The World Bank, International Financial Institutions, and the Development of International Law

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Clean Hands in the Court

By Stephen M. Schwebel

In oral argument at the phase of provisional measures in the cases brought on April 29, 1999 by Yugoslavia against ten Members of NATO concerning *Legality of the Use of Force*, a number of the respondents argued that the injunctions sought by Yugoslavia should not in any event be granted because Yugoslavia did not come to Court with "clean hands." The Court rejected Yugoslavia's requests for the indication of provisional measures in all ten cases; eight of those cases remain on the docket of the Court for subsequent consideration. Having rejected Yugoslavia's requests on grounds of lack of *prima facie* jurisdiction, the Court did not find it necessary to address the argument about Yugoslavia's lack of clean hands.

In the circumstances, it would not be appropriate for me to express a view on the applicability of the doctrine of clean hands to the cases concerning *Legality of the Use of Force*. It is, however, of high interest that that doctrine was invoked by leading Powers that were the object of Yugoslavia's Applications. Is the doctrine of clean hands one that is supported in international law?

In my view, it is. I relied on that doctrine, and recalled the equitable considerations of law on which it is based, in passages of my dissenting opinion in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports, as follows.*[1]

> "240. As against Nicaragua, however, a further factor comes into play, in addition to those specified above. Nicaragua stands in violation of that most pertinent obligation which the Court set forth in the *Corfu Channel* case, namely, its 'obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'. Since Nicaragua has violated and continues to violate that cardinal obligation, and commenced its violation of that obligation years before the mining and maintained that violation during the period of the mining and thereafter, Nicaragua cannot be

[1] *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1986 ICJ 380–81, 392–94 (dissenting opinion of Judge Schwebel).

> heard to complain, as against it, of the mining of its ports. As Judge Hudson concluded in his individual opinion in the case of *Diversion of Water from the Meuse, P.C.I.J., Series A/B, No. 70,* p 77:
>
> 'It would seem to be an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party . . . a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.'

* * * *

X. Nicaragua's Unclean Hands Require the Court in any Event to Reject its Claims

268. Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible—but ultimately responsible—for large numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail.

269. As recalled in paragraph 240 of this opinion, the Permanent Court of International Justice applied a variation of the 'clean hands' doctrine in the *Diversion of Water from the Meuse* case. The basis for its so doing was affirmed by Judge Anzilotti 'in a famous statement which has never been objected to: "The principle . . . *(inadimplenti non est adimplendum)* is so just, so equitable, so universally recognized that it must be applied in international relations . . ."' Elizabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures,* 1984, pp. 16–17). That principle was developed at length by Judge Hudson. As Judge Hudson observed in reciting maxims of equity which exercised 'great influence in the creative period of the development of Anglo-American law', 'Equality is equity', and 'He who seeks equity must do equity'. A Court of equity 'refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper' (citing Halsbury's *Laws of England,* 2nd ed., 1934, p. 87). Judge Hudson noted that, 'A very similar principle was received into Roman law . . . The *exception*

non adimpleti contractus . . . " He shows that it is the basis of Articles of the German Civil Code, and is indeed a 'a general principle' of law. Judge Hudson was of the view that Belgium could not be ordered to discontinue an activity while the Netherlands was left free to continue a like activity—an enjoinder which should have been found instructive for the current case. He held that, 'The Court is asked to decree a kind of specific performance of a reciprocal obligation which the demandant is not performing. It must clearly refuse to do so.' (*Loc. cit.*, pp. 77–78. And see the Court's holding, at p. 25) Equally, in this case Nicaragua asks the Court to decree a kind of specific performance of a reciprocal obligation which it is not performing, and, equally, the Court clearly should have refused to do so.

270. The 'clean hands' doctrine finds direct support not only in the *Diversion of Water from the Meuse* case but a measure of support in the holding of the Court in the *Mavrommatis Palestine Concessions* case, *P.C.I.J., Series A , No. 5,* page 50, where the Court held that: 'M. Mavrommatis was bound to perform the acts which he actually did perform *in order to preserve his contracts from lapsing as they would otherwise have done.*' (Emphasis supplied.) Still more fundamental support is found in Judge Anzilotti's conclusion in the *Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No.53,* page 95, that 'an unlawful act cannot serve as the basis of an action at law'. In their dissenting opinions to the Judgment in *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980,* pages 53–55, 62–63, Judges Morozov and Tarazi invoked a like principle. (The Court also gave the doctrine a degree of analogous support in the *Factory at Chorzów* case, *P.C.I.J., Series A, No. 9,* p. 31, when it held that 'one party cannot avail himself of the fact that the other has not fulfilled some obligation . . . if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question . . . ') The principle that an unlawful action cannot serve as the basis of an action at law, according to Dr. Cheng, 'is generally upheld by international tribunals' (Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* 1958, p. 155). Cheng cites, among other cases, the Clark Claim, 1862, where the American Commissioner disallowed the claim on behalf of an American citizen in asking: 'Can he be allowed, so far as the United States are concerned, to profit by his own wrong? . . . A party who asks for redress must present himself with clean hands . . . ' (John Bassett Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party,* 1898, Vol. III, at pp. 2738, 2739). Again, in the *Pelletier* case, 1885, the United States Secretary of State 'peremptorily and immediately' dropped pursuit

of a claim of one Pelletier against Haiti—though it had been sustained in an arbitral award—on the ground of Pelletier's wrongdoing:

> '*Ex turpi causa non oritur:* by innumerable rulings under Roman common law, as held by nations holding Latin traditions, and under the common law as held in England and the United States, has this principle been applied.' (*Foreign Relations of the United States,* 1887, p. 607)

The Secretary of State further quoted Lord Mansfield as holding that: 'The principle of public policy is this: *ex dolo malo non oritur actio.*' (at p. 607)

271. More recently, Sir Gerald Fitzmaurice—then the Legal Adviser of the Foreign Office, shortly to become a judge of this Court—recorded the application in the international sphere of the common law maxims: 'He who seeks equity must do equity' and 'He who comes to equity for relief must come with clean hands,' and concluded:

> 'Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it.' ('The General Principles of International Law', *92 Collected Courses,* Academy of International Law, The Hague, (1957-II), p. 119. For further recent support of the authority of the Court to apply a 'clean hands' doctrine, see Oscar Schachter, 'International Law in the Hostage Crisis,' *American Hostages in Iran,* 1985, p. 344)

272. Nicaragua is precisely such a State which is guilty of illegal conduct. Its conduct accordingly should have been reason enough for the Court to hold that Nicaragua had deprived itself of the necessary *locus standi* to complain of corresponding illegalities on the part of the United States, especially because, if these were illegalities, they were consequential on or were embarked upon in order to counter Nicaragua's own illegality—'in short were provoked by it.'"

In *Military and Paramilitary Measures in and against Nicaragua*—at the stage of provisional measures as well as the merits—the Court gave no weight to considerations of clean hands. This was understandable, because—less understandably—it found the hands of Nicaragua to be clean. It accepted as true misrepresentations of essential facts by the then Government of Nicaragua. To what should be its enduring embar-

rassment, the Court's reliance on Nicaragua's misrepresentations, incautious at the time, subsequently was shown to have been misplaced. It has been proven that Nicaragua, in attesting that it was not supporting the insurgency in El Salvador materially, deceived the Court.[2] In the ten cases brought by Yugoslavia against Members of NATO, the Court, having found a lack of *prima facie* jurisdiction, did not have to consider whether, if there were such jurisdiction, it should exercise its discretion to order or not to order provisional measures. Had the Court found *prima facie* jurisdiction, the Court would have had to consider exercising its discretion not to order interim measures of protection for, among other reasons, one of the Respondents' arguments: considerations of clean hands. And if, nevertheless, the Court had decided to issue Orders of provisional measures, arguably those measures would have had to have been framed so as to give effect to the equitable considerations that are at the heart of the general principles of law that the doctrine of clean hands embodies.

[2] *See Letter from the Secretary-General to the President of the Security Council*, U. N. Doc. S/25901 (1993); *Note by the President of the Security Council*, U.N. Doc. S/5929 (1993); *Further Report of the Secretary-General on the United Nations Observer Mission in El Salvador (ONUSAL)*, U.N. Doc. S/26005 (1993); *Letter from the Charges d'affaires a.i. of the Permanent Mission of Nicaragua to the United States Addressed to the Secretary-General*, U. N. Doc. S/26008 (1993); *Further Report of the Secretary-General on the United Nations Observer Mission in El Salvador (ONUSAL)*, U.N. Doc. S/26371 (1993); *Further Report of the Secretary-General on the United Nations Observer Mission in El Salvador (ONUSAL)*, U.N. Doc. S/26790 (1993); *Statement of the President of the Security Council*, Resolutions and Decisions of the Security Council (June 11, 1993); *Statement of the President of the Security Council*, Resolutions and Decisions of the Security Council (July 12, 1993); Shabtai Rosenne, *The World Court: What It Is and How It Works* 141–43, 152–53 (1995); Stephen M. Schwebel, *The Roles of the Security Council and the International Court of Justice in Shaping the Application of International Humanitarian Law*, 27 N.Y.U. J. INT'L L. & POL. 740–41 (1995).

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CGX rig to stay west until drill feud resolved

Surinamese coast guard threatened to use force

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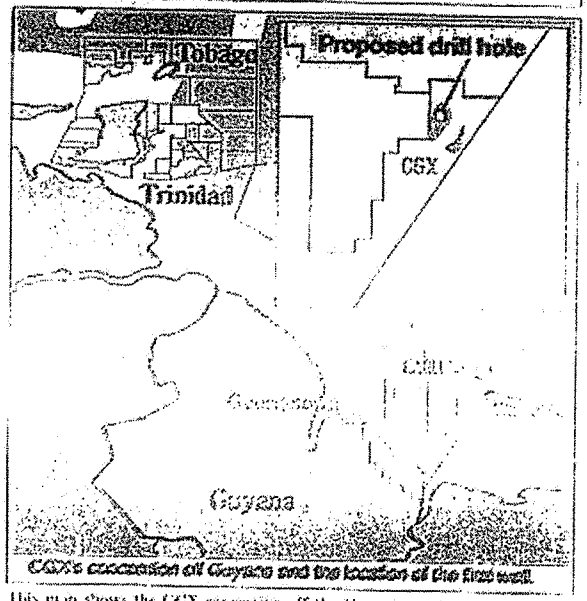


CGX's concession off Guyana and the location of the first well

This map shows the CGX concession off the Guyana coast in the country's Exclusive Economic Zone. CGX has identified two target sites the Eagle and the Washburne. The Eagle site - further into Guyana's waters was the one from which the rig was evicted by the Surinamse Coast Guard on Saturday. The line extending eastwards into the Atlantic is meant to divide the maritime boundaries of the two countries based on the mouth of the Corentyne River. (CGX website)

CGX rig to stay west until drill feud resolved

From page 1

CARICOM what has been taking place.

The bilateral move, the source said, is in keeping with Guyana's policy in dealing with Suriname and the issue will be resolved at a diplomatic level.

Foreign Affairs Minister, Clement Rohee, will be meeting with his Surinamese counterpart on Tuesday in Trinidad to attempt to resolve the issue. The acting Surinamese Foreign Minister is Errol Alibux.

Rohee had sent a diplomatic note last Friday to his Surinamese counterpart requesting an emergency meeting within 24 hours but such a meeting did not take place. Another diplomatic note was sent on the issue and led to the scheduling of the Tuesday meeting in Trinidad.

It is not certain who will accompany Rohee to this meeting and despite repeated efforts yesterday by *Stabroek News* he was not available for comment on the matter.

The government has also sent CGX comfort notes as a measure of security for its investment in the area, the official stated.

The government had on May 17th responded t[illegible] Suriname's concern about the drilling activity in the area vi[illegible] diplomatic note denying that Suriname's sovereignty or terr[illegible] had been [illegible]

The note [illegible] [illegible] However [illegible] [illegible] process.

[illegible] official [illegible] Fisheries [illegible] was casing the area when at 9.30 am on Friday, a Surinamese Cessna 212 aircraft invaded into Guyana's airspace on a reconnaissance mission.

However, the official explained that the patrol vessel which was being used by the GDF had a limited range and needed to refuel and to renew permission for use of the vessel for [illegible]

The patrol boat left the area around midday on Friday and [illegible]

Venezuelan fishing boats in Guyana's waters.

According to the official, Suriname patrol boats came into Guyana's waters under the cover of darkness (12.25 am) on Saturday and ordered the CGX rig out.

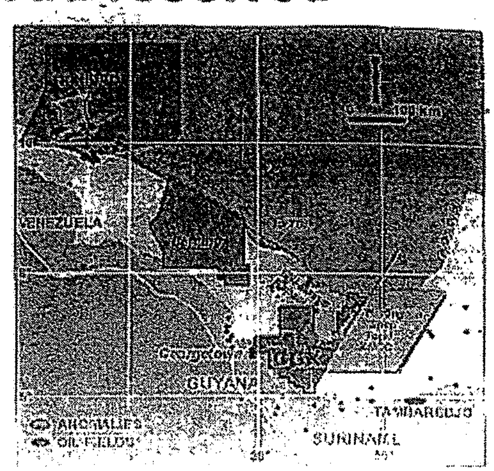
The Surinamese craft were positioned some way off, the official said, maybe suspecting that the rig had military protection. Using wireless communication the Surinamese craft threatened to use force to evict the rig if it did not leave within 12 hours. Suriname has eight new patrol boats which are fully equipped and has Cassel 212 aircraft. The [illegible] entry [illegible] for reconnaissance work.

[illegible] sent a strong protest note to Suriname [illegible]

[illegible]

[illegible] boundary," the note stated.

Stabroek News understands that Canadian High Commissioner to Guyana Jacques Crete was summoned by the Surinamese Foreign Ministry to discuss the matter on Thursday. He returned on Saturday and this newspaper learnt that the High Commissioner was informed by the Surinamese foreign minister that this was an issue between that country and Guyana and [illegible] Paramaribo [illegible]



This map shows concessions on both sides.

[illegible] relationship with [illegible] South American [illegible]

According to reports, the Surinamese [illegible]

[illegible]

[illegible] in 1998.

The firm has reportedly invested US$5M to date on its exploration activities here and is expected to expend US$7.5M in each drilling activity. The company expects to drill at two points within its concession.

Under the current drilling plan CGX was expected to take 45 days to drill and case to the target depth of 12,500 feet.

A further five days were scheduled for testing, if results [illegible]

[illegible]

[illegible] area which was [illegible] resolved. [illegible] the area is believed to be rich in hydrocarbons. The investor, the official said, is still very interested in the project.

Interestingly, the official pointed out that Suriname has granted concessions for oil exploration as recent as this year to Repsol [illegible] on the border of Guyana's [illegible] boundary but never [illegible] sought to award a concession in the area [illegible]

CGX rig to stay west until drill feud resolved
Surinamese coast guard threatened to use force

By Gitanjali Singh & Desiree Jodah

Stabroek News
Vol. 14, No. 156
June 5, 2000

CGX's rig which was chased out of its drill location within Guyana's maritime boundary by Suriname's coast guard on Saturday will remain west of the area until the two governments resolve the impasse.

A high level source close to the government said yesterday that the Guyana Government has also notified CARICOM of the situation even as the two sides are scheduled to meet tomorrow in Trinidad and Tobago to thrash out the issue.

Suriname two weeks ago objected to CGX Resources Inc, a Canadian oil exploration company, drilling in an area that Georgetown says is definitely within Guyana's maritime boundary. Suriname is claiming that the operation was taking place in its waters. Its coast guard on Saturday morning gave the crew of the rig 12 hours notice to leave the area or be forcibly removed.

However, the high-level official last evening insisted that the rig was within this country's waters, west of Guyana's median line. (See map)

The median line is the boundary line of Guyana's Exclusive Economic Zone (EEZ) and was drawn in accordance with the UN Law of the Sea Convention which is recognised globally as the method which states and adjacent states ought to use in defining their boundaries.

"Suriname has not drawn its median line in accordance with the UN Law of the Sea Convention," the official stated.

The source said that Suriname has been objecting to Article 15 of the Law of the Sea Convention which determines the manner in which maritime boundaries lie and Suriname uses a different method in drawing its boundary.

The official said that the Government of Guyana is moving to resolve the issue with Suriname at a bilateral level but has signalled to CARICOM what has been taking place.

The bilateral move, the source said, is in keeping with Guyana's policy in dealing with Suriname and the issue will be resolved at a diplomatic level.

Foreign Affairs Minister, Clement Rohee, will be meeting with his Surinamese counterpart on Tuesday in Trinidad to attempt to resolve the issue. The acting Surinamese Foreign Minister is Errol Alibux.

Rohee had sent a diplomatic note last Friday to his Surinamese counterpart requesting an emergency meeting within 24 hours but such a meeting did not take place. Another diplomatic note was sent on the issue and led to the scheduling of the Tuesday meeting in Trinidad.

It is not certain who will accompany Rohee to this meeting and despite repeated efforts yesterday by Stabroek News he was not available for comment on the matter.

The government has also sent CGX comfort notes as a measure of security for its investment in the area, the official stated.

The government had on May 17th responded to Suriname's concern about the drilling activity in the area via diplomatic note, denying that Suriname's sovereignty or territorial integrity had been violated.

The note also called for the reactivation of the Suriname/Guyana border commission. However, Suriname on June 2nd and 3rd proceeded to violate Guyana's air and maritime space, evicting the CGX rig from the area in the process.

The official said the Guyana Defence Force (GDF), using a Guyana Fisheries Limited patrol boat was casing the area when at 9.50 am on Friday, a Surinamese Cassel 212 aircraft intruded into Guyana's airspace on a reconnaissance mission.

However, the official explained that the patrol boat which was being used by the GDF had a limited range and needed to refuel and to renew permission for use of the vessel for patrolling.

The patrol boat left the area around midday on Friday and intercepted five Venezuelan fishing boats in Guyana's waters.

According to the official, Suriname patrol boats came into Guyana's waters under the cover of darkness (12.25 am) on Saturday and ordered the CGX rig out.

The Surinamese craft were positioned some way off, the official said, maybe suspecting that the rig had military protection. Using wireless communication the Surinamese craft threatened to use force to evict the rig if it did not leave within 12 hours. Suriname has eight new patrol boats which are fully equipped and has Cassel 212 aircraft. The local army has no patrol boat or aircraft for reconnaissance work.

Guyana has since then sent a strong protest note to Suriname on the issue, rejecting that state's "intimidatory and hostile actions against CGX".

"These hostile and intimidatory actions by the Surinamese Navy posed a serious threat to the lives of CGX personnel and property while they were conducting their legitimate activities within Guyana's Maritime boundary," the note stated.

Stabroek News understands that Canadian High Commissioner to Guyana, Jacques Crete was summoned by the Surinamese Foreign Ministry, to discuss the matter on Thursday. He returned on Saturday and this newspaper learnt that the High Commissioner was informed by the Surinamese foreign minister that this was an issue between that country and Guyana and that Paramaribo did not want to sour its bilateral relationship with the North American country.

According to reports, the Suriname foreign minister also made it clear that the country would not allow CGX to drill at the designated site.

The Guyana government granted CGX permission to explore for oil in the area described as the Corentyne block in 1998.

The firm has reportedly invested US$5M to date in its exploration activities here and is expected to expend US$7.3M in each drilling activity. The company expects to drill at two points within its concession.

Under the current drilling plan, CGX was expected to take 45 days to drill and case to the target depth of 12,500 feet.

A further five days were scheduled for testing if results from the target zone were encouraging.

The rig, rented from R&B Falcon Corporation of Houston, Texas was towed from a site in Trinidad last week and was to start drilling last Friday.

The official conceded that it is costing the firm substantial sums of money to have the rig stand idle but the firm will keep the platform west of the area it was in until the issue is resolved. And because the area is believed to be rich in hydrocarbons, the investor, the official said, is still very interested in the project.

Interestingly, the official pointed out that Suriname has granted concessions for oil exploration as recent as this year to Burlington on the border of Guyana's maritime boundary but never has it sought to award a concession in the area it is now objecting to.

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Crucial oil rig talks on today

Alibux, Snijders due

Crucial oil rig talks on today

From page one

a diplomatic note from Suriname protesting the viola-tion of its airspace.

A report in yesterday's edition of the English Language edition of the Suriname daily, *De Ware Tijd* said that the diplomatic note was sent to the Guyana government on Saturday. "The Surinamese government lodges a strong protest against the illegal entry of its territory by military aircraft and the violation of its sovereignty and territorial integrity," the note reported said.

atmosphere of the ministerial talks and have violated Suriname's trust." The note also referred to a call by the Caribbean Community (CARICOM) to which both Guyana and Suriname belong, to settle the dispute through dialogue and a constructive approach, the newspaper said.

CARICOM Secretary-General, Edwin Carrington, visited Paramaribo yesterday for talks with Surinamese President, Jules Wijdenbosch, and *De Ware Tijd* quoted him as saying that he had "come to listen." The newspaper also quoted Carrington as saying that he thought both countries [illegible]

The statement which welcomed the resort to dialogue by the two countries also encouraged them to "avoid at all cost any escalation of the present tension." It also reminded them "of their responsibility to the community for the maintenance of peace and stability to which all member states are committed and in the absence of which the well-being of the people of the community can be so easily jeopardised."

In Georgetown yesterday, Foreign Affairs Minister Rudy Insanally told reporters that he had received no official information about the dispute by President Wijdenbosch in a letter dated June [illegible] Insanally said that he had been informed about the dispute by Guyana's Ambassador to Suriname, Laleshwar Singh, who had received a copy of the letter from Suriname's Foreign Minister, Errol Snijders.

Insanally about the dispute.

Robroe told a press conference earlier this month that the mechanism in place in CARICOM for dealing with the Guyana-Suriname border issue was that of the CARICOM Heads and the secretary-general working together in an effort to contribute to a resolution of the issue. He said too that the mechanism had been invoked by Guyana when there had been undue delays in getting the Guyana-Suriname ferry project completed.

Meanwhile, [illegible] the RAF [illegible]

he appeared with Jackson, Robroe said that the Guyana government had offered to provide CDX with a military escort for and a military presence on its rig but that CDX had declined the offer.

Asked by *Stabroek News* yesterday how this would have been accomplished, an army spokesman said that the army would have done as requested provided that it was given the necessary resources with which to carry out the task. A government source told this newspaper that the army would have been able to provide whatever vessels were needed [illegible]

and beef up its presence in the area.

CDX spokesman explained to *Stabroek News* that the offer was not an option that would have been entertained by CDX which was just seeking to have the issue resolved by the two governments peacefully.

Crucial oil rig talks on today Alibux, Snijders due

Stabroek News
June 13, 2000

The Surinamese delegation to the Joint Technical Committee meeting is to arrive at 7:30 am today by a special plane. The venue of the meeting, which will conclude tomorrow, is Herdmanston House at Lamaha and Peter Rose streets, Queenstown.

The team includes Suriname's acting Prime Minister, Errol Alibux and its Foreign Minister, Errol Snijders. Suriname's Ambassador to Guyana, Dr Humphrey Hasrat, had signalled on Sunday that either one or both of the ministers would have joined the team as a show of good faith.

The other members of the Surinamese delegation are Permanent Secretary, Ministry of Foreign Affairs, Henk Alimahomed; senior officer of the Ministry of Foreign Affairs, Eudya van Frederiklust-Kamp; Idris Taus of the Ministry of Natural Resources; Lt Col Jerry Slijngaard and J. Djojomoenawi of the Ministry of Defence; E. Fitz Jim Eric Tjon Kie Sim, and Borger Breeveld, advisers; and Carla Simons, translator.

Guyana's team to today's meeting will be same as that which Foreign Minister, Clement Rohee led to Trinidad but for the inclusion of former foreign minister in the PNC administration, Rashleigh Jackson as an adviser and former GDF Coast Guard commander, Gary Best, and the exclusion of Guyana's Ambassador to Suriname, Karshanjee Arjune, who has returned to his post. The other members of the team are Donald Abrams, Rudy Collins and Elizabeth Harper of the Ministry of Foreign Affairs; Brian Sucre and Newell Dennison of the Guyana Geology and Mines Commission; Permanent Secretary, Ministry of Fisheries, Crops and Livestock, Bhowan Balkarran; Technical Adviser, Ministry of Agriculture, R. Jaggarnauth; Col Chabilall Ramsaroop of the Guyana Defence Force and Dr Barton Scotland, as consultant.

Both Alibux and Snijders were at the first meeting last week in Trinidad which was convened at Guyana's initiative to explore ways of resolving the dispute which had flowed from Suriname's forced eviction on June 3, of the oil rig owned by CGX Energy Inc from its drilling location in Guyana's territorial waters. At that meeting Suriname undertook to indicate today to Guyana its decision about the steps which would have to be taken to allow the CGX oil rig to return to its drilling location in Guyana's territorial waters unhindered.

A release from the Ministry of Foreign Affairs yesterday said that the Surinamese ministers are travelling to Guyana at Rohee's invitation. It said too that while here they would take the opportunity to pay a courtesy call on Prime Minister Sam Hinds, who is performing the duties of president and to meet Rohee.

The meeting today flows from a decision taken last week in Port-of-Spain which recognises the need to simultaneously address the ongoing dispute on the border dispute as well as put in place arrangements to end the current dispute over the oil exploration concessions including the one granted to CGX.

The meeting according to the Ministry of Foreign Affairs release will "discuss modalities for the treatment of the exploration and exploitation activities in the area of the North Eastern and North Western seaward boundaries of Guyana and Suriname respectively. It is expected that these modalities will also cover the concession granted to CGX Energy Inc."

The release said too that "Guyana remains committed to a peaceful resolution of the current situation with Suriname. It is hoped that the discussions over the two days will lead to a solution of the problem that will be acceptable to both Guyana and Suriname."

Guyana's proposals for the modalities are based on those contained in 1991 MOU, which the two countries signed to allow for oil exploration by a British oil company BHP-LASMO.

Meanwhile, a Ministry of Foreign Affairs official yesterday confirmed the receipt of a diplomatic note from Suriname protesting the violation of its airspace.

A report in yesterday's edition of the English Language edition of the Suriname daily, De Ware Tijd said that the diplomatic note was sent to the Guyana government on Saturday. "The Surinamese government lodges a strong protest against the illegal entry of its territory by military aircraft, and thus violation of its sovereignty and territorial integrity," the note reportedly said.

The note, according to De Ware Tijd, also demanded that Guyana stop the violations of Suriname's airspace and gave, as well, precise details of the days and times of the flights in question.

The De Ware Tijd report said that on Saturday, a Guyanese aircraft was sighted above the Corentyne River, Clarapolder and the airfield for the third day in a row.

The note also referred to the agreement reached in Trinidad to settle the dispute peacefully in the face of which "the aircraft were making provocative flights, even above inhabited communities in Nickerie," the newspaper said.

De Ware Tijd said that the Surinamese authorities pointed out in the note that "the Guyanese authorities had seriously jeopardized the good atmosphere of the ministerial talks and have violated Suriname's trust." The note also referred to a call by the Caribbean Community (CARICOM) to which both Guyana and Suriname belong, to settle the dispute through dialogue and a constructive approach, the newspaper said.

CARICOM Secretary-General, Edwin Carrington, visited Paramaribo yesterday for talks with Surinamese President, Jules Wijdenbosch, and De Ware Tijd quoted him as saying that he had "come to listen." The newspaper also quoted Carrington as saying that he thought both countries should do their utmost to break the impasse and if that failed, the CARICOM Heads of Government Conference could be of assistance.

Carrington told Stabroek News that a statement should have been issued by CARICOM Chairman, Prime Minister of St Kitts and Nevis Dr Denzil Douglas, but it was not issued as yesterday was a public holiday there.

However, Stabroek News received a statement by Dr Douglas from the secretariat yesterday, dated June 9, in which he said, "the community and its various institutions stand ready, within their capacity, to provide to the two parties whatever assistance they may require in the resolution of their current difficulties."

The statement which welcomed the resort to dialogue by the two countries also encouraged them to "avoid at all cost any escalation of the present tension." It also reminded them "of their responsibility to the community for the maintenance of peace and stability to which all member states are committed and in the absence of which the well-being of the people of the community can be so easily jeopardised."

Dr Douglas was advised about the dispute by President Bharrat Jagdeo in a letter dated June 3, and President Wijdenbosch was also reported to have informed the community about the dispute.

Rohee told a press conference earlier this month that the mechanism in place in CARICOM for dealing with the Guyana-Suriname border issue was that of the CARICOM Heads and the secretariat working

together in an effort to contribute to a resolution of the issue. He said too that the mechanism had been invoked by Guyana when there had been undue delays in getting the Guyana-Suriname ferry project completed.

Meanwhile, during a discussion on the NBTV Channel 9 programme, University on Nine, in which he appeared with Jackson, Rohee said that the Guyana government had offered to provide CGX with a military escort for and a military presence on its rig but that CGX had declined the offer.

Asked by Stabroek News yesterday how this would have been accomplished, an army spokesman said that the army would have done as requested provided that it was given the necessary resources with which to carry out the task. A government source told this newspaper that the army would have been able to acquire whatever vessels were needed on hire from private sources to provide the escort and beef up its presence in the area.

A CGX spokesman explained to Stabroek News that the offer was not an option that would have been entertained by CGX which was just seeking to have the issue resolved by the two governments peacefully.

THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY

Introduction, Text and Commentaries

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CONTENTS

RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

Commentaries

1. These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive international law, customary and conventional.

2. Roberto Ago, who was responsible for establishing the basic structure and orientation of the project, saw the articles as specifying . . .

> "the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility . . . [I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation."[33]

3. Given the existence of a primary rule establishing an obligation under international law for a State, and assuming that a question has arisen as to whether that State has complied with the obligation, a number of further issues of a general character arise. These include:

(a) the role of international law as distinct from the internal law of the State concerned in characterising conduct as unlawful;

(b) determining in what circumstances conduct is to be attributed to the State as a subject of international law;

(c) specifying when and for what period of time there is or has been a breach of an international obligation by a State;

(d) determining in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter;

(e) defining the circumstances in which the wrongfulness of conduct under international law may be precluded;

33 *Yearbook . . . 1970*, vol. II, p. 306, para. 66 (c).

(f) specifying the content of State responsibility, i.e. the new legal relations that arise from the commission by a State of an internationally wrongful act, in terms of cessation of the wrongful act, and reparation for any injury done;

(g) determining any procedural or substantive preconditions for one State to invoke the responsibility of another State, and the circumstances in which the right to invoke responsibility may be lost;

(h) laying down the conditions under which a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfilment of the obligations of the responsible State under these articles.

This is the province of the secondary rules of State responsibility.

4. A number of matters do not fall within the scope of State responsibility as dealt with in the present articles:

First, as already noted, it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted. The same is true, *mutatis mutandis*, for other "sources" of international obligations, such as customary international law. The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.

Secondly, the consequences dealt with in the articles are those which flow from the commission of an internationally wrongful act as such.[34] No attempt is made to deal with the consequences of a breach for the continued validity or binding effect of the primary rule (e.g. the right of an injured State to terminate or suspend a treaty for material breach, as reflected in article 60 of the Vienna Convention on the Law of Treaties). Nor do the articles cover such indirect or additional consequences as may flow from the responses of international organizations to wrongful conduct. In carrying out their functions it may be necessary for international organizations to take a position on whether a State has breached an international obligation. But even where this is so, the consequences will be those determined by or within the framework of the constituent instrument of the organization, and these fall outside the scope of the articles. This is particularly the case with action of the United Nations under the Charter, which is specifically reserved by article 59.

Thirdly, the articles deal only with the responsibility for conduct which is internationally wrongful. There may be cases where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited, and may even be expressly permitted, by

34 For the purposes of the articles, the term "internationally wrongful act" includes an omission, and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act. See commentary to article 1, para. (1).

and result was not determinative of the actual decision that there had been a breach of article 6 (1).[228]

(12) The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation *prima facie* conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down applicable to all cases.[229] Certain obligations may be breached by the mere passage of incompatible legislation.[230] Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State, the legislature itself being an organ of the State for the purposes of the attribution of responsibility.[231] In other circumstances, the enactment of legislation may not in and of itself amount to a breach,[232] especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect.[233]

228 See also *Islamic Republic of Iran v. United States of America (Cases A15 (IV) and A24)*, (1996) 32 *Iran-U.S.C.T.R.*, 115.

229 Cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, I.C.J. Reports 1988*, p. 12, at p. 30, para. 42.

230 A uniform law treaty will generally be construed as requiring immediate implementation, i.e. as embodying an obligation to make the provisions of the uniform law a part of the law of each State party: see, e.g., B. Conforti, "Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme", *Rivista di diritto internazionale privato e processuale*, vol. 24 (1988), p. 233.

231 See article 4 and commentary. For illustrations see, e. g., the findings of the European Court of Human Rights in *Norris v. Ireland, E.C.H.R., Series A, No. 142* (1988), para. 31, citing *Klass v. Germany, E.C.H.R., Series A, No. 28* (1978), at para. 33; *Marckx v. Belgium, E.C.H.R., Series A, No. 31* (1979), at para. 27; *Johnston v. Ireland, E.C.H.R., Series A, No. 112* (1986), at para. 33; *Dudgeon v. United Kingdom, E.C.H.R., Series A, No. 45* (1981), para. 41; *Modinos v. Cyprus, E.C.H.R., Series A, No. 259* (1993), at para. 24. See also Advisory Opinion OC-14/94, *International responsibility for the promulgation and enforcement of laws in violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Inter-Am.Ct.H.R., Series A, No. 14* (1994). The Inter-American Court also considered it possible to determine whether draft legislation was compatible with the provisions of human rights treaties: Advisory Opinion OC-3/83, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Inter-Am.Ct.H.R. Series A, No. 3* (1983).

232 As the International Court held in *LaGrand (Germany v. United States of America), Merits*, judgment of 27 June 2001, paras. 90-91.

233 See, e.g., the report of the W.T.O. Panel in *United States — Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, paras. 7.34-7.57.

ARTICLE 13

International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Commentary

(1) Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when the State is bound by the obligation. This is but the application in the field of State responsibility of the general principle of intertemporal law, as stated by Judge Huber in another context in the *Island of Palmas* case:

> "A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[234]

Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation ("does not constitute . . . unless . . .") is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.

(2) International tribunals have applied the principle stated in article 13 in many cases. An instructive example is provided by the decision of Umpire Bates of the United States-Great Britain Mixed Commission concerning the conduct of British authorities who had seized American vessels engaged in the slave trade and freed slaves belonging to American nationals. The incidents referred to the Commission had taken place at different times and the umpire had to determine whether, at the time each incident took place, slavery was "contrary to the law of nations". Earlier incidents, dating back to a time when the slave trade was considered lawful, amounted to a breach on the part of the British authorities of the international obligation to respect and protect the property of foreign nationals.[235] The later incidents occurred when the slave trade had been "prohibited by all civilized nations" and did not involve the responsibility of Great Britain.[236]

(3) Similar principles were applied by Arbitrator Asser in deciding whether the seizure and confiscation by Russian authorities of United States vessels engaged in seal-hunting outside of Russia's territorial waters should be considered internationally wrongful. In his

234 *R.I.A.A.*, vol. II, p. 829 (1949), at p. 845. Generally on the intertemporal law see the Resolution of the Institute of International Law, *Annuaire de l'Institut de Droit International*, vol. 56 (1975), at pp. 536-540; for the debate, ibid., pp. 339-374; for Sørensen's reports, *Annuaire de l'Institut de Droit International*, vol. 55 (1973) pp. 1-116. See further, W. Karl, "The Time Factor in the Law of State Responsibility", in M. Spinedi and B. Simma (eds.), *United Nations Codification of State Responsibility* (New York, Oceana, 1987), p. 95.

235 See *The "Enterprize"*, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, p. 703; Moore, *International Arbitrations*, vol. IV, p. 4349, at p. 4373. See also *The "Hermosa"* and *The "Créole"* cases, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, pp. 703, 704; Moore, *International Arbitrations*, vol. IV, pp. 4374, 4375.

236 See *The "Lawrence"*, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, p. 740, at p. 741; Moore, *International Arbitrations*, vol. III, p. 2824. See also *The "Volusia"*, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, p. 741.

award in *The "James Hamilton Lewis"*,[237] he observed that the question had to be settled "according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the vessel".[238] Since, under the principles in force at the time, Russia had no right to seize the American vessel, the seizure and confiscation of the vessel were unlawful acts for which Russia was required to pay compensation.[239] The same principle has consistently been applied by the European Commission and Court of Human Rights to deny claims relating to periods during which the European Convention for the Protection of Human Rights and Fundamental Freedoms was not in force for the State concerned.[240]

(4) State practice also supports the principle. A requirement that arbitrators apply the rules of international law in force at the time when the alleged wrongful acts took place is a common stipulation in arbitration agreements,[241] and undoubtedly is made by way of explicit confirmation of a generally recognized principle. International law writers who have dealt with the question recognize that the wrongfulness of an act must be established on the basis of the obligations in force at the time when the act was performed.[242]

(5) State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new permeptory norm of general international law comes into existence, as contemplated by article 64 of the Vienna Convention on the Law of Treaties, this does not entail any retrospective assumption of responsibility. Article 71 (2) provides that such a new peremptory norm "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm".

(6) Accordingly it is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application. It is however without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct

237 *R.I.A.A.*, vol. IX, p. 66 (1902).
238 Ibid., p. 69.
239 Ibid. See also the case of *The "C.H. White"*, *R.I.A.A.*, vol. IX, p. 71 (1902), at p. 74. In these cases the arbitrator was required by the arbitration agreement itself to apply the law in force at the time the acts were performed. Nevertheless, the intention of the parties was clearly to confirm the application of the general principle in the context of the arbitration agreement, not to establish an exception. See also the *S.S. "Lisman"* case, *R.I.A.A.*, vol. III, p. 1767 (1937), at p. 1771.
240 See, e.g., *X v. Germany* (Application 1151/61) (1961), *Recueil des decisions de la Commission européene des droits de l'homme*, No. 7, p. 119 and many later decisions.
241 See, e.g., the declarations exchanged between the United States and Russia for the submission to arbitration of certain disputes concerning the international responsibility of Russia for the seizure of American ships: *R.I.A.A.*, vol. IX, p. 57 (1900).
242 See e.g. P. Tavernier, *Recherche sur l'application dans le temps des actes et des règles en droit international public* (Paris, L.G.D.J., 1970), pp. 119, 135, 292; D. Bindschedler-Robert, "De la rétroactivité en droit international public", *Recueil d'études de droit international public en hommage à Paul Guggenheim* (Geneva, Faculté de droit, Institut universitaire de hautes études internationales, 1968), p. 184; M. Sørensen, "Le problème intertemporel dans l'application de la Convention européenne des droits de l'homme", *Mélanges offerts à Polys Modinos* (Paris, Pedone, 1968), p. 304; T.O. Elias, "The Doctrine of Intertemporal Law", *A.J.I.L.*, vol. 74 (1980), p. 285; R. Higgins, "Time and the Law", *I.C.L.Q.*, vol. 46 (1997), p. 501.

which was not at the time a breach of any international obligation in force for that State. In fact cases of the retrospective assumption of responsibility are rare. The *lex specialis* principle (article 55) is sufficient to deal with any such cases where it may be agreed or decided that responsibility will be assumed retrospectively for conduct which was not a breach of an international obligation at the time it was committed.[243]

(7) In international law, the principle stated in article 13 is not only a necessary but also a sufficient basis for responsibility. In other words, once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law. Thus, as the International Court said in the *Northern Cameroons* case:

> "... if during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust".[244]

Similarly, in the *Rainbow Warrior* arbitration, the Arbitral Tribunal held that, although the relevant treaty obligation had terminated with the passage of time, France's responsibility for its earlier breach remained.[245]

(8) Both aspects of the principle are implicit in the decision of the International Court in *Certain Phosphate Lands in Nauru*. Australia argued there that a State responsibility claim relating to the period of its joint administration of the Trust Territory for Nauru (1947-1968) could not be brought decades later, even if the claim had not been formally waived. The Court rejected the argument, applying a liberal standard of laches or unreasonable delay.[246] But it went on to say that:

> "it will be for the Court, in due time, to ensure that Nauru's delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law."[247]

Evidently the Court intended to apply the law in force at the time the claim arose. Indeed that position was necessarily taken by Nauru itself, since its claim was based on a breach of the Trusteeship Agreement, which terminated at the date of its accession to independence in 1968. Its claim was that the responsibility of Australia, once engaged under the law in force at a given time, continued to exist even if the primary obligation had subsequently terminated.[248]

243 As to the retroactive effect of the acknowledgement and adoption of conduct by a State, see article 11 and commentary, esp. para. (4). Such acknowledgement and adoption would not, without more, give retroactive effect to the obligations of the adopting State.
244 *Northern Cameroons, Preliminary Objections, I.C.J. Reports 1963*, p. 15, at p. 35.
245 *Rainbow Warrior (New Zealand/France), R.I.A.A.*, vol. XX, p. 217 (1990), at pp. 265-266.
246 *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240, at pp. 253-255, paras. 31-36. See article 45 (b) and commentary.
247 *I.C.J. Reports 1992*, p. 240, at p. 255, para. 36.
248 The case was settled before the Court had the opportunity to consider the merits: *I.C.J. Reports 1993*, p. 322; for the Settlement Agreement of 10 August 1993, see *U.N.T.S.*, vol. 1770, p. 379.

(9) The basic principle stated in article 13 is thus well-established. One possible qualification concerns the progressive interpretation of obligations, by a majority of the Court in the *Namibia (South West Africa)* advisory opinion.[249] But the intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The evolutionary interpretation of treaty provisions is permissible in certain cases[250] but this has nothing to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct. Nor does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to ensure that persons accused are tried without undue delay, periods of detention prior to the entry into force of that obligation may be relevant as facts, even though no compensation could be awarded in respect of the period prior to the entry into force of the obligation.[251]

249 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 16, at pp. 31-32, para. 53.

250 See, e.g., the dictum of the European Court of Human Rights in *Tyrer v. United Kingdom, E.C.H.R., Series A, No. 26* (1978), at pp. 15-16.

251 See, e.g., *Zana v. Turkey, E.C.H.R. Reports*, 1997-VII, p. 2533; J. Pauwelyn, "The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems", *B.Y.I.L.*, vol. 66 (1995), p. 415, at pp. 443-445.

LA COUR INTERNATIONALE DE JUSTICE À L'AUBE DU XXIÈME SIÈCLE

Le regard d'un juge

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3. L'utilisation des ressources naturelles et la protection de l'environnement marin

18. L'utilisation des ressources naturelles de la mer et la protection de l'environnement marin soulèvent aujourd'hui, comme hier, des difficultés entre les Etats côtiers et les Etats tiers se livrant à des activités diverses, et notamment à la pêche.

La Cour a eu à connaître de tels problèmes dans les affaires relatives à la compétence en matière de pêcheries qui opposèrent en 1971 et 1972 la Grande Bretagne et l'Allemagne à l'Islande. La Cour, compte tenu de l'état du droit de la mer existant alors, estima que la réglementation islandaise des pêches n'était pas opposable au Royaume-Uni et à l'Allemagne fédérale et que l'Islande n'avait pu exclure de la zone des 50 milles qu'elle avait constituée les navires des deux Etats ou y entraver leurs activités. Elle ajouta que les trois gouvernements avaient l'obligation de négocier de façon à aboutir à une solution équitable de leurs divergences concernant leurs droits de pêche respectifs. Comme la Cour l'avait d'ailleurs pressenti, cette décision se trouva cependant dépassée assez rapidement par l'évolution du droit de la mer permettant de créer des zones économiques exclusives allant jusqu'à 200 milles des côtes.

La Cour a par ailleurs été saisie en 1995 par l'Espagne d'un différend qui l'opposait au Canada à la suite de l'arraisonnement par un patrouilleur canadien d'un bateau de pêche battant pavillon espagnol. Cet arraisonnement avait été effectué en haute mer en vertu d'une loi canadienne sur la protection des pêches côtières que l'Espagne estimait contraire au droit international. Toutefois, dans cette affaire de la *Compétence en matière de pêcheries*, la Cour, par arrêt du 4 décembre 1998, s'est finalement déclarée incompétente dans la mesure où l'objet du différend était couvert par une réserve à la déclaration de juridiction obligatoire du Canada[32] concernant précisément les pêches dans l'Atlantique du nord-ouest.

CONCLUSION

19. Vingt-trois affaires sont actuellement inscrites au rôle de la Cour internationale de Justice. Trois d'entre elles comportent des aspects relatifs au droit de la mer.

L'affaire de la *Frontière terrestre et maritime entre le Cameroun et le Nigeria* porte, elle, sur le tracé de la frontière entre les deux pays, en particulier sur la presqu'île de Bakassi et dans le golfe du Guinée. La Cour a déjà rendu un arrêt sur les exceptions préliminaires en 1998 et a affirmé sa compétence en l'espèce. Elle a en outre admis l'intervention de la Guinée

[32] Affaire de la *Compétence en matière de pêcheries (Espagne c. Canada)*, arrêt sur la compétence du 4 décembre 1998, *C.I.J. Recueil 1998*, p. 468, par. 89.

Equatoriale pour ce qui est de la délimitation maritime à opérer. Le jugement au fond devrait être rendu au cours de l'année 2002.

La Cour a par ailleurs été saisie d'un différend concernant la *Délimitation maritime entre le Honduras et le Nicaragua dans la mer des Caraïbes*. Dans sa requête, le Nicaragua indique notamment que, depuis des décennies, sa frontière maritime avec le Honduras dans les Caraïbes n'a pas été déterminée, tandis que la position du Honduras serait qu'il existe bel et bien une telle frontière[33]. Selon le Nicaragua, «la position adoptée par le Honduras... a donné lieu à des affrontements répétés ainsi qu'à la saisie de part et d'autre de navires des deux pays dans la zone de la frontière en général et dans ses environs». D'après le demandeur, la Cour devrait donc déterminer le tracé d'une frontière maritime unique entre les mers territoriales, les plateaux continentaux et les zones économiques exclusives relevant respectivement du Nicaragua et du Honduras, «conformément aux principes équitables et aux circonstances pertinentes que le droit international général reconnaît comme s'appliquant à une délimitation de cet ordre»[34].

Enfin, la Cour a été saisie en décembre 2001 d'une deuxième requête du Nicaragua dirigée contre la Colombie. Celle-ci porte sur les titres de deux Etats sur diverses îles et cayes des Caraïbes occidentales et sur la délimitation maritime à opérer dans cette région.

Ces exemples montrent que la Cour continue à jouer un rôle important dans l'application et le développement du droit de la mer. Ce rôle, à mon sentiment, demeurera essentiel en particulier en matière de délimitation des espaces maritimes. Plusieurs centaines de frontières maritimes restent à fixer ou à compléter de par le monde et, si la plupart seront déterminées par négociation entre les Etats, il restera des cas difficiles où le recours au juge s'imposera.

Certes, la Cour internationale de Justice ne dispose pas en ce domaine d'un monopole. Les Etats ont parfois eu recours également à l'arbitrage, comme dans les affaires du canal de Beagle, de la mer d'Iroise, de Saint-Pierre-et-Miquelon ou des îles Hanish et continueront sans doute à le faire. Par ailleurs, un nouveau Tribunal international sur le droit de la mer a été crée par la convention de Montego Bay et a commencé à fonctionner à Hambourg.

Mais ce Tribunal qui n'a pour l'heure été saisi d'aucune affaire en ce domaine a une compétence limitée aux océans. Or un grand nombre de différends interétatiques porte à la fois sur la souveraineté en ce qui concerne certains territoires terrestres (et notamment des îles) et sur la délimitation maritime. Ces différends ne sauraient relever de la compétence du Tribunal et demeureront sans aucun doute dans l'avenir du ressort de la Cour.

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[33] Affaire de la *Délimitation maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, Requête introductive d'instance, 8 décembre 1999, p. 7.
[34] *Ibid.*, pp. 3 et 5.

Celle-ci demeure enfin la seule juridiction à compétence universelle et générale susceptible de traiter de tous les litiges touchant à la mer et aux activités exercées en mer. Elle est de ce fait la mieux à même de juger de ces litiges en prenant en considération les intérêts de tous les Etats en cause. En effet, pour reprendre la formule de René-Jean Dupuy, «La mer a toujours été battue par deux vents contraires ; le vent du large, qui souffle vers la terre, est celui de la liberté ; le vent de la terre vers le large est porteur des souverainetés». Le juge doit demeurer attentif à ces vents contraires. Je pense que la Cour l'a été dans le passé et suis persuadé qu'elle le restera dans l'avenir.

Oceans Management in the 21st Century: Institutional Frameworks and Responses

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Chapter 7

THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE IN MARITIME BOUNDARY DELIMITATION

Robin R. Churchill

INTRODUCTION

The provisions of the United Nations Convention on the Law of the Sea (LOS Convention)[1] on coastal State maritime zones, now reflected in customary international law, mean that the following kinds of maritime boundaries between neighboring States are required: territorial sea boundaries between adjacent States and States whose coasts are opposite each other and less than 24 nautical miles apart; continental shelf and exclusive economic zone (EEZ)/exclusive fishery zone (EFZ) boundaries (where an EEZ/EFZ is claimed) between adjacent States and States whose coasts are opposite each other and less than 400 nautical miles apart; and a continental shelf boundary between adjacent States and opposite States whose coasts are more than 400 nautical miles apart where the States concerned are able to claim a continental shelf beyond 200 nautical miles in accordance with article 76 of the LOS Convention.[2] So far around 150 such boundaries have been determined, which is less than half the number of potential boundaries.

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[1] 1833 UNTS 396.

[2] The LOS Convention also permits States to claim a 24 nautical mile contiguous zone. This is subsumed within the EEZ/EFZ where a State claims an EEZ/EFZ as well as a contiguous zone, which is normally, though not invariably, the situation, so that no separate boundary for the contiguous zone is required. While a contiguous zone boundary might be required where no EEZ/EFZ was claimed, some writers take the view that because the contiguous zone is not

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The determination of maritime boundaries is in the first place a matter for the States concerned to seek to settle through negotiations. Only where those States cannot agree, is it appropriate to consider reference to a third party for assistance in establishing the boundary. This is so both as a matter of law and of policy. As far as the law is concerned, this is implicit in the provisions of the 1958 Convention on the Territorial Sea and the Contiguous Zone[3] and the LOS Convention dealing with territorial sea boundaries,[4] and stated more or less explicitly in the 1958 Convention on the Continental Shelf[5] and the LOS Convention as far as continental shelf and EEZ boundaries are concerned.[6] It is also the position as far as customary international law is concerned according to the International Court of Justice (ICJ).[7] As for policy considerations, it is clear that States that need to establish a boundary between their overlapping maritime zones would prefer if at all possible to agree a boundary between themselves. This allows them (if so desired) to make compromises that may be at variance with the strict law; to bring factors into the negotiations (such as political and economic considerations) that an arbitral or judicial body is precluded from considering and/or factors that have nothing directly to do with a boundary; and to include elements other than a simple boundary line in a boundary settlement (such as a zone of joint fisheries or oil exploitation). Entrusting the task of determining a boundary to a third party has a certain element of uncertainty and unpredictability, and means that the States concerned are no longer in control of the situation.[8] Where it is desired to involve a third party to assist in

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an area of sovereignty or jurisdiction there is no reason why contiguous zones should not overlap and there is therefore no need for a boundary: see e.g. M. Hayashi "Japan New Law of the Sea Legislation" (1997) 12 IJMCL 570-580 at 572. The LOS Convention contains no provisions dealing with the delimitation of contiguous zone boundaries between neighboring States.

3 516 UNTS 205.

4 Art 12 of the 1958 Convention and art 15 of the LOS Convention.

5 499 UNTS 311.

6 Art 6(1) and (2) of the 1958 Convention and arts 74(1) and (2) and 83(1) and (2) of the LOS Convention.

7 See, for example, the *Gulf of Maine* case [1984] ICJ Reports 246 at 299-300, par 112.

8 See further D. Anderson "Negotiation and Dispute Settlement" in M. Evans (ed) *Remedies in International Law: The Institutional Dilemma* (1998) 111-121, especially at 112 and 116; B.H. Oxman "Political, Strategic and Historical Considerations" in J.I. Charney and L.M. Alexander (eds) *International Maritime Boundaries* (1993), Vol I, 3-40 at 11-15.

the determination of a maritime boundary, various forms of such assistance are available. In terms of diplomatic, non-binding means, third party assistance includes mediation, inquiries and conciliation. Where it is desired that a third party should give a legally binding decision based on rules of international law, the possibilities include arbitration of the traditional kind, the ICJ, and the machinery provided under the dispute settlement provisions of Part XV of the LOS Convention (essentially the International Tribunal for the Law of the Sea (ITLOS) and arbitration in accordance with Annex VII of the Convention).

The focus of this chapter is on one of these means of third party dispute settlement, the ICJ. The chapter will consider what role the ICJ has played so far in helping to establish maritime boundaries and the possible role that it might play in the future in resolving unsettled maritime boundaries.[9]

A SURVEY OF MARITIME BOUNDARY-MAKING UP TO 2002 AND THE ROLE OF THE ICJ

A number of writers have made estimates of the total number of maritime boundaries required worldwide. The most recent estimate of which the writer is aware is that by Smith, who calculates the figure as 414.[10] Since Smith wrote, the Soviet Union has collapsed, Yugoslavia disintegrated, the two Germanies and the two Yemens have each united, and Eritrea and East Timor have become independent, leading to a net increase of about 15 in the number of boundaries required. For the purposes of this chapter an estimate of 430 required boundaries will be used.

Of the 430 or so boundaries required, about 150 had by 2002 been successfully negotiated directly between the States concerned and included in an agreement. While the actual or planned exploitation of marine resources has been the major

[9] In doing so, this chapter is concerned only with the broad role of the ICJ in settling maritime boundaries. It therefore does not deal with the finer points of the tasks of the Court, such as propriety of establishing a single maritime boundary, the use of maps etc. (for a discussion of such issues, see K.H. Kaikobad "Problems of Adjudication and Arbitration in Maritime Boundary Disputes" in (2002) 1 *The Law and Practice of International Courts and Tribunals* 257-341), nor does it expound or analyze the Court's case law on the substantive law of maritime boundary delimitation in any detail.

[10] R.W. Smith "Establishing Maritime Boundaries: the United States Experience" in C. Grundy-Warr (ed) *International Boundaries and Boundary Conflict Resolution* (1990) 376-385 at 376. For earlier estimates, see G.H. Blake "World Maritime Boundary Delimitation: The State of Play" in G. Blake (ed) *Maritime Boundaries and Ocean Resources* (1987) 1 at 3.

factor stimulating the determination of such boundaries, there are a number of other reasons that have led States to conclude boundary agreements also in areas where there is no immediate prospect of resource exploitation.[11]

Some 17 maritime boundaries have been determined wholly or partly as a result of the intervention of a third party. As far as diplomatic, non-binding, means are concerned, there has so far been one instance of mediation (by the Pope in relation to the maritime boundary between Argentina and Chile) and one instance of conciliation (in respect of the continental shelf boundary between Iceland and the Norwegian island of Jan Mayen).[12] Turning now to binding third-party settlement, seven boundaries have been determined as a result of arbitration.[13] Coming into a unique category of its own is the maritime boundary between Iraq and Kuwait determined in 1993 by the Iraq-Kuwait Boundary Demarcation Commission.[14] Finally, seven boundaries have been determined by, or with the assistance of, the ICJ. In the *North Sea Continental Shelf* cases[15] the Court was asked to indicate the principles governing the delimitation of the continental shelf between the Federal Republic of Germany and Denmark and between the Federal Republic and the Netherlands, but not to determine the actual boundary. On the basis of the Court's judgment the two sets of parties then concluded bilateral boundary agreements.[16]

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[11] Oxman, note 8, at 3-10.

[12] Report of the Conciliation Commission, 1981 (1981) 20 ILM 797.

[13] Grisbadarna arbitration (Norway/Sweden), 1909 XI RIAA 147; Beagle Channel arbitration (Argentina/Chile), 1977 52 ILR 93; Anglo/French Continental Shelf Arbitration, 1977 (1979) 18 ILM 397; Arbitral Award between Guinea-Bissau and Senegal, 1989 83 ILR 1; Guinea/Guinea-Bissau Maritime Boundary Arbitration, 1985 (1986) 25 ILM 251; Delimitation of Maritime Areas between Canada and France Arbitration, 1992 (1992) 31 ILM 1145; and Eritrea/Yemen Maritime Delimitation Arbitration, 1999 119 ILR 417. There is also the Dubai/Sharjah Border Arbitration, 1981 91 ILR 543, but this relates to internal borders within the United Arab Emirates, rather than international boundaries.

[14] Final Report on the Demarcation of the International Boundary between the Republic of Iraq and the State of Kuwait by the United Nations Iraq-Kuwait Boundary Demarcation Commission, 1993 (1993) 32 ILM 1425.

[15] [1969] ICJ Reports 3.

[16] Agreement between the Federal Republic of Germany and Denmark concerning the Delimitation of the Continental Shelf under the North Sea, 1971, and Treaty between the Netherlands and the Federal Republic of Germany concerning the Delimitation of the Continental Shelf under the North Sea, 1971 (1971)10 ILM 603 and 607.

In the *Tunisia/Libya Continental Shelf*[17] and the *Libya/Malta Continental Shelf* cases[18] the Court was asked to carry out a similar exercise to that in the *North Sea Continental Shelf* cases but in addition was requested to indicate the way in which the boundary line might be drawn. The *Gulf of Maine* case involved the Court determining the single maritime boundary between the continental shelves and EFZs of Canada and the USA in the Gulf of Maine. Fifth, in the *Jan Mayen* case[19] the Court determined separate (but ultimately coinciding) boundaries between the continental shelves and EFZs of the Danish island of Greenland and the Norwegian island of Jan Mayen. Finally, in its two most recent maritime boundary judgments the Court determined the single maritime boundary between the maritime zones of Bahrain and Qatar,[20] and of Cameroon and Nigeria.[21] There are also two cases currently pending before the Court, both brought by unilateral application by Nicaragua, in which it asks the Court to determine the single maritime boundary between its maritime zones and those of Honduras[22] and Colombia.[23] It should also be noted that two other maritime boundary cases were referred to the Court, but in neither did the Court give a judgment on the merits. In the *Aegean Sea Continental Shelf* case[24] the Court found that it lacked jurisdiction to determine a continental shelf boundary between Greece and Turkey, while the *Guinea-Bissau/Senegal* case, in which the Court had been asked to determine that part of the maritime boundary left unresolved following the Arbitral Award of 1989, was withdrawn before the Court could give a judgment as the parties had reached

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[17] *Case concerning the Continental Shelf (Tunisia/Libya)* [1982] ICJ Reports 18.

[18] *Case concerning the Continental Shelf (Libya/Malta)* [1985] ICJ Reports 13.

[19] *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Reports 38.

[20] *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* [2001] ICJ Reports (not yet reported).

[21] *Case concerning Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* [2002] ICJ Reports (not yet reported).

[22] The case was brought in December 1999 (see ICJ Press Communiqué 99/52 of 8 December 1999).

[23] The case was brought in December 2001 (see ICJ Press Communiqué 2001/34 of 6 December 2001).

[24] [1978] ICJ Reports 3.

agreement on a boundary settlement.[25] In the *Land, Island and Maritime Frontier Dispute* case the ICJ declined to delimit maritime boundaries either within or outside the Gulf of Fonseca, despite a request by one of the parties (Honduras) for it to do so, on the ground that it had lacked jurisdiction under the special agreement referring the case to the Court.[26]

In most of the cases decided by the ICJ the applicable law has been customary international law, rather than the 1958 Continental Shelf Convention or the LOS Convention. In articulating customary international law in these cases, the Court has not generally followed the orthodox approach to ascertaining whether an alleged custom exists, which is to see whether there is sufficient uniformity and consistency of State practice, coupled with the necessary opinio iuris. Instead, the Court has simply declared what customary law is.[27] Furthermore, the Court has not been consistent in its view of the law over time. Within the confines of this chapter only a limited number of examples can be given. First, the Court has not been consistent in its regard of what constitute relevant circumstances. While in the *North Sea Continental Shelf* cases the list of relevant circumstances was seen as almost open-ended,[28] in later cases, both for the continental shelf (at least within 200 nautical miles of land) and the single maritime boundary, the circumstances that are seen as relevant are primarily those that are geographical in character. As far as the relationship of article 6 of the Continental Shelf Convention to custom is concerned, while in the *North Sea Continental Shelf* cases they are seen as quite different, in the *Jan Mayen* case they are virtually equated.[29] Related to this is the Court's treatment of equidistance. In the *North Sea Continental Shelf* cases the Court sees equidistance as having virtually no role to play (at least in the case of adjacent States); but in the most recent cases (*Qatar/Bahrain* and *Cameroon/Nigeria*) equidistance was used as the starting point in determining the boundary between adjacent coasts and then was only slightly modified in the former case

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[25] *Case concerning the Maritime Delimitation between Guinea-Bissau and Senegal.* The case was referred to the Court in March 1991 and was withdrawn in November 1995 (see ICJ Communiqué No. 95/36 of 14 November 1995).

[26] *Case concerning the Land, Island and Maritime Frontier Dispute* [1992] ICJ Reports 351 at 582-586.

[27] See further P. Weil *The Law of Maritime Delimitation – Reflections* (1989) at 6-8, 149-156.

[28] Note 15, at 50.

[29] R.R. Churchill "The Greenland-Jan Mayen Case and its Significance for the International Law of Maritime Boundary Delimitation" (1994) 9 IJMCL 1 at 14-16.

and not at all in the latter case. In the *Cameroon/Nigeria* case the Court seems to have made an almost 180 degree turn on the question of equidistance from the *North Sea Continental Shelf* cases. Other points on which the Court has not been consistent are its treatment of proportionality[30] and the relevance of geomorphological features[31] and fisheries.[32]

THE ROLE OF THE ICJ IN FUTURE BOUNDARY-MAKING

As mentioned earlier, about 165 of the total of some 430 potential maritime boundaries have so far been determined, either by means of an agreement between the States concerned or by some form of third party settlement. What are the prospects of the ICJ being involved in the determination of the remaining 265 or so maritime boundaries that are still required?

As mentioned in the Introduction, both as a matter of law and of policy, States will first seek to determine unresolved maritime boundaries through negotiations. Only where negotiations are unsuccessful, will they consider resort to a third party. But even at the stage of negotiations the ICJ is not without some relevance. Where States are engaged in negotiations on a maritime boundary, they will, of course, deploy any legal arguments that will support their negotiating position. It is likely that such arguments will include reliance on any relevant case law of the ICJ.[33] It is not possible to verify this assumption empirically because the records of maritime boundary negotiations invariably remain confidential. There are, however, traces of the Court's influence in the outputs of such negotiations. Some boundary agreements refer to equitable principles[34] and others to the fact that the

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[30] On this question, see Y. Tanaka "Reflections on the Concept of Proportionality in the Law of Maritime Delimitation" (2001) 16 IJMCL 443-463.

[31] R.R. Churchill and A.V. Lowe *The Law of the Sea* 3rd (1999) 190.

[32] Churchill, note 29, at 21-22.

[33] Oxman, note 8 at 15-17; P. Weil "Geographic Considerations in Maritime Delimitation" in Charney and Alexander, note 8, 115-130 at 120-121; and K. Highet "The Use of Geophysical Factors in the Delimitation of Maritime Boundaries" in ibid 163-202 at 165.

[34] E.g. the Treaty on the Delimitation of Marine and Submarine Areas between the Republic of Venezuela and the Dominican Republic of 3 March 1979 (Charney and Alexander, note 8, 588); Agreement concerning the Delimitation of the Continental Shelf between the Republic of Turkey and the USSR of 23 June 1978 (ibid, 1698).

agreement represents an equitable solution,[35] in both cases reflecting the fundamental norm of boundary delimitation propounded by the Court in every case so far that delimitation is to be effected in accordance with equitable principles and taking account of all the relevant circumstances in order to achieve an equitable result. It has also been suggested that since the *North Sea Continental Shelf* cases there has been less use of equidistance in negotiated maritime boundaries, the assumption being that this development is at least in part the result of those cases.[36] Nevertheless, States are not, of course, bound by the case law emanating from the ICJ and may frequently disregard it, agreeing on a boundary that may be very different from that which the ICJ might have determined.[37]

For States that are parties to the LOS Convention, articles 74 and 83 provide that in the case of the delimitation of EEZ and continental shelf boundaries where "no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV."[38] Not surprisingly, the Convention gives no indication of what is meant by a "reasonable period of time." Because of the policy considerations outlined in the Introduction as to why States are likely to prefer negotiations to third party settlement, States may be expected to take a generous view of what is meant by a "reasonable period" of time. Only where one of the States is anxious for the dispute to be speedily resolved, is it likely that early recourse will be made to the dispute settlement procedures of Part XV.

Under section 1 of Part XV consensual means of dispute settlement are to be used first, before possible resort is had to compulsory dispute settlement under section 2. Article 279, at the head of section 1, provides that States shall settle any dispute "by peaceful means [...] and to this end, shall seek a solution by the means indicated in Article 33, paragraph 1 of the [UN] Charter." These means are, of course, also available to the 24 or so coastal States currently not parties to the LOS Convention. These consensual means of dispute settlement include both non-

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[35] E.g. the Agreement between the Government of the French Republic and the Government of the Kingdom of Belgium on the Delimitation of the Continental Shelf of 8 October 1990 (19 LOSB 29).

[36] L. Legault and B. Hankey "Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation" in Charney and Alexander, note 8, 203-242 at 205.

[37] Weil, note 33 at 121.

[38] Note that there is no equivalent of this provision in article 15 of the LOS Convention, concerning the delimitation of territorial sea boundaries.

binding, diplomatic means and adjudication (arbitration or the ICJ). What factors are likely to influence a decision to resort to adjudication, and, where such a decision is taken, what factors are likely to govern the choice between arbitration and use of the ICJ?

States are likely to utilize third-party diplomatic means (mediation and conciliation) if they want to retain control over the dispute and avoid the expense, delay and binding nature of adjudication. Diplomatic means may also be particularly helpful if the parties want a more creative solution to the boundary dispute in terms of, for example, a zone of joint development or some other means of sharing revenue from the resources of the disputed boundary area.[39] States are only likely to refer an unresolved maritime boundary dispute to adjudication if they are prepared to accept the expense of litigation,[40] the possible uncertainty and unpredictability of such settlement,[41] and the fact that the outcome might be less favorable to them than what might eventually have been achieved through continued attempts at negotiation. States are more likely to refer an unresolved boundary to adjudication if there is a perceived need for the boundary to be determined reasonably quickly so that exploitation of natural resources in the boundary area can proceed in an orderly manner. On the other hand, if a solution is needed urgently, adjudication may not be appropriate as litigation before an arbitral tribunal or the ICJ will inevitably take some time. There may be a reluctance to seek adjudication if the boundary situation is complicated by disputes over territory (such as the ownership of islands or disagreement over the location of the terminus of the land frontier from which the maritime boundary should commence) because one or both of the parties may be unwilling for the adjudicative body to deal with territorial issues. There may also be reluctance to seek adjudication because of the presence of the possible

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[39] For a fuller discussion of the use of diplomatic means to resolve maritime boundary disputes, see T.W. Wälde "Methods for Settling Boundary Disputes: Escaping from the Fetters of Zero-Sum Outcomes" (2003) 1 *Oil, Gas and Energy Law Intelligence* <www.gasandoil.com/ogel/articles/article_37.htm> (30 May 2003).

[40] In the *Gulf of Maine* case Canada and the USA spent about US$ 7 million each (in early 1980s prices) in preparing and presenting their positions to the Court (see D.R. Robinson et al "Some Perspectives on Adjudicating before the World Court in the Gulf of Maine Case" (1985) 79 AJIL 578-597 at 588).

[41] Such uncertainty and unpredictability result from the fact that the customary international law of maritime boundary delimitation laid down by the ICJ and arbitral tribunals is stated at a very high level of generality and abstraction. Furthermore, as pointed out earlier, the case law of the ICJ (and arbitral tribunals) has not been consistent over time.

maritime zones of third States in parts of the boundary area (as is the case, for example, with many of the unresolved boundaries in the Mediterranean and Caribbean), and, if the case were referred to the ICJ, a third State might seek to intervene (as has happened in practice on some occasions), thus complicating and prolonging proceedings before the Court. Such a situation might prevent determination of other than a rather small portion of the potential boundary.[42] Finally, some States are opposed to adjudication either for ideological reasons (e.g. Communist States in the past, some developing States today) or because of their traditional legal cultures (e.g. some East Asian States). For some or all of the above reasons, it is therefore often the case that States are prepared to negotiate for very long periods of time without considering recourse to a third party.

If States are prepared to resort to adjudication, then the choice lies between the ICJ and arbitration (and, for States parties to the LOS Convention, the ITLOS[43]). States are more likely to opt for arbitration if they set a high premium on choice of judges (although use of Chambers of the ICJ offers the parties some choice of judges); choice of procedure; and choice of applicable law. Arbitration will also be preferred if speed is of the essence: an arbitral tribunal will normally take about two years to decide a case (although to this must be added the time taken to negotiate an agreement establishing all the arrangements for an arbitral tribunal), whereas the ICJ (with currently a very full docket) would be likely to take about five years, and longer if jurisdictional or other preliminary issues were raised. In the past there was some hostility towards the ICJ from developing States because it was often seen as a conservative body, dominated by judges from developed States. Although such hostility has largely evaporated, it appears still to persist in a few quarters.[44] On the other hand, the ICJ does offer some advantages over arbitration. It is cheaper (there are no fees to be paid towards the Court's running costs, whereas such costs must be borne entirely by the parties in the case of an arbitration) and

[42] For examples of this phenomenon, see the *Libya/Malta Continental Shelf* and *Cameroon/Nigeria* cases.

[43] Although the primary jurisdiction of the ITLOS is under the compulsory means of dispute settlement in section 2 of Part XV, the ITLOS can be used by agreement between the parties: see art 280 and Annex VI, art 21.

[44] An example of this can been seen in the declarations on choice of forum under section 2 of Part XV of the LOS Convention where three developing States – Algeria, Cuba and Guinea-Bissau – have explicitly rejected cases being heard by the ICJ, something that can be achieved equally well by simply not selecting the ICJ as a forum, rather than by rejecting it explicitly.

developing States may obtain money from the UN Trust Fund to finance other costs involved in bringing a case, whereas the Fund is not available for arbitration. Furthermore, it is possible to obtain provisional measures in the case of the ICJ[45] but not normally in the case of arbitration: this possibility could be important if, for example, one of the parties was proposing to go ahead unilaterally with seabed mineral exploitation or large-scale fishing in the disputed boundary area. As far as application of the substantive law of maritime boundary delimitation is concerned, there is little to choose between arbitration and the ICJ, as arbitral tribunals have closely followed the developing case law of the ICJ in this area. As regards the choice between the ICJ and the ITLOS, both courts are comparable in terms of cost, the possibility of using chambers and the availability of provisional measures. The ITLOS, with currently an almost empty docket, would be quicker, but in comparison with the ICJ may be perceived at present by a number of States as being an untried and inexperienced court.

Where consensual means of dispute settlement do not succeed in resolving the boundary, there are possibilities for one party, without the consent of the other party, to refer the disputed boundary to a third party for adjudication (compulsory dispute settlement). In the case of States parties to the LOS Convention, section 2 of Part XV allows either party to refer the dispute to the court or tribunal having jurisdiction under that section.[46] Parties to the LOS Convention may choose one or more of the ICJ, the ITLOS or arbitration as the forum for hearing the case. Where the preferred forum of each of the parties to the case coincides, that will be the forum for hearing the case. Where their choices do not coincide or they have not exercised their option to choose a forum, the case will be heard by an arbitral tribunal constituted in accordance with Annex VII.[47] In practice relatively few States parties to the LOS Convention have exercised their option to choose a preferred forum. Of those that have, 20 have selected the ICJ as their preferred forum or one of their preferred forums. It is also possible for States, if they so wish, to exclude maritime boundary disputes from the scope of compulsory dispute settlement under section 2 of Part XV.[48] Again few States – only 19 – have so far made

[45] For an example of an attempt (albeit unsuccessful) to obtain provisional measures in a maritime boundary case, see the *Aegean Sea Continental Shelf (Interim Measures)* case [1976] ICJ Reports 3.

[46] Art 286.

[47] Art 287.

[48] Art 298(1)(a).

declarations excepting maritime boundary disputes wholly or partially from compulsory dispute settlement. However, such declarations may be made at any time, so that it is quite possible that the number may increase significantly in the future. Where such a declaration has been made, the parties must refer the dispute to compulsory conciliation.[49]

So far the ICJ has not been used under section 2 of Part XV to settle a maritime boundary dispute (nor has any other forum under that section). The current prospects of the ICJ being so used are slight because only 14 coastal States have so far chosen the ICJ as their preferred forum and not excluded maritime boundary disputes, and of these only five are neighboring States without fully resolved boundaries.[50] Of course, this picture may change if more States choose the ICJ as their preferred forum. Should this happen, one further limitation may be mentioned. Under Part XV any body dealing with a dispute is limited to disputes concerning the interpretation or application of the LOS Convention. Thus, if the maritime boundary at issue was to be determined with reference to territory that was in dispute (as was the case in the *Cameroon/Nigeria* and *Qatar/Bahrain* cases, for example), the body concerned would probably not be able to determine the boundary because it would lack jurisdiction to settle the territorial issue.[51]

Two other points may also be made about the use of section 2 of Part XV by parties to the LOS Convention in the context of continental shelf and EEZ boundary delimitation. As already pointed out, articles 74 and 83 provide that where the parties cannot reach agreement on a boundary within a reasonable period of time, recourse is to be had to the dispute settlement procedures of Part XV. The consensual procedures of section 1 of Part XV include negotiation. Would it be possible for one party involved in negotiations on a maritime boundary that had been continuing for some time and that appeared to be making no progress, to argue that the negotiations conducted thus far represented both the first "reasonable period of time" phase and an attempted use of section 1 of Part XV, so that that party could then go straight to the compulsory means of dispute settlement under section 2 of

[49] Ibid.

[50] The boundaries concerned are as follows: Belgium-UK; Germany-Netherlands; Germany-UK; Netherlands-UK; Norway-Sweden; and Norway-UK. In each case there is a continental shelf boundary, but no EEZ/EFZ boundary, although in practice the existing continental shelf boundary serves as the EEZ/EFZ boundary.

[51] This limitation is set out explicitly in the LOS Convention in relation to compulsory conciliation under art 298, but, for the reasons given, it must apply generally.

Part XV? Or would the two phases have to be clearly distinguished in some way? The Convention does not seem to give a clear answer on this point.

The second point about the procedural provisions of articles 74 and 83 and Part XV concerns some observations of the ICJ in the *Cameroon/Nigeria* case. Nigeria challenged the jurisdiction of the Court in this case on various grounds. One of these was that no attempt had been made by the parties to reach agreement, as required by articles 74 and 83, before the case was referred to the Court by Cameroon. To this the Court responded, rather laconically, that it had "not been seized on the basis of Article 36, paragraph 1, of the Statute, and, in pursuance of it, in accordance with Part XV" of the LOS Convention, but on the basis of declarations made under article 36(2) of the Statute "which declarations do not contain any condition relating to prior negotiations to be conducted within a reasonable time period."[52] This appears to suggest that a party to the LOS Convention can ignore the provisions of articles 74 and 83 relating to the prior necessity of negotiations for at least a reasonable period of time and proceed straight to the use of article 36(2) of the Statute if it and the other party have made declarations thereunder.[53] In other words, the ICJ appears to be suggesting that the provisions of the Statute prevail over the provisions of the LOS Convention. This seems contrary to the principles of both lex posterior and lex specialis. Nor does it seem to fall within article 311(2) of the Convention, which provides that the LOS Convention does not alter the rights and obligations of States parties which arise from other agreements compatible with the Convention and which do not affect the enjoyment by other States parties of their rights or the performance of their obligations under the Convention. Recourse to article 36(2) would affect the right of a State under articles 74 and 83 to seek to have a boundary determined by agreement, before recourse to any third party. In any case, Nigeria's argument was essentially irrelevant (a fact that the Court appears to fail to recognize) because at the time Cameroon referred the case to the Court the LOS Convention was not in force, and so Cameroon and Nigeria were not bound by articles 74 and 83.

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[52] *Case concerning Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections)* [1998] ICJ Reports 275 at 321-322.

[53] Note that art 282 (which is discussed below) is not applicable at this, pre-Part XV, stage. This provision, which allows art 36(2) of the ICJ's Statute to be used in preference to Part XV, only becomes applicable once the parties have moved on from negotiations under par 1 of arts 74 and 83 to dispute settlement under Part XV.

Compulsory dispute settlement under Part XV is obviously possible only for parties to the LOS Convention. For States not party to the Convention there are two possibilities for utilizing compulsory dispute settlement procedures to resolve a disputed maritime boundary, whether *inter se* or with a State party to the Convention. The first is where there is a compromissory clause in an existing treaty between the parties which permits reference of disputes to the ICJ or arbitration. There are several hundred such clauses in bilateral and multilateral agreements and a number of these could certainly be of potential use in maritime boundary cases. Indeed, use of such clauses has already been attempted. It was one of the grounds of jurisdiction relied on (albeit unsuccessfully) by Greece in the *Aegean Sea Continental Shelf* case[54] and is one of the grounds relied on by Nicaragua in its current cases against Colombia and Honduras.[55] The second possibility for compulsory dispute settlement is where both parties to the dispute have made declarations under article 36(2) of the Court's Statute (the so-called optional clause). This was the basis of the Court's jurisdiction in the *Jan Mayen* and *Cameroon/Nigeria* cases (and would also have been in the *Guinea-Bissau/Senegal* case had it not been discontinued) and is the alternative ground of jurisdiction relied on by Nicaragua in the two cases just mentioned. It is also possible that the optional clause will form the basis of jurisdiction in future cases before the ICJ. Currently some 53 coastal States (including parties to the LOS Convention) have made declarations under article 36(2), although nine of these declarations exclude maritime boundary disputes from the scope of their declaration,[56] thus leaving 44 potentially applicable declarations. These 44 States include a number of pairs of neighboring States with unresolved maritime boundaries.

The relationship of compromissory clauses and the optional clause to Part XV needs to be considered. Article 282 of the LOS Convention provides that if the parties to a dispute concerning the LOS 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

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[54] The treaty on which Greece sought unsuccessfully to rely was the General Act for the Pacific Settlement of Disputes of 26 September 1928 (93 LNTS 343).

[55] The treaty on which Nicaragua seeks to rely in each case is the American Treaty on Pacific Settlement of 30 April 1948 (30 UNTS 55).

[56] Australia, Honduras, India, Malta, Nigeria, Norway, Philippines, Poland and Surinam. Nigeria's reservation was added after Cameroon brought the case against it.

this Part, unless the parties to the dispute otherwise agree." Clearly compromissory clauses fall within the scope of Article 282. What about the optional clause system? Obviously the system entails a binding decision, but does article 36(2), or two declarations made thereunder, fall within the notion of a "general [...] agreement or otherwise"? The Virginia commentary, one of the very few works to offer a view on this question, regards the optional clause as falling within article 282, explaining that the phrase "or otherwise" was added specifically to cover declarations made under article 36(2).[57] The effect of article 282 is that where there is a dispute between two States parties to the LOS Convention over an unresolved maritime boundary and both States are parties to the optional clause system or a treaty containing a relevant compromissory clause, either party could (if it so wished) resort to compulsory dispute settlement under one or other of those procedures in preference to utilizing either the consensual means of dispute settlement of section 1 of Part XV or the compulsory means of section 2.[58] In the case of the latter this presents a way of circumventing the maritime boundary exception in section 2 of Part XV.[59] A number of declarations under the optional clause exclude disputes that the parties have agreed to settle by other procedures. Such other procedures would seem to include the dispute settlement machinery of Part XV of the LOS Convention. But the latter also includes article 282, which ousts the application of the rest of Part XV, giving primacy to article 36(2) declarations. There thus seems scope for complete circularity.

Although, as indicated, there are a number of ways in which unresolved maritime boundary disputes can be referred unilaterally by one party to compulsory dispute settlement, States may from a policy perspective have reservations about resorting to such procedures (including the ICJ). Such resort is likely to be perceived by the other party as an unfriendly act and may possibly affect the general climate of relations between the States concerned. In addition, unilateral applications to the ICJ, whether under a compromissory clause or the optional clause, are

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[57] S. Rosenne and L.B. Sohn (eds) *United Nations Convention on the Law of the Sea: A Commentary* (1989) Vol V at 26-27.

[58] On the relationship between compromissory clauses and art 282, see the orders for provisional measures by the ITLOS in the *Southern Bluefin Tuna* and *MOX Plant* cases, (1999) 38 ILM 1624, pars 53-55 and (2002) 41 ILM 405, pars 48-53, respectively.

[59] R.R. Churchill "Dispute Settlement in the Law of the Sea – the Context of the International Tribunal for the Law of the Sea and Alternatives to It" in Evans, note 8, 85-109 at 99-100.

in general frequently challenged on jurisdictional grounds:[60] as regards maritime boundary cases such challenges were made in both the *Aegean Sea Continental Shelf* and *Cameroon/Nigeria* cases. Such challenges invariably considerably extend both the length and cost of proceedings. Finally, unilateral applications may increase the unpredictability of outcome of the case because the parties have less control over what the ICJ may decide to do than where they refer a dispute to it by means of a special agreement. This is illustrated by the *Jan Mayen* case. Here Denmark, the applicant, asked the Court to draw a single maritime boundary between the maritime zones of Greenland and Jan Mayen. On the other hand, Norway, the respondent, asked the Court merely to declare "the basis of delimitation," leaving it to the parties to negotiate the precise line of delimitation. The Court rejected both parties' requests, and decided that it should draw separate boundaries for each of the fishery zones and continental shelves, and held that even if these boundary lines should happen to coincide (as in fact they did), that was not the same as a single maritime boundary.[61] All the factors just outlined mean that even where a party to a maritime boundary dispute would be prepared for the ICJ to resolve the dispute and could refer the dispute to it unilaterally, it may nevertheless decline to do so, preferring reference (if at all) by means of a special agreement.

CONCLUSIONS

This book addresses the question of how the institutional and procedural framework of the LOS Convention contributes to its effective implementation and as such is conducive to the prevention and settlement of disputes. The aim of this chapter was to examine the Convention's institutional and procedural framework as it relates to maritime boundary delimitation, with specific reference to the role of the ICJ.

There are still some 265 potential maritime boundaries to be resolved, although the determination of quite a number of these will not be a pressing practical issue for many years and a few may never require resolution. The LOS Convention provides that the determination of such boundaries is in the first place a matter for negotiation between the States concerned, and, for policy reasons that have been

[60] This has also been the case so far with unilateral resort to arbitration under section 2 of Part XV. No unilateral applications have yet been made to the ITLOS.

[61] [1993] ICJ Reports 38 at 56-57 and 77-78.

explained earlier, negotiations will remain States' preferred option. Nevertheless, where States cannot agree a boundary through negotiations, the Convention, in Part XV, offers a diverse choice of dispute settlement procedures and institutions, including use of the ICJ. To what extent such procedures and institutions, and the ICJ in particular, will be used for maritime boundary delimitation is impossible to predict. Various factors that relate to the likelihood of such use can be identified, such as the number of declarations excepting maritime boundary disputes from the scope of Part XV and the number of declarations selecting the ICJ as the preferred forum (low on both counts), as well as the fact that a considerable number of boundaries still to be determined involve non-parties to the Convention. What militates against trying to make predictions from such factors is the fact that in international law litigation is traditionally exceptional and sporadic. On the basis of the operation of the dispute settlement provisions of the LOS Convention so far, there is no reason to suppose that this traditional position will change.