Division for Ocean Affairs and the Law of the Sea

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Digest

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CONTENTS

		Page Nos.
	INTRODUCTION	1
I.	BASELINES, BAYS AND TERRITORIAL SEAS	2-28
	A. Gulf of Fonseca Case (El Salvador/Nicaragua) (Central American Court of Justice, 1917)	2
	B. Fisheries Case (United Kingdom v. Norway) (ICJ, 1951)	6
	C. Beagle Channel Arbitration (Argentina/Chile) (1977; Holy See, 1984)	11
	D. Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening) (ICJ, 1992)	18
II.	STRAITS USED FOR INTERNATIONAL NAVIGATION	29-37
	A. [deleted for technical reasons]	29
	B. Corfu Channel Case (United Kingdom v. Albania) (ICJ, 1949)	32
III.	MARITIME DELIMITATION	38-140
	A. Maritime Boundary Delimitation Arbitration (Grisbardana) (Norway/Sweden) (1909)	38
	B. North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (ICJ, 1969)	42
	C. Continental Shelf Arbitration (France/United Kingdom) (1977)	51
	D. Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (ICJ, 1982)	60
	E. Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (ICJ, 1984)	67
	F. Maritime Boundary Delimitation Arbitration (Guinea/Guinea-Bissau) (1985)	75

G. Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) (ICJ, 1985) 80

H.

V. CRIMINAL JURISDICTION AND FLAG STATE JURISDICTION ON THE HIGH SEAS 205-209

A. The Case of the S.S. *Lotus* (France v. Turkey) (PCIJ, 1927) 205

VI . NAVIGATION 210-261

A. The *I'm Alone* Case (Canada v. United States of America) (Commissioners, 1935) 210

B. The MV *Saiga* Cases (Nos. 1 & 2) (Saint Vincent and the Grenadines v. Guinea) (ITLOS, 1997 and 1999) 215

C. The *Volga* Case (Russian Federation v. Australia) (ITLOS, 2002) 253

VII. MARINE ENVIRONMENT 262-272

A. The Mox Plant Case (Ireland v. United Kingdom) (ITLOS, 2001) 262

B. The Mox Plant Arbitration (Ireland v. United Kingdom) (PCA, 2003) 269

I. BASELINES, BAYS AND TERRITORIAL SEAS

A. Gulf of Fonseca[1] Case

Parties:	El Salvador and Nicaragua
Issues:	Co-ownership of the waters; concession to a third country

(b) Arguments presented by the Parties

Jurisdiction

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

Co-ownership of the Gulf of Fonseca

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

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

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

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

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

B. Fisheries Case

Parties:	Norway and the United Kingdom
Issues:	Straight baselines; bays
Forum:	International Court of Justice (ICJ)
Date of Decision:	Judgment of 18 December 1951
Published in:	ICJ: Reports of Judgments,

(ii)

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

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

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

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

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

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

4. Decision

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

(a) That the islands of Picton, Nueva and Lennox, together with their immediately "appurtenant" islets and rocks, belonged to the Republic of Chile;

(b) That a line drawn on an attached chart, which formed an integral part of the decision, constituted the boundary between the territorial and maritime jurisdictions of Argentina and Chile;

(c) That within the area of the "hammer", the title to all islands, islets, reefs, banks, and shoals was vested in Argentina if situated to the northern side, and in Chile if situated to the southern side, of that line;

(d) That in so far as any special steps needed to be taken for the execution of the decision, they were to be taken by the Parties, and that the decision was to be executed within a period of nine months from the date on which, after ratification by the British Government, it was communicated by the latter to the Parties; and

(e) That the Court was to continue in being until it had notified the British Government that, in its opinion, the Award had been materially and fully executed.

5. Declaration of Judge Gros

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

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

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

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

6. Mediation and subsequent boundary agreement

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

1. Facts

67. On 11 December 1986, by a joint notification filed with the Registry of the International Court of Justice, Honduras and El Salvador transmitted a copy of a Special Agreement signed by them on 24 May 1986 for the submission of their dispute to a Chamber of the Court.
On 8 May 1987, the Court formed the Chamber to deal with the case. On 17 November 1989, Nicaragua filed an application for permission to intervene in the case. The Chamber of the Court decided in September 1990 that Nicaragua could intervene in the case, but not as a party, solely in respect of the question of the status of the waters of the Gulf of Fonseca.

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

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

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

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

72. It was in respect of the islands of the Gulf of Fonseca, all of which had been under Spanish sovereignty, that a dispute first became manifest. An attempt was made in 1884 to delimit the waters of the Gulf between El Salvador and H

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

2. Issues

(a) Questions before the Court

(i) **El Salvador** asked the Chamber of the Court to determine that:

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

(ii) **Honduras** asked the Chamber of the Court to adjudge and declare that:

Within the Gulf:

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

(b) Arguments presented by the Parties

(i) El Salvador *th0 04 Tw(AT4 1 Tfd(0)T45 36 4pk0 Tw(El Salva)5 88 7.)T45 36 94 3 l140 0 Tw388 7m0 10 2m*

Legal situation of the waters of the Gulf: Honduras opposed the concept of condominium, as established in the 1917 Judgment of the Central American Court of Justice and, in fact, called into question the correctness of this part of the 1917 Judgment. It maintained that, as it was not a Party to the case it therefore could not be bound by the decision. Honduras also argued that condominia could only be established by agreement. Honduras proposed the alternative idea of “community of interests” or of “interest” as expounded in the Judgment of the Permanent Court of International Justice in

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

80. Under the principle of the *uti possidetis*, it was necessary to establish what was the status of ne3751.2u650.1

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

(h) The Cha.4(f)4(t)4(fen)Tje584(a)-0.2(n)6C584(a)-0l3ei1 l143.04 7143.0 5fmJ204 7143493 -1clim

(ii) [deleted]

(b) Arguments presented by the Parties

(i) [deleted]

(ii) [deleted]

3. Reasoning of the Court

106. [deleted]

107. [deleted]

108. [deleted]

B. Corfu Channel Case

Parties:	Albania and the United Kingdom
Issues:	Sovereignty in territorial sea; innocent passage of warships
Forum:	International Court of Justice (ICJ)
Date of Decision:	25 March 1948 (Preliminary Objection) 9 April 1949 (Merits) 15 December 1949 (Amount of Compensation Assessment)
Published in:	- ICJ: Reports of Judgments, Advisory Opinions and Orders, 1949, pp. 4-131 - International Law Reports, Vol. 15, p. 349 and Vol. 16, p. 155
Selected commentaries:	- Schultze, T., "Free Passage of Warships through the Strait of Hormuz: Is the Logic of the Corfu Channel Case Applicable?", 18 Thesaurus Acroasium (1991), pp. 603-612 - Gardiner, L., The Eagle Spreads his Claws: A History of the Corfu Channel Dispute and of Albania's Relations with the West, 1945-1965, Edinburgh, London, Blackwood, 1966 -

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

Separate Opinion, Dissenting Opinions (Merits)

(a) Separate Opinion

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

(b) Dissenting Opinions

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

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

129. **Judge Krylov** agreed with the Court in rejecting the British argument that the laying of

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

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

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

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

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

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

4. Arbitral Award

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

146. Accordingly, the Tribunal decided and pronounced that the maritim0.0016 Tw(.52 -1.65 TD0nm2)]TJ04

southeast of Heja Islands; from point XX a straight line is drawn in a direction of west 19 degrees south, which line passes midway between the Grisbadarna and the Skjöttegrunde south and extends in the same direction until it reaches the high sea".

B. North Sea Continental Shelf Cases

Parties:	Denmark, Federal Republic of Germany and the Netherlands
Issues:	Delimitation; continental shelf; adjacent States; equidistance method
Forum:	International Court of Justice (ICJ)
Date of Decision:	Judgment of 20 February 1969
Published in:	- ICJ: Reports of Judgments, Advisory Opinions and Orders, 1969, pp. 3-257 - International Law Reports, Vol. 41, p. 29
Selected commentaries:	- Guernsey, K.N., "The North Sea Continental Shelf Cases", 27 Ohio Northern University Law Review (2000-2001), pp. 141-160 - Friedman, N.W., "The North Sea Continental Shelf Cases: A Critique", 64 American Journal of International Law (1970), pp. 229-240 - Grisel, E., "The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases", 64 American Journal of International Law (1970), pp. 562-593 - Blecher, M.D., "Equitable Delimitation of Continental Shelf", 73 American Journal of International Law (1979), pp. 60-88 - Jennings, R.Y., "The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment", 18 International and Comparative Law Quarterly (1969), pp. 819-832 - Jewett, M.L., "The Evolution of the Legal Regime of the Continental Shelf," 22 Canadian Yearbook of International Law (1984), pp. 153-193 - Hutchinson, D.N., "The Concept of Natural Prolongation in the Jurisprudence Concerning Delimitation of Continental Shelf Areas", 55 British Year Book of International Law (1984), pp. 133-187 - Monconduit, F., "Affaire du plateau continental de la Mer du Nord", Annuaire Français de Droit International, (1969), pp. 213-244 - Lang, J., "Le plateau continental de la mer du Nord: arrêt de la Cour Internationale de Justice" , 20 février 1969, Librairie

1. Facts

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

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

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

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

2. Issues

(a) Question before the Court

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

(b) Arguments presented by the Parties

(i) Federal Republic of Germany

- Delimitation of the continental shelf between the Parties in the North Sea was governed by the principle that each coastal State was entitled to a just and equitable share, taking into account the particular geographical situation in the North Sea; and
- The equidistance method of determining boundaries was not a rule of customary international law. In addition, the rule contained in the second sentence of article 6 (2) of the Continental Shelf Convention had not become customary international law. Even if that rule had been applicable between the Parties, special circumstances within the meaning of that rule would exclude the application of the equidistance method in this case. Moreover, the equidistance method could not be used for the delimitation of the continental shelf unless it was established by agreement, arbitration or otherwise, that it would achieve a just and equitable apport0.9olud

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

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

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

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

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

4. Decision

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

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

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

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

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

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

(i) The general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;

(ii) So far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;

(iii)The element a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal States and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.

5. Declarations, Separate Opinions, Dissenting Opinions

(a) Declarations

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

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

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

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

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

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

(b) Separate Opinions

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

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

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

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

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

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

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

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

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

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

172. **Judge Morelli** considered that, in order to find the rules and principles of general international law concerning the delimitation of the continental shelf, it might be useful to take account of the Convention as a very important evidential factor with regard to general international law. The reason underlying this consideration is that the purpose0.0003 Tc-0.0003

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

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

188. The Court found that its task was to determine the boundary between the United Kingdom and France without regard to the possibility that a United Kingdom-Ireland boundary could result in the overlapping

192. Regarding the rule of equidistance as a method of delimitation (and recalling the principles set forth in the North Sea Continental Shelf cases), the Court found that under article 6 the rule possesses an obligatory

5. Declaration by Mr. Briggs

202. Mr. Briggs was in complete agreement with the course of the boundaries delimited by the Court. However, he did not concur with the Court's evaluation of the French reservation to Article 6. He stated that the intent of the thr

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

Dissenting Opinion

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

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

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

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

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

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

3. Reasoning of the Court

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

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

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

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

223.

"(1) the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances;

"(2) the area relevant for the delimitation constitutes a single continental shelf as the natural prolongation of the land territory of both Parties, so that in the present case, no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation as such;

"(3) in the particular geographical circumstances of the present case, the physical structure of the continental shelf areas is not such as to determine an equitable line of delimitation."

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

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

5. Separate Opinions, Dissenting Opinions

(a) Separate Opinions

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

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

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

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

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

(b) Dissenting Opinions

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

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

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

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

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

1. Facts

239. On 29 March 1979, Canada and the United States of America signed a Special Agreement by which the Parties decided to refer to the Court a long-standing dispute between

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

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

245. Then it considered the geological characteristics of the area. It noted that the Parties were in agreement on the unity and lgrimiys of the

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

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

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

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

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

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

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

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

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

4. Decision

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

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

	Latitude North	**Longitude West**
A	44º 11' 12"	67º 16' 46"
B	42º 53' 14"	67º 44' 35"
C	42º 31' 08"	67º 28' 05"
D	40º 27' 05"	65º 41' 59"

"

5. Separate Opinion, Dissenting Opinion

(a) Separate Opinion

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

260. The point on which Judge Schwn s-0.000

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

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

F. Maritime Boundary Delimitation Arbitration

Parties:	Guinea and Guinea-Bissau
Issues:	Delimitation; territorial water; exclusive economic zone; continental shelf; interpretation
Forum:	Arbitral Tribunal composed of three members established on 14 October 1983 on the basis of a Special Agreement of 18 February 1983
Date of Decision:	Award of 14 February 1985
Published in:	Reports of International Arbitral Awards, Vol. XIX, pp. 148-196.
Selected commentaries:	- McLarky, K.A., "Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary, February 14, 1985", 11 Maryland Journal of International Law and Trade, Spring (1987), pp. 93-121 - Fu, K-C., "Note on the Guinea/Guinea-Bissau Maritime Boundary Delimitation Arbitration", 7 Chinese Yearbook of International Law and Affairs, (1987/88), pp. 120-123 - Aquarone, M-C., "The 1985 Guinea/Guinea-Bissau Maritime Boundary Case and its Implications", 26 Ocean Development and International Law, (1995), pp. 413-431 - Evans, M.D., "Maritime Delimitation and Expanding Categories of Relevant Circumstances", 40 International and Comparative Law Quarterly (1991), pp. 1-33 - Willis, L.A., "From Precedent to Precedent: The Triumph of Pragmatism in the Law of Maritime Boundaries", 24 Canadian Yearbook of International Law (1986), pp. 3-60 - Evans, M.D., "Delimitation and the Common Maritime Boundary", 64 British Year Book of International Law (1993), pp. 283-332 - David, E., "La sentence arbitrale du 14 février 1985 sur la délimitation de la frontière maritime Guinée/Guinée-Bissau", Annuaire Français de Droit International, (1985), pp. 350-389

1. Facts

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

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

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

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

2. Issues

(a) Questions before the Arbitral Tribunal

(i) Whether the Franco-Portuguese Convention of 12 May 1886 determined the maritime boundary between the French and Portuguese possessions in West Africa;

(ii) What legal significance was to be attached to the additional protocols and documents of the 1886 Convention for the purpose of interpreting the Convention?

(iii) What course should be followed by the single line delimiting the territorial waters, the exclusive economic zones and the continental shelves appertaining respectively to Guinea-Bissau and to Guinea?

(b) Arguments presented by the Parties

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

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

(i) **Guinea** asserted that:

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

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

- The only purpose of the "southern limit" mentioned in the 1886 Convention was to designate the islands belonging to Portugal;
-

3. Reasoning of the Arbitral Tribunal

267. The Arbitral Tribunal noted that the 1886 Convention remained in force between France and Portugal until the end of the colonial period, and then became binding as between Guinea and Guinea-Bissau by virtue of the principle of *uti possidetis*. The Tribunal proceeded to interpret the terms of the last paragraph of article I of the Convention in accordance with the provisions of the 1969 Vienna Convention on the Law of Treaties to which both Parties agreed. The Tribunal found that the meaning of "limit" was uncertain, although it was clear from the facts submitted that until the dispute arose neither France, Portugal, Guinen GuiTJ18.785 0 TD0.0006 T1dispuT

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

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

274. The Tribunal considered that an examination of the other circumstances invoked in this case by the Parties should not call into question whether its decision had achieved an equitable result. There was no possibility of invoking any feature based on the concept of natural prolongation of the land territory of either Stat7p18 2aBa2o

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

"D. The adjustment of the median line referred to in subparagraph (c) above is

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

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

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

(a) The criterion of the "median line". According to Judge Valticos, a number of reasons existed for choosing the median line as a delimitation line, not merely on a provisional basis, but also on a final basis;

(b) The "proportionality" factor and the circumstances of the "length of the coasts". In Judge Valticos' opinion, since the case did not relate to adjacent coasts or to any abnormal configuration, no part should have been played by proportionality. Moreover, the proportionality calculation seemed difficult to make with accuracy;

(c) The distance between the coasts;

(d) The role of certain other "relevant circumstances". Judge Valticos also addressed two circumstances mentioned during the proceedings: economic factors and security;

(e) The delimitation area.

(d) Dissenting Opinions

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

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

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

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

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

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

306. The Court first met at Santiago de Compostela, Spain, on 7 September 1989. At this

315. Furthermore, Mr. Weil regretted that the Court had not included economic or socio-economic factors and political considerations for security and navigation to delimit the area. He advocated a broad equitable spatial approach, including economic and political considerations. He also favoured a spatial equity instead of a geographical one, even if he

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

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

322. In 1965, Denmark and Norway concluded an Agreement concerning the delimitation of

(i) Greenland was entitled to a full 200-mile fishery zone and continental shelf area vis-à-vis the island of Jan Mayen;

(ii) Consequently to draw a single line of delimitation of the fishery zone and continental shelf area of Greenland in the waters between Greenland and Jan Mayen at a distance of 200 nautical miles measured from Greenland's baselines; and

(iii) If the Court, for any reason, did not find it possible to draw the line of delimitation requested, Denmark requested the Court to decide, in accordance with international law and in light of the facts and arguments developed by the Parties, where the line of delimitation should be drawn between Danish and Norwegian fisheries zones and continental shelves in the waters between Greenland and Jan Mayen, and to draw that line.

Norway requested the Court to adjudge and declare that:

(i) The median line constituted the boundary for the purpose of delimitation of the relevant areas of the continental shelf between Norway and Denmark in the region between Jan Mayen and Greenland;

(ii) The median line constituted the boundary for the purpose of delimitation of the relevant areas of the adjoining fisheries zones in the region between Jan Mayen and Greenland; and

(iii) The Danish claims were without foundation and invalid, and that the Danish submissions and claims were to be rejected.

(b) Arguments presented by the Parties

(i) Denmark

The 1965 Agreement

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

Conduct of the Parties

326. Denmark observed that the 1963 Royal Decree concerning the Exercise of Danish Sovereignty over the Continental Shelf was promulgated in accordance with the 1958 Geneva Convention on the Continental Shelf and expressly extended the Danish claim to its continental shelf as far as the Convention allowed. Speci

Norway's side.

(ii) Norway

The 1965 Agreement

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

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

The 1958 Geneva Convention on the Continental Shelf

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

339. Norway based its contention on its view that the 1965 Agreement was declaratory of the interpretation by the Parties of the 1958 Conveation TD(kSto of theqlyp2ion1em)8.3(a)ir0.01(arar)Tj10.at a d8E

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

3. Reasoning of the Court

(a) The 1965 Agreement

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

(b) The 1958 Geneva Convention on the Continental Shelf

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

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

(c) Conduct of the Parties

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

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

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

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

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

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

(d) Nature of the task conferred on the Court

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

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

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

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

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

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

372. *Security.* Recalling the decision in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*

4. Decision

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

" (a) to the north by the intersection of the line of equidistance between the coast of Eastern Greenland and the western coast of Jan Mayen with the 200-mile limit calculated as from the said coasts of Greenland; indicated on sketch-map No. 2 as point A, and

(b) to the south, by the 200-mile limit around Iceland, as claimed by Iceland, between the points of intersection of that limit with the two said lines, indicated on sketch-map No. 2 as points B and D,

the delimitation line that divided the continental shelf and fishery zones of the Kingdom of

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

(b) Separate Opinions

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

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

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

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

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

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

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

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

(a) Dissenting Opinion

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

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

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

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

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

Parties:	Eritrea and Yemen
Issues:	Maritime delimitation; arbitration; equidistance; baselines; islands; proportionality; fishing
Forum:	Arbitral Tribunal constituted under the Agreement of 3 October 1996 (Proceedings under the auspices of the Permanent Court of Arbitration)
Date of decision:	Award of 17 December 1999
Published in:	- 40 International Legal Materials (2001), pp 983-1019 - International Law Reports, Vol. 119, p. 417

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

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

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

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

2. Issues

(a) Questions before the Arbitral Tribunal

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

(b) Arguments presented by the Parties

Both Parties claimed a form of median international boundary line, although their respective claimed median lines followed a veTD1.412u Tc-0.0912.Tw((be.)Tj/TT42wboundary

3. Reasoning of the Arbitral Tribunal

(a) Applicable Law

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

(b) Method

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

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

424. The Tribunal decided to draw a single median line all-purpose boundary. A median line is defined as a line "every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured" (article 15,

4. Award

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

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

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

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

	- Kwiatkowska, B., "The Qatar-Bahrain Maritime Delimitation and Territorial Questions Case", 33 Ocean Development and International Law (2002), pp. 227-262 - Décaux, E., "Affaire de la délimitation maritime et des questions territoriales entre Qatar et Bahreïn, fond", 47 Annuaire Français de Droit International (2001), pp. 177-240

1. Facts

436. From 1976, the King of Saudi Arabia conducted a mediation in order to resolve the dispute between Bahrain and Qatar, concerning sovereignty over certain islands and their mutual maritime boundary. No agreement could be reached. On 8 July 1991, Qatar filed an Application with the International Court of Justice instituting proceedings against Bahrain on account of a number of disputes between the two States relating to "sovereignty over the Hawar Islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah, and the delimitation of the maritime areas of the two States". Qatar contended that the Court had juriagailas03e1(1 T(a0FaleditimCOfe2421386 -2na

465. The Court concluded that a low-tide elevation did not generate the sa

5. Declarations, Separate Opinions, Dissenting Opinions

(a) Declarations

477. **Judge Herczegh** stressed the importance of the operative part of the Judgment in which the Court stated that Qatari vessels enjoy in the territorial sea of Bahrain, separating the Hawar Islands from the other Bahraini islands, the right of innocent passage. That part, he stated, had enabled him to vote in favour of the part of the Judgment that defined the single maritime boundary that divides the maritime areas of the two States concerned.

478. **Judge Vereshchetin** stated that he was prevented from concurring in the Court's findings on the legal position of the Hawar Islands and the maritime feature of Qit'at Jaradah. As regards the decision, he noted that by abstaining from analyzing whether the 1939 British decision was well founded in law and rectifying it, if appropriate, the Court had failed in its duty to take into account all the elements necessary for determining the legal position of the Hawar Islands.

479. As for Qit'at Jaradah, his view was that the tiny maritime feature, constantly changing its physical position, could not be considered an island within the meaning of the 1982 UN Convention on the Law of the Sea. Instead, he considered the feature to be a low-tide elevation whose appurtenance depended on its location in the territorial sea of one State or the other. Accordingly, the attribution of Qit'at Jaradah should have been effected after the delimitation of the territorial seas of the Parties and not vice versa.

480. **Judge Higgins** stated that the Court, had it so chosen, could have grounded Bahraini title in the Hawars on the law of territorial acquisition. Among the acts occurring in the Hawars were some that did have relevance for legal title. The effectivités were no sparser than those on which title had been founded in other cases. Even if Qatar had, by the time of the early *effectivités*, extended its own sovereignty to the coast of the peninsula facing the Hawars, it performed no comparable effectivités in the Hawars. She therefore concluded that these elements were sufficient to displace any presumption of title by the coastal State.

(b) Separate Opinions

481. **Judge Oda** disagreed with the Court's methods for determining the maritime boundary as well as with the Court's decision to demarcate the boundary's precise geographic coordinates. He made special mention of the Court's treatment of low-tide elevations and islets and noted in particular the incongruity between the expansion of the territorial sea from 3 to 12 miles and the regime under which low-tide elevations and islets are accorded territorial seas of their own. In this connection, he expressed the view that such a regime might not be considered customary international law as it was only addressed indirectly by the relevant provisions of the1982 United Nations Convention on the Law of the Sea.

482. Judge Oda also disagreed with the Court's use of the phrase "single maritime boundary" and noted the distinction between the regimes governing the exclusive economic zone and the continental shelf, on the one hand, and the territorial sea, on the other. Therefore, the Court's use of "a single maritime boundary" was inappropriate.

483. As regards the southern sector, he objected to the Court's decision to delimit the southern sector as a territorial sea, stating that even if the Court's approach to the southern sector were appropriate, the Court had misinterpreted and misapplied the rules and principles governing the

496. It follows that Judge ad hoc Torres Bernárdez was unable to accept the conclusion that Bahrain was the holder of a derivative title to the Hawar Islands on the basis of consent to the British procedure as determined by the Judgment.

L. Case concerning the Land and Maritime Boundary between Cameroon and Nigeria

Parties:	Cameroon and Nigeria (Equatorial Guinea intervening, not as a Party)
Issues:	Maritime boundary delimitation (only issue treated in the present summary)
Forum:	International Court of Justice (ICJ)
Date of Decision:	11 June 1998 (Preliminary objections on jurisdiction and admissibility) 25 March 1999 (Request for interpretation of Judgment of 11 June 1998) and 10 October 2002 (Merits) (as they relate to the maritime boundary delimitation issue)
Published in:	- ICJ: Reports of Judgments, Advisory Opinions and Orders, 1998, p. 275 - ICJ: Reports of Judgments, Advisory Opinions and Orders, 2002, pp. 303-602
Selected commentaries:	- Merrills, J.G., "Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea intervening)" merits judgment of 10 October 2002, 52 International and Comparative Law Quarterly (2003), pp. 788-797 - Udombana, N.J., "A harmony or a cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development", 13 Indiana International & Comparative Law Review, (2002-2003), pp. 185-236 - "ICJ: Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), No. 94 (October 10, 2002)", International Law in Brief, 12 December 2002 (issue of the American Society of International Law)

1. Facts

497. On 29 March 1994, Cameroon filed an

belonging to Equatorial Guinea, or, alternatively, that Cameroon's claim was inadmissible to that extent;

- That Cameroon's claim to a maritime boundary based on the global division of maritime zones in the Gulf of Guinea was inadmissible, and that the Parties were under an obligation, pursuant to articles 74 and 83 of the United Nations Law of the Sea Convention, to negotiate in good faith with a view to agreeing on an equitable delimitation of their respective maritime zones, such delimitation to take into account, in particular, the need to respect existing rights to explore and exploit the mineral resources of the continental shelf, granted by either party prior to 29 March 1994 without written protest from the other, and the need to respect the reasonable maritime claims of third States;
- In the alternative, that Cameroon's claim to a maritime boundary based on the global division of maritime zones in the Gulf of Guinea was unfounded in law and therefore rejected;
- That, to the extent that Cameroon's claim to a maritime boundary could be held admissible in the proceedings, Cameroon's claim to a maritime boundary to the west and south of the area of overlapping licences was rejected;
- The respective territorial waters of the two States are divided by a median line boundary within the Rio del Rey; and
- That, beyond the Rio del Rey, the respective maritime zones of the Parties are to be delimited in accordance with the principle of equidistance, to the point where the line so drawn meets the median line boundary with Equatorial Guinea at approximately 4° 6' N, 8° 30' E.
- **Equatorial Guinea,** at the end of the oral observations as regards its intervention, recalled that it had asked the Court not to delimit a maritime boundary between Cameroon and Nigeria in areas lying closer to Equatorial Guinea than to the coasts of the two Parties or to expres

IV. FISHERIES AND MARINE LIVING RESOURCES

A. Bering Sea (Fur Seal) Arbitration

Parties:	United Kingdom and United States of America
Issues:	Seal fisheries; exclusive jurisdiction; high seas
Forum:	Arbitral Tribunal composed of seven arbitrators based on a Treaty of Arbitration of 29 February 1892

Date of Decision: Award of 15 August 1893 and appoi

544. On 29 February 1892, a treaty was concluded between the United States and the United Kingdom providing for the submission to an arbitral tribunal of seven members of issues that had arisen between those countries in respect of the preservation of the valuable herd of fur seals of the Pribilof Islands in the Bering Sea. The issues that became the subject of the arbitration arose out of the threatened extinction of the seal herd of the Pribilof Islands through the killing of vast numbers of the females by pelagic sealers.

2. Issues

(a) Questions before the Tribunal

(i) What exclusive jurisdiction in the sea known as the Bering Sea and what exclusive rights in the seal fisheries therein did Russi

546. The United Kingdom then contended that the Bering Sea was an open sea in which all nations of the world had the right to navigate and fish: “the rights of navigation and fishing cannot be taken away or restricted by the mere declaration or claim of any or more nations” since “they are natural rights, and exist to their full extent unless specifically modified, controlled, or limited by treaty”.

547. The United Kingdom also stated that international law comprised only so much of the principles of morality and justice as nations had agreed should be part of those rules of conduct to govern their relations with one another. In other words, international law rested upon the principle of consent.

548. The United Kingdom disagreed with the authorities produced by the United States to show that under certain conditions wild animals may become subject of property and considered that these authorities were not applicable to the instant case. It claimed that no possession of a seal on the islands was possible until it had been killed; that the United States had not explicitly asserted ownership of the seals through any statute; and that the doctrine of *animus revertendi* did not apply in the case of migratory animals, but only where it had been induced by the effort of man. Furthermore, as to the claim of right to protect the fur seals outside the three-mile limit, the United Kingdom held that it was without precedent and in contradiction of the position assumed by the United States in analogous cases.

549. As to the principle of self-defence claimed by the United States in respect of the fur seal industry on the high seas, the United Kingdom attacked vigorously the authorities the United States had cited. The United Kingdom also rejected the United States’ contentions as to the hovering and quarantine acts and the maritime industries since they were exceptional.

550. The **United States** argued that exclusive jurisdiction in the Bering Sea had been accepted by both the United States and the United Kingdom and had passed unimpaired to the United States with the cession of Alaska. This was supported by a Russian ukase (edict) of 1821, under which the United States claimed Russia had asserted territorial rights to the extent of 100 Italian miles over the water adjacent to her coastlines.

551. The United States contended that those rights relating to a property interest in the seals and to the protection of the industry established on the Pribilof Islands were rights that rested on fundamental principles. The United States stated that (i) the law to be applied in this case was international law, the main foundation of which was the law of nature, (ii) that "municipal and international law flow equally from the same source", and (iii) that the rule of the Tribunal should be the "general standard of justice recognized by the nations of the world".

552. The United States then argued that under both municipal law and international law, useful wild animals reclaimed by man and possessed of the *animus revertendi* could become the subject of property.

553. The United States qualified fur seals that were bred on the Pribilof Islands as quasi-domesticated. Since there existed a well-established American industry based on their exploitation, the United States asserted a property right to protect and defend such property by the practical prohibition of pelagic sealing in its waters.

554. Furthermore, the United States claimed that it had complete property in the "seals" not only while on its territory, but during their absence on the high seas through the certainty of their return. This was explained on the basis of the principle of self-defence on the high seas, either in

times of war or peace, such right extending to such part of the seas as might be necessary and appropriate for the particular case, the three-mile limit being an incident to such right and not the limit thereof.

555. The United States cited numerous instances of legislation and regulations enacted by foreign countries to take effect beyond the limits of their usual territorial jurisdiction, such as hovering and quarantine laws, and also legislation to protect maritime industries appurtenant to a territory, such as pearl oyster

B. North Atlantic Coast Fisheries Arbitration

Parties:	United Kingdom and United States of America
Issues:	Fisheries; bays and high seas
Forum:	North Atlantic Coast Fisheries Tribunal of Arbitration, composed of members of the Permanent Court of Arbitration and constituted under a Special Agreement signed at Washington on 27 January 1909
Date of Decision:	Award of 7 September 1910
Published in:	Foreign Relations of the United States**,** 1910, Government Printing Office, Washington, 1915, pp. 544-591 4 American Journal of International Law

United States. Article I[15] defined the rights and obligations of inhabitants of the United States as

restrictions making the exercise of such privileges conditional upon the payment of light or harbour or other dues, or entering or reporting at custom houses, or any similar conditions?

(v) From where must be measured the "three miles of any of the coasts, bays, creeks or harbours" referred to in the said article?

(vi) Have the inhabitants of the United States the liberty under the said article or otherwise, to take fish in the bays, harbours and creeks of that part of the southern coast of Newfoundland, which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?

(vii) Are the inhabitants of the United States whose vessels resort to the Treaty coasts for the purpose of exercising the liberties referred to in Article I of the Treaty of 1818 entitled to have for these vessels, when duly authorized by the United States in that regard, the commercial privileges on the Treaty coasts accorded by agreement or otherwise to United States trading vessels generally?

(b) Arguments presented by the Parties

(i) **Great Britain**. On the first question, Great Britain contended that the exercise of the liberty to take fish, which the inhabitants of the United States have forever in common with the subjects of His Britannic Majesty, was subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada or Newfoundland.

As to the second question, Great Britain claimed that the Treaty conferred that liberty only to inhabitants of the United States and that it could prohibit persons from engaging as fishermen in American vessels.

On the fifth question presented to the Tribunal, Great Britain contended that the renunciation applied to all bays generally.

(ii) **United States of America**. On the first question, the United States contended that the exercise of such freedom was not subject to limitations or restraints by Great Britain, Canada or Newfoundland.

Regarding the second question, the United States claimed: First, that the liberty assured to its inhabitants by the Treaty plainly included the right to use all the means customary or appropriate for fishing upon the sea, not only ships, nets, etc., but also crew. And second, that there was no limit as to the means which the inhabitants could use unless provided for in the Treaty, and that no right to question the nationality of the crew was contained in the Treaty.

As for question five, it was argued that the term "bays" of His Britannic Majesty's Dominions in the renunciatory clause was to be read as including only those bays that were under the territorial sovereignty of Great Britain. It was further argued that the renunciation applied only to bays six miles or less in width, those bays being only territorial bays, because the three-mile rule was a principle of international law applicable to coasts and should be strictly and systematically applied to bays. The

that the enumeration of the component parts of the coast of Labrador were made in order to discriminate between the coast of Labrador and the coast of Newfoundland. Furthermore, it pointed out that the Treaty granted the right to take fish of every kind, not only codfish, and that it is not proved that Americans only took an interest in the cod fishery.

573.

C. Fisheries Jurisdiction Case

Parties:	Iceland and United Kingdom
Issues:	Extension by coastal State of fisheries jurisdiction; fishery zone; preferential rights and concurrent rights of other States; conservation measures
Forum:	International Court of Justice (ICJ)
Date of Decision:	2 February 1973 (Jurisdiction)

1961 Exchange of Notes. The regulations also constituted an infringement on the principle of reasonable regard for the interests of other States set out in article 2 of the 1958 Geneva Convention on the High Seas.

(ii) **Iceland** did not appear before the Court nor did it file any pleadings on the merits of the dispute.

3. Reasoning of the Court

(a) Interim Measures

583. The Court considered that Iceland's failure to appear did not constitute by itself an obstacle to the indication of interim measures. It further stated that the request for interim measures, which sought to protect the right of fishing in the area in question, was directly linked to the original Application by the United Kingdom.

584. As regards jurisdiction, the Court found that on a request for interim measures it was not necessary for the Court to satisfy itself conclusively that it had jurisdiction, unless the absence of jurisdiction was manifest. The Court held that the compromissory clause in the 1961 Exchange of Notes accorded it, *prima facie*, jurisdiction to hear the case.

585. The Court indicated interim measures similar to those requested by the United Kingdom on the basis that the immediate implementation of Iceland's new fishery regulations would prejudice the rights the United Kingdom was trying to assert in the case. However, the Court limited the catch of the United Kingdom to 170,000 metric tons of fish per year and not to 185,000 tons, as requested, on the basis of the exceptional dependence of Iceland upon coastal fisheries for its livelihood and economic development.

(b) Jurisdiction

586. The Court found that the compromissory clause in the 1961 Exchange of Notes was intended to cover the type of dispute in question.

587. The Court rejected Iceland's argument that it had entered into the 1961 Exchange of Notes owing to the use of force exerted by the United Kingdom.[16] If such an argument were proven, the 1961 Exchange of Notes would have been clearly void under the United Nations Charter and article 52 of the Vienna Convention on the Law of Treaties. However, the history of the negotiations, which led up to the 1961 Exchange of Notes, revealed that the agreement was "freely negotiated by the interested Parties on the basis of perfect equality and freedom of decision on both sides. No fact has been brought to the attention of the Court from any quarter suggesting the slightest doubt on this matter".

588. As to Iceland's right to terminate the agreement, the Court found that the compromissory clause made the Exchange of Notes a non-permanent agreement. However, the 1961 Exchange of Notes did not establish a definitive time limit for the extension of Iceland's fisheries jurisdiction. The right to invoke the Court's jurisdiction would only materialize if Iceland made a claim to extend its fishery limits. Therefore, there could be no specification of a time limit for the

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[16] Such an argument was contained in a lette

(b) That a coastal State, in a situation of special dependence on its fisheries, was to benefit from preferential fishing rights in waters adjacent to the zone of exclusive fishing.

596. The Court noted that the practice of States showed that the latter concept, in addition to receiving increasing and widespread acceptance, was being implemented by agreements. The United Kingdom had expressly recognized the preferential rights of Iceland in the disputed waters beyond the 12-mile limit, and the exceptional dependence of Iceland on its fisheries and its primary need to preserve fish stocks in the interest of rational and economic exploitation were unquestionable. However, the notion of preferential fishery rights for the coastal State in a situation of special dependence, though it implied a certain priority, could not imply the extinction of the concurrent rights of other States. The fact that Iceland was entitled to claim preferential rights did not suffice to justify its claim to exclude British fishing vessels from all fishing beyond the limit of 12 miles agreed to in 1961.

597. The United Kingdom stressed its historical presence in the disputed waters. Therefore, and in order to reach an equitable solution to the dispute, the Court found it necessary to reconcile the preferential fishing rights of Iceland with the traditional fishing rights of the United Kingdom through appraisal of the relative dependence of either State on the fisheries in question. While Iceland did not have the right to exclude unilaterally British v

(d) Iceland should refrain from applying administrative, judicial or other measures against ships registered in the United Kingdom, their crews or other related persons because of their having engaged in fishing activities in the waters around Iceland outside the 12-mile fishery zone;

(e) The United Kingdom should ensure that vessels registered in the United Kingdom do not take an annual catch of more than 170,000 metric tons of fish from the "Sea Area of Iceland" as defined by the International Council for the Exploration of the Sea; and

(f) The United Kingdom should furnish Iceland and the Registry of the Court with all relevant information, orders issued and arrangements made concerning the control and regulation of fish catches in the area.

601. On 2 February 1973, on the question of **jurisdiction**, by fourteen votes to one, the Court held that it had jurisdiction under the 1961 Exchange of Notes, which remained a valid and effective treaty.

602. On 12 July 1973, on the continuance of interim measures, by eleven votes to three, the Court held that the **interim measures** indicated in the Order of 17August 1972 would remain operative until the Court rendered its final Judgments in the case.

603. On 25 July 1974, on the **merits**, by ten votes to four, the Court:

(a) Found that the Icelandic Regulations of 1972 constituting a unilateral extension of the exclusive fishing rights of Iceland to 50 nautical miles from the baselines were not opposable to the United Kingdom;

(b) Found that Iceland was not entitled to exclude unilaterally United Kingdom fishing vessels from areas between the 12-mile and 50-mile limits or unilaterally to impose restrictions on their activities in such areas;

(c) Held that Iceland and the United Kingdom were under mutual obligation to undertake negotiations in good faith for an equitable solution of their differences; and

(d) Indicated certain factors which were to be taken into account in the negotiations (preferential rights of Iceland, established rights of the United Kingdom, interests of other States, conservation of fishery resources, joint examination of measures required).

5. Declarations, Separate Opinions, Dissenting Opinions

(a) Declarations

604. **President Lachs** stated that he was in agreement with the reasoning and conclusions of the Court and did not deem it appropriate to make any comments on the Judgment.

605. **Judge Ignacio-Pinto** declared that the Court had deliberately evaded what was placed squarely before it in the case, namely whether Iceland’s claims were in accordance with the rules of international law. In fact, in his view, by concentrating on questions of preferential rights and seeking to prescribe the guiding principles for negotiations between the Parties, the Court had avoided the main issue.

exercise of a right impliedly recognized by the United Kingdom in the 1961 Exchange of Notes. He added that by indicating interim measures, which gave to the United Kingdom almost everything it had requested, the Court had failed to maintain a proper balance between the Parties.

Continuance of Interim Measures

615. **Judge Ignacio-Pinto** considered that circumstances had changed since the interim measures had first been indicated but that the confrontations between Britain and Iceland meant that different interim measures were not warranted.

616. **Judge Gros** advanced the argument that in Iceland's absence the Court should have applied article 53 of its Statute and considered *proprio motu* the role of interim measures in the light of the changed circumstances. He thought the Court should not delay in rendering a judgment on the merits solely to allow the Parties to negotiate a settlement.

617. **Judge Petrén** considered that circumstances had clearly changed and that the Court should have invited the Parties to present their observations on the subject in order to obtain information about these changes and the effect they might have on interim measures.

Jurisdiction

618. **Judge Padilla Nervo** repeated the comments he had made during the proceedings on the interim measures, adding that Iceland's action was legitimate.

Merits

619. **Judge Gros** thought that Iceland's claim was contrary to international law, but he did not agree with the legal reasoning of the Court. He made, inter alia, the following points in his dissenting opinion:

(a) That the purpose of the compromissory clause in the 1961 Exchange of Notes was to refer to the Court any dispute concerning a future extension of Iceland's fishing limits so that the Court could decide whether that extension was permitted by international law. The Court had erred by failing to decide on that central question. The extended limits were contrary to international law and were not opposable to any State;

(b) That the Court was also wrong to hold that the Parties were under a duty to negotiate an equitable settlement. Questions of preferential rights and conservation were not within the compromissory clause of the 1961 Exchange of Notes and the Court therefore had no jurisdiction to decide upon them; and

(c) That the decision on the duty to negotiate was also illusory since the 1973 Exchange of Notes had effectively suspended any duty to negotiate.

620. **Judge Petrén** considered that the Court had failed to answer the most important question and that it had exceeded its jurisdiction by deciding that the Parties were under a duty to achieve an equitable settlement by negotiation. In addition, he considered that the 1961 agreement between the Parties did not confer jurisdiction upon the Court to make any pronouncement with regard to preferential or historic fishing rights as may exist within the waters adjacent to the Icelandic fishery zone.

621. In the view of **Judge Onyeama** the Court should have decided that Iceland's extended fishing limits were without foundation in international law. Also, he was of the opinion that the Court had exceeded its jurisdiction by considering the question of preferential rights, and deciding that the Parties were obliged to negotiate.

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registered in Germany were unlawful under international law and that Iceland was under an obligation to make compensation to Germany.

626. **Iceland** did not take part in any phase of the proceedings. By a letter of 27 June 1972, Iceland informed the Court that it regarded the Exchange of Notes of 1961 as terminated, that in its view there was no basis under the Statute for the Court to exercise jurisdiction and that, as it considered its vital interests to be involved, it was not willing to confer jurisdiction on the Court in any case involving the extent of its fishery limits. Subsequently, in a letter dated 11 January 1974, Iceland stated that it did not accept any of the statements of fact or any of the allegations or contentions of law submitted by Germany to the Court.

3. Reasoning of the Court

627. Under Article 53 of its Statute, the Court had to determine whether the claim was well founded in fact and law. The facts were supported by documentary evidence. As for the law, the Court was deemed to take notice of international law, which lay within its own judicial knowledge, even though Iceland had failed to appear.

(a) Jurisdiction of the Court

628. The Court, having in its Judgment of 2 February 1973 affirmed its jurisdiction by virtue of the Exchange of Notes of 1961, which was a treaty in force, emphasized that it would be too narrow an interpretation of its compromissory clause to conclude that it limited the Court’s jurisdiction to giving an affirma

5. Declarations, Separate Opinions and Dissenting Opinions

(a) Declarations

642. **President Lachs** stated that he was in agreement with the reasoning and conclusions of the Court and did not deem it appropriate to make any comments on the Judgment.

643. As regards the compensation claim presented by Germany, **Judge Dillard** maintained that there was no doubt that Iceland's acts of harassment, which were indicated in considerable detail in the proceedings, were unlawful. Those acts were committed *pendente lite* despite obligations assumed by Iceland in the Exchange of Notes of 1961, which the Court had declared to be a treaty in force. According to Judge Dillard, the Court was only asked to indicate the unlawful character of the acts concerned and take note of the consequential liability of Iceland to make reparations. The Court was not asked to assess damages. Judge Dillard, therefore, would have preferred it if the Court had stressed the limited nature of the German submission instead of concluding that it could not accede to the submission in the absence of detailed evidence bearing on each concrete claim.

644.

(Judge Sir Gerald Fitzmaurice also appended a separate opinion on jurisdiction.)

(d) Dissenting Opinions

660. **875 0 TDe4 1 Tfe74l149.52 le TD0.0004 as0**

666. **Judge Onyeama** observed that there were at the time of the dispute between the Parties four treaties that contained positive rules of international law concerning the sea: the 1958 High Seas Convention, the Convention on the Territorial Sea and Contiguous Zone, the Convention on Fishing and Conservation of the Living Resources of the High Seas and the Convention on the

contemplation of the Parties when they conferred jurisdiction on the Court, and the particular acts in the case appear to form part of what the Exchange of Notes referred to as “a dispute in relation to such extension”.

The decision that the Regulations on which Iceland sought to base its extension of its fisheries jurisdiction beyond the limit agreed in the Exchange of Notes was not opposable to Germany appears to carry the necessary implication that acts done in enforcement of the Regulations against German fishing vessels are contrary to law.

(Judge Padilla Nervo also appended a dissenting opinion on jurisdiction.)

E. Southern Bluefin Tuna Cases

Parties:	Australia, New Zealand and Japan
Issues:	Fisheries conservation and management; provisional measures
Forum:	International Tribunal for the Law of the Sea (ITLOS)
Date of Decision:	Order of 27August 1999 (Provisional measures)
Published in:	- 38 International Legal Materials (1999), pp. 1624-1655 - 117 International Law Reports, p. 148 - ITLOS Reports of Judgments, Advisory Opinions and Orders 1999, p. 280-336
Selected commentaries:	- Baldock, J., "Determining the fate of Southern Bluefin Tuna International Tribunal for the Law of the Sea (1999) New Zealand v. Japan; Australia v. Japan, 17 Environmental and Planning Law Journal (2000), pp. 157-164 - Churchill, R.R., "The Southern Bluefin Tuna cases (New Zealand v. Japan; Australia v. Japan): Order for Provisional Measures of 27 August 1999", 49 International and Comparative Law Quarterly (2000), pp. 979-990 - Evans, M.D., "The Southern Bluefin Tuna dispute: provisional thinking on provisional measures?", 10 Yearbook of International Environmental Law**,** 1999 (2000), pp. 7-14 - Hayashi, M., "The Southern Bluefin Tuna Cases: prescription of provisional measures by the International Tribunal for the Law of the Sea", 13 Tulane Environmental Law Journal (2000), pp. 361-385 - Kwiatkowska, B., "Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Order on Provisional Measures (ITLOS Cases Nos. 3 and 4)", 94 American Journal of International Law (2000), pp. 150-155 - Legget, K., "The Southern Bluefin Tuna Cases: ITLOS Order on Provisional Measures", 9 Review of European Community and International Environmental Law (2000), pp. 75-79 - Schiffman, H.S., "The Southern Bluefin Tuna Case: ITLOS hears its first fishery dispute", 2 Journal of International Wildlife Law and Policy (1999), pp. 318-333

1. Facts

673. On 30 July 1999 and pending the constitution of an arbitral tribunal under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS), Australia and New Zealand filed separately with the Registrar of the International Tribunal for the Law of the Sea (the Tribunal) requests for the prescription of provisional measures in a case against Japan concerning the conservation of southern bluefin tuna in accordance with article 290, paragraph 5, of UNCLOS. The Applicants demanded that Japan cease immediately its unilateral experimental fishing programme for southern bluefin tuna, which had commenced at the beginning of June 1999.

674. In 1993 the Parties adopted the Convention for the Conservation of Southern Bluefin Tuna[17] (the 1993 Convention). This established a Commission, which, with the assistance of a Scientific Committee, could determine a total allowable catch (TAC) and national allocations (quotas) by a unanimous decision of the three Parties.

675. In 1989, the Parties agreed upon a TAC of 11,750 tonnes, which was maintained under the 1993 Convention until 1997, despite proposals from 1995 by Japan for an increase of 6,000 tonnes. In 1998 and 1999, the Commission was unable to agree on a TAC and Japan decided to commence an "experimental fishing programme" (EFP) of 3,000 tonnes.

676. In their pleadings Australia and New Zealand opposed the EFP, because they considered that the fishing was for commercial purposes, with minimal scientific benefit, and would endanger the continued viability of the stock, which was severely depleted and at its historically lowest levels.

677. By means of diplomatic notes delivered on 31 August 1998, Australia and New Zealand formally notified Japan of the existence of a dispute. The ensuing negotiations were unsuccessful. Japan proposed to settle the dispute by mediation, but insisted on continuing the EFP. Since the other Parties did not agree to mediation, Japan then proposed having the dispute resolved by arbitration under the 1993 Convention. As Japan refused to suspend the EFP pending arbitration, Australia and New Zealand commenced compulsory dispute proceedings under Section 2, Part XV, of UNCLOS.

678. Because the requests submitted by Australia and New Zealand stated that they appeared as Parties in the same interest, the Tribunal, by Order of 16 August 1999, joined the proceedings for provisional measures. Pursuant to article 17 of its Statute, the Tribunal accepted the nomination by Australia and New Zealand of Mr. Ivan Shearer as judge ad hoc.

2. Issues

(a) Questions before the Tribunal

(i) Whether provisional measures pursuant to Article 290, paragraph 5, of UNCLOS

[17] Convention for the Conservation of Southern Bluefin Tuna (10 May 1993), 1819 United Nations Treaty Series 360 (entered into force 10 May 1994).

3. Reasoning of the Tribunal

(a) Jurisdiction

679. The Tribunal noted that, before prescribing provisional measures under article 290, paragraph 5, of UNCLOS, it had to satisfy itself that *prima facie* the arbitral tribunal to be established under Annex VII would have jurisdiction.

680. Australia and New Zealand alleged that Japan, by unilaterally designing and undertaking an EFP, had failed to comply with its obligations under articles 64 and 116 to 119 of UNCLOS, with provisions of the 1993 Convention and with the rules of customary international law. Furthermore, they invoked, as the basis for jurisdiction of the arbitral tribunal, article 288, paragraph 1, of UNCLOS, which reads as follows:

> "A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part."

681. Japan, on the other hand, maintained that the dispute concerned the interpretation or implementation of the 1993 Convention and not the interpretation or application of UNCLOS. It further denied that it had failed to comply with any of the provisions of UNCLOS referred to by Australia and New Zealand.

682. The Tribunal noted that, under article 64, read together with articles 116 to 119, of UNCLOS, States Parties to UNCLOS have the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species such as the southern bluefin tuna.

683. The Tribunal further noted that the conduct of the Parties within the Commission for the Conservation of Southern Bluefin Tuna, established in accordance with the 1993 Convention, and in their relations with non-Parties to that Convention, was relevant to an evaluation of the extent to which the Parties were in compliance with their obligations under UNCLOS; and that the fact that the 1993 Convention applied between the Parties did not exclude their right to invoke the provisions of UNCLOS in regard to the conservation and management of southern bluefin tuna. Hence, in the view of the Tribunal, the provisions of UNCLOS invoked by the Applicants appeared to afford a basis upon which to found the jurisdiction of the arbitral tribunal.

684. As for the contention by Japan that recourse to the arbitral tribunal was excluded because the 1993 Convention provided for a dispute settlement procedure, the Tribunal held that the fact that the 1993 Convention applied between the Parties did not preclude recourse to the procedures in Part XV, section 2, of UNCLOS.

(b) Conditions for the prescription of provisional measures under UNCLOS article 290

685. With respect to the respondent's argument that Australia and New Zealand had not exhausted the procedures for amicable dispute settlement under Part XV, section 1, of UNCLOS, in particular article 281, through negotiations or other agreed peaceful means, before submitting the disputes to a procedure under Part XV, section 2, of UNCLOS, the Tribunal considered that a State Party was not obliged to pursue procedures under Part XV, section 1, when it concluded

in calculating the annual catches for 1999 and 2000, and without prejudice to any decision of the arbitral tribunal, account shall be taken of the catch during 1999 as part of an experimental fishing programme.

(c) By 20 votes to 2:

- Australia, Japan and New Zealand shall each refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna, except with the agreement of the other Parties or unless the experimental catch is counted against its annual national allocation as prescribed in subparagraph (c).

(d) By 21 votes to 1:

- Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna.

(e) By 20 votes to 2:

- Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock.

(f) By 21 votes to 1:

- The Tribunal decided that each party shall submit the initial report referred to in article 95, paragraph 1, of its Rules not later than 6 October 1999, and authorized the President of the Tribunal to request such further reports and information as he may consider appropriate after that date; and

- The Tribunal decided, in accordance with article 290, paragraph 4, of UNCLOS and article 94 of the Rules, that the provisional measures prescribed are to be

694. Regarding paragraph 1(c), Judge Warioba noted that the Parties' positions on the TAC were based on their appreciation of scientific evidence. Since the Tribunal admitted that it could not assess the scientific evidence presented by the Parties, it had no basis for prescribing an order that set a TAC. As to paragraph 1(f), Judge Warioba believed that the Tribunal should have confined itself to issues that were the subject matter of the dispute placed before it. According to Judge Warioba, the relationship of the Parties to this dispute did not include non-Parties to the 1993 Convention. Judge Warioba further disagreed with references to the protection of the marine environment in the Order. It was not necessary for the Tribunal to include considerations of the marine environment in every case. The Tribunal can do so only when a party or Parties have requested it or when it considers it absolutely necessary and urgent. In Judge Warioba's opinion, it was not so in the instant case.

(b) Separate Opinions

695. **Judges Yamamoto and Park** were concerned about the regulatory measures taken by Australia against Japanese fishing vessels in response to Japan's unilaterally-launched experimental fishing programme.

696. They noted that if, in compliance with paragraph 1(d) of the Judgment, "the experimental fishing by any of the Parties, Japan in the instant case, is to be suspended pending a decision by an arbitral tribunal to be constituted, it may be pointed out, in fairness, that the retaliatory measures taken by Australia against Japanese fishing vessels could have been dealt with likewise in the above paragraph of the judgment at least for the period pending the decision of the arbitral tribunal, because, in the absence of the cause that gave rise to the need for the measures, the measures themselves would have no *raison d'être*."

697. In his separate opinion, **Judge Laing** attempted to elucidate his views on the institution of provisional measures and on certain aspects of international environmental law.

698. Judge Laing noted that the Tribunal had not chosen to base its decision on the criterion of "irreparability" applied by other fora because that was not the sole required criterion for the prescription of provisional measures. Instead, the key to UNCLOS provisional measures was "the discretionary element of appropriateness", which was exercised in the light of the purpose of provisional measures: the preservation of the *status quo pendente lite* and the maintenance of peace and good order.

699. Judge Laing then proceeded to explain the concept of urgency in connection with provisional measures. In respect of "procedural urgency", he observed that in its Order the Tribunal had prescribed provisional measures pending a decision of the arbitral tribunal. In his

1. Facts

719. This case was the second stage of the proceedings brought by Australia and New Zealand against Japan, which began with a request for provisional measures heard in August 1999 by the International Tribunal for the Law of the Sea (see preceding case summary in this publication). The first stage concluded with an Order finding that, *prima facie*, an arbitral tribunal to be formed under Annex VII to UNCLOS would have jurisdiction and prescribing certain provisional measures in the light of an urgent need to prevent further deterioration of the stock of southern bluefin tuna.

720. An Arbitral Tribunal under Annex VII to UNCLOS (the Arbitral Tribunal) was constituted in order to consider the merits of the case. However, it first had to decide whether it had jurisdiction over the merits of the dispute. This was the first arbitral tribunal to be constituted under Part XV ("Settlement of Disputes"), Annex VII ("Arbitration") of UNCLOS.

721. At the request of the Parties, the proceedings before the Arbitral Tribunal were administered by the World Bank's International Centre for Settlement of Investment Disputes (ICSID). The President of the five-member Arbitral Tribunal was Judge Stephen M. Schwebel, a former President of the International Court of Justice; its other members were Judge Florentino Feliciano, Justice Sir Kenneth Keith, Judge Per Tresselt and Professor Chusei Yamada.

2. Issues

(a) Questions before the Tribunal

The Arbitral Tribunal considered:

(i) Whether it had jurisdiction to rule on the merits of the dispute; and

(ii) Whether, in accordance with article 290(5) of UNCLOS, the provisional measures prescribed by the International Tribunal of the Law of the Sea on 27 August 1999 should be revoked.

(b) Arguments presented by the Parties

(i) **Australia and New Zealand,** as Applicants, rejected the Respondent's preliminary objections and made the following final submissions:

- That the Parties differ on the question whether Japan's EFP and associated conduct was governed by UNCLOS;
- That a dispute thus existed on the interpretation and application of UNCLOS within the meaning of Part XV;
- That all the jurisdictional requirements of that Part had been satisfied; and
- That Japan's objections to the admissibility of the dispute were unfounded.

(ii) **Japan**, as Respondent, maintained its preliminary objections on jurisdiction and admissibility and requested the Arbitral Tribunal to adjudge and declare that:

- The case had become moot and should be discontinued; alternatively,

- The Arbitral Tribunal did not have jurisdiction over the claims made by the Applicants; alternatively,
- The claims were not admissible.

G. The *Camouco* Case

Parties:	France and Panama

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Article 73(3) and (4) of UNCLOS

756. The Tribunal observed that the scope of the jurisdiction of the Tribunal in proceedings under article 292 of UNCLOS encompasses only cases in which "it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security". Inasmuch as paragraphs 3 and 4, unlike paragraph 2, of article 73 were not such provisions, the submissions concerning their alleged violation were not admissible.

(c) **Non-compliance with article 73(2) of UNCLOS**

757. In accordance with article 113(1) of its Rules, the Tribunal dealt with the allegation that the detaining State had not complied with the provisions of UNCLOS for the prompt release of the vessel and its Master upon the posting of a reasonable bond or other financial security, and noted that for the application for release to succeed the allegation had to be well-founded.

Posting of a bond

758. The Tribunal underscored that th

4. Decision

762. Four months and ten days after the arrest, on 7 February 2000:

(a) The Tribunal found unanimously that it had jurisdiction under article 292 of UNCLOS to entertain Panama's Application;

(b) By a vote of 19 to 2, the Tribunal found that the Application for release was admissible;

(c) By a vote of 19 to 2, the Tribunal ordered France to release the *Camouco* and its master promptly upon the posting of a bond or financial security;

(d) By 15 votes to 6, the Tribunal fixed the amount of the bond at 8 million French francs (approximately US$ 1.2 million); and

(e) By 19 votes to 2, the Tribunal determined that the bond was to be in the form of a bank guarantee or, if agreed by the Parties, in any other form.

5. Declarations, Separate Opinion, Dissenting Opinions

(a) Declarations

763. **Judge Mensah**

767. **Judge Ndiaye** did not agree with the majority on the amount of the bond. In his opinion, there being no prescribed standards, in order to arrive at an objective criteria for determining the amount of a reasonable bond one had to resort to the application of the laws and regulations of the coastal or port State.

(b) Separate Opinion

768. **Vice-President Nelson** was of the view that the mechanism for prompt release of vessels was designed to isolate the proceedings from those taking place in the domestic forum and this was a logical consequence arising from the very nature of the proceedings. In this connection, he remarked that in the oral pleadings France had stated that the Tribunal should "…take great care not to interfere with the functions of the French courts seized of the same question" as the one before the Tribunal, i.e., that the Tribunal may have to refrain from rendering a judgment on the prompt release of the vessel while the same matter was before the local courts. In his opinion, such an approach would run counter to the object and purpose of article 292. In other words, the Tribunal was only competent to pronounce itself on the prompt release issue under article 292 of UNCLOS and nothing else.

769. As for the reasonableness of the bond, he agreed with the majority that the bond had to be reasonable in the sense of being fair and equitable. However, he thought that in order to arrive at what was reasonable the Tribunal should have also looked at such factors as the context of "illegal, unreported and unregulated" fishing in the Antarctic Ocean and more especially in the exclusive economic zone of the islands where the facts of the case occurred.

(c) Dissenting Opinions

770. **Judge Anderson** did not agree with the judgment because he felt that greater significance should have been accorded to the values protected under Part V of UNCLOS, such as the conservation of the living resources of the sea and the effective enforcement of national fisheries laws and regulations.

771. As regards the bond, Judge Anderson was of the view that the local court should be accorded wide discretion in fixing the amount of the security for release pending trial. In other words, the Applicant had to show compelling grounds for reducing the amount of the security fixed by a national court under local law in order to succeed under article 292 of UNCLOS. Furthermore, the appreciation of "reasonableness" under article 73(2) of UNCLOS, according to Judge Anderson, was a difficult concept to determine unless the relevant facts and circumstances were taken into account, which was not done in the Judgment. He did not consider that the amount of security ordered by the national courts in the case exceeded their margin of appreciation.

772. In addition, Judge Anderson remarked that it was unprecedented for the same issue to be submitted in quick succession first to a national court of appeal and then to an international tribunal, and for the issue to be actually pending before two instances at the same time. That situation was not conducive to efficient administration of justice and smacked of "forum hopping". An international tribunal could best adjudicate when the national legal system has been used not partially, as in the instant case, but completely and exhaustively ("exhaustion of

based on estoppel, but on misinterpretation by Panama of the general concept of prompt release in UNCLOS and of the main provisions of article 292.

774. According to Judge Vukas, Panama acted against the doctrine of litispendence, i.e., two courts should not exercise concurrent jurisdiction in respect of the same case, same Parties or same issue. Moreover, Judge Vukas did not understand why Panama addressed the Tribunal 100 days from the time of detention of the vessel. Judge Vukas was of the view that it was impossible to foresee all complications resulting from two different judgments, notwithstanding the appealing conclusion that the international judgment prevails over the national judgment.

775. **Judge Wolfrum** considered the bond of 8,000,000 French francs to be far too low to be reasonable within the terms of article 292 of UNCLOS. In addition, he disagreed with the judgment on two points. He did not agree with the reasoning of the Tribunal on the unreasonableness of the bond set by the French courts. He did not agree on the powers of the Tribunal to set aside national measures concerning the enforcement of national laws and regulations on the management of marine living resources in the exclusive economic zone.

776. As regards the bond, Judge Wolfrum expressed the view that the Judgment did not give appropriate guidance on what basis it assessed a bond set by national authorities, on what are the possible reasons to declare a national bond to be unreasonable and on what are the criteria used to determine the amount of the bond set by the Tribunal. Therefore, the Judgment lacks objective analysis and borders on subjective justice.

777. As for the limitations of the Tribunal to pronounce itself on measures under national law, Judge Wolfrum advanced the argument that the Judgment made no reference to the discretionary powers of coastal States concerning the conservation and management of marine living resources in their exclusive economic zone and of the corresponding laws on enforcement. Such discretionary powers by the coastal State limit the powers of the Tribunal on deciding whether a bond set by national authorities was reasonable or not. It was not the role of the Tribunal to challenge the decisions of French courts in a way that would make the Tribunal a court of third or fourth instance, which it is not. In this connection, Judge Wolfrum mentioned that the Tribunal should have taken into consideration that UNCLOS restricts challenging the exercise of discretionary powers of coastal States and of the International Seabed Authority.

778. **Judge Treves** expressed the opinion that two questions were not clearly distinguished in the Judgment: whether the allegation concerned non-compliance by the detaining State with the prompt release of the vessel and crew upon the posting of a reasonable bond or other financial security and whether the allegation was well-founded. According to him, the Judgment jumps

2. Issues

(a) Questions before the Tribunal

(i) Admissibility of the application;

(ii) Reasonableness of the bond or guarantee.

(b) Arguments presented by the Parties

(i) Seychelles

Seychelles requested the Tribunal:

- To declare that the Tribunal had jurisdiction under article 292 of UNCLOS to hear its Application;
- To declare the Application admissible;
- To declare that France had contravened article 73(4) of UNCLOS by not properly giving notice of the arrest of the vessel *Monte Confurco* to Seychelles; and
- To declare that the guarantee set by France was not reasonable as to its amount, nature and form.

As regards the Master of the *Monte Confurco*:

- To find that France had failed to observe the provisions of UNCLOS concerning prompt release of masters of arrested vessels;
- To require France to release promptly the Master, without bond, in light of the presence of the ship, cargo, etc., as a reasonable guarantee, given the impossibility of imposing penalties of imprisonment against him and the fact that he is a European citizen; and
- To find that the failure by France to comply with the provisions of article 73(3) in applying to the Master measures of a penal character constituted a *de facto*

784. The Tribunal noted that both France and Seychelles are States Parties to UNCLOS. Moreover, the status of Seychelles as the flag State of the *Monte Confurco* at the time of the incident and thereafter was not disputed. The Parties had not agreed to submit the question of release from detention to any other court or tribunal within 10Tc0 08 748.940.0006 Tc-0.days flag Stt th7496.2(e

to take appropriate measures as may be necessary to ensure compliance with the laws and regulations adopted by it; and the interest of the flag State in securing prompt release of its vessels and crews from detention. Prompt release was subject only to a reasonable bond. The object of article 292 of UNCLOS was to reconcile the interest of the flag State to have its vessel and crew promptly released with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties.

793. The Tribunal expressed the view that the amount of the bond should not be excessive and unrelated to the gravity of the alleged offences. The Tribunal referred to factors specified in the *Camouco* case which were relevant in an assessment of the reasonableness of bonds or other financial security. In the Tribunal's view, this was a non-exhaustive list of factors which complemented the criterion of reasonableness specified in the M/V *Saiga* case.

Application of relevant factors in the present case

794. The Tribunal then proceeded to apply the various factors to the present case, i.e., gravity of the alleged offences, range of penalties imposable under French law for the alleged offences, value of the *Monte Confurco* and of the fish and fishing gear seized. The alleged offence committed in the present case relates to the conservation of the fishery resources in the exclusive economic zone, particularly illegal fishing of toothfish by Seychelles. Seychelles argued that the only offence committed by the Master of the vessel was his failure to notify the entry of the *Monte Confurco* into the exclusive economic zone of the Kerguelen Islands and the tonnage of fish it carried on board, and that the vessel did not fish in the said zone. After reviewing the various factors in the case, the Tribunal, as it had done in the M/V *Saiga* case, assessed the reasonableness of the bond and found that the bond was not reasonable.

795. The Tribunal found that the bond of 56,400,000 FF imposed by the French court was not reasonable pursuant to article 292 of UNCLOS. Accordingly, the Application concerning the allegation of non-compliance with article 73, paragraph 2, of UNCLOS was admissible and the allegation well-founded.

Detention of the Master

796. The Parties were in disagreement whether the Master of the vessel was in detention. The Tribunal noted that the Master was not in a position to leave Réunion and considered that, in the circumstances of the case, it was appropriate to order the release of the Master in accordance with article 292, paragraph 1, of UNCLOS.

(d) Form and amount of the bond or other financial security

797. The Tribunal was of the view that the security should be in the amount of 18,000,000 FF. In considering the overall balance of amount, form and nature of the bond or financial security, the Tribunal held that the monetary equivalent of the 158 tonnes of fish on board the *Monte Confurco* held by French authorities, i.e., 9,000,000 FF was to be considered as security to be held or, eventually, returned by France to Seychelles. The remaining security, in the amount of 9,000,000 FF, should be, unless the Parties agree otherwise, in the form of a bank guarantee, to be posted with France. In this connection the Tribunal noted that in the *Camouco* case it decided that the bond should be in the form of a bank guarantee and that no difficulty was encountered in the implementation of the judgment. Therefore, the claim by France that cash or certified cheque was the only possible form for the bond did not seem reasonable to the Tribunal.

V. CRIMINAL JURISDICTION AND FLAG STATE JURISDICTION ON THE HIGH SEAS

A. The Case of the S.S. *Lotus*

Parties: France and Turkey

823. The proceedings had been instituted in pursuance of Turkish legislation. According to the French Government, the Criminal Court claimed

jurisdiction whenever such jurisdiction did not come into conflict with a principle of international law.

3. Reasoning of the Court

826. The Court first established that the question submitted to it was whether the principles of international law prevented Turkey from instituting criminal proceedings against Lieutenant Demons under Turkish law.

827. The Court found that the French contention that Turkey, in order to have jurisdiction, should be able to point to some title of jurisdiction recognized by international law was opposed to generally accepted international law, as referred to by Article 15. It stated that the first restriction imposed by international law upon a State was that it could not exercise its power in any form in the territory of another State. However, this did not imply that international law prohibits a State from exercising jurisdiction in its own territory in respect of any case that relates to acts that have taken place abroad and in which it cannot rely on some permissive rule

4. Decision

831. Judgment was rendered on 7 September 1927. By the President's casting vote - the votes being equally divided - the Court held that:

(a) Turkey, by instituting criminal proceedings against Lieutenant Demons, had not acted in conflict with the principles of international law;

(b) Consequently, there was no occasion to give judgment on the question of the pecuniary reparation.

5. Dissenting Opinions

832. Former **President Loder** criticized the Court for accepting Turkey's view according to which under international law everything that is not prohibited is permitted. Then he stated that the criminal law of a State could not extend to offences committed by a foreigner in foreign territory without infringing the sovereign rights of the foreign State concerned. Similarly, the criminal law of a State could not extend to a foreigner who happened to be in the territory after the commission of an offence since "the subsequent presence of the guilty person could not have the effect of extending the jurisdiction of the State". Judge Loder disagreed with the alleged "connexity" between the movements of the vessels as a ground for Turkey's jurisdiction since

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837. **Judge Moore** differed from the Court in that he thought that even though the Court was not empowered by the compromise to enquire into the regularity of the proceedings under Turkish law or into the question of applicability of the terms of Article 6 to the facts in the case, it had to take the article and its jurisdictional claim simply as they stood.

838. He felt that the criminal proceedings as they rested on Article 6 were in conflict with a few principles of international law, among them: (i) that the jurisdiction of a State over the national territory is exclusive; and (ii) that a State cannot rightfully assume to punish foreigners for alleged infractions of laws to which they were not, at the time of the alleged offence, in any way subject.

839. **Judge Altamira** found that Turkey had acted in contravention of international law in imposing further exceptions to the principle of territoriality, by virtue of the admitted freedom in internal legislation but without the requisite consent.

845. It was common ground between the Parties that the initial position of the *I'm Alone*, whether inside or outside the conventional limits

The United States alleged that the right of hot pursuit from any point within the conventional limits was a necessary inference from the terms of the Convention itself, and that otherwise, the rights purported to be conferred on the United States by the Convention would be largely illusory.

The United States took the view, on the question of the hot and continuous nature of the pursuit, that since the “Wolcott” was in pursuit throughout, from start to finish, the continuous nature of the pursuit was not affected by the fact that the “Wolcott” was subsequently joined by another vessel by whom the actual sinking was carried out.

The United States contended that the right in the last resort to sink a vessel, which refused to stop or to allow herself to be boarded, when hailed within the conventional limits, was a necessary implication of the terms of the Convention.

3. Reasoning of the Commissioners and Decision

846. In their Joint Final Report of January 5, 1935, the Commissioners declared that they found as a matter of fact that, from September 1928 down to the date when she was sunk, the *I’m Alone*, although a British ship of Canadian registry, was *de facto* owned, controlled and, at the critical times, managed and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert, who were entirely, or nearly so, citizens of the United States. They employed her for the purpose of carrying intoxicating liquors from British Honduras designed for illegal introduction and sale in the territory of the United States. It was said that the possibility that one of the group of such persons might not have been of American nationality was regarded as of no importance in the circumstances of the case. The Commissioners declared that "in view of the facts, no compensation ought to be paid in respect of the loss of the ship or the cargo".

847. On the second question, that of hot pursuit from within conventional but not territorial waters, the Commissioners stated that they were not yet in agreement, nor had they reached disagreement. In view of their ultimate response to the third question confronting them, the Commissioners seemingly found it unnecessary in their Joint Final Report to answer the second question.

848. The third question was based upon the assumption that the United States had the right of hot pursuit in the circumstances and was entitled to exercise the right under Article II of the Convention at the time when the “Dexter” joined the “Wolcott” in the pursuit of the *I’m Alone*. The precise issue was "whether in the circumstances, the Government of the United States was legally justified in sinking the *I’m Alone*.

849. The Commissioners said that the "United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur accidentally, as the result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless". The Commissioners considered that the sinking of the vessel was not justified by anything in the Convention nor in any principle of international law. The Commissioners also recommended that the United States ought formally to acknowledge its illegality and to apologize to His Majesty's Canadian Government, therefore,

and further, that as a material amend in respect of the wrong, the United States should pay the sum of $25,000 to His Majesty's Canadian Government.

B. The M/V *SAIGA* Cases (Nos. 1 & 2)

Parties: Guinea and Sais

- Oxman, B.H., Bantz, V.P., “The M/V Saiga (No. 2),

871. For the above reasons, the Tribunal found that the application was admissible, that the allegations made by Saint Vincent and the Grenadines were well-founded for the purposes of the proceedings and that, consequently, Guinea was under an obligation to release promptly the M/V *Saiga* and the members of its crew currently detained or otherwise deprived of their liberty.

872. Such release had to be effected upon the posting of a reasonable bond or other financial security. In this regard the Tribunal did not support the request of Saint Vincent and the Grenadines that no bond or financial security (or only a "symbolic bond") should be posted.

(c) Reasonableness of the bond: form and amount

873. According to article 113 (2) of the Rules of the Tribunal, the Tribunal then proceeded to determine the amount, nature and form of the bond or financial security to be posted, which had to be "reasonable", as required by article 292, paragraph 1, of UNCLOS. In the opinion of the Tribunal, the criterion of reasonableness encompasses the amount, form and nature of the bond or financial security.

874. It was reasonable, in the view of the Tribunal, to consider the gas oil discharged by Guinea as a security to be held and, as the case may be, returned by Guinea, in kind or in its equivalent in United States dollars at the time of judgment. The Tribunal also considered reasonable that to this security there should be added a financial security in the amount of four-hundred-thousand (400,000) United States dollars, to be posted in accordance with article 113 (3) of the Rules of the Tribunal, in the form of a letter of credit or bank guarantee, or, if agreed by the Parties, in any other form.

4. Decision

875. On 4 December 1997, the Tribunal delivered its Judgment (*Saiga* case no. 1).

a) The Tribunal found unanimously that it had jurisdiction under article 292 of UNCLOS to entertain the Application filed by Saint Vincent and the Grenadines on 13 November 1997.

b) By 12 votes to 9 the Tribunal decided that the application was admissible;

c) By 12 votes to 9 the Tribunal ordered that Guinea promptly release the *Saiga* and its crew upon the posting of a reasonable bond or security by Saint Vincent and the Grenadines;

d) The Tribunal decided the security should consist of the gas oil discharged from the *Saiga* by the authorities of Guinea plus an amount of US$ 400,000 to be posted in the form of a letter of credit or bank guarantee or, if agreed by the Parties, in any other form.

5. Dissenting Opinions

876. **President Mensah** was not able to concur with the reasoning and conclusions of the Tribunal that the application was admissible and that Guinea had to promptly release the *Saiga* and its crew from detention. As he did not agree that this was a case in which an order of the Tribunal for the prompt release of the vessel or its crew under article 292 of UNCLOS was justified, he could not support the decision to order the Applicant to post a bond or security for such release nor the determination of the amount, nature and form of the security.

877. He agreed with the dissenting opinions of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye. He also agreed with the dissenting opinion of Judge Anderson and in particular with the view therein contained that proceedings under article 292 of UNCLOS are not preliminary or incidental but definitive proceedings in which a court or tribunal is required to decide whether a case has been made that the allegation of non-compliance is well-founded. He also endorsed the reasoning and conclusions contained in the dissenting opinion of Vice-President Wolfrum and Judge Yamamoto. In particular, he agreed with their views concerning the unwarranted *obiter dictum* in the Judgment on the issue whether "bunkering of a fishing vessel is an activity the regulation of which falls within the competence of the coastal States when exercising their sovereign rights concerning exploration, exploitation, conservation or management of living marine resources of the exclusive economic zone."

878. He fully concurred in the opinion of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye that the Tribunal could not order the prompt release of an arrested vessel under article 292 merely on the "allegation" of the flag State that the detaining State has not complied with a provision of UNCLOS for prompt release upon the posting of a bond. Therefore, he agreed with their conclusion that the allegation of Saint Vincent and the Grenadines, that Guinea had failed to comply with the provisions of article 73 of UNCLOS was not well-founded.

879. He carefully examined the reasons given by the Judgment for the conclusion that the *Saiga* was arrested for contravening the fisheries laws of Guinea and not for contravening its customs laws, as submitted by Guinea, but he was not able to accept them. In particular, he did not consider that the importance attached to article 40 of the Maritime Code of Guinea in reaching that conclusion was justified.

880. All the ascertainable facts surrounding the arrest of the *Saiga* by the customs authorities of Guinea pointed to the fact that those actions were indeed based on a particular law or laws which the officials concerned considered, rightly or wrongly, to be applicable to the situation. Accordingly it was, in his view, not right for the Tribunal to declare that laws on which they clearly based themselves in arresting the vessel did not in fact form the basis of their actions. He considered it even less justifiable for the Tribunal to decide that other laws of Guinea should be deemed to have been the laws which were in fact being applied.

881. President Mensah reached two conclusions. The first was that the Tribunal was claiming the right, not only to disregard completely the choice of law which a State had, clearly in good faith (whether or not justifiably), made in taking its actions, but actually to determine the laws on which the State should have based itself, solely on the grounds that the Tribunal considers that the laws preferred by it would be more likely to justify the actions of the State under international law than those upon which the State itself decided to base its actions.

882. The second conclusion to be drawn dealt with the preference expressed by the Tribunal for the classification of the arrest of the *Saiga* as falling under article 73 and the characterization of the action as "smuggling" by Guinea. The Tribunal was clearly implying that the classification of bunkering as a customs offence was a violation of international law, whereas the classification of bunkering as coming under article 73 avoided such an implication.

883. In President Mensah's view it was not appropriate for the Tribunal to pronounce itself, even by implication, on an issue of such fundamental importance as the scope and extent of

coastal State legislation for fisheries control in the exclusive economic zone permissible under article 73 of the Convention. That question was not at issue in the present case, either in specific or general terms.

884. In the Judgment, the Tribunal had chosen to disregard completely the charges which Guinea had made against the *Saiga* right from the very beginning of the case. Instead, the Tribunal substituted a basis for the accusation against the *Saiga* which had not been used or even

Guinea concerning the explorati

907. Judge Anderson stated that proceedings under article 292 formed a discrete case, not a first phase in a case which proceeds on to the merits. Such proceedings were not preliminary or incidental and, in accordance with the Rules of the Tribunal, they concluded, not with an order, but with a judgment. They were definitive proceedings in which the court or tribunal had to decide whether Saint Vincent and the Grenadines' initial allegation was well-founded or not.

908. In his opinion, the charges against the *Saiga* could not properly be characterised as falling within the ambit of article 73. In the first place, the *Saiga* was a tanker and off-shore support vessel, not a fishing vessel. Secondly, before the Tribunal, Guinea had explained the arrest in terms of smuggling, contraband and the importance to its national economy of safeguarding customs revenues from petroleum products. Most importantly, the charges set out in the Procès-Verbal issued by the customs authorities had been laid under legislation dealing with smuggling. There was insufficient justification in this case for changing Guinea's own description of the charges from smuggling to fisheries offences.

909. Judge Anderson's overall conclusion was that the *Saiga* was not an "arrested vessel" within the meaning of article 73(2). Since no other article of the Convention was applicable, it followed that the Saint Vincent and the Grenadine's allegation was not well-founded within the meaning of article 113 of the Rules, and that there was an insufficient basis in law for the decision concerning the release of the vessel under article 292(4).

910. He explained that since article 292 represented a self-contained, special procedure, separate from the other provisions for the settlement of disputes contained in Part XV of the Convention, his dissenting opinion should not be taken as expressing any opinions whatsoever on the merits of those issues, which may still be the subject of further proceedings before a court or tribunal under Part XV of the Convention.

II. The M/V *Saiga* (Case No. 2)

A. Provisional Measures

1. Facts

911. Notwithstanding the Judgment of the Tribunal in the *Saiga* Case No. 1, criminal proceedings were subsequently instituted by the Guinean authorities against the Master before the Tribunal of First Instance in Conakry. Additionally, Saint Vincent and the Grenadines was named as civilly responsible. The Tribunal of First Instance in Conakry found the Master guilty of the crimes of contraband, fraud and tax evasion. It imposed on him a fine and ordered the confiscation of the vessel and its cargo as a guarantee for payment of the penalty. The Master appealed to the Court of Appeal against his conviction, and was found guilty of the offence of "illegal import, buying and selling of fuel in the Republic of Guinea". The Court imposed a suspended sentence of six months imprisonment on the Master, as well as a fine, and ordered that he bear the costs of all fees and expenses. The Court of Appeal also ordered the confiscation of the cargo and the seizure of the vessel as a guarantee for payment of the fine.

consequence of the request of Saint Vincent and the Grenadines for the prescription of provisional measures.

3. Reasoning of the Tribunal

916. The Tribunal noted that the Parties disagreed as to whether the Tribunal had jurisdiction. According to Saint Vincent and the Grenadines, the Tribunal had jurisdiction under UNCLOS article 297(1), and, according to Guinea, the Request of Saint Vincent and the Grenadines concerned a dispute covered by UNCLOS article 297(3(a)) and was not subject to the jurisdiction of the Tribunal. The Tribunal concluded that, on one hand, it did not need to satisfy itself that it had jurisdiction on the merits of the case. On the other, it could not prescribe such measures unless the provisions invoked by the Applicant appeared *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded. It concluded that article 297 (1), invoked by Saint Vincent and the Grenadines, appeared *prima facie* to afford a basis for the jurisdiction of the Tribunal.

917. The Tribunal considered the fact that after it began its deliberations on the present Order, it was informed by letter dated 4 March 1998 sent on behalf of the Agent of Saint Vincent and the Grenadines that the *Saiga* had been released. In addition, the information received from the Parties confirmed that the *Saiga,* its Master and crew had been released in execution of the Tribunal's Judgment of 4 December 1997. The Tribunal concluded that, following the release of the vessel and its crew, the prescription of a provisional measure for their release would serve no purpose.

918. The Tribunal considered that the rights of the Applicant would not be fully preserved if judicial or administrative measures were taken against the vessel, its crew, its owners or operators, and that the parties should make every effort to prevent aggravation or extension of the dispute. The Tribunal noted that, in accordance with article 89, paragraph 5, of the Rules it could prescribe measures different in whole or in part from those requested.

4. Decision

919. On 11 March 1998, the International Tribunal for the Law of the Sea delivered its unanimous Order prescribing provisional measures concerning the continued detention of the *Saiga* and its crew, and the possibility of further actions against them and other vessels registered in Saint Vincent and the Grenadines in accordance with article 290, paragraph 1, of UNCLOS. The Order:

a) prescribed that Guinea should refrain from taking or enforcing any judicial or administrative measures against the *Saiga,* its Master and the other members of the crew, its owners or operators, in connection with the incidents leading to the arrest and detention of the vessel on 28 October 1997 and to the subsequent prosecution and conviction of the Master;

b) recommended that Saint Vincent and the Grenadines and Guinea endeavour to find an arrangement to be applied pending the final decision. To this end, the two States were to ensure that no action was taken by their respective authorities or vessels flying their flag which might aggravate or extend the dispute submitted to the Tribunal; and

927. In relying on article 290, paragraph 1, of the Convention, the Tribunal had solely prescribed the measure designed to preserve such right. The Tribunal decided to consider that the function of non-aggression/non-extension measures was a completely subsidiary aspect of the institution of protection of rights. While he agreed with that approach, in his view the Tribunal showed excessive caution in not categorically prescribing measures of non-aggression/non-extension, even if that entailed mandating specific actions that the parties should take. That could have been achieved, even without "prescribing" a measure, with language less tentative than that of a recommendation.

B. Merits

1. Facts

928. A request for the prompt release of the ship *Saiga* and its crew from detention was the subject of the first judgment of the Tribunal on 4 December 1997. The second *Saiga* case concerned a dispute between Saint Vincent and the Grenadines and Guinea arising from the arrest and detention of the vessel *Saiga* by Guinean authorities. The dispute was originally submitted by Notification of 22 December 1997 to an arbitral tribunal to be constituted in accordance with Annex VII to UNCLOS. The Parties subsequently agreed (1998 Agreement), to transfer the dispute to the Tribunal. During the first phase of the second case, Saint Vincent and the Grenadines requested the Tribunal to prescribe provisional measures pending the constitution of an UNCLOS Annex VII arbitral tribunal. The second phase of the case consisted of the dispute on the merits and dealt with the interpretation and application of UNCLOS. The parties raised a number of questions covering a wide range of issues relating to activities in the 200-mile exclusive economic zone.

2. Issues

(a) Questions before the Tribunal

(i) **Saint Vincent and the Grenadines** requested that the Tribunal adjudge and declare that: the actions of Guinea violated its right and the right of vessels flying its flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea, as set forth in articles 56(2) and 58 and related provisions of UNCLOS; that the customs and contraband laws of Guinea should in no circumstances have been applied or enforced in the EEZ of Guinea; that Guinea did not lawfully exercise the right of hot pursuit under article 111 of UNCLOS in respect of the *Saiga*, and was liable to compensate the *Saiga* according to article 111(8) of UNCLOS; that Guinea had violated articles 292(4) and 296 of UNCLOS in not releasing the *Saiga* and her crew immediately upon the posting of the guarantee of US$400,000 on 10 December 1997 or upon the subsequent clarification from Crédit Suisse on 11 December 1997; that the citing of Saint Vincent and the Grenadines in proceedings instituted by the Guinean authorities in the criminal courts of Guinea in relation to the *Saiga* violated the rights of Saint Vincent and the Grenadines under UNCLOS; that Guinea should immediately repay to Saint Vincent and the Grenadines the sum realized on the sale of the cargo of the *Saiga* and return the bank guarantee provided by Saint Vincent and the Grenadines; that Guinea should pay damages as a result of such violations with

interest thereon; and that Guinea should pay the costs of the arbitral proceedings and the costs incurred by Saint Vincent and the Grenadines.

(ii) **Guinea** asked the Tribunal to adjudge and declare that: the claims of Saint Vincent and the Grenadines were dismissed as non-admissible and thus Saint Vincent and the Grenadines should pay the costs of the proceedings and the costs incurred by Guinea. Alternatively, that the actions of Guinea did not violate the right of Saint Vincent and the Grenadines and of vessels flying her flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea, as set forth in articles 56 (2) and 58 and related provisions of UNCLOS; that Guinean laws could be applied for the purpose of controlling and suppressing the sale of gas oil to fishing vessels in the customs radius according to article 34 of the Customs Code of Guinea; that Guinea did lawfully exercise the right of hot pursuit under article 111 of UNCLOS in respect to the *Saiga* and was not liable to compensate the *Saiga* according to article 111 (8) of UNCLOS; that Guinea had not violated articles 292 (4) and 296 of UNCLOS; that the mentioning of Saint Vincent and the Grenadines in Guinea's National Courts did not violate the rights of Saint Vincent and the Grenadines under UNCLOS; that Guinea was not under an obligation to immediately return to Saint Vincent and the Grenadines the equivalent in United States dollars of the discharged gas oil; that Guinea had no obligation to pay damages to Saint Vincent and the Grenadines; and that Saint Vincent and the Grenadines should pay the costs of the proceedings and the costs incurred by Guinea.

(b) Arguments presented by the Parties

(i) Saint Vincent and the Grenadines

Challenges to admissibility

929. In response to Guinea's challenges to the admissibility of the claims set out in the Application, Saint Vincent and the Grenadines objected that Guinea did not have the right to raise any challenges to admissibility. The terms of the 1998 Agreement, whose provisions permitted Guinea to raise only the objection to jurisdiction and precluded objections to admissibility, were recalled in support of these contentions. Besides, it was further argued that Guinea had lost the right to raise objections toce9e shoul

the responsibility for any damage resulting from the use of force on the Master and crew of the ship.

Schedule of summons

958. Guinea contended that the citation of Saint Vincent and the Grenadines in the schedule of summons did not have any legal significance and was without practical effect.

Financial Security and Reparation

959. Guinea contended that there was no obligation for Guinea to return the bank guarantee and to pay damages to Saint Vincent and the Grenadines.

Costs

960. Both parties requested the Tribunal to award legal and other costs.

3. Reasoning of the Tribunal

(a) Jurisdiction

961. There was no disagreement between the Parties regarding the jurisdiction of the Tribunal. Nevertheless, the Tribunal had to satisfy itself that it had jurisdiction to deal with the case as submitted. In its Order dated 20 February 1998, the Tribunal stated that, having regard to the 1998 Agreement and article 287 of UNCLOS, it was "satisfied that Saint Vincent and the Grenadines and Guinea have agreed to submit the dispute to it". The Tribunal found that an "objection as to jurisdiction" made by Guinea in the 1998 Agreement, raised in the phase of the proceedings relating to the Request for the prescription of provisional measures, did not affect its jurisdiction to deal with the dispute. The Tribunal thus found that the basis of its jurisdiction in the present case was the 1998 Agreement, which transferred the dispute to the Tribunal, together with articles 286, 287 and 288 of UNCLOS.

(b) Objections to challenges to admissibility

962. The Tribunal found that the reservation of Guinea's right in respect of the specific objection as to jurisdiction contained in the 1998 Agreement did not deprive it of its general right to raise objections to admissibility, provided that it did so in accordance with the Rules and consistently with the Agreement between the Parties that the proceedings be conducted in a single phase.

963. In relation to the contention that the objections by Guinea were not receivable because they were raised after the expiry of the time-limit specified, the Tribunal observed that the time-limit did not apply to objections to jurisdiction or admissibility, which were not requested to be considered before any further proceedings on the merits. The Tribunal thus found that the objections to admissibility raised by Guinea were receivable and could be considered.

(c) **Challenges to admissibility**

964. *The registration of the Saiga.* In order to establish whether the *Saiga* had the nationality of Saint Vincent and the Grenadines at the time of its arrest, the Tribunal recalled article 91 of UNCLOS, which embodies the well-established rule of general international law that each State has exclusive jurisdiction over the granting of its nationality to ships. Under that article, it is for Saint Vincent and the Grenadines to fix the conditions for the granting of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag.

965. The Tribunal considered that the nationality of a ship was a question of fact to be determined on the basis of evidence adduced by the Parties. On the basis of the evidence before it, the Tribunal decided that it had not been established that the Vincentian registration or nationality of the *Saiga* had been extinguished in the period between the date on which the Provisional Certificate of Registration was stated to expire and the date of issue of the Permanent Certificate of Registration. Additionally, the consistent conduct of Saint Vincent and the Grenadines provided sufficient support for the conclusion that the *Saiga* retained the registration and nationality of Saint Vincent and the Grenadines at all times material to the dispute.

966. In view of Guinea's failure to question initially the assertion of Saint Vincent and the Grenadines that it was the flag State of the *Saiga*, when it had every reasonable opportunity to do so, Guinea could not subsequently challenge the registration and nationality of the *Saiga.*

967. For these reasons, the Tribunal rejected Guinea's objection that the *Saiga* was not

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972. *Exhaustion of local remedies.* The Tribunal considered that, under article 295 of UNCLOS, whether local remedies must be exhausted was to be determined by international law. All the violations alleged by Saint Vincent and the Grenadines were direct violations of that State's rights and not breaches of obligations concerning the treatment to be accorded to aliens. Damage to the persons involved in the operation of the ship arose from those violations. As a consequence, in the view of the Tribunal, the claims in respect of such damage were not subject to the rule that local remedies must be exhausted. The Tribunal further held that even if some of the claims did not arise from direct violations of the rights of Saint Vincent and the Grenadines, there was no jurisdictional connection between Guinea and the natural and juridical persons in respect to whom Saint Vincent and the Grenadines made claims (see below regarding Guinea's right to apply its customs laws). Accordingly, on this ground also, the rule that local remedies must be exhausted did not apply.

973. *Nationality of claims.* The Tribunal found that under UNCLOS (articles 94, 217, 106, 110 (3) and 111 (8)) the ship is considered as a unit, as regards the obligations of the flag State and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of UNCLOS. Thus the ship, everything on it and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationality of such persons is not relevant.

974. The Tribunal also called attention to a significant aspect relating to modern maritime transport: the transient and multinational composition of ships' crews and the multiplicity of interests that may be involved in the cargo on board a single ship. The Tribunal considered that if each person sustaining damage were obliged to look for protection from the State of which such person was a national, undue hardship would ensue. The Tribunal was, therefore, unable to accept Guinea's contention that Saint Vincent and the Grenadines was not entitled to present claims for damages in respect of natural and juridical persons who were not nationals of Saint Vincent and the Grenadines.

(d) **Arrest of the *"Saiga"***

975. The Tribunal declared the judgment of the Permanent Court of International Justice in the *Case Concerning Certain German Interests in Polish Upper Silesia*, [24] and came to the conclusion that there was nothing to prevent it from considering the question whether or not Guinea was acting in conformity with UNCLOS and general international law in applying its national law.

976. To deny the competence of the Tribunal to examine the applicability and scope of national law was not in conformity with certain provisions of UNCLOS, such as article 58 (3). Under that article the rights and obligations of coastal and other States arise both from the provisions of UNCLOS and from national laws and regulations "adopted by the coastal State in accordance with the provisions of this Convention". The Tribunal therefore considered that it was competent to determine the compatibility of such laws and regulations with UNCLOS.

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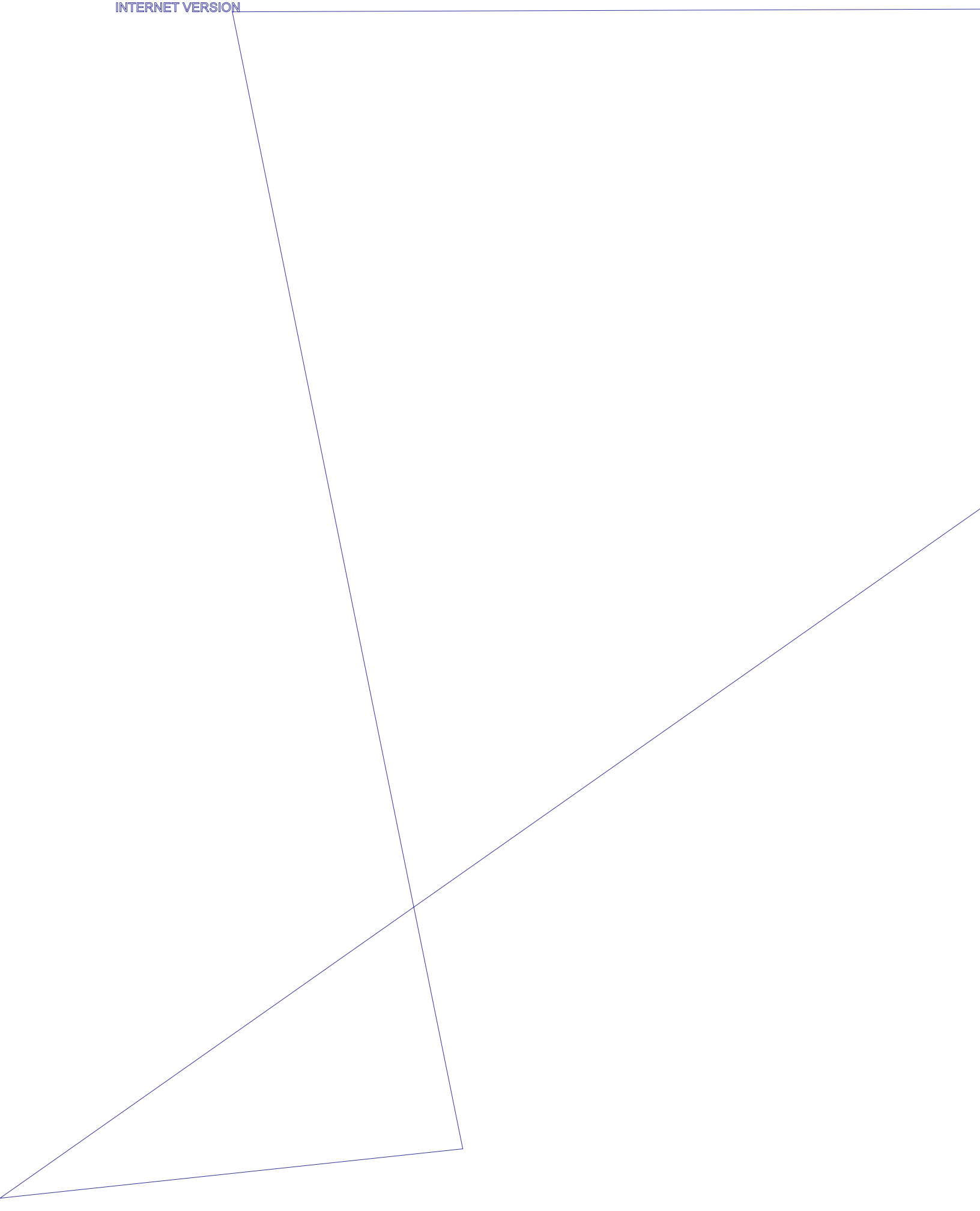
[24] *Certain German Interests in Polish Upper Silesia*, Merits, Judgment No. 7, 1926, P.C.I.J.(Series A), No. 7, p. 19.



the release of the ship and its crew. The Deed of Release expressly stated that it was in execution of the Judgment of 4 December 1997.

991. The Tribunal held that although a release occurring 80 days after the posting of the bond could not be considered as a prompt release, a number of factors had contributed to the delay in releasing the ship and not all of them were the fault of Guinea. Therefore, the Tribunal found that Guinea did not fail to comply with the Judgment of 4 December 1997 or with articles 292 (4) and

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5. Declarations, Separate Opinions, Dissenting Opinions

(a) Joint Declarations by Judges Caminos, Yankov, Akl, Anderson, Vukas, Treves and Eiriksson

1000. The Judges were unable to support the decision on the question of costs for two reasons. First, the Parties agreed, in the 1998 Agreement, that the successful party should be awarded costs. Second, the case resulted in the award of compensation to eliminate the consequences of acts found to have been contrary to UNCLOS. In the opinion of the Judges, it would have been consistent with that aim to also award costs to Saint Vincent and the Grenadines.

1001. The Judges believed that, although the Tribunal had not yet elaborated specific rules or procedures, certain general principles and the information provided by each party could have been used to award costs.

(b) Separate Opinions

1002. **President Mensah** in his separate opinion stated that, although he supported the decision of the majority, he had serious doubts about the registration status and nationality of the *Saiga* at the time of the incident which gave rise to the dispute. He agreed with the dissenting opinions of Judges Warioba and Ndiaye and the separate opinion of Vice-President Wolfrum on that issue. In his view the *Saiga* was not a ship entitled to fly the flag of Saint Vincent and the Grenadines on 28 October 1997 because, on that day, its provisional registration had expired and no other registration had been granted to it under the laws of Saint Vincent and the Grenadines.

1003. He was able, nevertheless, to support the decision to reject Guinea's contention that Saint Vincent and the Grenadines did not have legal standing to bring the dispute to the Tribunal. He joined in the decision to deal with the merits of the case because he agreed that it would not be consistent with justice if the Tribunal decided otherwise, having regard to the particular circumstances of the case. His decision, in effect, disregarded what was no more than a technical defect in order to do greater justice.

1004. In coming to this conclusion, he nevertheless expressed his concerns regarding certain unusual features of the legislation of Saint Vincent and the Grenadines and the administrative practices of its Maritime Authorities concerning the issuance of documents to ships.

1005. **Vice-President Wolfrum** in his separate opinion explained the grounds for his disagreement and provided for alternative reasons for the holdings of the Judgment. He focused in particular on the following issues: the appreciation of evidence as developed and applied in the Judgment; the reasoning concerning registration and nationality of the *Saiga;* interpretation and application of the principle of the exhaustion of local remedies; relationship between UNCLOS and national law as well as the competence of the Tribunal to establish violations of national law.

1006. *Appreciation of evidence.* Vice-President Wolfrum underlined that the Tribunal, in referring to the principles on the appreciation of evidence to be applied in the case, did not really reveal which mode concerning the appreciation of evidence it considered to be appropriate. He believed that the system for appreciation of evidence should be clearly identified and fully

1014. The crucial question to be decided was whether this was a case whose subject matter was the alleged violation of the rights of a State, or whether its subject matter also covered alleged violations of rights of individuals. In his view, it was questionable to qualify claims resulting from infringements upon the right of freedom of navigation as interstate disputes. However, he agreed with the Judgment that Guinea could not successfully invoke the exhaustion of the local remedies rule, since the concept did not apply in cases where the State acted outside the scope of its jurisdiction.

1015. *Relationship between UNCLOS and national law.* In Vice-President Wolfrum's opinion the Tribunal's statement on its competence to determine the compatibility of national laws and regulations with UNCLOS should be

1024. *Registration.* In Judge Nelson's opinion, and on the basis of the facts presented to the Tribunal, the provisional registration could not be valid for longer than one year. He therefore concluded that in the case

1041. *Arrest of the Saiga.* Judge Anderson pointed out that he agreed with the Judgment to the effect that the arrest of the *Saiga* in respect of its bunkering activity on 27 October 1997 violated the rights of Saint Vincent and the Grenadines. In his opinion, coastal0

1084. On 30 May 2002, the three crew members who remained in Australia obtained a variation of the bail conditions to return to Spain, pending the hearing on the criminal charges brought against them. On 14 June 2002, the Supreme Court of Western Australia ordered a variation of the bail so as to require a deposit of AU $275,000 (instead of AU $ 75,000) from each of the three crew members. An apl141.3 753.72 l140.94 753berf3(in ers. Arained a)8427613 Tc-0nn ers. Ara9.92 74AI

1091. According to the laws of Australia, the maximum total of fines imposable on the three crew members was AU $1,100,000 and the vessel, its equipment and catch were liable to forfeiture.

1092. The bond sought by Australia in the amount of AU $3,325,500 consisted of three components:

(a) AU $1,920,00 in respect of security to cover the assessed value of the vessel, fuel, lubricants and fishing equipment;

(b) AU $412,500 to secure the payment of potential fines imposed in the criminal proceedings on the crew members; and

(c) AU $1 million relating to the carriage of a fully operational VMS (vessel monitoring system) and observance of CCAMLR conservation measures.

1093. As for the three crew members, the Tribunal noted that the Full Court of the Supreme Court of Western Australia upheld the appeal of the three officers of the Volga on 16 December 2002 and ordered that they be permitted to leave Australia upon the amount of bail already posted and was informed that the officers left Australia on 20 December 2002. The Tribunal considered that since the three crew members had departed from Australia setting a bond in respect of them no longer served any practical purpose.

1094. With respect to the imposition of non-financial conditions, one of the main issues in the Tribunal's decision was the question whether Australia was entitled to make the release of the Volga conditional on the fulfilment of two conditions: that the vessel carry a VMS and that information concerning particulars about the owner and ultimate beneficial owner of the ship be submitted to its authorities.

1095. The question was not, explained the Tribunal, to consider whether a coastal State is entitled to impose such conditions in the exercise of its sovereign rights under UNCLOS. In the proceedings the only question to be decided was whether the "bond or other security" mentioned in article 73(2) of UNCLOS may include such conditions. These and similar words also appeared in article 292 and other articles of UNCLOS. Therefore, the expression should be interpreted as referring to a bond or security of a purely financial nature. Where the Convention envisages the

1108. He mentioned that there was a tidy profit to be made from illegal fishing, that the cost of combating illegal fishing was considerable for the coastal State and that international organizations had called upon their Member States to take measures against illegal fishing.

1109. The measures taken by Australia, both in terms of prevention and enforcement, clearly fall within the scope of the efforts made by international organizations to combat illegal, unreported and unregulated fishing. They came under article 56 of UNCLOS and have been taken in pursuance of the sovereign rights exercised by coastal States for the purpose of exploring, exploiting, conserving and managing the natural resources of the exclusive economic zone.

1110. The Tribunal has a duty to respect the implementation by the coastal State of its sovereign rights with regard to the conservation of living res

VII.

(ii) The **United Kingdom** claimed that article 282 [31] of UNCLOS denies an Annex VII arbitral tribunal jurisdiction over the dispute. It argued that the dispute was governed by the compulsory dispute settlement provisions of the 1992 OSPAR Convention, the EC Treaty and the Euratom Treaty. Ireland had already submitted a dispute under the 1992 OSPAR Convention and it had publicly stated its intention to bring proceedings before the European Court of Justice.

- Furthermore, the United Kingdom contended that the dispute was premature given that the Parties had not exchanged views as required by article 283 [32] of UNCLOS. It maintained that the correspondence between the two States did not amount to an exchange of views within the meaning of that article.
- According to the United Kingdom, the commissioning of the MOX Plant would not cause irreversible damage to the marine environment of the Irish Sea. It put forward evidence demonstrating that the risk of pollution from the operation of the plant would be infinitesimally small. With regard to the security risks from a terrorist attack, the United Kingdom maintained that extensive precautions had already been taken.
- Finally the United Kingdom stated that there would be no export of MOX fuel from the Plant until the summer of 2002 and that there was to be no import to the THORP Plant of spent nuclear fuel pursuant to contracts for conversion at the MOX Plant within that period. Therefore there was no urgency in the prescription of provisional measures and Ireland's request should be rejected. Furthermore, the United Kingdom requested the Tribunal to order Ireland to bear its costs of the proceedings.

3. Reasoning of the Tribunal

(a) Jurisdiction

1127. The Tribunal noted that before prescribing provisional measures it must satisfy itself that *prima facie* the UNCLOS Annex VII arbitral tribunal would have jurisdiction. It agreed with Ireland that even if the obligations of the 1992 OSPAR Convention, the EC Treaty and the Euratom Treaty were identical to those in UNCLOS, the obligations have a separate existence under each treaty. Furthermore the interpretation of identical obligations will differ according to the respective context, the object and purpose of each treaty, the subsequent practice of the Parties to each treaty, and the respective *travaux préparatoires*. Accordingly, it held that, as the dispute concerned the interpretation and application of UNCLOS and no other agreement, article 282 was inapplicable.

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[31] Article 282 provides that "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree."

[32] Article 283 (1) provides that "When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."

1136. Judge Mensah further noted that there would be no irreparable prejudice to the procedural rights of Ireland. It would be within the competence of the Annex VII arbitral tribunal to order the United Kingdom to decommission the MOX Plant or comply with any procedural requirements before the further operation of the facility.

1137. On the issue of jurisdiction, **Judge Anderson** added that the question was whether articles 282 or 283 "obviously exclude" the jurisdiction of the arbitral tribunal. The application of article 282 involves complicated questions of fact and law. Judge Anderson had some doubts about the reasoning of the Tribunal with regard to jurisdiction.

1138. Judge Anderson also doubted whether the provisional measures prescribed by the Tribunal were appropriate. He would have preferred an approach that declined the requests of Ireland, whilst encouraging further consultation between the Parties.

1139. With respect to the first request of Ireland, Judge Anderson would have been prepared to go further than the Tribunal to support a finding that it had not been shown that either any irreparable prejudice to the Applicant or any serious harm to the marine environment would have been caused. The second request to prohibit vessels carrying radioactive materials to and from the MOX Plant would have raised issues relating to the rights of third States, for example rights of passage and navigation.

1140. According to **Judge Wolfrum**, the United Kingdom's argument on article 282 does not take into account the actual wording, nor the context or objective of section I, Part XV, of UNCLOS. Parallelism of treaties, both in their substantive provisions and their procedures for the settlement of disputes is a reality, but the 1992 OSPAR Convention and the EC Treaty set out procedures to settle disputes under those treaties, not under UNCLOS. This interpretation does not render article 282 redundant as Parties may agree upon a system of dispute settlement different to that contained in section 2, Part XV, of UNCLOS.

1141. Judge Wolfrum would have preferred it if the Tribunal had stated that it would not have been within the competence of the Tribunal to prescribe provisional measures given the circumstances of the case. In the opinion of Judge Wolfrum, the Tribunal could not have applied the precautionary principle as it would have required the Tribunal to assess the merits of the case. The limitation that provisional measures should not anticipate a judgment on the merits cannot be overruled by the precautionary principle.

1142. The duty to co-operate is an inherent principle of Part XII of UNCLOS as well as of international customary law for the protection and preservation of the marine environment. It

B. The Mox Plant Arbitration

Parties:	Ireland and United Kingdom

4. Decision

1161. On 24 June 2003, the Arbitral Tribunal unanimously issued the following Award pursuant to articles 1 and 8 of its rules of procedure and article 290 of the Convention:

(a) Further proceedings in the case were suspended until not later than 1 December 2003;

(b) Provisional measures prescribed by ITLOS in its Order of 3 December 2001 were affirmed;

(c) The requig24 Tw[(a2Cog24 Tw[(a13urther6)w[(a13urn)]a7r)-8.1(mC Tw[Em)8