

**Delimitation of The Maritime Boundary Between
the Commonwealth of The Bahamas and The
United States of America: A Case Study**

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Acknowledgment

This research project would not have been possible without the generous funding of the The Nippon Foundation of Japan. Additionally, I wish to thank the United Nations and in particular the Division for Ocean Affairs and the Law of the Sea for the very competent manner in which they have coordinated and administered the UN-Nippon Fellowship Programme, in addition to the substantive comments and guidance I received from members of the technical staff of the Division for Ocean Affairs and Law of The Sea. During the tenure of my fellowship, I had the opportunity to conduct the research phase of this programme at Tulane University in New Orleans. The access to the vast sources of research material and the professional assistance of their reference librarians, especially Ms. Charlotte Bynum, made my time there very rewarding. I am particularly grateful to Professor Gunther Handl, of Tulane Law School, for his sage advice and guidance. I also wish to thank my family and the Ministry of Foreign Affairs of the Commonwealth of The Bahamas, especially Mr. George Stewart and Mr. Godfrey Rolle for their continued support.

Disclaimer

The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations, The Nippon Foundation of Japan or that of the Government of The Commonwealth of The Bahamas.

Introduction

More than a thousand years ago a Roman Emperor, Antonius, once said that “The Law is the Master of the Sea”.¹ It was a prescient statement given the current state of maritime law. The efforts of the world community to establish and codify the law of the oceans has resulted in the creation of a body of law, namely the United Nations Convention on the Law of the Sea, which singularly has expanded and created new legal regimes as it relates to the management of the world’s oceans.²

The Convention establishes a jurisdictional regime for the world’s oceans based on a series of zones defined by reference to a seaward distance from a State’s coast. The Convention also establishes rules for drawing baselines to be used in measuring the distances from a State’s coast that define the various zones. Additionally, the Convention establishes the basis upon which States with overlapping or converging maritime claims can delimit their relevant maritime space.

The present study focuses on the legal rules, legal principles and state practice that are pertinent to the issue of maritime delimitation. Additionally, this study’s primary

¹ Thomas A. Clingan, Jr. Ed, Law of the Sea: State Practice in Zones of Special Jurisdiction, Proceedings Law of the Sea Institute Thirteenth Annual Conference, October 15-18, 1979, Mexico City, Mexico, page 327

² Thomas A. Clingan, Jr. Ed, Law of the Sea: State Practice in Zones of Special Jurisdiction, Proceedings Law of the Sea Institute Thirteenth Annual Conference, October 15-18, 1979, Mexico City, Mexico, page 327

intention is to assist the Government of The Bahamas in articulating a clear, considered, informed and comprehensive strategy for any future maritime delimitation negotiations it may initiate or that may be initiated by the Government of the United States of America.

The following overriding themes will be examined in this research to ascertain the most efficacious negotiating position that can be advanced by the Bahamas Delegation:

1. The drawing of archipelagic baselines in accordance with international law.
2. The legal framework informing bilateral negotiations.
3. Establishment of a dispute settlement mechanism.

It is hoped that this study will give some insight into the fundamental legal considerations that need to be taken into account when attempting to negotiate a bilateral maritime boundary delimitation agreement.

Chapter I

Establishment of Archipelagic Baselines - The Bahamas

I. Introduction

Prior to initiating maritime boundary delimitations, the first critical step for the Bahamian Government is to determine its baselines. This first step is an important exercise in state sovereignty, as it is this act that will establish the boundaries of The Bahamas and by extension the land and maritime space over which it would have jurisdiction.

Additionally, the identification of Bahamian baselines will underpin any in-depth analysis and examination of the fundamental legal principles that will necessarily inform any delimitation process between The Bahamas and the United States. The International Court of Justice articulated the importance of establishing accurate baselines in rendering its judgment in the Bahrain and Qatar maritime delimitation case. The Court noted that “no method for determining an equitable means of delimitation can be conducted without first knowing the baselines of both countries.”³ At the time of the adjudication of the case, neither Bahrain nor Qatar had officially determined their basepoints.

³ International Court of Justice, Summary Judgment of 16th March 2001 , Maritime Delimitation and Territorial Questions between Qatar and Bahrain 1991-2001 paragraph 169

Similarly, what must be determined is the category of baselines which can be constructed around The Bahamas. To comprehensively address this question a succinct examination of the evolution of the archipelagic concept must be undertaken to illustrate the transformation of the concept from a merely geographical term to a concept that carries with it a great deal of legitimacy. Moreover, there must also be a sober discussion of the archipelagic regime in contemporary international law and a determination made as to whether The Bahamas can avail itself of the rights that are attendant to an archipelagic state.

II. Evolution of the Archipelagic Regime in International Law

Prior to the United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS), there was no recognition of the special characteristics and consequently the particular legal rights and obligations of archipelagic States. State practice with regard to the establishment of straight baselines around archipelagic nations was not considered to be part of customary international law prior to UNCLOS. The Philippines in the 1950's campaigned for the international recognition of its special geographical circumstances. The Philippines in its note of 12, December, 1955 to the Secretariat of the United Nations indicated that "The Position of the Philippine Government in the matter is that all waters around, between and connecting the different islands belonging to the Philippine

Archipelago... are necessary appurtenances of its land territory, forming an integral part of the national or inland waters subject to the exclusive sovereignty of the Philippines”⁴

Similarly, Indonesia in December 1957, issued the Djuanda Declaration, which called for the use of straight baselines joining together the outermost seaward points of the islands in the archipelago to outline the territorial limits of Indonesia including both islands and water⁵. While this declaration had no legal effect, even for Indonesia domestically, it generated protests from France, the United States, the United Kingdom, Australia, the Netherlands, New Zealand and Japan.⁶

Such protests reflected a conflict between competing interests; archipelagic States, on the one hand trying to maximize their jurisdiction of maritime space that traditionally had been seen as part of the high seas, and the interests of developed countries, on the other hand, who wanted to ensure freedom of navigation for military and commercial purposes. The need for compromise and concessions in order to incorporate the interests of archipelagic States and other States was a major point in the negotiations at the United Nations Conferences on the Law of the Sea. Subsequently, a balance was reflected in the substantive provisions of UNCLOS dealing with the definition of the archipelagic

⁴ Ku, Charlotte, The Archipelagic State Concept and Regional Stability in Southeast Asia, Case Western Journal of International Law, 1991 page 463

⁵ Ku, Charlotte, The Archipelagic States Concept and Regional Stability in Southeast Asia , Case Western Journal of International Law, 1991 page 470

⁶ Ku, Charlotte, The Archipelagic States Concept and Regional Stability in Southeast Asia , Case Western Journal of International Law, 1991 page 472

concept and the condition under which straight baselines can be constructed around an archipelagic State.

1. Definition of the Archipelagic State in International Law

Without a precise definition of the term archipelago it would be difficult to ascertain the number of States which would be able to take advantage of the legal regime specifically related to archipelagic States.

In general terms, the concept of archipelagos merely refers to a grouping of islands.⁷ Initially, the expression was strictly used as a geographical term. However, for the purposes of this study there needs to be an analysis of the legal meaning of the term “archipelago” and the legal ramifications that are concurrent with a State declaring archipelagic status.

The International Court of Justice in the Anglo-Norwegian Fisheries Case recognized the relationship between islands and the surrounding waters and that of the mainland with respect to a coastal archipelago. While this case specifically dealt with the particular circumstances of a coastal archipelago it has been argued that the need for geographic

⁷ O’Connell, D.P. “Mid-Ocean Archipelagos in International Law”, 45 British Yearbook of International Law, 1971, page 24

cohesiveness extends to mid-ocean archipelagos as well.⁸ This need for geographic specificity plays a critical role and is arguably the basis and starting point for the archipelagic concept.

However, within this concept there are deviations. There are coastal archipelagos as noted above, mid-ocean archipelagos and archipelagos with one or more dominating main islands⁹. The Bahamas falls into last category. Mid-ocean archipelagos usually involve the consolidation of the island grouping into a single unit by a system of straight baselines. Usually there is no single larger island that dominates the total land area of the archipelago.

2. Legal Definition of an Archipelago

UNCLOS article 46 defines an archipelago as:

“a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely inter-related that such islands, waters and other natural features form an intrinsic geographical economic and political entity or which historically have been regarded as such”.¹⁰

⁸ Mohamed, Munavvar, Ocean States, Archipelagic Regimes in the Law of the Sea, Martimnu Nijhoff Publishers, 1995. page 114

⁹ Rodger, Patricia Elaine Joan, MidOcean Archipelagos and International Law, New York: Vantage Press, 1981, page 4

¹⁰ United Nations Convention on the Law of The Sea, Article 46

3. Can The Bahamas Be Defined As An Archipelago Pursuance to Article 46?

The Bahamas has enacted legislation pertaining to its archipelagic status (see annex 1). However, such a declaration does not assure a country that it will be recognized by the international community as an archipelagic State. Additionally self declaration does not ensure that the country can meet all of the legal requirements that will determine whether in law it can be defined as an archipelago. Historically the islands of The Bahamas have always been perceived as one unit for the purposes of economic, political and cultural cohesiveness. The delegate of The Bahamas at the Caracas Session of the Third United Nations Conference on the Law of the Sea, while addressing the issue of special circumstances surrounding The Bahamas stated, “areas of shallow water had historically been regarded as parts of the territory of The Bahamas: a grant, encompassing the banks as well as the islands and the cays, had been made to the Lord Proprietors by King Charles of England in 1670”¹¹. Additionally, The Bahamas has recently celebrated 275 years of uninterrupted parliamentary democracy, which attests to the fact that the islands of The Bahamas have been perceived as one cohesive unit.

Despite the extensive definition of what geographical, economic, historical and political factors helped to determine the existence of an archipelagic regime in international law,

¹¹ Renate Platzoder (editor) The Third United Nations Conference on The Law of The Sea: Documents Volume II page 265, 1983, Oceana Publications, Inc, Dobbs ferry, New York

there is no legal regime that speaks to the specific and peculiar circumstance of each deviation of the archipelagic concept. There are several States that from a purely geographical perspective can be considered archipelagos, such as the United Kingdom and Japan, but legally are not considered to be so and therefore cannot avail themselves of this legal concept.¹² In my opinion, The Bahamas unequivocally conforms to article 46 UNCLOS without foreseeable challenges being posed by any other states within the international community. The real test will be constructing archipelagic straight baselines in accordance with article 47 of UNCLOS.

III. Drawing of Archipelagic Straight Baselines in Accordance with Article 47 of the United Nations Law of the Sea Convention

How then must Bahamian archipelagic baselines be established? Article 47 of UNCLOS enumerates several precise and objective tests that a State must satisfy before it can draw archipelagic straight baselines. Article 47 states:

1. “ An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in

¹² Mohamed, Munavvar, Ocean States, Archipelagic Regimes in the Law of the Sea, Martimnu Nijhoff Publishers, 1995. page 112

which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.

2. The length of such baselines shall not exceed 100 nautical miles except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.
3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.
4. Such baselines shall not be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.
5. The system of such baselines shall not be applied by an archipelagic states in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another state.
6. If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such

waters and all rights stipulated by agreement between those States shall be respected.

7. For the purpose of computing the ratio of water to land under paragraph 1, land areas may include waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau.
8. The baselines drawn in accordance with this article shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted.
9. The archipelagic State shall give due publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.”

1. The Process of Drawing Archipelagic Baselines in Accordance with International Law.

In-depth analysis of the substantive provisions of article 47 relative to the construction of baselines reveals that there is a list of strict tests that must be satisfied in order for a country to take advantage of the archipelagic straight baseline principle. In my opinion such tests would permit The Bahamas to acquire the maximum amount of maritime space allowed.

Article 47, paragraph 1, of UNCLOS provides, among other things, that “ an archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago ...”

Such lines serve as the baselines from which the breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of archipelagic States are measured. It is clearly evident that the drawing of the baselines is the first step before any attempt at delimitation can be undertaken.

Article 47, paragraph 1, also stipulates that archipelagic baselines should be drawn in such a way as to include all the main islands of the archipelago within the archipelagic baselines. The concept of “main” is rather vague and needs an objective test which will clearly determine what this term truly means.

The concept of what constitute a main island has been described in the following terms;

“ ... main islands might mean the largest islands, the most populous islands , the most economically productive islands or the islands which are pre-eminent in an historical or cultural sense.¹³

2. Current State Practice

The majority of the mid-ocean archipelagic States, including Indonesia, the Philippines, Trinidad and Tobago, the Maldives and Antigua and Barbuda have all been able to incorporate the “ main” island when drawing their respective baseline.

3. Recommendations for The Bahamas

In my opinion, all of the main islands, including the politically, historically and culturally significant islands can be incorporated under one single archipelagic baseline configuration. The critical point that needs further examination is whether such an archipelagic configuration potentially exceeds the established water-land ratio and whether it extends beyond the established limit of the permissible length of baselines.

¹³ (United Nations Publication, Sales no. E. 88. V.5 Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea.), paragraph 82

IV. Establishment of Water to Land Ratio

It is recalled that article 47, paragraph 1, states that

“ An archipelagic State may draw straight archipelagic baselines joining the outermost islands and drying reefs of the archipelago provided that within such baselines ... an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9:1.”

Additionally, paragraph 7 of the article expands the basis upon which particular geographical anomalies can be taken into consideration when determining what can constitute and be defined as “land” for the purpose of establishing the water to land ratio.

Article 7 states;

“For this specific purpose land areas may include waters lying within fringing reefs of islands and atolls, including the superjacent waters of that part of a steep sided oceanic plateau which is enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateaus. “

2. Historic Negotiation Position During UNCLOS III

At the III Conference of UNCLOS The Bahamas in articulating its peculiar and unique circumstances intimated that:

“The Bahamas was a unique case which had long been regarded as a geological enigma. The islands comprised a realm of predominantly shallow waters which were largely non-navigable except by vessels of shallow draught. The Bahamas banks present a special problem of delimitation since both the ratio of very

shallow water to dry land area and the steepness of the slopes appeared to be unparalleled. If those unique physio- geographic conditions were disregarded and conventional baselines at low-water level were used, bizarre effects would result.”¹⁴

The Bahamas further contended that it was constituted of more than islands and cays. He intimated that the perception of the average Bahamian was that the Great and Little Bahama banks, which are areas of shallow water, had historically been regarded as part of the territory of The Bahamas¹⁵. This connects directly to the sentiment held by many archipelagic nations that the land and the sea are intimately linked and should not be distinguished one from the other. Indonesia as a leading proponent of the archipelagic concept incorporated this notion in the term “Wawasan Nusantara” (Archipelagic Outlook).

This political notion basically refers to the concept that the land and the sea are intrinsically intertwined and is seen as a bridging and unifying force that connects the peoples of Indonesia.¹⁶

The perception of the interconnectedness of the land and the sea may be at the heart of the archipelagic concept from a nationalist standpoint of island States. However, in

¹⁴ Office for Ocean Affairs and Law of The Sea, Archipelagic States, Legislative History of Part IV of United Nations Convention on the Law of The Sea, United Nations Publication, 1990 page 46.

¹⁵ Office for Ocean Affairs and Law of The Sea, Archipelagic States, Legislative History of Part IV of United Nations Convention on the Law of The Sea, United Nations Publication, 1990 page 46.

¹⁶ Ku, Charlotte, “The Archipelagic State Concept and Regional Stability in Southeast Asia.” Case Western Reserve Journal of International Law, 1991, Vol. 23 page 465

international law, there is a clear distinction between what constitutes land and what constitutes ocean space.

3. Current State Practice

States such as Indonesia and the Philippines are able to satisfy the land to water ratio with little difficulty given the fact that they are constituted by a number by large islands and several thousand smaller islands in close proximity. The water to ratio of Indonesia and the Philippines is 1:1.2 and 1:1.8, respectively.¹⁷

Conversely, Mauritius one of the original members of the archipelagic States group, can not draw a composite baseline around itself. Additionally, the Seychelles, in the west Indian Ocean, and Tonga, in the South Pacific, are also too widely scattered and would not be able to enclose their archipelagos within a single baseline system in conformity with the maximum water to land ratio set forth in UNCLOS.¹⁸

¹⁷ R.R Churchill and A.V. Lowe, The Law of the Sea, 3rd Edition, Juris Publishing, Manchester Univeristy Press 1999, page 123

¹⁸ Mohamed Munavvar, Ocean States, Archipelagic Regimes in the Law of The Sea, Martinus Nijhoff Pubishers, 1995, page 131

4. Recommendations for The Bahamas

A table indicating the main grouping of islands and banks and surrounding sea of the Bahamian archipelago is shown below. These calculations will form one of the components for determining whether The Bahamas has a case for establishing archipelagic baselines around its entire coastline in accordance with UNCLOS.

The following chart contains geographical data that does not take into consideration the geodetic datum that is critical for a precise calculation for actual delimitation purposes. Consequently, the calculations indicated are preliminary and are subject to change after they have been verified and checked for accuracy.¹⁹

<i>Descriptions</i>	<i>Square Nautical Miles</i>	<i>Square Miles</i>
<i>Total area of Land, water and Banks within the Archipelagic boundary</i>	72,085.64	95,462.53
<i>Total area of Land</i>	3,894.55	5,157.52
<i>Total area of Banks</i>	34,562.33	45,770.66
<i>Total area of Water</i>	33,701.89	45,041.46

¹⁹ Information received from the Bahamas GIS service

<i>Total area of Islands and Banks</i>	38,073.95	50,421.08
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Major Island Groups of The Bahamas

<i>Island Group</i>	<i>Square Nautical Miles</i>	<i>Square Miles</i>
Abaco	430.16	596.66
Acklins	142.58	188.81
Andros	1596.38	2114.08
Berry Islands	19.13	25.33
Bimini Islands	8.39	11.11
Cat Island	111.12	147.16
Cay Sal	4.33	5.74
Crooked Island	80.17	106.16
Double Breasted Cays	0.09	0.13
Eleuthera	143.42	189.92
Exuma Cays	8.69	11.51
Exuma Island	0.17	0.23
French Keys	5.02	6.64
Grand Bahama	342.99	454.21
Great Exuma	105.24	139.37

Great Harbour Cay	0.06	0.08
Inagua	492.22	651.84
Long Island	144.87	191.85
Mayguana	85.23	112.87
Moore's Island	7.93	10.50
New Providence	69.61	92.18
Ragged Island	0.21	0.28
Ragged Islands	14.37	19.03
Rum Cay	25.01	33.12
Samana Cay	10.35	13.12
San Salvador	46.82	62.00
Total	3,880.00	5,138.26

Calculation of Banks

Bank	Square Nautical Miles	Square Miles
Acklins Bank	585.61	775.52
Brown Bank	4.24	5.61

Cay Sal Bank	1,519.53	2,012.30
Clarion Bank	15.36	20.34
Conception Island Bank	31.44	41.64
Diana Bank	25.31	33.52
Great Bahama Bank	27,930.14	36,987.69
Great Inagua	72.35	95.81
Little Bahama Bank	4,157.72	5,506.04
Mira Pos Vos Bank	42.29	56.04
North West Cay Bank	13.33	56.01
Plana Cays Bank	31.86	17.66
Rum Cay Bank	72.61	42.19
Samana Cays Bank	22.63	96.15
San Salvador Bank	37.91	50.21
	34,562.33	45,770.66

There is a clear objective test which must be undertaken by the Bahamian delegation, specifically whether the water to land ratio of The Bahamas falls within the parameters of article 47 paragraph 1.²⁰ Article 47 allows for the incorporation of banks into the

²⁰ Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, (United Nations Publication, Sales no. E88.V.5) paragraph 82

definition of what constitutes “land” for the strict purpose of calculating the water to land ratio. Consequently, The Bahamas has a substantial claim that can comply with the prescribed limits of contemporary international law. Basing my calculations on the above tables it would appear that:

- (i) that the land surface (inclusive of all of the banks) is 50,421.08 square miles; and
- (ii) the maritime space is 45,041.46 square miles.

However it must be re-iterated that these tabulations are merely preliminary. Additionally, in determining the water to land ratio an accurate assessment of what *percentage* of the Bahama Banks is “land” must be a priority for The Bahamas delegation. In actuality this may significantly increase the water to land ratio. Currently, based on my calculation it appears that the water to land ratio would be 0.89:1.

Based on the above calculation there appears to be a challenge for The Bahamas, as the ratio of 0.89:1 is not in keeping with the international standard of 1:1 to 9:1. Any decision made by The Bahamas has to ensure that all the strategic areas of the banks it wishes to include in a single archipelagic baseline configuration must be in keeping with the provisions of UNCLOS.

This decision has political implications as particular factors and considerations relate to the heart of national sovereignty and statehood. Moreover, a decrease in the size of the

banks included in the construction of baselines can be a key negotiation strategy in the event there is a need for a compromise. A point to consider is the particular areas which can be excluded, whether they are key fishing grounds, or if they bear a particular historic or strategic significance. Another consideration is the role of public perception as no government wants to be perceived as excluding from its boundaries parts of maritime space that is culturally and historically considered to be part of The Bahamas. Therefore, the Bahamian delegation must ensure that extremely accurate assessments are undertaken to determine what extent of the Bahamian banks can be considered “land”.

Another aspect of the water to land ratio that would need to be borne in mind would be the consequences of sea level rise and the resultant decrease in land area and how that would affect the water to land ratio. Several archipelagic States, including The Bahamas are very low lying States and would lose a considerable portion of their land areas to a rise in sea level. One solution to such a potential situation may be for negotiating states to agree to maintain the position of baselines as they are drawn prior to such a shifting of baselines landward as a result of a rise in sea level.²¹ What must be ascertained is whether such a negotiation position has a legitimate basis in international law. Article 7 paragraph 2 of UNCLOS states:

“... Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent

²¹ Mohamed, Munavvar, Ocean States, Archipelagic Regimes in the Law of the Sea, Martimnu Nijhoff Publishers, 1995. page 112

of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention...”

From this provision it appears as if the original baseline system remains valid and it is up to the negotiating States to initiate changes in the positioning of baselines. Subsequently it would be prudent for The Bahamas to attempt to include in its maritime delimitation agreements with its neighbouring States, a provision that calls for baseline co-ordinates to be maintained even in the event of a rise in sea level.

V. Length of Archipelagic Straight Baselines

While at this juncture it appears as if The Bahamas can easily satisfy the water to land ratio test with slight adjustments to the position of its baselines, the second and perhaps more challenging test would be to ensure that the length of its baselines do not contravene the provisions of paragraph 2 of Article 7 UNCLOS. This provision states that “ the length of archipelagic baselines should not exceed 100 nautical miles except that up to 3 percent of the total number of lines enclosing the archipelago may be between 100 and 125 nautical miles in length”

This provision on preliminary examination appears to be a rather specific and restrictive test²² and could be seen as way of challenging the unity of an archipelagic state and could lead to the severing of parts of archipelagic waters.

I. Historic Negotiating Position at UNCLOS III.

It was argued by The Bahamas at the Third Conference on the Law of the Sea that by applying such a rigid requirement this provision could undermine the integral purpose of creating archipelagic baselines in the first place. The Bahamas stated that the length of the baseline criterion became irrelevant when applied to the unique circumstance of The Bahama Islands and Banks and was therefore unacceptable.²³

Conversely, there was a proposal by the British government promoting the maximum length of baselines to be 48 nautical miles. The reasoning behind such a calculation was the fact that this calculation is 4 times the permissible breadth of the territorial sea and is also based on judicial reasoning, specifically the judgment of the International Court of Justice in the Anglo Norwegian Fisheries Case where it was determined that the drawing

²² Victor Prescott and Clive Schofield, The Maritime Political Boundaries of the World, Second Edition, Koninklijke Brill NV, Leiden, the Netherlands, 1995 page 175

²³ Office for Ocean Affairs and Law of The Sea, Archipelagic States, Legislative History of Part IV of United Nations Convention on the Law of The Sea, United Nations Publication, 1990 page 46.

of straight baselines of 40 miles in length with respect to coastal archipelagos was acceptable.²⁴

2. Balancing the needs of Archipelagic States and the needs of the International Community.

However, article 47 paragraph. 1 reflects the requisite balance that is necessary to ensure not only that the interests of archipelagic states are addressed. An absence of limits could have lead to a scenario in which the necessary degree of proximity and relationship between the islands and the water area may not be achieved.²⁵ There does not appear to be a logical technical basis for acceptance of the specific references of the length of baselines finally agreed to. It appears that the specific calculations referred to in article 47 paragraph 1 is not based on any objective, geographical, ecological or oceanographic factors.²⁶

While paragraph 1 of article 47 may seem overly stringent it belies the discretionary powers available to states to maximize the maritime space that it can incorporate in a

²⁴Edited By Renate Platzoder, The Third United Nations Conference on the Law of The Sea, Official Records, Vol I 1994, page 124, Oceana Publications, INC, Dobbs Ferry, New York

²⁵ McDougal and Burke, The Public Order of the Oceans, New Haven: Yale University Press, 1962 page 412

²⁶ Churchill, Robin, R. and Lowe, Alan V. The Law of the Sea, New rev. ed. Manchester: Manchester University Press 1988, page 102.

single baseline system. Although UNCLOS clearly states that only 3 percent of baseline segments may exceed 100 nautical miles in lengths, there is no limit to the number of segments a country may draw. It has been argued that it would not be difficult for a state to decrease the number of segments exceeding the 100 nautical miles by increasing the number of shorter segments and thereby, the number of baseline segments.

3. Current State Practice

The majority of states that have drawn archipelagic states that have drawn archipelagic straight baselines have done so in accordance with international standards. However, there are two prominent cases of non compliance with UNCLOS provisions relative to the length of baselines. The Philippines has three baseline segments out of a total of 80 which exceed 100 nautical miles in length and one segment is 140 nautical miles in length. It should be pointed out that the baseline segment measuring 140 nautical miles can easily be adjusted without difficulty to comply with the provisions of UNCLOS.²⁷

Cape Verde which in 1977, legislatively drew 14 base points, two of which exceed the permissible maximum 125 mile length. Additionally, the water area enclosed by the archipelagic baselines is 50,546 square kilometers and the Cape Verde land area is 4,031 square kilometers. The resulting water to land ratio is 12.54:1, which exceeds the

²⁷ Mohamed, Munavvar, Ocean States, Archipelagic Regimes in the Law of the Sea, Martimnu Nijhoff Publishers, 1995. page 135

maximum internationally accepted standard. In 1980 as a result of Cape Verde's non compliance with internationally accepted parameters the United States protested Cape Verdes claim. Cape Verde has redrawn their baselines with some modifications.²⁸ It is unclear whether the protest of the U.S. had a direct correlation to this modification.

4. Recommendations for The Bahamas

Therefore the positioning and number of baselines constructed at the "outermost points of the outermost islands and drying reefs of the archipelago"²⁹ encompasses some degree of discretionary political decision making and must be considered cautiously in order to guarantee that vital national territory falls within the maritime boundaries of the country.

In order to ensure that only 3% of the baselines fall within and not beyond the 100-125 nautical mile limit, there should be a construction of baselines at the minimum 85 turning points, two of which will be beyond 100 nautical miles. The particular points in question are located between Cay Lobos and Cay Santo Domingo measuring 110 nm and the point connecting Cay Santo Domingo and South West Point which measures approximately 125 miles.

²⁸ Office of the Legal Advisor, Digest of United States Practice in International Law, Department of State, International Law Institute, 2000, page 740

²⁹ Article 47 paragraph 1, United Nations Convention on The Law of the Sea, 1982

VI. Establishment Of Straight Baselines In Adherence To The General Configuration Of The Archipelago.

The third test set forth in article 47 paragraph 3 states that the drawing of Archipelagic baselines should not “depart to any appreciable extent from the general configuration of the archipelago’ This article echoes similar sentiments of article 7 of UNCLOS which states that “ straight baselines should conform to the general direction of the coast” It is advanced that this restrictive provision was advanced by archipelagic states to address concerns by the international community that archipelagic status would be used as a means of creating an excessive claim to maritime space.

What naturally must be examined is this whole notion of “ general configuration” this is rather vague terminology, as the configuration of archipelagic states vary.

2. Current State Practice

Comparison of various archipelagic configurations bears this point out. In the case of the Maldives, the archipelago was enclosed by a “constitutional rectangle”. This configuration was constructed by baselines which do not touch land and therefore is non compliant with international law. One can argue that since the Maldives Islands are in more or less a linear configuration, the condition that “archipelagic baselines should not

deviate to any appreciable extent from the general configuration of the archipelago” has been met.³⁰

If one were to compare the general configuration of the Maldives with that of the world’s largest Archipelago, one would be hard pressed to find any basis for comparison. It could be argued that the “general configuration” of Indonesia’s Archipelagic configuration is hard to define. The Indonesian archipelago is unique because of its peculiar shape and varied composition. It has some of the largest islands in the world which are separated from innumerable smaller and tiny islands by very shallow as well as some of the deeper waters of the world.³¹ It shares land territory with two countries, Papua New Guinea and East Timor.

IV. Recommendations for The Bahamas

After viewing two extreme examples of archipelagic configurations there does not appear to be a degree of commonalty for defining what constitutes the model archipelagic configuration. It has been argued that in the event The Bahamas intends to include Cay Sal and its attendant banks into its calculation of basepoints, this would result in the creation of a single baseline system that deviates from the general configuration of the

³⁰ Mohamed, Munavvar, Ocean States, Archipelagic Regimes in the Law of the Sea, Martimnu Nijhoff Publishers, 1995. page 132

³¹ Mohamed, Munavvar, Ocean States, Archipelagic Regimes in the Law of the Sea, Martimnu Nijhoff Publishers, 1995. page 132

Bahamian archipelago. Conversely it can be argued that this area, situated at the south eastern section of the archipelago which is in relative proximity to one of the main islands (Andros), can be deemed to be easily incorporated in a single baseline system.

In the event that this argument is challenged to be in non conformance with international practice there are two avenues that can be considered by the Bahamas delegation.

Where states have been unable to surround their entire archipelago into one single unit, there have been instances where a state has drawn more than one archipelagic baseline system around separate groups of islands.

The Solomon Islands in 1979 proclaimed archipelagic baselines around more than one archipelago. It is notable that this act was prior to the enactment of UNCLOS and one must examine whether this action adheres to international law and can be a viable option for The Bahamas. UNCLOS does not explicitly endorse or prohibit the drawing of multiple archipelagic baselines. It does indicate in article 46 that an archipelagic state “may be constituted by one or more archipelagos.” Therefore one can argue that where a country can satisfy the tests of article 47, a state is permitted to draw more than one archipelagic straight baseline.³²

³² Victor Prescott and Clive Schofield, The Maritime Political Boundaries of the World, Second Edition, Koninklijke Brill NV, Leiden, the Netherlands, page 175

Additionally, an obvious lack of state practice inadvertently gives credence to this concept. The U.S. as a noted advocate for adherence to standards of baseline calculations has not lodged a protest against this multiple delimitation. The absence of action on the part of the U.S., can be seen as legitimizing this action by the Solomon Islands.³³

However, it is arguable whether The Bahamas would fare so well in not raising the protest of the U.S. if it were to consider multiple archipelagic baselines. In my opinion it is doubtful that The Bahamas would have a legal basis for such an action. All of the islands of The Bahamas are situated in such close proximity that all islands could be linked by one set of baselines. Additionally, The Bahamas would be hard pressed to satisfy the water to land ratio if it were to try to enclose a separate archipelagic baseline around Cay Sal and a separate one around the principal islands of the Archipelago.

Another option that is available to The Bahamas is the construction of archipelagic baselines around the main groupings of islands and outer limits and the construction of separate straight baselines around Cay Sal and its attendant banks. This would allay fears that encompassing both Cay Sal and the main groupings of islands would not be in keeping with the general configuration of The Bahamas Archipelago. Such action was taken by the Fiji Islands when it established archipelagic baselines around its main

³³ Victor Prescott and Clive Schofield, The Maritime Political Boundaries of the World, Second Edition, Koninklijke Brill NV, Leiden, the Netherlands, page 175

islands and separate straight baselines between the Island of Rotuma and its dependencies (which lies in the North of Fijian Archipelago).³⁴ It should be noted that there is a considerable distance of over several hundred kilometers separating the main islands of the north and the south. It would be impossible for the Fiji islands to include all of their territory into one single baseline system. The distance between the main groupings of islands would extend far beyond the permissible length of baselines permitted under international law. This is not the case for The Bahamas, Cay Sal, while appreciably distant from the main groupings of islands, can be incorporated into a single baseline system by connecting turning points which would not exceed 100 nautical miles.

There is strong evidence to suggest that The Bahamas can encompass its entire archipelago within one single baseline system and still conform with the provisions of article 47 paragraph 3.

VI. Archipelagic Baseline System and the Rights of Other States

Once baseline co-ordinates in keeping with the legal standard of the international community have been drawn by The Bahamas, it must ensure that rights of other states in

³⁴ Mohamed, Munavvar, Ocean States, Archipelagic Regimes in the Law of the Sea, Martimnu Nijhoff Publishers, 1995. page 19

particular the issue to the access through archipelagic waters and traditional fishing rights are recognized.

1. Archipelagic Waters as Defined in UNCLOS article 49:

1. The sovereignty of an archipelagic state extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47, described as archipelagic waters, regardless of their depth or distance from the coast.
2. This sovereignty extends to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein.
3. This sovereignty is exercised subject to this Part.
4. The regime of archipelagic sea lane passages established in this Part shall not in other respects affect the status of the archipelagic waters, including the sea lanes , or the exercise by the archipelagic state of its sovereignty over such waters and their air space, beds and subsoil, and the resources contained therein.

Under international law, prior to the conceptualization of what is now known as *archipelagic waters* , waters landward of baselines from which territorial sea is measured were internal waters, areas of complete state jurisdiction, where foreigners would require

prior permission for passage or any other activity.³⁵ However the creation of the archipelagic waters in my opinion was a balance of competing interests.

Knight and Chiu indicate that:

“The history of the law of the sea has been dominated by a central and persistent theme, the competition between the exercise of governmental authority over the sea and the idea of the freedom of the seas. The tension between these has waxed and waned throughout the centuries, and has reflected the political, strategic and economic circumstances of each particular age. When one or two great commercial powers have been dominant or have achieved parity of power, the emphasis in practice has lain upon the liberty of navigation and the immunity of shipping from local control, in such ages the seas have been viewed more as strategic than economic areas of competition. When, on the other hand, great powers have been in decline or have been unable to impose their wills upon smaller states, the emphasis has lain upon the protection and reservation of maritime resources, and consequently upon the assertion of local authority over the sea.³⁶”

The fact that a country can exercise limited sovereign rights over archipelagic waters does not inevitably signify a major decline in the influence of major maritime powers such as the U.S. To draw such a conclusion is quite an oversimplification of complex situation.

The formation of the archipelagic state in international law addresses the concern of ocean states with the preservation of territorial integrity and maximum control of maritime space falling within its baseline system. However, there is also an appreciation

³⁵ Mohamed, Munavvar, Ocean States, Archipelagic Regimes in the Law of the Sea, Martimnu Nijhoff Publishers, 1995. page 112

³⁶ Knight, Gary and Hungdah Chiu. The International Law of the Sea. Cases, Documents and Readings. New York. Elsevier Applied Science and Unifo Publishers, 1991

of the interests of maritime powers in particular the need to preserve the widest possible freedoms as it relates to freedom of navigation.

VII. Archipelagic Sea Lanes

The principles enshrined in the archipelagic straight baseline regime can be seen as a boon for small island states in so far as they may extend their maritime space far beyond what could have been envisioned by customary international law prior to UNCLOS³⁷. With rights come responsibility, and article 46 artfully balances the rights of archipelagic states with the responsibility to ensure that its establishment of archipelagic straight baselines do not adversely affect the rights of neighboring states. Also, archipelagic states are to ensure that they allow for the establishment of archipelagic sea lanes which guarantees the rights of other states to the concept of freedom of navigation.

The introduction of a specialized passage regime for archipelagic sea-lanes is part of UNCLOS broader concept of archipelagic waters which extends the sovereignty of an archipelagic state to its archipelagic waters regardless of their depth or distance from the coast. Article 53 of UNCLOS speaks specifically to the right of archipelagic sea lanes

³⁷ Victor Prescott and Clive Schofield, The Maritime Political Boundaries of the World, Second Edition, Koninklijke Brill NV, Leiden, the Netherlands, page 175

passage.³⁸ Archipelagic states are not totally free to designate sea lanes and to prescribe traffic separation schemes at their own discretion. They must conform to generally accepted international standards. The proposal submitted by Indonesia to the International Maritime Organization gives an insight into the requirements and the procedures that must be adhered to in establishing archipelagic sea lanes. The fact that the establishment of archipelagic sea lanes is a collaborative effort was reflected in U.S. State Department telegram to the U.S. Embassy dated August 8, 2003 in which it was indicated that;

“Indonesia consulted closely with the United States and Australia in identifying three north–south mutually acceptable sea lanes. Additionally there was consultation on the creation of regulations by which the International Maritime Organization would agree with the submission by archipelagic states on the establishment of archipelagic sea lanes.”³⁹

This level of consultation should not belie the tensions that have existed between Indonesia and the United States as it relates to a passage through the archipelagic waters of Indonesia. Indonesia has closed or attempted to close some of its straits and challenged the passage rights of the Sunda and Lombok Straits to international shipping. Additionally, Indonesia has at some time attempted to close the Strait of Malacca to international maritime traffic. Such action inevitably would elicit decidedly strong

³⁸ Constance Johnson, A Rite of Passage: The IMO consideration of the Indonesian Archipelagic Sea-Lanes Submission, International Journal of Marine and Coastal Law Vol 15, No. 3, Kluwer Law International, 2000.

³⁹ Constance Johnson, A Rite of Passage: The IMO consideration of the Indonesian Archipelagic Sea-Lanes Submission, International Journal of Marine and Coastal Law Vol 15, No. 3, Kluwer Law International, 2000. page 3

protests from countries such as the United States who has consistently championed the policy of freedom of the seas.⁴⁰ As a maritime nation, the United States' national security depends on a stable legal regime assuring freedom of navigation on and flight over international waters.⁴¹

Like Indonesia, The Bahamas lies in the midst of critical international shipping lanes (the North West Providence Channel and the Crooked Island Passage in particular)⁴².

The relevant Bahamian legislation relative to archipelagic waters allows for the establishment of archipelagic sea lanes in accordance with international law (see annex II).

However, it also indicates that in the absence of a designation of archipelagic sea lanes :

“ where there is no designation made pursuant to subsection (1) the right of archipelagic sea lane passage may be exercised through the routes normally used for international navigation”.

While this provision preserves the right of freedom of navigation, it does not carry the same level of legal certainty that the archipelagic sea lane regime inherently possesses.

⁴⁰ Constance Johnson, A Rite of Passage: The IMO consideration of the Indonesian Archipelagic Sea-Lanes Submission, International Journal of Marine and Coastal Law Vol 15, No. 3, Kluwer Law International, 2000. page 3

⁴¹ Digest of United States Practice in International Law, Office of the Legal Advisor, Department of State, International Law Institute, 2000, page 740

⁴² Coquia, Jorge R. “ Analysis of the Archipelagic Doctrine in the Convention on the Law of the Sea”, 8 Phillippine Yearbook of International Law. 1982 pg 30

I am of the opinion that once baselines have been established delineating the sovereign territory of The Bahamas, deliberate steps should be taken to consider the establishment of archipelagic sea lanes. Given the U.S.'s policy of freedom of navigation there is a great possibility that there will be intimations by the U.S. for The Bahamas to consider establishing the appropriate sea lane regime in accordance with conventional international law. A proactive overture by The Bahamas to ensure that Archipelagic Sea lanes are established in keeping within the parameters of international law will underscore the Bahamas' commitment to its responsibilities within the Law of the Sea.

Additionally, as a leading financial contributor to the International Maritime Organization and one of the third largest ship registries in the world, such action by The Bahamas could only strengthen its reputation as a leading proponent for responsible use and regulation of the worlds ocean space.

VIII. Rights Of Immediately Adjacent Neighbouring States

While a predominant theme in the negotiation of the concept of archipelagic waters was the divergent perspectives of maritime states and ocean states, there was also the concern of states that were in close proximity to the archipelago. These states were particularly interested in ensuring that their rights as they related to the right of local access, and

rights to resources now falling within the archipelagic baseline system would not be discarded.

1. Traditional Fishing Rights

Article 51 of UNCLOS states:

“ ... An archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals.”

2. Current State Practice

The Jakarta Treaty signed between Indonesia and Malaysia on February 25, 1982 entered into force on May 25, 1984. As it relates to traditional fishing, the Jakarta Treaty designates a fishing area where Malaysian traditional fishermen may continue to exercise their traditional fishing rights. It also provides for the right of access and communication of Malaysian government ships, merchant ships and fishing vessels, including foreign fishing vessels which must be exercised through two designated corridors defined by a

series of continuous axis lines. The Jakarta Treaty underscores the specific character of the provisions of the Law of the Sea Convention which relate to the interests of immediately adjacent neighbouring states in areas of archipelagic waters.⁴³

3. Recommendations for The Bahamas

Unlike the unique situation of Malaysia and Indonesia, the territorial sea of the United States does not overlap into the archipelagic waters of The Bahamas. As it relates to traditional fishing rights, there are several very commercially viable fishing grounds that can fall within The Bahamas baseline configuration. At this juncture I am not convinced that the issue of traditional fishing rights will be an area of great concern for the United States delegation as I am unaware of any historic instances of American fishing in any great degree within Bahamian waters. In the event that traditional fishing rights does become an issue of contention there are several factors that The Bahamas delegation must consider.

The following need to be clearly determined: the scope and content of what the terms “traditional fishing rights”, “legitimate activities” and the “area” to which such rights and activities are applied. Studies that have been carried out in this area have indicated that in order to qualify for traditional fishing rights, one might be required to meet the following conditions:

⁴³ Mohamed, Munavvar, Ocean States, Archipelagic Regimes in the Law of the Sea, Martimnu Nijhoff Publishers, 1995. page 161

1. The fishermen in order to be protected under this category must have been fishing for a sufficient length of time in the area, thus, a new comer could not be regarded as having “traditional fishing rights”.
2. Their equipment must be sufficiently “traditional” thus fishermen using modern technology could not be regarded as falling under the definition of “traditional fishing rights.” Otherwise, local and poor fishermen using traditional equipment would be placed at a tremendous disadvantage.
3. Since the catch of “ traditional fishing” is not very substantial, the notion of “ traditional fishing rights” excludes the possibility of a sharp increase in the catch by using modern equipment and methods, or by establishing large scale joint ventures with “ non-traditional” fishermen.
4. The area or the fishing ground of traditional fishing rights must have been frequented for a sufficient length of time. The area, therefore, should be relatively easy to determine by observing the actual practice.⁴⁴

⁴⁴ Mohamed, Munavvar, Ocean States, Archipelagic Regimes in the Law of the Sea, Martimnu Nijhoff Publishers, 1995. page 162

IX Conclusion

Twenty five years ago the mid-ocean archipelago had no place in international law. Today this unique nation state has an enviable place in the regime of the law of the sea. What strikes me as a significant factor in the evolution of the archipelagic concept, is that the leading proponents of this legal regime were all once colonies of metropolitan states . It appears that during negotiations on this concept, these metropolitan countries expressed a desire to ensure that not only were these nascent states tempered in their aspirations for maximum sovereign expression, but that there should be an acknowledgement of the rights of other states when constructing the archipelagic baselines. While dated sentiments of colonization and neo-colonialism currently have no legitimate place for the determination of Bahamian baselines, what should be considered by The Bahamas is that the mere act of establishing baselines is flexing of sovereign muscle which will be noted and reacted to in varying degrees by its neighbouring states. What should be appreciated by The Bahamas is the fact that the U.S. has been the world's preeminent advocate of conservative delimitation principles, discouraging excessive maritime claims primarily through diplomacy.⁴⁵ In the event that the U.S. perceives that The Bahamas is exceeding its maritime claims as they relate to internationally recognized standards, as current practice indicates, the U.S. will make its observations known through diplomatic channels.

⁴⁵ Digest of United States Practice in International Law, Office of the Legal Advisor, Department of State, International Law Institute, 2000, page 755

The Bahamas must ensure as far as possible that its baselines are in keeping with the fundamental tenets of treaty law as they are reflected in UNCLOS. As my research has revealed, there is a critical need for technical accuracy in determining the length of baselines and the ratio of water to land. In my opinion these two areas are the most challenging in terms of being in full compliance with the relevant provisions of UNCLOS. However, with slight technical adjustments and adroit political decision making, The Bahamas can ensure compliance with international law.

Chapter II

Proposed Delimitation of Exclusive Economic Zone and Continental Shelf between The Bahamas and the United States of America – A Case Study

I. Introduction

The first step that needs to be concluded by The Bahamas, before it attempts to initiate maritime discussions, is that of determining its baseline co-ordinates. It is only after this has been established can there be legitimate discussions as to the apportioning of maritime space with its neighbours. This chapter addresses the fundamental legal principles that need to be incorporated into The Bahamas delegation's negotiation position for future discussion with the United States. In my opinion the establishment of a single maritime boundary to delineate the maritime jurisdiction between The Bahamas and the United States of America will prove to be the most advantageous course of action for both parties. In my examination of this issue the geographical context of the delimitation process will be limited to the coastal areas between Cay Sal Bank and the western tip of Grand Bahama Island. (see figure 1).



Figure 1: Shaded portion denotes the area of overlap between the maritime jurisdiction of the United States and that of The Bahamas (in this particular case the Exclusive Economic Zone and the Continental Shelf). (original map exclusive of shaded portion , courtesy of The CIA Factbook)

This narrow geographical distinction is based on the fact that the delimitation process of this maritime area can be based on the concept of equidistance. The areas of maritime space which overlap do not involve the territorial sea of either party. Additionally the process does not involve any particularly complex geographical configuration as it relates to the coasts of either party. On the other hand, the areas to be delimited in the section of maritime space north of The Bahamas will be more contentious and challenging given the fact that both The Bahamas and the United States have legitimate claims to the outer continental shelf. This area of potential conflict shall be examined in greater detail in the subsequent chapter.

The areas of maritime space ⁴⁶that are to be delimited between The Bahamas and The United States of America are distinct legal regimes.

1. The Legal Regime of the Exclusive Economic Zone

The specific legal regime of the exclusive economic zone is described as;

‘An area beyond and adjacent to the territorial sea, subject to the legal regime established in Part V of the United Nations Convention on the Law of the Sea. This area shall not extend beyond 200 nautical miles from mean low water of the coastline from which the breadth of the territorial sea is measured. Within this zone, the coastal State has sovereign rights for the purposes of exploring and exploiting, conserving and managing

⁴⁶ see figure 1

natural resources, and other activities such as the production of energy from water, currents and winds.’⁴⁷

II. The Legal Regime of The Continental Shelf

While the Exclusive Economic Zone is limited to the water column that extends to 200 nautical miles seaward of a nations coastline, according to international law, the continental shelf ;

‘comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.’ (Article 76, paragraph 1. of the United Nations Convention on the Law of The Sea).

IV International Law and the Establishment of A Single Maritime Boundary

As these two maritime spaces have their unique legal personality, one may conclude that they demand separate delimitations. A Special Chamber of the Court of International Justice in the Gulf of Maine Case (1984) was asked to answer this very question. This was the first case referred to any international court or tribunal which concerned the establishment of a single maritime boundary, that is in this case, a boundary which would

⁴⁷ David, Attard, The Exclusive Economic Zone in International Law, Oxford University Press, 1987, pg 78

serve for both the continental shelf and the exclusive fishing zone.⁴⁸ With a view to establishing that it had the right to draw a single line, the Chamber indicated that international law made no objection to the drawing of a single line if the parties so requested;

“With regard to this ... aspect, the Chamber must observe that the Parties have simply taken it for granted that it would be possible, both legally and materially, to draw a single boundary for two different jurisdictions. They have not put forward any arguments in support of this assumption. The Chamber for its part is of the opinion that there is certainly no rule of international law to the contrary, and, in the present case, there is no material impossibility in drawing a boundary of this kind. There can thus be no doubt that the Chamber can carry out the operation requested of it.”⁴⁹

In practice there is an increasing tendency to parcel delimitation of the Exclusive Economic Zone and the Continental Shelf together, both in judicial settlements and in bilateral agreements, by laying down a single maritime boundary without distinguishing between the different zones.⁵⁰ Agreements that create an all-purpose maritime boundary do so in several ways. One way is to label the boundary with a term that is not associated with a particular jurisdictional regime. For instance, the 1986 Colombia-Honduras agreement describes a “maritime frontier”. The encompassing nature of these terms suggests the

⁴⁸ E.D. Brown, Sea-bed Energy and Minerals: The International legal Regime, Volume 1. The Continental Shelf, 1992, Kluwer Academic Publishers page 226

⁴⁹ Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers, page 230

⁵⁰ R.R. Churchill and A.V. Lowe, The law of the sea, third edition, 1999, Manchester University Press, page 181

boundary's use is for all jurisdictional purposes. Another way to create an all-purpose boundary is to do so expressly.⁵¹

An additional means of creating an all-purpose boundary is by the formula common in United States maritime boundary agreements. Rather than describing the jurisdiction divided, the United States has incorporated in its maritime boundary agreements a formula where states concerned undertake not to make any claim of jurisdiction on the other side of the line. For instance, the 1977 US-Cuba agreement states;

“South of the maritime boundary the United States of America shall not, and north of the maritime boundary the Republic of Cuba shall not, claim or exercise sovereign rights or jurisdiction over the waters or seabed and subsoil.”⁵²

While it is apparent that there are no legal constraints barring the establishment of a single maritime boundary, clarity is lacking in the state of the law as it appertains to the methods and legal principals that can be employed in the establishment of such a line.

Nowhere in the United Nations Convention on the Law of the Sea (UNCLOS) is there any consideration for the establishment of single maritime boundaries nor is there an

⁵¹ Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996, page 49

⁵² Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996, page 50

elucidation of the methods or principals that can be utilized to achieve an equitable result in the delimitation process.

V. Delimitation of the Exclusive Economic Zone and the Continental Shelf in International Law

The articles of UNCLOS which refer to the delimitation of the Exclusive Economic Zone and the Continental Shelf are almost identical in their construction and are very vague in terms of adding any clarity to the debate on maritime delimitation. Articles 76 and 83 state;

1. The delimitation of the continental shelf/exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution .
2. If no agreement can be reached within a reasonable period of time the States concerned shall resort to the procedures provided for in Part XV.
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf/ exclusive economic zone shall be determined in accordance with the provisions of that agreement.

VI. Negotiation History of the UNCLOS Provisions Relative to the Delimitation of the Continental Shelf and the Exclusive Economic Zone

The first paragraph of articles 76 and 83 reflects a compromise that was hard won at the final day of the resumed the tenth session. The provisions dealing with delimitation between states with opposite or adjacent coasts proved to be one of the most intractable of the hard-core issues with which UNCLOS III had to deal.⁵³

There were 10 formulas advanced, several of which sought to incorporate into the proposed text the idea of “the median or equidistance line”, and the concept of “special circumstances.”

One such formula that could not achieve broad consensus stated:

“ The delimitation of the Exclusive Economic Zone/Continental Shelf between adjacent or opposite States shall be effected by agreement employing, as a general principle, the median or equidistance line, taking into account any special circumstances where this is justified”.⁵⁴

⁵³ E.D. Brown, Sea-bed Energy and Minerals: The International legal Regime, Volume 1. The Continental Shelf, 1992, Kluwer Academic Publishers page 48

⁵⁴ E.D. Brown, Sea-bed Energy and Minerals: The International legal Regime, Volume 1. The Continental Shelf, 1992, Kluwer Academic Publishers page 341

This formula along with others drafted in a similar vein could not be accepted by the majority of delegates. One of the arguments advanced against the acceptance of such a formula was the fact that every delimitation between opposite or adjacent states is unique and it is in relation to the unique circumstance present in its own boundary situation that each State will evaluate the rules by reference to which delimitation must be effected. Given the diversity of geographical circumstances, it is of course impossible to lay down clear, detailed rules, the application of which would readily solve all such delimitation principals.⁵⁵ It is no doubt that the Conference would have found it very difficult, if not impossible, to reach agreement on any clearer or more precise a formula than the one finally agreed upon. The cost of agreement was, however, high; it was to burden the international community with a formula which is virtually meaningless in itself and very difficult to interpret even with the reference to international law.⁵⁶

⁵⁵ E.D. Brown, Sea-bed Energy and Minerals: The International legal Regime, Volume 1. The Continental Shelf, 1992, Kluwer Academic Publishers page 333

⁵⁶ E.D. Brown, Sea-bed Energy and Minerals: The International legal Regime, Volume 1. The Continental Shelf, 1992, Kluwer Academic Publishers page 354

VII Understanding the connection between legal principle and practical method in the Maritime Delimitation Process.

How must a nation determine what is the most equitable means of achieving a maritime delimitation with a neighbouring state? The history of maritime boundary law is marked by two conflicting trends. The first seeks a synthesis of legal principle and practical method that would provide a clear, conclusive, and equitable rule for the delimitation of overlapping or converging maritime claims. The second denies the possibility of any such synthesis and insists that the only equitable rule is one that allows virtually absolute freedom of method.⁵⁷ The move to freedom of method in the judicial decisions in the treaty law has produced a legal situation that was aptly described in the following terms in the Joint Separate Opinion of Judges Ruda, Bedjaoui and Jimenez de Arechaga in the Libya/Malta case;

“... it has to be faced that the law governing maritime delimitations is still affected with a degree of indeterminacy, in the sense that the reasons put forward do not invariably and automatically produce a delimitation line. Often, even a regrettable but doubtless inevitable gap can be observed between the arguments expounded in a judicial decision and the concrete findings as regards the choice of delimitation adopted. However well founded, the reasoning does not necessarily, mathematically issue in the conclusion adopted”.⁵⁸

⁵⁷ E.D. Brown, Sea-bed Energy and Minerals: The International legal Regime, Volume 1. The Continental Shelf, 1992, Kluwer Academic Publishers page 345

⁵⁸ Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996, page 206

The challenge for any country attempting to establish any type of delimitation boundary is two fold, identifying legal principles that are relevant to the country's specific geographical context without presuming that one particular method of delimitation will achieve the necessary equitable result. What needs to be stressed at this juncture is the fact that unilateral action cannot be taken on the part of any one country to delimitate a maritime boundary. International Law and judicial decisions highlight the importance of agreement between the two parties. This concept is a well known fundamental norm of the law of maritime delimitation⁵⁹ and the Chamber in the Gulf of Maine case attempted to provide a more complete and more precise reformulation of this "fundamental norm". The chamber stated :

"What general international law prescribed in every maritime delimitation between neighbouring States could therefore be defined as follows:

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

The call for agreement between the parties emphasizes the need for The Bahamas to identify practical methods of delineation and the application of legal principles which

⁵⁹ Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996, page 231

can find consensus with the U.S. delegation. The state of the law and state practice as it appertains to maritime delimitation reflects the fact that for decision-makers, the choice of means or methods for translating the relevant geographical and other circumstances into a precise line is as ever, the most difficult issue in the law of maritime boundaries.⁶⁰

VIII Recommendations for The Bahamas

1. Establishment of A Single Boundary Line based on Equidistance
2. Examination of the prior conduct of the parties to determine whether the concept of acquiescence will be relevant in this delimitation process.

Additionally, I am of the opinion that The Bahamas should examine the following as a potential argument that can be advanced by the delegation of the United States.

3. The delimitation should facilitate conservation and management of the natural resources of the area;

⁶⁰ Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996, page 206

1. Establishment of A Single Boundary Line based on Equidistance

It is my contention that a single boundary based on equidistance would achieve the most equitable result in the proposed U.S./Bahamas maritime discussions (in relation to the area in question, see figure 1). While the equidistance-special circumstances rule is not a part of international custom as was pointedly stated by the Court in the North Sea Continental Cases, it has been employed as a practical and effective method in the majority of agreements concluded by coastal states with opposing coastlines.⁶¹

However, the general rule of international law is based on the overriding consideration that any method employed should have an equitable outcome. Additionally, one must ask the question; what then could be considered an equitable principle that exists in custom that can be applied to this situation? The concept of "special circumstances" can be defined as a fact necessary to be taken into account in the delimitation process to the extent that it affects the right of the Parties over certain maritime areas.

To my mind I can think of several factors that may be relevant in this particular circumstance, particularly given the fact that The Bahamas is a recognized Archipelagic State and has the advantage of constructing straight base lines. Additionally, the length of the coastlines of the two States can be a "special circumstance".

⁶¹ Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers, page 117

In the Greenland and Jan Mayen Case the court noted that the length of the coasts of the states in question was a vital component to determining whether this geographic factor “ would lead to manifestly inequitable results if a median line was applied.”⁶² What must be determined is whether the coastlines of The Bahamas and the U.S in the area of convergence is relatively similar in length.

Judicial decisions and state practice indicate that states with opposite coasts usually lean towards applying the equidistant method. While I cannot over stress the point that this method is not a general rule of international law it is a method that seems to strike a balance between predictability and flexibility and also respects the principle of equal division of the area of overlapping claim.⁶³ However, I must point out that there does not appear to be a strict rule for applying a median line, there is room for flexibility which is always important in any negotiation process, it allows for concessionary overtures in the event that negotiations cannot be advanced because of a seemingly intractable position taking by either of the parties.

a. Establishment of Median Line based on Strict Equidistance

A strict equidistant line is drawn from all the base points required by law. A true equidistant line – one constructed using all coastal base points permitted under

⁶² Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers, page 123

⁶³ Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers, page 254

international law ... - will involve a multiplicity of turning points and numerous short straight-line segments. The resulting boundary is complex and can create practical difficulties for mariners and developers of seaboard resources, particularly oil and gas concessionaires.⁶⁴

b. Modification of the Equidistance Line based on the Partial Effect Method

One technique of the partial effect method is to give half effect to an island, rock or low-tide elevation. The half-effect approach for islands also has been used in non-equidistance delimitations even though in state practice this method appears to be preferred by states with opposing coastlines. Canada's Seal Island was given half effect in determining the crucial middle segment of the line in the Gulf of Maine Case. In the Tunisia/Libya case, half effect was given to the Tunisian Kerkennah Islands in determining the angle of the outer segment of the boundary.⁶⁵

This method of partial effect can be achieved by constructing two equidistant lines, one utilizing features in question, the other ignoring them and then drawing a third line equidistant from the first two lines or otherwise dividing the space between them equally

⁶⁴ Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996, page 208

⁶⁵ Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996, page 208

or in some other proportion.⁶⁶ At this stage in my research I do not envision this method being favoured over simplified equidistance.

In my opinion, the most advantageous position for The Bahamas to advance is the establishment of a median line based on simplified equidistance. Reducing the number of turning points usually decreases the number of and increase the length of straight-line segments forming the boundary. This course of action avoids the resultant complex boundary produced by adopting the strict-equidistant approach. Whether one manifestation of the equidistant method is preferred over another may lend itself to marriage of political considerations and legal concepts.

2. Examination Of The Prior Conduct Of The Parties To Determine Whether The Concept Of Acquiescence Will Be Relevant In This Delimitation Process.

The Chamber, in the Gulf of Maine Case justly observed that acquiescence is equivalent to tacit recognition, where particular conduct by one party can be interpreted, in

⁶⁶ Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996, page 208

accordance with the principle of reliance, by the other party as consent...⁶⁷ Is there evidence that in its conduct with the United States the Bahamas has already acquiesced to a de facto maritime boundary? The only unilateral action which can be the basis for the establishment of a de facto maritime boundary is the fisheries conservation zone which has been established by the United States. This conservation zone is a vertical line which traverses up the entire Floridian coastline. This zone is established outside of the territorial sea of the US and as a consequence falls within the maritime jurisdiction that will be the basis of discussion between the U.S and The Bahamas.

In my opinion it is extremely doubtful if this conservation zone will be advanced as a basis for delimitation. In the improbable instance that the United States advances such a position, it needs to prove that there was a tacit acceptance on the part of The Bahamas that this zone constitutes the basis of a maritime demarcation between the parties. The mere fact that this vertical zone exists in the maritime jurisdiction adjacent to both parties is not sufficient evidence to imply that acquiescence can be applied to this scenario.⁶⁸ In order to prove acquiescence there needs to be a prolonged period in which this unilateral action has been tolerated by the other party.⁶⁹

⁶⁷ Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers, page 247

⁶⁸ The issue of acquiescence will be a critical issue that needs to be examined in great detail by the Bahamian delegation. There is significant co-operation between the U.S. and The Bahamas as it relates to the established shiprider agreements. This fact can be seen as a basis for advancing the argument that in point and fact The Bahamas has established de facto baseline coordinates.

⁶⁹ Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers, page 247

The Chamber in the Gulf of Maine case indicated that a “momentary toleration” is not sufficient to imply acquiescence. In this instance the momentary toleration spanned the period of seven years .There needs to be unequivocal consistency and certainty as it relates to the conduct of the parties.⁷⁰

3. The Delimitation Should Facilitate Conservation And Management Of The Natural Resources Of The Area

Given the fact that there exists a fisheries conservation zone off of the coast of Florida the U.S. delegation may include in its proposal that delimitation should take conservation issues into consideration.

Among its arguments submitted to the Chamber in the Gulf of Maine Case the United States advanced “the principle that the delimitation should facilitate conservation and management of the natural resources of the area.”⁷¹

The chamber in rejecting this argument along with the other arguments of a social and economic nature stated that;

⁷⁰ Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers, page 248

⁷¹ Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers, page 236

“It should be emphasized that these fishing aspects, and others relating to activities in the fields of oil exploration, scientific research, or common defense arrangements, may require an examination of valid considerations of a political and economic character. The Chamber is however bound by its Statute, and required by the Parties, not to take a decision *ex aequo et bono* but to achieve a result on the basis of law. The Chamber is, furthermore, convinced that for the purposes of such a delimitation operation as is here required, international law, as will be shown below, does no more than lay down in general that equitable criteria are to be applied, criteria which are not spelled out but which are essentially to be determined in relation to what may be properly called the geographical features of the area. It will only be when the Chamber has, on the basis of these criteria, envisaged the drawing of a delimitation line that it may and should – still in conformity with a rule of law – bring in other criteria which may also be taken into account in order to be sure of reaching an equitable result.”⁷²

The fact that the Chamber does not see fisheries conservation as a viable legal principle that may result in an equitable result does not mean this concept does not exist in state practice. Alexander and Charney in Maritime Boundaries Volume I indicate that;

“ ... fisheries have played an important role in a number of delimitation negotiations as a factor accompanying and closely intertwined with the settlement. In six of 134 maritime agreements examined in this work, there were six instances of state practice that suggest that fishery considerations had a direct influence on the actual location of the boundary line. One example is the 1980 Iceland-Norway fisheries agreement. Due to Iceland’s dependence upon fisheries and Norway’s desire to avoid a dispute with Iceland over capeline fishing in the area in question, the agreement establishes a boundary following the 200 nautical mile limit measured from Iceland’s basepoints.”⁷³

The United States – Venezuela maritime boundary under the 1978 agreement (No. 2-14) represents a case of its own. The course of this boundary, in particular the granting of full

⁷² Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers, page 246

⁷³ Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996, page 81

effect to Venezuelan Aves Island, was partly a result of economic assessments available at the time ... indicating no resource (whether fisheries or minerals) potential in the delimited area.⁷⁴

It is evident from state practice that the presence or lack of fisheries resources is a factor in the determination of maritime boundaries. It stands to reason therefore that the conservation and management of fisheries resources is an issue that will be advanced by the United States. There is sufficient evidence of not only U.S. state practice but also U.S. policy positions to substantiate this claim. The Bahamas delegation must consider that this will be an issue that will require careful examination and review.

IX Conclusion

The delimitation of the coastal areas between Cay Sal Bank and the western tip of Grand Bahama can be best delimited by the establishment of a single maritime boundary based on equidistance. The form in which this equidistant line manifests itself will be determined by both the delegations of The Bahamas and the United States of America. The need for agreement in the determination of a maritime boundary calls for a sober examination of the geographical reality that exists between the parties and an identification of the practical methods and legal principals that will result in an equitable result.

⁷⁴ Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996, page 82

Chapter III

Potential Claims by The Bahamas and The United States to the Outer Continental

Shelf beyond 200 nautical miles:

I. Introduction

The legal concept of the continental shelf has evolved over a 60 year period. The Truman Proclamation of 1945 first asserted a U.S. claim to resources on its continental shelf. This proclamation set a precedent for other coastal nations to assert similar claims over resources far from their shores.⁷⁵

The Truman Proclamation of 1945 was not the first instrument to deal with the legal aspects of the continental shelf, however, it certainly constitutes the first significant landmark in the development of the legal concept of the continental shelf. Its place as one of the decisive acts in history would have been assured in any event by the very fact that it embodies a claim by the US to exclusive jurisdiction and control over the natural

⁷⁵ E.D. Brown, Sea-bed Energy and Minerals: The International legal Regime, Volume 1. The Continental Shelf, 1992, Kluwer Academic Publishers pg 56

resource of the continental shelf, thus providing a model for a succession of similar claims by other States.⁷⁶

Its importance as a legal landmark, rests on an additional foundation: its characterization by the International Court of Justice as having “a special status” and as having come to be regarded as the starting point of the positive law on the subject.⁷⁷

Additionally, the need for greater uniformity of state practice was one of the underlying factors that contributed to the 1958 United Nations Convention on the Continental Shelf, one of the limiting factors and perhaps one of the fundamental provisions that narrowed the scope and application of this Convention was the fact that the continental shelf was defined primarily by a nations ability to recover resources from the seabed. The definition did not take into primary consideration the geological configuration of the continental shelf.⁷⁸

⁷⁶ E.D. Brown, Sea-bed Energy and Minerals: The International legal Regime, Volume 1. The Continental Shelf, 1992, Kluwer Academic Publishers pg 56

⁷⁷ E.D. Brown, Sea-bed Energy and Minerals: The International legal Regime, Volume 1. The Continental Shelf, 1992, Kluwer Academic Publishers pg 52

⁷⁸ Satya N. Nandan and Shabtai Rosenne, (Eds.), United Nations Convention On The Law of The Sea 1982 A Commentor Volume II, Center for Oceans Law and Policy, University of Virginia School of Law, Martinus Nijhoff Publishers pg 829

The United Nations Convention on The Law of the Sea in particular part VI (articles 76 to 85) and Annex II of the Convention (together with Annex II of the Final Act) set out the internationally accepted regime of the continental shelf.

This regime contains the new juridical definition of the continental shelf, and sets out the methods for delineating its outer limits. Additionally, provisions contained within UNCLOS sets up the Commission on the Limits of the Continental Shelf and provide rules for contributions to be made by the coastal State in respect of the exploitation of the nonliving resources of the continental shelf beyond 200 nautical miles from the baselines from which the territorial sea is measured.⁷⁹

This chapter will focus on the provisions of article 76 as they set the parameters under which a state can claim jurisdiction over the continental shelf beyond 200 nautical miles.

Three major themes will be explored:

1. The rights and duties of The Bahamas in the delineation of the Continental Shelf beyond 200 nautical miles.
2. The process of delimiting a boundary with a neighbouring state in the event there is overlapping claims to the continental shelf beyond 200 nautical miles.
3. The role of the Commission on the Continental Shelf.

⁷⁹ Satya N. Nandan and Shabtai Rosenne, (Eds.), United Nations Convention On The Law of The Sea 1982 A Commentor Volume II , Center for Oceans Law and Policy, University of Virginia School of Law, Martinus Nijhoff Publishers pg 641

The geographical context in which this chapter is framed comprises of the area of maritime space that is situated to the extreme north of The Bahamas (please see figure 2). This particular maritime space will be a complex and contentious issue for both The Bahamas and the U.S based on the fact that both The Bahamas and the U.S. appear to share the same continental shelf. Additionally, there is clear evidence that both countries can have legitimate claims to the outer continental shelf beyond 200 nautical miles.



Figure 2: The shaded portion is a **partial** illustration of the areas of overlap between the maritime jurisdictions of The United States and The Bahamas . (in particular the exclusive economic zone and the outer continental shelf beyond 200 nautical miles. (Original map exclusive of shaded portion: courtesy of CIA fact book)

I. International Legal Regime as it relates to the delineation of the outer limits of the Continental Shelf

Article 76 of the United Nations Convention on the Law of the Sea defines the Continental shelf as follows;

1. The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.
2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.
3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.
4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

5. The fixed points comprising the line of the outer limits of the continental shelf on the sea-bed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateau, rises, caps, banks and spurs.

7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the

territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

9. The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto.

10. The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.

Article 76 provides the new definition of the continental shelf whereby a coastal State may apply either a geomorphologic criterion or a distance criterion in determining the outer limit of its continental shelf. On the basis of the geomorphologic criterion, coastal

States have rights beyond 200 nautical miles to the outer edge of the continental margin.

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VI Rules Under Which Claims to Outer Continental Shelf can be Based

Claims to the margin beyond 200 nm involve a number of factors including the location of the 2500 meter isobath, the existence of submarine elevations that are natural components of the margin and the location of the foot of the slope.

The two rules by which the outer edge of the margin will be established are found in Article 76(4). Both rules require the identification of the foot of the continental slope as the baseline from which seaward claims will be made. The foot of the slope can be determined by any appropriate means that would include sedimentology, geology and topography.⁸¹

Only if no other evidence is available will the foot of the slope be deemed to be the point of maximum change in gradient at its base. Because some slopes are unstable, countries need to undertake relevant surveys to produce maps or charts that fix the foot of the slope as far seaward as possible on the basis of reliable evidence.⁸²

⁸⁰ E.D. Brown, Sea-bed Energy and Minerals: The International legal Regime, Volume 1. The Continental Shelf, 1992, Kluwer Academic Publishers pg 56

⁸¹ Victor Prescott and Clive Schofield, The Maritime Political Boundaries of the World, Second Edition, Koninklijke Brill NV, Leiden, the Netherlands 193

⁸² Victor Prescott and Clive Schofield, The Maritime Political Boundaries of the World, Second Edition, Koninklijke Brill NV, Leiden, the Netherlands 194

The sediment formula in Article 76(4) (a) I is explicit. The boundary will join points not more than 60 nm apart, where the thickness of sedimentary rocks is at least one per cent of the shortest distance between the point and the foot of the slope. Sedimentary rocks are usually defined as layered rock, resulting from the consolidation of sediment.

Article 76 (7) requires the outer limit of the continental margin to be delineated by straight lines no longer than 60 nm connecting fixed points. This means that adjacent fixed points determined by sediment thickness must be no further than 60 nm apart. In the case of an outer limit determined by the Hedberg⁸³ formula it is likely that the outer points will be located on arcs of circles with a radius of 60nm from the foot of the slope the line joining two adjacent points might be more than 60 nm from the foot of the slope.

Article 76(5) determines that the outer limit of the continental margin wider than 200 nm must lie landward of one of the two absolute limits. The first limit is unambiguous; it is “350 nm seaward from the baseline from which the maritime zones are measure. The second limit lies 100nm seaward from ‘... the 2500 metre isobath, which is a line

⁸³ Hedberg, whose view had been adopted by the US. National Petroleum Council in 1974, had suggested that the outer limits of the continental shelf should be fixed by a coastal state within an area located between the base of the continental shelf, which was described as the most natural and identifiable limit of the continental shelf, and a fixed distance beyond the width ...”The Hedburg Formula speaks to the precise limits that should be fixed by a coastal state by the drawing of straight lines joining the points with geographical co-ordinates within this extended zone, rather than by following a bathymetric contour.. (source, S.P. Jagota)

connecting the depth of 2500 metres'. This definition gives no guidance in situations where there is more than one 2500 metre isobath which will often be the case."⁸⁴

There is strong evidence to suggest that The Bahamas based on geomorphologic criterion can claim a continental shelf beyond 200 nautical miles. It should be pointed out at this juncture that there is a distinct divergence in the conceptualization of what is legally defined as the continental shelf and the continental shelf from a purely geological perspective.

While on a technical and scientific basis The Bahamas may be able to submit a claim to the continental shelf beyond 200 nautical miles other relevant criteria must also be examined. One of the questions that must be asked by the Bahamas delegation is whether there is a long term economic benefit that will warrant the initial outlay of significant funds to authoritatively determine whether an extended continental shelf exists.

Political considerations must also be weighed and measured. What will be the reaction of neighbouring states in the event that The Bahamas attempts such action? These are pressing issues that must be dealt with in an expedient fashion by The Bahamas. The need for decisive action needs to be underscored given the fact that as an early signatory to the convention The Bahamas has until the 13th May 2009 to submit a claim to the Commission on the Outer Limits of the Continental Shelf. One can advance the point that the Commission cannot refuse a submission as such a provision does not exist in the

⁸⁴ Victor Prescott and Clive Schofield, The Maritime Political Boundaries of the World, Second Edition, Koninklijke Brill NV, Leiden, the Netherlands 196

Commissions Rules and Procedures. However, this does not bar States from lodging a complaint.

What is clear is the critical need for The Bahamas to acquire the technical capacity for determining the basis upon which it will define its continental shelf and which method of determining the outer continental shelf will be more advantageous to its claim. The Bahamas must determine as a matter of great priority if it is willing to investing politically and financially into this venture.

The Bahamas as a states party to UNCLOS can apply to the Trust fund for the purpose of facilitating the preparation of submissions to the Commission on the Limits of the Continental Shelf for developing States, in particular the least developed countries and small island developing States. The Trust Fund is limited in the level of assistance it can render to states. It does not assist in the acquisition of data such as the hydrographic and geoscientific surveying and mapping of the continental margin. However, the fund does allow for the training of the appropriate technical and administrative staff of the coastal State in question, in order to enable them to perform initial desktop studies and project planning or at least to take full part in these activities. Additionally, The Fund provides for funds for such studies and planning activities, including funds for advisory/consultancy assistance if needed.⁸⁵

⁸⁵ In order to facilitate the access of developing States to the Trust Fund, as well as its management, the General Assemble amended sections 1,4 and 6 of the terms of reference, guidelines and rules of the Trust Fund as set out in the annex to resolution 58/240. The original terms of reference were contained in annex ii to General Assembly resolution 55/7 of 30 October 2000.

II. Role of The Commission on the Outer Limits of the Continental Shelf

Article 3 of Annex II to the United Nations Convention on the Law of the Sea of 10 December 1982 stipulates that the functions of the Commission shall be;

- (a) “to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 ...”
- (b) To provide scientific and technical advise, if requested by the coastal State concerned during the preparation of the data referred to in subparagraph (a).

VII Delimiting a boundary to separate overlapping claims to Exclusive Economic Zone and the continental margin wider than 200nm in the Northern Quadrant of The Bahamas

In the event that an agreement is concluded between The Bahamas and the U.S. that sets a maritime jurisdiction that is equitable, given the geographic proximity and configuration of both The Bahamas and the U.S., both countries can legitimately have a

legal basis for claiming more than 200 nautical miles of continental shelf. According to the U.S. Commission on Ocean Policy, “the U.S. continental margin extends beyond 200 nautical miles in numerous regions including the Atlantic Coast”. What should resonate with the Bahamian delegation is the fact that any claim it makes to the Commission should take full consideration of any perceived points of contention the U.S. may have with the basis and formulation of The Bahamas’ submission

In delimiting the boundary across the seabed more than 200nm from their baselines one or both countries might choose to argue on grounds of natural prolongation. The submerged natural prolongation of the land mass can be interpreted in both a geological and geomorphic sense. It is important at this juncture to point out that claims based on the theory of natural prolongation prove to be very expensive to mount .⁸⁶

In some cases states will be able to make claims to the continental margin beyond 200nm without involving any other neighbour. Such is not the case in the claims to be made by The Bahamas and the US. I am of the view that the most advantageous position is the establishment of two separate maritime jurisdictions. This is in due part to the fact that in separating the claims of the two distinct areas of maritime jurisdiction, The Bahamas can attempt to advance negotiations on areas where state practice and jurisprudence has established guidelines that can underscore The Bahamas case for the equitable

⁸⁶ Victor Prescott and Clive Schofield, The Maritime Political Boundaries of the World, Second Edition, Koninklijke Brill NV, Leiden, the Netherlands page 206

delimitation of The Exclusive Economic Zone(here in after referred to as the EEZ). There are no guidelines in terms of definitive state practice and jurisprudence as it relates to the outer limits of The Continental Shelf. The interpretative capacity of the states in applying the principles of article 76 have not resulted as yet in any outer limits being formally established and recognized by the international community.⁸⁷

With regard to the delimitation of the EEZ as I pointed out in the previous chapter delimitation is not a unilateral act that can be conducted at will by a sovereign state. The notion of acceptance is critical fundamental norm of international law that must be taken into consideration. That said, there must be a clear understanding on the part of The Bahamas government as to proposals that may be advanced by the U.S. authorities in relation to the delimitation of the EEZ in the north quadrant of the Bahamian archipelago.

Compelling evidence exists that suggests that the concept of proportionality may play a critical role in the delimitation of areas of convergence as they relate to the EEZ. This argument may be advanced by the U.S. based on the apparent disparity in the length of the coastlines of the two countries. While proportionality is fundamental to the law of maritime delimitation, this concept is based upon the relationship between the relative lengths of the coasts of the parties abutting the maritime area to be delimited and the

⁸⁷Victor Prescott and Clive Schofield, The Maritime Political Boundaries of the World, Second Edition, Koninklijke Brill NV, Leiden, the Netherlands page 193

relative areas of maritime space allocated to each of the parties by means of the delimitation.⁸⁸

As the International Court of Justice in the Libya / Malta case indicated, proportionality has a double role. In one role, a comparison of the coastal and aerial ratios is sometimes used as a test of the equity of a provision of the delimitation. In the other role, an assessment of the relative lengths of the coastlines may be one of the factors taken into account in determining the method used to effect the delimitation.⁸⁹ A challenge and a potential basis for The Bahamas' rejection of the use of this method, is the difficulty of defining the extent both of the coasts relevant to the delimitation and of the area of overlap or convergence. In the Gulf of Maine case, both issues were hotly contested by the parties. While the method used by the Chamber did not require it to define an area of overlap or convergence, it did have to define the extent of the coasts relevant to the delimitation.⁹⁰

It appears as though proportionality plays a significant role in the delimitation of maritime space between states with adjacent coastlines. Given the substantive reports of Alexander and Charney in which they concluded that the predominant method for states

⁸⁸ Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996 pg 219

⁸⁹ Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996 pg 219

⁹⁰ Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996 219

with opposing coastlines was a manifestation of the equidistance method, I am not convinced that the concept of proportionality if used in The Bahamas/US scenario will ultimately produce an equitable result for The Bahamas.

In state practice, as in the jurisprudence, the use of proportionality is often more subjective and impressionistic than mechanical and precise. The French-Saint Lucia agreement seems to bear this point out. This agreement appears to suggest that an implicit and subjective consideration of proportionality may have influenced the choice of the equidistance method: “ the islands are of comparable size, and the general configuration of their opposite coasts relevant to this delimitation is quite simple and short...”⁹¹

That said the Jan Mayen case highlighted the importance of the criteria of “equitable access to resources” to the equation of the maritime delimitation process. It has been observed that by delimiting the maritime space in this case by establishing two separate lines for the two disputed zones, this enabled economic factors to grow in importance. The exclusion of the single line obliged the Court to carry out a dual exercise, separately measuring the equities and relevant circumstances for each of the disputed zones. While the single line called for equities and special circumstances of a neutral nature, the separate lines permitted the Court also to take account of equities and relevant circumstances appropriate to each zone separately.⁹²

⁹¹ Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996 219

⁹² Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers, pg 447

With regard to the resources of the sea bed, the court noted that

“ So far as seabed resources are concerned, (...) little information has... been given to the Court in that respect, although reference has been made to the possibility of there being deposits of polymetallic sulphides and hydrocarbons in the area.”⁹³

With regard to the issue of fisheries resources the Court indicated that;

“ It appears however to the Court that the median line is too far to the west for Denmark to be assured of an equitable access to the capelin stock, since it would attribute to Norway the whole of the area of overlapping claims. For this reason also the median line thus requires to be adjusted or shifted eastwards...”⁹⁴

Noted legal authorities have argued that this case signifies a noticeable movement by the Court towards a greater interest in socio-economic factors. The Court accepted that the wealth or poverty of ... communities ... remained irrelevant to the process of delimitation. However this attitude was strongly tempered by the fact that the distribution of the resources of the relevant waters became a relevant circumstance.

Given the above, once The Bahamas delegation is able to provide concrete evidence of the nature and extent of hydrocarbon deposits in the area of overlap or convergence and where relevant the nature of commercial viable fish stock it can argue that any delimitation of the maritime space must ensure that The Bahamas has “equitable access “ to any resources that may exist in the area of convergence.

⁹³ Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers, pg 467

⁹⁴ Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers, pg 246

The very fact that the U.S. delegation may advance the method of proportionality as a method of delimitation of The Exclusive Economic Zone does not deny the Bahamas delegation the possibility of tempering this position with other relevant circumstances that may be pertinent to its position not only as an archipelagic country but as a developing nation as well.

In the event that there are substantial hydrocarbon deposits in the area of convergence The Bahamas may have to consider as a last resort the option of a joint agreement for exploitation. In the Eritrea and Yemen case the Court noted ;

“In respect of petroleum arrangements and a maritime boundary between the Parties... the Tribunal recalls the conclusion of the International Court of Justice in its Judgment in the North Sea Continental Shelf case that delimitation of States areas of continental shelf may lead to “ an overlapping of the areas appertaining to them.” The Court considers that such a situation must be accepted as a given fact and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, that latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit.”⁹⁵

A study by the British Institute of International and Comparative law undertaken in 1989 indicated the existence of 12 bilateral treaties providing for Joint Areas or joint development of resources of the continental shelf. Since 1990 the concept of a joint area or joint zone has continued to attract interest on the part of negotiators as part of a wider

⁹⁵ Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers, pg 509

agreement or settlement of a boundary issue and today there are at least 20 such agreements.⁹⁶

Additionally along with general provisions contained in many delimitation treaties referring to mineral resources, states have also included unity of deposit clauses in continental shelf and multipurpose maritime delimitation treaties.

The Bahamas Government in 2003 granted nine exploratory oil and gas licenses located in the Blake Plateau Basin about 100 miles North of Grand Bahama (northern most Island) which covers 6.5 million acres in water depth ranging from 650 feet to more than 7,000 ft. In the event significant hydrocarbon deposits are located in these areas The Bahamas may have to consider the issue of a joint agreement for exploitation with the U.S.

While the very nature of a joint managed agreement is complicated in terms of the royalties and management contracts, The Bahamas may be prudent to consider this as an option that can be advanced perhaps as a way to encourage a bilateral settlement of maritime disputes without resorting to third party settlement. It is doubtful that in any arrangement entered into with the U.S. there will be an equal partnership arrangement with the U.S.

⁹⁶ David Colnson and Robert Smith, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 2005 pg 3217

The Bahamas must be realistic in its aspirations, it is highly doubtful that there would be an equal division of royalties. The way in which the terms and provisions of the final delimitation text is achieved will either cement or strain existing Bahamian / U.S relationship.

It is apparent that a maritime agreement is not drafted in a vacuum, it can at times reflect the temporal context in which it is being drafted. State practice bears this point out. The Cuba/ U.S. maritime agreement was drafted in 1978 at a time when there was a sincere effort on the part of both countries to advance a thawing of relations.⁹⁷ Hypothetically, if there was no agreement, given the current political tensions between these two countries what realistically would be the outcome of any attempts to establish maritime boundaries in a climate of mutual distrust and animosity? The tone of negotiations and any agreed text may reflect the political reality that currently exists between the two states.

That said The Bahamas must be clear as to what its objectives are and how far it is willing concede maritime space if necessary, in order to preserve its relationship with the U.S.

Recommendations for The Bahamas

As a result of the unresolved delimitation issue between The Bahamas and The U.S. in relation to the area lying to the north of The Bahamas, in the event that The Bahamas

⁹⁷ Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996 pg 417

wishes to submit a unilateral claim to the area of overlap between the U.S. and The Bahamas the following must be taken into consideration;

A. Annex 1 of the Rules and Procedures of the Commission indicate that;

“2. In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States, or in other cases of unresolved land or maritime disputes, related to the submission, the Commission shall be :

(a) Informed of such disputes by the coastal States making the submission; and

(b) Assured by the coastal States making the submission to the extent possible that the submission will not prejudice matters relating to the delimitation of boundaries between States.

Additionally in order to submit a claim to an area that is subject to a maritime dispute the submitting State must get the consent of the other party (or parties) involved. It is highly unlikely that the U.S. will extend its consent in this particular situation.

I am of the opinion that the most prudent course of action for The Bahamas in claiming an outer continental shelf beyond 200 nautical miles is to submit a partial claim to the CLCS prior to the deadline of 13th May 2003. Paragraph 3 of Annex I states that;

“ A submission may be made by a coastal State for a portion of its continental shelf in order not to prejudice questions relating to the delimitation of boundaries between States

in any other portion or portions of the continental shelf for which a submission may be made later, notwithstanding the provisions regarding the ten-year period established by article 4 of Annex II to the Convention.

The Bahamas can submit a unilateral claim to the eastern quadrant of its adjacent ocean space in the event that the Continental Shelf extends beyond 200 nautical miles in this area as there are no potential areas of overlap with neighbouring states (see figure 3). In the event that an outer continental shelf does exist in this area there needs to be an examination as to the long term economic benefits to be gained from such delineation.



Figure 3: The shaded portion represents an area that can theoretically form the basis of a unilateral submission by The Bahamas to the Commission on the Outer Limits of the Continental Shelf. (original map exclusive of the shaded portion courtesy of the CIA factbook)

What is also called for on the part of The Bahamas is an in depth analysis in terms of potential political and economic fall out of The Bahamas advancing a claim to the outer limits of the continental margin and the delimitation of the Exclusive Economic Zone based on equidistance in the northern quadrant of The Bahamas.

Additionally, The Bahamas must determine what price it is willing to pay for self affirmation. Any attempts to delineate its maritime space will be reacted to by the U.S. Is The Bahamas willing to undertake the costly exercise of determining the true extent of its continental margin? There are quantifiable and non quantifiable costs that must be weighed and measured by The Bahamas delegation. It must determine given the current political climate whether it is prudent to boldly venture down the road of sovereign expression or whether allowing the status quo to remain is the most prudent course of action at this time.

Chapter IV

Potential Dispute Settlement Scenario

I. Introduction

In the event that an agreement cannot be reached between The Bahamas and The United States on a bilateral basis, there needs to be an earnest consideration as to the mechanism to be employed to effect the delimitation of maritime space via a third party.

Where negotiations between the parties to an international dispute fail to yield a settlement, the intervention of a third party may have the effect of ... breaking the deadlock and providing a way forward towards the peaceful resolution of the dispute.⁹⁸

II. Dispute Settlement Mechanisms

Once a State Party to the United Nations Convention on the Law of the Sea has considered that all possibilities to settle a dispute through either bilateral negotiation or non-binding procedures have been exhausted, then settlement by binding third party procedures are the only option remaining to the state.

⁹⁸ Victor Prescott and Clive Schofield, The Maritime Political Boundaries of the World, Second Edition, Koninklijke Brill NV, Leiden, the Netherlands page 205

Section 2 Part XV of the United Nations Convention on the Law of the Sea lays down the rules and regulations which would apply in the case of third party delimitation. The state can, in accordance with Article 287, choose the type of binding settlement it prefers by a written declaration, either at the time of ratifying or acceding to the Convention or at any time thereafter. Four choices are available to the state: the International Tribunal for the Law of the Law, the International Court of Justice, an arbitral tribunal, or a special tribunal. However, the special arbitral tribunal can only arbitrate in disputes concerning fisheries, protection and preservation of the maritime environment,, marine scientific research or navigation, including pollution from vessels, and dumping.⁹⁹

Given the fact that The U.S. is not a party to UNCLOS and does not appear to endorse the International Tribunal for the Law of the Sea it is improbable that this Tribunal will be a viable option. Additionally to date, the tribunal has not dealt with any cases relative to delimitation. States also tend to be conservative when choosing third party settlement and until ITLOS has some delimitation jurisprudence of its own it may be some time before it deals with this type of case.¹⁰⁰

The International Court of Justice has vast experience as it relates to the issue of maritime delimitation. The U.S submitted to the jurisdiction of a special Chamber of the Court in

⁹⁹ Victor Prescott and Clive Schofield, The Maritime Political Boundaries of the World, Second Edition, Koninklijke Brill NV, Leiden, the Netherlands 259

¹⁰⁰ Victor Prescott and Clive Schofield, The Maritime Political Boundaries of the World, Second Edition, Koninklijke Brill NV, Leiden, the Netherlands page 259

the Gulf of Maine Case, after more than five years of intensive high-level negotiations which failed to reach an agreed result.¹⁰¹ I am currently of the position that this option may be the most viable alternative in the event that the Bahamas/ U.S delimitation will be referred to a third party.

One of the prominent aspects of the particular Special Agreement in the Gulf of Maine was the very strict corset the parties imposed on the Court, fixing an exact starting point for the line (Point A) and requiring that the boundary should end at the Atlantic coast somewhere within a predetermined triangle.¹⁰² The imposition of a predetermined end-point gave rise to greater problems; arguably it tends to restrict the tribunal in its choice of the applicable law and relevant methods. Kolb contends that the parties are intervening in the domain in which the law is actually applied.

The Chamber's attitude inclined towards the idea that the law would defer in an almost unlimited way to agreement between the parties:

“The application of the rules of international law and the methods of delimitation considered the most appropriate in this case might present the Chamber with the temptation to adopt another starting-point of the line to be drawn, or to draw a line terminating at a point outside the triangle. However, even disregarding the somewhat improbable nature of this hypothesis, the decisive reason why such solutions should not be pursued is the fact that for the delimitation of a maritime boundary- whether it concerned the territorial sea or the continental shelf or the exclusive economic zone- both conventional and customary international law accord priority over all others to the

¹⁰¹ Johnathan I. Charney and Lewis M. Alexander, International Maritime Boundaries, Volume I, Martinus Nijhoff Publishers, 1996 page 409

¹⁰² Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers page 489

criterion that this delineation must above all be sought, while always respecting international law, through agreement between the parties concerned. Recourse to delimitation by arbitral or judicial means is in the final analysis simply an alternative to direct and friendly settlement between the parties.”¹⁰³

It is therefore apparent that The Bahamas must be extremely prudent in determining the terms and provisions of any special agreement that defers maritime delimitation issues to the International Court of Justice . It has been argued that a strict formulation as to the nature of the Court’s task in the delimitation process can be less than advantageous.

In the Eritrea and Yemen case the court was asked to draw a line of delimitation and to describe its course, not to pronounce on the applicable principles and rules. In cases where, by contrast, the tribunal’s task is to establish in general terms the applicable principles and rules, the judgment will dwell primarily on the normative considerations from which the concrete delimitation is to be derived.¹⁰⁴ In the Eritrea and Yemen case, the clearly dispositive nature of the Tribunal’s task explains the frugality of the courts reasoning. This aspect of the case bore witness once again to the importance of arbitration agreements, entered into between the parties, in defining the tribunal’s task. It has been argued that the terms of this arbitration agreement profoundly marked the whole structure of the Award and the tribunal’s exposition of the relevant law.¹⁰⁵

¹⁰³ Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers page 490

¹⁰⁴ Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers page 499

¹⁰⁵ Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers page 499

Does The Bahamas wish the Court to adjudicate on the basis of established legal principles or on the basis of ex aequo bono as provided for in the in article 38 Statute of the International Court of Justice?

The concept of equity is a dominant theme in the question of delimitation of maritime boundaries. States have the prerogative of instructing the court to determine a boundary on the basis of both legal rules and equity. Equity does not necessarily imply equality nor does it seek to make equal what nature has made unequal.¹⁰⁶ If equity does not inherently imply equality then what exactly does it signify? Equity is the body of principles constituting what is fair and right.¹⁰⁷ The equitable principles that The Bahamas may wish to incorporate into a special agreement may not be perceived by the U.S as provisions that will result in a fair and equitable result. There seems to be a level of subjectivity in terms of identifying whether principles such as proportionality on one hand or the concept of equitable access to resources on the other hand, if applied will result in a fair and just outcome for the parties concerned.

III. Recommendations for The Bahamas

The Bahamas must determine what are the provisions and particular principles and rules its wishes to be examined and deliberated upon in the event that delimitation goes to third party settlement.¹⁰⁸

¹⁰⁶ Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers page 332

¹⁰⁷ Blacks Law Dictionary, West Publishing Co. 1999 Page, 579

¹⁰⁸ Robert Kolb, Case Law on Equitable Maritime Delimitation, 2003, Martinus Nijhoff Publishers page 499

Additionally, what must be examined by The Bahamas is whether the possibility exists in theory for a unilateral submission of an application to the International Court of Justice. Article 36 paragraph 2 states:

“ The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other states accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature of extent of the reparation to be made for the breach of an international obligation.”

In determining whether there is a theoretical possibility of The Bahamas applying unilaterally to the International Court of Justice for the court to adjudicate on the matter of maritime delimitation must also be put into a political context. Exercising the provision of the compulsory jurisdiction of the court must be weighed and measured very carefully by the Bahamian political directorate. It is highly questionable that the United States would not react to The Bahamas invoking such a provision if indeed the possibility so exists.

I am currently of the opinion that every effort must be made on the part of The Bahamas to ensure that a maritime agreement is reached by a bilateral agreement between the parties. The objectives of the Bahamian delegation must be clearly thought out and articulated. It must determine the parameters of its negotiating strategy.

Third party delimitation should only be resorted to in the event that there is an intractable position taken by either party. One of the key disadvantages of submitting a dispute to judicial settlement lie in the costs incurred, and the possibility that that the state concerned will come away with nothing. As far as the costs of a case before the International Court of Justice are concerned, it is estimated that one can expect the total cost for a full case from application to judgment to be between 3 and 10 million dollars.

¹⁰⁹These are all pertinent issues that must be seriously considered by The Bahamas delegation.

The Bahamas must weigh very carefully what are its objectives and to what extent its political directorate is willing to pursue those objectives. Politically reality will have a crucial role to play in what is at its core a legal process.

¹⁰⁹ Victor Prescott and Clive Schofield, The Maritime Political Boundaries of the World, Second Edition, Koninklijke Brill NV, Leiden, the Netherlands page 206

Conclusion

The Bahamas has a great opportunity to determine the extent of its maritime space in accordance with international law. What must also be appreciated by The Bahamas is that this opportunity to affirm its existence as an independent sovereign nation does not exist in a vacuum. The Bahamas must delimit its maritime borders with several countries one of them being the United States of America, arguably the most powerful country in the world.

What must be determined by The Bahamas is the extent to which political and strategic considerations will influence a process which should be guided primarily by legal rules and principles.

The Bahamas needs to advance a reasonable, legally sound and all encompassing negotiation position. This position must take into consideration the geographical circumstance and nature the political and strategic relationship that exists between The Bahamas and the United States. Taking into consideration the foregoing The Bahamas must at the same time attempt to maximize the advantages that it can claim as an archipelagic state. If this course of action is pursued there is a great possibility that the

unique relationship that The Bahamas currently shares with The U.S. can be maintained and strengthened.

Recently, I was reminded, good fences make good neighbours. How does The Bahamas intend to erect the fence that separates it from the U.S? The foundation of any viable and lasting agreement should be based on legal principles and rules. This creates a degree of legal certainty that would be lacking if a delegation were to rely only on the notions of good faith and equity.

For The Bahamas the cornerstone of any negotiation is the drawing of its archipelagic baselines. By following the spirit and the letter of UNCLOS The Bahamas will reduce the possibility of any of its neighbouring states arguing that The Bahamas is claiming maritime space that is excessive and in contravention with contemporary legal standards.

Once baselines have been drawn The Bahamas should consider delimiting its maritime space with the U.S. by addressing in the initial stages those issues that are the least contentious. In particular the area between Cay Sal and the most westerly point of Grand Bahama Island. This area given the lack of geographic complexity appears to be easily apportioned based on the equidistant method.

The same cannot be said for the northern quadrant of The Bahamas. The area of overlap between the two states in this area of overlap is compounded in complexity by the ability of both countries to claim in excess of 200 miles of continental shelf.

I am of the opinion that the most prudent course of action for The Bahamas in claiming an outer continental shelf beyond 200 nautical miles is to unilaterally submit a partial claim to the Commission on the Outer Limits of the Continental Shelf. In the event that it is determined that a outer continental shelf beyond 200 nautical miles exists, this partial claim will be limited to the area east of Abaco Island (see figure 3). The Bahamas at this time cannot submit a unilateral claim in relation to the northern quadrant of The Bahamas as there is a significant area of convergence with the United States. Similarly a joint submission cannot be advanced as the U.S. is a non States party to the UNCLOS. There also needs to be an acute appreciation of the need for urgency and decisiveness as it relates to the issue. The Bahamas has until the 13th May 2009 to submit a claim partial or otherwise to the Commission.

Additionally I am currently of the opinion that every effort must be made on the part of The Bahamas to ensure that a maritime agreement is reached by a bilateral agreement between the parties. The objectives of the Bahamian delegation must be clearly thought out and articulated. It must determine the parameters of its negotiating strategy.

Third party delimitation should only be resorted to in the event that there is an intractable position taken by either party. One of the key disadvantages of submitting a dispute to judicial settlement lie in the costs incurred, and the possibility that that the state concerned will come away with nothing. As far as the costs of a case before the International Court of Justice is concerned, it is estimated that one can expect the total cost for a full case from application to judgment to be between 3 and 10 million dollars. These are all pertinent issues that must be seriously considered by The Bahamas delegation.

Drawing a line in the ocean to separate one country from the other is more than a legal or technical complexity. How and where this line is drawn can affect the nature of Bahamas / U.S relations for years to come.

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Annex I

No. 37 of 1993

An Act respecting the territorial sea, archipelagic waters, internal waters and the exclusive economic zone of The Bahamas.

(Date of Assent: 31st December, 1993)

Enacted by the Parliament of The Bahamas.

1. This Act may be cited as the Archipelagic Waters and Maritime Jurisdiction Act, 1993 and shall come into operation on such date as the Minister responsible for the Law of the Sea may appoint by notice published in the Gazette. -

2. In this Act — “archipelagic baselines” means the baselines drawn under section 3(2);

“baseline” means the line from which the width of the territorial sea of The Bahamas is measured;

“Convention” means the United Nations Convention on the Law of the Sea signed on December 10, 1982;

“exclusive economic zone” means the exclusive economic zone of The Bahamas as defined in section 8;

“innocent passage” means passage which is not deemed to be prejudicial to the peace, good order, or security of The Bahamas and is in conformity with the provisions of the Convention and such other relevant rules of international law;

“island” means a naturally formed area of land which is surrounded by and above water at mean high-water;

“miles” means international nautical miles of 1,852 meters each; “Minister” means the Minister responsible for Lands and Surveys;

“passage” means the navigation of a ship in the territorial sea or archipelagic waters of The Bahamas without stopping or hovering, but includes stopping, hovering and anchoring in so far as the same are rendered necessary by force majeure or by reason of distress or for the purpose of affording assistance to persons, ships or aircraft in danger or distress.

3. (1) The archipelagic waters of The Bahamas comprise those areas of the sea enclosed by the baselines, established by this section.

(2) The Governor-General may by Order issue one or more lists by reference to physical features marked on official charts or, to geographical co-ordinates of points between which archipelagic, baselines may be drawn in accordance with international law for the purpose of determining the inner limits of the territorial sea of The Bahamas, and may as he deems necessary amend those lists.

(3) In respect of any area for which physical - features marked on official charts or geographical co-ordinates of points have been listed in a list issued pursuant to subsection (2), subject to any exceptions in the list for the use of the low-water line along the coast as the baseline between given points, baselines are straight lines joining the consecutive geographical coordinates of points as listed.

(4) In respect of any other area, and until such time as physical features marked on official charts, or geographical coordinates of points have, for such other area, been listed in a list issued pursuant to subsection (2), baselines remain those applicable immediately before the coming into force of this Act.

4. (1) The territorial sea of The Bahamas comprises those areas of the sea having as their inner limits the baselines described in this section and as their outer limits a line established seaward from those baselines every point of which is at a distance of twelve miles from the nearest point of the appropriate baseline.

(2) Where archipelagic baselines are drawn under section 3, those baselines shall be the baselines from which the breadth of the territorial sea of The Bahamas shall be measured.

(3) In all other cases the baselines from which the breadth of the territorial sea of The Bahamas is measured shall be the low-water line along the coast of each island.

(4) Where a low-tide elevation lies wholly or partly within the breadth of sea which would be the territorial sea of The Bahamas if all low-tide elevations were disregarded for the purpose of measurement of the breadth thereof, the low-tide elevation shall be treated as an island.

(5) For the purposes of this section, a low-tide elevation is a naturally formed area of land which is surrounded by and is above water at mean low-water but is submerged at mean high-water.

5. (1) Subject to subsections (2) and (3) and section 13 and without prejudice to sections 7 or 11, a foreign ship shall be entitled to enjoy the right of innocent passage through the archipelagic waters and territorial sea of The Bahamas.

(2) The passage of a foreign ship shall be deemed to be prejudicial to the peace, good order or security of The Bahamas if, the ship while in the archipelagic waters or territorial sea of The Bahamas, engages in any of the following activities

- (a) any threat or use of force against the sovereignty, territorial integrity or political independence of The Bahamas, or in any other manner in violation of the principles of international law;
- (b) any exercise or practice with weapons of any kind;
- (c) any act aimed at collecting information relating to the defence or security of The Bahamas;
- (d) any act of propaganda aimed at affecting the defence or security of The Bahamas;
- (e) the conveyance, taking on board or off-loading of any person, commodity or currency in breach of any law relating to exchange control, customs, immigration, health or drugs;
- (f) any act of pollution calculated or likely to cause damage or harm to The Bahamas, its resources or its marine environment;
- (g) any fishing activities other than in accordance with the Fisheries Resources (Jurisdiction and Conservation) Act;
- (h) any act aimed at interfering with systems of communication or telecommunication of The Bahamas;

- (i) such other activity as the Governor-General may by Order prescribe.

(3) Without prejudice to subsection (2) the passage of a foreign ship shall also be deemed to be prejudicial to the peace, good order or security of The Bahamas if without the prior permission of the Minister obtained by the captain or person in charge Of the ship, the ship while in the archipelagic waters or territorial sea of The Bahamas, engages in any of the following activities —

- (a) the launching, landing or taking on board of any aircraft;
- (b) the launching, landing or taking on board of any military device;
- (c) the carrying out of research or survey activities;
- (d) being a submarine or other underwater ship, underwater navigation.

6.—(1) Where a foreign ship engages in any of the activities specified in subsections (2) and (3) of section 5 or prescribed under paragraph (i) of section 5(2), as the case may be, or where a law enforcement officer suspects on reasonable grounds that a foreign ship is engaged in any such activity, such law enforcement officer may in the course of his duty —

- (a) stop, board and search the ship for the purpose of carrying out enquiries and investigations;
- (b) without warrant or other process seize and detain the ship and bring it into a port of The Bahamas;
- (c) without warrant or other process arrest the captain and any person on board the ship whom he reasonably suspects to be participating in the activity of the ship which is deemed to be prejudicial to the peace, good order or security of The Bahamas.

(2) Where a foreign ship is seized or detained or any person is arrested under this section, such ship or person shall forthwith be taken —

- (a) to the nearest or most convenient place in The Bahamas and delivered into the custody of the most senior police officer; or
 - (b) before a magistrate to be dealt with according to law,
- (3) Where the passage of a foreign ship is deemed to be prejudicial to the peace, good order or security of The Bahamas, the captain or other person in charge of such ship and any person participating in the activity of the ship which is deemed to be so prejudicial, is guilty of an offence and liable, on summary conviction to a fine of ten thousand dollars or imprisonment for a term of five years or both.
- (4) The Court may in addition to any penalty which it may impose under subsection (3) order the forfeiture to the Crown of any ship engaged, or equipment used, in any activity which is the subject of the offence.
- (5) Any person who assaults or obstructs a law enforcement officer acting under the authority of this' section is guilty of an offence and liable on summary conviction to a fine of ten thousand dollars or imprisonment for a term of five years or both.
- (6) In this section — “law enforcement officer” means any peace officer, a member of the Royal Bahamas Defence Force, an officer of Customs or an officer of the Department of Immigration.

7.—(1) The internal waters of The Bahamas comprise those areas of the sea that are on the landward side of the closing lines referred to in this section.

- (2) The Governor-General may by Order issue one or more lists of geographical co-ordinate~ of points from which the closing lines of the internal waters may be determined in accordance with international law and may, as he deems necessary, amend those lists.

8.—(1) Subject to this section, the exclusive economic zone of The Bahamas comprises those areas of the sea, having as their inner limits the outer limits of the territorial sea of The Bahamas and, as their outer limits, a line drawn seaward from the baselines every point of which is at a distance of two hundred miles from the nearest point of the appropriate baseline.

- (2) The Governor-General may by Order, for the purpose of implementing any international agreement or the award of any international body, or otherwise, declare that the outer limits of the exclusive economic zone of The Bahamas extend to such line, any point or which may be at a distance of less than two hundred miles from the nearest point of the appropriate baseline, as may be specified in such Order.
- (3) Where the median line, as defined in subsection (4), is less than two hundred miles from the nearest baseline, and no other line is for the time being specified under the provisions of subsection (2), the outer limits of the exclusive economic zone of The Bahamas extend to the median line.
- (4) The median line is a line every point of which is equidistant from the nearest points of the baselines from which the breadths of the territorial sea of The Bahamas and of any neighbouring state are measured.

9.—(1) The sovereignty of The Bahamas extends over the territorial sea, the archipelagic waters, the internal waters, the seabed and subsoil thereof as well as the airspace over such sea and waters.

(2) Within the exclusive economic zone The Bahamas has —

- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living of the seabed and subsoil and superjacent waters;
- (b) exclusive rights for the purpose of constructing and authorising and regulating the construction, operation and use of artificial islands; and
- (c) exclusive jurisdiction over artificial islands including jurisdiction with regard to customs, fiscal, health, drugs; safety and immigration laws.

10 The Minister may cause charts to be issued indicating baselines referred to in sections 3 and 4.

11.—(1) The Governor-General may by Order prescribe sea lanes and air routes above archipelagic waters suitable for the continuous and expeditious passage of

foreign ships and aircraft through or over the archipelagic waters and the adjacent territorial sea.

(2) Subject to section 5 all ships and aircraft shall enjoy the right of archipelagic sea lanes passage in the sea lanes and air routes prescribed under subsection (1).

(3) Archipelagic sea lane passage shall be the exercise in accordance with international law and with any laws of The Bahamas of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

(4) Sea lanes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points and ships and aircraft in archipelagic sea lanes passage shall not deviate more than twenty-five miles to either side of such axis lines during passage nor navigate closer to the coast of the islands of The Bahamas than ten per cent of the distance between the nearest points on islands bordering the sea lane or air route.

(5) Where there is no designation made pursuant to subsection (1) the right of archipelagic sea lane passage may be exercised through the routes normally used for international navigation.

12. The Governor-General may by Order prescribe traffic separation routes within archipelagic sea lanes for the passage of ships and make alterations to those routes. -

13. Where sea lanes and traffic separation routes have been prescribed under sections 11 and 12 —

- (a) foreign ships exercising the right of innocent passage through the archipelagic waters and territorial sea of The Bahamas; and
- (b) ships exercising archipelagic sea lane passage, shall use the sea lanes and traffic separation routes so prescribed.

14. The Governor-General may, whenever he considers it necessary or expedient so to do having regard to international law, by Order alter the seaward limit of the territorial sea of The Bahamas.

15. Where the territorial sea of The Bahamas meets with the territorial sea of another state to the extent only to which such limits are recognised by The Bahamas to be validly established pursuant to international law, the Governor-General may initiate and conduct negotiations with that state to establish the boundary of the territorial sea of The Bahamas and in the absence of agreement the boundary of the territorial sea of The Bahamas shall not extend beyond the median line every point of which is equidistant from the nearest 'points on the baselines from which the breadths of the territorial seas of The Bahamas and that other state are measured.

16.—(1) The Minister may cause charts to be issued delineating the territorial sea of The Bahamas as settled by agreement under section 15 or any portion thereof as may be delineated consistent with the nature and scale of the 'charts.

- (2) In any proceedings in any court a certificate purporting to be signed by the Minister or a person authorised by him that the chart issued pursuant to section 10 or to this section is for the time being an authorised and accurate chart shall be admissible