time thereafter, has accepted another procedure pursuant to article 287 for the settlement of disputes under this Part.
 4. A State Party to this Agreement which is not a Party to the Convention, when signing, ratifying or acceding to this Agreement, or at any time thereafter, shall be free to choose, by means of a written declaration, one or more of the means set out in article 287, paragraph 1, of the Convention for the settlement of disputes under this Part. Article 287 shall apply to such a declaration, as well as to any dispute to which such State is a party which is not covered by a declaration in force. For the purposes of conciliation and arbitration in accordance with Annexes V, VII and VIII to the Convention, such State shall be entitled to nominate conciliators, arbitrators and experts to be included in the lists referred to in Annex V, article 2, Annex VII, article 2, and Annex VIII, article 2, for the settlement of disputes under this Part.
 5. Any court or tribunal to which a dispute has been submitted under this Part shall apply the relevant provisions of the Convention, of this Agreement and of any relevant subregional, regional or global fisheries agreement, as well as generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible with the Convention, with a view to ensuring the conservation of the straddling fish stocks and highly migratory fish stocks concerned.

Note: The official texts of declarations, which contain choice of procedure and optional exceptions to applicability of Part XV of the Convention under article 30 of the Agreement, are available at the web site of the Treaty Section of the Office of Legal Affairs of the United Nations at:

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty9.asp#Declarations>

The following choices were communicated in the declarations made upon ratification of the Agreement:

State	Choice of procedure under article 30 of the Agreement (numbers indicate the order of preference) 122[1]				Optional exceptions to applicability of Part XV of the Convention invoked under article 30 of the Agreement
	International Tribunal for the Law or the Sea	International Court of Justice (ICJ)	An arbitral tribunal constituted in accordance with Annex VII	A special arbitral tribunal constituted in accordance with Annex VIII	Declarations indicating that the State does not accept any one or more of the procedures provided for Part XV, Section 2 (compulsory procedures entailing binding decisions) with respect to one or more of the following categories of disputes:
Canada (upon ratification)	-	-	1	-	Disputes referred to in article 298, paragraph 1, of the Convention
Norway (upon ratification)	No declaration regarding the choice of procedure was made				Does not accept an arbitral tribunal constituted in accordance with Annex VII of the Convention for disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 3, of the Convention, in the event that such disputes might be

					considered to be covered by the Agreement
<u>United States of America</u> (upon ratification)	-	-	-	1	---
