GUYANA GEOLOGY & MINES COMMISSION

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RECEIVED
13 SEP 1994
EMBASSY OF THE
REPUDLIC OF GUYANA
SURINAME

22nd August 1994

Messrs: Managing Director
Staatsolie
Maatschappij Suriname NV
State Oil Company Suriname NV
Gravenbercbstraat 18
Paramaribo Suriname

Director
Geologische Mijnbouwkundige Dienst
Kleine Watar Straat # 2-6
Paramaribo Suriname

Dear Sirs

RE: PRACTICAL CO-OPERATION BETWEEN GUYANA AND SURINAME IN THE PETROLEUM SECTOR AND SOLID MINERALS/MINING SECTOR

During his recent State Visit to Suriname, His Excellency the President of the Co-operative Republic of Guyana was impressed with the activities your country's indigenous state oil company 'Staatsolie' were engaged. High level discussions between His Excellency the President of the Republic of Suriname and His Excellency the President of the Co-operative Republic of Guyana resulted in a strong commitment being reached between the two leaders, which called for urgent practical co-operation between Guyana and Suriname in the Petroleum and Solid Minerals/Mining Sectors.

In keeping with the Government to Government Presidential Mandate, the Guyana Geology and Mines Commission (GGMC) now extends an invitation for a visit to Guyana to :-

(1) Managing Director &
Deputy Managing Director
Staatsolie

(2) Director & Deputy Director
Geologische Mijnbouwkundige Dienst

This visit would serve the purpose of reviving dormant relations, fostering new ones and provide the opportunity to identify areas of new, meaningful, practical, technical co-operation.

The GGMC suggests for consideration, an agenda for the visit which includes:-

(a) Discussions related to data exchanges for Suriname and Guyana's Offshore and Coastal Areas where petroleum exploration is in progress.

(b) Discussions related to Suriname/Guyana short term exchanges of technical personnel to examine operations and activities of interest to Guyana/Suriname.

(c) Discussions related to the formulation of a working document which outlines terms for exploration of Guyana/Suriname border areas to the mutual benefit of both countries. This working document being pursuant to the 1991 Memorandum of Understanding signed by the respective countries.

(d) Discussions related to the pursuit of a document which establishes a means by which present exploration in mutual border zones may proceed to the mutual benefit of Guyana/Suriname pending the resolution of justifiable claims.

(e) Discussions related to the impact of international investment on the Minerals' Sector; the formulation of a common approach to multinational investors which could influence on a singular basis, the ability for countries in the region to dictate more favourable contracts and execution of these contracts

(f) Discussions related to the means by which practical co-operation could influence the positive development of the local mining sectors in the two countries.

The GGMC anticipates a favourable response to this invitation and enthusiastically looks forward to your early communication on this subject.

Thank you

Yours sincerely
GUYANA GEOLOGY AND MINES COMMISSION

Brian Sucré
Commissioner

GUYANA GEOLOGY & MINES COMMISSION

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December 5, 1995

Staatsolie Mij. Sur. N.V.			
IN/UIT: 13 feb			
NO: 96-672			
	COPY	VHN	ADV
Techn. Dir	✓		X
Fin. Dir.	✓		X
R.v.C.			
Prod. Div.			
Expl./Reser.	✓		X
Datamgnt			
H.R.M.			
Publ.Rel.			
Man.Secr.		✓	
File		✓	

Mr. S.E. Jharap
Managing Director
Staatsolie, Maastschappij Suriname N.V
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P.O.Box 4069
Flora Paramaribo

Fax #: 597 491105

"AGREED MINUTES"

Dear Mr. Jharap

Thank you for reviewing and commenting on the Agreed Minutes. The completed document reflects the changes you suggested and has been signed by the Commissioner, Brian Sucré.

Please sign on behalf of Staatsolie the enclosed copies. One (1) copy is for your records, the second is for Guyana Geology and Mines Commission (GGMC) and the Ministry of Foreign Affairs Guyana will have a copy for their records. The Foreign Ministry, you may recall, orchestrates the wider theme of Technical Cooperation within the context of the Joint Border Committee.

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Once again, my best regards and a pleasant Christmas season to all.

Yours sincerely
GUYANA GEOLOGY AND MINES COMMISSION

Newell M. Dennison
for Commissioner

AGREED MINUTES FOR THE MEETING OF APRIL 27, 1995.

AREAS PROPOSED FOR PRACTICAL TECHNICAL CO-OPERATION BETWEEN STAATSOLIE (STATE OIL COMPANY OF SURINAME) AND THE GUYANA GEOLOGY AND MINES COMMISSION (GGMC).

Guyana Geology and Mines Commission's visit to Staatsolie April 24 - 28, 1995.

INTRODUCTION:

As per Section 1 part(e) of the Agreed Minutes dated November 30, 1994 between Staatsolie and GGMC, a team from GGMC paid a reciprocal visit to Staatsolie during April 24 - 28, 1995 in order to discuss further, areas for possible, practical, technical co-operation in the petroleum exploration sector and solid minerals/mining sector. Arrangements were made on arrival, to facilitate meetings between GGMC's Deputy Commissioner, Mr William Woolford and his Surinamese counterpart Divisional Head, Mr Gemert. Minutes concerning that aspect of the visit will be separate from these minutes.

The GGMC team were exposed over four (4) days to presentations and visits to Staatsolie's various operating facilities in order to identify which areas were most appropriate for the technical co-operation envisaged. The discussion at the end of the visit was to determine which of the GGMC's requests could be entertained and how to formulate the implementation of any programme of co-operation.

Here-in lies a record of salient issues addressed during the discussion period with Staatsolie on April 27, 1995.

ATTENDANCE/VENUE

The discussion was held in the Office of the Managing Director, Staatsolie at the Head Office, Flora Suriname. Present at the meeting which commenced at 09:30 hours were:-

Mr S.E. Jharap	-	Managing Director, Staatsolie
Mr Brian Sucré	-	Commissioner, GGMC
Mr H Kartoredjo	-	Chief Geologist, Staatsolie
Mr William Woolford	-	Deputy Commissioner, GGMC
Mr N Dennison	-	Head, Petroleum Unit, GGMC

Mr Woolford departed at 10:30 a.m. for his appointment with Mr Gemert. The meeting was concluded at approximately 12:15 hours.

MATTERS DISCUSSED

GGMC presented a number of suggestions for Staatsolie to consider. These suggestions were as follows:-

For Technical Co-operation in the Coastal Onshore Basin.

(1) Short-term technical assistance in the area of exploration drilling, whereby a specific number of candidates would gain hands-on experience in Suriname during Staatsolie's exploration drilling campaign in 1995.

(2) Short-term technical assistance in the area of well site geology, whereby a specific number of candidates would gain hands-on experience, as wells were logged.

(3) Short-term technical assistance in the area of data review, whereby the Petroleum Unit's Geologist/Geophysicist would spend up to one (1) week exercising on logs in Suriname, so as to become proficient at interpreting well logs of similar compositional types that may be present in Guyana's data base or subsequently generated in Guyana.

(4) Medium-term to long-term technical assistance in the area of exploration drilling, whereby Staatsolie would provide a rig and personnel, which would come to Guyana in order to drill in the Coastal Onshore Basin.

(5) Medium-term to long-term technical assistance in the area of drilling, whereby Staatsolie personnel would come to Guyana and assist with training Guyanese drillers in the specifics of oil drilling, or Guyanese drillers have the same experience in Suriname.

Staatsolie responded to these first suggestions by defining the context in which Staatsolie could offer technical assistance to GGMC. The following was emphasised:-

(a) Staatsolie was not in the business of training since they were not qualified to do so and in fact, paid contractors to perform non-routine tasks and provide specialist training for workers engaged in routine tasks. However, Staatsolie could provide an environment under which GGMC technicians could observe certain routine oil field activities and engage themselves sufficiently in the routine so as to become familiar with it.

Within the preceding context, short-term technical assistance in the areas of exploration drilling, well site exposure and data review as outlined in GGMC's suggestions 1, 2, and 3 were possible. Costs for such programmes would be calculated and a formula for meeting the expenses determined between GGMC and Staatsolie.

(b) Recent developments in Staatsolie's onshore drilling program (blow-out) have demonstrated to Staatsolie that a drilling program in Guyana with the equipment they had in mind cannot be carried out in a safe manner, and in accordance with the international industry standards. Staatsolie is currently reviewing its procedures and equipment. When these problems are solved, Staatsolie is willing to evaluate the drilling-plan again. It is however, understood that GGMC will bear the costs of such a drilling program in Guyana. The proposed technical assistance is to be confined to GGMC direct activities and its personnel.

GGMC presented further suggestions for Staatsolie's consideration:-

Technical Co-operation in the Form of Information Exchange

1. GGMC and Staatsolie should share freely their Onshore data.

2. GGMC and Staatsolie should share freely their offshore data once it did not contravene any existing proprietary clauses.

Staatsolie had no difficulty with these general suggestions but with just rationalisations, applied conditions to this form of technical co-operation.

Staatsolie responded as follows:-

(a) Data facilities at Staatsolie were extensive. It was not Staatsolie's desire to have GGMC duplicate their data base. However, any specific reference could be facilitated or at convenient times, GGMC could send personnel to utilise the facility.

Staatsolie would not appreciate third party access to the facility since its operations were not geared to provide public service.

(b) In the case of the offshore data, Staatsolie preferred requests for specific data to be judged on a case by case basis. If the beneficiary of the requested data was ultimately, other than GGMC, then the beneficiary must have a vested interest or contract with GGMC. Scouts and promoters seeking information on Suriname through GGMC would not be appreciated.

It was at this point in the discussion, that unavoidably, the issue of the 'Area of Overlap' arose. Understandably, Staatsolie would be reluctant to pursue or continue technical co-operation with GGMC if it was perceived that Guyana was exercising territorial sovereignty over certain common areas.

Staatsolie's position was:-

At this time, co-operation between Staatsolie and GGMC for the Coastal Onshore Basin would not be threatened by the 'Area of Overlap' issue. Co-operation between Staatsolie and GGMC in the Offshore Basin would be practically impossible if Guyana negotiated a concession with a company and included in that concession, was the section of the common border area where the 'Area of Overlap' existed.

Mr Jharap was of the opinion that some resolution to the issue must be negotiated before either country should explore in the 'Area of Overlap'. He declared that it was the responsibility of the Foreign Ministries of the respective Governments to urgently pursue the matter.

Mr Sucré agreed with Mr Jharap, that there should evolve some resolution to the issue. He countered with the fact that Guyana's Foreign Ministry was eager to pursue the matter with Suriname, however, Suriname apparently was not as keen to deal with the issue.

It was decided that the issue should not be further discussed as it did not fall within Staatsolie's of GGMC's mandate. It was intuitively obvious to both parties how this important, sensitive, emotional issue could unavoidably hinder the degree to which complete technical co-operation between Staatsolie and GGMC would be pursued and maintained.

Mr Sucré requested a list of Staatsolie's consultants which Mr Jharap promised to provide. GGMC could then arrange for any specific needs in oil field technology.

With nothing further to discuss, the meeting was concluded. GGMC's team thanked Mr Jharap and Mr Kartoredjo for the hospitality their company displayed during the visit. Mr Jharap responded pleasantly to the courtesies.

The above being a true and accurate account of the issues addressed.

Signed this 29th **day of** December **1995.**

S.E. Jharap
Managing Director
Staatsolie

B.L. Sucré
Commissioner
Guyana geology and Mines Commission

OIL DAILY

Canadian Rig to Drill Elsewhere

Oil Daily Tuesday, June 20, 2000

A Canadian oil company prevented from drilling an offshore oil concession near Guyana's coast due to a border flare-up with neighboring Suriname moved its oil rig on Monday to another area nearby.

Toronto-based CGX Energy found itself at the center of the dispute on June 3 when Surinamese patrol boats evicted its rig from the concession granted by Guyana in 1998 in the Atlantic off South America's northeastern shoulder (OD June6,p1).

It subsequently towed the rig "to a safe location" outside of the disputed area pending talks between the two countries. It was spending around $80,000 a day to keep it on stand-by.

Three rounds of bilateral conversations at ministerial levels, the latest ones over the weekend in Suriname's capital Paramaribo, have failed to bring about an agreement.

In a statement released in Georgetown, the Canadian company said rather than "continuing to incur significant non-productive stand-by charges, CGX had positioned the jack-up drill rig" at the Horseshoe location.

The company statement said that in light of the developments in the border spat, CGX intended to drill to a depth of 12,500 feet in the Horseshoe site which is "located well outside the area disputed between Guyana and Suriname."

Introduction to the Compendium of Oil Concession Maps

The attached maps prepared by Petroconsultants were copied at the U.S. Library of Congress.

It will be noted that Petroconsultants' practice is to prepare separate maps for Guyana and Suriname/French Guiana.

The maps of Guyana only show Guyana's concessions, but those maps also indicate the maritime boundary positions of Guyana and Suriname. Likewise, the Suriname/French Guiana maps show only the concessions of those respective countries, but also show the maritime boundary positions of Guyana and Suriname.

Those maps are widely utilized in the petroleum industry and in petroleum publications and leave no doubt that there is an area of overlapping maritime boundary claims between Suriname and Guyana.

The use of those commercial petroleum industry maps by Suriname in this Annex and elsewhere in this Memorandum on Preliminary Objections, dated 23 May 2005, does not constitute Suriname's recognition or acceptance of the illustrated land boundaries between Guyana, Suriname and French Guiana. The submission of those maps is without prejudice to Suriname's position on those land boundaries.

Determining a Transition Point Between Riverbank and Ocean Coast on an Arcing Headland Using Geometric Principles

Suriname's position is that a transition point between riverbank and ocean coast on an arcing headland can be determined by using the following four-step geometric method that is depicted on the accompanying map.

First, the final sections of bank or coast that do not form the headland are identified. In this situation, those sections are the easternmost section of Guyana's ocean coast that maintains a constant bearing, and the northernmost section of the Corantijn River's left bank that maintains a constant bearing.

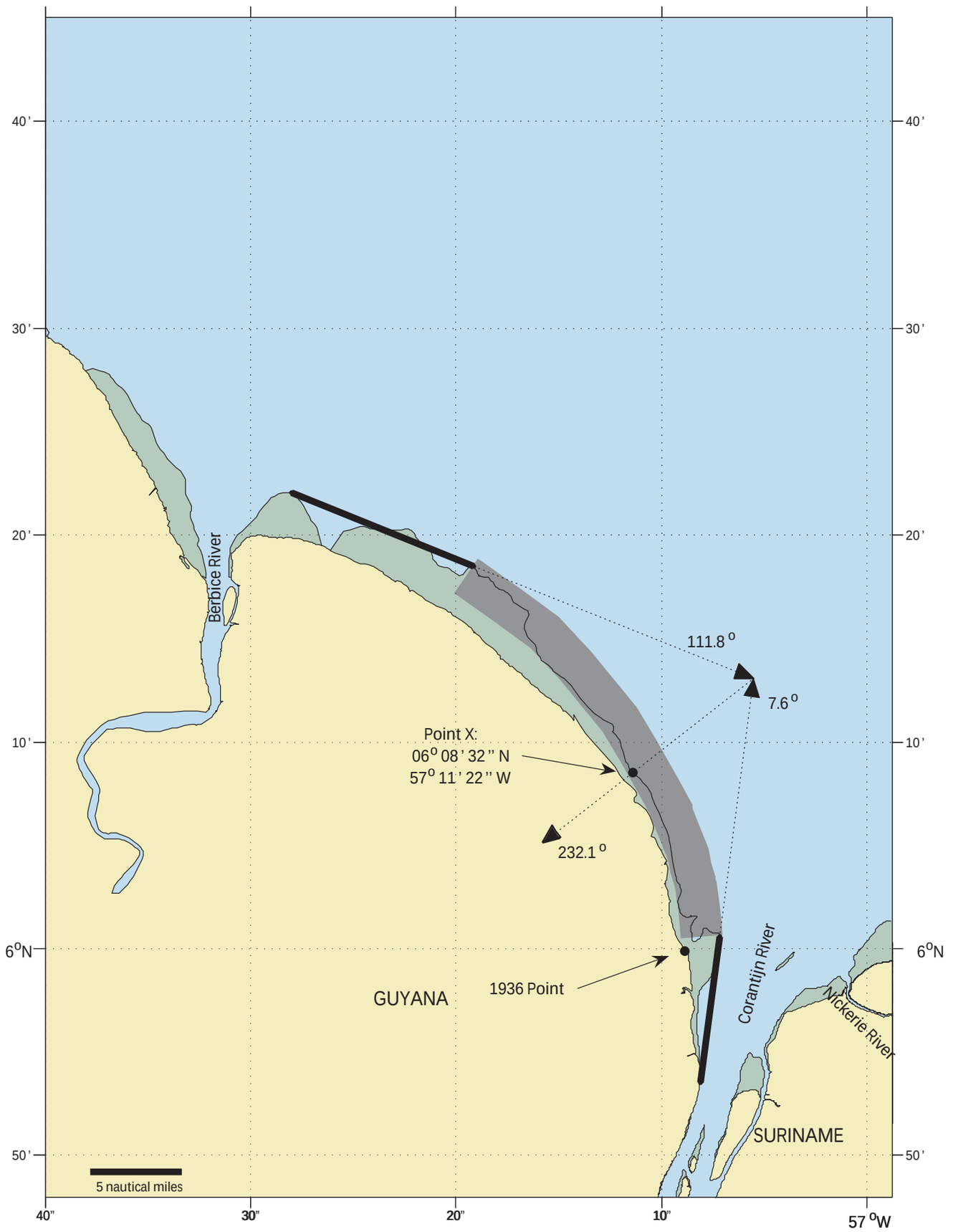
Second, the general directions of those sections are determined. The general directions of the left bank of the Corantijn River and Guyana's ocean coast are indicated with solid lines on the map.

Third, those general directions are extended toward each other to an intersection point, or vertex. In this way the two lines of general direction create an angle opening back toward the headland.

Fourth, the bisector of the angle formed by the general directions is drawn from the vertex back toward the headland. The transition point between the riverbank and the ocean coast is the point where the angle bisector intersects the shore.

The application of this method to the western headland of the Corantijn River is depicted on the accompanying map. The transition point is located at 06° 08' 32" N, 57° 11' 22" W.

Determining the Transition Point Between Riverbank and Ocean Coast on an Arcing Headland: A Geometric Method



THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 1957

THIRTY-THIRD YEAR OF ISSUE

Issued under the auspices of the
Royal Institute of International Affairs

OXFORD UNIVERSITY PRESS
LONDON NEW YORK TORONTO
1958

ESTOPPEL BEFORE INTERNATIONAL TRIBUNALS AND ITS RELATION TO ACQUIESCENCE

By D. W. BOWETT M.A., LL.B., PH.D.

THE rule of estoppel, whether treated as a rule of evidence[1] or as a rule of substantive law,[2] operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit.[3] The basis of the rule is the general principle of good faith and as such finds a place in many systems of law;[4] the description of this rule as an Anglo-American rule is misleading in so far as it suggests that its essentials are peculiar to the English and American legal systems. It may be true that in those systems the rule has developed refinements which find no place in the 'rough jurisprudence' of international courts,[5] but the essentials of the rule are far more general, and their acceptance into the jurisprudence of international tribunals will be apparent from the following pages.

For the sake of clarity and of indicating the precise nature of estoppel (and therefore the scope of this article) it may be useful to distinguish certain principles which have effects similar to estoppel. The first of these principles is that of *res judicata*, whose reception into international jurisprudence is now beyond question.[6] The basis of this principle is a final decision of a court of competent jurisdiction upon questions directly in

[1] Friede, 'Das Estoppel-Prinzip im Völkerrecht', *Z.f.a.ö.R.v.V.* 5 (3), (1935), pp. 517–45; Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), p. 203.

[2] This is the modern treatment in American municipal law; see Wigmore on *Evidence*, 3rd ed., s. 2589; and in English municipal law; see *Canada and Dominion Sugar Co. Ltd.* v. *Canadian National (West Indies) Steamships Ltd.* [1947] A.C. (P.C.) 46 at p. 56.

[3] For an early and restrictive definition see *Pickard* v. *Sears* (1837) 6 Ad. & E., p. 469 *per* Lord Denman C.J. at p. 474; and generally Halsbury, *Laws of England*, 3rd ed., vol. xv, p. 168 et seq.; D'Argent, *La Doctrine de l'estoppel* (1942), *passim*; Phipson, *The Law of Evidence* (1952), pp. 704–10; Strode, *Law of Estoppel* (1923), *passim*. For definitions before international tribunals see opinion of the American Commissioners in the *Santa Isabel Claims* (U.S./Mex.), Special Claims Commission, *American Journal of International Law*, 26 (1932), p. 196.

[4] Lauterpacht, op. cit., p. 204, draws illustrations of similar principles from various municipal systems, as does Friede, loc. cit., p. 531. The best jurisprudential analysis of the basis of estoppel is by D'Argent, op. cit., p. 228 et seq. Cheng, *General Principles of Law* (1953), pp. 141–9, deals with the principle *allegans contraria non est audiendus* and shows its wide application before international tribunals: the present writer is indebted to Dr. Cheng's detailed treatment.

[5] Hall, *International Law*, 7th ed., p. 349 (n. 1).

[6] See Cheng, op. cit., ch. xvii, *passim*; *Pious Fund* case (1902), *Scott's Hague Court Reports*, pp. 3–5; *Trail Smelter* arbitration (U.S./Canada), *U.N.R.I.A.A.* (United Nations Reports of International Arbitral Awards), vol. 3, p. 1905 at p. 1951; Merignhac, 'De l'autorité de la chose jugée en matière de sentence arbitrale', *Revue générale de droit int. public*, 5 (1898), pp. 606–25; Limburg, 'L'Autorité de la chose jugée des décisions des jurisdictions internationales', *Recueil des Cours*, 30 (1929), pp. 523–618.

issue between parties to an action, and its effect is to preclude those parties or their privies from raising those same issues before another court in a subsequent action. The Permanent Court of International Justice has said that 'recognition of an award as *res judicata* means nothing else than recognition of the fact that the terms of the award are definitive and obligatory'.[1] The rationale of the principle is expressed in the maxim *interest rei publicae ut sit finis litium*: it is essentially a rule of common sense and public policy that litigation should have finality. It follows, therefore, that, though in its effect of precluding a party from raising certain issues before a court it is remarkably similar to the preclusion of an estoppel, the principle of *res judicata* is distinguishable from estoppel. The rationale of estoppel is expressed in the maxim *allegans contraria non audiendus est*; its essential aim is to preclude a party from benefiting by his own inconsistency to the detriment of another party who has in good faith relied upon a representation of fact made by the former party. *Res judicata*, in contrast, is not concerned with inconsistency in the party's conduct: indeed, there could be nothing more consistent than the attempt to raise before a court the very same issues which had been finally determined by a previous court. The reason for preventing this course of action is based on the necessity to put an end to litigation, not, as with estoppel, to avoid inconsistency. Moreover, whereas the source of *res judicata* is the decision of a tribunal, the source of estoppel is the conduct or statements of the parties. This indicates at once the wider ambit of the doctrine of estoppel, for, though the plea of estoppel is invariably made in the course of judicial proceedings, it is not confined to conduct or statements made in the course of judicial proceedings.

The second principle which in its effect is somewhat similar to estoppel is that by which, in cases of doubt as to the meaning of an agreement, the subsequent conduct of the parties in carrying out the agreement affords evidence of its meaning. This principle has been accepted by international tribunals and is now well recognized,[2] although there is room for argument whether this is a rule of construction or a rule of evidence. Sir Gerald

[1] *Société commerciale de Belgique* case, *P.C.I.J.* (1939), Series A/B, No. 78, p. 175.

[2] Advisory Opinion on the *Competence of the I.L.O.* (*P.C.I.J.*, Series B, No. 2, pp. 40–41); Advisory Opinion on the *Frontier between Iraq and Turkey* (ibid., No. 12, at p. 24); Case of the *Brazilian Loans* (ibid., Series A, Nos. 20/21, p. 119); 'Chamizal arbitration', *American Journal of International Law*, 5 (1911), p. 805; the *David J. Adams* (U.S./G.B.), *Annual Digest, 1919–1922*, No. 239; *Chamberlain and Hookham Ltd.* v. *Solar Zahlerwerke* (G.B./Germ.), ibid., No. 249. See also British Prize Court decisions in *Les Quatres Frères* (1778), Hay and Marriott, 170, 172; *The Vrijheid No. 1* (1778), ibid., 188, 193; *The Franciska* (1855), Spinks' *Ecclesiastical and Admiralty Cases*, 113, 150. For U.S. decisions see *Pigeon River Development* v. *Charles W. Cox Ltd.*, 291 U.S. 138, 157–161 (1934); *U.S.* v. *Eighteen Packages of Dental Instruments*, 230 Fed. 564, 569 (C.C.A. 3d, 1916), and generally McNair, 'L'Application et l'interpretation des traités d'après la jurisprudence britannique', *Recueil des Cours*, 43 (1933), 251 at pp. 264–7; Ehrlich, 'L'Interprétation des traités', ibid., 24 (1928), pp. 34–39.

Fitzmaurice, in an article in this *Year Book*,[1] illustrated the application of the rule in recent decisions of the International Court and reached the conclusion that 'it is a question of the probative value of the practice of the parties as indicative of what the treaty means',[2] in other words a rule of evidence. The question which it is relevant for us to consider is whether or not this rule is an application of the rule of estoppel; for it is possible to construe the conduct of the parties as, in effect, estopping them from attributing to the agreement a meaning other than that in the sense of which they have interpreted it by their conduct. On analysis, however, this rule is distinct from estoppel. The purpose of the rule is to assist in ascertaining the intention of the parties *at the time of the agreement* and, therefore, since this is the relevant time, any reliance by one party upon the conduct of the other after that time is irrelevant.[3] Yet, without this reliance by the one party on the statements or conduct of the other it is impossible to think in terms of an estoppel. Moreover, as the International Court in its Advisory Opinion on the *International Status of S.W. Africa*[4] has pointed out, the interpretations placed upon legal instruments by the parties to them are not and cannot be conclusive as to their meaning: they lack the binding effect which is characteristic of the true estoppel. Further, the conduct of the parties will generally be based upon a general concurrence in the interpretation it involves between the parties to the agreement, so that the position is not akin to the situation found in estoppel where one party assumes responsibility towards the other for a statement of fact: indeed, in the majority of cases, the conduct will relate not to a statement of fact (with which estoppel is concerned) but to an interpretation of the rights and obligations of a party to the agreement.

Before turning to the forms of estoppel in international law a preliminary word might be said on the distinction between one form of estoppel known as collateral estoppel (sometimes issue estoppel or estoppel by record)[5] and *res judicata*. In the Anglo-American legal systems, and in international

[1] 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points', this *Year Book*, 28 (1951), p. 1.

[2] Ibid., p. 21, relying on the application of this principle in the Advisory Opinion on the *International Status of S.W. Africa* (*I.C.J. Reports*, 1950, at p. 135); Advisory Opinion on *Admission to Membership* (ibid., p. 9); *Corfu Channel* case (Merits), ibid., 1949, p. 25; the Dissenting Opinion of Judge Read in the *Asylum* case, ibid., 1950, pp. 323–4.

[3] Indeed, if the subsequent conduct did 'estop' the parties it would have to amount to a subsequent agreement upon a particular interpretation of the original terms or even a variation of those terms: but estoppel would be inappropriate here for the binding force of the subsequent agreement or variation would rest upon the fact of agreement, which has nothing to do with estoppel. See 'Harvard Research in International Law, Draft Convention on the Law of Treaties', *American Journal of International Law*, 29 (1935), Supp., p. 653, at p. 966, Comment.

[4] *I.C.J. Reports*, 1950, at p. 135.

[5] See 'Developments in the Law of Res Judicata', *Harvard Law Review*, 65 (1951–2), p. 820 et seq.; U.S. Restatement, (1942), Judgments, s. 68 Comment (*a*); Halsbury, op. cit., p. 181 et seq.

law too, *res judicata* presupposes identity of parties, object and cause:[1] the effect of *res judicata* is to bar the entire claim which shares identity in these three respects with a previous claim. In those cases where this identity is not present, as, for example, where the claimant in the second action proceeds upon a different cause of action, *res judicata* cannot apply. However, in English and American municipal law the notion of collateral estoppel is used to preclude the claimant from re-raising issues identical to those determined in a previous case between the same parties: the bar is partial, not complete, and the claimant is prevented from re-arguing only certain issues, not his claim as a whole. In reality this notion is one of partial *res judicata* and should be so treated by international tribunals. The reason why this notion is treated as estoppel rather than *res judicata* in English and American municipal law is an historical one;[2] it lies in the extreme formalism of the early systems of pleading and need not obscure the fact that the doctrine, in effect, has more kinship with *res judicata* than with estoppel. Its basis is *finis litium*, not the avoidance of inconsistency. Its advantage is that it prevents unnecessary litigation whilst at the same time conceding to a claimant his right to have any new cause of action adjudicated: as such it is a notion which international tribunals might usefully adopt.

It is not apparent, however, that this distinction between strict *res judicata* and partial *res judicata* (collateral or issue estoppel) has been specifically recognized by international tribunals. In the *Delgado* case[3] there had been a claim in 1876 for 'the seizure and detention of Mr. Delgado's property and the damages consequent thereto', and this claim had been adjudicated on its merits. In 1881 a second claim was brought for 'the value of the property' and the 'value of the net annual revenues for ten years'; despite the appearance of this second claim as a separate cause of action from the first, the Umpire held the matter was *res judicata*. However, the Umpire allowed to proceed a part of this second claim which was founded upon a decree of the Spanish government in 1873, and which had not been before the Umpire in 1876—scarcely reconcilable with the complete preclusion of the *res judicata* doctrine.

The nearest example of a tribunal's recognition of the distinction between the total bar of *res judicata* and the partial bar of issue estoppel is to be found in the *Haya de la Torre* case[4] in which the International Court took the view that the precise issue of whether or not there was a legal

[1] *Trail Smelter* arbitration, *U.N.R.I.A.A.*, vol. 3, p. 1951 and the authorities there cited.

[2] *Harvard Law Review*, 65 (1951–2), p. 820; Millar, 'The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law', *Michigan Law Review*, 39 (1940), pp. 8–9; for the origins of a similar rule in German medieval law see Engelmann, *History of Continental Civil Procedure* (1927), p. 149.

[3] Moore's *International Arbitrations*, vol. iii, p. 2196.

[4] *I.C.J. Reports*, 1951, p. 71.

obligation to surrender the refugee was not decided in the previous *Asylum* case;[1] it said:

"The question of the surrender of the refugee was not decided by the Judgment of November 20th. This question is new. . . . There is consequently no *res judicata* upon the question of surrender."[2]

Yet, even here, the recognition is not explicit for there was no need to distinguish this issue from any other issue raised in the later case which had in fact been decided in the earlier case.

It is submitted that much might be gained by a clear recognition by international tribunals of this distinction between the total bar of *res judicata* and the partial bar of collateral or issue estoppel. Let us suppose State A claims for damage to certain property belonging to one of its nationals in State B's territory and alleges the vicarious liability of State B for the acts of rioters; this claim is dismissed on the basis that there was no vicarious liability upon State B. In a subsequent claim State A claims for damage to other property, but occasioned in the same riots, and alleges both vicarious responsibility for the acts of the rioters and original responsibility upon State B for authorized acts of its armed forces. Clearly, for the court to apply the *res judicata* principle to the second claim would be unjust, for it would preclude State A from raising quite distinct issues from those previously determined. The most that ought to be done would be to apply the rule of collateral or issue estoppel so as to preclude State A from raising again the issue of vicarious responsibility.

For the purposes of the present paper, however, it may properly be assumed that estoppel rests upon the statements or conduct of the parties, and it is on the basis of this assumption that the various different forms of estoppel will now be examined.

(1) *The Forms of Estoppel*

In English municipal law there are three forms of estoppel: estoppel by record (otherwise known as collateral or issue estoppel), estoppel by deed[3] and estoppel in pais.[4] With the first we have already dealt in suggesting that its recognition would promote justice before international tribunals more than an unwarranted or inexact extension of the concept of *res judicata*. The second form of estoppel is one which is based upon the especial sanctity of a deed in English law, with the result that parties (and

[1] *I.C.J. Reports*, 1950, p. 266.

[2] Ibid., 1951, p. 80. See generally on this problem Cheng, op. cit., pp. 343–7.

[3] Defined for the purposes of English law as 'a formal document on paper or parchment duly signed, sealed and delivered (Wharton's *Law Lexicon*, 14th ed., p. 308). In both its forms, as an indenture between two or more persons, and as a deed-poll made by a single person as a binding declaration, the deed has analogies in international law, i.e. the treaty and the unilateral declaration.

[4] Halsbury, op. cit., pp. 168–256.

their privies) are bound by statements of fact contained in a deed which is their act. It will be submitted presently that in international law a similar sanctity is attached to treaties and other engagements in written form. The third form of estoppel is really estoppel by conduct, and this, too, has its analogy in international law.

(a) *Estoppel by treaty, compromis, exchange of notes, or other undertaking in writing*

Without suggesting that an obligation undertaken by a State and evidenced in writing is essentially different from an obligation undertaken in some other way,[1] it would seem that the evidence in writing distinguishes this type of undertaking from others, for it is to this evidence that courts will, in the first instance, resort to ascertain the meaning of any given undertaking. The maxim *pacta sunt servanda* illustrates the sanctity of the obligations: it is supplemented by the doctrine of estoppel in that statements of fact which condition and render meaningful these obligations are, by that doctrine, deemed to be binding on the parties to the agreement. The analogy suggested above is with that type of estoppel known to English law as estoppel by deed.

In the *Pious Fund* case,[2] the United States and Mexico had agreed by treaty that in those territories ceded by Mexico to the United States, residents wishing to retain Mexican citizenship must elect to do so, and those failing so to elect and remaining in the ceded territory should be considered to have elected to become citizens of the United States. In an arbitration in 1875, before Sir Edward Thornton as Umpire, the question arose of the nationality of the Roman Catholic Church in Upper California, part of the ceded territory; the Umpire stated:

'It has not been shown that the Roman Catholic Church in Upper California had declared any intention of retaining its Mexican citizenship and it can not but be concluded that it had elected to assume the citizenship of the United States. . . .'[3]

The effect was, therefore, to estop Mexico from contesting the character of the Church as a United States national since the statement in the treaty was binding upon her.

[1] See McNair, *Law of Treaties* (1938), p. 47; Hackworth, *Digest of International Law*, vol. v, p. 31. The *Report on the Law of Treaties* (A/CN. 4/63) of 24 March 1953 presented by Lauterpacht as rapporteur to the International Law Commission at its Fifth Session, Articles 1 and 2, together with comment, provide an exhaustive analysis of the different forms which engagements may take.

[2] Scott's *Hague Court Reports*, p. 3: this should not be confused with later decision of the Hague Tribunal in 1902 dealing with the same case but concerned with a question of *res judicata*, not estoppel as we are now treating it.

[3] Ibid., p. 49. McNair, op. cit., p. 126 cites the Report of the Law Officers of 2 June 1877 as giving an instance of estoppel by treaty: there the Law Officers advised that, by the Treaty of Washington, Great Britain had impliedly admitted the abrogation of certain former rights.

In the *Eastern Greenland* case[1] the Danish contention was that various bilateral[2] and multilateral[3] treaties, to which Norway was a party and which described Greenland as a Danish colony or as part of Denmark or by which Denmark was allowed to exclude Greenland from the operation of the agreement, precluded Norway from contesting Danish sovereignty over Greenland. This contention was upheld by the Permanent Court.[4]

It is, of course, clear that an estoppel will normally have effect only between the parties to the treaty which contains the representation. A Report by the Queen's Advocate dated 17 April 1857[5] dealt with this general question whether an estoppel can arise between *A* and *B* from a statement contained in a treaty between *A* and *C*. The point had then arisen whether a treaty with the United States in which a clause admitted that certain islands were part of the Republic of Honduras would preclude Great Britain from insisting upon certain concessions before making a similar admission in another treaty (till then unratified) with Honduras. The Queen's Advocate replied that in strict law the admission to the United States could not avail Honduras. The only exception to this rule (which is more part of the general rule of estoppel than an exception) is that an estoppel could both benefit and bind States in privity with the original contracting parties. For example, where in a treaty between *A* and *B* an admission is made as to the extent of *B*'s territory, *C*, a State in succession to *B*, could treat this as an estoppel against *A* or a State in succession to *A*.

One form of agreement particularly relevant to the doctrine of estoppel is the compromis which forms the basis of a tribunal's jurisdiction over a dispute. Statements of fact contained in the compromis will, if their meaning is clear, estop the parties from contesting those facts before the tribunal: as Witenberg has said: 'on ne peut, en effet, ni plaider ni prouver à l'encontre du compromis'.[6] In the *Venezuelan Preferential Claim*[7] Venezuela had, in February 1903, signed separate protocols with Great Britain, Italy and Germany in which the justice of these countries' claims against Venezuela was admitted and the customs revenues of two Venezuelan ports allocated to the purpose of satisfying these claims. These same protocols were in

[1] *P.C.I.J.* (1933), Series A/B, No. 53, pp. 22–147.
[2] I.e. the Commercial Treaty of 1826.
[3] I.e. the Universal Postal Conventions of 1920, 1924 and 1929.
[4] *P.C.I.J.* (1933), Series A/B, No. 53, pp. 70–71. See also the view of the British Government that by the Preamble to the Postal Convention of 1869 describing Honduras as a British 'Colony', a Convention signed by the United States, the United States was precluded from denying that Honduras was subject to British sovereignty: cited McNair, op. cit., p. 260.
[5] Cited McNair, op. cit., pp. 345–7.
[6] Witenberg, 'Théorie des preuves devant les jurisdictions internationales', *Recueil des Cours*, 56 (1936), at p. 26.
[7] The Venezuelan Arbitration before the Hague Tribunal, 1903, *Proceedings of the Tribunal* (U.S. Sen. Doc. 58th Congress, 3rd Session), vol. vii; the case is extensively cited by Lauterpacht as an instance of estoppel in *Private Law Analogies*, pp. 205, 253–4.

turn incorporated in the compromis of 7 May 1903, which provided for the submission of the claim of the allies to preferential treatment to arbitration by the Hague Tribunal. Great Britain contended that Venezuela was estopped by the terms of the compromis:

> 'The protocol is itself recited in the compromis of the 7th May—it is incorporated in it. Now, according to the first article of the protocol, the justice of the British claims is admitted, and it is from the compromis alone that the tribunal derives its jurisdiction. The compromis recites the protocol. It was in consideration of the admission contained in the protocol of the justice of the British claim that the blockade was raised and the Venezuelan vessels restored. It therefore would be . . . contrary to the most elementary and fundamental principles of jurisprudence to allow a power which was a party to this compromis reciting the protocol, which itself contains the formal admission on the strength of which the compromis was signed . . . to deny . . . the truth of the formal admission so contained in the protocol. . . . If a document contains an admission on the strength of which stipulations in the document are made, then the party signing the document is estopped from denying the truth of that admission."[1]

It is, of course, obvious that to create an estoppel the words must be clear. In the *Salem* case[2] the compromis referred to Salem as an American citizen: the question then arose whether, as the United States contended, this estopped Egypt from contending otherwise, or whether, as Egypt contended, this was a fact capable of argument before the arbitral tribunal since upon it rested the juridical basis of the United States' claim. The tribunal took the view that the strict grammatical construction of the phrase was not the only possible construction, for the phrase 'can also be read to mean that by the words "American citizen" the juridical basis for the claim for damages is indicated, and as the claim is disputed between the high parties in its entirety the investigation of the validity of this basis would also fall under the jurisdiction given by them to the Arbitral Tribunal'. Accordingly, once this ambiguity had been accepted, the Tribunal referred to the preliminary correspondence between the parties which confirmed them in the view that the admission of Salem's American nationality had been only for the purpose of a re-submission of Salem's case to the Egyptian Court of Appeals: the matter was, therefore, arguable before the arbitral tribunal.

(*b*) *Estoppel by conduct*

Representations of a state of fact may be made expressly or impliedly where, upon a reasonable construction of a party's conduct, the conduct presupposes a certain state of fact to exist. Assuming that another party to whom the statement is made acts to its detriment in reliance upon that statement, or from that statement the party making the statement secures

[1] Speech of Mr. Arthur Cohen, pp. 1259–69.
[2] (Egypt/U.S.A.) January 1931: *U.N.R.I.A.A.*, vol. ii, at p. 1180.

some advantage, the principle of good faith requires that the party adhere to its statement whether it be true or not. It is possible to construe the estoppel as resting upon a responsibility incurred by the party making the statement for having created an appearance of fact, or as a necessary assumption of the risk of another party acting upon the statement. Witenberg has said:

'Cependant, de toutes les formes que revêt l'estoppel se déduisent, comme principes communs, d'une part la responsabilité des apparences créées, d'autre part, l'obligation pour celui qui agit d'assumer le risque des réactions que son activité a pu normalement provoquer chez lui.'[1]

In essentials, however, the principle of good faith lies behind the responsibility and the risk. It is this principle of good faith which gives rise to the term 'equitable estoppel' to describe this form of estoppel, but equity in this connexion denotes, not a departure from established rules of international law,[2] but the basis of good faith upon which so many of those substantive rules rest. The American Commissioner in his Conclusions in the *Santa Isabel Claims*[3] said:

'The modern rule is: equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might otherwise have existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.'[4]

In that case, dissenting from his fellow Commissioners, he concluded that Mexico was estopped from denying responsibility for the acts of the bandit Villa. The estoppel rested, in his view, partly on the convention by which Mexico agreed to submit these claims to arbitration and which stated that all claims should be decided 'in accordance with the principles of justice and equity', and partly upon the conduct of Mexico's representatives. The President, Carranza, had extended a guarantee of protection and safety to the American citizens who were killed by Villa, and General Obregon, in command of the regular Mexican forces, had given a similar offer of protection.

The representation of fact must be unequivocal in the sense that it can reasonably support the meaning attributed to it by the party raising the plea of estoppel: and that party must satisfy the court that it understood

[1] 'L'Estoppel. Un aspect juridique du problème de créances américaines', *Clunet* (1933), vol. lx, p. 529 at p. 532.

[2] See the detailed discussion of the relation between equity and law in *The Cayuga Indians* (1926) U.S./G.B. Claims Arbitration: Hudson, *Cases on International Law* (1929), p. 1283: 'general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any state' is a description we should accept.

[3] U.S./Mex. Special Claims Commission' in *American Journal of International Law*, 26 (1932), p. 196.

[4] Ibid., at p. 196.

the statement to have that meaning. In the *Eastern Greenland* case,[1] Denmark contended that, in effect, Norway was precluded from contesting Danish sovereignty over Greenland by the Ihlen declaration of 22 July 1919; this was the reply of Mr. Ihlen, the Norwegian Minister of Foreign Affairs, given orally to the Danish Minister. The Permanent Court declined to accept this view, saying:

'A careful examination of the words used and of the circumstances in which they were used, as well as of the subsequent developments, shows that M. Ihlen cannot have meant to be giving there and then a definitive recognition of Danish sovereignty over Greenland, and shows also that he cannot have been understood by the Danish Government at the time as having done so.'[2]

The Court did, however, regard the Ihlen declaration as constituting an engagement obliging Norway in the future to refrain from occupying any part of Greenland.[3]

Two cases concerning the effect of the conduct of individuals on their claim of nationality may be cited to illustrate further the principle that an estoppel will only lie when the conduct is unambiguous in its representation of fact. In the *Sharpe* case[4] before a British-American Commission, the United States argued that by exercising voting powers in the United States the claimant had estopped himself from claiming British nationality. Upon proof that voting was not confined to citizens, the Tribunal refused to treat this act as unambiguous and creating the binding estoppel for which the United States contended: at most it could afford strong evidence of naturalization. In contrast, in the *Canevero* case[5] before the Permanent Court of Arbitration, the claimant's many acts of citizenship, especially in standing as a candidate for the Senate where none were admitted except Peruvian citizens, enabled Peru to regard the claimant as a Peruvian citizen: the acts were, in this case, unequivocal in their implication.

The representation involved in a course of conduct must, apparently, be made to or directed to the party which pleads the estoppel: a party cannot rely upon statements which are not addressed to it and which are not

[1] *P.C.I.J.* (1933), Series A/B, No. 53, pp. 22–147.

[2] Ibid., p. 69.

[3] See below, p. 192. It does not appear that the U.K. used the plea of estoppel in the *Corfu Channel* case (Preliminary Objection), *I.C.J. Reports*, 1948, p. 19, against the Albanian argument that it was not bound to accept the Court's jurisdiction despite the Albanian letter of 2 July 1947 from the Minister of Foreign Affairs to the Registrar, stating 'il est prêt, malgré cette irrégularité commise par le Gouvernement Britannique, à se présenter devant la Cour'. Perhaps the reasons for this were (1) that the statement was not made to the U.K., and (2) that the U.K. was not prejudiced by relying on the statement.

[4] Moore's *International Arbitrations*, vol. iii, p. 2548.

[5] Italy/Peru: *American Journal of International Law*, 6 (1912), p. 747. See also the *Corvaia* case, Ralston's *Venezuelan Arbitrations* (1903), p. 2782, where the claimant, having accepted public and confidential employment with one State as a naturalized citizen of that State, was estopped from setting up the citizenship which he formerly held. Also the *Texas Bonds* case, Moore's *International Arbitrations*, vol. iv, p. 3591.

intended to or likely to affect its course of action.[1] Hence, although occasionally cited as an illustration of estoppel,[2] the *Croft* case[3] is not properly construed as a case of estoppel. Great Britain argued that Portugal was estopped from denying the truth of the British allegations of a denial of justice since Portugal had, by a decree in 1851, described the attitude of the Portuguese administrative organs (whose acts were called in question) as a denial of justice. Yet, since this was a decree submitted to the Portuguese Council of Senate, and not to the British government, it could not really be relied upon to create an estoppel.[4]

Many of the cases on estoppel by conduct illustrate the simple principle that the law will demand consistency in conduct where the result of inconsistency would be to prejudice another party. In the *Shufeld Claim*[5] the United States argued that the conduct of Guatemala in treating a concession to Shufeld as a valid concession for a period of six years precluded Guatemala from denying the validity of the concession before the Tribunal. The argument of the United States was that:

"The principle that an international tribunal will not regard as a nullity a contract concluded by a government when that government, by its acts performed in pursuance of that contract, has clearly recognised the contract as valid, is similar to the doctrine of estoppel in municipal law. . . . The U.S. contends that where, as in this case, a government enters into a contract, repeatedly assures the other party, or his assignee, of the validity of that contract and accepts from the other party, or his assignee, benefits growing out of the contract, an international tribunal is constrained to hold that such a contract is valid and a binding one.'[6]

[1] Witenberg, *Théorie des preuves devant les juridictions internationales*, p. 27.

[2] Lauterpacht, op. cit., p. 204; Ralston, *Law and Procedure of International Tribunals*, Supp. (1936), s. 402 (*b*).

[3] Moore's *International Arbitrations*, vol. v, pp. 4979-83.

[4] Hence Friede, op. cit., p. 523; and Holohan, 'Legal Aspects of the Inter-Allied Debt', *Boston University Law Review*, 14 (1934), pp. 47–81 at p. 78, criticize reliance on this case as one of estoppel. See Cheng, op. cit., p. 148 for other reasons.

Contrast the Decree of the Peruvian Government in May 1877 disclaiming responsibility for the acts of the pirate vessel Huascar: this was rightly construed by the Law Officers of the Crown to be addressed to maritime nations, including Great Britain, and the Law Officers took the view that Peru was consequently estopped from claiming the vessel was of Peruvian nationality: Draft of letter prepared for transmission to the Peruvian Minister in London, cited McNair, *International Law Opinions*, vol. i, p. 277.

[5] Dept. of State, Arbitration Series No. 3, Washington 1932, s. 65 et seq.: *U.N.R.I.A.A.*, vol. ii, p. 1081.

[6] Ibid., at s. 68. The Tribunal approved of the *Claim of Joseph E. Davies* (1926) U.S./Mex. Opinions of Commissioners under Convention concluded 8 September 1923 between U.S. and Mexico, Washington, 1927, s. 199 et seq.: in that case three payments under the contract to the claimant by Mexico precluded Mexico from denying the validity of the contract. See also the *Mariposa Claim*, American-Panamanian General Claims Arbitration, Dept. of State Arbitration Series No. 6, Washington, 1934, p. 547; *Spanish Zone of Morocco Claims* (1923), *U.N.R.I.A.A.*, vol. ii, p. 685 at p. 686; *North Atlantic Coast Fisheries* case (1910), Scott's *Hague Court Reports*, p. 141 at p. 186. See also the Report of the Law Officers of the Crown dated 7 February 1873 to the effect that Uruguay, having acted upon the Postal Convention of 1853 for many years, could not legally denounce it on the ground of non-compliance with constitutional requirements; this is very much akin to estoppel and could be so treated: cited McNair, op. cit., p. 38.

Referring to this contention, the Arbitrator said: 'I have no doubt that the contention of the United States is sound and in keeping with the principles of international law and I so find.'

Similarly, when a State has treated an individual as having a particular nationality it cannot, at a later stage, obtain an advantage over him by treating him as not being possessed of that nationality. In *Kunkel et al.* v. *Polish State*[1] the Tribunal took the view that Poland, having liquidated the estates of certain persons on the ground that they were of German nationality, was estopped from denying their German nationality so as to deprive those persons of the legal remedies afforded to German nationals under the Peace Treaties. In *Kahane* v. *Parisi and the Austrian State*[2] the conduct of the Roumanian Government and the Central Powers in treating the native Jews of Roumania as Roumanians throughout the war estopped them from denying to these Jews the status of Roumanian 'ressortissants' within the meaning of the treaty of St. Germain.

There are in English and American municipal law two rules which are sub-species of estoppel by conduct: they are, first, the rule of election of remedies, and, second, the rule of preclusion of inconsistent positions.[3] Both rules operate within the domain of judicial proceedings but they are neither of them cases of *res judicata* (nor are they treated as *res judicata* in municipal law) for they relate to the conduct of the parties before the Tribunal, not to the effect of the judgment of the Tribunal on issues decided in the judgment. By the rule of election of remedies a party pursuing one remedy rather than another, where that party is entitled to recover via either remedy but not both, is precluded from subsequently pursuing the remedy against which he elected in the first instance. The case of the *Yukon Lumber Company*[4] seems to indicate an acceptance of this particular form of estoppel by an international tribunal: in that case one Mountain had sold timber to the United States authorities and, certain dues on the timber being unpaid, the question arose whether the United States was liable to pay the dues to the British Government. The Tribunal stated:

'Even now, before this Tribunal, the British government claim for payment of dues, and they have added only as an alternative a claim for the value of the timber. The opinion of this Tribunal is that it is impossible to admit that after having at the beginning ratified the trespass and claimed during thirteen years for only payment of dues,

[1] (1925) German-Polish Mixed Arbitration Tribunal: *Annual Digest, 1925–1926*, Case No. 318.

[2] (1929) Austro-Roumanian M.A.T.: *Annual Digest, 1929–1930*, Case No. 131: see also *Rychnewsky et al.* v. *Empire Allemand*, (Germ./Czech.) *Recueil des décisions des tribunaux arbitraux mixtes*, vol. iii, p. 1011 at pp. 1017–18; *Kramata* v. *Empire Allemand*, ibid., p. 988.

[3] For the operation of these rules in English municipal law see Halsbury, op. cit., p. 183, and in American law see *Harvard Law Review*, 65 (1951–2), pp. 822–5.

[4] (1910), Nielson, s. 438 et seq. cited in Friede, op. cit., pp. 533–4.

and still now claiming for that payment, the British government is entitled to contend that they retained the ownership of the said timber and claim for its value as representing the thing itself which has been consumed. Moreover, the British government does not claim first for the value and secondly for the dues, but first for the dues, and in the alternative for the value. It seems that this alternative is somewhat contradictory, as it is clear that the claim for the dues is exclusive of a claim for recovery.'

By the rule precluding inconsistent positions a party will be estopped from taking up a position on the facts of an issue inconsistent with that he has previously taken up on the same issue. In the *S.S. Lisman*[1] the claimant before a British prize court in 1782 had proceeded on the ground that, whilst the Crown had a right to seize the goods and detain the ship, there was an undue delay on the part of the Crown in taking the steps they were otherwise entitled to take. However, in a subsequent claim before an international tribunal the claimant complained of the actual seizure of the goods and detention of the ship; the Tribunal stated:

'. . . it is seen at once that by the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ships was lawful, and that he did not complain of them, but only of undue delay from the failure of the Government to act promptly, the claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now stands on. . . .'[2]

(2) *The Essentials of Estoppel*

So far our concern has been with the various forms which estoppel may take. It is suggested that estoppel, in whatever form it arises, operates as a binding preclusion only when certain essential conditions are present. It is to a consideration of these essential conditions that we now turn.

(*a*) *The meaning of the statement must be clear and unambiguous*

Reference has already been made[3] to the *Eastern Greenland* case,[4] the *Sharp* case,[5] the *Canevero* case[6] and the *Salem* case[7] as illustrations of the principle that an estoppel can only rest upon a statement which in its meaning is clear and unambiguous: and it matters not whether the statement be conveyed in writing or by conduct. There is ample authority to support this proposition.

[1] (1937) U.S./G.B., *U.N.R.I.A.A.*, vol. iii, p. 1769.
[2] Ibid., at p. 1790.
[3] Above, p. 185.
[4] *P.C.I.J.* (1933), Series A/B, No. 53, pp. 22–147. In the same case Norway sought to argue that the Danish notes to various powers between 1915 and 1921, in seeking recognition of the Danish position in Greenland, estopped her from claiming that she had sovereignty over Greenland at that time: the Court rejected this view on the ground that this was not a necessary construction of the Danish notes (see Judgment, pp. 55, 62).
[5] Moore's *International Arbitrations*, vol. iii, p. 2548.
[6] Italy/Peru: *American Journal of International Law*, 6 (1912), p. 747.
[7] *U.N.R.I.A.A.*, vol. ii, p. 1180.

In the *Serbian Loans* case[1] the question arose whether, by their conduct in accepting payment of interest upon the loans in French francs as opposed to 'gold francs', the French bondholders had represented that they were prepared to accept payment in French francs. If they had, then despite the derogation from the terms of the loans it was arguable that they were henceforth estopped from claiming payment according to the strict terms of the loans. On this point the Permanent Court said:

'. . . when the requirements of the principle of estoppel to establish a loss of right are considered, it is quite clear that no sufficient basis has been shown for applying the principle in this case. There has been no clear and unequivocal representation of the bondholders upon which the debtor state was entitled to rely and has relied.'[2]

Similarly, in the *Russian Indemnity* case[3] before the Hague Tribunal in 1912, the award of the Tribunal stressed the lack of ambiguity in the conduct of the parties relating to the status of the Russian victims of war operations as indemnities.

Clearly the question whether there is any ambiguity, apparent or latent, and if so how it should be resolved, is a question to which the established rules of interpretation apply. This much is apparent from the estoppel cases, that a tribunal will not take a phrase out of its context and upon that isolated phrase create an estoppel: on the contrary, the tribunal will review the whole circumstances and the background of diplomatic negotiation and correspondence even for a period of thiry years prior to the hearing of the case as it did in the *Russian Indemnity* case.[4] In the *Eastern Greenland* case,[5] though, as we have previously suggested, the Permanent Court chose to regard the Ihlen declaration as creating a binding obligation rather than an estoppel, the application of a similar principle is called for in order to discover the real meaning of the declaration.[6] Indeed, unless and until the meaning of the representation is clear, there is no justification for binding one or other of the parties to that meaning.

One final point seems relevant here. The estoppel rests on the representation of fact, whereas the conduct of the parties in construing their respective rights and duties does not appear as a representation of fact so much as a representation of law. The interpretation of the rights and duties of parties to a treaty, however, should lie ultimately with an impartial

[1] *P.C.I.J.* (1929), Series A, Nos. 20/21, pp. 5–89.
[2] Ibid., p. 39. France also pleaded estoppel against Serbia on the basis of Serbia's own legislation: see reply of Basdevant (Series C, No. 16, III, p. 255). '. . . La Serbie ne peut pas prétendre, et elle n'a d'ailleurs pas prétendu, que les clauses ainsi établi par sa législation ne seraient pas valables. . . . Si elle tentait de le faire ou de le prétendre, elle s'exposerait à se voir opposer cette doctrine de l'estoppel à laquelle il a été fait allusion . . . on a dit d'elle qu'elle interdit à quelqu'un de souffler à la fois le chaud et le froid.'
[3] Scott's *Hague Court Reports*, p. 297 at p. 317. See below, p. 192.
[4] Ibid.
[5] *P.C.I.J.* (1933), Series A/B, No. 53, pp. 22–147. See also the *Anglo-Norwegian Fisheries* case, *I.C.J. Reports*, 1951, at p. 138; *United States Nationals in Morocco* case, *I.C.J. Reports*, 1952, at p. 200.
[6] See above, p. 185.

international tribunal, and it would be wrong to allow the conduct of the parties in interpreting these rights and duties to become a binding interpretation of them. The International Court has rightly said that 'interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument'.[1] The relation of estoppel to the sphere of fact and law is that it operates in the former only, but in so doing it may determine the context within which the legal rights and duties of the parties have meaning and application: a nice distinction, but a necessary one.

(b) The statement or representation must be voluntary, unconditional and authorized

In general, and leaving aside the question of treaties imposed upon the vanquished after a war, a representation which creates an estoppel must be made voluntarily by the party against which the estoppel is pleaded. It follows that duress or fraud of any material kind will nullify the plea of estoppel. In the *Salvador Commercial Company* case,[2] Salvador contended that the Company had not fulfilled the terms of its concession, despite the reports of its agents that it had in fact done so; the Arbitrators said:

'It is of course obvious that the Salvador Government should be estopped from going behind those reports of its own officers on the subject and from attacking their correctness without supplementary evidence tending to show that such reports were induced by mistake or were procured by fraud or undue influence. No evidence of this kind is introduced here.'[3]

The obvious implication is that upon proof of fraud or duress the estoppel would have been nullified. Similarly, in the *Cuculla* case,[4] when faced with the argument that the constitutional government of Mexico had accepted responsibility for the acts of the rebel Zuloaga Government by the treaty of Puebla with Great Britain, the Tribunal said:

'But these concessions, extorted by a duress as actual and relentless as ever pressed upon an embarrassed and exhausted government, were made to buy its peace and, rejected by its powerful adversaries, can not now furnish any assistance to this commission in determining the interesting question presented in this case.'[5]

A situation parallel to that created by fraud or duress, but obviously not identical, is that in which the conduct of one party lacks a 'voluntary'

[1] *A.O. on the Status of S.W. Africa* (*I.C.J. Reports*, 1950, p. 129 at p. 135): the dictum refers to the declarations by South Africa to the League and the United Nations acknowledging that its duties under the Mandate continued.

[2] *United States Foreign Relations* (1902), p. 862.

[3] Ibid., p. 867.

[4] Moore's *International Arbitrations*, vol. iii, p. 2873.

[5] Ibid., p. 2879. *Sed quaere* if the United States, as claimant in this case, could have pleaded estoppel on the basis of a representation made to Great Britain and not to the United States; there was no privity between the two.

character by reason of that party's inability to act otherwise; this would likewise vitiate the plea of estoppel. In the *Serbian Loans* case,[1] one of the grounds upon which the Court refused to regard the bondholders as estopped from claiming payment under the original terms of the debt was the simple inability of the bondholders to do anything but accept the Serbian payment of French francs, pending their efforts to organize concerted measures for the defence of their rights and to interest the French Government in their case. The Permanent Courts said 'it does not even appear that the bondholders could have effectively asserted their rights earlier than they did, much less that there is any ground for concluding that they deliberately surrendered them'.[2] It is possible also that excusable error in making the statement can preclude the setting up of the plea of estoppel upon the statement:[3] but the error would have to be 'excusable', that is to say, not due to the fault or neglect of the party making the statement, for otherwise that party could mislead another and yet rely upon its own fault to escape the liability which an estoppel might impose.

Where a representation is made conditionally, either in the sense that it is made in the course of negotiations with a view to a settlement which does not materialize, or in the sense that it is made subject to conditions later unfulfilled by the other party, it cannot create a binding estoppel. In the *Advisory Opinion on the European Commission of the Danube*[4] the Permanent Court referred to the Declaration of the three powers, the *modus-vivendi* of October 1922, in these terms:

'It will suffice to observe that, though it is perfectly true that the three delegates of France, Great Britain and Italy, with a view to arriving at an amicable solution of the difficulties with which the Commission was faced, declared that they would agree to leave to the Roumanian authorities the enforcement of the regulations . . . it is equally true that this proposal was made dependent upon conditions which were not accepted by the Roumanian government. No agreement was therefore reached and the matter was left as it stood. The most that can be inferred from what then happened is that the three delegates did not consider it impossible for the European Commission to perform its duties even without the power of making and enforcing regulations above Galatz.'[5]

[1] *P.C.I.J.* (1929), Series A, Nos. 20/21, pp. 5–89.

[2] Ibid., p. 39.

[3] See Cheng, op. cit., p. 148, citing the *Mavrommatis Concessions* case, *P.C.I.J.*, Series A, No. 5, p. 31, and the *Closure of Buenos-Aires* case (1870), Moore's *International Arbitrations*, vol. ii, p. 637: these appear to be cases of admission rather than binding estoppel, but the principle is probably applicable to estoppel. See also the *Kling Claim* (1930) U.S./Mex. General Claims Commission, *Opinions of Commissioners* (1931), p. 36, where a Consul's report did not bind the United States since it was prepared without detailed examination of the circumstances. In the *Eastern Greenland* case, Judge Anzilotti seems to have accepted, in his dissenting judgment, the principle that an excusable error would preclude the creation of a binding undertaking: but, on the facts, he held the Ihlen declaration was not an excusable error (Series A/B, No. 53, p. 92).

[4] *P.C.I.J.* (1927), Series B, No. 14, p. 6.

[5] Ibid., p. 35. See also the *Eastern Greenland* case (Judgment, p. 73) where the Court stressed that the Ihlen undertaking was 'unconditional and definitive'.

The Permanent Court appears to have treated this *modus vivendi* as admissible evidence, with a limited influence, but not as a binding estoppel.

It is, finally, clear that before a party can be bound by a representation the representation must have been made with its authority, express or implied: in the absence of such authority another party would not be entitled to rely upon the statement. Where the authority is expressly given no real difficulty arises, but in cases of implied authority it will be a question of construction of the status of the person actually making the representation and the sphere within which he purports to act with authority: there is a notion of 'apparent' authority which it would seem international tribunals will accept. In the *Eastern Greenland* case[1] the Court had no doubt that the Norwegian Minister of Foreign Affairs, acting within the sphere of foreign affairs, could be treated by the Danish Government as having authority to give a reply binding on his Government.

'The Court considers it beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.'[2]

As we have seen, in the *Salvador Commercial Company* case[3] the Government was estopped by the reports of its agents whose function was to report upon the degree of compliance by the Company with the concession; and in the *Russian Indemnity* case,[4] the Hague Tribunal held the Russian Government bound by the conduct of its embassy which had negotiated on its behalf. One rather curious case in this context is the *Chase Claim*[5] where the United States Minister in Panama, acting privately and without government instructions, had negotiated a settlement between an American national and the Panamanian Government. The arbitrators held that the participation of this Minister gave to the settlement the character of a diplomatic settlement and precluded the United States from bringing a claim contesting its validity. This reasoning is difficult to follow, for there is nothing to suggest that the Panamanian Government understood the

[1] *P.C.I.J.* (1933), Series A/B, No. 53, pp. 22–147. [2] At p. 71.

[3] United States *Foreign Relations*, 1902, p. 862 at p. 867. This whole problem is in essentials the same as the problem of authority to conclude a binding treaty or other obligation. See Memorandum of the Solicitor for the Dept. of State (Clark), 14 January 1911 (cited Hackworth, *Digest*, vol. v, p. 393): '. . . there is little doubt but that a nation entering into an arrangement by the exchange of diplomatic notes is, certainly as to the other negotiating power, estopped to say that the Foreign Office, in making such arrangement, had no power or authority in the premises.'

[4] Scott, *Hague Court Reports*, p. 297 at p. 321. See the *Cuculla* Case, Moore's *International Arbitrations*, vol. iii, p. 2873 where the Tribunal rejected the plea that the Zuloaga Government was authorized to contract on behalf of Mexico.

[5] American-Panamanian General Claims Arbitration, Dept. of State Arbitration Series, No. 6, Washington, 1934, p. 374: *Annual Digest, 1933–1934*, Case No. 90. The case is dealt with by Friede, op. cit., p. 541 as one of estoppel. See *Federal Coop Insurance Corp.* v. *Merrill*, 68 Sup. Ct. 1 (noted in *Georgetown Law Review*, vol. 16, pp. 273–6) for the principle that a sovereign is liable only for the authorized acts of his agent.

Minister to be acting on his Government's behalf. The more reasonable view, taken by the United States Commissioner on the Tribunal, is that the participation of the Minister sufficed to negative the claimant's plea that the settlement was imposed upon him by the Panamanian Government under duress.

(c) *Reliance in good faith upon the representation of one party by the other party to his detriment (or to the advantage of the party making the representation).*

This third essential illustrates how the principle of good faith lies at the very root of the doctrine of estoppel, for that doctrine has binding effect only where the party making the representation has secured some advantage thereby, or the other party relying on the representation has as a result suffered some detriment: the consequent change in the position of the parties means that in order to maintain good faith the party must stand by his representation. The advantage to the one party or detriment to the other is the 'consideration', to use an English term of contract law, which binds the parties. In the case of estoppel by conduct it must be clearly shown to exist; in the case of estoppel by treaty or other undertaking in writing it lies in the reciprocal exchange of promises or, where the undertaking is unilateral, in the reliance of a party on that undertaking. In the *Serbian Loans* case[1] the Permanent Court stated:

'. . . when the requirements of the principle of estoppel to establish a loss of right are considered, it is quite clear that no sufficient basis has been shown for applying this principle in this case. . . . There has been no change in position on the part of the debtor state. The Serbian debt remains as it was originally incurred; the only action taken by the debtor state has been to pay less than the amount owing under the terms of the loan contracts.'[2]

Similarly, when in the *Tinoco* arbitration[3] Costa Rica argued that the non-recognition by Great Britain of the Tinoco Government during its period of control estopped the British Government from claiming that the Tinoco Government could confer rights binding upon succeeding governments, the arbitrator, Taft C.J., stated:

'I do not understand the arguments on which an equitable estoppel in such a case can rest. The failure to recognise the de facto government did not lead the succeeding government to change its position in any way upon the faith of it. . . . An equitable estoppel to prove the truth must rest on previous conduct of the person to be estopped, which has led the person claiming the estoppel into a position in which the truth will injure him. There is no such case here.'[4]

[1] *P.C.I.J.* (1929), Series A, Nos. 20/21, pp. 5–89. [2] At p. 39.

[3] *American Journal of International Law*, 18 (1924), p. 147.

[4] Ibid., at p. 156. This award was approved in the *George W. Hopkins* case (1926), U.S./Mex.: *Annual Digest, 1925–1926*, Case No. 317. Taft C.J. refused to follow *Schultz's* case (Moore's *International Arbitrations*, vol. iii, p. 2973), *Janson's* case (ibid., p. 2902), and *Jarvis's* case

In the *Shufeld Claim*[1] the United States stressed the fact that for six years the Guatemalan Government had received benefits under the contract and Shufeld had expended money on the concession. In the *Russian Indemnity* case[2] the Hague Tribunal noted that Turkey had obtained value for its agreement on indemnity by the cessation of hostilities; and in the *Santa Isabel Claims*[3] the American Commissioner spoke of one 'who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse. . .'. It is on the same basis that Friede criticizes the use of the *Chorzów Factory* case[4] as an authority on estoppel, for there was no reliance on the conduct of the Polish Government to the detriment of the claimants.[5] In the absence of a change of position of the parties of the kind we have considered, the effect of representations or admissions is that they operate, not as binding estoppels, but as evidence which can be used to weaken a party's case on the ground of inconsistency.[6]

Before turning to this distinction between binding estoppels and evidence of a merely probative value, it is necessary to note that the effect of an estoppel may bear upon persons who are not parties in the strict sense; in municipal law this wider effect is described in the statement that an estoppel binds 'parties and their privies'. Privity, in this sense, will exist between persons whose interest is so identified that their claims are based upon the same legal right, or between persons who enjoy a mutual or successive relationship to the same rights of property. Often the representations of a State will estop nationals of that State,[7] and a State claiming upon a national's behalf will be estopped by the national's own representations in so far as the State claims in a purely representative capacity. It will be less frequently found that States are thus identified in interest,[8] although cases could arise on succession to territory where privity would exist.

(Ralston's *Ven. Arb.* (1903), p. 150). See the view of the State Department on the evidential weight of non-recognition on 8 August 1925; cited in Hackworth, *Digest*, vol. v, pp. 496–7.

[1] *U.N.R.I.A.A.*, vol. ii, p. 1081 at p. 1094.

[2] Scott, *Hague Court Reports*, p. 317.

[3] *American Journal of International Law*, 26 (1932), p. 196. See also *Cushing* v. *Laird*, 107 U.S. 69: *Prize Cases decided in the U.S. Supreme Court, 1789–1918*, vol. iii, p. 1853.

[4] *P.C.I.J.* (1927), Series A, No. 9, at p. 31.

[5] Friede, op. cit., p. 525: the judgment is better authority for the proposition that one party who has precluded another from fulfilling certain obligations cannot thereafter call upon that other to fulfil those same obligations.

[6] See below, p. 195.

[7] In *The Amy Warwick et cet* (1862) 2 Black. 635: *Prize Cases decided in the United States Supreme Court*, vol. iii, p. 1438, official recognition of belligerency by Great Britain estopped British citizens from denying that a war existed, together with its consequences upon neutrals.

[8] See McNair, 'The Legality of the Occupation of the Ruhr', in this *Year Book*, 5 (1924), p. 17 at p 36, who describes the principle of privity in estoppel as a particular application of the general principle *res inter alios acta*: he doubted that the interpretation of the Versailles treaty by Great Britain could affect the rights of Germany, since there was no privity between the two. See also the *Cuculla* case, Moore's *International Arbitrations*, vol. iii, p. 2873.

(3) *Representations not creating a Binding Estoppel but having Probative Value*

Where one or other of the foregoing essentials of a binding estoppel is absent the representation, whether by words or conduct, does not lose all value for, although lacking conclusive effect, it may still be adduced in evidence as an admission to show a lack of consistency or weakness in a party's position. Cheng, contrasting simple admissions with the true equitable estoppel, says:

'Unlike the latter, an admission does not peremptorily preclude a party from averring the truth. It has rather the effect of an *argumentum ad hominem*, which is directed at a person's sense of consistency, or what in logic is paradoxically called the "principle of contradiction".'[1]

In the *Tinoco* arbitration,[2] Taft C.J. rejected the suggestion that non-recognition would create an estoppel but admitted that it had a certain probative value in saying 'the evidential weight of non-recognition against the claim of its *de facto* character I have already considered and admitted. . .'.[3] The *Croft* case is,[4] as we have already suggested, a case of admission, not estoppel; similarly with cases like the *Mechanic*[5] and the *Meuse* case.[6]

McNair,[7] after reviewing Great Britain's attitude since 1920 towards Germany, rightly suggested that in so far as Great Britain might choose to contest the legality of the French occupation of the Ruhr, an 'international tribunal could hardly fail to be unfavourably impressed by those inconsistencies in the event of a direct juridical issue being raised between Great Britain and France'.[8] But this principle of weighing evidence with a view to detecting inconsistency is not the same as the principle of binding estoppel: as McNair put it, 'this is not estoppel *eo nomine*, but it shows that international jurisprudence has a place for some recognition of the prin-

[1] Op. cit., p. 147.

[2] *American Journal of International Law*, 18 (1924), p. 147.

[3] Ibid., p. 149.

[4] Moore's *International Arbitrations*, vol. v, pp. 4979–83.

[5] Ibid., vol. iii, p. 3221: in that case Ecuador, having abided by the principle 'free ships, free goods' established by Treaty of 1795 when advantages were to be gained thereby, was held to be bound by the principle when it imposed an obligation.

[6] *P.C.I.J.* (1937), Series A/B, No. 70, at p. 25 where the Court refused to admit the Netherlands complaint of an act of which they had themselves set an example in the past. See also the argument of Great Britain in the *Fur Seal* arbitration (Moore, op. cit., vol. i, pp. 775 et seq.) when the inconsistency between the United States position vis-à-vis the Russian ukase of 1821 and her position vis-à-vis Great Britain was demonstrated.

[7] 'The Legality of the Occupation of the Ruhr', this *Year Book*, 5 (1924), pp. 34–37. The same author in *Law of Treaties* (1938), p. 407, cites a similar example in the dispatch from the Secretary of State for Foreign Affairs to the British Ambassador at Tokio, 14 July 1916, which took the view that France, by her attitude on the effect of annexation on existing commercial rights in Madagascar after the French annexation, was debarred from appealing to Great Britain to join in protest to Japan over the Japanese annexation of Korea.

[8] This *Year Book*, 5 (1924), p. 36.

ciple that a State cannot blow hot and cold—*allegans contraria non audiendus est*'.[1]

There is no special difference in the form which an admission, as opposed to an estoppel, may take. To a certain extent admissions have a wider scope than estoppels, for an admission may concern a question of the interpretation of a legal rule or the existence or non-existence of legal rights; estoppels, in contrast, are confined to representations of fact. There may, however, be circumstances in which the admission covers a statement of fact, and in these circumstances the question will arise whether this admission should be treated as a binding estoppel or merely as a statement having probative value. This question cannot, in our submission, be answered by looking at the form which the statement takes: the answer lies in ascertaining whether the statement fulfils the essential conditions of an estoppel. If it does not, then, although denied binding effect, it can still be adduced as evidence to weaken the case which the party making the statement or admission now puts forward.

Sir Gerald Fitzmaurice, in a recent article in this *Year Book*,[2] has drawn upon some recent decisions of the International Court to illustrate the Court's attitude towards admissions. This attitude shows an application to admissions of principles similar to those applied to estoppels: for example, an admission will not lightly be presumed against a State and will be considered only within its general context, not as an isolated statement;[3] superficial contradictions and inconsistencies will not be given much importance.[4] Similarly, mere proposals or concessions made in the course of negotiations will not rank as admissions.[5] All these principles are, as we have shown, applicable also to estoppels, but in all the cases where a statement is treated as an admission rather than as a binding estoppel one or more of the conditions essential to an estoppel are absent. For example, in the *Minquiers and Ecrehos* case[6] the Court dealt with a letter in which the French Government had, apparently, admitted that the Minquiers were in 1819 an English possession.

'By his Note of June 12th, 1820, to the Foreign Office, already referred to . . ., the French Ambassador in London transmitted a letter from the French Minister of Marine of Sept. 14th, 1819 to the French Foreign Minister, in which the Minquiers were stated to be 'possédés par l'Angleterre', and in one of the charts enclosed the Minquiers group was indicated as being British. It is argued by the French Government that this admission cannot be invoked against it, as it was made in the course of negotiations which did not result in agreement. But it was not a proposal or concession made during negotiations, but a statement of facts transmitted to the Foreign Office by the French Ambassador, who did not express any reservation in respect thereof. This statement must therefore be considered as evidence of the French official view at that time.'[1]

The Court, therefore, treated this admission as 'evidence' merely, not as conclusive of the fact that in 1819 England possessed sovereignty over the Minquiers. Indeed, the Court could not have regarded this as an estoppel, for one of the essential conditions of estoppel was missing, namely the proof of some advantage gained thereby to France or some detriment to England. In the absence of that condition the statement could only qualify as an admission.

The actual value of any particular admission will, of course, be for the Tribunal to decide in view of all the facts of the case. Factors such as duress, fraud, or mistake will doubtless vitiate an admission just as they do an estoppel; and an admission made directly to a party will have more effect than an admission to be gleaned from, say, correspondence between different departments of the administration of a State.

The difference in effect between an estoppel and an admission is then, first and foremost, that the former is binding whereas the latter has mere probative value. An estoppel will exclude altogether evidence of a disputed fact, whereas an admission will either render evidence superfluous where there is no other evidence to contradict the admission or, where there is such contradictory evidence, will weaken or perhaps nullify the contradictory evidence—depending on the relative weight of the admission and such evidence. There is yet another difference. An estoppel only binds between parties and privies; it does not assist the stranger. An admission may well do, although, as we have suggested, an admission to a third party will not have the same force as an admission direct to the party who seeks to adduce it in evidence.

(4) *Estoppel in Relation to Acquiescence*

Most legal systems are more ready to impose negative duties than positive ones, and a duty to protest or to take other effective action to safeguard established rights is not to be regarded, *prima facie*, as a condition of the

[1] Ibid., p. 35. He is here referring to the *Tinoco* arbitration and applying the principle of that case to the British attitude.

[2] 'The Law and Procedure of the International Court of Justice', this *Year Book*, 30 (1953), pp. 44–47.

[3] *Anglo-Norwegian Fisheries* case, *I.C.J. Reports*, 1951, p. 138; *United States Nationals in Morocco*, ibid., 1952, p. 200.

[4] *Fisheries* case, loc. cit., p. 138; *Ambatielos* case (First Phase), *I.C.J. Reports*, 1952, Opinion of Judge Basdevant at pp. 69–70.

[5] *Minquiers and Ecrehos* case, *I.C.J. Reports*, 1953, p. 71 (by necessary implication).

[6] Ibid., p. 4.

[1] Ibid., p. 71. Judge Basdevant, in a Separate Opinion (at pp. 80–81), took a different view on this point and used arguments which are applicable both to estoppels and admissions. He denied that the letter could have any implication on the question of sovereignty, since it was concerned only with oyster-fisheries; moreover, he denied that the Minister of Marine could be assumed competent to make a binding statement on matters of state territory. These arguments relate to (1) the meaning of the statement, and (2) the authority of the person making it; both are relevant to estoppel (see above, pp. 188, 192).

continuing validity of those rights. On the other hand, there are situations in which one party's failure to act or acquiescence will prejudice his rights against another who has been misled by that party's inaction or silence. For example, in English law a duty to speak out may be postulated where one party, possessing an interest in property, knows that another party, unaware of that interest, purports to be obtaining an incompatible interest in the same property.[1] When this duty is broken, the silence of a party operates like an estoppel, so that he is precluded by his apparent acquiescence from setting up his own interest in the property to defeat the interest acquired by the innocent purchaser.

In international law this relation between acquiescence and estoppel is also apparent, and a duty to speak out or act may in certain circumstances be likewise postulated. In the *Costa Rican–Nicaragua Boundary* case[2] Nicaragua argued that a treaty of 1858 defining the boundary was not binding, since a third state, San Salvador, had not ratified in its capacity as guarantor. The Arbitrator, in rejecting this contention, said:

'These views are strengthened by a consideration of the evidence adduced on the part of Costa Rica to prove acquiescence by Nicaragua for ten or twelve years in the validity of the treaty. I do not regard such acquiescence as a substitute for ratification by a second legislature, if such had been needed, but it is strong evidence of that contemporaneous exposition which has even been thought valuable as a guide in determining doubtful questions of interpretation.'[3]

He also continued:

'But the Government of Nicaragua was silent when it ought to have spoken, and so waived the objection now made. It saw fit to proceed to the exchange of ratifications without waiting for San Salvador. . . . Neither may now be heard to allege, as reasons for rescinding this completed treaty, any facts which existed and were known at the time of its consummation.'[4]

Another example of inaction or acquiescence operating as an estoppel is to be found in the Report of the Law Officers of the Crown of 14 January 1878, on the Turkish Guaranteed Loan (1855) in which they regarded the British Government's inaction as a waiver of rights and an estoppel from claiming such rights as might have been claimed but for the implied waiver.

'In our opinion the English Government has waived its right to the increased Egyptian tribute, and the action, or rather abstinence of action, by the British Government in 1871 is an instance of that consent on the part of at least one of the Guaranteeing Powers, which estops that Power from claiming, under the Convention, the additional tribute money as part of the security.'[5]

[1] Halsbury's *Laws of England*, vol. xv, p. 241, and the list of authorities there cited.

[2] Moore's *International Arbitrations*, vol. ii, p. 1945: this is actually the report to the arbitrator (the President of the U.S.A.).

[3] Ibid., p. 1959: the arbitrator is here referring to the Nicaraguan argument that the treaty was not sanctioned by its own constitution. [4] Ibid., p. 1961.

[5] Cited McNair, *Law of Treaties* (1938), p. 261.

In the *Venezuelan Preferential Claims* case[1] the Hague Tribunal stressed the lack of protest of Venezuela and the neutral Powers against the claims of the blockading Powers to preferential treatment, and in the *Landreau Claim*[2] it was said:

'Of course if there was anything to show that Célestin knew of this release at the time of its execution and abstained from putting forward his claim, he and his representatives would be estopped from making any claim against the Peruvian government, but there is nothing to show that there was any such acquiescence in the transaction by Célestin.'

More recently, in the *Anglo-Norwegian Fisheries* case,[3] without using the term estoppel, the International Court placed great stress upon the effect of absence of protest against the Norwegian claims:

'In its opinion Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other states, a kind of *possessio longi temporis*, with the result that her jurisdiction over these waters must now be recognised although it constitutes a derogation from the rules in force.'[4]

'The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.'[5]

In effect, though not in express terms, this is almost like raising the acquiescence of Great Britain as an estoppel against her; and, indeed, certain writers have stressed the similarity of effect between estoppel and acquiescence when acquiescence is treated as one element in the acquisition of title by prescription.[6]

[1] Scott's *Hague Court Reports*, p. 56. Another example of the value of protest is found in the protest of the ex-Allied Powers against the Treaty of Rapallo of 16 April 1922, whereby they 'expressly reserve for their Governments the right to declare null and void any clauses in the Russo-German Treaty which may be recognised as contrary to existing Treaties'. McNair (op. cit., p. 124) rightly says that the significance of the protest is that they could not thereafter be estopped from holding Germany to a strict performance of her prior obligations to them.

[2] *U.N.R.I.A.A.*, vol. i, pp. 365–6: the claim concerned the release of certain contractual rights to which Célestin Landreau was not a party, and where the Peruvian Government knew of his 30 per cent. share in the contractual rights.

[3] *I.C.J. Reports*, 1951.

[4] Ibid., p. 130. [5] Ibid., p. 139.

[6] Lauterpacht, 'Sovereignty over Submarine Areas', this *Year Book* 27 (1950), at p. 395; MacGibbon, 'The Scope of Acquiescence in International Law', ibid., 31 (1954), at p. 147. See the *Chamizal* arbitration (U.S./Mex.) of 24 June 1910, *American Journal of International Law*, 5 (1911), pp. 785 et seq., where the U.S. argued that her long, undisturbed possession estopped Mexico from asserting title. The tribunal held Mexico's failure to protest was not acquiescence and therefore estoppel could not arise. Also the *Title to Islands in the Bay of Fundy and Passamaquoddy Bay*: Moore's *International Adjudications* (Modern Series), vol. vi, p. 195, for British argument that profound silence over twenty-three years was tantamount to an estoppel. In the *Palmas Island* case, *American Journal of International Law*, 22 (1928), p. 867, the award treated the question of sovereignty over territory as one of fact as to which party exercised sovereignty; the absence of protest by the Netherlands to the Treaty of Paris of 1898 under which the U.S.A. purported to acquire sovereignty by succession from Spain was disregarded.

It is believed, however, that this similarity in effect tends to confuse the notion of acquiescence with the doctrine of estoppel in circumstances in which estoppel cannot really be invoked. In general the claim to acquire rights by prescription must rest upon the acquiescence of States generally, or at least those States adversely affected by the claim. Especially in circumstances similar to those in the *Anglo-Norwegian Fisheries* case, where the rights in the high seas belong to the community at large, the acquiescence must be shown to exist in the community at large. Hence, Judges Read[1] and Hsu Mo[2] stressed the need for recognition or acquiescence by the international community as a whole. In contrast, the plea of estoppel is made *inter partes* (or their privies); it affects the position between the parties without regard to the question whether the claim is recognized or acquiesced in by the community generally. There may, of course, be circumstances in which only one State is affected by another State's claims, as, for example, where the claim relates to the exact situation of a boundary between the two. In these circumstances the relation between acquiescence (and a prescriptive title) and estoppel will be closer, but even here a number of conditions would have to be satisfied before acquiescence becomes tantamount to an estoppel. Before estoppel can be invoked on the basis of one party's acquiescence or inaction the following conditions would, in our submission, be essential:

(i) The purported acquisition of some right or interest by State A in ignorance of State B's conflicting right or interest.
(ii) Actual or constructive knowledge by State B that State A purports to be acquiring some right or interest in conflict with its own right or interest.[3]
(iii) Silence or inaction by State B such as to lead State A to suppose it possessed no conflicting right or interest.[4]
(iv) Some detriment to State A as a result of reliance upon the silence or inaction of State B, or some gain to State B as a result of State A's action.

When, therefore, as in the *Anglo-Norwegian Fisheries* case, the state pro-

[1] *I.C.J. Reports*, 1951, p. 194. [2] Ibid., p. 154.

[3] See the Dissenting Opinion of McNair in the *Anglo-Norwegian Fisheries* case, *I.C.J. Reports*, 1951, p. 171: 'Supposing that so peculiar a system could, in any part of the world and at any period of time, be recognised as a lawful system of the delimitation of territorial waters, the question would arise whether the United Kingdom had precluded herself from objecting to it by acquiescence in it. An answer to that question involves two questions: When did the dispute arise? When, if at all, did the United Kingdom become aware of this system, or when ought it to have become aware but for its own neglect: in English legal terminology, when did it receive actual or constructive notice of the system?' And see Fitzmaurice, loc. cit., pp. 42–44; Waldock, 'The *Anglo-Norwegian Fisheries* case', this *Year Book*, 28 (1951), p. 165.

[4] The remarks of Johnson, 'Acquisitive Prescription in International Law', this *Year Book*, 27 (1950), p. 332 at p. 346, to the effect that a simple protest is no more than a temporary bar to the acquisition of a title by prescription now that procedures for settlement via the I.C.J. and other arbitral tribunals are available would not seem to apply equally to estoppel. The protesting State must take such measures as are designed to bring firmly to the notice of the other state that its rights or interests are infringed: once the ignorance is dispelled there can be no estoppel. See also the separate opinion of Judge Carneiro in the *Fisheries* case, *I.C.J. Reports*, 1951, at pp. 107–8.

ceeds with full knowledge of another state's conflicting right or interest, the inaction or silence of the latter may afford a basis for the acquisition of a title by prescription, but it cannot be treated as estoppel. There has been no deception and nothing which good faith, operating through the doctrine of estoppel, requires to be put right. Moreover, in most cases the State which purports to acquire the right is losing nothing: on the contrary the detriment is all on the other side, so that the doctrine of estoppel cannot operate to protect the State which has been placed in an improved position as a result of the silence or inaction of another. There may, of course, be exceptions: a State may, in genuine ignorance of the fact that a portion of territory lies within the boundaries of another, indulge in considerable expenditure on that territory to its improvement. In such circumstances that other State would be estopped by its inaction from asserting its ownership of the portion of territory affected, and there the difference between estoppel and acquiescence as an element in the acquisition of a title by prescription would be negligible.[1] In the main, however, the circumstances in which estoppel is relevant are distinct from those in which acquiescence should be considered as one element in the acquisition of a title by prescription.[2] The confusion of these two notions will only serve to lessen the burden of proving the acquisition of title by prescription and, since no requirement of good faith demands such result, it would seem that the use of the doctrine of estoppel in circumstances where prescription ought to be relied on and proved is inadmissible in international law.

CONCLUSIONS

1. The rule of estoppel operates so as to preclude a party from denying the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit: as such the rule has been accepted by international tribunals.

2. The rule of estoppel is distinguishable both from the principle of *res judicata* and the principle that, in cases of ambiguity in the meaning of an agreement, the subsequent conduct of the parties in carrying out the agreement affords evidence of its meaning.

3. The forms in which estoppel can arise are:

(*a*) By Treaty, Compromis, Exchange of Notes, or other Undertaking in Writing.
(*b*) By Conduct.

[1] There would still be a difference: prescription presupposes a long period of time, estoppel does not. See the argument of the United Kingdom in the *Anglo-Norwegian Fisheries* case, *I.C.J. Pleadings*, vol. iv, p. 346.

[2] On prescription generally see Johnson, loc. cit., p. 332 et seq., and the authorities there cited.

4. The essentials of estoppel are:

(*a*) The statement of fact must be clear and unambiguous.

(*b*) The statement of fact must be made voluntarily, unconditionally, and must be authorized.

(*c*) There must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.

5. Representations or admissions lacking the essentials of an estoppel have a certain probative value, depending upon the circumstances, but do not bind a party conclusively: moreover, as distinct from true estoppel, their effect is not confined to parties and their privies.

6. Acquiescence may, when properly construed as a representation of fact and otherwise fulfilling the essentials of an estoppel, operate as an estoppel. This is not the same as the principle whereby, under the doctrine of acquisitive prescription, rights are acquired on the basis of another party's acquiescence; a confusion between the two leads to a lessening of the burden of proving the extent and duration of acquiescence necessary to establish a prescriptive right.

International Environmental Law and Policy Series

The Peaceful Management of Transboundary Resources

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Graham & Trotman/Martinus Nijhoff
Members of the Kluwer Academic Publishers Group
LONDON/DORDRECHT/BOSTON

Graham & Trotman Limited
Sterling House
66 Wilton Road
London SWIV 1DE
UK

Kluwer Academic Publishers Group
101 Philip Drive
Assinippi Park
Norwell, MA 02061
USA

First published 1995

British Library Cataloguing in Publication data is available

Library of Congress Cataloging in Publication data is available

HC
79
.E5
P367
1995

ISBN: 1–85966–173–4
Series ISBN: 1–85333–275–5

Printed and bound in Great Britain by Athenaeum Press Ltd, Gateshead, Tyne & Wear.

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Natural Resource Development (Oil and Gas) and Boundary Disputes

Rodman R. Bundy

Introduction

The following analysis focuses on the issues arising when natural resources are found in areas where either no international boundary has been delimited or where the reservoirs containing those resources straddle existing international frontiers. These issues can be highlighted by posing two hypothetical problems:

1 An oil company has a production sharing agreement covering an off-shore area where oil and gas have been found. The field straddles a delimited international boundary and oil has been produced normally on both sides of the boundary for some time. Due to unforeseen circumstances, whether *force majeure* or a decision to curtail production as part of a quota or price support plan, production is dramatically cut on the other side of the line. What, if any, legal obligation does the company have to follow suit, ie, to cut its own production?
2 An oil company is operating in an area which has been allocated pursuant to a valid permit by a Ministry of Petroleum. While carrying out exploratory drilling, it receives a warning from a neighbouring State asserting that the area in which the company is operating forms part of its territory or, in the case of off-shore areas, is under its jurisdiction. The company is reluctant to stop, not only because of the commercial interest of the acreage in question, but also because it has important exploration commitments and has already committed substantial funds to the project. What should the company do?

These hypothetical situations arise from actual events which we have encountered in working with State and private oil companies, and it is suggested that the responses to each situation depend on both legal considerations and practical factors.

Oil Fields which Straddle International Boundaries

Take the first hypothesis. Figure 2.1 shows the existing maritime delimitations in the Persian Gulf. If one focuses on the Iran–Abu Dhabi boundary, it can be seen that a large oil field (the Sassan or Abu al Bukoosh – ABK field) sits right on the median line separating the maritime jurisdictions of the two States.

Prior to the Iranian Revolution, the Iranian side of the field was producing some 200,000 barrels per day (b/d), and the Abu Dhabi side about 50,000b/d. When the Revolution broke out, disruptions in the Iranian oil sector resulted in the complete shut-down of production from the Iranian side for several months. Later on in 1979 oil production recommenced, but was cut back once more in September 1980 due to the outbreak of the Iran–Iraq war which resulted in Iranian oil installations becoming prime targets for Iraqi air raids. In April 1988, it was the United States Navy that finished the job: it destroyed the Sassan producing complex, in apparent retaliation for the USS *Samuel Roberts* hitting a mine in the Persian Gulf, and thus halted all production from the field on a near-permanent basis. This incident is the subject of a case before the International Court of Justice (ICJ).

Because of the petrophysical characteristics of the Sassan field, Iran's shut-down resulted in a substantial migration of oil to the Abu Dhabi side of the field, where production continued. Iran thus lost significant quantities of crude. In the circumstances, did Abu Dhabi have an obligation to curtail its own production or to reimburse Iran?

The answer was clearly no, and this for essentially two reasons. Unlike fresh water resources, to which concepts such as the right of a riparian State to a 'fair and equitable share' of the resource, and the prohibition against causing appreciable harm to other riparian States can be said to represent emerging trends of customary international law, the exploitation of international oil and gas reserves is still based largely on the law of capture. This means that, in the absence of an agreement to the contrary, a State or international oil company is free to maximise production from its side of the boundary line notwithstanding the policies of neighbouring States which share the same field.

In the Abu Dhabi–Iran example, what actually happened was that Abu Dhabi *increased* its production from the ABK field when Iran's production was shut down. Indeed, even when Abu Dhabi curtailed its overall production in compliance with OPEC (Organization of Petroleum Exporting Countries) quotas, it made a deliberate decision to exclude the ABK field from any prorated decrease. Clearly, this exacerbated the migration problem from Iran's point of view. Yet Iran had no cause of action against Abu Dhabi under international law.

It should be pointed out that in this specific example, Iran and Abu Dhabi had foreseen the possibility that a hydrocarbon deposit might straddle their boundary and had thus agreed to some fairly rudimentary

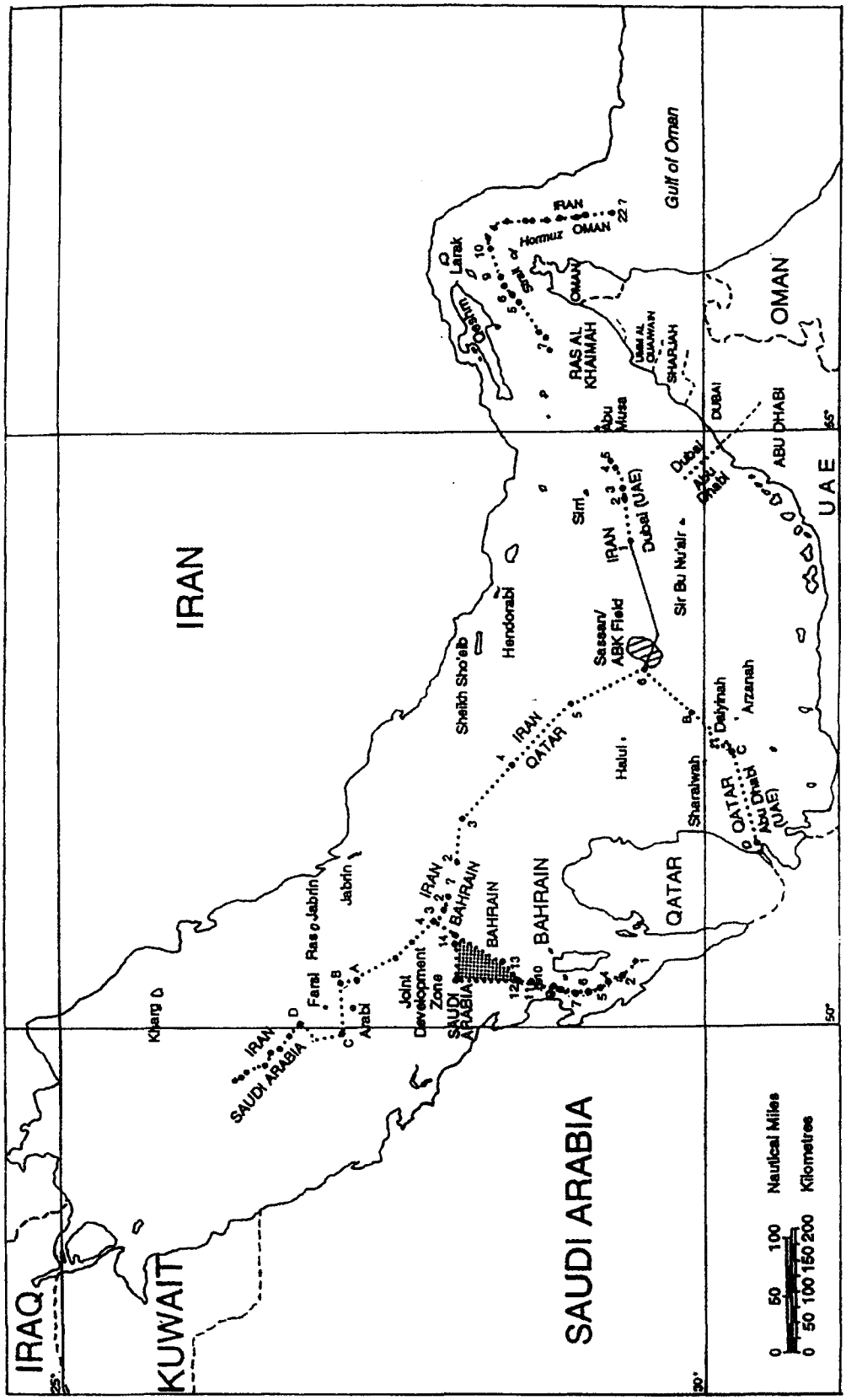


Figure 2.1 The Sassan/Abu al Bukoosh (ABK) Oil Field, Persian Gulf

provisions to deal with such a situation. In essence, their delimitation agreement, like others entered into by Iran with its Persian Gulf neighbours, provided that where a single geological petroleum structure or field extended across the boundary line, neither State would drill within 125m of the boundary without the agreement of the other. Both States also agreed to 'endeavour to reach agreement as to the manner in which the operations on both sides of the boundary could be co-ordinated or unitised' (see, for example, Article 2 of the Iran–UAE Agreement of 13 August 1974).

It is clear that this was scarcely a very vigorous obligation – the Parties had absolutely no obligation to reach agreement or to co-ordinate production; they only had to *endeavour* to do so. In practice, only a modest amount of co-ordination was achieved. Prior to the Iranian Revolution, a joint committee was established primarily as a conduit for the exchange of technical information relating to the field, but this line of communication broke down after the Revolution and remained so during the Iran–Iraq war.

The point is that Iran had no cause of action against Abu Dhabi for the oil it had lost due to migration, and Abu Dhabi had no legal obligation to reduce its production.

At present, it is difficult to envisage the adoption of a rule of international law requiring an 'equitable apportionment' of oil and gas resources which straddle international boundaries. For one thing, it would be difficult to argue that a State is geographically disadvantaged *vis-à-vis* its neighbours in the exploration and exploitation of hydrocarbon reserves in the same way as States may be disadvantaged in their access to fresh water resources. Obviously, up-stream users of fresh water have a geographical advantage over the down-stream users – they get to use the resource first. Disadvantaged States thus require some measure of protection so as to guarantee for themselves an equitable share. But the same cannot be said of a State which owns part of an oil field since that State is, in theory, just as able to develop the field as its neighbour. By the same token, why should a State be obligated to reduce its production in the name of equity simply because its neighbour has chosen a different production policy. Whether, in such circumstances, there still remains some lesser duty of *co-operation* between the States is a matter which will be discussed below.

The Problem Where There is No International Boundary

The second situation – where drilling takes place in areas where no boundary exists – arises with increasing frequency and often gives rise to serious problems.

In the early 1980s, we were involved in two large cases involving the delimitation of the continental shelf between Libya, Tunisia and

Malta where no boundary had previously been agreed. The problems were complicated by the fact that all three States had granted oil and gas concessions in the disputed area.

Throughout the 1970s, a series of protests and counter-protests was exchanged over each side's petroleum activities in these areas. For practical purposes, both Libya and Malta eventually agreed to a 'no drilling' understanding covering the disputed area pending resolution of the matter by the International Court of Justice.

For reasons which need not be discussed here, Malta abrogated the 'no drilling' agreement in 1980 by dispatching a drilling rig to one of its concessions in the disputed area. This led to a forceful protest from Libya including a visit from the Libyan Navy to the personnel on board the rig. Not surprisingly, drilling ceased and the rig was withdrawn. Happily, however, Libya and Malta went on to settle their differences peaceably before the ICJ, although not before the matter was first brought before the UN Security Council.

Much the same situation occurred between Libya and Tunisia, and indeed similar confrontations have arisen in many areas around the world, including the Middle East and the South China Sea, where concessionaires have been warned by neighbouring States not to proceed with petroleum operations because the areas in question lie in disputed boundary zones.

So what does one do in these circumstances? The answer largely depends on whether you are the concession holder, the host government or the protesting State.

For the concession holder, the situation can be extremely awkward. On the one hand, a company naturally tends to pay attention when a State tells it to stop doing something. In several cases in which we have been involved, initial warnings to stop operations were followed by visits from the protesting State's armed forces.

Perhaps the obvious reaction for the concession holder is to leave it to the two countries to sort out by invoking *force majeure* and suspending its contractual obligations. The problem with this approach is that whether *force majeure* can be successfully invoked to excuse the fulfilment of exploration or development commitments depends very much on the contractual provisions contained in the concession agreement, the nature of the threat received, and the attitudes of the host State.

Suffice it to say that the host State may take an entirely different view of the situation by considering that the threats are more political than real, and that absent some event that actually *prevents* performance, *force majeure* cannot be invoked, especially if the particular kind of threat in question was not foreseen and identified as such in the contract. In short, the host country has to decide how far to hold its concessionaires' feet to the fire.

In the two examples referred to above, the disputes between the contesting States became wholly intractable, leading to serious

problems in their bilateral relations and, in one case, to a complaint before the Security Council, as has already been mentioned. Fortunately, at the end of the day good sense prevailed and the disputes were successfully litigated before the ICJ.

While much depends on the circumstances of each case, what can be said is that a State which issues ultimatums to its neighbours to cease operations, but then *refuses* to negotiate in good faith or to submit the dispute to international arbitration or adjudication, risks seeing its position on the international plane deteriorate. There are limits under international law to the ability of a State to blow hot and cold at the same time.

In most cases, the end result is likely to be frustration for the concession holder and, to a lesser extent, for the host country as well. For if the stakes are raised, and the dispute becomes a major bone of contention between the contesting States, or if it goes to litigation, there is often little that the concessionaire can do but to sit back and await the outcome.

This does not mean that lawyers, businessmen and diplomats alike should not seek to find some other kind of solution pending resolution of the dispute. Alternatives do exist and have been used with varying success in many parts of the globe.

One alternative that was tried in the Libya–Malta case was to create a 'no drilling' zone within a band 15 miles wide on either side of a hypothetical median line. This effort failed largely because Malta's position had always been based on a median line boundary (while Libya argued for a boundary significantly further north). Libya considered that it could not afford to accept any proposal which revolved around the median line because it might suggest tacit acceptance of the equidistance principle as the basis for the ultimate boundary. However, in other cases it may well be possible to agree on a limited area of dispute so as to allow development to proceed elsewhere.

Joint Development Zones

There are many other forms of co-operation which have increasingly found favour in recent years. These vary from mere undertakings not to drill within a certain distance of an established boundary line, as in Iran's agreements with its neighbours, to the Treaty between Australia and Indonesia on the Timor Gap Zone of Co-operation signed in December 1989 which, with its annexed model production sharing agreement and Petroleum Mining Code, runs to over 100 pages and covers virtually all aspects of joint production within the shared area.

Space does not permit the examination of all these agreements in detail here. However, it may be useful to discuss briefly a few

representative examples to highlight some of the principal legal and practical issues that co-operation agreements can give rise to.

NORTH SEA: UNITED KINGDOM–NETHERLANDS (1993)

The United Kingdom (UK) has entered into several agreements relating to cross-boundary fields in the North Sea, the most recent of which is with The Netherlands. Figure 2.2 shows the location of various maritime boundaries in the North Sea. The section between the United Kingdom and The Netherlands was delimited in 1965. In a separate agreement signed that same year, the Parties also agreed that they would seek to reach an accord as to the manner in which any oil or natural gas structure extending across the boundary line could be most effectively exploited, and costs and proceeds shared.

Subsequent drilling resulted in the discovery of gas from a field known as the Markham Field, which straddles the international boundary. These developments led the two Governments to agree in May 1992 to a program of joint development of the field. The agreement came into force on 3 March 1993. In essence, the Markham Field agreement requires the groups of licensees on both sides of the boundary to form an agreement amongst themselves to regulate the exploitation of the field. In particular, the licensees are required to nominate a single licensee to act as the Unit Operator. The Unit Operator is charged with submitting to the two Governments a proposal setting forth the position and extent of the field and details as to how the petroleum from the field should be apportioned between the two groups of licensees on each side of the boundary. The Governments must then approve this proposal, and a system of referral to a neutral expert is provided for in the event that agreement is not reached.

The determination by the Unit Operator of the apportionment of the field serves as the basis on which tax and royalty payments are calculated. For purposes of this calculation, it is irrelevant where the actual producing platforms or wells are located. The controlling factor is the petrophysical characteristics of the field and its apportionment to the licensees on each side of the boundary.

As can be seen, the primary aim of the UK–Netherlands agreement is two-fold:

1 to obligate the licence holders on both sides of the boundary to agree on a joint unitisation and development plan to be carried out by a sole operator; and
2 to establish a mechanism whereby a determination can be made as to the limits of the field and an apportionment of petroleum to each side of the boundary.

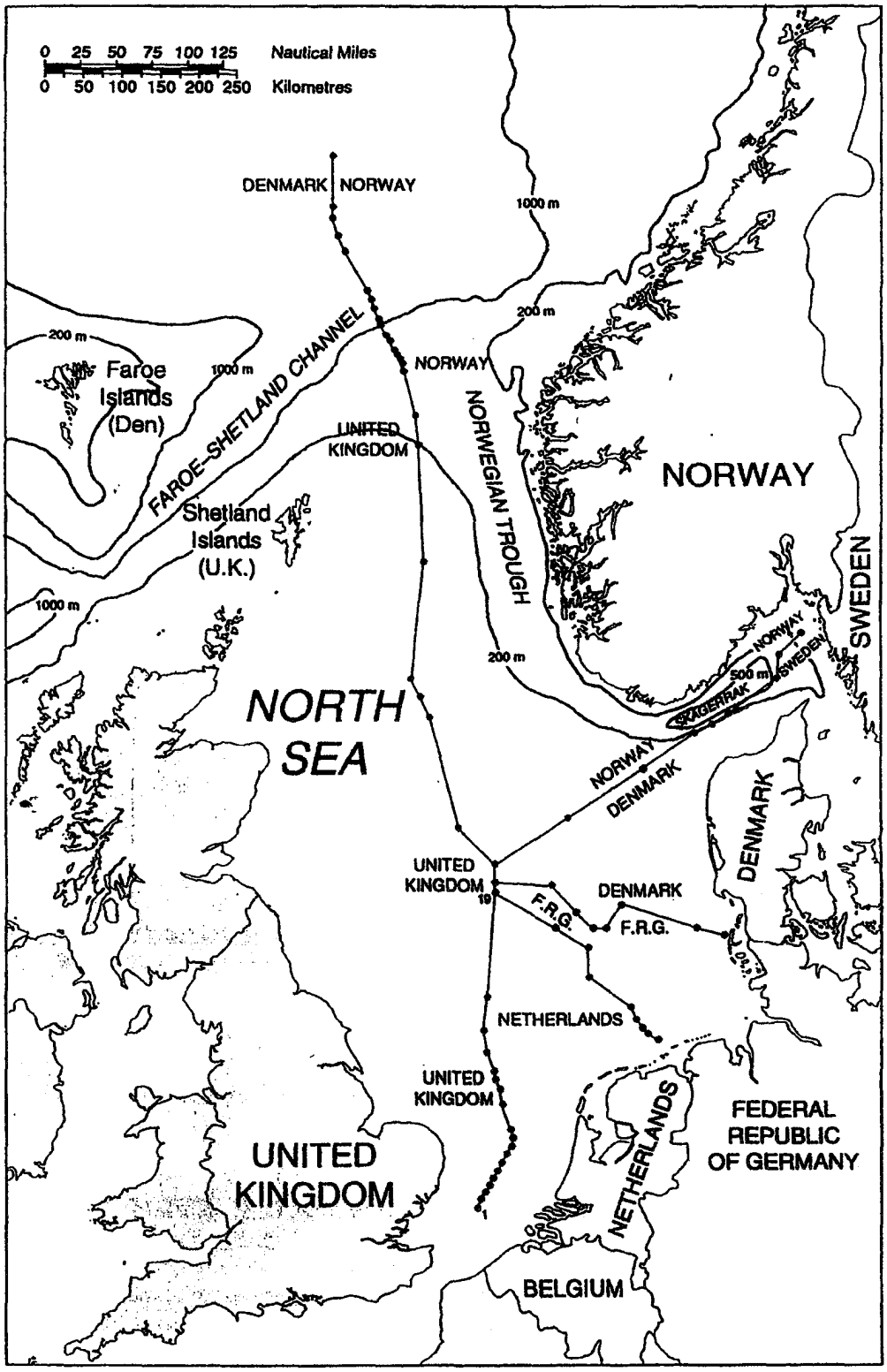


Figure 2.2 Maritime Boundaries in the North Sea

Where possible, the onus in terms of operations and planning is transferred from the States concerned to the licensees. It is therefore the Unit Operator who submits the plan for the development of the reservoir and keeps this plan up-dated. The plan and any amendments are then subject to the oversight of a joint Government body known in this case as the Markham Commission.

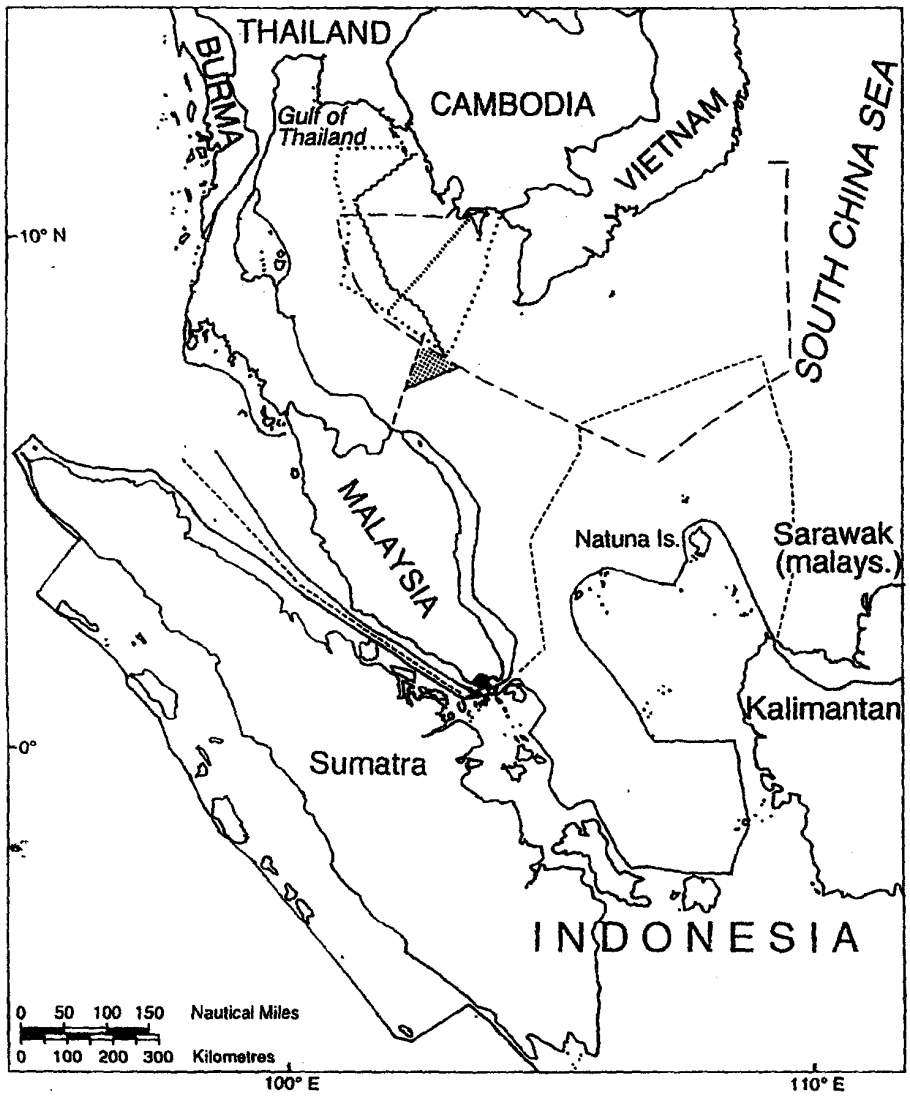
Obviously, this kind of agreement, by which petroleum is shared on the basis of a technical assessment of how much lies on each side of the boundary, is only possible where the boundary has already been delimited.

THAILAND–MALAYSIA

Turning to a second example (Thailand–Malaysia) – where no boundary has been agreed – the situation is very different. Figure 2.3 shows that in the Gulf of Thailand there are no agreed boundaries, but plenty of claims (by Thailand, Malaysia, Cambodia and Vietnam). Recognising the oil and gas potential of this area, and unable to agree on more than a relatively short segment of their offshore boundary (some 50km), Thailand and Malaysia signed a Memorandum of Understanding in 1979 designating a triangular area as a Joint Development Area.

While the idea of creating joint development zones in areas where no agreed boundary exists is on the face of it an attractive one, in reality a host of practical problems need to be addressed in order to make such a system work. In the Thailand–Malaysia case, it took the Parties 11 years to transform their Memorandum of Understanding into a full-fledged Joint Development Agreement (which was only signed in 1990). Foremost amongst the stumbling blocks was the fact that Malaysia favoured a production-sharing type of contract with its foreign partners while Thailand had already granted licences in the area modelled on the concession type of agreement. These differences had to be ironed out. In addition, Article 3(2) of the original 1979 Memorandum of Understanding provided that the creation of a Joint Authority by the two States with responsibility for petroleum development within the joint development zone would 'in no way affect or curtail the validity of concessions or licenses hitherto issued or agreements or arrangements hitherto made by either party'. It is not difficult to imagine the resultant difficulties in trying to reconcile the terms of existing concession agreements with the newly-created powers of the Joint Authority and with the production sharing type of framework that was provided for by the 1990 Agreement.

Unlike the UK–Netherlands agreement, the Thailand–Malaysia agreement provides for the *equal* sharing of production after deduction of royalties and production costs. This appears to be the normal rule of thumb for inter-State agreements creating joint development zones. For



The sea area claimed by Singapore cannot be represented on this map

Boundaries according to the opinion of the respective governments

Figure 2.3 Maritime Claims in the Gulf of Thailand

example, in the Bahrain–Saudi Arabia joint development zone (Figure 2.1), while Saudi Arabia retains the right to develop the oil resources of the joint area as it chooses, half of the net resource derived therefrom goes to Bahrain (Bahrain–Saudi Arabia, 1958). Similarly, the Abu Dhabi–Qatar agreement provides that whereas the boundary passes through the location of a well in the Al-Bunduq Field (Point B), and whereas this field is to be developed by Abu Dhabi, Qatar nonetheless retains a right to an *equal* share of royalties and profits therefrom (Abu Dhabi–Qatar, 1969).

If we move to other parts of the globe, both the France–Spain delimitation agreement of 1974 (Figure 2.4) and the Japan–Korea agreement (Figure 2.5) provide for variations on the same theme.

AUSTRALIA–INDONESIA ZONE OF CO-OPERATION

The last example, mentioned earlier, is the Zone of Co-operation created by the Australia–Indonesia Treaty of 11 December 1989 (for figure, see Chapter 5, Figure 5.2). Its genesis may be said to date back to the 1971 and 1972 boundary agreements between the two countries which stipulated that each would seek to reach agreement on the manner in which the joint deposits would be most effectively exploited and equitably shared. The Parties have been unable to agree on a continental shelf boundary in the Timor Gap, and this has given added impetus to the need to arrive at practical arrangements for oil and gas development in the disputed area.

The Zone of Co-operation covers some 61,000km^2 and is divided into three areas: Area A is the zone of joint development, whilst Areas B and C are under the sole jurisdiction of Australia and Indonesia, respectively. Each country retains an interest in the other's area of sole jurisdiction to the extent of 10% of the gross tax revenues arising from petroleum production in that area. But it is in Area A that the benefits of production are to be shared equally and it is also there that the most exploitable reserves are thought to be.

The Treaty creates a Joint Authority, but with powers that are more limited than those of the Joint Authority provided for in the Malaysia–Thailand agreement. Its functions are essentially administrative and it operates subject to a Petroleum Mining Code, annexed to the Treaty. Decision-making power is retained by a Ministerial Council. Although the Joint Authority is granted the power to enter into contracts, the actual form of contract – a model production sharing agreement – is annexed to the Treaty; variations to the model can only be made with the approval of the Ministerial Council (Article 6(1)(c)); and the conclusion and termination of production sharing contracts also requires Ministerial Council approval (Article 6(1)(d) and (e)). Further, it is the Ministerial Council which approves the distribution of production revenue between the States, approves the Joint Authority's

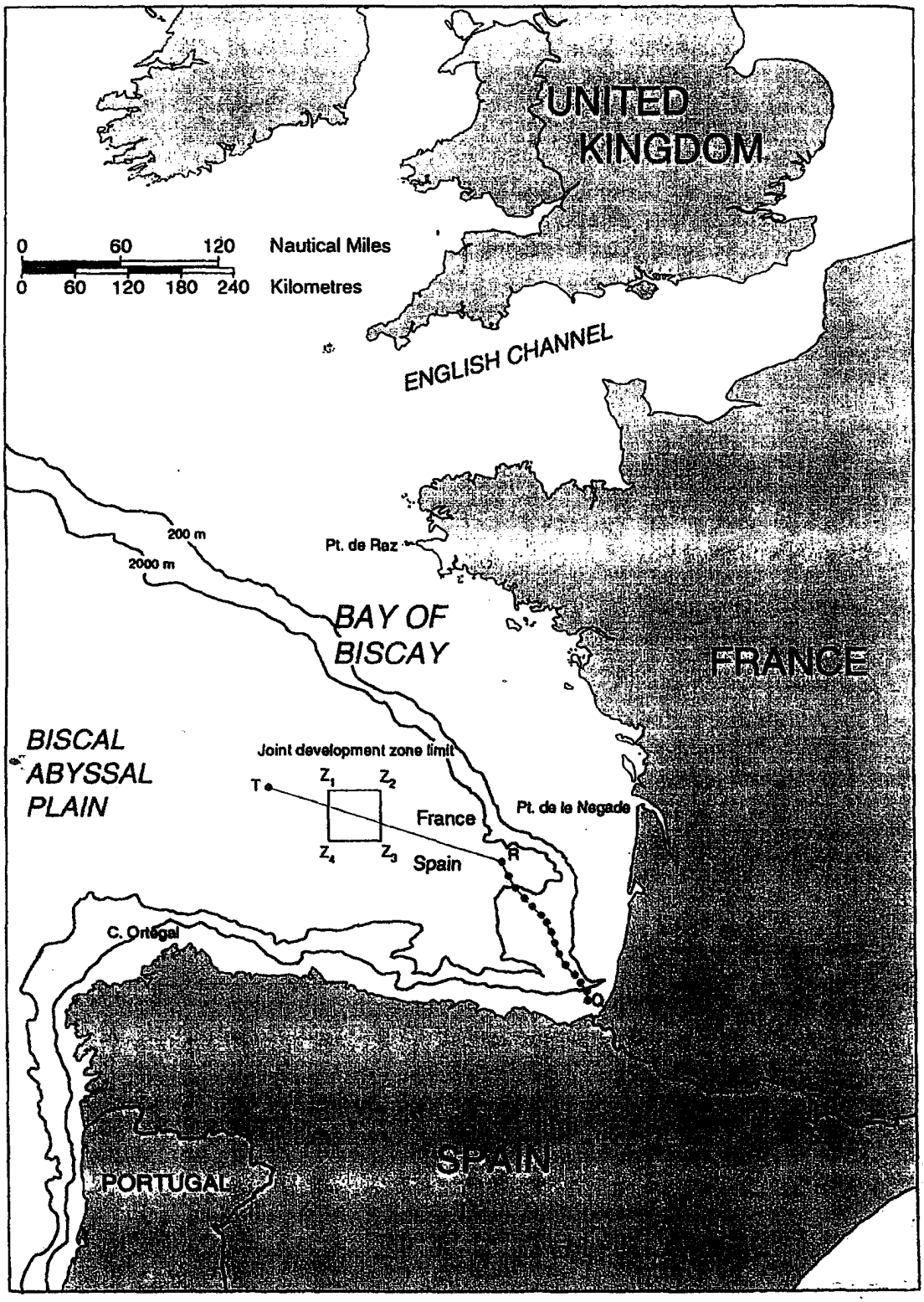


Figure 2.4 France–Spain Joint Development Zone

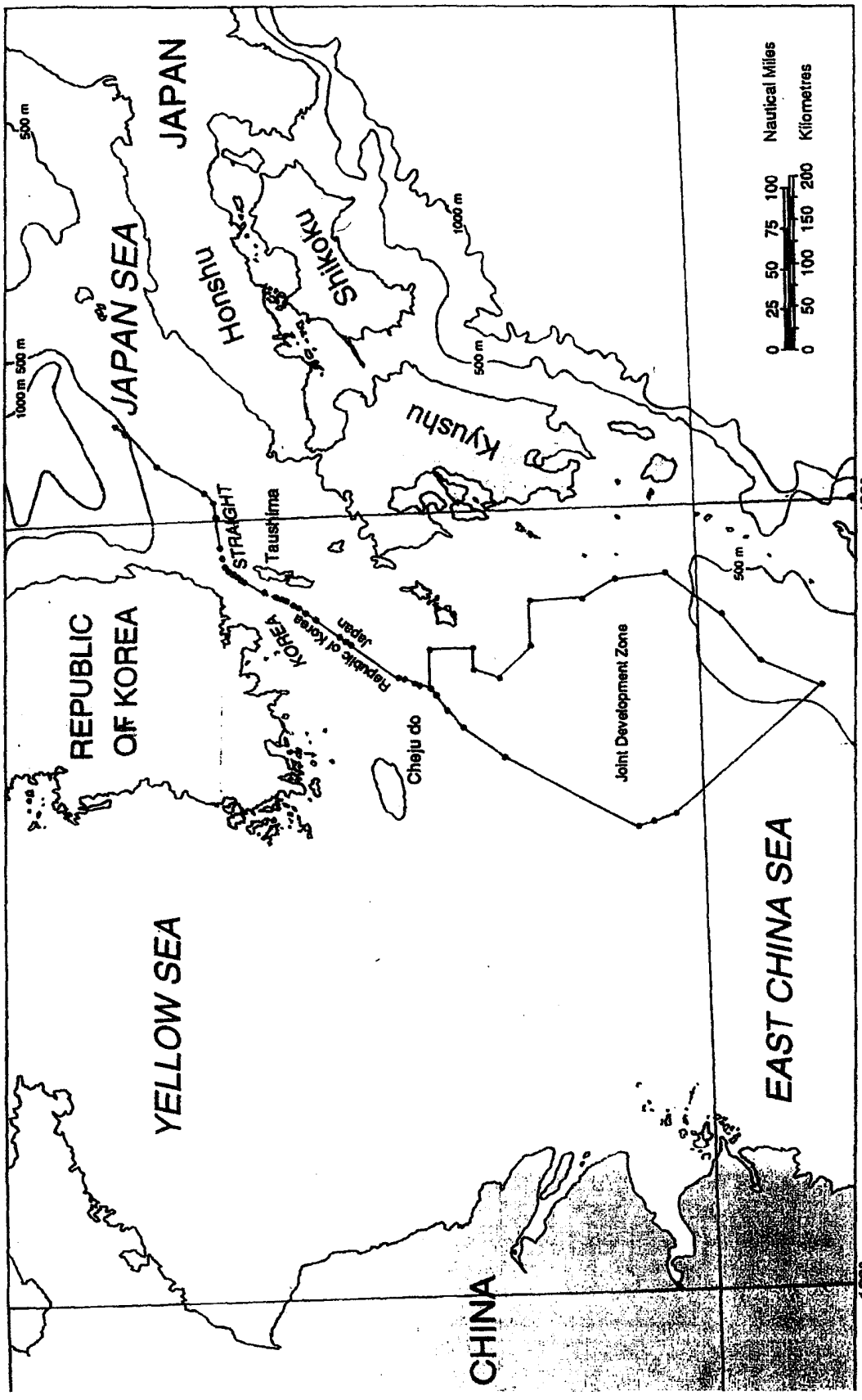


Figure 2.5 Japan–Korea Joint Development Zone

budget and establishes its regulations. Contractors must submit tax returns in both countries and receive a 50% rebate in each. The tax legislation of each country otherwise operates normally.

Attempts at Codification of the Law

Turning to the state of the law, there are two issues that warrant discussion:

1 what attempts have been made on the international plane to codify a series of legal principles covering shared oil and gas resources?
2 to what extent does the State practice discussed in this chapter reflect an emerging duty on States to co-ordinate and co-operate in the joint development or unitisation of shared oil and gas resources?

As already stressed, the natural starting point of the legal analysis is the law of capture which means that, ordinarily speaking, oil and gas resources found within a State's territory may be produced by that State without restriction, even if they straddle an international boundary.

That being said, it is significant that in the very first continental shelf delimitation case submitted to the ICJ in 1969 (the North Sea Continental Shelf Cases), the Court drew attention to the unity of deposits lying on both sides of the boundary line as one of the relevant factors that the parties should take into account in delimiting the continental shelf between them.

In his separate opinion in the case, the American judge, Judge Jessup, delivered a strong plea for increased international co-operation in the development of shared mineral resources. Nonetheless, he was the first to admit that concepts such as the doctrine of co-relative rights (so prevalent in domestic US practice) and the mandatory unitisation of petroleum reservoirs do not rise to the level of emerging rules of international law.

On 13 December 1973, the UN General Assembly adopted Resolution 3129 on 'Co-operation in the field of the environment concerning natural resources shared by two or more States'. The Resolution contained little in the way of positive obligations, but it did draw attention to the need to establish 'adequate international standards for the conservation and harmonious exploration of natural resources common to two or more States'. It also provided that co-operation between countries 'must be developed on the basis of a system of information and prior consultation' (UNGA 1973).

This is not the place to go into the thorny question whether General Assembly resolutions are binding under international law. However, at the least Resolution 3129 reflected a growing awareness amongst States of the importance of the issue. As such, it represented a tentative first

step towards articulating a series of principles governing the exploitation of natural resources shared by two or more neighbouring States.

On 12 December, 1974, the General Assembly adopted the Charter of Economic Rights and Duties of States by a vote of 120 for, six against and ten abstentions (Resolution 3281). Article 3 of the Charter echoed some of the themes introduced by Resolution 3129, providing that:

> In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve *optimum use* of such resources without causing damage to the legitimate interests of others (UNGA 1974).

Furthermore, Article 30 of the Charter sounded an environmental theme by providing that,

> All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States (UNGA 1974).

A definition of what constitutes 'optimum use' is not easy to agree. Indeed, in one case we handled, each side was effectively trying to define what 'optimum use' was in the context of oil and gas production. The question revolved around the meaning of a contractual term calling for the production of petroleum from a reservoir such as could be 'economically extracted' over the term of the concession – a kind of 'optimum use' formula. Several eminent economists testified that as long as the revenue achieved from production exceeded the cost of production by even as little as one cent per barrel, it was 'economical' to continue production. One can imagine how the host State reacted to this argument, which suggests that the contract in question required maximum production of the host State's most valuable, non-renewable resource at a margin of one cent (or even US$1) per barrel. The point is that 'optimum production' and 'optimum use' are concepts that are not always easily tailored to the different interests of oil companies and producing States.

Following the actions of the UN General Assembly in the early 1970s, the task of formulating more detailed principles fell to the UN Environmental Program. In 1978 it issued a series of Draft Principles which included the following elements:

1 States were encouraged to co-operate in the field of the environment concerning shared natural resources in a manner that was consistent

with the concept of the 'equitable utilisation' of those resources – a term that was not precisely defined.

2 States were also encouraged to endeavour to conclude agreements amongst themselves to regulate the utilisation of shared natural resources and to consider establishing joint commissions for consultations on environmental problems relating to their use.

3 Principle 3 stated:

> 'States have in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.'

In this context, the draft principles stated that:

> '... it is necessary for each State to avoid to the maximum extent possible and to reduce to the minimum extent possible the adverse environmental effect beyond its jurisdiction of the utilisation of a shared natural resources...' (UNEP 1978).

4 States were also encouraged to make environmental assessments (impact statements) prior to engaging in any activity which might entail environmental risks, and to exchange information with their neighbours on environmental issues.

5 Finally, States were warned that they would be liable in accordance with applicable international law for environmental damage resulting from violations of their international obligations caused to areas beyond their jurisdiction.

As might be expected, one of the main controversies surrounding the Draft Principles was whether they created, or purported to express, binding obligations under international law. The Explanatory Note to the draft tried to allay concerns that new law was being created by stating that the draft had been drawn up simply for the 'guidance' of States, and that the principles were aimed at 'encouraging' States sharing a natural resource to co-operate on environmental issues. The Explanatory Note went on to say that the language used in the draft was not intended to prejudice whether, or to what extent, the conduct envisaged by the principles was already prescribed by existing rules of general international law. As such, the draft principles should probably only be viewed as *recommendations* which do not create any new rules of international law, nor necessarily even express existing rules.

It was also in 1982 that the United Nations Convention on the Law of the Sea was finalised. While it deals with a broad range of maritime issues, some of its provisions deserve brief mention here in so far as they relate to the exploitation of offshore natural resources. The main issue to which attention should be drawn concerns the different treatment given in the Convention to the exploration and exploitation of 'continental shelf resources' – ie, mineral resources found in the

shelf itself – compared to the exploration and exploitation of Exclusive Economic Zone resources – ie, fish. With respect to the continental shelf, the Convention provides that the coastal State exercises sovereign rights for the purpose of exploring the shelf and exploiting its natural resources. These rights are exclusive in the sense that if the coastal State does not exercise them, no one else may do so without that State's express consent. No limitations are placed on the State's ability to exploit such resources in terms of the quantity extracted or the method of extraction.

The provisions relating to the Exclusive Economic Zone are quite different. While the coastal State has the sovereign right to exploit these resources, it has a corresponding duty to *conserve* and *manage* the resources as well. In particular, the coastal State is charged with controlling over-exploitation and promoting 'optimum utilisation' of the resource. No such obligation arises from the provisions of the Convention governing mineral resources.

Conclusions

While international law thus remains relatively undeveloped with respect to the exploitation of shared oil and gas resources, it is possible to perceive an emerging trend amongst States to deal with these issues on a bilateral level. In view of these developments, a fairly strong argument can now be made that there is a customary duty placed on States at least to consult with neighbouring States over the exploitation of jointly shared oil and gas reserves and perhaps to notify such States of new developments, even if a full-fledged duty to unitise and jointly develop such resources does not yet exist.

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Melland Schill Studies in International Law
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The law of the sea

third edition

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Juris Publishing
MANCHESTER

First edition published 1983 by Manchester University Press
Reprinted with addenda 1985
Revised edition printed 1988

This edition published 1999 by
Manchester University Press
Oxford Road, Manchester M13 9NR, UK
http://www.man.ac.uk/mup

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

ISBN 0 7190 4381 6 *hardback*
0 7190 4382 4 *paperback*

First published in the USA and Canada by Juris Publishing, Inc.
Executive Park, One Odell Plaza, Yonkers, NY 10701

Library of Congress Cataloging-in-Publication Data applied for

ISBN 1 57823 029 2 *hardback*
1 57823 030 6 *paperback*

This edition first published 1999

06 05 04 03 02 01 00 99 10 9 8 7 6 5 4 3 2 1

Typeset in 10/12 pt Times
by Graphicraft Limited, Hong Kong
Printed in Great Britain
by Biddles Ltd, Guildford and King's Lynn

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10

Delimitation of maritime boundaries

Introduction

Because of the close geographical proximity of many States, their maritime zones often overlap to a greater or lesser extent. There is therefore a need for boundaries between such zones in order to avoid disputes and uncertainties over the right to exercise sovereignty, sovereign rights or jurisdiction and to exploit resources. When the only maritime zone was the territorial sea, in most cases of no more than three miles in breadth, the need for boundaries was limited and mainly confined to States adjacent to one another along the same stretch of coast. However, the tremendous extension of coastal State jurisdiction since 1945, expecially over the continental shelf and EEZ, has substantially increased the need for maritime boundaries, not only for more extensive boundaries seawards between adjacent States but also between States situated opposite one another.

The drawing of boundaries is essentially a task for the two (or sometimes three) States involved, and many bilateral treaties establishing maritime boundaries have been concluded which are examined later in this chapter. First, however, we look at the attempts to develop general rules and principles to guide States in the drawing of boundaries which have been made in both the 1958 Geneva Conventions and the 1982 Law of the Sea Convention. This has necessarily been a difficult task given the great diversity of coastal geography. In addition to the Conventions, customary law on this matter has been extensively developed through decisions of the International Court of Justice and various arbitral tribunals. There has been much more international litigation in this area of the Law of the Sea than any other – and indeed it has arguably been the most fertile area in the whole of international law for judicial dispute settlement in recent years.

In theory, each maritime zone demands a separate delimitation, yielding boundaries for the territorial sea, the EEZ or exclusive fisheries zone (in which the contiguous zone is commonly subsumed) and the continental shelf. In practice, there is an increasing tendency to parcel these delimitations together, both in judicial settlements and in bilateral agreements, by laying down a single maritime

boundary without distinguishing between the different zones. Nonetheless, although there is a growing tendency for the principles on the delimitation of the various maritime zones to come together, it is convenient to consider them separately, and we do so here.

At the outset it should be emphasised that the principles of delimitation which have been laid down in the Conventions and by courts and arbitral tribunals have been formulated at a high level of generality. For this reason it is extremely difficult to offer any precise account of the principles of delimitation, such as might be applied in future to unresolved boundaries. Quite apart from the inherent generality and vagueness of the principles, each delimitation involves a situation which has its own unique characteristics which will have to be taken into account. Previous practice and decisions will at best point to the kind of factors to be considered and approach to be adopted, but will not permit the deduction of a precise boundary line which must be established.

Territorial sea boundaries

In the case of territorial sea delimitations between opposite States (i.e., two States facing each other) the normal practice has been to agree upon the median line, equidistant from the nearest points of the opposing States' shores, as the boundary. This was done, for example, in the 1932 Danish-Swedish Declaration concerning the Sound, for a large part of the boundary between the two States. Sometimes States have employed instead the centre line of the main deep-water channel passing between their shores: an instance of this is the 1928 Agreement between Great Britain and the Sultan of Johore concerning the Johore Strait.[1]

Practice in delimiting the territorial seas of adjacent States has been less consistent. Considerable use has been made of the equidistance principle, drawing a median line outwards from the boundary on the shore: the 1976 Colombia–Panama delimitation agreement is one of many examples. But other criteria have also been used. Thus the Permanent Court of Arbitration, in its award in the *Grisbådarna* case in 1909, favoured a line drawn perpendicular to the general direction of the coast. While that case turned in part upon use of the perpendicular in seventeenth-century practice, made relevant by a treaty of 1661 concerning the Norwegian-Swedish boundary, the perpendicular line is still occasionally referred to in delimitations, such as the 1958 Poland–USSR delimitation agreement and the 1972 Brazil–Uruguay Agreement on the Chuy River Bank and the Lateral Sea Limit. In addition, some maritime boundaries between adjacent States follow the line of latitude passing through the point where the land boundary meets the sea. This method was used, for example, in the 1975 delimitation agreement between Ecuador and Colombia.

[1] See the (UK) Straits Settlement and Johore Territorial Waters (Agreement) Act, 1928. This is, strictly, a colonial rather than an international delimitation.

In all cases it is possible that special circumstances, such as the presence of offshore islands or the general configuration of the coast, or claims to water areas based upon an historic title, will demand the adoption of some other boundary line by agreement between the States concerned. In the 1974 Agreement between India and Sri Lanka on the Boundary in Historic Waters between the Two Countries, for instance, a modified median line was used, to take account of 'historical' factors. Indeed, it is the common practice at present to set boundaries by reference to geographical co-ordinates for the sake of certainty and simplicity, and such determinations almost inevitably demand some departure from the exact median line or other criterion. The particularity of the circumstances of each case make generalisation upon these delimitations difficult, and since they are motivated primarily by expediency and a spirit of compromise it is probably wrong in any event to attempt to infer any rules of international law from them. Indeed, in the *Guinea/Guinea-Bissau* case (1985) the tribunal decided that all delimitations had to be measured against the single goal of producing an equitable solution in the circumstances of each case. Many examples of recent agreements have been collected and analysed in the series *Limits in the Seas*, published by the Geographer of the US Department of State and in the three-volume work edited by Charney and Alexander referred to in 'Further reading'.

The conventional rules concerning delimitation are consistent with the pattern of State practice described above. Article 12 of the 1958 Territorial Sea Convention and article 15 of the Law of the Sea Convention, which deal with the matter, are in substance identical. The latter reads:

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

In the *Dubai/Sharjah Border Arbitration* (1981) part of the task of the tribunal was to draw a territorial sea boundary between two parts of the United Arab Emirates adjacent to each other along what was essentially a straight coast. The tribunal, applying customary international law, drew a 'lateral equidistance line from the coastal terminus which divides the two territorial seas according to the principles laid down in' article 12 of the Territorial Sea Convention and the draft of what became article 15 of the Law of the Sea Convention, and it regarded this line as 'in all respects equitable'.[2] The tribunal would seem thereby to have equated the customary and the conventional rules.

[2] 91 *ILR* 543 at 663.

Continental shelf and EEZ boundaries

Continental shelf

Early practice

Early delimitations of the continental shelf evidenced the application of no clear principles. The first ever agreed delimitation, in 1942 between the then British colony of Trinidad and Venezuela in the Gulf of Paria, for example, was said to have secured an 'equitable division' between the two territories concerned. Similarly, the Truman Proclamation in 1945 referred to the application of 'equitable principles' in determining boundaries.

1958 Convention

In the 1950s more specific principles emerged. Arguments for the adoption of the equidistance principle were pressed strongly in the ILC during this period. That solution had the advantages of simplicity and certainty. It was, however, evident from the outset that inflexible application of the equidistance principle was undesirable. For example, since islands could generate their own continental shelves, a single small offshore island could create massive distortions in the line of equidistance that would be produced by considering only the coast of the mainland. Again, the configuration of the mainland coast itself might render equidistance an inequitable principle. This was the source of the dispute litigated in the *North Sea Continental Shelf* cases (1969): under the equidistance principle the concavity of the coastline of the Federal Republic of Germany and the adjacent States, Denmark and the Netherlands, resulted in Germany being allotted an exceptionally small part of the North Sea shelf. There may be other special circumstances which would justify divergences from the equidistance principle. For these reasons the principle was from the first coupled with a reservation allowing such special circumstances to be accommodated. Thus the 1958 Continental Shelf Convention provided that the boundary of the continental shelf should be determined by agreement between the States concerned. However:

> In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance. (CSC, art. 6(2); cf. art. 6(I))

Thus, States shall first seek to agree on a boundary. If they are unable to do so, the boundary will be a line equidistant from the baselines of the parties (the median line), unless another line is justified by special circumstances.

Custom

Article 6 of the Continental Shelf Convention represents a rule of treaty law only, applying 'equidistance plus special circumstances' in the absence of agreement – and most continental shelf boundaries have been settled by agreement, as is explained below – in relations between States Parties to the Convention.

Thus the provision was not applicable in the *North Sea Continental Shelf* cases because Germany had not ratified the Convention. Prior to the entry into force of the Law of the Sea Convention, in situations where one or more of the States concerned was not a party to the Continental Shelf Convention customary international law applied. Such law has been developed by decisions of the International Court of Justice[3] and a number of arbitral tribunals.[4] In doing so the International Court and tribunals have not adopted the conventional approach to ascertaining rules of customary international law, which is to examine State practice and see whether there is the necessary degree of uniformity coupled with *opinio iuris* (cf. p. 7 above). Instead they have simply declared what customary law is. We are therefore here dealing with what is essentially judge-made law. In stating what customary law is, the International Court and tribunals have been faced with the almost impossible task of trying to formulate rules of sufficient generality to be applicable to a wide variety of geographical circumstances, while at the same time being of sufficient precision to allow the boundary to be reasonably easily determined in the particular case.[5] It has to be said that the Court and tribunals have not been very successful in this task. The rules of customary law they have enunciated are, as will be seen, very general and imprecise, while it has often been difficult to see how the boundary they have determined in the particular case follows from the principles of customary law stated in the case.

In the first case in which it had to deal with customary law, the *North Sea Continental Shelf* cases, the Court, after observing that there was no single method

[3] In the following cases: *North Sea Continental Shelf* cases (1969); *Continental Shelf (Tunisia/Libya)* case (1982); *Continental Shelf (Libya/Malta)* case (1985); and *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)* (1993), which concerned the boundary between the continental shelves and 200-mile fishing zones of the Danish island of Greenland and the Norwegian island of Jan Mayen. In the *Aegean Sea Continental Shelf* case (1978) the Court found that it lacked jurisdiction. The *Gulf of Maine* case (1984) also concerned delimitation of the continental shelf, as part of the delimitation of a single maritime boundary between both the continental shelves and the 200-mile fishing and economic zones of Canada and the USA in the Gulf of Maine. For reasons which will become apparent later, cases involving delimitation of a single maritime boundary are not directly relevant to delimitation of the continental shelf only.

[4] The main cases are the *Anglo-French Continental Shelf* case (1977) and the *Dubai/Sharjah Border Arbitration* (1981). The *Guinea/Guinea Bissau Maritime Boundary* case (1985) and the *Case concerning the Delimitation of Maritime Areas between Canada and the French Republic* (1992) both concerned a single maritime boundary between the continental shelves and the 200-mile fishing zones/EEZs of the States concerned, and therefore like the *Gulf of Maine* case are not directly relevant in the present context.

[5] But cf. the *Gulf of Maine* case, where the International Court made a distinction between principles of delimitation and practical methods for determining a boundary. According to the Court, only the former could be the subject of customary international law. See [1984] *ICJ Rep.* 246, at 290. This distinction has not been pursued by either the Court or tribunals in later cases.

of delimitation the use of which was compulsory, stated that under customary international law:

> delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.[6]

This was accordingly achieved, following the Court's judgment in the case, through the negotiation of a series of treaties between the littoral States concerned, the Court having been asked only to indicate the principles of delimitation and not to determine the actual boundary, in such a way as to give Germany a larger share of the shelf than it would have enjoyed under a delimitation employing only the equidistance principle.

The International Court's dictum in the *North Sea Continental Shelf* cases that under customary international law delimitation is to be effected by agreement in accordance with equitable principles and taking account of all the relevant circumstances has been reiterated in all subsequent cases. Since the *Tunisia/Libya* case the Court has stressed, in addition, that the goal of the delimitation process is an equitable result, although this does not mean a judgment *ex aequo et bono*.

Although the delimitation rule in article 6 of the Continental Shelf Convention and the customary rules are rather differently formulated, and although the Court in the *North Sea Continental Shelf* cases stressed that the rule in article 6 had not passed into customary law, there has been a tendency to see them as leading to much the same effect. Thus, the arbitral tribunal in the *Anglo-French Continental Shelf* case in 1977, dealing with delimitation of the Western Approaches between France and the United Kingdom (both parties to the 1958 Convention), stated that the equidistance–special circumstances rule of article 6, which the tribunal saw as a single rule rather than (as suggested above) two rules (the main rule and an exception to it), 'in effect gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles'.[7] In the *Greenland/Jan Mayen* case the International Court went further and added:

> If the equidistance-special circumstances rule of the 1958 Convention is, in the light of this 1977 Decision, to be regarded as expressing a general norm based on equitable principles, it must be difficult to find any material difference – at any rate in regard to delimitation between opposite coasts – between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles.[8]

[6] [1969] *ICJ Rep.* 3, at 54.
[7] 18 *ILM* 398 (1979), at 421.
[8] [1993] *ICJ Rep.* 38, at 58.

The Court thus appears to have equated article 6 with the customary international law rules on continental shelf delimitation, at least as far as opposite coasts are concerned. In doing so, it appears to have gone further than the *Anglo-French Continental Shelf* case where the tribunal noted that 'under article 6 the equidistance principle ultimately possesses an obligatory force which it does not have in the same measure under the rules of customary law' and that 'the rules of customary law are a relevant and even essential means for both interpreting and completing the provisions of article 6'.[9]

Although courts and tribunals have been reluctant to enumerate principles of delimitation under customary law, a number of such principles do seem to have emerged through consistent utilisation in a number of cases. First, in the case of delimitations between opposite (as opposed to adjacent) coasts, there is an increasing tendency for courts and tribunals, even when applying customary law, to begin the delimitation process by drawing an equidistance line as a provisional boundary and then considering whether it requires modification in the light of the relevant circumstances in order to achieve an equitable solution. This was done, for example, in the *Libya/Malta*[10] and *Greenland/Jan Mayen*[11] cases. Secondly, a court or tribunal will not choose as a boundary a line that encroaches on or cuts off areas that more naturally belong to one party than the other. This, perhaps somewhat question-begging, principle was applied in the *North Sea Continental Shelf*[12] and *Tunisia/Libya*[13] cases. Thirdly, courts and tribunals have emphasised that in carrying out a boundary delimitation, they are not engaged in an exercise in distributive justice and dividing the delimitation area into just and equitable shares.[14] Finally, a court or tribunal may limit the area in which the boundary is drawn because of the presence of continental shelves claimed by third States: this happened, for example, in the *Libya/Malta* case.

As we have seen, article 6 of the Continental Shelf Convention requires consideration of any 'special circumstances' which might justify a departure from the median line when drawing a continental shelf boundary, whereas customary international law requires 'relevant circumstances' to be taken into account. 'Special circumstances' have traditionally been regarded as being fairly narrow in scope: for example, the principal drafters of article 6, the International Law Commission, considered 'special circumstances' as embracing (and apparently being limited to) exceptional configurations of the coast, and the presence of islands and navigable channels.[15] 'Relevant circumstances', on the other hand, have been regarded as being much wider in scope: indeed, in the *North Sea*

[9] *Op. cit.* in footnote 7, pp. 421 and 422.
[10] [1985] *ICJ Rep.* 13, at 47 *et seq.*
[11] *Op. cit.* in footnote 8, pp. 61–2.
[12] *Op. cit.* in footnote 6, p. 47.
[13] [1982] *ICJ Rep.* 18, at 61–2.
[14] See, for example, the *Greenland/Jan Mayen* case, *op. cit.* in footnote 8, pp. 66–7 where the International Court quotes from its previous case law.
[15] See *ILC Yearbook*, 1956, Vol. II, p. 300.

Continental Shelf cases the International Court suggested that there was no limit to the kind of circumstances that might be taken into account in effecting an equitable delimitation.[16] Subsequent cases, however, have tended to narrow such circumstances to those that are relevant to the continental shelf and are primarily geographical in character. In the *Greenland/Jan Mayen* case the International Court, having (as we have already seen) effectively equated article 6 of the 1958 Convention with customary law, went on to point out that although special circumstances and relevant circumstances were different in origin and in name, there was a tendency to assimilate the two because 'they both are intended to enable the achievement of an equitable result', especially in the case of opposite coasts.[17] As regards the question of how particular relevant or special circumstances are to be weighted, it seems, especially from the *Libya/Malta* and *Greenland/Jan Mayen*[18] cases, that a court has a broad discretion to determine the relative weight of any particular circumstances, subject only to the need for some consistency with previous cases.

In fact a number of relevant or special circumstances can be identified with some confidence as there has been a degree of consistency in the case law. One relevant circumstance is the configuration of the coast. One example, the concavity of the German coast in the *North Sea Continental Shelf* cases, has already been mentioned. A second example is in the *Tunisia/Libya* case, where the Court noted that the marked change in the direction of the Tunisian coastline to the west of the terminus of the land frontier modified the situation of lateral adjacency of the parties.[19] A second relevant circumstance is the presence of islands. Small islands are usually given less than full effect: where a court is minded to utilise an equidistance line as the boundary it will be modified so that the boundary is not equidistant between the island and the opposite coast. An example is the *Anglo-French Continental Shelf* case, where the tribunal gave the Scilly Isles 'half effect', i.e., the boundary line was the line which bisected (i.e. was halfway between) an equidistance line between the mainland coasts of the United Kingdom and France (i.e., ignoring the Scilly Isles completely) and an equidistance line between the Scilly Isles and France. (In drawing both these lines the French island of Ushant was given full effect because of its size and proximity to the French mainland.[20]) Other examples are the *Tunisia/Libya* case, where the Tunisian Kerkennah islands were given half effect,[21] and the *Dubai/Sharjah* case, where the island of Abu Musa (belonging to Sharjah) was given no continental shelf beyond its twelve-mile territorial sea in order to achieve an equitable solution.[22] On the other hand, where even relatively small islands lie a long way

[16] *Op. cit.* in footnote 6, p. 50.
[17] *Op. cit.* in footnote 8, p. 62.
[18] *Op. cit.* in footnote 10, p. 39 and footnote 8, pp. 63–4.
[19] *Op. cit.* in footnote 13, p. 62–3.
[20] *Op. cit.* in footnote 7, pp. 454–6.
[21] *Op. cit.* in footnote 13, pp. 63–4 and 89–90.
[22] *Op. cit.* in footnote 2, p. 677.

from their metropolitan territory or constitute a single State, they will in principle be given full effect. This is illustrated by the *Greenland/Jan Mayen* case (in respect of Jan Mayen) and the *Libya/Malta* case (in respect of Malta). Where islands lie on the 'wrong' side of a line which a court is minded to choose as a boundary, they may be given their own small enclaves of continental shelf without the provisional boundary line being modified. This was done with the Channel Islands in the *Anglo-French Continental Shelf* case,[23] where the islands were each given a twelve-mile wide enclave of continental shelf, with the boundary in this area otherwise being a line down the middle of the English Channel equidistant from the coasts of England and France.

Thirdly, differences in the lengths of the relevant coastlines are a relevant circumstance, especially (perhaps only) in the case of opposite coasts. Where an equidistance line is drawn as the provisional boundary between two coastlines of markedly different lengths, there will be a considerable degree of disparity between the ratio of the coastlines to each other and the ratio of the areas of continental shelf attaching provisionally to each party. This is thought to be inequitable. In such cases, therefore, a court will adjust the provisional boundary line so that there is a reasonable degree of proportionality, or at least not excessive disproportionality, between the length of each party's coastline and the area of continental shelf attaching to it. Thus, for example, in the *Libya/Malta* case the fact that the ratio of the length of the Libyan coastline to the Maltese coastline was eight to one was a reason for adjusting a median line as the provisional boundary closer to Malta.[24] A similar exercise was carried out in the *Greenland/Jan Mayen* case.[25] In the *Tunisia/Libya*[26] case the principle of proportionality was used in a somewhat different way, in order to confirm the equitableness of the court's proposed solution, rather than to modify an equidistance line.

Fourthly, the prior conduct of the parties, such as having agreed a provisional boundary line, may be a relevant circumstance. Thus, in the *Tunisia/Libya* case the Court regarded a line extending seawards from the terminus of the land boundary which neither party had crossed when granting offshore oil and gas concessions as a highly relevant circumstance, and used it as the first segment of the boundary line.[27] The relevance of prior conduct was also recognised in the *Libya/Malta*[28] and *Greenland/Jan Mayen*[29] cases, although in neither case did the Court find that there was sufficient concordance of conduct for it to be relevant. Fifthly, security considerations may be a relevant circumstance. They were recognised in principle as relevant in the *Libya/Malta* and

[23] *Op. cit.* in footnote 7, pp. 444–5.
[24] *Op. cit.* in footnote 10, pp. 43–6, 49–50, but note the limitation of using proportionality expressed at pp. 45–6.
[25] *Op. cit.* in footnote 8, pp. 65–70.
[26] *Op. cit.* in footnote 13, p. 75.
[27] *Ibid.*, pp. 71 and 80–6.
[28] *Op. cit.* in footnote 10, pp. 28–9.
[29] *Op. cit.* in footnote 8, pp. 75–7.

Greenland/Jan Mayen cases;[30] but in practice they did not affect the course of the boundary line.

In the *North Sea Continental Shelf* cases the International Court placed great emphasis on the concept of the natural prolongation of land territory as a factor in continental shelf boundary delimitation.[31] Thus, geological and geomorphological features, such as a deep trench amounting to a discontinuity in the sea bed, would constitute relevant circumstances. However, in later cases courts and tribunals have severely downgraded such circumstances. In the *Libya/Malta* case the International Court, after noting that the EEZ gave the same rights over the sea bed and its subsoil as the continental shelf and that the EEZ was now incontestably part of customary law, concluded that under customary law the minimum breadth of the continental shelf must be 200 miles. In other words title to the continental shelf is now based on a distance criterion.[32] The consequence of this must be that geological and geomorphological factors are all but irrelevant, at least in the case of States opposite each other and less than 400 miles apart. They could be relevant where opposite States are more than 400 miles apart.[33] They could possibly also be relevant in the case of adjacent States, although in the *Tunisia/Libya* case[34] arguments based on geomorphology were effectively ignored by the International Court. Courts and tribunals have also been consistent in holding a variety of other factors to be irrelevant. These include socio-economic factors, such as disparities in the wealth and size of population of each party; differences in the area of land territory belonging to each party; and normally the natural resources and ecology of the delimitation area.[35]

Although the principles and circumstances relevant to continental shelf delimitation can now be identified with some confidence from the case law, the fact that courts and tribunals have a wide discretion as to which of these criteria are selected and how they are weighted means that in any particular case it is very difficult to predict what line will be chosen as the boundary by the court or tribunal concerned. It is largely this that has led a number of writers, and perhaps also even one or two judges of the International Court, to deny that courts and tribunals are applying rules of law when they engage in boundary delimitation: instead, it is suggested, they are in effect making a judgment *ex aequo et bono*. There is certainly some force in such arguments. The more cynical might observe

[30] *Op. cit.* in footnote 10, p. 42 and footnote 8, pp. 74–5, respectively.
[31] *Op. cit.* in footnote 6, pp. 51 and 53.
[32] *Op. cit.* in footnote 10, pp. 33–5.
[33] However, it should be noted that in the *Canada/France* case the tribunal held that it had no competence to delimit the continental shelf beyond 200 miles because of the interests of the international community, in particular the International Sea Bed Authority and the Commission on the Limits of the Continental Shelf, in the question of the seaward limit of the shelf beyond 200 miles: 31 *ILM* 1145 (1992), at 1172.
[34] *Op. cit.* in footnote 13, pp. 41–58.
[35] See, for example, the *Tunisia/Libya* case, *op. cit.* in footnote 13, pp. 77–8; the *Libya/Malta* case, *op. cit.* in footnote 10, pp. 40–1; and the *Greenland/Jan Mayen* case, *op. cit.* in footnote 8, pp. 73–4.

that in most cases the boundary line chosen by the court or tribunal more or less represents a splitting of the difference between what each party has claimed should be the boundary.

The Law of the Sea Convention

UNCLOS III had great difficulty in finding acceptable provisions concerning the delimitation of the continental shelf and EEZ. Participants at the Conference divided into two broad camps, those who favoured equidistance (with an exception for special circumstances) as the primary principle of delimitation and those who wanted the emphasis placed on equitable principles, with no mention being made of equidistance. Negotiations on the matter were very protracted, and the resulting compromise is not very meaningful, article 83(1) of the Convention providing simply:

> The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

As can be seen, the article contains no specific reference to either equidistance or equitable principles. Strictly speaking, it deals only with delimitation by agreement. The phrase 'effected by agreement' is the same as that used in the *North Sea Continental Shelf* cases, in the passage quoted on p. 186. Of this phrase the International Court said in that case that it implied an obligation to enter into meaningful negotiations in good faith.[36] In seeking to negotiate an agreement the parties to a continental shelf delimitation are enjoined by article 83(1) to apply any rule of international law that may be binding upon them (which in practice is likely to be limited to customary rules[37]), although they probably remain free to agree to disregard any such rule, in order to reach an 'equitable solution'. It would, of course, be very odd if they succeeded in agreeing on a solution which they did not consider to be equitable. Taken literally, article 83(1) does not itself contain any provisions on delimitation where the parties are unable to reach agreement, let alone indicate to any competent tribunal any principles or methods to be used to settle the dispute. Article 83 does go on, however, in paragraph 2 to say something about procedures if the parties are unable to agree. It provides that if agreement on the boundary is not possible 'within a reasonable period of time', the matter is to be referred to the dispute settlement procedure set out in Part XV of the Convention, unless there is a special treaty in force between the States concerned which covers the matter, in which case the dispute is to

[36] *Op. cit.* in footnote 6, p. 47.
[37] Even if both States were parties to the Continental Shelf Convention, article 6 of the Convention would not be applicable. This is because article 311(1) of the Law of the Sea Convention provides that that Convention prevails over the 1958 Conventions. See further chapter one, p. 24.

be resolved according to the provisions of such treaty (art. 83(4)). It should be noted that States may choose to except boundary delimitation from the Convention's provisions on compulsory dispute settlement, apart from compulsory conciliation.[!]

Pending settlement of delimitation disputes, the States concerned are to make every effort to enter into provisional arrangements of a practical nature (art. 83(3)). An example of such an arrangement might be the 1985 France–Tuvalu agreement, under which the equidistance line is used as a temporary boundary pending agreement upon a permanent boundary. Article 83(3) goes on to provide that pending the reaching of a definitive agreement on a boundary, the parties are to make every effort not to 'jeopardise or hamper the reaching of the final agreement'. This suggests that neither party should take any action in the area subject to delimitation, such as engaging in exploratory drilling for oil or gas, which might be regarded as prejudicial by the other party. Arguably such a rule exists also in customary international law.[38]

EEZ and fishing zone

Custom

Customary international law relating to the delimitation of the EEZ and/or fishing zone between neighbouring States has been developed by the International Court and arbitral tribunals in much the same way as they have done for continental shelf delimitation. So far only one case, the *Greenland/Jan Mayen* case (1993), has been concerned with an EEZ/fishing zone boundary as such. The other three cases so far decided, the *Gulf of Maine* (1984), *Guinea/Guinea Bissau* (1985) and *Canada/France* (1992) cases, were all concerned with delimitation of a single maritime boundary between both the continental shelves and the 200-mile EEZs/fishing zones of the States concerned.[39] Since the continental shelf and EEZ are coterminous within 200 miles of the coast and since there is a general trend in treaty practice to draw a single continental shelf/EEZ boundary within this area (as explained below), it seems legitimate to regard the single maritime boundary cases as relevant to EEZ delimitation. In practice, as will be seen,

[38] For discussion of this point, see R. R. Churchill and G. Ulfstein, *Marine Management in Disputed Areas: the Case of the Barents Sea* (London, Routledge), 1992, pp. 85–9.

[39] Two further cases concerning a single maritime boundary are currently pending before the International Court – *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, which was referred to the Court in 1991 and for which the Court found that it had jurisdiction in 1994 and 1995, and *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*, referred to the Court in 1994 and for which the Court found that it had jurisdiction in 1998. One arbitration is also pending, between Eritrea and Yemen: see their Arbitration Agreement, 1996. Proceedings before the International Court in the *Case concerning the Maritime Delimitation between Guinea Bissau and Senegal*, which had been referred to the Court in 1991, were discontinued in 1995 when the parties reached an agreement settling their dispute.

courts and tribunals have applied many of the principles which they have laid down for continental shelf delimitation to delimitation of single maritime boundaries. All four cases mentioned were decided after the Law of the Sea Convention was signed but before its entry into force.

In the *Gulf of Maine* case the International Court was asked to draw a single boundary between the continental shelves and the 200-mile fishing zones of Canada and the USA. Although both States were parties to the Continental Shelf Convention, the Court held that this was not relevant to the drawing of a single boundary since the Convention related only to the sea bed and was not concerned with the superjacent waters. The Court then enunciated a two-stage fundamental norm of maritime delimitation:

> (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.[40]

The Court then went on to decide that the criteria and methods of delimitation it should use were those that were appropriate for both the sea bed and water column, and that criteria which related to only one of these zones (such as geological criteria) should be ignored. The criteria that were most likely to be suitable for a multi-purpose delimitation were those of geography. The Court's emphasis on geographical criteria as the most appropriate for delimitation means that most, if not all, of those factors identified earlier as relevant to continental shelf delimitation, such as the principle of non-encroachment, coastal configuration, islands and proportionality, will be equally relevant to a single maritime boundary.

In the *Gulf of Maine* case the Court constructed a boundary in three segments. In the inner part of the Gulf of Maine, where the parties are adjacent, the boundary was a line which effected an equal division of the area where the parties' maritime zones overlapped. In the outer part of the Gulf, where Canada and the USA are opposite each other, the boundary was a median line in principle, adjusted and moved closer to Canada to take account of the greater length of the US coastline in the Gulf and to give only half effect to Canada's Seal Island. From the mouth of the Gulf the boundary was a line perpendicular to the closing line of the Gulf. The Court then checked to see whether this overall result was equitable. At this stage economic and other factors (*in casu* the long history of fishing on the resource-rich Georges Bank) could be relevant

[40] *Op. cit.* in footnote 5, pp. 229–300.

(even if irrelevant as delimitation criteria), but they would only disturb the boundary line which the Court had provisionally arrived at if they showed that result to be 'radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the countries concerned'.[41] This was not, however, the case here.

The International Court's approach in the *Gulf of Maine* case was broadly followed in the *Guinea/Guinea Bissau* and *Canada/France* cases. In the former case, in which the arbitral tribunal was asked to draw a single boundary between the territorial seas, continental shelves and EEZs of Guinea and Guinea Bissau, the main factors which the tribunal found to be relevant were the configuration and respective lengths of the parties' coasts, the principle of non-encroachment, security interests and the prior conduct of the two colonial powers before the parties' independence. In the *Canada/France* case, in which the tribunal was asked to draw a single boundary between the continental shelf and the 200-mile fishing zone of Canada and the continental shelf and the EEZ of the French islands of St Pierre and Miquelon which lie close to the coast of Newfoundland, the principal relevant factor was the principle of non-encroachment, with St Pierre and Miquelon being awarded a zone only twelve miles in breadth beyond its twelve-mile territorial sea in areas close to the Canadian coast, but a small corridor of maritime zone out to a full 200 miles to the south where this did not cut off seaward projections of the Canadian zone. Interestingly, part of this area had not been included by France in its proposed solution as part of the maritime zone of St Pierre and Miquelon. Proportionality was then used to check that the tribunal's solution was equitable (which it was).

In the *Greenland/Jan Mayen* case, unlike in the three cases just discussed, the International Court had not been asked by both parties to draw a single maritime boundary. The case had been referred to it unilaterally by Denmark, invoking its own and Norway's declarations under article 36(2) of the Court's Statute. Although Denmark had asked the Court to draw a single boundary, the Court decided, although without really explaining why, that it could not do so without the consent of Norway. It therefore engaged in two separate delimitation exercises, one for the continental shelf and the other in respect of the 200-mile fishing zones of Greenland and Jan Mayen, although ultimately the two boundaries drawn by the Court coincided. As regards the fishing zone boundary, the Court decided as a first step to determine such a boundary by applying the customary law governing EEZ delimitation. The Court asserted that this customary law was the same as the provisions of the Law of the Sea Convention governing EEZ delimitation (art. 74(1)), which are the same, *mutatis mutandis*, as those governing continental shelf delimitation (art. 83(1)) and which are discussed below. The Court then decided that it would follow the *Libya/Malta* and *Gulf of Maine* cases (neither of which, of course, was concerned with an EEZ boundary *simpliciter*) and draw a median line as the provisional boundary and then adjust it in the light of any

[41] *Ibid.*, p. 342.

relevant circumstances in order to achieve an equitable result. The circumstances which were found to be relevant were the great difference in the lengths of the relevant coasts of Greenland and Jan Mayen (the former was about nine times longer than the latter) and the fishery resources of the area. The provisional boundary was therefore moved eastwards towards Jan Mayen to take account of these circumstances and so as to give fishing vessels from Greenland 'equitable access to the capelin stock', the main fishery resource of the area.[42] It will be noted that the question of fishery resources played a greater role in the delimitation process here than in the *Gulf of Maine* and *Canada/France* cases, where they were held to be relevant only if the Court's provisional boundary was radically inequitable. The difference may be explained by the fact that in the *Greenland/Jan Mayen* case the Court was concerned with a separate fishing zone boundary whereas the other two cases were concerned with a multi-purpose boundary. In the case of the continental shelf boundary the Court also drew a median line as the provisional boundary which it then adjusted (for reasons which are not entirely clear) so as to coincide with the fishing zone boundary.

Thus, it would seem that under customary law States are free to agree on any boundary for their overlapping EEZs that they like. Where they are unable to agree, and the matter is referred for third party settlement, the boundary should be drawn applying equitable criteria and taking account of all the relevant circumstances in order to produce an equitable result. Where the EEZ boundary is part of a multi-purpose boundary, the relevant circumstances will primarily be geographical features. Where, on the other hand, an EEZ boundary only is to be drawn, the circumstances that will be considered relevant are likely to be wider and would seem potentially to include any factors connected to the rights which coastal States enjoy in their EEZs. Given, however, the clear trend towards single maritime boundaries, the principles enunciated by the International Court and arbitral tribunals peculiar to delimitations concerned with the boundary for only one maritime zone, be it the continental shelf or the EEZ, are likely to be of decreasing significance.

The Law of the Sea Convention

At UNCLOS III there was a feeling that in general it is desirable for continental shelf and EEZ boundaries to coincide, and during the later sessions of the Conference negotiations on delimitation of continental shelf and EEZ boundaries were conducted together. Not surprisingly, therefore, the wording of the provisions of the Convention on the delimitation of EEZ boundaries, in article 74, is the same, *mutatis mutandis*, as that of article 83 on continental shelf delimitation. Thus, delimitation of EEZ boundaries is to be effected by agreement on the basis of international law in order to achieve an equitable solution (art. 74(1)), about which the same comments can be made as were made above in relation to the

[42] *Op. cit.* in footnote 8, p. 72 and see also pp. 79–81.

equivalent provision concerning the continental shelf. Procedures are set out where the parties cannot agree (art. 74(3)); and provisional arrangements called for in the interim (art. 74(3)). An example of such a provisional arrangement might be the 1977 Denmark–Sweden agreement, which provided that until a permanent boundary was agreed (as it was in 1984) the exclusive fishing zones in the area of the Kattegat lying beyond twelve miles from the coasts should be placed under joint Danish-Swedish fisheries jurisdiction.

Although the provisions of the Convention governing continental shelf and EEZ delimitation are the same, their wording is sufficiently imprecise for the provisions to be capable of application in more than one way, and thus for the continental shelf and EEZ boundaries to differ – a situation fraught with the potential for conflict (for example, if one State wanted to exploit its continental shelf underlying an area of another State's EEZ rich in fish stocks). In practice, of the EEZ boundaries that have so far been agreed, the EEZ boundary is the same as the continental shelf boundary in all but two cases. The first is the Australia–Papua New Guinea Maritime Boundaries Treaty of 1978, which provides for a divergence between the fisheries jurisdiction and the sea-bed jurisdiction boundaries in the Torres Strait, partly in order to recognise the importance of fishing to the inhabitants of certain Australian islands close to Papua New Guinea, and partly to avoid establishing Australian-inhabited enclaves north of a general maritime boundary between the two States.[43] The second instance is the Australia–Indonesia Maritime Boundaries Treaty of 1997, which provides for part of the EEZ boundary between the two States to diverge from the continental shelf boundary and regulates possible conflicts of use and jurisdiction in areas where the boundaries diverge. Although State practice exhibits an overwhelming trend towards EEZ and continental shelf boundaries coinciding, the practice is not such as to require a single boundary. Nevertheless, it is generally desirable that EEZ and continental shelf boundaries should coincide. However, the fact that articles 74 and 83 of the Law of the Sea Convention stipulate that such boundaries should represent an 'equitable solution' will in many cases make it more difficult to agree on a common boundary. A boundary that might be equitable for EEZ purposes might not be equitable for continental shelf purposes because of the different considerations that are relevant to achieving an equitable solution in each case – for example, the location of fish stocks in the case of the EEZ, the geological characteristics of the sea bed and the location of sea-bed mineral deposits in the case of continental shelf. The approach of the International Court in the *Gulf of Maine* case was, as we have seen, to sidestep this problem by concentrating upon the equity of the delimitation from the geographical point of view, paying scant attention to the equity of the resulting division of the economic resources of the area. That is not, however, to say that

[43] See Burmester, *op. cit.* in 'Further reading' at pp. 333–4. In relation to matters other than the sea bed and fisheries in the area of divergence, the treaty provides that no party may exercise jurisdiction without the concurrence of the other (art. 4(3)).

such economic factors will not figure more prominently in negotiated settlements of boundary lines.

State practice on delimitation

The principles described above will be applied, unless excluded or modified by the agreement of the parties, in judicial and arbitral determinations of maritime boundaries, and will also have a considerable influence on negotiated settlements as those principles considered particularly apposite will be invoked by a State to support its negotiating position. Most maritime boundaries so far have been settled by agreement rather than by a judicial or arbitral body. Currently about 140 such boundaries have been agreed, out of an estimated 400 or so potential boundaries.[44] In the case of territorial sea and continental shelf boundary agreements, the equidistance principle, modified to take account of special circumstances, has tended to predominate as the basis of the delimitation, although some recent agreements, such as the Belgium–France territorial sea and continental shelf boundary agreements of 1990, refer to the desire of the parties to arrive at an equitable solution. Few EEZ/fishing zone-only boundaries have been agreed. Since the late 1970s the trend, particularly outside Europe, has been to conclude agreements establishing a single maritime boundary for all zones. Within Europe there have been a few EEZ and fishing zone boundary agreements, but in many cases existing continental shelf boundaries agreed in the 1960s and early 1970s have been treated as *de facto* boundaries for the EEZ/fishing zone. Of the single maritime boundaries that have so far been agreed, many, particularly in the case of opposite coasts, are based on the equidistance principle, sometimes with modifications to simplify what would otherwise be an unduly complicated line or to take account of special circumstances (e.g., the India–Sri Lanka Maritime Boundary Agreement of 1976, the Colombia–Haiti Maritime Limits Agreement of 1978 and the France–Tonga Convention of 1980). A few agreements (e.g., the Colombia–Costa Rica Maritime Delimitation Treaty of 1977 and the Trinidad and Tobago–Venezuela Maritime Delimitation Treaty of 1990) appear to be based on equitable principles, while in two cases (the Colombia–Ecuador Marine Delimitation Agreement of 1975 and the Gambia–Senegal Maritime Boundaries Agreement of 1975) the boundary has been chosen, presumably for reasons of simplicity, as the line of latitude extending seawards from the terminus

[44] Such computations have been done, *inter alia*, by Blake, *op. cit.* in 'Further reading', chapter 1 and Charney, *op. cit.*, footnote 45 (see below). The statistics appear to treat territorial sea, continental shelf and EEZ boundaries between two States in the same sea as one boundary, but where two States have boundaries in more than one sea, this counts as more than one boundary: e.g., Canada and the USA have four potential boundaries – in the Atlantic, Pacific, Bering and Beaufort seas. For a list of boundary agreements concluded up to 1990, see Brown, *op. cit.* in 'Further reading', Vol. I, pp. 439–75. See also the UN volumes referred to in 'Further reading'.

of the land boundary. The American Society of International Law Maritime Boundary Project, which analysed all existing maritime boundary agreements, found such a diversity of practice, both as to the method of delimitation and the factors taken into account in the delimitation and the weight attached to them, that it concluded that 'no normative principle of international law has developed that would mandate the specific location of any maritime boundary line'.[45]

As regards State practice in the form of national legislation, of the many States which have legislated on the continental shelf and the EEZ, well over one-third include in their legislation reference to the equidistance principle, commonly as an interim solution pending the settlement of boundaries by agreement.[46] While this practice is, in view of the divergent practice of other States, probably insufficient to establish a rule of law of general application, the principle of opposability (see chapter one) is likely to secure the utilisation of the equidistance principle as a starting point for delimitations in several areas.

Co-operative arrangements

Attempts to delimit overlapping EEZs and continental shelves need not necessarily involve, or only involve, the drawing of a boundary line. The States concerned may decide to establish co-operative arrangements for the exploitation and management of the resources of the delimitation area either in place of a boundary line or to facilitate the drawing or continuing operation of a boundary. Four types of arrangement may be distinguished: (1) co-operative arrangements for the exploitation of sea-bed and/or fishing resources in place of a boundary line; (2) the establishment of a joint exploitation zone for sea-bed and/or fishing resources which straddles the boundary and is part of the boundary settlement; (3) arrangements for the exploitation of oil and gas fields found to be lying across the boundary line; and (4) co-operative arrangements to facilitate the management of transboundary fish stocks.

Turning to the first of these, States unable to agree, or reach agreement easily, on a maritime boundary (and the generality and vagueness of the rules surveyed above do not exactly help States to reach agreement) may decide instead to establish, either provisionally or on a longer-term basis, a zone in all or part of the area where their zones overlap, in which the sea-bed and/or fishery resources are to be jointly exploited and managed. The advantage of doing this is that in

[45] J. I. Charney, 'The American Society of International Law Maritime Boundary Project' in G. H. Blake (ed.), *Maritime Boundaries* (London, Routledge), 1994, 1 at 9. The results of the Project are published as Charney and Alexander (eds), *op. cit.* in 'Further reading', *passim*.

[46] See *Smith*, *op. cit.* in 'Further reading', *passim*. Barbados, Fiji, Iceland, India, Indonesia, Morocco, Mozambique, New Zealand, Nigeria, Oman, Qatar, Spain, Tonga and Western Samoa are among the States concerned. See also Brown, *op. cit.* in footnote 44, pp. 167–200, 305–19.

the absence of a boundary and without such a zone the exploitation of sea-bed resources is unlikely to take place because oil companies are usually unwilling to invest in disputed areas and in any case there is (as we have seen) probably a rule of international law that prohibits unilateral exploitation in such areas. As far as fishery resources are concerned, there is likely to be exploitation in such areas (there being no equivalent rule against unilateral exploitation, unless article 74(3) of the Law of the Sea Convention can be read as restraining such action), but such exploitation cannot be properly regulated and thus the resources are likely to become over-exploited.

In the case of sea-bed resources there are about half-a-dozen agreements establishing joint development zones. A good example is the agreement between Japan and South Korea. In 1974 the two States succeeded in reaching agreement on a continental shelf boundary in the northern part of the area where their continental shelves overlap, but were unable to agree on a boundary in the southern part of this area. Instead, in the same year they signed an Agreement concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries. The Agreement, which is to last for fifty years and applies to an area of some 24,000 square nautical miles, provides that concessionaires from each party are to enter into operating agreements to carry out jointly exploration and exploitation of the area and are to appoint an operator and share the resources equally. A joint commission is established to oversee activities in the area.[47] Turning to co-operative arrangements for fisheries resources, there are several such arrangements, of which the best example is probably the 1978 Agreement between Norway and the then USSR on an Interim Practical Arrangement for Fishing in an Adjoining Area in the Barents Sea. The Agreement applies to an area of 67,500 square kilometres in the southern part of the Barents Sea where the EEZs of Norway and Russia overlap. Within this area total allowable catches, quotas and other regulatory measures are adopted by a Norwegian/Russian Fishery Commission. Each party has jurisdiction in the area only in respect of its own fishing vessels and such third State vessels as it has licensed to fish against its quota. Although described as 'interim' and originally concluded for one year only, the Agreement has subsequently been renewed annually, and this is likely to continue until the parties agree on an EEZ and/or continental shelf boundary.[48] Finally, there are also one or two instances where States have established a zone

[47] For fuller details of this and most of the other examples of co-operative sea-bed arrangements, see Fox (ed.), *op. cit.* in 'Further reading', *passim*. One of these examples is the Treaty between Australia and Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, 1989. This treaty was challenged by Portugal before the International Court of Justice on the ground that it was a denial of East Timor's right to self-determination. The Court held that it could not rule on this question because Indonesia was not a party to the case: see the *East Timor* case (1995).

[48] For fuller details of this and other examples, see R. R. Churchill, 'Fisheries issues in maritime boundary delimitation', 17 *Marine Policy* 44 (1993) at 45–51.

for the joint management of both living and non-living resources. An example is the zone created by the Colombia–Jamaica Maritime Delimitation Treaty of 1993.

The second category concerns co-operative arrangements as part of a boundary settlement. The inclusion of such arrangements may facilitate the drawing of a boundary line because it may enable a more equitable sharing of resources to take place than would happen with a boundary *tout court* and may increase the number of variables involved in a boundary negotiation, thus promoting possibilities for trade-offs and compromises. Again there are a number of examples of such co-operative arrangements, both for sea-bed resources and for fisheries resources. An example of a sea-bed arrangement is the 1974 Continental Shelf Boundary Convention between France and Spain which establishes a zone of some 814 square nautical miles straddling these countries' continental shelf boundary in the Bay of Biscay. The aim of this arrangement is an equal division of resources between the two States which is to be achieved by encouraging companies from each State to participate in partnership agreements on an equal basis.[49] Similar zones straddling the boundary have been established for co-operation over the exploitation and management of fisheries, such as that between Argentina and Uruguay. These are discussed in chapter fourteen, in the context of the management of shared fish stocks (see pp. 294–6).

The third type of arrangement concerns co-operation over the exploitation of oil and gas fields found to be straddling a previously agreed boundary line. In the North Sea there are a number of fields in this situation. Several bilateral treaties, principally between the United Kingdom and Norway, have been concluded under which production from the cross-boundary reservoir is apportioned between the two States and arrangements for co-ordinated administration of the field are established. An example is the agreement between Norway and the United Kingdom concerning the Frigg gas field (1976). Another example, from outside the North Sea, is the 1969 Maritime Boundary Agreement between Abu Dhabi and Qatar which provides for the Al Bunduq field, which straddles the continental shelf boundary, to be exploited by a concessionaire of Abu Dhabi and all revenues to be shared equally between the two parties. The system adopted in such cross-boundary agreements is entirely a matter for the agreement of the parties. Customary international law does not yet seem to yield any precise rules applicable in the absence of such agreement, although some writers have advanced general solutions based on a mixture of basic principles of law, previous treaty practice and robust expediency.

Finally, in the fourth category mentioned above, there are various arrangements that have been agreed for fisheries in the context of boundary negotiations. They include such matters as access by fishermen from one State to the zones of the other State and the management of transboundary fish stocks. These are discussed in chapter fourteen.[50]

[49] For fuller details of this and other examples, see Fox, *op. cit.* in footnote 47.
[50] See also Churchill, *op. cit.* in footnote 48, pp. 55–7.

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High seas

Introduction

The legal regime of the high seas has traditionally been characterised by the dominance of the principles of free use and the exclusivity of flag State jurisdiction, in sharp contrast to the powers of States over their coastal waters. The High Seas Convention which, alone among the 1958 Conventions, purported to codify customary international law, gave four examples of the freedom of the high seas: the freedoms of navigation, fishing, laying of submarine cables and pipelines, and overflight. The list of examples set out in the 1958 Convention has been extended in article 87 of the Law of the Sea Convention so as to include the freedom to construct artificial islands and other installations, and the freedom of scientific research. Some aspects of the high-seas freedoms have received close attention and have generated a considerable body of legal material of their own. Accordingly, we have reserved for treatment in later chapters some specific topics, such as high-seas fisheries (see chapter fourteen) and marine pollution (see chapter fifteen). Here we discuss only the general regime of the high seas.

Definition

The high seas were defined in the 1958 High Seas Convention as 'all parts of the sea not included in the territorial sea or in the internal waters of a state' (HSC, art. 1). With the advent of the EEZ and of the concept of archipelagic waters (see above, chapters nine and six respectively), this definition had to be modified. Article 86 of the Law of the Sea Convention, while strictly speaking not offering a *definition* of the high seas, states that the high-seas rules in the Convention apply to:

> all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.

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Marine management in disputed areas

The case of the Barents Sea

Robin Churchill and Geir Ulfstein

ROUTLEDGE

London and New York

First published 1992
by Routledge
11 New Fetter Lane, London EC4P 4EE

Simultaneously published in the USA and Canada
by Routledge
a division of Routledge, Chapman and Hall, Inc.
29 West 35th Street, New York, NY 10001

Typeset in Times by
NWL Editorial Services, Langport, Somerset

Printed and bound in Great Britain by
Mackays of Chatham PLC, Chatham, Kent

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library.

ISBN 0–415–03811–1

Library of Congress Cataloging in Publication Data
Churchill, R.R. (Robin Rolf)
Marine management in disputed areas: the case of the Barents Sea / Robin Churchill and Geir Ulfstein.
p. cm.
Includes bibliographical references and index.
ISBN 0–415–03811–1
1. Barents Sea – International status. 2. Marine resources conservation – Law and legislation – Barents Sea. 3. Marine resources conservation – Law and legislation – Norway – Svalbard. 4. Territorial waters. 5. Economic zones (Maritime law). 6. Norway – Boundaries – Soviet Union. 7. Soviet Union –Boundaries – Norway.
I. Ulfstein, Geir, 1951– . II. Title.
JX4084.B35C48 1992
341.4'48'0268470481–dc20 91–37180
CIP

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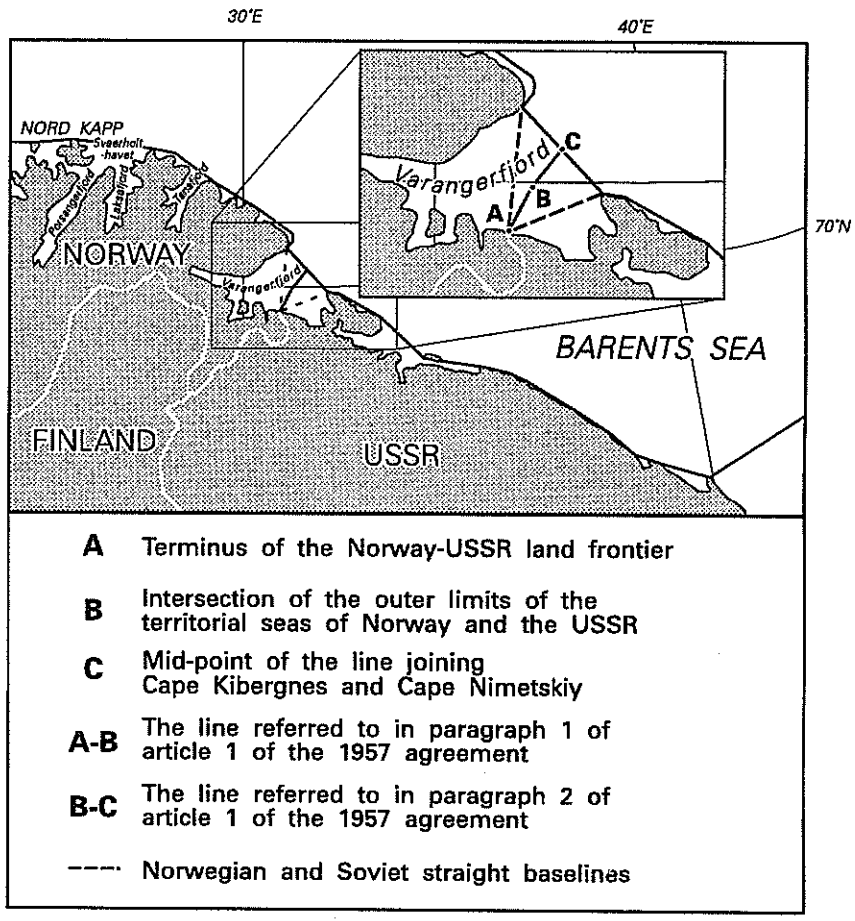
3 Boundary delimitation in the Barents Sea

INTRODUCTION

In 1957 Norway and the USSR signed an agreement which establishes a maritime boundary between them in the Varangerfjord.[1] Paragraph 1 of article 1 of the agreement provides that 'the sea frontier' between Norway and the USSR in the Varangerfjord 'shall follow a straight line' from the terminus of their land frontier to 'the intersection of the outer limits of Norwegian and Soviet territorial waters'. The outer limit of Norway's territorial sea (waters) is four miles, measured from a straight baseline drawn between the initial point of the boundary line and Cape Kibergnes; the outer limit of the USSR's territorial sea is twelve miles, measured at the time the agreement was signed from the low-water mark. Paragraph 2 of article 1 provides that 'neither of the Contracting Parties shall extend its territorial waters beyond the straight line' running from the intersection referred to above to the mid-point of a line drawn across the mouth of the Varangerfjord between Cape Kibergnes (in Norway) and Cape Nemetskiy (in the USSR), this point being some 13.5 nautical miles (hereafter all references to miles are to nautical miles) from the two Capes, the nearest land (see Map 3.1). The two boundary lines described in paragraphs 1 and 2 are 12.6 and 11.75 miles in length respectively.

The line described in paragraph 1 of article 1 is a territorial sea boundary proper. The line described in paragraph 2 would become a territorial sea boundary if either party were to extend its territorial sea beyond the breadths of four miles and twelve miles that they had in 1957. In fact neither party has done so. However, paragraph 2 became relevant in 1985 when the USSR changed its baseline in the Varangerfjord from the low-water mark to a straight baseline. The effect of paragraph 2 was to prevent the USSR's territorial sea extending beyond the line described in that paragraph, which it otherwise would have done in some places.



Map 3.1 Norway–USSR maritime boundary in the Varangerfjord

At the time the agreement was signed in 1957, neither Norway nor the USSR possessed any other maritime zones. Since 1957, however, as we saw in Chapter 1, each has claimed a continental shelf and an exclusive economic zone (EEZ). Although paragraph 2 of article 1 of the 1957 agreement is limited in its wording to the line it describes being a potential boundary for the territorial sea only, it would be contrary to the spirit of the agreement for either party to claim that its continental shelf or EEZ extended beyond that line. Therefore, the line may in

practice, though not in strict law, also be regarded as a continental shelf and EEZ boundary.

The boundary just described obviously covers only a tiny part of the Barents Sea, indeed it hardly reaches out into the Barents Sea proper. In the vast remainder of the Barents Sea, no boundary between the maritime zones (continental shelf and economic zone) of Norway and the Soviet Union has yet been agreed. The absence of such a boundary is an obstacle both to the effective management of living resources (as will be seen in Chapter 4) and to the exploration and exploitation of offshore oil and gas (as will be seen in Chapter 5), as well as being a source of tension in itself, as explained later in this chapter.

This chapter examines the origins of the dispute between Norway and the USSR over a maritime zones boundary in the Barents Sea and the negotiations that have so far taken place to try to resolve this dispute. It subjects each party's position to critical scrutiny, and offers a possible solution. The final part of the chapter considers the question of whether it is possible to explore for or exploit oil and gas in the disputed boundary area before a boundary has been agreed. First, however, the chapter begins by giving an outline of the rules of international law governing maritime boundary delimitation.

AN OUTLINE OF THE INTERNATIONAL LAW OF MARITIME BOUNDARY DELIMITATION

For the sake of readers who are not familiar with the rules of international law governing the delimitation of maritime boundaries, it seems desirable to begin this chapter by giving a brief and succinct account of the rules relating to the drawing of boundaries between the maritime zones with which we are concerned in this chapter (the continental shelf and economic zone), before examining the dispute over the absence of such boundaries in the Barents Sea. Readers who are familiar with the relevant law will appreciate the difficulty, if not impossibility, of giving a concise account of the rules that is very meaningful.

As with all areas of international law, there are both rules found in treaties and rules found in customary international law, which in the case of maritime boundary delimitation are not necessarily the same (as they are in some other areas of international law). We will begin first by looking at treaty rules. In the case of the continental shelf, rules on the drawing of boundaries between neighbouring states' continental shelves are found in two treaties, the Convention on the Continental Shelf, 1958[2] and the United Nations Convention on the Law of the Sea, 1982.[3]

Both Norway and the USSR are parties to the 1958 Convention. Neither is a party to the 1982 Convention, although both have signed it: if and when they both ratify it and the Convention enters into force (which it is still some way off doing), the Convention will prevail over the 1958 Convention as between Norway and the USSR.[4]

Article 6 of the 1958 Convention lays down what is essentially a three-point formula for determining the boundary between the overlapping continental shelves of neighbouring states. It provides that such a boundary is to be 'determined by agreement' between the states concerned.

> In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.

In other words, states shall (1) first seek to agree on the boundary; (2) if they are not able to do so, the boundary is the median line unless (3) another line is justified by special circumstances. By 'special circumstances' the drafters of the Convention appear to have had in mind such matters as exceptional configurations of the coastline, islands and the presence of navigable channels.

The 1982 Convention takes a rather different approach from the 1958 Convention. Article 83 provides that:

> The delimitation of the continental shelf between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

The reason for this bland, and apparently almost meaningless, provision is that at the UN Law of the Sea Conference there was a deep division of opinion between one group of states, which thought that continental shelf delimitation should be based on equidistance, and another group of states, which wanted delimitation to be based on equitable principles (following the approach of the International Court of Justice, discussed below). Article 83 is the best the Conference could come up with by way of a compromise.

The only treaty provision dealing with delimitation of neighbouring states' overlapping economic zones is article 74 of the 1982 Convention. At the Law of the Sea Conference there appears to have been a feeling that, in general, it is desirable for continental shelf and economic zone

boundaries to coincide, and as a result article 74 is the same, *mutatis mutandis*, as article 83 quoted above.

We turn now from the rules on maritime boundary delimitation found in treaties to those found in customary international law. The latter rules are primarily the product of the International Court of Justice and arbitral tribunals. The International Court has dealt with this matter in four cases. These are the *North Sea Continental Shelf* cases[5] (1969), which concerned the continental shelf boundaries between Denmark and West Germany and between the Netherlands and West Germany; the *Continental Shelf (Tunisia/Libya)* case[6] (1982), which concerned the continental shelf boundary between Tunisia and Libya; the *Gulf of Maine* case[7] (1984), which concerned the boundary between the continental shelves and 200-mile fishing and economic zones of Canada and the USA in the Gulf of Maine; and the *Continental Shelf (Libya/Malta)* case[8] (1985), which concerned the continental shelf boundary between Libya and Malta. The leading arbitrations are the *Anglo-French Continental Shelf* arbitration[9] (1977), which concerned the continental shelf boundary between France and the United Kingdom in the English Channel and Western Approaches; and the *Guinea/Guinea Bissau Maritime Boundary* arbitration[10] (1985), which concerned the boundaries between the territorial seas, economic zones and continental shelves of Guinea and Guinea Bissau.[11] At the time of writing two further maritime boundary cases were pending before the International Court (between El Salvador and Honduras, and between Denmark and Norway concerning the boundary between Greenland and Jan Mayen), and there was at least one pending arbitration (between Canada and France over the maritime boundaries between Canada and the French islands of St Pierre and Miquelon).

Although there is now, by international law standards, a considerable body of case law on maritime boundary delimitation, it is very difficult to say with any precision what the rules of customary international law on this subject are. This is so for a number of reasons, as explained by Weil.[12] First, the International Court and arbitration tribunals have not adopted the conventional approach to ascertaining rules of customary international law, which is to examine the practice of states and deduce a customary rule if there is a sufficient degree of practice coupled with evidence that states believe that what they are doing is permitted or required by international law *(opinio iuris)*: instead the courts have simply declared the law. In short, we are dealing here with judge-made law. Second, in making this law, the judges have not been consistent between cases or even within cases – there has been no linear development from case to case. Third, the rules enunciated by the courts are

lacking in precision. The courts have not yet succeeded in laying down rules of general application with a sufficient degree of precision; nor of explaining convincingly how the result in a particular case has been derived from the general principles adopted by the courts. For these reasons it is especially difficult to try to present a synthesised account of the courts' case law, especially in the limited space available here.[13]

In the *North Sea Continental Shelf* cases the International Court, after observing that there was no single method of delimitation of which the use was compulsory, stated that 'delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances'.[14] This dictum has been reiterated in all subsequent cases: the most recent cases have stressed, in addition, that the goal of the delimitation process is an equitable solution. The courts have, however, never indicated with any precision what the content of such equitable principles is (although they have stressed that the application of such principles is a matter of law and not simply of discretionary justice – or a decision *ex aequo et bono*, to use the language of article 38(2) of the Court's Statute). The courts have, however, indicated various factors (or criteria) which are to be taken into account in applying equitable principles. (In fact in some cases there seems to be a certain blurring between equitable principles and the criteria of delimitation.[15]) Although in the *North Sea* cases the Court suggested that there was no limit to the kind of factors or criteria that might be taken into account in effecting an equitable delimitation, subsequent cases have tended to narrow such factors or criteria to those that are primarily geographical. They include the configuration of the relevant coastlines (for example in the *North Sea* cases, where the concavity of the German coastline coupled with the convexity of the Danish and Dutch coastline meant selection of a method of delimitation other than that of equidistance, which would have produced an inequitable result); obtaining a reasonable degree of proportionality between the length of coastlines of the states concerned and the area resulting to each from the delimitation; in general not allowing islands to have the same effect in determining the boundary as the mainland; and, finally, not allowing the boundary line to encroach on or cut off areas that more naturally belong to one of the states concerned rather than the other(s).

On the other hand, courts have discounted as relevant factors economic differences between the states concerned; differences in the area of land territory belonging to the states concerned; and the natural resources and ecology of the delimitation area (except perhaps in exceptional circumstances). In the *North Sea* cases the International Court, with its repeated references to the continental shelf being a

natural prolongation of a state's land territory, placed considerable emphasis on geological and geomorphological factors: the later cases, however, have so downgraded these factors that they are now all but irrelevant – at least for areas within 200 miles of the coast where title to the continental shelf, under the 1982 Convention, is now based on distance.

It will be recalled that in article 6 of the 1958 Convention on the Continental Shelf equidistance is not only specifically mentioned as a method of delimitation but is also given a certain primacy. The courts have been consistently adamant, however, that article 6 has not become part of customary international law and that equidistance is not a method of delimitation whose use is mandatory under customary international law. Nevertheless, the courts have acknowledged that in certain circumstances, particularly where the coasts of the states concerned are opposite one another (as opposed to being adjacent), equidistance can be a useful method of delimitation, certainly as a starting point. In some cases, particularly the *Tunisia/Libya* case, the courts have suggested that prior conduct of the parties, for example agreement on a provisional line of delimitation, may be a relevant factor and could even in some circumstances amount to an estoppel: in other words, the parties would be precluded from claiming areas beyond such a provisional line as part of their maritime zones.

Although it was suggested above that the treaty rules on maritime delimitation (particularly article 6 of the 1958 Convention) differ from the customary rules as elaborated by international courts and tribunals, it should perhaps be pointed out here that a different view was taken by the arbitral tribunal in the *Anglo-French Continental Shelf* case. The tribunal suggested that the equidistance/special circumstances provision of article 6 (which the tribunal saw as a single rule rather than, as suggested above, a two-step process) and the rules of customary law had the same object – the delimitation of the boundary in accordance with equitable principles. The tribunal regarded the rules of customary law as a relevant means both for interpreting and completing the provisions of article 6.

To sum up the international law on maritime boundary delimitation very briefly: the primary rule, both in conventional and customary law, is that the states concerned must make a genuine effort to negotiate and reach an agreement on a boundary. Obviously it is open to the states concerned to reach agreement on any boundary they wish. The significance of the equidistance/special circumstances rule of the 1958 Convention and the equitable principles and criteria of customary law for negotiated boundaries is that those rules and principles which are considered particularly apposite will be invoked by a state to support its negotiating position. Depending on the outcome of negotiations, such

rules and principles may or may not be reflected in the maritime boundary agreed. In practice, of about 400 potential maritime boundaries in the world, some 120 have so far been agreed through negotiations by the states concerned. If the states concerned are unable to agree on a boundary, then they may – if they both agree to do so – refer the dispute to some form of third party settlement – the International Court of Justice, arbitration or conciliation. A court or tribunal seized of a boundary dispute will seek to resolve it by applying the rules contained in any treaties to which all/both the disputing states are parties or, if there are no treaty rules applicable, the equitable principles and criteria of customary law, described above. It will be obvious from what has been said that the generality and lack of precision of such principles and criteria, coupled with the fact that every area where a boundary is to be drawn has a unique set of geographical and other characteristics, mean that no precise boundary line will be indicated to the court or tribunal at the outset: the court or tribunal will have to select those principles and criteria which it considers will produce an equitable result. Sometimes this has been done as a single process: in other cases a two-stage process is involved where the court or tribunal first selects a provisional boundary (often the line of equidistance) and then checks, and if necessary corrects, it to ensure that it represents an equitable solution. In practice about a dozen maritime boundary disputes have so far been referred to third party settlement.

ORIGINS OF THE MARITIME BOUNDARY DISPUTE IN THE BARENTS SEA AND THE COURSE OF NEGOTIATIONS SO FAR

Having briefly examined the general rules of international law governing maritime boundary delimitation, we must now turn to consider the particular maritime boundary dispute in the Barents Sea, beginning with its origins, and then going on to see how the rules examined above might be applied to resolve the dispute. As explained at the beginning of this chapter, no boundary has yet been agreed either between the continental shelves of Norway and the USSR or between their economic zones. We will look first at the origins of the dispute over the continental shelf boundary, and then consider subsequently the origins of the dispute over the economic zone boundary.

As we saw in Chapter 1, the legal definition of the continental shelf is rather different from a geographical or geological definition; nor has the legal definition remained constant over time. To recapitulate briefly what was said in Chapter 1: under article 1 of the 1958 Continental Shelf

Convention (to which, as pointed out earlier, both Norway and the USSR are parties) the continental shelf is defined as the sea-bed out to 200 m or beyond if the depth of the superjacent waters admits of the exploitation of the resources of the sea-bed. Under article 76(1) of the 1982 UN Convention on the Law of the Sea the continental shelf is defined as the sea-bed out to 200 miles or the edge of the continental margin, whichever is the further. Although the 1982 Convention is not yet in force, there is a good deal of evidence to suggest that the definition of the continental shelf in the Convention is in the process of passing into customary law:[16] in fact part of the definition, that the continental shelf extends at least to 200 miles, has been held by the International Court of Justice in the *Libya/Malta* case already to have passed into customary international law.[17] Thus under the 1958 Convention at least part of the bed of the Barents Sea is continental shelf – that part lying in less than 200 m of water, together with however much beyond that is exploitable. Under the UN Convention and emerging customary law there is no doubt that the whole of the bed of the Barents Sea is, legally speaking, continental shelf.

Since a state has in law a continental shelf automatically and does not need to make an express claim to one,[18] this means that since the emergence of the continental shelf as a concept in international law (i.e. that a state has sovereign and exclusive rights to explore and exploit the resources of its continental shelf, as defined above) in the 1950s, there has been the need to establish a boundary between the continental shelves of Norway and the USSR. This need was originally probably only of a rather theoretical character: it was not really perceived as a practical issue until each state made a formal claim to a continental shelf. In the case of Norway, this occurred in 1963 when a Royal Decree was issued which claimed sovereign rights over:

> The seabed and the subsoil in the submarine areas outside the coast of Norway . . . as far as the depth of the superjacent waters admits of exploitation of natural resources . . . but not beyond the median line in relation to other states.[19]

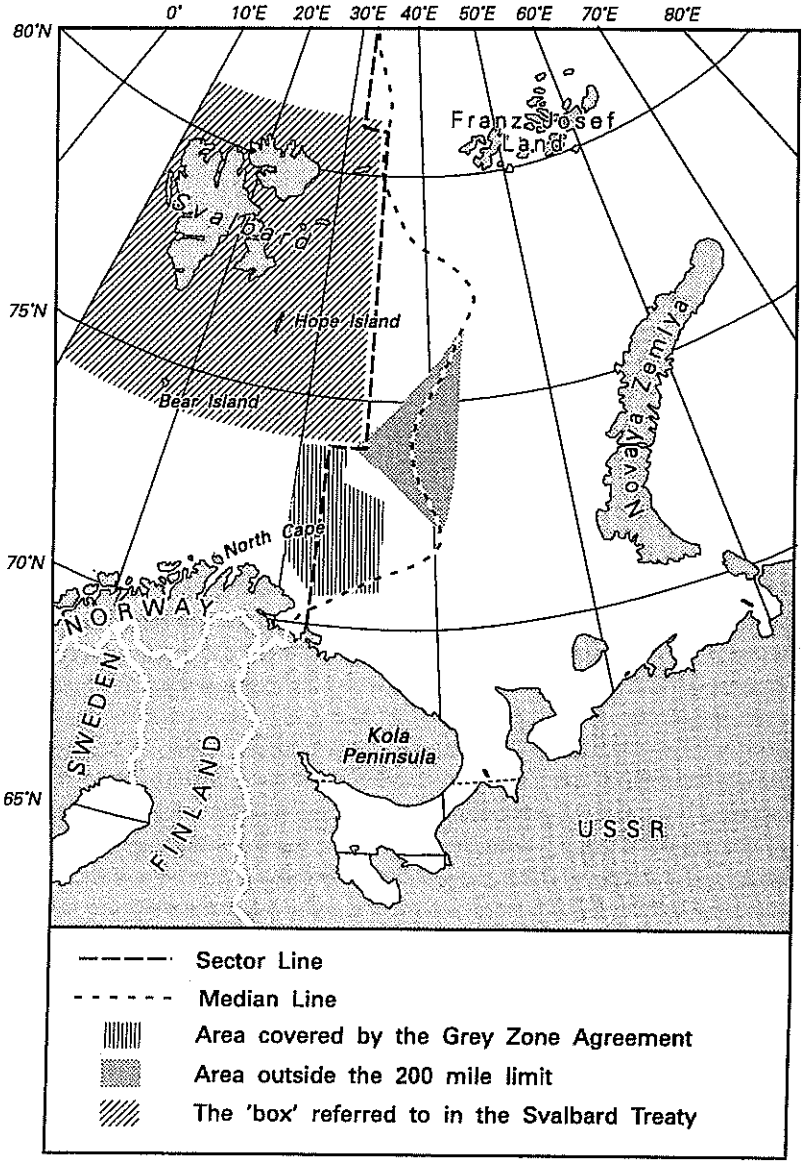
The USSR did not make its own claim until five years later, when the Supreme Soviet issued a decree claiming sovereign rights over:

> The seabed and subsoil of the submarine areas adjacent to the coast or to the islands of the USSR . . . to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas

[i.e. the 1958 Continental Shelf Convention formula].[20] The Decree went on to repeat the 1958 Convention's provisions as regards boundaries with neighbouring states (i.e. such boundaries should be determined by agreement with such states: in the absence of agreement, and unless another boundary was justified by special circumstances, the boundary should be the median line).

The first contacts between Norway and the USSR over a continental shelf boundary in fact took place the year before the USSR made its continental shelf claim, in 1967, when Norway proposed that negotiations over a continental shelf boundary should be held. This led to an informal meeting in Oslo in 1970, and the first formal negotiations in Moscow in 1974. Subsequently a further eight rounds of negotiations have so far taken place, at varying intervals.[21] In these negotiations the parties have recognised that the point of departure is article 6 of the 1958 Continental Shelf Convention (referred to earlier). Norway has argued that there are no special circumstances and that the boundary should therefore be the median line between the Norwegian and Soviet mainland coasts and between the Svalbard archipelago and the Soviet archipelagos of Novaya Zemlya and Franz Josef Land. The USSR, on the other hand, has argued that there are special circumstances and that the boundary should be a sector line (i.e. a line of longitude) running from the terminus of the existing boundary in Varangerfjord (described at the beginning of this chapter; see Map 3.1) towards the North Pole, but modified in an easterly direction in the Svalbard area so as to avoid cutting through the area defined in article 1 of the 1920 Svalbard Treaty (referred to in the previous chapter; see Map 3.2). These arguments will be examined in more detail in the next section. The sea-bed lying between the median line proposed by Norway and the sector line proposed by the USSR is an enormous area of approximately 45,000 square nautical miles (155,000 square kilometres) – an area greater than the Norwegian sector in the North Sea – and comprising roughly 11 per cent of the entire Barents Sea. During the negotiations that have so far taken place there does not appear to have been a great deal of change in each side's position, although the Norwegian Government has made it clear that it would be prepared to modify its position on the median line in return for some concessions on the USSR's sector claim. So far the USSR does not appear to have indicated any real willingness to make such concessions, apart from its initiative in 1988 (discussed below).

In 1977 negotiations over a continental shelf boundary became further complicated with the establishment by both Norway and the USSR of 200-mile economic zones.[22] This development meant that future negotiations would be concerned not just with a continental shelf boundary



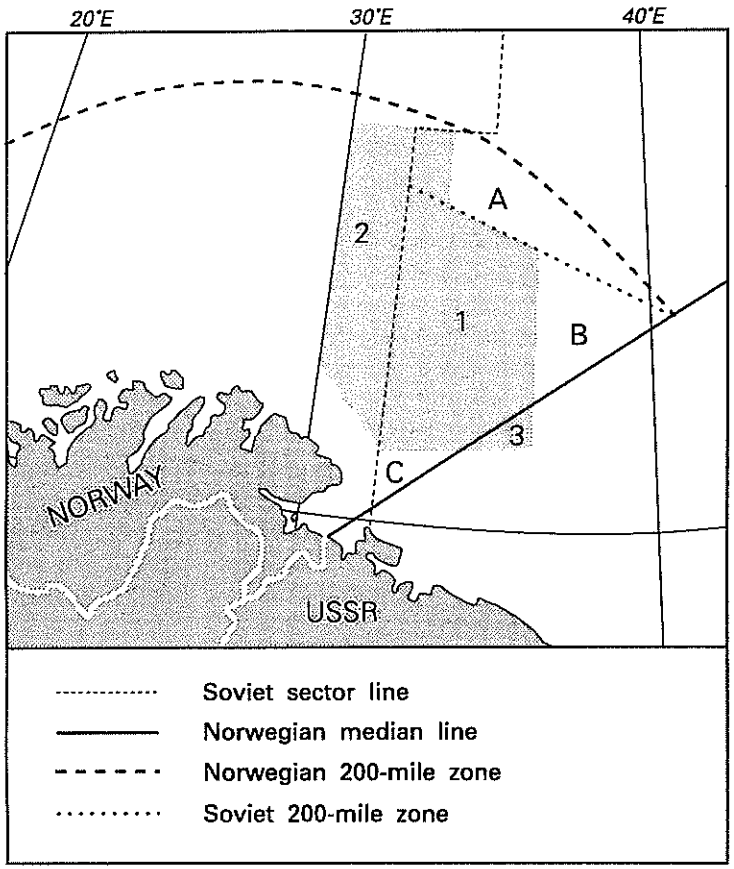
Map 3.2 The median and sector lines in the Barents Sea

but also with an economic zone boundary. In the late 1970s there was no immediate urgency for a continental shelf boundary, as neither Norway nor the USSR desired to begin early exploration for hydrocarbons in the

disputed area. The same was not true for an economic zone boundary, however, as the Southern Barents has been long and heavily fished by both Norwegian and Soviet fishermen, and, to a lesser degree, by fishermen from third states. Given the difficulties already apparent by this time in negotiating a continental shelf boundary, and the fact that the boundaries for the economic zone and continental shelf would probably coincide,[23] it was unlikely that Norway and the USSR would rapidly agree on an economic zone boundary. Both sides were agreed, however, on the need speedily to come to some temporary practical arrangement for the exercise of each state's fisheries jurisdiction, particularly in respect of vessels from third states, in the waters lying over the disputed area of continental shelf and economic zone (i.e. the area between the median line in the east and the sector line in the west and within 200 miles of the mainland). Without some such arrangement there would have been unregulated fishing, with a real danger of over-fishing and a resulting threat to the well-being of fish stocks, as well as the likelihood of confrontations and disputes if one state purported to exercise its jurisdiction over the vessels of other states or third states. Negotiations to try to come to some form of arrangement were held in the Spring and Summer of 1977 and led to the signature of the so-called 'Grey Zone Agreement' on 11 January 1978.[24]

The Agreement applies to an area which not only covers a large part of the disputed area of continental shelf and economic zone in the Southern Barents Sea (the grey zone proper), but also to areas to the west of the sector line and east of the median line respectively (see Map 3.3). These areas of undisputed economic zone covered by the Agreement differ considerably in size, however. Whereas the area of undisputed economic zone belonging to Norway covered by the Agreement (area 2 on the map) amounts to 23,000 square kilometres, that belonging to the USSR (area 3) amounts to a mere 3,000 square kilometres. The reason why the area of application of the Agreement is not limited to the area between the median line and the sector line is because the USSR could not accept a solution which would indicate that the latter area was the subject of the boundary dispute between Norway and the USSR.[25] This was in spite of the fact that the Agreement contains a 'without prejudice' clause, which reads:

> [This Agreement] does not prejudice the positions or views of either party with regard to the boundaries of the parties' areas of fisheries jurisdiction, or to the delimitation of the continental shelf and sea areas referred to in this [Agreement].[26]



Map 3.3 Area covered by the 'Grey Zone Agreement'

One further point of interest about the area of application of the Agreement should also be noted. The area bounded by the median line, the sector line and a line 200 miles from the Norwegian and Soviet mainland comprises 60,700 square kilometres. Of this area, only 41,500 square kilometres is covered by the Agreement. In other words, there is a considerable area of the economic zones of Norway and the USSR between the sector line and the median line which is not covered by the Agreement and where to a considerable extent the zones overlap. Of this area the Agreement says nothing. The Norwegian Government has explained that the parties assume that that part of this area within 200

miles of the Soviet coast (Map 3.3, areas B and C) is regarded by the USSR as a Soviet area of fisheries jurisdiction as long as the Agreement lasts. As regards that part of this area beyond 200 miles of the Soviet coast but within 200 miles of the Norwegian coast (area A), the parties assume that this area will be high seas as long as the Agreement lasts (though the Norwegian Government does not explain why such an apparently odd assumption has been made). On the other hand, the area within 200 miles of the Norwegian coast north of the area of the Agreement is regarded by Norway as being part of Norway's economic zone.[27]

Of the area of application of the Agreement as a whole, Mr Per Tresselt, a former head of the Department of Legal Affairs in the Norwegian Foreign Office and a member of the Norwegian delegation that negotiated the Agreement, has explained that it was 'a compromise which *inter alia* had regard to important fishing banks in the boundary area'.[28] Nevertheless, the fact that the Agreement covers a much larger area of undisputed Norwegian economic zone than Soviet zone led in Norway to considerable opposition to the Agreement when it was signed: and the Agreement was approved by the Storting (the Norwegian Parliament) by a majority of only four votes.

The substantive provisions of the Agreement are largely taken up with arrangements relating to fisheries. These provisions are discussed in detail in the next chapter. One feature of these provisions should, however, be mentioned here, and that relates to jurisdiction. The Agreement provides that each party is to exercise jurisdiction only in respect of its own fishing vessels and not in respect of vessels of the other party: jurisdiction over the fishing vessels of third states is to be exercised by whichever party has licensed such vessels. This arrangement, which can be characterised as a regime of split jurisdiction, is very important for Norway, as it avoids any suggestion that the grey zone is an area of joint jurisdiction or a kind of condominium. It has been the policy of successive Norwegian Governments since at least 1944 to avoid any kind of arrangements with the Soviet Union in the North which smack of a condominium, because of fears that this would undermine Norwegian sovereignty (particularly over Svalbard) and possibly detach it from the Western alliance.

The Agreement is a temporary one, and was originally concluded for one year only. It has subsequently been extended for annual periods in every year following its signature, and this is likely to continue until agreement is reached on a continental shelf/economic zone boundary. In general the Agreement has worked well, and it is some measure of the Agreement's perceived usefulness and success that its annual renewals

have continued uninterrupted, notwithstanding the fact that the non-socialist parties in Norway, who were originally opposed to the Agreement, subsequently replaced the Labour Party as the Government and the fact that a prominent member of the Norwegian delegation that negotiated the Agreement, Arne Treholt, was in 1985 convicted of being a Soviet spy.

As mentioned above, negotiations over a continental shelf (and economic zone) boundary have taken place at intervals, without there apparently having been much change in either party's position. In January 1988, however, came a dramatic new development from the Soviet side, a product no doubt of the effect Mr Gorbachev and his policies of *glasnost* and *perestroika* have had on Soviet diplomacy generally, and more specifically a follow-up to Mr Gorbachev's speech in Murmansk in October 1987, when he called for peaceful co-operation in exploiting the resources of the Arctic.[29] In January 1988 the then Soviet Prime Minister, Mr Ryzkhov, visited Oslo. He suggested that the main reason why negotiations over a boundary appeared to be deadlocked was because the differing interests of Norway and the USSR in the area had become entangled: drawing a line on a map would not achieve any balance between their interests and would not strengthen security and stability. He proposed that instead Norway and the USSR should co-operate in the joint development of oil and gas resources in a 'special economic zone', which would cover both parts of the disputed area and undisputed areas of both parties. Such joint development would be on the basis of full equality and in the form of a joint venture. This proposal was rejected by the Norwegian Government both on grounds of principle, because of its long-standing policy, referred to above, of avoiding any arrangements with the Soviet Union in Northern Waters which resemble a condominium, and on practical grounds, because existing joint development zones in other parts of the world have not worked well. It was agreed that negotiations over a continental shelf and economic zone boundary should continue.[30]

A year later came a further initiative from the USSR. In January 1989 it became known that a Soviet official had secretly visited Oslo the previous month and had told the Norwegian Government that the USSR was willing to accept a modified version of the sector line as the boundary in the northernmost part of the disputed area. At the same time he reiterated the USSR's proposal for a zone of joint co-operation, stressing that its details were open to negotiation.[31] The significance of this episode is that it appears to be the first time in fifteen years of negotiations that the USSR has made any concession on the sector line as the boundary. Subsequently a number of informal meetings between Norwegian and Soviet officials have been held, and there is now a

cautious Norwegian hope that the USSR will before long be willing to discuss a compromise boundary.

Having examined the origins of the dispute over the continental shelf and economic zone boundaries and the course of negotiations so far, we will now turn to examine critically the arguments of the parties in the light of the applicable international law.

A CRITICAL EXAMINATION OF THE PARTIES' VIEWS AS TO WHERE THE BOUNDARY SHOULD LIE

This section will evaluate the arguments of Norway and the USSR as to where the boundary between their overlapping continental shelves and economic zones should be drawn – the Norwegian claim that the boundary should be the median line, the Soviet claim that it should be a sector line – in the light of the applicable international law. It must be stressed at the outset, as was pointed out above when discussing the general international law rules relating to maritime boundaries, that international law does not dictate any particular line as the boundary or any particular method of delimitation to be used in determining the boundary. It is open to Norway and the USSR to agree on any particular boundary line or boundary solution they wish. This might therefore suggest that the exercise to be undertaken in this section is rather fruitless. We would suggest that this is not so. As explained above, while states remain free to agree on any solution they wish, they do in practice when negotiating a boundary invoke the various rules and principles of international law already outlined (see pp. 56–61). There is evidence that this has happened with Norway and the USSR in their negotiations over a boundary in the Barents Sea.[32]

At the outset it is desirable to recognise that the disputed boundary has three distinct segments (as the parties also appear to recognise).[33] The first segment runs from the terminus of the existing maritime boundary described at the beginning of this chapter, at the mouth of Varangerfjord, to a point 200 miles from the mainland of either Norway or the USSR (or possibly a point 200 miles from both). In this segment there is a need for both a continental shelf and economic zone boundary between the adjacent mainland coasts of Norway and the USSR. The second segment comprises the area in the middle of the Barents Sea which is more that 200 miles from any land. Here only a continental shelf boundary is required. In this segment the relevant coasts of Norway (in part Svalbard, in part the mainland) and the USSR (Novaya Zemlya) are essentially opposite one another. In the final segment, in the northern Barents, there is need once again for both a continental shelf and

economic zone boundary. Here the relevant coasts – Novaya Zemlya and Franz Josef Land on the Soviet side, Svalbard on the Norwegian side – are again opposite. Each of the three segments must be considered separately, both because the applicable law differs and because different factors relevant to delimitation apply to each.

The southern segment

We will begin with the southern segment, which in practice is the area where the need for a boundary is greatest. Before 1977 negotiations in this area were concerned solely with a continental shelf boundary. For this the applicable law was the Continental Shelf Convention (since both states are parties to it). Article 6 of the Convention, it will be recalled, provides that in the absence of agreement, the boundary line is to be the median line unless another line is justified by special circumstances. Since 1977 the negotiations have become concerned with seeking to establish a single boundary for both the economic zone and continental shelf.[34] In this situation is article 6 still the applicable law? In the *Gulf of Maine* case the International Court of Justice held that where a single boundary between overlapping continental shelves and economic zones is to be drawn, article 6 should not be regarded as being applicable even though (as in the *Gulf of Maine* case) all/both the states concerned are parties to the Continental Shelf Convention, because article 6 applies only to one of the zones to be delimited (the continental shelf) and not to the superjacent waters.[35] In spite of this decision in the *Gulf of Maine* case, it appears that Norway and the USSR still regard article 6 as being the governing law in this southern segment.[36] In the discussion that follows article 6 will be treated as the applicable law, although because there is doubt on the matter, reference will also be made to the situation, were customary international law to be the governing law. In any case, it is not altogether easy always to maintain a rigid distinction between article 6 and customary law, especially in the light of the comments of the tribunal in the *Anglo-French Continental Shelf* arbitration that the rules of customary law are a relevant means both for interpreting and completing the provisions of article 6.

Considering first the situation if article 6 were the applicable law: Norway, as we have seen, takes the view that in the light of article 6 the boundary should be the line equidistant from the coasts of Norway and the USSR, and that there are no special circumstances within the meaning of article 6 that call for a modification of the equidistant line – though Norway has said that it is prepared to simplify a strict equidistant

line so as to avoid it having too many turning points and segments. Before evaluating the strength of Norway's contention, one preliminary point needs to be dealt with. When maritime boundaries are drawn as equidistant lines, equidistance is usually calculated with reference to the baselines of the states concerned, not their coasts as such. When negotiations over a Barents Sea boundary began and Norway put forward its contention that the equidistance line should be the boundary, the USSR's baseline along its Barents Sea coasts was the low-water mark. In 1985, however, the USSR drew straight baselines along its Arctic coasts, including the Barents Sea.[37] The effect of measuring an equidistant line from these new baselines would be to push the line a little further west in one or two places, though probably not to any marked degree.

Turning now to an evaluation of the Norwegian claim that the equidistant line should be the boundary, the main question to consider is obviously whether there are any special circumstances within the meaning of article 6. The USSR has argued that there are. We will therefore leave this point until we come to evaluate the USSR's arguments below.

If customary international law were the applicable law, then delimitation would have to be in accordance with equitable principles and taking account of all the relevant circumstances so as to reach an equitable result. The Norwegian view would presumably be that the equidistant line is an equitable result. There are, however, two possible arguments against the equidistant line being considered to be an equitable result. The first of these arguments concerns proportionality. As we have seen, international courts and tribunals have generally taken the view that there ought to be a reasonable degree of proportionality (or at least not a significant disproportion) between the lengths of the coastlines of the states concerned, measured in their general direction, and the area resulting to each state from the delimitation.[38] Proportionality is used by international courts, not as a method of delimitation, but as a way of the checking the equitableness of the result of using other methods (in this case, equidistance). According to Tresselt,[39] use of the equidistance line as the boundary in the Barents *as a whole* would divide the continental shelf in the proportion of 60 per cent to the USSR and 40 per cent to Norway. The ratio of each state's share of the lines bounding the Barents as defined in Chapter 1 (so including not only the coastline but lines drawn from the mainland and connecting the various groups of islands), the authors have calculated, is roughly in the proportion 66:33 in the USSR's favour. This calculation was based on

drawing, on the Soviet side, a line across the mouth of the White Sea (which is in any case under Soviet law a straight baseline), a line from the eastern end of that line to Kolguyev Island, and thence to the nearest point on Novaya Zemlya. If, however, one included in the Soviet calculation all the mainland coast east of the White Sea to the point where it is opposite the southern end of Vaygach Island (which is between the mainland and Novaya Zemlya), the coastline of Vaygach Island and the southern coastline of Novaya Zemlya excluded from the previous calculation, the ratio would obviously be much more in the USSR's favour – something like 70:30. If one ignored lines joining islands and simply measured the coastline as such (both of islands and mainland), the figure would be even more in the USSR's favour – something like 75:25. This last figure might be regarded as sufficiently disproportionate to the 60:40 ratio of the division of continental shelf to suggest that use of the equidistant line leads to an unequitable result.

However, the figures above relate to the Barents Sea as a whole, while we are concerned here only with the southern sector. We have no figures for applying the proportionality test in this area, and it is difficult to see how such figures could be calculated. Apart from the difficulties alluded to above of measuring the coastlines of the parties along their general direction, there is the difficulty of knowing exactly what areas of continental shelf and economic zone should be included for the purposes of calculating proportionality: for example, how far north and west can one go on the Norwegian side before one is out of this southern sector? On the Soviet side, are the areas of shelf and zone to the east of Kolguyev Island still in the delimitation area? These problems simply underline the point made by most writers on maritime boundary delimitation, namely that in spite of the repeated statements by international courts and tribunals that proportionality is a criterion for assessing the equitableness of any solution, it is a criterion which in most situations it is extremely difficult to apply. In the present case the most that can perhaps be said is that proportionality may raise some slight doubt about the equitableness of a boundary line based on equidistance, and there is a need for cartographers to attempt to come up with rather more accurate calculations than those used above, based on alternative hypotheses as to what are the relevant areas and relevant coastlines.[40]

So much for proportionality: we must now consider the other argument against the equidistance line being considered to be an equitable result. This is the principle of non-encroachment or cut-off. As pointed out above, international courts and tribunals will not regard a boundary line as equitable if it encroaches on, or cuts off, areas that more naturally belong to one of the states concerned rather than the

other.[41] In the present case, the Norwegian coast projects a little further seawards than the Soviet coast along what is basically a straight coast between the White Sea and the North Cape. The effect of this is to push the equidistance line a little further to the east, possibly to such an extent that it might be regarded as encroaching on maritime areas that more naturally belong to the USSR, although it is difficult to be conclusive, since in borderline cases like this one, the matter must inevitably be largely one of subjective judgment, be it by a court, the parties or a neutral observer.

To sum up this examination so far of the Norwegian position: some doubts may be raised about the equitableness of using an equidistance line as a boundary line because it may result in a disproportionate division of the continental shelf and economic zone in the southern Barents and because it may encroach on areas which more properly should appertain to the Soviet Union.

Turning back now from customary law to article 6 of the Continental Shelf Convention, what we must now consider is whether there are any special circumstances within the meaning of article 6 which would justify a departure from the median line, as the USSR has argued in this case. These Soviet contentions will now be examined.

The Soviet Union has invoked a whole range of special circumstances to justify a departure from the median line. These include: the configuration and lengths of coastline; geological conditions; the greater population of the Kola Peninsula as compared with northern Norway; ice conditions; the USSR's economic interests; special environmental risks from the Gulf Stream to which Soviet interests are uniquely exposed; and its security interests (which were explained in Chapter 1).[42] The relevance of each of these alleged special circumstances will be examined in turn. As regards the configuration of the coastline, this probably refers to the non-encroachment principle, which has already been discussed. Although the principle has largely featured in the customary rules, it (or more accurately, a coastal configuration which produces encroachment) may equally be considered as a special circumstance within the meaning of article 6. The reference to lengths of coastlines presumably relates to the question of proportionality, which again we have already discussed. As regards geological conditions, whilst at one time international courts and tribunals did regard them as relevant to continental shelf delimitation, the International Court in the *Libya/Malta* case held that because title to the continental shelf was now based on a distance criterion as far as continental shelves within 200 miles of land were concerned (i.e. all states automatically have a continental shelf of 200 miles in breadth as a minimum), geological and

geomorphological circumstances were irrelevant in the case (as here) of delimitation of continental shelves within 200 miles of land.[43] Even more is this the case where the delimitation involves (as here) not just a continental shelf boundary, but also an economic zone boundary.[44]

The next Soviet argument, that based on the difference in the size of coastal populations, has not yet been faced by international courts and tribunals. However, given the fact that the trend of their decisions is to exclude as irrelevant to delimitation all factors except the geographical, particularly where, as here, the boundary line relates to both the continental shelf and economic zone, and the fact that arguments based on the differing sizes of land mass of the states concerned have been rejected,[45] it seems likely that a Soviet argument based on differing sizes of population would be regarded as irrelevant. For the same reason, the Soviet Union's ecological and economic arguments would also be regarded as irrelevant.[46] Security considerations are, however, a somewhat different matter. In both the *Guinea/Guinea Bissau* arbitration[47] and the *Continental Shelf (Libya/Malta)* case[48] security factors were not dismissed out of hand as irrelevant, though in neither case was it made very clear in what circumstances they might be relevant: what the court in each case seems to have had in mind is that a state should have control of the maritime territory immediately off its coast. In that sense, security factors would seem to reinforce the non-encroachment principle (see p. 73 above).

Thus, most of the special circumstances invoked by the USSR are irrelevant. The only relevant circumstances are the configuration of the coastline (i.e. the further projection of the Norwegian mainland coastline seawards) and the USSR's security interests, which both refer to the non-encroachment principle, and the differing lengths of the Norwegian and Soviet coastlines, which raise the question of proportionality. As pointed out above, both these matters, particularly the non-encroachment principle, may call for some readjustment to the equidistance line. The USSR has argued that this readjustment should take the form of a sector line:[49] as pointed out above, this is the line of longitude running from the terminus of the existing Norwegian–Soviet frontier to the North Pole, with a slight deviation in the Svalbard area to pass outside the 'box' described in the 1920 Svalbard Treaty (see Map 3.2). Before evaluating the USSR's contention that special circumstances should modify the equidistance line to the sector line, something more must be said about this sector line. This line first made its appearance in Soviet policy in 1926. In that year the USSR issued a decree[50] under which:

> All lands and islands situated in the Arctic to the north, between the coastline of the U.S.S.R. and the North Pole, both already discovered and those which may be discovered in the future, which at the time of the publication of the present decree are not recognized by the government of the U.S.S.R. as the territory of any foreign state, are [hereby] declared territory of the union, [namely in the area] between the meridian 32°4′35″ longitude, East of Greenwich ... and the meridian 168°49′30″ longitude, West of Greenwich.

The westerly meridian referred to in this decree, 32°4′35″, passed through what was in 1926 the terminus of the USSR's frontier on the Barents Sea with Finland. Since then, the USSR's frontier has moved several miles further west and Finland has lost its frontage on the Barents Sea. In spite of this, the sector line referred to by the USSR in its maritime boundary negotiations with Norway appears to be this original 1926 line. Thus, the reference above to its running from the terminus of the Norwegian–Soviet frontier is not quite accurate. On the other hand, the reference to the deviation in the Svalbard area is: this is a modification which is not found in the original 1926 decree but has been introduced by the USSR in the course of the maritime boundary negotiations. It will also be noted that the decree refers quite explicitly only to *land territory*, and says nothing about maritime territory or maritime frontiers.[51] We return now to the contention of the USSR that modification of the equidistance line because of special circumstances should take the form of the sector line, a contention that would seem to have little merit. It would seem highly artificial to consider that special circumstances could cause an equidistance line to be modified to such a precise and, from the Soviet point of view, well-established line.

It seems, however, that as an alternative the USSR has argued that the sector line is itself a special circumstance: the USSR refers to its use in Soviet administrative practice, in a way that gives it a special psychological and political signficance.[52] This argument again has little merit. A sector line is not of the character of circumstances which international courts have hitherto recognised as relevant. It is true that international courts have attached some weight to lines which have been used provisionally as boundary lines, but such provisional boundary lines must have been accepted or acquiesced in by both/all parties to the dispute.[53] That is clearly not the case here, where Norway has consistently objected to the use of the sector line as the boundary.

Finally, turning from article 6 to customary international law, it is possible that the USSR considers that the use of the sector line is justified either because a sector line is the appropriate way of drawing a

maritime boundary in polar areas or because a sector line is an equitable result. If the former is the Soviet contention, the USSR would have to prove that the use of sector lines as a method for drawing maritime boundary lines in polar areas is a rule of customary international law and that such a rule is binding on Norway. (Because it is seeking to rely on an alleged rule of customary international law, the burden of proof, as is normal in international law, is on the USSR.) There does not appear to be such a rule as that alleged. In reaching this conclusion the authors have relied heavily on the recent, exhaustive study of the question by Pharand.[54] Briefly, the evidence for this conclusion is that there is both insufficient practice and inadequate *opinio iuris* (state practice and *opinio iuris* being the two constituent elements of customary international law). It is true that sector lines have been used as boundaries in the Antarctic, but this use is limited to *land territory*, and seems to be motivated by reasons of convenience, not because the states concerned felt themselves to be under any legal obligation to use such lines. Nor have all these Antarctic sector lines been recognised by other states. It is also true that two 19th-century treaties – the Great Britain–Russia Convention of 1825[55] and the USA–Russia Convention of 1867[56] – utilise sector lines as boundary lines in the Arctic (although the former, establishing the boundary between Canada and Alaska, is probably limited to a *land* boundary), but again the reason for their use appears to be convenience, rather than any form of legal compulsion resulting from the existence of a rule of customary international law requiring the use of sector lines. Apart from these treaties, sector lines have been used by the USSR in its municipal legislation (notably in the 1926 decree already referred to) and, more ambiguously, by Canada. On the other hand, Norway and the USA have consistently, and Denmark less certainly, objected to the use of sector lines in the Arctic. Thus, even if there were a rule of customary law requiring the use of sector lines as maritime boundaries in the Arctic, this persistent objection by Norway would prevent its being applicable to Norway.

It is also noteworthy that the USSR has refrained from formally endorsing the sector principle for maritime delimitation generally;[57] and that in the provisions of its continental shelf and economic zone legislation dealing with boundaries with neighbouring states (quoted earlier), there is no reference to the use of sector lines. Scrivener suggests that more recent Soviet writers, in contrast to their predecessors, place much less emphasis on the sector principle.[58]

If we turn to the alternative possible justification in customary law of the sector line as the boundary line, namely that the sector line represents an equitable result applying the normal principles of

customary law delimitation, this too does not seem very persuasive. An international tribunal would probably not regard the sector line as an equitable boundary in the southern part of the Barents, because such a line would encroach on maritime areas which more properly belong to Norway.

Having now examined the various contentions put forward by Norway and the USSR as to where their maritime boundary should lie in the southern part of the Barents Sea, we have arrived at the conclusion that, even if article 6 of the 1958 Continental Shelf Convention is the applicable law (about which there is doubt), there may be special circumstances, namely the configuration of the parties' coastlines and possibly the USSR's security interests, which would justify some departure from an equidistance line, as such a line risks encroaching on areas that more appropriately belong to the USSR and may cause some disproportion between the length of the parties' respective coastlines and the area of maritime zones resulting to each. In each case, it was suggested above, there is no objective method for determining encroachment or lack of proportionality: it is to a large extent a matter of subjective judgment, which is why no dogmatic conclusion is offered here. If these special circumstances are thought to exist, they would not seem to be of such an extent as to require any very extensive modification of the equidistance line westwards. Certainly, under no circumstances do they require the equidistance line to be modified to the sector line proclaimed by the USSR, nor is there any reason why this latter should autonomously constitute the boundary.

If customary international law were the applicable law then the boundary would be agreed by the parties, or decided by a court or tribunal, by applying equitable principles and taking into account the relevant circumstances so as to produce an equitable solution. If the matter were settled by agreement, then no doubt the parties would regard the result as equitable. If, on the other hand, the matter were decided by a court or tribunal, one can only speculate rather broadly what the result might be. One possible approach of a court or tribunal might be to begin by observing that Norway and the USSR were adjacent states along what is essentially a straight coastline and that the Soviet coastline in the Southern Barents was considerably longer than the Norwegian coastline. What it might then suggest as an equitable boundary might be a line drawn perpendicular to the general direction of the coast. This was commended by the International Court in the *Gulf of Maine* case as a suitable method of delimitation on coasts which are more or less straight.[59] Furthermore, a perpendicular line would respect the principles of non-encroachment and proportionality.[60]

Having now looked at the first segment of the maritime boundary in the Barents, which is in practice the most important, because it is in this part of the disputed boundary area in the Barents that there is most fishing, the greatest likelihood of finding oil and gas and the USSR's security interests are greatest, we must turn to examine the second, middle, segment.

The middle segment

In this segment, it will be recalled, only a continental shelf boundary is required. Thus there is no doubt that the applicable law is article 6 of the Continental Shelf Convention. In other words, in the absence of an agreement between the parties on a different solution, the boundary will be the median line unless another line is justified by special circumstances. Of the various alleged special circumstances raised by the USSR in connection with the boundary in the southern segment and which were found to be relevant in that area, the configuration of the coastline (which was taken to be a reference to the non-encroachment principle) is not relevant to this middle segment of the boundary. This is because the non-encroachment principle has no application where, as here, the respective coasts are opposite one another rather than adjacent. A second relevant circumstance in the southern segment was the respective lengths of the coastlines of the parties (which was taken to be a reference to the proportionality principle). This principle could be relevant to the middle segment of the boundary, but the test of proportionality is at least as hard to apply in this segment as in the southern segment. It would be difficult to calculate the lengths of the parties' relevant coastlines, particularly in the case of Norway, where the relevant coastlines would include part of Svalbard and possibly also part of the Norwegian mainland. Equally, it would be difficult to calculate the area of overlapping continental shelves. Whilst at first sight it might seem that this area was simply the triangular-shaped area beyond the 200-mile limit (see Map 3.2), it is clear on reflection that the Norwegian and Soviet continental shelves also overlap to both the east and west of the triangular-shaped area.

In this middle segment of the boundary the USSR has argued that there is an additional special circumstance. According to the USSR, the Svalbard archipelago should not be given full effect in determining a boundary because of its special legal status.[61] This argument seems to be without any legal merit. It was argued in the previous chapter that Norway's sovereignty over Svalbard means that Norway can claim all the generally accepted maritime zones in respect of Svalbard: there is

nothing in the rights given to the other parties to the Svalbard Treaty to limit this aspect of Norway's sovereignty over Svalbard. The same argument would apply equally to the use of Svalbard in general as a coastline for calculating a boundary. On the other hand, there is an argument for saying that some individual islands in the Svalbard archipelago should not be used, or should not be given full effect, in calculating the boundary. This is not because of anything to do with the legal status of Svalbard but follows from the general rules of maritime boundary delimitation: as pointed out above, there has been a trend in the practice both of international courts and tribunals and of states in concluding bilateral delimitation agreements to discount or give only partial effect to isolated islands. In the case of Svalbard, several islands – Hope Island, the King Karl's Land group of islands and Bear Island – lie a long way from the main part of the archipelago. These islands should thus not be used as basepoints in calculating an equidistance line. Instead, they should be either ignored completely or given partial effect (i.e. the equidistance line should be measured from a point somewhere between these islands and the main Svalbard archipelago). Finally, it should be stressed, as indeed should be clear, that the sector line is no more a special circumstance or mandatory boundary than it was in the southern segment.

To sum up the position in this middle segment of the Barents Sea maritime boundary: because the boundary here is a continental shelf boundary, unless the parties agree otherwise, the boundary should be the median or equidistance line, modified so as to discount, wholly or partially, Hope Island, King Karl's Land and Bear Islands.

The northern segment

In this part of the Barents, it will be recalled, there is a need, as in the southern Barents, for both a continental shelf and economic zone boundary. Again, there is the same doubt as to what is the applicable law, article 6 of the Continental Shelf Convention or customary international law. If article 6 is the applicable law, then in the absence of an agreement between the parties to the contrary, the boundary will be the equidistance line, unless another line is justified by special circumstances. In this area the relevant coasts are the Svalbard archipelago on the Norwegian side and the Franz Josef Land archipelago and Novaya Zemlya on the Soviet side. Of the various alleged special circumstances raised by the USSR and discussed in relation to the other two segments of the boundary, the only relevant circumstance is the configuration of the coast. There are various outlying islands in

both the Svalbard and Franz Josef Land archipelagos that ought to be wholly or partially discounted in calculating the equidistance line.

If the applicable law is customary international law, the boundary is likely to be much the same. This is because in general international courts have taken the view that equidistance is an appropriate method of delimitation (at least as a starting point) in the case of opposite coasts.[62] Again there would need to be some adjustment to a strict equidistance line to discount the outlying islands of the Svalbard and Franz Josef Land archipelagos.

In relation to this northern segment, two further points are worth noting. First, the presence of ice-shelves off parts of Svalbard (especially off the south-east coast of North-east Land) and Franz Josef Land may complicate the drawing of an equidistance line, as there may be differences of view between Norway and the USSR as to whether an equidistance line should be calculated from the land or from the outer edge of the ice-shelf. The question of whether ice-shelves can be used in delimiting maritime zones is unsettled in international law, and the views of writers are divided as to whether their use is or should be permissible.[63] Second, in part of this northern area, the sector line follows very closely the equidistance line (see Map 3.2). Even though this is of no legal relevance (because, as stressed earlier, the sector line has no standing in international law), it should make it easier for the parties to agree on the equidistance line, or some modified version of it, as the boundary.

Having examined the parties' arguments as to where their maritime boundary in the Barents Sea should be drawn in the light of the applicable international law, we will now turn to consider what the prospects are for a solution to this dispute.

TOWARDS A SOLUTION?

The solution to the Barents Sea boundary dispute has both a procedural and a substantive aspect; that is, the question of what procedure will be used to arrive at a solution, and the question of what the actual substance of any solution will be. As far as the former is concerned, until very recently one would have been certain that the procedure by which the dispute would be resolved, if it were to be resolved, would be by continued bilateral negotiations between the parties. The alternative to negotiations is some form of third party settlement – conciliation, arbitration or use of the International Court of Justice. The use of such forms of third party settlement is purely optional in international law – no state can be forced to go to arbitration or the International Court of

Justice against its will. Traditionally the USSR has always opposed the third party settlement of disputes. However, this aspect of Soviet policy has also been affected by Mr Gorbachev's policies of *glasnost* and *perestroika*. The USSR has recently proposed that greater use should be made of the International Court of Justice for settling disputes and has withdrawn its reservations to the clauses in various human rights treaties to which it is a party, conferring jurisdiction on the Court to deal with disputes arising under those treaties.

Nevertheless, in spite of this radical change in Soviet attitudes to the third party settlement of disputes, it is still likely that a solution to the Barents Sea maritime boundary dispute will come through direct negotiations and not some form of third party settlement. Like most states, Norway and the USSR are likely, in the light of past practice and the vagueness of the relevant international law rules, to regard the outcome of a submission of their dispute to arbitration or the International Court as being too unpredictable. It is true that Norway's dispute with Denmark over the maritime boundary between Jan Mayen and Greenland is currently before the Court, but this is contrary to Norway's wishes: Norway would have preferred the dispute to be resolved by negotiation. The case was referred to the Court by Denmark, relying on its and Norway's long-standing declarations under article 36(2) of the Court's Statute (the optional clause) to found the Court's jurisdiction. In the case of the Barents Sea boundary dispute, the USSR is likely especially not to wish to refer the dispute to third party settlement, because of the implications of the dispute and any solution for its security interests.

Even if direct negotiations seem the most likely procedure by which the dispute will be resolved, it is necessary to add a few words about the possible significance of the 1982 UN Convention on the Law of the Sea, should the Convention enter into force and Norway and the USSR be parties to it before the dispute is resolved. Part XV of the Convention provides in general for the compulsory third party settlement of disputes. However, article 298(1)(a) provides that a state may, when signing or ratifying the Convention, declare that it does not accept the third party settlement of dispute procedures under the Convention (which are arbitration or the use of the International Court of Justice or the International Tribunal for the Law of the Sea) in the case of maritime boundary disputes. Nevertheless, a state having made such a declaration must accept compulsory conciliation for 'disputes concerning the interpretation of articles 15, 74 and 83 relating to sea boundary delimitations . . . when such a dispute arises subsequent to the entry into force of this Convention', if any party to the dispute so

requests. Although this provision is not without a certain ambiguity, it is clear from the *travaux préparatoires* of the Convention that the intention is to exclude maritime boundary disputes arising *before* the entry into force of the Convention from the obligations of compulsory conciliation.[64] When signing the Convention, the USSR made a declaration under article 298 (1)(a). If it maintains this declaration when it ratifies the Convention, or if Norway makes a similar declaration when it ratifies the Convention, then, because the Barents Sea dispute arose before the entry into force of the Convention, there will be no obligation to refer the dispute either to the forms of third party settlement established by the Convention or to compulsory conciliation. If, as seems unlikely, both the USSR and Norway were to refrain from making a declaration under article 298(1)(a), then there would be an obligation on them to refer their dispute, if it still could not be settled by negotiations, to arbitration, the International Court or the Law of the Sea Tribunal. Thus, the most likely result is that the entry into force of the Law of the Sea Convention would not affect the procedure by which the Barents Sea maritime boundary will be resolved, which will continue to be direct negotiations between the parties.

The speed at which negotiations over a maritime boundary in the Barents are continued and the likelihood of their reaching a successful conclusion depend to a considerable extent on how strongly the parties feel the need to explore new areas for sea-bed hydrocarbons. As long as the 'Grey Zone Agreement' remains in force, fisheries interests will not press either party to seek an early solution to the boundary problem. As explained in Chapter 5, there are a number of reasons why both Norway and the USSR in the fairly near future are likely to want to step up their exploratory activities for oil and gas in the Barents Sea (although at the same time there are a number of factors that are likely to slow down such a development). While the respective desires of the parties to explore for hydrocarbons in the Barents Sea is likely to be a major factor in determining the speed and course of negotiations, it is not the only factor. For the USSR security considerations are also very important. Its security interests would, in the absence of any pressing need for resources, lead the USSR to delay negotiations. So long as there is no agreed boundary, the Norwegians will not drill in the disputed area or in all probability so very close to it. Wherever a boundary is located, it will almost certainly lead to Norwegian offshore activity pushing eastwards, something which is inimical to Soviet security interests: the further east Norwegian offshore activity takes place, the greater the possibility of Norwegian drilling rigs obstructing or monitoring Soviet naval vessels on their way into or out of the ports of the Kola

Peninsula.[65] A final factor in determining the speed of negotiations is the fact that the USSR may perceive Norway to be keener on a boundary agreement than it is: it can therefore afford to wait, hoping that this will lead to concessions by Norway.[66] However, given the rapid pace of change currently taking place in the USSR, it is unwise to be too dogmatic with any predictions about how long it will be before negotiations achieve a positive result.

It is, of course, equally unwise to be too dogmatic about predicting what this result might be. While some suggestions have been made in the preceding section as to the possible course of the boundary indicated by international law, it should be stressed again that it is open to the parties, whether the applicable law is article 6 of the Continental Shelf Convention or customary international law, to agree on any boundary line they wish. It may also be that the parties would be wise to broaden their negotiations beyond simply searching for agreement on a boundary line. A number of writers have suggested that jurisdictional disputes and disputes over maritime boundaries are likely to be more easily settled if one abandons discussing such disputes purely in terms of reaching a definite solution on jurisdiction or an agreed boundary, and instead looks at the issues underlying the dispute and attempts to address these: in other words, one to some extent redefines the problem.[67] Looked at in this way, the issues in the Barents Sea maritime boundary dispute are, from the Soviet point of view, its security concerns and a desire for a reasonable share of the natural resources of the Barents (oil, gas and fish), and, from the Norwegian point of view, a similar desire for a reasonable share of natural resources and a wish not to be seen to have given in to the USSR or entered into any kind of sharing or condominium arrangement with it. Norway's security concerns are much less of a factor because its security interests (which were explained in Chapter 1) are not likely to be directly affected by the location of the boundary (at least on the assumption that it will not be further west than the sector line). In the light of this analysis, one might therefore suggest that the parties should search for a boundary settlement having the following five elements, the first two of which are (1) agreement on a boundary line, probably lying somewhere between the median line and the sector line; and (2) a way of addressing the USSR's security interests.

Offshore oil and gas activities in the Norwegian sector of the Barents Sea raise a number of possible problems for the USSR from a security point of view.[68] First, oil and gas installations pose an obstacle to navigation by Soviet naval vessels, both surface vessels and submarines,[69] particularly since the effect of ice and sea-bed conditions

is to channel Soviet naval vessels out of the Barents between Bear Island and mainland Norway – the area of the Norwegian sector most likely to see oil and gas activities. Second, installations have some espionage potential, although this is limited because the noise they produce makes them not very suitable listening-posts for submarines. Third, the increase in the background noise underwater resulting from both installations and other activities, such as seismic testing, makes it more difficult for the USSR to detect non-Soviet submarines through underwater listening devices – though equally, of course, it makes it more difficult for Soviet submarines to be detected.

To deal with the first two of these problems, a boundary settlement could include designating an area on the Norwegian side of the boundary line where the USSR would be notified and/or consulted over the emplacement of oil and gas installations, in order to avoid major interferences with Soviet naval shipping, and offering the USSR a guarantee that Norwegian installations would not be used for espionage (even though this might raise difficult questions of verification and inspection). To some extent such arrangements would be a fairly natural extension of and building on the existing agreement between Norway and the USSR on the prevention of incidents at sea, signed in December 1989. That the USSR might be receptive to such ideas is suggested by Mr Gorbachev's Murmansk speech, which called for restrictions on various forms of naval activity in northern and Arctic waters as a confidence-building measure. As regards the third problem, increased noise, there seems no effective way of dealing with this without prohibiting or drastically limiting offshore oil and gas activities in the Barents Sea, something neither Norway nor the USSR would be likely to agree to. In any case, as pointed out above, increased noise has advantages for the USSR as well as disadvantages.

The other three elements would be: (3) a continuation and possible modification of existing arrangements relating to the joint management of fish stocks in the Barents (which are discussed in the next chapter); (4) arrangements for the unitisation of any oil or gas fields straddling the boundary line, which Norway has already proposed[70] and numerous examples of which exist elsewhere – such arrangements are, or course, quite different from the zone of joint development which the USSR has proposed and Norway has rejected; and (5) arrangements providing for co-operation in the event of any pollution resulting from offshore oil and gas activities. Such arrangements are to some degree in fact already being discussed by the Joint Norwegian–Soviet Commission on Environmental Co-operation, established by the Agreement between Norway and the USSR on Environmental Co-operation of 1988. This

matter is considered in further detail in Chapter 5.

The comments made by the Soviet Prime Minister, Mr Ryzkhov, on his visit to Oslo in January 1988, referred to earlier, suggest that the USSR might be responsive to such an approach to resolving the dispute.

In addition, or as an alternative, it is possible to envisage a further broadening of the issues to involve the unresolved questions concerning Svalbard (discussed in Chapter 2) in order to arrive at a giant package deal involving both Svalbard and the Barents Sea boundary. Such a possibility, which has been advocated by some writers,[71] will be discussed in Chapter 6.

We have now explored most of the issues concerned with the delimitation of maritime boundaries in the Barents Sea, but there is one final question which must be examined, and that is whether there is any obligation on Norway and the USSR in international law not to explore or exploit the sea-bed of the disputed area, pending agreement on a boundary.

IS THERE ANY PROHIBITION IN INTERNATIONAL LAW ON EXPLORING AND EXPLOITING THE DISPUTED AREA?

Given the length of time negotiations over a maritime boundary in the Barents Sea have lasted and may continue to last, given the discovery of oil and gas in the eastern Barents and the expansion of Norwegian oil and gas activities northwards, it is obviously an important practical question as to whether international law prohibits Norway and the USSR from unilaterally engaging in any activities relating to the exploration and exploitation of sea-bed resources until agreement has been reached on a boundary. While a clear-cut answer cannot be given to this question, there is quite a lot of evidence to suggest that there is a rule of customary international law prohibiting states from unilaterally engaging in offshore hydrocarbon activities in disputed areas of the continental shelf.

In the first place, there are a number of broad principles of international law providing support for such a rule. Under article 6 of the Continental Shelf Convention a continental shelf boundary 'shall be determined by agreement' between the states concerned. This implies that such states are under an obligation to enter into negotiations with a view to reaching agreement. This is also the position in customary international law, as the International Court of Justice stressed in the *North Sea* cases.[72] It is a rule of international law, as has been stressed on many occasions by international courts and tribunals,[73] that negotiations must be conducted in good faith. It can be argued that to

drill in a disputed area of continental shelf subject to delimitation negotiations is a breach of good faith because it is an action which may be regarded as trying to prejudice the outcome of the negotiations. Since only a coastal state can explore and exploit its continental shelf, such action would be tantamount to asserting that the area of disputed continental shelf where drilling had taken place belonged to the state undertaking the drilling. If there is such a principle, there is some difficulty in ascertaining its temporal application. While there is an obligation to negotiate in good faith, there is no obligation to reach an agreement. At some stage, therefore, if agreement cannot be reached, the obligation to negotiate must lapse. This would imply that the obligation not to drill in the disputed area would also lapse.

A second, and to some extent related, argument is as follows. A coastal state has the exclusive right to explore and exploit the resources of its continental shelf. Therefore, if state A explores and exploits resources of a disputed area of continental shelf which later turns out to belong to state B, it will have committed an international wrong against state B. (State B's rights over its continental shelf, it should be noted, exist *ab initio* and not simply from the date of the delimitation when its title to the disputed continental shelf becomes unequivocally established.) It could be argued that state A is under an obligation (deriving again from good faith) not to risk committing such a wrong and thus must not drill in the disputed area. While some writers have asserted that this must be so,[74] the matter does not seem entirely free from doubt, particularly in the light of an *obiter dictum* in the *Aegean Sea* case. In this case the International Court of Justice held that seismic surveys by Turkey in an area of continental shelf claimed by both Turkey and Greece did not constitute such an irreparable prejudice to Greece's rights that interim measures of protection were justified. The Court added, however, that seismic exploration of a continental shelf without the consent of the coastal state 'might, no doubt, raise a question of infringement of the latter's exclusive right of exploration'. If so, and if Turkey's exploration took place in an area that was subsequently adjudged to be Greek continental shelf, there would be a case for reparation by Turkey to Greece.[75] Thus, the Court contemplates that a wrong could be committed for which reparation would subsequently be made: it does not suggest that there is any obligation to avoid the risk of committing a wrong in the first place, as was argued above might be the case, although it may be that the Court's comments should be regarded as being limited to the situation where the exploration is by means of seismic tests. It might have taken a different view had drilling been involved. While the Court's statement is only an *obiter dictum* and its

exact scope is unclear, it does cast doubt on the argument that a state must not drill in a disputed area of continental shelf in order to avoid the risk of committing a wrong against another state.

To the above two broad principles suggesting that a state is prohibited from unilaterally exploring and exploiting a disputed continental shelf area may be added another. Lagoni persuasively argues, relying on a dictum from the *Electricity Company of Sofia and Bulgaria* case[76] and certain provisions of the General Act for the Pacific Settlement of Disputes of 1928,[77] that there is a general rule of customary international law that parties to a dispute must not take any steps that would aggravate or extend the dispute.[78]

Apart from these general principles, there are a number of examples of state practice which provide further evidence for there being a rule of customary international law that a state may not unilaterally engage in offshore oil and gas activities in disputed areas of continental shelf. First, Tunisia and Libya halted offshore oil and gas operations in the area of disputed continental shelf while their case was being dealt with by the International Court of Justice.[79] Second, the USA in 1976 and 1978 withdrew from consideration areas proposed for offshore hydrocarbon licensing because they were situated on part of the continental shelf on Georges Bank also claimed by Canada.[80] Third, Greece and Turkey in 1976 signed an Agreement on the Procedure to be followed for the Delimitation of the Continental Shelf,[81] paragraph 6 of which provides that 'both parties undertake to abstain from any initiative or act relating to the continental shelf of the Aegean Sea which might prejudice' their negotiations over a continental shelf boundary. Fourth, following exploratory drilling for oil by Denmark in 1983 in an area of continental shelf in the Kattegat also claimed by Sweden, the Swedish government sent the Danish government a note of protest in which it claimed that the Danish action was contrary to international law. Subsequently, Denmark and Sweden issued a communiqué in which they agreed that 'activity in the disputed area should be based on the principle of having regard to the other party's interests, including the principle of consultation between the parties'. It was also stated that neither party would permit exploratory drilling during the period of negotiations over a boundary.[82] Lastly and quite significantly in the present context, in 1982 the Norwegian Minister for Oil and Energy stated in reply to a Parliamentary question that 'international law requires mutual restraint. The outcome of the boundary negotiations [with the USSR] must not be anticipated through unilateral action.'[83]

From these quite extensive instances of state practice, coupled with the general principles discussed earlier, it seems reasonable to conclude

that there is probably a rule of customary international law requiring states not to engage unilaterally in offshore oil and gas activities in disputed continental shelf areas. However, it is not altogether clear exactly what activities are covered by this probable rule. Certainly, it would seem that exploratory drilling is covered, as of course is production. But what about seismic tests? Here there must be more doubt. The general principles discussed earlier appear to apply to all the continental shelf rights of a coastal state, which include its exclusive sovereign rights of exploring and exploiting the resources, as well as its right to regulate research on its continental shelf. The latter at least covers seismic tests, even if exploring possibly does not (this point was left open in the *Aegean Sea* case). This would therefore mean that seismic tests were included in the prohibition on unilateral acts. On the other hand, the *Aegean Sea* case casts doubt on this; and the examples of state practice shed no light on the matter. The question of whether seismic tests are included in the probable rule therefore remains uncertain. However, since seismic testing involves substantially less interference with the sea-bed than drilling, there are good reasons why it might be considered differently and excluded from the scope of the rule.

The basic rule itself will be strengthened if and when the 1982 UN Convention on the Law of the Sea enters into force. Articles 74(3) and 83(3) provided that pending the reaching of agreement on economic zone and continental shelf boundaries the states concerned 'shall make every effort ... not to jeopardise or hamper the reaching of the final agreement'. Again, it is not clear exactly what activities are caught by this provision. Lagoni persuasively argues that it covers 'any activity which represents an irreparable prejudice to the final delimitation agreement', including exploratory drilling but not exploratory activities of a transitory character such as seismic tests, unless in exceptional circumstances they would aggravate the dispute.[84]

Having seen that there probably is a rule of customary international law (which is closely mirrored in the Law of the Sea Convention) which prohibits unilateral oil and gas activities on disputed continental shelves (even if the exact activities encompassed by this prohibition remain unclear), it remains to examine how far Norway and the USSR have complied with such a rule in the disputed sea-bed area in the Barents Sea. The short answer is that on the whole the rule has been complied with. On the Soviet side, the one breach of the rule was in May 1983 when the drilling ship, *Valentin Shashin*, drilled about 1.5 miles west of the median line inside the disputed area, but it later transpired that this transgression had been accidental: in any case the ship was within the

2–3 mile margin of error corridor recognised by Norway.[85] Both the USSR and Norway have engaged in seismic testing in the disputed area, and each has protested to the other.[86] However, as we have seen, there is doubt as to whether seismic testing is covered by the prohibition on unilateral acts in disputed continental shelf areas.

CONCLUSIONS

As we have seen, Norway and the USSR have been negotiating over a maritime boundary in the Barents Sea for nearly twenty years. Norway has argued that the boundary should be a median line, the USSR that it should be a sector line. Because of the vagueness and generality of the rules of international law relating to maritime boundary delimitation, international law does not prescribe with anything approaching precision where the boundary should lie. Nevertheless, there is no justification in international law for the sector line being the boundary. There is more support for the median line, especially if modified, first, to take account of the further projection of the Norwegian mainland coast seawards; second, to reflect a reasonable degree of proportionality between the lengths of the parties' respective coastlines and the areas of continental shelf belonging to each; and third, to discount, wholly or partially, the effect of various off-lying islands in the Svalbard and Franz Josef Land archipelagos. Ultimately, however, the boundary is a matter for negotiation between the parties (unless, as seems very unlikely, recourse is had to some form of third party settlement). In such negotiations, the parties are, from a power-politics point of view, in an unequal bargaining position, which is accentuated by the lack of precision and of the obligatory nature of the legal rules on which the weaker party (Norway) can rely in support of its case.[87]

In spite of the length of time that the parties have been negotiating over a boundary, there has appeared until recently to have been very little narrowing of the two parties' original positions. Norway has indicated that it is prepared to make concessions on the median line, whereas the USSR appeared to stick uncompromisingly to the sector line, without offering any concession, until 1988, when it proposed a zone of joint development as at least a temporary solution to the boundary problem, a proposal Norway immediately rejected because of its desire to avoid any kind of condominium arrangements in the far north. More recently there have been some further signs that the USSR may be prepared to modify its original position. Nevertheless, there seems little likelihood of any solution to the boundary dispute in the near future, although given the current capacity for unforseen changes

in all matters involving the USSR, it would be most unwise to make any firm predictions as to when a boundary solution might be reached and what its substance might be.[88] There seems little doubt, however, that if the location of the boundary did not have considerable security implications for the USSR, a maritime boundary would probably have been agreed by now.[89] Thus, as suggested earlier, agreement on a boundary is more likely to be reached if it is included as part of a settlement that addresses the USSR's security interests.

During the considerable length of time the boundary dispute has lasted, the parties have succeeded in keeping the dispute low-key, therefore not adding greatly to the existing tension in the area. It is true that there have been occasional incidents which could be seen as connected with the dispute, such as the USSR engaging in weapons tests in part of the disputed area in 1976 and 1979 and in 1985 cutting the streamer of the Norwegian ship, *Malene Østervold*, when engaged in seismic tests in an area of continental shelf well to the west of the sector line and therefore outside the disputed area, but such incidents have been few and far between. In particular, with one accidental exception, the parties have observed a probable international law obligation not to drill for oil and gas in the disputed area pending agreement on a boundary. As far as fisheries are concerned, the 'Grey Zone Agreement' has provided a reasonably satisfactory temporary solution to the absence of an agreed boundary. Thus, as maritime boundary disputes go, this has so far been one of the better-managed ones. It is to be hoped that this state of affairs will continue until the dispute is solved.[90]

4 Fisheries management and access to fishery resources

INTRODUCTION

The Barents Sea and the Norwegian Sea are regarded as forming a single ecosystem, and this maritime area is biologically one of the most productive in the world. The average annual catch of the most important fisheries in this area has been 2.2 million tonnes for the last twenty years.[1] Of the total Norwegian catch in 1978–85, 72 per cent was taken in this area, and fishing for the Barents Sea stocks is of vital importance to the northernmost regions of Norway. The USSR catch is about the same as the Norwegian in quantity, but this represents a smaller percentage of the total Soviet catch. (Further information about the fishery resources of the Barents Sea was given in Chapter 1.)

Traditionally, the rich fishing grounds in the Barents Sea have also been exploited by fishermen from other nations. In 1976, before the establishment of 200-mile zones, 20 per cent of the most important fish stock, the North-east Arctic cod, was caught by states other than Norway and the USSR. The most important of these other fishing nations were states from the European Community, especially the United Kingdom, the Faroe Islands and the Eastern European states, Poland and the German Democratic Republic.[2]

As in other parts of the world, a regional fisheries organisation was established, the North-East Atlantic Fisheries Commission (NEAFC) of 1959.[3] The Commission became operative from 1963 and its regulatory powers applied not only to the high seas but also to the territorial seas and the then twelve-mile national fishing zones of the North-east Atlantic (including the Barents Sea). The Commission was authorised to make recommendations by a two-thirds majority vote (art. 8(1)), but each of the member states could reject these recommendations by submitting a protest within ninety days (art. 8(2)). Recommendations were enforced either by coastal states within their maritime zones or by flag states on the high seas.

an actual legal right to special treatment, or to action not in accordance with the normal rule can be founded.

(b) *As the basis of a change in the law* — Special circumstances may, again, without themselves justifying failure to observe the normal rule, constitute the factual basis of, or motive for, a new practice which the generality of States will come to regard themselves as entitled, and bound, to observe; thus leading to the development of a new rule of customary law. But once more, it is the new rule, if and when developed, not the original departures from the previous one, or the special circumstances themselves, that constitutes the basis of the right.

(c) As evidence of reasonableness—Finally, notice may be taken of another connection in which the existence of special circumstances can have a legitimate legal effect. Very often, in applying a rule of international law, or in estimating the validity of State action, something—perhaps a good deal—may turn on the reasonableness of the action in itself, or on the degree of reasonableness with which it has been carried out. In such cases, the existence of special interests or particular circumstances of, for instance, an economic, social, or geographical character, may well affect, if they do not determine, the reasonableness of the action taken. It was in this way and on this ground, that in the *Norwegian Fisheries* case, the International Court held that, on the assumption that a valid legal case existed (by reason of the broken character of a coast generally or the existence of an island fringe) for measuring territorial waters from straight base-lines drawn across curves, or between two outlying points, instead of from low-water mark along the coast, then, in estimating its character, length, and terminal points, it was legitimate to take into account the existence of special economic interests in the region or neighbourhood of that base-line [1].

1. I.C.J. Reports, 1951, pp. 133 and 142.

CHAPTER VII

3rd THEME [1] *(continued)—ASPECT (B)*: THE PRINCIPLE "EX INJURIA NON ORITUR JUS"

69. General nature of the principle "ex injuria non oritur jus" [2]

This matter is closely related to, and involves a somewhat similar paradox as that discussed in the previous Chapter in connexion with the development of new customary rules of international law—namely that violations of international law, while not ceasing to be such, may nevertheless in a certain sense end by having juridical effects if eventually they result in, or become symptomatic of a new practice leading to a new legal situation. In the same way, the wrongful act of a State, without thereby ceasing to be wrongful, may become the basis of a new legal situation in which the wrongful act is accepted as a fact, and in relation to which even the State responsible for it may have certain rights. The general principle is that States cannot profit from their own wrong, or plead their own omisions or negligences as a ground absolving them from performances of their international obligations; and similarly that rights and benefits cannot be derived from wrong-doing. This admits of no doubt. It is a wide general principle having many diverse applications under international law. One or two of these were noticed earlier, in other connections—for instance that a State which had failed to bring its municipal law into conformity with its treaty obligations could not plead the deficiencies of that municipal law as a ground for non-performance of the treaty. In the same way, a State could not allege non-compliance with

1. For full title, see heading to Chapter VI above.
2. Other maxims expressing the same idea are "*Nemo ex suo delicto meliorem suam conditionem facere potest*", and "*Nullus commodum capere potest de sua propria injuria*".

a treaty provision by another State as a justification for a non-performance on the part of itself, if it was its own action which prevented the other State from complying with the treaty. This was the basis of the well-known decision of the Permanent Court of International Justice in the *Chorzow Factory* case, and of course these principles apply not merely as regards treaty obligations but to general international law obligations also. The Permanent Court in the *Chorzow Factory* case said that it was a generally accepted principle that one party to a dispute "... cannot avail himself of the fact that the other has not fulfilled some obligation... if the former party has by some illegal act, prevented the latter from fulfilling the obligation in question..." [1] In the field of treaties, an important application of these principles exists in relation to the question of the termination of treaties by means other than those provided for in the treaty itself, or in any other relevant agreement of the parties. For instance, a party may claim that circumstances have arisen making further performance of the treaty a literal impossibility. This claim may be accurate on the facts, yet if that party has itself created the impossibility in question, or contributed to it by its own action, although the treaty may indeed be terminated in the sense that it can no longer be performed, an obligation will arise to make reparation for the wrong suffered by the other parties in the loss of the benefits of the treaty, and the party at fault cannot take advantage of the wrong. Again a party which purports to terminate a treaty because of an alleged fundamental breach of it by the other, or by another party, cannot be regarded as having a right to do so if it was itself a party to the breach, or by its own action contributed to or connived at it. Equally, as was pointed out by Judge Read in the *Peace Treaties* case (second phase) before the International Court of Justice, a government which prevents the setting up of an arbitral tribunal by refusing to take the steps (*e.g.* nomination of its arbitrator) specified for that purpose by an arbitration agreement to which it is a party, may be unable to complain

1. P.C.I.J. Reports (question of competence), Series A, No. 9, p. 31.

if the tribunal is set up by other means, and may be prevented from contesting the validity of any decision it gives [1]. Another example of the same principle is to be found in the fact that although international law does not apply any direct rule of temporal prescription to international claims, causing them to become time-barred if not brought within a certain period, yet if by unnecessary delay in bringing the claim, the other party to the dispute has in fact been prejudiced (*e.g.* by the death of essential witnesses, destruction of evidence etc.), it is open to the tribunal to find in its favour on the ground that the claimant party would derive advantage from its own *laches* if the case proceeded. This is also an application of the maxim of equity, *vigilantibus non dormientibus jura subveniunt.*

70. The place of reprisals

Certain English principles of equity find an application in the international field through the same basic idea, such as that "He who seeks equity must do equity", and that "He who comes to equity for relief must come with clean hands." [2] Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it. In some cases, the principle of legitimate reprisals will remove any aspect of illegality from such counter-action. But even where the act remains *per se* illegal, it may be that the State suffering from it is deprived by its own prior illegality of juridical grounds of complaint. However, three important provisos or qualifications to this position must be noted. *First*, an illegality by one State cannot justify a totally unconnected illegality by another, except as a professed exercise of a legitimate reprisal. *Secondly*, even where reprisals are concerned, they must be proportionate to the original illegality; and similarly, a State whose own

1. I.C.J. Reports, 1950, pp. 241 and 244.
2. See any standard English text-book on the principles of Equity.

wrongful act has provoked or contributed to illegal (or what would normally be illegal) action by another, will retain its right of complaint if such action was out of reasonable proportion or relation to the provocation or contributory acts—if for instance these have been seized upon as pretexts for action not necessitated by, proportioned to, or appropriate in the circumstances. *Thirdly*, there are certain forms of illegal action that can never be justified by or put beyond the range of legitimate complaint by the prior illegal action of another State, even when intended as a reply to such action. These are acts which are not merely illegal, but *malum in se*, such as certain violations of human rights, certain breaches of the laws of war, and other rules in the nature of *jus cogens*—that is to say obligations of an absolute character, compliance with which is not dependent on corresponding compliance by others, but is requisite in all circumstances, unless under stress of literal *vis major*. In the conventional field, may be instanced such things as the obligation to maintain certain standards of safety of life at sea. No amount of non-compliance with the conventions concerned, on the part of other States, could justify a failure to observe their provisions.

71. Apparent exceptions to the rule "ex injuria non oritur jus"

International law, while in general insisting on this maxim, nevertheless does not always refuse to recognize the validity, or at any rate the fact, of certain *situations* brought about by illegal action, though it will continue to characterise as illegal, and to refuse to validate, the action itself. Certain cases were noticed in the preceding Chapter of what are in a sense examples of this process, namely the possibility that breaches of the law may bring about changes in the law, or that a State may, by breaches in the law acquiesced in by other States, build up a prescriptive or historic right to behave or act in a certain way, as the International Court found in the *Norwegian Fisheries* case. Another example of the same kind, is the acquisition of title to territory by the process of what is known as acquisitive

prescription; for the essence of the process by which one State acquires a prescriptive right to the territory of another, is *adverse* or, in effect, *illegal* possession, or other acts in the illegal assertion of sovereignty performed by that State in relation to the territory—acts which *in their inception* are strictly nullities, without legal effect, except as violations of the territorial State's sovereignty. It is by a settled and uninterrupted course of such illegal activity, acquiesced in, or not effectively or sufficiently countered in the manner, or to the extent, prescribed by international law for the upkeep of title, that a title by prescriptive means is acquired. The acquisition of "territorial" or property rights by prescription is of course known to private law also.

72. Rationalisation of these cases

One justification for such processes in the international field is the impossibility of procuring changes in the law by legislation, or (except with the consent of the parties given generally or *ad hoc*) a judicial determination of State rights. It must, however, also be noticed that the appearance of the acquisition of rights through illegalities is misleading. In the last analysis, what the law recognizes in this class of case, is not the rightfulness of a situation of illegality, but the fact that there is a double process at work, and it is the second element in this process which confers the right. Thus, in the case of territorial sovereignty just mentioned, there goes on, parallel with the illegal action of the prescripting State, the *inaction* of the existing sovereign, by which the latter State in effect abandons or allows its title to lapse, or loses it as a matter of law by failure to keep it up. No amount of illegal action by the State purporting to acquire sovereignty would avail in law against adequate reaction or counter-action by the existing sovereign. It is the latter which ultimately forms the basis of the new sovereign's right, rather than its own illegalities, as such. Similarly, when a State acquires a historic right to behave in a certain way [1], what really confers

1. As for instance in the *Fisheries* case, Norway was found to have acquired a historic right to establish straight base-lines in certain regions, irrespective of the general law.

that right is not its own actions in departing from the normal rule, but the acquiescence of other States in such departures, thus in effect validating them and depriving them of their illegal character. Again, when a new rule of customary law is evolved out of widespread departures from existing law, there is, as was seen in the preceding Chapter, a double process. Side by side, and indeed simultaneously with the negative process of breach, there is or there may be (for that is what the matter depends on) the positive process of the general adoption of a new practice. It is this, and not the breaches as such, that confers validity on the new position, and gives rise to a new rule of law.

73. Does international law ever validate an illegality?

There are yet other classes of cases in which it may appear that international law in effect recognizes and validates an illegality, although here again analysis seems to show that this is not what really occurs. There are three main classes: *first* those in which, as a matter of law, the existence of a new situation or status is simply a question of *fact*, and cannot be denied, whatever the method by which it was brought about; *secondly* there are the cases in which overriding rules of *jus cogens* produce a situation of irreducible obligation and demand that illegal actions be ignored or not allowed to affect the obligations of other States; *thirdly* there are cases where, because an action which is illegal by international law produces its effects, or some of them, exclusively or mainly on the domestic plane, or does not require to be completed by the action or assent of any other State, its effects must, *pro tanto* be suffered, although the illegality of the action internationally is not affected.

(i) *Irreversible situations of fact*

(a) War or equivalent hostilities—The most prominent example in this class is that of war or of hostilities in the nature of war. The use of force in a given case may constitute an act of aggression or a breach of the peace, or an illegal act of force, and may lead to war, or hostilities indistinguishable from war. Whether it does so or not is always a question of fact, and, moreover, a question

of fact to be objectively determined—not one that depends exclusively on the will or views of the parties. Naturally, the views and declarations of the parties, or of either of them, constitute a factor of primary importance which must always be given full weight. But if they were *per se* conclusive, it would always be open to a State to commence hostilities, and then, on the pretext that these did not in its view or intention constitute war, escape some of the legal consequences of its act, or at any rate free itself from obligations normally incumbent on belligerents in a war. It is partly to meet the possibility that this kind of attitude may be taken up, that the 1949 Geneva Conventions are so worded as to be specifically applicable to any kind of hostilities whatever they may be called. Equally, if on the facts there is a war, then there is a situation recognized by international law as having legal consequences, as giving rise to legal rights and obligations, and as doing so *even in favour of the party responsible or at fault.* This is not to say that the aggressor State may not, according to modern conceptions, be subject to a number of penalties and disabilities [1]. But in the actual conduct of the hostilities at any rate, it will be entitled to claim observance of the laws of war and, in general, of the Geneva Conventions. The illegality of the aggression or breach of the peace is in no way modified or diminished, but in the present state of the international society, lacking any central authority or sufficiently certain means of enforcement, the fundamental purposes of the rule of law are better served by recognizing and regulating the consequences of certain situations of fact, however brought about, than by attempting to deny them their objective status.

(b) Premature recognition—Another situation in the same class may arise from premature (and therefore in themselves illegal) acts of recognition—for instance one government extends premature recognition as a lawful belligerent to an insurgent or

1. The whole subject is highly controversial. See generally Sir Hersch Lauterpacht's study *The Limits of the Operation of the Law of War* in the British Year Book of International Law, 31 (1954), p. 206. The matter is the subject of current study by the Institute of International Law.

revolutionary faction in another country which is attempting to subvert and overthrow the legitimate government by force. Such premature recognition is at the least an unfriendly act in respect of any government which is in fact the legitimate authority in the country concerned, and with which normal relations exist; and it may even be actively contrary to international law by amounting to a constructive intervention in the internal affairs of the country concerned, in those cases where it is clearly directed to subverting the legitimate authority, and to assisting an insurrectionary faction not representative of the general will of the population [1]. Nevertheless, there is a resulting situation of fact, of which international law takes account—that is to say, recognition once having been given, the insurgents have, *in relation to the recognizing government* [2], the status of lawful belligerents; they can, in respect of its ships and cargoes, exercise belligerent rights at sea; they can require the government concerned, as of right, to conform to the behaviour of a neutral in a war and to refuse governmental assistance to the other side, and so on. This is again a case in which the facts do not override or cancel the illegality: for instance, in the event of a premature or otherwise unjustified recognition of insurgents as lawful belligerents, the injured State affected by the insurgency retains all its rights and may be able to claim damages or other reparation from the recognizing State. Nevertheless, the *fact* of recognition, even if unjustified, will tend to create a situation which, in the present state of the international society, gives rise to legal consequences that cannot be ignored. A variation of this case occurs where premature recognition is given to a seceding territory as being a sovereign independent State, although the secession is neither fully accomplished nor necessarily final. Such action may again amount to a breach of international law vis-à-vis the parent State, yet may nevertheless produce its full legal consequences

1. This matter is given more detailed study in the Second Part of this course.

2. One Government cannot, by recognition, confer a general status of belligerency on insurgents, but is of course itself subject to the natural consequences of its own declaration or act.

in the relations between the recognizing government and the seceding entity, and, by reason of that, more widely still [1].

(ii) *Irreducible obligations of law*—In this category there are rules in the nature of *jus cogens* which operate in an imperative manner in virtually all circumstances. The law-breaking State can obtain no advantage or fresh rights from its law-breaking, but does not suffer the penalties, or incur the liability to counteraction which it might do in other circumstances. A primary example is afforded by the case of a State which breaks certain of the laws of war that have reference to the treatment of the civilian population in war time, the treatment of prisoners of war, the sick and wounded in the field, civilian internees, the population in occupied territory, and so on. Without going into details, or suggesting that there are no qualifications or exceptions, it is broadly true to say that a State which commits breaches of the laws of war in these respects is not thereby deprived of the right to claim the correct and lawful treatment of its own civilians, prisoners of war, etc.—or perhaps it would be more accurate to say that such a breach would not free the other belligerent from its obligation to respect the rules concerned. The obligation is, for each State, an absolute obligation of law not dependent on its observance by others. This is because all rules of this particular character are intended not so much for the benefit of the States, as directly for the benefit of the individuals concerned, as human beings and on humanitarian grounds. In the same way, a breach by one party of a convention on human rights, a convention providing for the safety of life at sea, labour conventions regarding hours and conditions of work, etc., would not justify corresponding breaches of the treaty by other parties even vis-à-vis the treaty-breaking State and its nationals, for reasons of a broadly similar character.

1. There is of course a natural tendency for foreign recognition to be regarded as premature by the former parent State. But the consequences are likely to remain, if the recognition is accorded in good faith and on the basis of a considered estimate of the realities of the case. One of the best known instances in history is the British recognition of a number of the Latin-American republics about 1820, when Canning, the British Foreign Secretary, stated in his famous phrase that he proposed to "call in the New World to redress the balance of the Old".

Such conventions involve obligations of an absolute and, so, to speak, self-existent kind, the duty to perform which, once assumed, is not (as for instance with commercial treaties or such conventions as disarmament conventions) dependent on a reciprocal or corresponding performance by other parties [1].

(iii) *Unaviodable consequences primarily produced on the domestic plane*

There is finally the category of case in which, although the illegality concerned does not cease to be one, it sets up within certain limits a new legal situation, because the effects take place largely in the domestic and not the international field—or they depend wholly or largely on action which the law-breaking State is able to take of its own motion and without the necessity of seeking agreement or co-operation from outside. It tends to be in the nature of these cases that the domestic results govern, in fact, even if not it law.

(a) Nationality questions—A conspicuous example of this kind occurs in the field of nationality, in relation to the action which a State may take to confer its nationality on individuals; or alternatively to deprive existing nationals of it, thus rendering them stateless, if they have not acquired or do not simultaneously acquire the nationality of any other country. *Conferment of nationality*: as is shown by a considerable weight of authority culminating in the decision of the International Court of Justice in the *Nottebohm* case [2], the fact that a country has conferred its nationality on an individual does not mean that such nationality will be recognised as valid *internationally* for all purposes, or as producing its full effect on the international plane. International law, while in general leaving it to each State to determine questions relating to its own nationality for itself, does not accord

1. For some description of the peculiar effect produced by such treaties in certain legal fields see the present writer's *Reservations to Multilateral Conventions* in the International and Comparative Law Quarterly, Vol 2, (1953); the Section on Reservations in his article on *The Jurisprudence of the International Court of Justice*, in 33 British Year Book of International Law, (1957); his Second Report on the Law of Treaties *(Termination of Treaties)* for the United Nations International Law Commission, published in the Yearbook of the Commission for 1957, Vol II.

2. I.C.J. Reports, 1955, p. 4.

complete freedom to States in the matter. The action of a State in conferring its nationality on persons who have no real connexion with it, and have not acquired such connexion by service, residence or other recognised means—especially if such persons are naturally connected with another country—may be illegal internationally, is at least an abuse of rights, and may constitute a serious encroachment on the sovereignty and natural rights of another State [1]. Yet international law recognises the principle of double or plural nationality, perhaps precisely because this possibility cannot be prevented so long as the subject of nationality remains primarily one for State determination. Thus, despite any abuse involved, the persons concerned would *possess* the nationality in question under the national law, and would be entitled to hold, and travel on a passport of that country, and so on. *Deprivation of nationality*: this may equally be illegal or abusive, internationally, yet nevertheless produce certain results, because the results cannot be prevented from occurring on the domestic plane. Thus it is an accepted principle of international law that a State is bound to receive back its nationals if they are deported from another country. But if a person is deprived of his nationality while in another country, his former State has technical grounds for refusing to have him back, even though the denationalisation was abusive and not justified on any grounds of substance, such as, for instance, that he had designedly severed his connexion with his own country, or deliberately acquired the nationality of another. It has been very cogently argued [2] that in such circumstances a country which has allowed the entry into its territory of the individual concerned, on the faith of his being a national, and travelling on the passport, of another country, is entitled to demand his re-admission by his country of origin. But the position is uncertain, and a practice that is undoubtedly abusive may have to be accepted because its operation takes place unilaterally and mainly on the domestic plane. In any event, a deprivation of

1. This matter is fully considered in the Second Part of this Course, Chapter X below.

2. See citation in n. 1 on p. 197 below, p. 49 *et seq.* and pp. 126-28.

nationality, however unjustified, cannot prevent the person concerned becoming stateless on the international plane, unless he is in a position to obtain the nationality of another country.

(b) The case of nationalisation and expropriation of property and interests—Another case in this general class of acts that cannot be prevented from producing effects on the domestic plane, and in respect of which such effects tend to be conclusive (in fact, that is, though not of course in law) arises where a government nationalises or expropriates foreign property or undertakings in its territory, in a manner which is contrary to international law, or at the least an abuse of rights—for instance if no real ground of public interest exists, or if the action is arbitrary or discriminatory, or if there is no provision for adequate compensation. Such action will not produce any effect on the status or property of the undertaking outside the country concerned, except to the extent that the national law or courts of any other country choose to give it recognition; and may similarly cease to have any legal effect on any property of the undertaking within the territory if such property is exported. But nothing can prevent it producing juridical effects on the *internal* plane, and these may well produce effects, or some effects, externally also, though the breach of international law remains [1].

1. The position described under these last rubrics is clearly not a satisfactory one. It may be summed up as follows. International law, while never validating or recognising illegal acts as lawful, may nevertheless extend a measure of recognition to the situation produced by those acts. Where this occurs, it is mainly either because international law finds itself confronted with a situation of fact which, in the present state of international organisation, cannot be avoided, but which itself requires legal regulation; or because there are overriding grounds of a humanitarian character; or because the legal consequences derive from action which a State is able to take on the domestic plane, and on a unilateral basis. These are, no doubt, fields in which there is room for a considerable development and extension of international law. Nevertheless, the matters involved are not of a character seriously to affect the principle of the rule of law in the international field, or the generality or uniformity of its application.

SECOND PART: MAINLY PRACTICAL

CHAPTER VIII

4th THEME—UNIVERSALITY AND UBIQUITY

(A) SPATIAL OR TERRITORIAL ASPECT: INTERNATIONAL LAW APPLIES TO AND PROVIDES A REGIME FOR EVERY PORTION OF THE GLOBE

(1) THE LAND AND ITS APPURTENANCES

74. THE DIFFERENT CLASSES OF TERRITORY AND RES

ALTHOUGH there are parts of the world which are uninhabited, or unoccupied, or outside the sovereignty of any State (and these three situations do not necessarily coincide), there is no portion of the globe which is beyond the pale of the law, and to which international law is, so to speak, wholly indifferent, although it applies differently to different parts. The territory of the globe is of two kinds, land territory [1] and marine or sea territory [2]. Three principal kinds of legal status are involved. Territory may be *res in possessione, res nullius*, or *res communis*. Territory in the first two of these classes consists of land territory, together with its appurtenant waters, and the bed of the sea and sub-soil under those waters and on the adjacent

1. This consists of actual land permanently above high water mark, and of what are variously known as interior, internal or national waters where these are within the body of the land and behind the line of the coast.

2. Marine territory (apart of course from the high seas) comprises a State's territorial sea, national waters behind a straight base-line but in front of the line of the coast, and perhaps the bed and sub-soil of the continental shelf adjacent to its territory, although this can also be regarded as an extension of the land territory and is probably best viewed in that light, for otherwise there may be a tendency to regard rights in the shelf as extending to the waters above it. The difficulty about this view is that outside its territorial sea a State does not exercise unqualified sovereignty or ownership over its continental shelf (*vide* section 78 (iii) below). From this point of view the continental shelf situation is more like that of the territorial sea of a State.