

TESTING THE BOUNDARIES

A Research Report for the
Maritime Dispute Resolution Project



U.S.-ASIA LAW INSTITUTE
NEW YORK UNIVERSITY SCHOOL OF LAW

Maritime Dispute Resolution Project

Testing the Boundaries

Research Report

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A research project of the
U.S.-Asia Law Institute

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** The views expressed herein are those of the author, and do not necessarily reflect the views of the United States Navy or any agency of the United States government.

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Project Background

The U.S.-Asia Law Institute at New York University School of Law is engaged in a study of international cases involving maritime disputes that have employed institutional dispute resolution mechanisms to seek resolution. The purpose of this project is to develop an understanding of the circumstances in which international maritime disputes are successfully resolved through adjudication, arbitration, mediation, or conciliation. This first round of research focused on cases involving adjudication and arbitration. Future rounds will examine a broader set of approaches to institutional dispute resolution to ensure the study's insights reflect the full range of options available to states seeking support to resolve maritime disputes. An additional purpose of the project will be to develop conclusions that offer insights to governments in Asia about the many long-standing maritime disputes in the region.

The inquiry began as an independent research effort to explore the circumstances in which international institutional dispute resolution (IIDR) processes successfully resolve maritime disputes. In the first stage of the project, experts in the field of international law of the sea from Japan, South Korea, Taiwan, and the United States were invited to prepare a case study based on the public record of a completed case. Cases were selected from various regions around the world in which two states submitted their unresolved territorial or maritime disputes to one of several IIDR mechanisms. Each expert researched and produced a case study that summarized the facts and legal issues of that dispute, the manner in which the court or tribunal resolved those issues, and the relevant lessons that might apply to unresolved maritime disputes and to aid governments in East Asia to resolve their disputes by peaceful means in accordance with applicable international law.

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In February 2019, the U.S.-Asia Law Institute brought many of these scholars together for a workshop at New York University to share the results of their research and to identify trends in this body of international jurisprudence and the subsequent choices of states involved in the dispute resolution processes. During this evaluation process, additional practitioners and scholars were invited to participate and offered invaluable insights.

The cases considered in this first stage and their case study authors were as follows:

Craig Allen	<i>University of Washington, Seattle, Washington</i> Romania v. Ukraine (Black Sea Delimitation)
Peter Dutton	<i>Naval War College, Newport, Rhode Island</i> Eritrea v. Yemen (Phases I and II)
Julian Ku	<i>Hofstra University, Hempstead, New York</i> Columbia v. Nicaragua
Oliver Lewis	<i>U.S. Department of State, Washington D.C.</i> Chile v. Peru
Christopher Mirasola	<i>U.S. Department of Defense, Office of General Counsel, Washington D.C.</i> Ghana v. Ivory Coast
Kentaro Nishimoto	<i>Toboku University, Sendai, Japan</i> Canada v. United States (Gulf of Maine)
Jonathan Odom	<i>Asia-Pacific Center for Security Studies, Honolulu, Hawaii</i> Croatia v. Slovenia
Yann-Huei Song	<i>Academia Sinica, Taipei, Taiwan</i> Malaysia v. Singapore
Seokwoo Lee	<i>Inha University, Incheon, South Korea</i> Bangladesh v. Myanmar

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Additional scholars and practitioners who participated in the analytical process include:

José Alvarez	<i>New York University School of Law, U.S.-Asia Law Institute</i>
Eli Blood-Patterson	<i>New York University School of Law, U.S.-Asia Law Institute</i>
Jerome A. Cohen	<i>New York University School of Law, U.S.-Asia Law Institute</i>
Andrew B. Loewenstein	<i>Foley Hoag, LLP</i>
Bernard Oxman	<i>University of Miami School of Law</i>
Ren Ito	<i>New York University School of Law, U.S.-Asia Law Institute</i>
Ken Sakaguchi	<i>Ministry of Foreign Affairs, Japan</i>

Research Analysis

The following is a summary of specific issues addressed in the case study analysis and workshop discussions. The summary reflects the views and understandings of the report authors about those discussions and may not reflect the views or understandings of every workshop participant. Further, the summary presented below is not meant to represent the views of any agency of the U.S. government or of any other government.

Overall, it is clear that states from around the world, in every region, have elected to submit their territorial-maritime disputes to IIDR mechanisms. Additionally, states employ the full range of IIDR mechanisms available. These include either full or special panels of the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), ad hoc arbitral tribunals, and conciliation commissions. In each case, the parties carefully selected the IIDM mechanism that was best suited for the nature of their particular dispute, and sought to tailor the scope of the IIDR forum's jurisdiction and the standards to be applied. Their decisions reflect the careful advice of lawyers and legal advisors

with special expertise in international dispute resolution and in the intricacies of international law related to maritime claims.

Venue Selection

One question every state must confront before it agrees to take a dispute through an international institutional dispute resolution process is: which among the venues will be most favorable to its interests? Because the decision must be jointly determined between the states, rather than necessarily maximizing their interests, states must optimize their choice of venue in light of the interests of the opposing party.

In some cases, this optimization process occurs outside of the context of an immediate dispute. In the Colombia-Nicaragua case, for instance, the ICJ was pre-determined to be the venue as the result of a separate regional treaty, the Pact of Bogota, which the parties each ratified decades before litigation of this specific set of issues was contemplated. Similarly, in the Chile-Peru case, based on the dispute settlement provisions in the Pact of Bogota to which both states were party, Peru initiated its case against Chile before the ICJ to resolve the dispute.

More commonly, states agree to submit their dispute to a specific venue as a result of a bilateral treaty signed in the course of negotiations, which often take place over the course of many years. In the Romania-Ukraine Black Sea delimitation case the parties adjudicated their case before the ICJ as a result of one such bilateral treaty. In that case, negotiations began after 1991, when Ukraine gained independence. The first issue that needed to be settled was the question of sovereignty over Serpent Island, which was resolved in Ukraine's favor in 1997. That same year the two states entered into a treaty, known as the *Additional Agreement to the Treaty on the Relations of Good Neighbourliness and Co-operation Between Romania and Ukraine*, which provided that if negotiations could not resolve

the boundary dispute the issue was to be brought to the ICJ. Romania originated the case in 2004.

In the Eritrea-Yemen case, the parties originally manifested the intent to take their dispute to the ICJ. However, through a process of negotiation and confidence-building the two finally agreed to refer the case to ad hoc arbitration in an apparent attempt to maximize control over the composition of the panel, the process itself, and the parameters of the decision. In the Bangladesh-Myanmar case, Bangladesh initially filed suit for arbitration under the U.N. Convention on the Law of the Sea (UNCLOS) Annex VII, but the two parties could not agree on a panel of arbitrators, so the parties shifted their approach and agreed to submit their dispute to the ITLOS. This was the first case of maritime delimitation heard by ITLOS and its decision largely followed the well-settled approaches taken by the ICJ, although in some respects the ITLOS judges went further in interpreting the provisions of UNCLOS than the ICJ has done. This expansive application of ITLOS authority included the first-ever judicial delimitation of a portion of the extended continental shelf. Reportedly, the judges of ITLOS felt some pressure to assert their role as the pre-eminent judicial body for dealing with all ocean law issues. Thus, while they prevented fragmentation in the law by adhering closely to existing approaches to the law developed by the ICJ where well-established precedents exist, they did not hesitate to carve out a role in new areas where they could. Nonetheless, the Bangladesh-Myanmar case stands as one of the more successful examples of dispute resolution and there is no indication either party regretted the choice of venue.

It is possible that ITLOS will become a more popular venue in the future given the range of options it affords the parties. In the Côte d'Ivoire-Ghana case, for instance, the Attorney General and Minister for Justice of Ghana transmitted a letter to the President of the ITLOS instituting arbitral proceedings under UNCLOS Annex VII. Consultations between the Tribunal President and

representatives of both countries, however, yielded an agreement to constitute a special chamber of the Tribunal pursuant to Article 15(2) of the Tribunal's Statute instead of arbitration. Article 15(2) of the Tribunal's statute states that "The Tribunal shall form a chamber for dealing with a particular dispute submitted to it if the parties so request. The composition of such a chamber shall be determined by the Tribunal with the approval of the parties." As designated by the statute, the Special Chamber was composed of five judges.

A second important aspect of venue selection in the Côte d'Ivoire-Ghana case was that it afforded Côte d'Ivoire the opportunity to request prescription of provisional measures in accordance with UNCLOS Art. 290(1). This Article provides that any tribunal duly constituted under the Compulsory Dispute Resolution provisions of UNCLOS "may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties of the dispute or to prevent serious harm to the maritime environment, pending the final decision." The ITLOS Special Chamber issued provisional measures to ensure that neither party's resource interests or other interests were prejudiced during the course of litigation. Provisional measures may be an especially useful tool in cases where one party might suffer harm during the period in which litigation is pending. Accordingly, the availability of provisional measures may be an important consideration in venue selection.

Canada and the United States also opted to have a chamber hear their case regarding delimitation in the Gulf of Maine. In that case the parties requested a Chamber of the ICJ to decide "the course of the single maritime boundary that divides the continental shelf and fisheries zones of Canada and the United States." Leading up to their venue choice and initiation of the case, the United States had claimed rights to the continental shelf by proclamation in September 1945 and the two states first began negotiations over their respective continental shelf limits in 1970. In anticipation of

the establishment of their fisheries zones, further negotiations were conducted in 1975-76. In 1977, special negotiators were appointed to negotiate a comprehensive agreement concerning maritime boundary delimitation that encompassed both fisheries and hydrocarbon resource arrangements. As a result of the negotiations, the parties agreed on a set of two interlinked treaties in 1979. One was a fisheries agreement to establish a coordinated fisheries management and allocation mechanism between the United States and Canada for fisheries on the Atlantic coast. In the other they agreed to submit the dispute on the maritime boundary to binding dispute settlement. The fisheries agreement did not survive domestic politics in the United States, but the agreement to submit the dispute to binding dispute settlement was ratified. The parties agreed to submit the dispute to a Chamber of the ICJ rather than to the full Court since a “Chamber procedure had the advantage of utilizing the institutional significance and established facilities of the International Court of Justice, while seeking convenience and innovation in presenting the case to a limited number of specially qualified jurists.” The parties requested specific judges to serve in the Chamber and the ICJ elected members of the Chamber according to the request.

In the Croatia-Slovenia Case, the parties initially engaged in bilateral negotiations and then mediation, each of which failed to resolve their disputes. Croatia then proposed international adjudication and, after further negotiations, the two parties agreed in principle to refer their dispute to the ICJ. By the early 2000’s, when the two states were moving toward adjudicated resolution of their disputes, there existed a well-established track record of ICJ maritime delimitation cases. The parties would have been able to make a reasonably fair assessment of how the case might be resolved, even given the special circumstances and peculiarities of their case. Perhaps for this reason, after further consideration of the likely outcome of an adjudicated case, Slovenia changed its attitude and instead successfully advocated resolving the issues through

arbitration with the specific purpose of creating circumstances in which the instructions to the tribunal could be prepared to accommodate a broader set of principles than a straightforward application of existing jurisprudence might normally allow. This turned out to be very important to the final result. After performing a fairly straightforward delimitation, the tribunal took note of its charge to apply equity and the “principle of good neighborly relations” and required Croatia to apply high seas freedoms in and above its territorial sea to allow access to Slovenian waters and air space for all ships and aircraft of all states. This creative outcome, which will be discussed further below, was enabled by the parties’ ultimate resort to carefully structured arbitration.

No matter what forum the parties ultimately choose, it should be pointed out that in nearly all cases there is a lengthy period of time, often during which multiple rounds of negotiations have failed to result in a resolution, before the parties are ready to acknowledge that their best option is some form of an adjudicated outcome. In the Malaysia-Singapore Pedra Branca case, for instance, the parties were unable to resolve the dispute concerning sovereignty over three small features during a series of bilateral talks that lasted a decade. The two countries finally signed a Special Agreement to request the ICJ to settle the sovereignty disputes between them.

In summary, while states will seek to maximize their leverage and protection for their interests through their venue choices, because their opponents seek the same goal, often an approach that achieves mutual optimization must be negotiated. The wide range of adjudicated or arbitrated dispute resolution options allows parties to weigh the degree to which they value predictability, flexibility, and creativity in their choice of venue. But reaching final bilateral agreement on a mutually optimal venue often takes a decade or more unless some form of prearranged agreement about dispute resolution is in place, such as the Treaty of Bogota.

Sovereignty Disputes

There is a consistent line of cases in which courts and tribunals have applied the doctrine of *effectivités*, or effective occupation, to disputes over offshore islands. The doctrine holds that a state may acquire sovereignty over territory by taking acts manifesting a display of sovereign authority over it. A related doctrine—that of the critical date, which is the date on which the dispute between the parties “crystalizes,” will be discussed in more detail in a separate section below. It is sufficient at this point to note that the critical date doctrine is backward looking. Once a dispute crystalizes, neither party’s further acts to manifest a display of sovereignty are legally relevant to the determination of sovereignty.

One case in which the doctrine of *effectivités* was applied in a straightforward manner is the Eritrea-Yemen case. The arbitral panel found that since neither party could prove historic or ancient title to the offshore islands in dispute, it was appropriate to inquire into the parties’ “evidence of use, presence, display of governmental authority and other ways of showing possession (*effectivités*) which may gradually consolidate into title.” It articulated the test of *effectivités* as the provision of evidence of “continuous and peaceful display of the functions of state within a given region” and allowed that the test may be modified when “dealing with difficult or inhospitable territory.” It based its view of gradual consolidation of title on three categories of evidence—the government’s physical activity and conduct in relation to the territory; international reputation as to ownership of the territory; and the opinions and attitudes of other governments. The difference between the second and third categories of evidence is the scope of opinions taken into account. Whereas the third category focused specifically on the views of other governments, the second took into account such international actors as oil companies, tourism companies, scientific researchers, etc. Furthermore, since the evidence of *effectivités* able to be produced by either party was slight, the tribunal took into account geographical factors when making an award. It found there

is in international law a principle of natural or geophysical unity of small offshore features, but rejected it as an absolute principle. In this case, it was applied in Eritrea's favor but only to small, closely co-located, uninhabited rocks. The arbitrators rejected Yemen's argument that the principle should be applied to the entire group of islands in dispute. The tribunal reaffirmed that only evidence of effective occupation and control would determine ownership over most features.

Similarly, in the Colombia-Nicaragua dispute the ICJ grounded its decision firmly on the principle of *effectivités* as regards the sovereignty aspects of the disputes. The case involved two different questions regarding sovereignty. The first had to do with ownership of many diverse islands scattered over a large expanse of water, some large and inhabited, others small and either uninhabited or uninhabitable. The second sovereignty issue had to do with the circumstances under which maritime features can be claimed as sovereign territory. The tribunal first applied provisions of a treaty that it said resolved some of the disputes, rejected the doctrine of *uti possidetis juris* as the basis for resolution, and then applied its traditional doctrine of *effectivités* or effective occupation to make a determination as to the rest.

In the Malaysia-Singapore case, Singapore argued that Pedra Branca, a small island more than 20 nautical miles from the closest Singaporean territory, but within the territorial sea of the closest Malaysian and Indonesian territory, was terra nullius or had become terra nullius and therefore susceptible of acquisition, first by Britain and then passed to Singapore. Malaysia's position was that Pedra Branca was never at any time terra nullius, since "from time immemorial" the feature "was under the sovereignty of the Sultanate of Johor." Thus, Malaysia argued, since ancient and original title to the island had been acquired by the Sultanate of Johor, the title reverted to the Sultanate upon Malaysia's independence from the British. After reviewing the relevant documents provided by Malaysia as evidence in support of its

claim, the Court observed that from at least the seventeenth century until early in the nineteenth century, it was acknowledged that the territorial and maritime domain of the Kingdom of Johor comprised a considerable portion of the Malay Peninsula, straddled the Straits of Singapore, and therefore included islands and islets in the area of the Straits, including Pedra Branca. Citing the Eastern Greenland case, the ICJ found that prior to the 19th century the Sultan of Johor's authority over Pedra Branca had never been challenged by any other power in the region and accordingly, ancient original title over Pedra Branca and the islands and islets within the Singapore Straits did indeed belong to the Sultanate. Title remained with the Sultanate as of the time the British took interest in the feature in 1844 for the purpose of building a lighthouse there.

In assessing whether sovereignty subsequently passed from the Sultanate of Johor to the United Kingdom, the ICJ noted that “sovereignty over territory might under certain circumstances pass as a result of the failure of the state which has sovereignty to respond to conduct *à titre de souverain* of the other state or to concrete manifestations of the display of territorial sovereignty by the other state. A lack of response by the original sovereign may well amount to acquiescence, which the ICJ held “is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent.” However, “any passing of sovereignty over territory on the basis of the conduct of the Parties . . . must be manifested clearly and without any doubt by that conduct and the relevant facts.” After reviewing the relevant records provided by the Parties, the Court was not able to draw any conclusions about sovereignty based on the construction of a lighthouse on Pedra Branca in 1850 and commissioning of it in 1851.

The Court then moved to examine the conduct of the Parties in the period 1852 to 1980. Of particular importance in the Court's analysis of the relevant facts was a letter dated September 21, 1953,

in which the Acting State Secretary of Johor replied to the Colonial Secretary of Singapore that “the Johor Government [did] not claim ownership of Pedra Branca.” The Court therefore found that as of 1953, it was Johor’s position that it did not have sovereignty over the feature. The Court then analyzed subsequent acts of administration and control by Singapore and Malaysia between 1953 and 1980 and found that, on balance, through Singapore’s actions *à titre de souverain* and Malaysia’s failure to respond, sovereignty over Pedra Branca had passed to Singapore. With respect to Middle Rocks, the Court observed that they were not similarly contested at any time and accordingly ancient or original title remained with Malaysia as the successor to the Sultanate of Johor. The Court determined that it could not make a determination of sovereignty over South Ledge because it is a low-tide elevation and sovereignty over it must be based on a determination among the parties as to the territorial sea boundary between them.

In summary, these three cases provide good representative examples of the state of the law as reflected in many ICJ cases and other tribunals before which questions of sovereignty over islands are presented. The consistently applied test of sovereignty is the occupation or effective administration and control over a feature, with due consideration given to the remoteness or lack of habitability of the feature in question. For the acts to have relevance they must be the acts of a sovereign unless, perhaps, the doctrine of ancient title is involved. In such cases, the acts requiring sovereign acquisition of the island may be somewhat broader and based on the understanding of the relationship between a sovereign and territory that applied in the region and at the time ancient title to the island was said to be acquired.

It is also important to note that the ICJ has rejected the idea that possession alone can be the basis for sovereignty. The doctrine of *uti possidetis juris* was rejected by the ICJ in the Colombia-Nicaragua case, which can be seen as a desire for the law of sovereignty to

avoid rewarding a state's use of force to control or administer disputed territory. This policy is reinforced by the doctrine of the critical date as discussed above. This doctrine makes any subsequent acts by one of the disputing states to consolidate its own administration and control over the feature at the expense of the opposing state legally irrelevant.

One little-discussed area of the law involves involuntary transfer of sovereign title over an island. In the *Pedra Branca* case the court made clear a sovereign may lose title to an island if another sovereign occupies it and the original sovereign fails to object in such a way that the occupying sovereign may take the original sovereign's lack of response as acquiescence. There are few cases that address this issue directly. Courts and other tribunals seem reluctant to find a shift of sovereignty through occupation and passive acquiescence. They prefer to see some clear indication of a relinquishment of sovereignty, as the court found in the letter from the Acting State Secretary of Johor to the Colonial Secretary of Singapore. But the principle remains in international law that a state may lose sovereignty over a maritime feature by acquiescence to its proscription.

Further questions regarding sovereignty over islands are addressed separately below, including more information concerning what constitutes maritime territory that may be brought under a state's sovereign control, and what is the effect of the critical date on a court's sovereignty determination.

Sovereignty and Low-Tide Elevations

The law surrounding the question of when, if ever, a state may claim sovereignty over a low-tide elevation that sits beyond the territorial sea of any other feature was slow to clarify. In the 1998 Eritrea-Yemen case, in its ruling in regard to two groups of islands near the Eritrean coast the tribunal awarded sovereignty to Eritrea over "islands, islets, rocks, *and low tide elevations*" forming each island

group. The tribunal left unclear whether all of the low tide elevations that are part of each island group fall within twelve nautical miles of a rock or island comprising a part of the group and sovereignty accrues as a result of their presence in a territorial sea, or whether in its view sovereignty over a low tide elevation could accrue independently. Accordingly, some argue that the ruling supports the right of a state to claim sovereignty over a low-tide elevation regardless of its location inside or beyond an existing territorial sea.

Ten years later, in 2008, the ICJ was reluctant in the Malaysia-Singapore case to hold specifically that a low-tide elevation beyond the territorial sea can be the subject of sovereign appropriation. In fact the ICJ did inch closer to the position that such a low-tide elevation cannot be appropriated. In that case, both parties claimed sovereignty over three features—Pedra Branca, the Middle Rocks, and South Ledge. The ICJ determined South Ledge to be a low tide elevation situated within the overlapping territorial sea entitlements generated by Pedra Branca and the Middle Rocks. Malaysia asserted it had sovereignty over South Ledge, citing the Qatar-Bahrain case’s statement that “a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself.” Singapore argued simply that South Ledge is a low-tide elevation, and, as such, cannot be subject to separate appropriation, citing both the Qatar-Bahrain case and the Nicaragua-Honduras case. In sorting the issue out, the ICJ repeated its own ruling in the Qatar-Bahrain case, stating:

International treaty law is silent on the question whether low-tide elevations can be considered to be ‘territory’. Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations . . . The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that islands constitute *terra firma* and are

subject to the rules and principles of territorial acquisition; the difference in effects which the law of the sea attributes to islands and low tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory.

Accordingly, the Court declined to award sovereignty over South Ledge to either party outright but left it to the parties to determine in the process of negotiating their maritime boundary whether the feature lies within Singapore's or Malaysia's territorial sea. The implication of the Court's decision set the stage for further development of the law only four years later in the 2012 Colombia-Nicaragua case.

In that case the ICJ held clearly that a low-tide elevation beyond the territorial sea of a state cannot be the subject of sovereign appropriation. The ICJ clarified that to form the basis of a lawful sovereignty claim, some portion of a maritime feature must be naturally formed land above water at high tide. Specifically, it held:

It is well established in international law that islands, however small, are capable of appropriation. By contrast, low-tide elevations cannot be appropriated, although a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself, and low-tide elevations within the territorial sea may be taken into account for the purpose of measuring the breadth of the territorial sea.

The Court's holding follows closely the terms of UNCLOS articles 13 and 121. Article 13 provides:

A low-tide elevation is a naturally formed area of land, which is surrounded by and above water at low tide but submerged at

high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

Furthermore, article 121 provides: “An island is a naturally formed area of land, surrounded by water, which is above water at high tide.” The article goes on to provide that only an island is entitled to any form of maritime zone associated with sovereign territory. This aspect of the text of UNCLOS was relied upon heavily by the ICJ in the Columbia-Nicaragua case in its holding that only one small coral feature of Quitasueño was subject to sovereign appropriation.

The ICJ’s decision in the Colombia-Nicaragua case was followed closely in the Philippines-China South China Sea arbitration in its decision regarding Mischief Reef. Accordingly, international law regarding the question of sovereignty and low tide elevations is now clear. This clarity should assist states in organizing their policies and approaches to maritime delimitation in areas where low-tide elevations are present.

Effect of the Critical Date

As noted above, the concept of the critical date in regard to sovereignty disputes holds that when a dispute between the parties ‘crystallizes,’ further acts of *effectivité* are irrelevant to a judicial determination of sovereignty. However, exactly how a dispute crystallizes is more a matter of the unique circumstances of a case than a clearly articulated legal test. Generally, the doctrine applies when the parties become aware of the existence of a competitor for sovereignty, although a state cannot escape the application or effect of the doctrine by claiming it does not recognize the existence of a dispute. The purpose of the doctrine is to encourage restraint and

to avoid potentially escalatory provocations, including the use of force, pending the resolution of the question of sovereignty.

This doctrine nearly always addresses disputes over territory. But in two cases considered by this study it arose in maritime areas, demonstrating that the doctrine may also be applicable in certain types of maritime delimitation cases. Any potential broadening of the application of the concept appears to be quite limited, however, since the maritime cases in which it was applied relate to disputes in which sovereign waters—that is, internal waters or the territorial sea—are wrapped up in the dispute over territory. The critical date concept is related directly to issues of sovereignty and therefore it has not been applied to cases involving delimitation of non-sovereign maritime zones (i.e., the exclusive economic zone (EEZ) and continental shelf).

In the Croatia-Slovenia arbitration the critical date issue arose in one of the unusual circumstances related to a maritime boundary. The tribunal was able to dispose of the issue easily, since the parties mutually agreed the critical date of their border-boundary dispute to be June 25, 1991 (i.e., the date when the two states declared independence). This reduced the number of unilateral acts that were relevant to the arbitration and discouraged either side from engaging in additional unilateral acts during the arbitration process. Although the doctrine of critical date is usually associated with disputes over territorial sovereignty, in this case the concept was nonetheless relevant since the tribunal was called upon to issue a decision delimiting the boundary between the two states' internal waters in the Bay of Piran. The fully sovereign status of these waters, the tribunal determined, might have made the doctrine relevant to a delimitation determination had not the parties agreed to negate the issue.

In the Malaysia-Singapore case, the issue of sovereignty over the three maritime features located in the Straits of Singapore was presented to the ICJ. The evidence demonstrated that in December

1979, Malaysia published a map, in which it claimed Pedra Branca (which Malaysians know as Pulau Batu Puteh) to be lying within Malaysia's territorial sea. In February 1980, Singapore responded to the publication of the map by sending a diplomatic note to Malaysia, rejecting Malaysia's claim. Both Parties agreed that the dispute over Pedra Branca crystallized on February 14, 1980 when they formally opposed each other's claims to the maritime feature. However, the ICJ also found that the dispute over Middle Rocks and South Ledge crystallized much later, in February 1993, when Singapore revealed during negotiations that it claimed Middle Rocks and South Ledge as features naturally appertaining to Pedra Branca. The Court observed that Singapore's 1980 diplomatic note refers explicitly only to Pedra Branca and Singapore provided no contemporaneous evidence prior to their 1993 meetings that it intended to include Middle Rocks and South Ledge within the scope of its sovereignty claim. Accordingly, the Court concluded that the dispute as to sovereignty over Middle Rocks and South Ledge crystallized at the time Malaysia was first put on unambiguous notice, when negotiations commenced.

While Middle Rocks was unambiguously territory, South Ledge was determined to be a low tide elevation. That the Court left the door open to the application of the concept of the critical date to the low tide elevation suggests that, although the low-tide elevations may not be subject to sovereign appropriation, as discussed above, nonetheless a state's assertion of occupation or effective control over a low tide elevation in an area of overlapping territorial seas may have an impact on the ultimate delimitation of the territorial sea between them. This issue may be relevant to delimitation of territorial seas among the tightly packed features in some areas of the Spratly Islands that are occupied by different states.

Maritime Boundary Disputes

In determining a maritime boundary, courts and tribunals have consistently begun by determining the relevant coast lines—that is

the specific coast lines of the parties the projections of which generate the overlapping area to be delimited. Once the relevant area to be delimited is determined, a three-part test, developed by the ICJ and followed consistently by other tribunals, is applied to effect the delimitation. First, the tribunal establishes a geometrically objective provisional delimitation line which for adjacent coasts is based on equidistance and for opposing coasts is based on a median line between the coasts. Second, the court considers any relevant circumstances that require an adjustment of the provisional delimitation line in order to achieve an equitable result. Third, the court verifies that the line as it stands at the conclusion of the second step does not lead to an inequitable result by reason of any marked disproportion between the ratio of the respective states' coastal lengths and the ratio of the maritime area assigned to each state.

One of the very earliest cases involving the development of this three-step method was the Canada-U.S., Gulf of Maine Case. In that case, Canada argued in favor of an equidistance line, adjusted to reduce the effect of islands and protruding features on the Massachusetts coast. This would have allocated more than one-third of the Georges Bank to Canada. It justified its claim based on adjacency, proximity, the general configuration of the coasts, and the continuity of the continental shelf in the area. It also argued that the interests of coastal States in fisheries resources constitute relevant circumstances, and that economic dependence associated with established fishing patterns must be given special weight.

The position of the United States was that the boundary should follow the Northeast Channel, which separates Georges Bank from Browns Bank, placing Georges Bank entirely within United States jurisdiction. Alternatively, the United States argued for a line "perpendicular to the general direction of the coast adjusted to take account of the relevant circumstances in the area," which it claimed would respect the geographical relationship between the coasts of the parties and the relevant maritime areas, facilitate conservation

and management of the marine living resources in the area by recognizing the “natural boundary” for fish stocks, minimize the potential for disputes, and take into account relevant circumstances such as the irregularities in the coast line and the historic and present interests of United States.

The ICJ Chamber rejected each party’s approach and, since it was called upon to determine a single maritime boundary for both the continental shelf and the water column, emphasized that the applicable criteria must be equally suitable to the division of both. Further, it expressed preferences for criteria derived from geography and equal division of overlapping maritime projections subject to adjustment through the application of auxiliary criteria such as disparities in coastal lengths, avoiding cut-offs, and giving partial effect to islands. In applying its method the Chamber held that the regional geography required it to delimit waters of two types, since the coast lines in the northeastern sector of the Gulf were regarded as adjacent and the coasts further out in the Gulf are opposing. The Chamber adjusted its line based on the differences in the lengths of the two states’ coastlines and to account for the disproportionate effect of Seal Island on the maritime boundary. This resulted in a corrected median line reflecting a 1.32 to 1 ratio in favor of the United States. The Chamber then considered whether its delimitation was “intrinsicly equitable” in light of all the circumstances of the case. In this regard, the segment that traversed Georges Bank, which was understood to be the “real subject of the dispute,” was given special attention. However, the Chamber did not consider fishing concerns to be relevant to delimitation. Instead, the Chamber indicated the possibility that such considerations might be taken into account where a tribunal’s initial delimitation was “likely to entail catastrophic repercussions.”

In the Black Sea delimitation case, in constructing the line, the ICJ applied the three-stage approach used in past cases. In this case, similar to the Gulf of Maine case, because of the particular geography of the Black Sea in the area delimited, the Court again

employed both the adjacent and the opposite coast equidistance approaches. Thus, the boundary line constructed by the Court began at the intersection of outer limits of the two states' previously agreed upon territorial sea. The boundary was then drawn to follow the outer limit of the territorial sea extending from Serpent Island. The next segments were constructed using the equidistant method measured from the *adjacent* mainland coasts of Romania and Ukraine. The following two points employed the equidistant method measured from the *opposite* coasts of Romania's mainland and Ukraine's Crimean Peninsula. The Court terminated its delimitation at the point at which the rights of third states (Bulgaria and Turkey) may be affected. Of note, the Court stated that "legitimate security considerations" might affect its delimitation decision, though it found no such relevant circumstance calling for adjustment of the delimitation line in this case.

In the Colombia-Nicaragua case, which involved maritime delimitation between the parties in circumstances that were complicated by the presence of numerous offshore islands disputed between them, the test was followed with some modification. Rather than adjusting a provisional median line, the ICJ enclaved three of the islands awarded to Colombia and provided a resource zone for Nicaragua in the waters beyond the features' territorial seas. These three cases are representative of the process that the ICJ follows in delimitation cases.

In the Bangladesh-Myanmar case, the ITLOS followed the ICJ's jurisprudence and applied the three-step delimitation process. It framed the dispute geographically, defining what it considered to be relevant coastlines and the resulting maritime area for delimitation. The Tribunal then traced the evolution of jurisprudence on ocean boundary making and the development of the equidistance approach adjusted for special circumstances and decided that it constituted the most appropriate method for delimiting the EEZ and continental shelf of the parties. However, the Bangladesh-Myanmar case also presents an unusual instance of

a tribunal extending beyond existing law to set a new precedent. In addition to delimiting the territorial sea, EEZ and continental shelf boundary to 200 nautical miles, the ITLOS further decided to delimit an 1100 square kilometer ‘Gray Area’ of overlapping claims beyond 200 nautical miles. This ‘Gray Area’ is an area in which, because of the unique geography of the coastline, the Myanmar EEZ extends further than the Bangladesh EEZ, but overlaps with an area in which Bangladesh can claim an extended continental shelf. The ITLOS satisfied itself that it could exercise jurisdiction beyond 200 nautical miles without infringing on the role of the Commission on the Limits of the Continental Shelf and decided that, to avoid further “impasse” between the parties it had an obligation to delimit this Gray Area as well. As a result, in the Gray Area the tribunal accorded rights to Bangladesh over an extended continental shelf but accorded Myanmar jurisdiction over the superjacent water column as part of its EEZ.

In the Chile-Peru case, beginning in 1947 the two states asserted certain maritime claims extending 200 nautical miles off their Pacific shores. The two then developed various instruments starting in the early 1950s to reinforce these claims, but by 2000, it was clear that they disagreed as to whether they had established a maritime boundary in their fish-rich waters. In 2008, based on the dispute settlement provisions in the Pact of Bogota discussed above, Peru initiated this case against Chile before the ICJ. Peru argued that no agreed maritime boundary existed and that the Court should delimit an equidistance-based boundary line. Chile argued that the maritime boundary had been established in a 1952 treaty and had been further reinforced by various subsequent agreements. The Court agreed with neither party’s argument in full and found certain provisions did reflect that a *tacit* agreement existed for a maritime boundary extending 80 nautical miles from shore.

Beyond 80 nautical miles, the Court applied a variation of its standard three-step approach to delimit an equidistance-based boundary measured from relevant portions of the parties’ coasts.

Specifically, the Court faced the anomalous problem of calculating an equidistance line beginning 80 nautical miles from shore and not equidistant from each country's coastline, given the shore's configuration. In creating the equidistance line, the Court therefore disregarded any points on Peru's coast within an 80 nautical miles arc around the end point of the agreed boundary. Similar to the challenge presented in the Bangladesh-Myanmar case's approach to the 'Gray Area,' the equidistance line adopted by the Court reaches a point 200 nautical miles from Chile before it reaches 200 nautical miles from Peru. The court fashioned a boundary in which Peru's EEZ and continental shelf include a small triangular area seaward of 200 nautical miles from Chile, but within 200 a nautical mile arc of Peru's coastline. These cases make clear that tribunals, like states, have had to find creative solutions to delimit small areas of overlapping claims at the limits of national jurisdiction where the effects of the coastal geography create complications. At these extremities, in an effort to achieve an equitable solution, tribunals have sometimes found it necessary to disaggregate the EEZ and continental shelf regimes, which UNCLOS normally treats as a unity out to 200 nautical miles from the coastal state's shores.

Another case in which the tribunal had to consider the impact of multiple maritime regimes on its delimitation decisions is the Croatia-Slovenia Case. In that case an arbitral tribunal was called upon to delimit two areas, one of internal waters and the other of territorial sea. The area of internal waters was the Bay of Piran. Because this delimitation involved a zone of full sovereignty, the arbitral tribunal applied the legal principles of *uti possidetis* and *effectivités* as it would have done for a dispute over territory. It determined that Slovenia had exercised relatively greater control over the waters within the Bay and awarded approximately 80% of the Bay's waters to it.

The second and more complicated issue addressed delimitation of the territorial sea. The tribunals reviewed UNCLOS article 15 and found that it requires delimitation on the basis of a median line and

observed that this is reflected in the long-standing jurisprudence of international tribunals. Article 15 further provides, however, that special circumstances may require a variance from the median line. Accordingly, the tribunal determined that, as in delimitation of EEZs, it should start with an equidistance line and consider whether any special circumstances warrant modifications to it. The tribunal determined that the equidistance line in fact should be modified in this case in order to “attenuate the ‘boxing in’ effect” of Slovenia’s maritime zones. Further, since Slovenia’s territorial sea is surrounded by Croatia’s, leaving Slovenia without a corridor of access to an area of high seas freedoms, the arbitrators determined that, as a matter of equity, in a special “junction area” between Slovenia’s and Croatia’s territorial seas all ships and aircraft shall enjoy the same freedoms that they enjoy as a matter of law on the high seas. Two aspects of the case facilitated this result. The first was the language of UNCLOS article 15 that allowed tribunals to take into account special circumstances in their approach to delimitation. The second was a specific provision of the arbitration agreement, which empowered the arbitral tribunal to apply, in addition to international law, “equity and the principle of good neighborly relations in order to achieve a fair and just result by taking into account all relevant circumstances.” The tribunal took advantage of that broad mandate. Recognizing the unusual geography of the northern Adriatic Sea, plus Slovenia’s vital national interest in having access by sea and by air, the arbitral tribunal determined that all ships and aircraft of all States enjoy *as a matter of equity* the same rights of access to and from Slovenia in the “junction area” that they enjoy *as a matter of law* on the high seas. Thus, the Croatia-Slovenia case marks the third example in this study in which a tribunal sought a creative solution at the outer limits of delimitation in order to produce a solution it deemed equitable. This demonstrates that even though it might be tempting to see the three-part legal test of delimitation (or its territorial sea counterpart) as formulaic, tribunals readily invoke equity and other

related principles to take into account the interests of the parties and the specific conditions of the disputed area.

Finally, in the Cote d'Ivoire-Ghana case, the Special Chamber was called upon to determine whether a tacit boundary existed. The Special Chamber recalled the Bangladesh-Myanmar case, where it was found that estoppel “exists when a State, by its conduct, has created the appearance of a particular situation and another State, relying on such conduct in good faith, has acted or abstained from an action to its detriment.” Further, the Special Chamber relied on the ICJ’s 2007 Nicaragua v. Honduras case, which found that “evidence of a tacit legal agreement must be compelling.” After considering evidence of the parties’ activities related to seabed hydrocarbon development, national legislation, and fisheries arrangements, the Special Chamber determined that the evidence was insufficient to prove the existence of a tacit agreement and it proceeded to effect delimitation. This it did following the familiar three-step process. While this is a straightforward case involving a rather standard application of the principles of international law and the practices of past tribunals, this case represents an instance in which the actions and agreements of the parties was strong, but not quite compelling, as to the existence of a tacit maritime border. It is a useful reminder that as states manage interactions in disputed areas, they should take care to specify whether interim agreements are meant to be part of an ultimate delimitation.

In summary, a three-part test was developed by the ICJ and followed by other tribunals to provide a systematic approach to grapple with maritime delimitation beyond the territorial sea. The test is systematic enough to provide predictability and flexible enough to account for unique circumstances in delimited areas. One important feature of this approach is that it treats the EEZ and continental shelf regimes as a unity out to 200 nautical miles from a coastal state’s baselines. Creativity in the application of equitable principles tends to be at the margins of delimitation. While there are examples of separate treatment of the EEZ and

continental shelf regimes, the cases presented for this study show the regimes treated separately only beyond 200 nautical miles from the entitlements of one of the parties.

Additionally, these cases make clear that geography rules delimitation. It is the first and most significant—sometimes the sole—determining factor in maritime delimitation. Tribunals have consistently interpreted international law as requiring equal division of overlapping entitlements unless special circumstances require adjustment to achieve an equitable solution. Tribunals consistently view avoiding a ‘cut-off’ as a special circumstance—as was applied in the case of Nicaragua’s EEZ and Slovenia’s territorial sea. These favor the general unity of resource zones and take into account the coastal state’s security concerns. Finally, as will be discussed further below, in creating maritime boundaries, tribunals are consistently unwilling to give undue effect to small islands, especially those that are remote, inhospitable, and without permanent habitation. Finally, coastal state concerns about unity of fish stocks or the effect of delimitation on fishing practices are not concerns that tribunals have found as important in adjusting delimitation based on geography and equal division, with the exception of longstanding traditional fishing practices.

Effect of Islands on Maritime Delimitation

In the cases considered, there were two circumstances in which islands affected maritime delimitation. The first circumstance involved cases of delimitation of opposing coastlines. That is, delimitation between islands of one party and the facing islands or continental coastline of the other party. The Eritrea-Yemen arbitration represents an example of a rather straightforward application of the relevant rules and practices of tribunals. In that case, coastal fringing islands were accorded baselines from which the area to be delimited was measured. Small, remote, inhospitable, uninhabited islands were given no effect on delimitation, but a median line was drawn between larger islands awarded to Yemen

and the smaller island groups awarded to Eritrea. Thus, in terms of the impact of islands on delimitation, this represented a case of delimitation between islands or groups of islands awarded to the parties.

In the Colombia-Nicaragua case, Colombia argued for an equidistance line similar to the approach taken in the Eritrea-Yemen case as the basis for delimitation between the mainland coast of Nicaragua and some small islands awarded to it and Colombia's offshore islands. The ICJ, however, determined that approach would result in an inequitable distribution of the relevant water space between the parties and instead chose to enclave three of Colombia's islands within an extended Nicaraguan EEZ. While this approach was designed to bring more alignment between the ratio of water space allocated to each party with the ratio of relevant coastal frontages, the approach nonetheless led to resentment in Colombia and was at the root of Colombian government's rejection of the tribunal's delimitation.

The second circumstance involves cases in which offshore islands may have an effect on the final boundary delimitation between states with adjacent coastlines. In the Black Sea delimitation case between Romania and Ukraine, a significant issue was the effect on delimitation of a small Ukrainian island known as Serpent Island, which sits 20 miles off the coast and has no indigenous population. Ukraine argued the feature is an island entitled to a full exclusive economic zone and therefore given full effect in delimitation. Romania argued it deserved no more than a territorial sea as a "rock" under UNCLOS article 121(3). The tribunal declined to rule on the island's status under article 121, but determined that Serpent Island "should have no effect on the delimitation in this case, other than that stemming from the role of the 12-nautical-mile arc of its territorial sea." Accordingly, the delimitation in the vicinity of Serpent Island was accomplished along a line twelve nautical miles from the feature and which separated its territorial

sea from the EEZ of Romania. The clear lesson of the Black Sea case is that small features will not be given disproportionate effect.

This lesson was also applied in the delimitation between Bangladesh and Myanmar. In that case, the presence of Bangladesh's St. Martin's Island just off the maritime terminus of the two states' land boundary was a significant aspect of the disagreement between the parties. The ITLOS followed the approach in the Black Sea case and awarded the island no effect beyond its territorial sea. Unlike Serpent Island, St. Martin's Island is inhabited and is used for tourism and other purposes. Nonetheless, it is insignificant in size compared to the continental coastlines of the two states and the ITLOS found that to give it any effect beyond its territorial sea would result in a disproportionate division of the relevant water space in the EEZ and continental shelf zones beyond the territorial sea.

The Court's invocation of the disproportionality test might prove relevant in addressing the maritime disputes in the East and South China Seas. The Court noted in the Black Sea Delimitation case that its jurisprudence has indicated, it may on occasion decide not to take account of very small islands or decide not to give them their full potential entitlement to maritime zones, should such an approach have a disproportionate effect on the delimitation line under consideration.

The key lesson derived from the Black Sea Delimitation and Bangladesh-Myanmar cases is that even where a small island is inhabited and productive, it is the overall disproportionality of effect that remains the court's focus in deriving a boundary.

In summary, tribunals avoid giving undue effect to small islands in resource zone delimitation, especially those that are remote, inhospitable, and without permanent habitation. However these additional cases make clear that any island or rock, no matter how small, is entitled to a territorial sea and that the territorial sea is

consistently favored over the resource zone. In other words, territorial sea trumps EEZ and in the treatment of small islands in delimitation, one coastal state's resource zone must give way to the full territorial sea of the other state's island or rock. This principle causes tribunals to make adjustments to delimitation of adjacent coastlines, as in the Romania-Ukraine Black Sea delimitation or the Bangladesh-Myanmar case in the Bay of Bengal. It also causes adjustments to opposing coastlines, as in the Eritrea-Yemen. Where opposing coastlines involve remote islands, the ICJ has been willing to enclave small features and their territorial seas within larger expanses of the resource zone of the coastal state.

Effect of Maritime Resources

In the Colombia-Nicaragua case, one of the drivers of the dispute was the fact that Nicaragua began issuing oil concessions as early as 1969 in waters disputed between it and Colombia. To this day, Colombia continues to dispute the expanded EEZ and continental shelf awarded to Nicaragua and development of the resources seems to be stymied since, to date, Nicaragua does not appear to have authorized hydrocarbon exploration or development in the expanded area. Additionally, a key reason the Colombian government gives for disputing the award is the loss of fishing grounds traditionally used by the fishermen who live on several of Colombia's islands off the Nicaraguan coast. The Court, however, did not treat the fishing practices of these fishermen as traditional fishing.

In the Romania-Ukraine case, one of the reasons the status of Serpent Island was so hotly disputed is the island sits seaward of the mouth of the Danube River in a region of rich silt deposits. Reportedly the seabed surrounding the island holds the potential for substantial hydrocarbon deposits. However, this issue did not appear to be a significant factor in the Court's decision. The award followed closely the Court's prior practice of geography-based delimitation, equality of the overlapping areas, and avoiding a

disproportionate effect from minor islands. Similarly, in the Bangladesh-Myanmar case the region in dispute is rich in both fish stocks and hydrocarbons, though it was the hydrocarbons that nearly drove the parties to conflict and which were also responsible for bringing the parties to an institutional dispute resolution process. There is an estimated 13.7 trillion cubic feet of gas reserves in the Bay of Bengal, which each side regarded as a potentially critical resource for future economic development. Bangladesh and Myanmar issued overlapping hydrocarbon concession blocks and each state's Navy served to protect commercial vessels engaged in hydrocarbon research in the disputed area. In fact, these naval standoffs and the underlying threat they represented led to the reopening of negotiations between the two states aimed at resolving their maritime disputes and maritime boundary delimitation after a hiatus of 22 years.

The fundamental driver of the Côte d'Ivoire-Ghana case was the discovery of substantial hydrocarbon reserves in the Gulf of Guinea. From 1968 to the early 2000s, there was little hydrocarbon exploration in the Gulf of Guinea, which encompasses the entire maritime domain of both Ghana and Cote d'Ivoire. Indeed, until 2006 only 33 small- to medium-sized oil and gas fields had been discovered in the region. This changed dramatically in 2007, when a Texas-based company discovered substantial reserves in what came to be called the Jubilee Oil Field. At the time, experts projected that the oil field contained 3 billion barrels of total proven reserves. In 2009 a second group of oil fields were discovered. At the time of discovery, it was projected that the project would yield around 216 million barrels of oil. Ghanaian authorities developed both of these projects in what Ghana claimed to be its EEZ. The Court imposed preliminary measures on both parties during the early stages of the case but did not penalize Ghana for carrying on development in the disputed area because it did so under the belief that the area was a zone in which it had sovereign rights and the tribunal later affirmed that to be the case.

In the Canada-United States Gulf of Maine Case, the most important driver bringing the parties to dispute resolution was concern for depleted fish stocks. In 1976, in response to widespread public concern about overfishing, the U.S. Congress adopted a 200-mile fishery zone to limit or exclude foreign fishing off its coasts. The Fishery Conservation and Management Act of 1976 (P.L. 94-265) expresses the concern that fish stocks in waters off the U.S. coast “have been overfished to the point where their survival is threatened.” The law went into effect on March 1, 1977. A similar Canadian law went into effect on January 1, 1977. These laws resulted in overlapping claims in several areas, including the rich fishing grounds of the Georges Bank. Despite extensive negotiations, the two states failed to reach agreement on a maritime boundary in the Gulf of Maine and eventually agreed to submit the dispute to binding dispute settlement. The United States presented substantial evidence of the essential unity of the fish stocks over the Georges Bank in support of its position that the entire Bank should be awarded to the United States. The United States argued that the delimitation between its waters and Canadian waters should be based on a trough that separated Georges Bank from Browns Bank, which lies closer to the Canadian coastline. The tribunal rejected this line of argument, favoring instead delimitation based solely on region’s coastal geographic circumstances. Additionally, the unity of the fish stocks, which the U.S. favored, was deemed an insufficient reason to find any inequities requiring adjustment. Accordingly, the ICJ awarded five-sixths of the waters of Georges Bank to the U.S. and one-sixth to Canada, based on its assessment of the geography of the two states’ coastlines in the Gulf of Maine.

In summary, these cases demonstrate that discovery of hydrocarbons under the seabed of un-delimited resource zones can be a significant motivator for states to resolve their disputes through IIDR processes. One issue of obvious concern is the possibility that the state that jumps out ahead of the other in developing hydrocarbons has an advantage in exploiting this finite

resource. To address this, Côte d'Ivoire's attempt to use an oft-overlooked provision of UNCLOS to impose provisional measures is instructive. The power of a tribunal to employ provisional measure amounts to a temporary injunction to prevent one party from exploiting finite resources during the proceedings at the eventual expense of the other. However, the Court's failure to assess a penalty against Ghana for having continued to exploit the resources may have undermined the usefulness of this tool. Also worth noting, as the Bangladesh-Myanmar case demonstrates, is that coercive measures are among the tool kit employed by states to preserve what they believe to be their resource rights at sea. The fear of provoking a potentially deadly and destructive clash can sometimes be a good inducement for the parties to pursue IIDR options.

Finally, it is worth noting that concern for the preservation of rapidly depleting fish stocks can propel states to resolve boundary disputes through an IIDR process before it is too late. This was certainly the case in the Gulf of Maine case. Both parties recognized that delimitation would be required to build an effective resource management regime, since national laws imposed against national fishing fleets provide the best guarantee of enforcement. Interim agreements can help, but experience in East Asia and elsewhere is that interim agreements sometimes have only limited effect, such as in the East China Sea. And in some areas where delimitation is likely to be complex, the ability to establish an interim agreement has so far been elusive. Imposition of state authority to enforce domestic law against a domestic fishing fleet—and those foreign vessels the coastal state chooses to license—appears to be the surest method of fish stock management.

Effect of Confidence-Building Measures

Perhaps the most important factor in bringing any two states together to resolve their disputes through an IIDR process is good diplomacy. Often, this takes the form of steady establishment of confidence between the parties. As discussed above, some of this confidence is developed in the process of mutual optimization through which the parties come to see that their most significant interests can be protected and that their opponent has no special advantage. Confidence can also come from steady steps taken as the result of the skilled diplomacy of one or more neutral third parties. Such was certainly true in the Eritrea-Yemen case.

In that case, through the diplomatic efforts of other states and of the United Nations, the parties were brought from a state of armed conflict into arbitration after two years of steadily developing confidence-building measures. After initial interventions by the Egyptians, Ethiopians, the U.N. Security Council and secretary general, and others, both parties eventually accepted the French as honest brokers. This enabled a successful, French-led process that began with an Agreement of Principles between the two states to renounce the use of force, accept peaceful settlement of the disputes through arbitration, and to settle the sovereignty disputes on the basis of historic title. A second, subsequent agreement took renunciation of force a step further. In a document known simply as the Joint Statement, both states agreed the purpose of their undertaking was to re-establish trust and cooperation between them and to contribute to peace and stability in the region. A third step in confidence building involved negotiating the arbitration agreement itself. To protect their specific interests and allay concerns about turning over the dispute to an IIDR process, the parties agreed that the arbitration would proceed in two stages. In the first stage, an arbitral tribunal would be called upon to resolve questions of territorial sovereignty over islands in the Red Sea and to define scope of the waters to be delimited. In the second stage, the arbitrators would be called upon to undertake maritime

delimitation on the basis of the results of the first stage. This process, and the control each party retained over the process as incremental progress was made, enabled the parties to proceed step by step and to advance only when both parties were prepared to do so. This established an atmosphere of increasing cooperation and confidence.

Similar processes were used in at least two other cases under consideration in this study. In 2006, around the time of the discovery of significant hydrocarbon deposits in the Gulf of Guinea, bilateral consultations between Côte d'Ivoire and Ghana began with the objective of reaching agreement on a maritime boundary. This case represents one in which both parties started from a reasonably high level of political goodwill for the other, but even so the delimitation process was not without rough spots. A joint Ivorian-Ghanaian Commission on Maritime Border Demarcation was established to find a negotiated solution to the overlapping resource claims. By December 3, 2014, however, little progress had been made. High-level meetings and other diplomatic and technical efforts occurred during the same period. Eventually, the two countries decided to bring their case to international arbitration before a panel of ITLOS.

The Croatia-Slovenia case represents an example of a bilateral relationship that cannot be similarly characterized as having the same level of goodwill as did Ghana and Côte d'Ivoire. The development of the arbitration agreement that eventually led to arbitration therefore bears some detailed discussion for the insights it offers. After separating from the former Yugoslavia in 1991, the two governments first attempted to resolve the dispute over their shared land border. This began a process of bilateral consultations, written exchanges, the creation of various expert groups, and, eventually, maritime border negotiations between them. After nearly a decade of unsuccessful work, efforts by the two states to resolve their land-sea border-boundary dispute shifted from negotiation to the possibility of third-party dispute resolution. The

parties accepted mediation, facilitated by former U.S. Secretary of Defense William Perry. This process also ended without agreement. Croatia then proposed international adjudication. The two governments engaged in a further series of negotiations, eventually agreeing in principle to refer their dispute to the ICJ. Slovenia, however, balked and shifted to a policy of *ad hoc* arbitration in order to accommodate “applicable principles broader than the pure application of international law.”

The two states remained in diplomatic deadlock until the European Union became engaged in 2009. The European Union’s Commissioner for Enlargement launched an initiative to facilitate the resolution of the dispute in order to harmonize relations between an existing member (Croatia) and a prospective member (Slovenia). The Commission presented a Draft Agreement on Settlement to submit the dispute to an arbitral tribunal to resolve the border-boundary dispute. In late 2009, the two governments approved an Arbitration Agreement. The Agreement provided that the arbitration should resolve both the land and maritime aspects of the dispute through the application of international law and other factors, including equity and the “principle of good neighborly relations.” The parties further specified that the critical date should be the date of independence, that tribunal members were to be prohibited from issuing separate or dissenting opinions, and that the tribunal’s award shall be binding and must be implemented within six months of its issuance. The parties further agreed to refrain from any action or statement that might intensify the dispute or jeopardize the work of the arbitral tribunal. Regrettably, this final provision was violated by serious Slovenian misconduct in the course of the arbitration, which, although it did not prevent the tribunal from issuing an award, has affected Croatia’s willingness to treat the award as final and binding.

In summary, Croatia-Slovenia is a good example of two states seeking optimization. First, they employed negotiation, then mediation, and adjudication before, after more negotiation,

agreeing to arbitration. The leverage that seems to have gotten Slovenia across the line to agree to arbitration is the intervention by the European Union with the expectation that its prospective membership depended on resolving the dispute with Croatia. But Slovenia's subsequent misconduct—which involved clear attempts to tamper with the independence of the tribunal—suggests that it was still not confident that it had optimized its position in regard to the maritime disputes. This lesson suggests that external pressure to bring parties to an IIDR process before they are ready may end badly.

In contrast, the Eritrea-Yemen case provides a more positive example of third-party support to build confidence between the disputing parties. Although as discussed below, that case's final resolution remains in doubt, this has more to do with the rather novel and unanticipated approach the arbitrators took to the final award than with the diplomatic confidence-building process that brought the parties to the point of arbitration in the first place. Perhaps the most successful example of successful confidence building was set by Côte d'Ivoire and Ghana. Their efforts to reach agreement to IIDR were entirely bilateral and based on a fairly high level of pre-existing goodwill. That is not to say that only cases in which the two states enjoy a high degree of goodwill can result in successful IIDR. The Eritrea-Yemen case stands as evidence against that proposition. But it is worth observing that diplomatic processes to bring the parties to *agreement*, as in the Eritrea-Yemen case, rather than external pressure to bring the parties to *acquiescence*, as in the Croatia-Slovenia case, is likely important for successful IIDR.

Effect of Other Treaties and Agreements

Following on the preparation of states to engage in arbitration above is the experience of states that entered into either multilateral or bilateral treaties that required resort to IIDR if negotiations failed to achieve resolution.

In the Colombia-Nicaragua case, a 1948 multilateral agreement, the American Treaty on Pacific Settlement—also known as the Pact of Bogota—committed both Colombia and Nicaragua as signatories to submit unresolved disputes to the ICJ. Specifically, under Article XXXI, states parties recognize the compulsory jurisdiction of the ICJ over all disputes of a juridical nature that arise among them concerning certain matters, including the interpretation of a treaty or any question of international law. The Pact of Bogota was the vehicle that delivered both Colombia and Nicaragua to the ICJ in the first instance, since neither party was willing to abandon the Pact and assume responsibility for having done so. Subsequent to the award in the case, however, Colombia did indeed withdraw from the Pact of Bogota as a result of its dissatisfaction with the ICJ's award. Similarly, both Peru and Chile ratified the multilateral Pact of Bogota. When it was clear that a dispute existed over the maritime boundary between them, Peru initiated the case before the ICJ without objection from Chile. Both states were willing to accept the results of the case and they remain party to the treaty. Each of these cases will be discussed further in the sections below that address whether the IIDR process brought about a final resolution. Here it is only worth noting that the cases differ in that regard, perhaps because the result in the Chile-Peru case involved uncomplicated geography, whereas the Colombia-Nicaragua case involved very complex geography and resulted in an award the specific parameters of which Colombia appears not to have contemplated in advance.

Another approach is for the parties to enter into a bilateral treaty that either brings them IIDR after a period of negotiation or otherwise clarifies issues in contention. Already discussed above is the process of negotiated agreements that led to the arbitration agreement in the Eritrea-Yemen case. Similarly, in the Gulf of Maine Case, the United States and Canada negotiated a set of treaties, one of which provided that since the two countries had failed to delimit a boundary between them on the basis of

negotiation, their maritime delimitation dispute in the Gulf of Maine should be resolved by adjudication through an international tribunal. This proved to be the single most important factor in resolving the dispute and in establishing what has been a well-settled border for more than three decades. The agreement was crucial to settlement in part because the parties' views were so substantially different, the applicable law at the time was not fully developed or clear, and there were significant domestic pressures on both governments that had to be deflected in order to reach settlement. The elements of uncertainty and the pressures of domestic politics made a binding bilateral agreement to engage in IIDR attractive.

The Black Sea delimitation case involved Romania, which accepts compulsory ICJ jurisdiction, and Ukraine, which does not. Furthermore, when it ratified UNCLOS, Ukraine asserted its right to exclude maritime delimitation cases from compulsory dispute resolution under that Convention as well. Accordingly, but for a bilateral treaty, this case would not have been adjudicated. Romania initiated the case under a compromissary clause in the bilateral "Additional Agreement to the Treaty on the Relations of Good Neighbourliness and Co-operation Between Romania and Ukraine." The compromissary clause provided that, if unresolved through negotiation, the maritime boundary dispute was to be brought to the ICJ. Negotiations between the two states over the maritime boundary dispute between 1998 and 2004 had spanned some 34 rounds, yet failed to produce an agreement. Both parties, as discussed below, have accepted the award in the case as final.

In summary, the cases reviewed for this study suggest treaties that bind the parties to compulsory dispute resolution work both ways. They can bring the parties' disputes to a successful resolution when both parties believe the IIDR they mandate optimizes their position in resolving the dispute. This is especially true where the outcomes are reasonably predictable. The less predictable the outcome or the less optimized the parties believe the approach to be, the less likely

the result will be accepted as final. Treaties that parties feel pressure to accept or that were entered into without contemplating the specific challenges they might later present can be counter-productive in producing a lasting result.

Status of the Parties in Relation to UNCLOS

Does the status of the parties in relation to UNCLOS matter in determining whether parties will adhere to the result of an IIDR process? Cases considered in this study in which both states were party to UNCLOS include Romania-Ukraine, Chile-Peru, Croatia-Slovenia, and Malaysia-Singapore. Of these four cases, the result in three has been fully accepted as final. Only in the Croatia-Slovenia case is the finality of the award called into question. Even then, the reason for rejecting the award appears to be Croatia's loss of faith in the integrity of the process after Slovenia's misconduct, rather than any fundamental rejection of the IIDR process itself.

The Canada-U.S. Gulf of Maine Case presents an interesting early look at the effect of UNCLOS on adjudication of maritime delimitation disputes. The case was initiated prior to the final negotiation of the text of the Convention and the opinion was issued more than a decade before the Convention came into force. In the interim, however, international agreement coalesced around the final text in December 1982. The Chamber's decision reflects careful attention to the legal developments reflected in the Convention. Indeed, there is some evidence that one reason the United States and Canada agreed to accept litigation was to demonstrate leadership in this area of international law and perhaps even to use the adjudication process to bring some additional clarity to the law that the final text of the Convention failed to do. Adjudication also served as a useful approach to deflect any domestic political fallout from the fishing industries. But even as it stands outside the Convention, the United States has continued to support the relevant UNCLOS provisions on the EEZ and continental shelf as generally reflective of customary international

law. Accordingly, the U.S. status as a non-party state has not affected the finality of dispute resolution in the Gulf of Maine case.

Similar circumstances apply in two other cases. In the Bangladesh-Myanmar case, Bangladesh is a party to UNCLOS and Myanmar is not. In the Eritrea-Yemen case, Yemen signed the Convention in 1982 and ratified it in 1987. Eritrea was not a state party to the Convention at the time of the arbitration and has not become one since. The fact that one of the states involved is not a party to UNCLOS did not prevent the successful resolution of the issues related to maritime delimitation through tribunals that applied the provisions of the Convention. This strongly suggests that even for many states not party to UNCLOS, the Convention's provisions related to the territorial sea, EEZ, continental shelf, and maritime delimitation of these zones are accepted as generally reflective of customary international law.

The Colombia-Nicaragua case is a bit more complex. Nicaragua signed the Convention in 1982 upon the negotiation of the final text, and ratified it in 2000. Colombia also signed the Convention in 1982, but has never ratified it and remains a non-party. However, the ICJ determined (and the parties apparently agreed) that the UNCLOS provisions regarding maritime delimitation and the provisions related to the entitlement of certain islands to maritime zones form a part of customary international law and accordingly could be applied against a non-party state. The ICJ decision on delimitation has met with serious opposition from Colombia. But that opposition seems to be grounded in the way the Court applied the law, rather than in the applicability of the law itself.

In summary, there are several insights to be gained from these cases about the broader acceptance of UNCLOS. First, the Convention's relevant provisions related to maritime zones and delimitation are accepted by the ICJ and other tribunals as reflecting customary international law. This widespread acceptance of the way in which international law establishes the basic construct of a coastal state's

maritime rights and interests, even among non-parties to the Convention, makes it very difficult for a country that seeks its own approach to establishing maritime zones to gain any international support. This finding has obvious implications for circumstances in the South China Sea, where the behavior of a leading state stands in stark contrast to the approach taken by leading states in the Gulf of Maine case and more recently in India's behavior in relation to its cases in the Bay of Bengal. Win or lose, these states saw dispute resolution as an opportunity to exercise leadership, to increase certainty both in the law itself and in its application to the region, to ensure good neighborly relations, and to move forward with effective resource exploitation and management.

Novelty of the Tribunal's Approach

In the Eritrea-Yemen case, the arbitration panel awarded a highly unusual traditional fishing regime that extended throughout the region, even reaching into the internal waters and ports of the parties. In the first stage of the arbitration, which involved a sovereignty dispute over numerous small islands in the Red Sea, the tribunal awarded the majority of the islands to Yemen. However, without request or prompting by either of the parties, the tribunal added:

In the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men.

This unexpected result required significant further clarification in the second stage of the arbitration as the parties sought to understand its impact on the maritime delimitation they had requested. Thus the tribunal further clarified that the traditional fishing rights it expected both parties to respect were to apply "to the region as a whole," without regard to the status of the affected

waters as internal, territorial, or EEZ. They included a right of access for fishermen to the islands and ports of the other state. This sweeping and unexpected result has not lent itself to finality. To date, neither party has enacted the provisions of the tribunal's award in its domestic laws. Thus, in a formal sense the waters between the two states remain undelimited and Eritrea regularly arrests Yemeni fishermen that cross into the Eritrean territorial sea.

A second case in which the award included a somewhat surprising provision is the Bangladesh-Myanmar case. In that case, the ITLOS followed the ICJ's three-step delimitation process by framing the dispute geographically, applying the equidistance rule adjusted for any special circumstances, and making a final assessment of the equitability of the solution derived. However, in addition to delimiting the territorial sea and EEZ and continental shelf boundary to 200 nautical miles, the ITLOS further decided to delimit an 1100 square kilometer "Gray Zone" area of overlapping claims beyond 200 nautical miles. This is the first instance of a tribunal establishing a delimitation beyond the EEZ. The Gray Zone is an area in which the Myanmar EEZ extends further than the Bangladesh EEZ, but overlaps with an area in which Bangladesh can claim an extended continental shelf. The ITLOS satisfied itself that it could exercise jurisdiction beyond 200 nautical miles without infringing on the role of the Commission on the Limits of the Continental Shelf and decided that, to avoid further "impasse" between the parties, it had an obligation to delimit this Gray Area. As a result, in the Gray Area the tribunal accorded rights to extended continental shelf to Bangladesh, but awarded Myanmar jurisdiction over the superjacent water column as part of its EEZ. The parties have accepted this ambitious and creative outcome.

Finally, the Croatia-Slovenia case represents a third circumstance in which the tribunal devised a creative award not specifically requested or perhaps even contemplated by the parties. In that case, after delimiting the internal waters and territorial sea, the arbitral tribunal addressed a third maritime issue, which the parties referred

to in the arbitral agreement as the “junction to the high sea.” The tribunal concluded that since Slovenia’s territorial sea was surrounded by Croatia’s, there was no corridor of “high seas” where the freedoms referred to in Article 87 of the UNCLOS exist as a matter of law. The tribunal noted the parties’ Arbitration Agreement empowered it to apply “international law, equity and the principle of good neighborly relations in order to achieve a fair and just result by taking into account all relevant circumstances.” Adhering to that broad mandate and recognizing the unusual geography of the northern Adriatic Sea and Slovenia’s vital national interest in having access to the high seas by sea and by air, the tribunal determined that all ships and aircraft of all States enjoy *as a matter of equity* the same rights of access to and from Slovenia in the “junction area” as they enjoy *as a matter of law* on the high seas. This unusual result was enabled by the terms of the arbitration agreement.

Cases in Which the Decision Was Accepted as Final

The foregoing analysis leads to the ultimate question of this research project. What do the cases under consideration in this round of research have to say about the circumstances in which the IIDR decision was accepted by the parties?

The Canada-U.S. Gulf of Maine case stands as an example of a highly successful IIDR process. The parties had agreed in advance to accept the decision of the Chamber as final and binding. Further, the special agreement also included a substantive provision stating that both sides shall not “claim or exercise sovereign rights or jurisdiction for any purpose over the waters or seabed and subsoil” on the other side of the boundary to be determined by the Chamber. No further agreements were required to implement the judgment. The boundary began to be enforced on 26 October 1984, after a 14-day grace period to allow fishing vessels to return to their sides of the new boundary. Having hoped to gain access to the entire Georges Bank, it is generally believed that the fisheries

sector in the United States was more dissatisfied than its counterpart in Canada. Some representatives of the U.S. fishing industry called for a one-year moratorium on implementation of the decision, but this was rejected in order to uphold the previous bilateral implementation agreement. After some fishing incidents in the late 1980s, the United States and Canada entered into an agreement on fisheries enforcement in 1990, which includes a provision reaffirming the commitment of the parties to ensure full respect for their maritime boundary. Since the late 1990s, mechanisms for cross-boundary cooperation on fisheries management have been successfully established.

Similarly, in the Chile-Peru case, before the ICJ issued its judgment both countries had already committed at high political levels to implement the decision. Within a couple of weeks of the judgment, the countries' respective foreign ministers and ministers of defense met to initiate the process of implementation. The two sides subsequently collaborated and completed the technical work needed to begin to implement the maritime boundary established by the ICJ, even though Chile had to concede to Peru jurisdiction in approximately 50,000 square kilometers of ocean space that it previously had considered its own. This was ameliorated by the Court's finding that a tacit boundary existed from the shore to 80 nautical miles, which had the practical effect of preserving Chile's jurisdiction over waters closest to shore that contain the most valuable fisheries.

In the Chile-Peru case, the Court also had to deal with a dispute over the coastal starting point for the maritime boundary. In doing so, the Court noted the end point of the land boundary might not be at the same location as the starting point for maritime delimitation, thereby avoiding a decision on a matter not before it. This issue might not prove significant as a practical matter, since the potential territorial difference is rather small. However, the territorial issue could have political significance. To date, the two countries have accepted the Court's judgment on the location of

the maritime boundary, but tensions have flared somewhat regarding the small triangle of land in play. It is presumably because of this ongoing territorial dispute that national legislation to implement the new maritime boundary coordinates appears to have stalled and that the two countries have not yet submitted their final maritime boundary coordinates to the UN, as they previously expressed an intention of jointly doing. Even if certain formal steps remain outstanding, however, in practice it appears that the two sides are fully honoring the ICJ's judgment and consider the maritime boundary dispute behind them. Accordingly, this appears to be a case in which, despite some lingering aspects of dispute between the parties, the imposition of political costs is highly unlikely.

Both parties also accepted the award in the Romania-Ukraine Black Sea case. The Romanian Ministry of Foreign Affairs stated:

The judgment the ICJ rendered is final, binding and without appeal. The two states are bound to observe the judgment, which is enforceable immediately, no further bilateral agreements, interpretations of the judgment or additional acts being needed.

Similarly, former Ukraine President Viktor Yushchenko announced on February 5, 2009, that Ukraine considered the ruling “just and final” and hoped that it would open “new opportunities for further fruitful cooperation in all sectors of the bilateral cooperation between Ukraine and Romania.” A significant feature of this case is the absence of a sovereignty dispute over Serpent Island. The fact that the sovereignty dispute was settled prior to the initiation of the case greatly simplified the proceedings over the maritime boundary. It is much more difficult to undertake dispute resolution the other way around, especially where it is unclear whether the feature can be treated as a habitable island entitled to resource zones. Another alternative to solving the question of sovereignty first might have been to include in the IIDR process a special agreement between

the parties to give a small, disputed island no effect beyond the territorial sea in delimitation of resource zones.

The overall positive political environment between Côte d'Ivoire and Ghana also led to cooperation and full implementation of the decision in their case. On the same day the tribunal's decision was announced, the two countries released a joint statement "expressing their special gratitude" to the Special Chamber and accepting the decision. Mutual presidential visits between the countries have also led to an agreement to negotiate a new joint strategic partnership and "commitment to ensure the smooth implementation of the ruling by the Special Chamber of the International Tribunal of the Law of the Sea." The parties established a joint implementation committee that met three times during 2018 to plot their maritime boundary in accordance with the decision. At the end of 2018, the two states signed a joint communiqué ratifying the coordinates and expressed an interest in cooperating to extract hydrocarbons and other natural resources.

As in the Côte d'Ivoire-Ghana case, in the Malaysia-Singapore case the parties agreed to abide by the Court's decision and the two states established a joint technical committee to implement the award. However, the Committee met seven times between 2008 and 2013 and remained at an impasse over the impact of the Court's decision on delimitation of the territorial sea and sovereign possession of South Ledge. Malaysia and Singapore continue to work together through the joint technical committee to address these issues. Recently, Malaysia expressed the intention to build up the Middle Rocks into a larger feature and Singapore did not object except to ensure the reclamation did not encroach on its territorial sea. Malaysia's desire to expand the size of the Middle Rocks could provide the necessary motivation for the parties to come to a negotiated agreement. But the close proximity of the three maritime features and the fact that they are situated at the intersection of the existing waters of Malaysia, Singapore and Indonesia, will make final delimitation complicated. In the meantime, despite occasional

tension the three states have been working together effectively to manage law enforcement issues, fishing rights, naval patrols, prevention of marine pollution, and traffic separation of thousands of vessels entering and leaving the Straits of Singapore. This demonstrates that good communication in an atmosphere of determined cooperation leads at the very least to effective management of water space that remains in dispute.

In summary, effective cooperation can be established when the parties are willing to agree in advance to accept the tribunal's decision as final and to implement it immediately. Additionally, when the parties work to establish an overall climate of goodwill, starting with meetings or statements from the highest levels of national leadership, an orderly process leading to final implementation of the award is much more likely. This can also be effective in managing whatever related disputes might remain between them. Even where the parties are more wary, there are ways they can enhance the likelihood of success. For instance, parties can pave the way to a smooth post-decision resolution process by dealing with a sovereignty dispute before dealing with the maritime boundary. If resolution of the sovereignty dispute remains elusive, the parties can at least agree in advance to eliminate the effect of the dispute by agreeing on the feature's entitlements. This might have benefited the outcome in the Colombia-Nicaragua case, for instance, and led to a more predictable result.

Political or Other Costs of Non-compliance

Three cases considered during this round of the study resulted in full or partial failure of implementation. In the Eritrea-Yemen case, for instance, the decision related to sovereignty over the islands seems to have been accepted, but neither party has formally implemented the maritime delimitation portion of the decision, and the traditional fishing rights the tribunal awarded have been a source of ongoing friction. There have been numerous reported arrests of Yemeni fishermen in Eritrean waters since the decision,

contrary to its award of historic rights to traditional fishermen. However, there is no evidence Eritrea has suffered any negative political or other effects for its actions, perhaps because Yemen is engaged in another civil war, or perhaps because the intrusiveness of the arbitral award is more widely seen as excessive.

Although the ICJ decision in the Colombia-Nicaragua case favored Colombia's position on questions of sovereignty in almost all cases, this did not prevent it from awarding Nicaragua a favorable outcome in the maritime delimitation aspects of the case. This led to public outrage in Colombia and that state's rejection of the ICJ's decision. This rejection, however, has received a surprisingly quiet reception from other states. Nicaragua is not popular in the region, because of the corrupt and bellicose government of Daniel Ortega who has been described as running the country more like a cartel boss than a president. Colombia, on the other hand, which is emerging from a decades-long civil war with the help of a politically inclusive process, is much more popular in the region and accordingly has not paid the kind of costs that might be expected. That said, Colombia's government is more democratic than Nicaragua's and in the wake of the decision, internal political pressure actually increased on its government not to comply. In its response, the Colombian government has had to manage popular expectations.

In the Croatia-Slovenia case, Article 7 of the Croatia-Slovenia Arbitration Agreement requires the parties to "take all necessary steps to implement the award, including by revising national legislation, as necessary, within six months after the adoption of the award." However, Croatia, because of Slovenia's misconduct during the tribunal process, has declined to implement the arbitral award. Indeed, after Slovenia's misconduct surfaced and prior to the arbitral tribunal's issuance of its award, the government of Croatia notified the government of Slovenia that it was terminating its obligations under the Arbitration Agreement. Concurrently, the government of Croatia informed the arbitral tribunal that it could

not “further continue the process [of the present arbitration] in good faith.” In contrast, Slovenia has taken actions to implement the tribunal’s award by enacting national laws to implement the boundary, issuing fisheries regulations, and taking various enforcement actions. Furthermore, the government of Slovenia filed an action against Croatia in the European Union Court of Justice seeking to enforce the award. This legal action remains pending, but given that the source of Croatia’s refusal to implement the award is Slovenia’s unequivocal misconduct, there is no evidence that Croatia has suffered any political or other harm from its refusal to implement the award.

In summary, in none of the three cases addressed in this study in which dispute resolution has so far partially or completely failed has either state paid significant political costs.

Conclusions

The cases analyzed in this study suggest that one of the most effective tools to help ensure parties are able to successfully bring a maritime dispute through an IIDR process to final resolution is a well-prepared legal and political framework accepted by both parties. This often takes the form of a negotiated agreement after a process involving a series of confidence-building measures that may take a decade or more to develop an atmosphere of good will and cooperation. Sometimes, the parties are able to manage the negotiation process on their own, as was the case for Chile and Peru, Côte d’Ivoire and Ghana, and Romania and Ukraine. On other occasions the good offices of a third party trusted by both states helps to bring the parties to an IIDR process. This was certainly the case with Eritrea and Yemen, which found their path to arbitration with the assistance of French diplomatic efforts.

The same might also be said of Croatia and Slovenia, which handled the diplomatic processes on their own, but were prompted (or perhaps cajoled) toward IIDR by the diplomats of the European

Union. Similarly, it would appear that Colombia was less enthusiastic than Nicaragua about proceeding with an IADR process, but felt compelled to do so by the dispute settlement provisions in the Pact of Bogota and a general fear of the reputational costs involved in withdrawing from that treaty. The lack of finality in each of these cases suggests, however, that a state that feels compelled to resolve its maritime disputes for reasons other than its inherent interests in relation to the disputes themselves may not be invested in the final outcome.

A second factor that appears to lend itself to finality is the simplicity of the relevant geography. Two cases with the simplest geographical circumstances--the Chile-Peru case and the Côte d'Ivoire-Ghana case--are among the more successful cases in terms of reaching finality through an IADR process. Cases with only one island affecting the course of the delimitation, such as the Canada-U.S., Romania-Ukraine, and the Bangladesh-Myanmar cases, may make for less certainty in the outcome, but these three cases are also examples of cases in which the outcomes have been accepted as final. Real problems seem to arise where there are numerous offshore islands and the tribunal is required to address both sovereignty and delimitation issues. This occurred in the Colombia-Nicaragua case and the Eritrea-Yemen case. And even though the tribunal's application of the law in these cases was familiar, in each case the tribunal was also tempted to develop unforeseen creative outcomes that appear to be driven more by sensibilities of equity than a strict adherence to the principles of law.

In the Eritrea-Yemen case, the tribunal's creativity led it to impose a novel system to protect traditional fishing rights. But the case suggests the parties were looking for an outcome more definitive and predictable and less invasive. Similarly, Colombia does not seem to have foreseen the degree to which the ICJ would seek to advantage Nicaragua's coastal state interests in resource zones over the interests of the inhabitants of the islands awarded to Colombia.

This outcome was somewhat more difficult to predict because of the region's complex geography.

A final point on the impact of complexity is worth noting. As the Colombia-Nicaragua case suggests and the Croatia-Slovenia case more clearly demonstrates, one of the real challenges in cases involving complex geography is how to appropriately apply the delimitation principles articulated in UNCLOS articles 15, 74 and 83. Thus, it is really the interplay between complex geography and the complex system of interests, rights, and duties reflected in the international law concepts of a coastal state's territorial sea, EEZ, and continental shelf that make outcomes so difficult to predict. And if anything will undermine the likelihood of finality in a case, it is the introduction of a wholly unforeseen outcome.

Accordingly, in cases where states are able to simplify the issues before the tribunal, they may be able to reach a result that is more acceptable. Parties have shown a number of creative ways to attempt to simplify the decisions before the tribunal in the interest of reaching a more predictable result. In the Romania-Ukraine case, the parties resolved the question of sovereignty before putting the question of delimitation before the ICJ. In the Eritrea-Yemen case, they attempted to limit uncertainty by bifurcating the case. Malaysia and Singapore limited the scope of the tribunal's authority in the Pedra Branca case to sovereignty, leaving delimitation issues to be resolved separately. Canada and the U.S. similarly limited the ICJ's discretion by providing a delimitation starting point and by specifying the space within which the tribunal's delimitation could occur. These techniques are all ways in which the parties can manage the uncertainties related to complex geographic situations and how tribunals might apply the law to address them.

A third important factor is the capacity for the parties to develop high-level political commitment to comply with the outcome of an IIDR process. Sometimes this has to do with building on good neighborly relations, as was the case between Chile and Peru and

Côte d'Ivoire and Ghana. Another driver of high-level cooperation may be to manage and deflect domestic pressures by interest groups affected by the IIDR, as was the case with Canada and the United States. For some states this cooperative atmosphere must be built incrementally, as in the Eritrea-Yemen or Croatia-Slovenia cases. But a circuitous process to resolution is not necessarily bad. Croatia and Slovenia took 26 years to get from the beginning of bilateral negotiations to a tribunal award. During ten of those years the parties engaged in negotiations at multiple levels. This was followed by another eight years of effort directed at putting the dispute before a third-party mechanism. Finally, the case was before the arbitral tribunal for another eight years. Through this period, shared experience and understanding developed as the claimants communicated, postured, and eventually settled their way into a process in which each felt its interests would be heard and an equitable outcome would be achieved.

Finally, it is helpful if the parties agree on the international law to be applied in the case. Interestingly, whether a state is party to UNCLOS does not seem to determine its attitude about the law. In many cases in which one of the states was a non-party, the two sides nonetheless agreed on the applicable law. The expectation of parties may be manageable where they acknowledge that the law and the facts do not provide an ironclad case. That is, many different outcomes might be acceptable in cases where both parties understand they cannot reasonably expect to win everything claimed. In such cases, a judgment that splits the difference in a way that preserves each side's most important interests may support cooperation in implementing an IIDR award.

Opportunities for Further Inquiry

While this first round of inquiry led to insights about what makes IIDR processes successful, it also raised many more issues that bear further analysis. In addition to surveying a second round of cases to confirm the insights outlined above, a second round can address

new issues. The following issues were raised during the first-round workshop discussions or were otherwise identified as opportunities for research during future phases of this project:

1. How might insights be confirmed or further insights gained through a further systematic assessment of the remaining reported cases of maritime dispute resolution undertaken during the UNCLOS era? There exist enough additional cases worthy of assessment to justify at least one more round of case analysis.

2. To what degree is the three-step process for maritime delimitation a matter of international law that binds tribunals to use it to achieve the “equitable solution” contemplated by UNCLOS? All workshop participants agreed that states are free to devise any approach to maritime delimitation that is mutually agreeable to them, consistent with international law and respecting the rights and duties of third parties. However, UNCLOS articles 74, with regard to the EEZ, and 83, with regard to the continental shelf, require delimitation to be “effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.” Article 38 of the Statute of the International Court of Justice provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

- b. international custom, as evidence of a general practice accepted as law;

- c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

In light of the existing jurisprudence and the attitudes of states, it is worth considering to what degree, if at all, states are required to be influenced in practice by the three-step process courts and tribunals have employed to address maritime boundary questions.

3. What insights can be derived from the assessment of academics whose work focuses on the relationship between international relations theories and the effectiveness of international institutional dispute resolution processes? The cases addressed so far make clear that the success of any IIDR process is always as much a function of the processes of international relations as it is of international law. This presents an opportunity for future fruitful analysis.

4. What insights can be gained for states in East Asia from an appraisal of the South China Sea arbitration case in light of the legal and political insights derived? Since the overarching goal of this study is to generate insights that might be applied to benefit East Asian states with maritime disputes, this study should devote a workshop to developing a full assessment of the effect of China's attitude toward the South China Sea arbitration on international law of the sea and on IIDR in East Asia.



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