THE BARBADOS/TRINIDAD & TOBAGO ARBITRATION
The Law of Maritime Delimitation:
Back to the Future

by

Bernard H. Oxman*

> *[A]rbitration, while expected to take into account the special circumstances calling for modification of the major principle of equidistance, is not contemplated as arbitration* ex aequo et bono. *That major principle must constitute the basis of the arbitration, conceived as settlement on the basis of law, subject to reasonable modifications necessitated by the special circumstances of the case*.[1]

The Award that is the subject of this volume is the first determination of a maritime boundary between States in a dispute submitted pursuant to the compulsory jurisdiction provisions of Section 2 of Part XV of the United Nations Convention on the Law of the Sea ("the Convention" or "UNCLOS").[2] It was rendered by a unanimous arbitral tribunal constituted under Annex VII of UNCLOS, comprised of five members of great distinction and experience in international law and international dispute resolution, including the law of the sea in general and maritime boundaries in particular. The panel was presided over by the former president of the International Court of Justice, Stephen M. Schwebel,[3] and included

* Richard A. Hausler Professor of Law, University of Miami School of Law; Faculty Chair of the Law School's Master of Laws Program in Ocean Law and Coastal Law.

[1] II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION p. 216, para. 82 (1953) (commenting on the equidistance/special circumstances rule of delimitation contained in its draft articles on the continental shelf), *cited in* Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. REP. 38, 122 (Sep. Op. Schwebel, J.).

[2] In the *Land Reclamation* arbitration under Annex VII of UNCLOS, Malaysia's submission included an issue pertaining to the delimitation of the territorial sea. In paragraph 13 of their settlement, the parties agreed "that the issue pertaining to the maritime boundaries be resolved through amicable negotiations." Case concerning Land Reclamation by Singapore In and Around the Straits of Johor (Malaysia v. Singapore), Award on Agreed Terms, Sept. 1, 2005, *available at* <http://www.pca-cpa.org>. Although jurisdiction was not predicated on Part XV of UNCLOS and the disputes submitted were not limited to questions of the law of the sea, there have been prior maritime boundary decisions where the parties to the dispute were party to the Convention, notably Eritrea/Yemen, Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation), 119 I.L.R. p. 417 (1999), Permanent Court of Arbitration Award Series, The Eritrea-Yemen Arbitration Awards of 1998 and 1999 p. 165 (TMC Asser Press (2005); Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), 2001 I.C.J. REP. 40; and Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.: Eq. Guinea intervening), 2002 I.C.J. REP. 303.

[3] Judge Schwebel also presided over the very first arbitral tribunal constituted under UNCLOS, which dealt with the Southern Bluefin Tuna Case (Austl. & N.Z. v. Japan).

Ian Brownlie, Vaughan Lowe, Francisco Orrego Vicuña, and Arthur Watts.[4] David Gray, an experienced hydrographer, was appointed as an expert to assist the tribunal.[5]

Each of the Parties was represented by its attorney general as agent. They were assisted by respected counsel learned in international law and experienced in international dispute resolution. Our ability to understand the Award is enhanced by the willingness of the Parties to make public the impressive written and oral pleadings and other documents, and the global availability of these documents (along with the text of the Award) on the website of the Permanent Court of Arbitration,[6] which served as the registry for the arbitration.[7] This is a welcome indication that public access to such information following the conclusion of arbitral proceedings between States under the Law of the Sea Convention is compatible with the desire for confidentiality during the proceedings,[8] and can be distinguished from the possible need to maintain confidentiality following the conclusion of proceedings involving private or proprietary information.[9]

I. THE SINGLE MARITIME BOUNDARY

The Parties agreed that Articles 74(1) and 83(1) were the relevant provisions of UNCLOS governing respectively the delimitation of the exclusive economic zone ("EEZ") and the continental shelf.[10] While those provisions are substantively the same, they reflect the fact that the regimes of the EEZ and the continental shelf developed separately and are addressed in different, albeit adjacent, parts of the Convention. However, although the continental shelf may extend further, both regimes apply within 200 nautical miles ("nm" or

[4] Barbados appointed Professor Lowe, Trinidad and Tobago appointed Professor Brownlie, and "in accordance with Article 3(d) of Annex VII to the Convention, the Parties have agreed" to the remaining appointments. *Rules of Procedure*, preamble.

[5] Award, para. 37.

[6] The website can be found at <http://www.pca-cpa.org>. The Award and documents in this case are *available at* <http://www.pca-cpa.org>.

[7] Bette Shifman was appointed registrar; Anne Joyce subsequently replaced her. Dane Ratliff assisted.

[8] Following consultation with the Parties, the President of the Tribunal did not accept Guyana's request for copies of the Application, Statement of Claim, and written pleadings of both Parties. Award, para. 10. Complaints about press leaks in the course of the hearings prompted the following admonition by the President (Award, para. 39):

> Reports have appeared in the Caribbean press about contents of the arbitral proceedings currently taking place in London between Barbados and Trinidad and Tobago concerning their maritime boundary. In that regard, the Tribunal draws attention to its Rules of Procedure, which, in Article 13(1), provide: "All written and oral pleadings, documents, and evidence submitted in the arbitration, verbatim transcripts of meetings and hearings, and the deliberations of the Arbitral Tribunal, shall remain confidential unless otherwise agreed by the Parties".
>
> The Tribunal accordingly trusts that this rule will be observed by the Parties and any spokesmen for them.

[9] It may be noted in this regard that UNCLOS specifies with respect to the international sea-bed area, "[p]roprietary data, industrial secrets or similar information and personnel records shall not be placed in archives which are open to public inspection." UNCLOS, art. 181, para. 2. As is doubtless well known to certain members of the Tribunal and counsel in this case, the president of the World Bank Administrative Tribunal may grant an applicant's request for anonymity "where publication of the applicant's name is likely to be seriously prejudicial to the applicant." Rules of the World Bank Administrative Tribunal, rule 28 (Sept. 26, 1980, as amended).

[10] Award, para. 299. Paragraph 1 of Article 74 of UNCLOS provides: "The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution." Paragraph 1 of Article 83 contains the same rule with respect to delimitation of the continental shelf.

"miles") of the coast, and to that extent they overlap.[11] The Tribunal observed that the "trend toward harmonization of legal regimes inevitably led to one other development, the establishment for considerations of convenience and of the need to avoid practical difficulties of a single maritime boundary between States whose entitlements overlap" and that it is now

> evident that State practice with very few exceptions (most notably, with respect to the Torres Strait) has overwhelmingly resorted to the establishment of single maritime boundary lines and that courts and tribunals have endorsed this practice either by means of the determination of a single boundary line (*Gulf of Maine*, I.C.J. Reports 1984, p. 246; *Guinea/Guinea-Bissau*, 77 I.L.R. p. 635; *Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40) or by the determination of lines that are theoretically separate but in fact coincident (*Jan Mayen*, I.C.J. Reports 1993, p. 38).[12]

In this case, Barbados sought a single maritime boundary delimiting both the EEZ and the continental shelf, while Trinidad and Tobago argued that the EEZ and the continental shelf are to be delimited separately. The Tribunal noted that "the question is largely theoretical because Trinidad and Tobago accepts that there is in fact no reason for the Tribunal to draw different boundary lines for the EEZ and the continental shelf within 200 nm of its own baselines" and that "the need for a separate boundary line appears to be associated with its claim over the outer continental shelf beyond its 200-mile area."[13] Accordingly, the Tribunal decided to "determine a single boundary line for the delimitation of both the continental shelf and the EEZ to the extent of the overlapping claims, without prejudice to the question of the separate legal existence of the EEZ and the continental shelf."[14]

II. THE TWO-STEP APPROACH

While there is no mention in UNCLOS Articles 74(1) and 83(1) of equidistance or any other specific approach to achieving the requisite equitable solution on the basis of international law,[15] and while Trinidad and Tobago emphasized "that equidistance is not a compulsory method of delimitation and that there is no presumption that equidistance is a governing principle,"[16] the Tribunal concluded that the Parties agreed "that the delimitation is

---

[11] UNCLOS, arts. 57, 76(1). The regimes are substantively harmonized in that they are subject to the same generally applicable provisions of the Convention, notably those regarding the protection and preservation of the marine environment and the settlement of disputes, as well as specific provisions that apply to both. *See* UNCLOS, arts. 56(3), 68, 78, 80, 208, 210, 214, 216, 246-249, 252-255, 297, 298.

[12] Award, paras. 227, 235.

[13] Award, paras. 296, 297. The Tribunal explained its preference for "outer" rather than "extended" continental shelf on the grounds that it is more accurate "since the continental shelf is not being extended." Award, para. 65, n.4. Indeed, the concept of the continental shelf as the natural prolongation of the land territory of the coastal state precedes that of a 200-mile limit chronologically in customary international law and textually in paragraph 1 of Article 76 of UNCLOS. It would seem that the term "extended continental shelf" is used in the Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf in the sense that the Tribunal finds problematic. *See* CLCS/11, para. 2.1.2 (May 13, 1999), *available at* <http://www.un.org/Depts/los/clcs_new/clcs_home.htm>. The term "outer continental shelf" is of course employed by the Tribunal in a context different from its use, in the statute implementing the 1945 Truman Proclamation, to identify submerged lands subject to the jurisdiction of the United States that are seaward of the boundaries of the states of the United States (in most cases fixed at three miles from the baselines). Outer Continental Shelf Lands Act, 67 Stat. 2296 (Aug. 7, 1953).

[14] Award, para. 298.

[15] Text at note 10 *supra*; *see* L.D.M. Nelson, *The Roles of Equity in the Delimitation of Maritime Boundaries*, 84 AM. J. INT'L L. p. 837 (1990).

[16] Award, para. 301.

to be effected by resort to the equidistance/relevant circumstances method" previously articulated by the International Court of Justice.[17]

The Tribunal described this as a

> two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a convenient starting point, equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result.[18]

In the Tribunal's view, "[c]ertainty is thus combined with the need for an equitable result."[19]

Much attention has been directed in the past to the distinction between opposite and adjacent coasts in terms of the effect of using equidistance. It has been pointed out that a median line (an equidistance line between opposite coasts) may tend to be self-adjusting, while the direction of an equidistance line extending from adjacent coasts may be determined through much of its length by the particular configuration of the coast. This in turn led to elaborate attempts to determine whether, for purposes of ascertaining effects on an equidistance line, the relationship between coasts, viewed from the sea, should be regarded as opposite or adjacent. Trinidad and Tobago in this case argued that as one moves east into the Atlantic, the relationship between the coasts of the Parties increasingly takes on the characteristics of adjacency.

Noting that Articles 74 and 83 of UNCLOS do not distinguish between opposite and adjacent coasts, the Tribunal concluded there is no justification for approaching the process of delimitation from the perspective of such a distinction and applying different criteria to each.[20] It also observed that "while relevant in limited geographical circumstances," the distinction "has no weight where the delimitation is concerned with vast ocean areas."[21]

III. THE QUEST FOR OBJECTIVITY: THE PROVISIONAL EQUIDISTANCE LINE

The Tribunal recalled that the venerable *North Sea Continental Shelf* cases, which rejected equidistance, were decided in a legal context that has changed:[22]

> [I]t is today well established that the starting point of any delimitation is the entitlement of a State to a given maritime area, in this case both to an exclusive economic zone and to a continental shelf. At the time when the continental shelf was the principal national maritime area beyond the territorial sea, such entitlement found its basis in the concept of natural prolongation (*North Sea Continental Shelf Cases*, I.C.J. Reports 1969, p. 4). However, the subsequent emergence and consolidation of the EEZ meant that a new approach was introduced, based upon distance from the coast.
>
> In fact, the concept of distance as the basis of entitlement became increasingly intertwined with that of natural prolongation. Such a close interconnection was

[17] Award, paras. 298, 300. Specific reference was made in this connection to *Qatar v. Bahrain*, note 2 *supra*, 2001 I.C.J. REP. 40, and *Cameroon v. Nigeria*, note 2 *supra*, 2002 I.C.J. REP. 303. Award, para. 298.
[18] Award, para. 242.
[19] *Id.*
[20] Award, para. 315.
[21] Award, para. 316.
[22] Award, paras. 224, 225.

> paramount in the definition of the continental shelf under UNCLOS Article 76, where the two concepts were assigned complementary roles. That same interconnection became evident in the regime of the EEZ under UNCLOS Article 56, distance being the sole basis of the coastal State's entitlement to both the seabed and subsoil and the superjacent waters.

It is sometimes maintained that the use of equidistance to delimit areas between States with opposite or adjacent coasts is a logical corollary of distance as the basis of title to such areas. That is not what the Tribunal said. And with good reason. The connection is doubtful. Just as in the case of airspace, where the basis of title is sovereignty over the surface of the earth, not the extra-terrestrial limit of airspace, so in the law of the sea it is sovereignty over the coast, not the seaward limit of zones of coastal State jurisdiction, that is the basis of title.[23]

Paragraph 10 of Article 76 of UNCLOS[24] draws an explicit distinction between rules regarding the seaward limits of entitlement and rules of delimitation. As is evident from Article 6 of the 1958 Convention on the Continental Shelf and the work of the International Law Commission on which it is based, the equidistance/special circumstances method embraced therein has no necessary connection to zones where title is based on distance: the definition of the continental shelf in Article 1 of that Convention contains no reference to distance. Moreover, equidistance or a close approximation at times has been used by States in other places where title is not based on distance, notably in shared internal waters such as lakes and rivers. Its use would not appear to be excluded with respect to the continental shelf beyond 200 miles, where natural prolongation of the land territory of the coastal State to the outer edge of the continental margin determines the seaward extent of coastal State entitlement under paragraph 1 of Article 76 of the Law of the Sea Convention.[25] Indeed, in this case, although the single maritime boundary drawn by the Tribunal does not extend beyond 200 miles of the coasts of the Parties,[26] the boundary claimed by Trinidad and Tobago did.[27] The Tribunal expressly decided that its jurisdiction included delimitation of the continental shelf beyond 200 miles,[28] and it articulated no exception in this regard to the approach to delimitation that it identified.

As to the first step in the delimitation process, the Tribunal observed that "the need to avoid subjective determinations requires that the method used start with a measure of certainty that equidistance positively ensures, subject to its subsequent correction if justified. A different method would require a well-founded justification and neither of the Parties has asked for an alternative method."[29] It would therefore appear that starting the analytical process by drawing an equidistance line is justified, as least in significant measure, by the desire to ensure that "the method used start with a measure of certainty that equidistance positively ensures" in order to avoid subjective determinations.

---

[23] In the context of relevant circumstances that may indicate an adjustment of the provisional equidistance line, the Tribunal stated that the "reason for coastal length having a decided influence on delimitation is that it is the coast that is the basis of entitlement over maritime areas and hence constitutes a relevant circumstance that must be considered in the light of equitable criteria." Award, para. 239.

[24] "The provisions of this article [on the definition of the continental shelf and its seaward limits] are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts." UNCLOS, art. 76, para. 10.

[25] Detailed technical criteria, constraints, and procedures are set forth in subsequent paragraphs of Articles 76 and in Annex II of UNCLOS.

[26] Award, para. 368.

[27] Award, para. 63(c).

[28] Award, paras. 213, 217(ii), 384(ii).

[29] Award, para. 306.

The objectivity of the equidistance line is geometric, and arises from its definition: a line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of the respective parties is measured.[30] Conceived as such, the equidistance line is a mathematical construct that is drawn in accordance with cartographic standards and practices; these days the precise location of coastal features can be ascertained from generally accessible satellite observations, and geometric calculations are typically made by specialized computer programs. As in this case, even where straight baselines or archipelagic baselines have been drawn by one of the parties, the nearest points will frequently be on the coast itself.[31] The equidistance line therefore supplies an objective common point of reference that is easily ascertained. This can be helpful in negotiations and in collegial deliberative processes engaged by any of the other means of peaceful settlement of disputes contemplated by Article 33 of the United Nations Charter. For example, in this case, there was no significant disagreement as to the location of an equidistance line. As illustrated by the maps to which the Tribunal referred, drawing an equidistance line at the initial stage makes transparent, and thereby exposes to useful critical examination, both the virtually ubiquitous tendency to consider the effect of an equidistance line in any event as well as the reasons for and effects of using a different line in whole or in part. It also focuses attention on coastal geography, the most important factor in maritime delimitation.

Applying the first step of this approach posed few problems as such. Barbados is located east of the Windward islands and 116 miles northeast of Tobago, and consists of a single island with a surface area of 441 square kilometers. Trinidad and Tobago established archipelagic baselines connecting basepoints on the islands of Trinidad (located off the coast of Venezuela, with an area of 4,828 square kilometers), Tobago (located northeast of Trinidad, with an area of 300 square kilometers) and smaller islands.[32] An equidistance line between the Parties is generated by small segments of the coasts of Barbados and Tobago that face the same marine area, and runs in a southeasterly direction.[33]

IV. RELEVANT CIRCUMSTANCES

Much of the Award concerned the question of applying the second step. Most of the maritime boundary was in dispute. Neither Party advocated an equidistance line for the entire boundary. They agreed on equidistance only with respect to a small central segment of about

[30] This is true both for the territorial sea and for zones seaward of the territorial sea. *See* UNCLOS, art. 15; Convention on the Territorial Sea and the Contiguous Zone, arts. 12, 24; Convention on the Continental Shelf, art. 6; 1956 ILC Draft Articles on the Law of the Sea, arts. 12(1), 14(1), 72; *Qatar v. Bahrain*, note 2 *supra*, 2001 I.C.J. REP. 40, 94, para. 177; *Cameroon v. Nigeria*, note 2 *supra*, 2002 I.C.J. REP. 303, 442, para. 290.

[31] Even if this is not the case, an equidistance line can be drawn either with reference to straight baselines and archipelagic baselines or with reference to the nearest points on the coast – more precisely, the nearest points on the normal baseline, namely the low water line along the coast. The latter approach eliminates any risks of subjectivity involved in the process of drawing or evaluating straight baselines or archipelagic baselines, and obviates the need to deal with their legality, which may impact issues regarding the rights of states generally that are not engaged by the delimitation as such. Both approaches were combined in a situation where Cuba had drawn straight baselines but the United States had neither drawn such baselines nor accepted the validity of the Cuban baselines. The agreed boundary essentially effects an equal division of the area lying between an equidistance line measured from the low-water lines along the respective coasts and an equidistance line measured from Cuba's straight baselines and comparable hypothetical construction lines along the coast of the United States. *See* J. CHARNEY & L.M. ALEXANDER, INTERNATIONAL MARITIME BOUNDARIES, vol. 1, p. 419 (1993).

[32] Award, paras. 43, 44.

[33] *See* Award, Map VII, at p.xxxx.

16 miles.[34] Barbados advocated departure from that line in the west, and Trinidad and Tobago in the east. Each Party found itself in the position of defending equidistance in one area and opposing it in another.

As to the second step, the Tribunal observed that the process of achieving an equitable result is

> constrained by legal principle, in particular in respect of the factors that may be taken into account. It is furthermore necessary that the delimitation be consistent with legal principle as established in decided cases, in order that States in other disputes be assisted in the negotiations in search of an equitable solution that are required by Articles 74 or 83 of the Convention.[35]

Still,

> [t]here will rarely, if ever, be a single line that is uniquely equitable. The Tribunal must exercise its judgment in order to decide upon a line that is, in its view, both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome. Certainty, equity, and stability are thus integral parts of the process of delimitation.[36]

The invocation of established case law with respect to the second step had its limits. Having relegated the abstract conceptual analysis of the first maritime delimitation decision of the International Court of Justice ("ICJ") to a legal context now largely changed,[37] the Tribunal questioned the second decision as well: "Some early attempts by international courts and tribunals to define the role of equity resulted in distancing the outcome from the role of law and thus led to a state of confusion in the matter (*Tunisia/Libya*, I.C.J. Reports 1982, p. 18)."[38] The Tribunal also marginalized the later *Jan Mayen* decision, describing it as "most exceptional in having determined the line of delimitation in connection with the fisheries conducted by the parties in dispute."[39]

V. COASTAL FRONTAGE AND CUT-OFF EFFECTS

In the *North Sea Continental Shelf* cases, the ICJ observed that

> the use of the equidistance method would frequently cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another, when the configuration of the latter's coast makes the equidistance line swing out laterally

---

[34] Award, para. 294.

[35] Award, para. 243. One may recall in this regard the following critique of the partition between the parties of a fishing area in the *Jan Mayen* case:

> While the Court may be commended for the simplicity of its conclusion, a principled consistency with its earlier case-law is less conspicuous. In this Judgment, the Court recalls "the need, referred to in the Libya/ Malta case, for 'consistency and a degree of predictability'". But in this, the most critical holding of the Judgment on the real assets at stake, the Court jettisons what its case-law, and the accepted customary law of the question, have provided.
>
> . . .
>
> If what is lawful in maritime delimitation by the Court is what is equitable, and if what is equitable is as variable as the weather of The Hague, then this innovation may be seen as, and it may be, as defensible and desirable as another.

Jan Mayen case (Den. v. Nor.), note 1 *supra*, 1993 I.C.J. REP. 38, 188, 120 (Sep. Op. Schwebel, J.).

[36] Award, para. 244.

[37] *See* text at note 22 *supra.*

[38] "It is submitted that, in this case, the ICJ has not carried the burden of demonstrating why granting full effect to the Kerkennahs would result in giving them 'excessive weight'." Case Concerning the Continental Shelf (Tunisia/Libya), 1982 I.C.J. REP. 18, 99 (Sep. Op. Schwebel, J.).

[39] Award, para. 241. *See* note 35 *supra.*

> across the former's coastal front, cutting it off from areas situated directly before that front.[40]

Notwithstanding all the scholarly and diplomatic attention to and judicial distancing from the conceptual distinction drawn in the *North Sea* cases between equitable principles and the equidistance/special circumstances approach, not to mention the Court's abstract invocation of natural prolongation as the basis of title, it is the foregoing observation regarding coastal frontage and cut-off effects that lies at the heart of the ICJ's analysis of the problem with concluding that the maritime boundary is an equidistance line in the geographic circumstances of the *North Sea* cases. This observation has continued to influence the law of maritime delimitation as a geographic circumstance relevant to assessing whether an equidistance line produces an equitable result.

In this case, Trinidad and Tobago maintained that, "[a]s a coastal State with a substantial, unimpeded eastwards-facing coastal frontage projecting on to the Atlantic sector, [it] is entitled to a full maritime zone, including continental shelf. The [equidistance line] in the Atlantic sector cuts right across the Trinidad and Tobago coastal frontage and is plainly inequitable."[41] As illustrated in Map II of the Award,[42] the long eastern segment of the boundary advocated by Trinidad and Tobago runs almost due east: it follows "an azimuth of 88º extending to the outer limit of the EEZ of Trinidad and Tobago" and beyond "to the outer limit of the continental shelf as determined in accordance with international law."[43]

Although the opinion makes several references to Trinidad and Tobago's assertion that the ratio of coastal frontage is on the order of 8.2:1 in its favor, and notes that Barbados contests the calculations,[44] the Tribunal does not engage with the matter directly apart from observing that it "finds no difficulty in concluding that coastal frontages are a circumstance relevant to delimitation and that their relative lengths may require an adjustment of the provisional equidistance line" but that "this does not require the drawing of a delimitation line in a manner that is mathematically determined by the exact ratio of the lengths of the relevant coastlines."[45]

In the particular context in which only a small part of the coast of the island of Tobago supplied basepoints influencing the location and direction of the equidistance line, the main question was whether the larger island of Trinidad possessed a relevant coastal front facing the area of delimitation, and if so whether and to what extent the existence of that coastal front and any cut-off of its seaward projection constituted relevant circumstances suggesting an adjustment of the provisional equidistance line. In this regard the Tribunal concluded that "what matters is whether they [coastal frontages] abut as a whole upon the disputed area by a radial or directional presence relevant to the delimitation, not whether they contribute basepoints to the drawing of an equidistance line."[46] In this connection, "the orientation of coastlines is determined by the coasts and not by baselines."[47] The Tribunal concluded

> that broad coastal frontages of the island of Trinidad and of the island of Tobago as well as the resulting disparity in coastal lengths between the Parties, are relevant

[40] North Sea Continental Shelf cases, 1969 I.C.J. REP. 1, 31-32, para. 44.
[41] Award, para. 62.
[42] Award, Map II, at p. xxxx.
[43] Award, para. 63.
[44] Award, paras. 159, 326, 352.
[45] Award, paras. 327, 328.
[46] Award, para. 331.
[47] Award, para. 334.

> circumstances to be taken into account in effecting the delimitation as these frontages are clearly abutting upon the disputed area of overlapping claims.[48]

The Tribunal noted that "there are no magic formulas" for determining where precisely the adjustment should take place.[49] It rejected the substantial deflection proposed by Trinidad and Tobago, and instead made a modest deflection so that the seaward portion of the boundary coincides with a line drawn from Little Tobago Island to the point where the 200-mile limit of Trinidad and Tobago's EEZ intersects its southern maritime boundary with Venezuela.[50]

Perhaps it is not coincidental that this modest deflection, and in particular its terminus, may be the most extensive northward adjustment that could be effected without requiring that at least some aspects of what is sometimes called the "grey zone" problem be addressed. This problem arises where the point at which the maritime boundary reaches the 200-mile limit of one of the parties is less than 200 miles from the coast of the other party because the maritime boundary is not an equidistance line at that point. Trinidad and Tobago's proposed boundary would have produced an area beyond 200 miles of its coast that is within 200 miles of Barbados. Trinidad and Tobago argued that because the continental margin extends beyond 200 miles from its coast in the east, its continental shelf and its proposed maritime boundary would continue beneath and beyond the EEZ of Barbados; as for the area immediately to the east of the 200-mile limit of Trinidad and Tobago's EEZ, "[w]e are saying that Trinidad and Tobago has continental shelf rights there, but we accept that Barbados has exclusive economic zone rights."[51]

The response was that

> the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nm. The problems posed by the relationship in that maritime area of CS and EEZ rights are accordingly problems with which the Tribunal has no need to deal. The Tribunal therefore takes no position on the substance of the problem posed by the argument advanced by Trinidad and Tobago.[52]

At the conclusion of the analysis, the Tribunal, having drawn the delimitation line, examines the outcome "in light of proportionality, as the ultimate test of the equitableness of the solution."[53] It reiterates that "proportionality is not a mathematical exercise that results in the attribution of maritime areas as a function of the length of the coasts of the Parties or other such ratio calculations," but is rather "a broader concept, … a sense of proportionality, against which the Tribunal can test the position resulting from the provisional application of the line that it has drawn, so as to avoid gross disproportion in the outcome of the delimitation."[54] Interestingly, its application of those observations to the facts of the case again engages the question of coastal frontages, reasoning that, while not a question of coastal lengths, it would be disproportionate to ignore a coastal frontage abutting the area of delimitation that is much larger than the short stretches of the coast that determine the

[48] *Id.*
[49] Award, para. 373.
[50] Award, paras. 360, 373.
[51] Proceedings, Day 4, p. 78 (Greenwood) (Oct. 21, 2005). *See* Award, Map II, at p. xxx. .
[52] Award, para. 368.
[53] Award, para. 376.
[54] Award, para. 376.

location and direction of the provisional equidistance line, but that it would also be disproportionate if the deflection designed to deal with this problem were too great.[55]

VI. THIRD STATES

In the eastern part of the delimitation area, the legal interests of Guyana[56] and Venezuela may come into play in a situation in which Barbados concluded a maritime boundary agreement with Guyana, Trinidad and Tobago concluded a maritime boundary agreement with Venezuela, and there is no maritime boundary agreement between Guyana and Venezuela, a matter that may in part engage Venezuela's claims over the Essequibo region.

The Barbados-Guyana agreed EEZ boundary is a short equidistance line whose western terminus would form a tri-point with an equidistance line boundary between Barbados and Trinidad and Tobago as proposed by Barbados. It is not only south of Trinidad and Tobago's claim line, but south of the EEZ and continental shelf boundary between Trinidad and Tobago and Venezuela. The latter boundary is somewhat closer to the coast of Trinidad and Tobago so as to respond to Venezuela's desire for a *salida al Atlántico*,[57] that is a corridor to the high seas beyond the EEZ. In this connection, Trinidad and Tobago, citing the *Guinea-Guinea Bissau* arbitration, argued for a regional approach to delimitation that would respect the *salida al Atlántico* accorded Venezuela and extend seaward from Trinidad and Tobago as well to the limits of the continental shelf. It would appear however that, having conceded that Barbados would have an EEZ that wrapped around the eastern limit of its EEZ, Trinidad and Tobago was making this argument only in respect of rights to the continental shelf seaward of its EEZ, and not in respect of access to the high seas for purposes of navigation and communications that is unencumbered by a foreign State's rights with respect to pollution from ships and other matters in its EEZ.

The Tribunal rejected Trinidad and Tobago's regional argument. It noted that the delimitation agreements between each of the Parties and a third State are *res inter alios acta* and do not affect the rights of the other Party.[58] Moreover, Barbados cannot be required to "compensate" Trinidad and Tobago for the concessions made to Venezuela by shifting Barbados' maritime boundary with Trinidad and Tobago in favor of the latter.[59]

The Tribunal did consider the agreements relevant insofar as they determined the limits of each Party's zones. The Trinidad and Tobago-Venezuela agreement determined the southern limit of Trinidad and Tobago's entitlement to maritime areas, and thus the maximum extent of overlapping claims between the Parties to the arbitration insofar as Trinidad and Tobago's claim is concerned.[60] Interestingly, although it did not advocate such an outcome, Trinidad and Tobago did state, "[i]f the maritime boundary drawn by the Tribunal meets the line delimited by the 1990 Venezuela-Trinidad and Tobago Agreement, then the Tribunal will have completed its task."[61]

---

[55] Award, paras. 378, 379.

[56] Guyana sent a letter to the President of the Tribunal which provided information regarding the outer limit of its EEZ. Award, para. 40.

[57] *See* CHARNEY & ALEXANDER, *supra* note 31, at p. 680.

[58] Award, paras. 346, 349.

[59] Award, para. 346.

[60] Award, paras. 345, 348.

[61] Trinidad and Tobago, Counter-Memorial, vol. 1, p. 91, para. 264.

VII. FISHERIES

The extension of coastal State jurisdiction over the natural resources of the seabed and subsoil following the 1945 Truman Proclamation on the continental shelf did not, in the main, affect on-going activities in general or those by nationals of foreign States in particular.[62] Indeed, because investment in offshore oil and gas development was conceived as requiring, as on land, exclusive rights of exploration and exploitation of specific sites for an extensive period of time, one of the purposes of the continental shelf regime was to establish a basis in international law for granting such rights.

Fishing, on the other hand, is as old humanity's use of the sea and, for much of that time, has been transitory in part because the location and abundance of the resource is transitory. Under modern international law, fishing had long been open to all States as a freedom of the high seas. Indeed, because freedom of fishing was increasingly regarded in the latter half of the twentieth century as posing unacceptable challenges to coastal State fishing interests, one of the purposes of the regime of the EEZ was to establish a basis in international law for greatly restricting the geographic scope of that freedom. Even once EEZs are established, fishing by nationals of foreign States, including neighboring States, might continue by virtue of express or tacit agreement. Indeed, most of the provisions of UNCLOS Part V on the EEZ are devoted to access of foreign fishing vessels and regulation of foreign fishing.

That said, it would appear that States are not inclined to request international tribunals to address the substance of the question of foreign access to fisheries within the EEZ. Such matters are excluded from compulsory arbitration or adjudication under the Law of the Sea Convention.[63] And States that submit maritime boundary disputes generally do not contemplate a functional allocation of fisheries resources by an international tribunal.

That was the case here. Barbados submitted the dispute to arbitration pursuant to the compulsory jurisdiction provisions of UNCLOS, which exclude questions of foreign access to fisheries within the EEZ. Also, although it followed by only 10 days the arrest by Trinidad and Tobago of Barbadian fisherfolk for illegal fishing,[64] the Statement of Claim by Barbados accompanying its written notification of February 16, 2004, initiating the arbitration referred only to "a single unified maritime boundary, delimiting the exclusive economic zone and continental shelf" and made no reference to the question of access to fisheries. It was only during the oral proceedings that Barbados argued that, if its proposed boundary were not accepted, the Tribunal could provide lesser included relief relating to access of its fisherfolk to the area it claimed.[65] The Tribunal disagreed, "because that award is outside its jurisdiction by virtue of the limitation set out in UNCLOS Article 297(3)(a) and because, viewed in the context of the dispute over which the Tribunal does have jurisdiction, such an award would be *ultra petita*."[66]

The Tribunal was however competent to take Barbadian fishing into account in deciding whether it should adjust the western segment of the equidistance line. According to Barbados, the "special circumstance is the established traditional artisanal fishing activity of Barbadian fisherfolk south of the median line. The equitable solution to be reached is one that

[62] There were some issues with respect to exploitation of sedentary species of living resources. To that extent, this tends to confirm the distinction drawn here between nonliving and living resources.

[63] UNCLOS, art. 297, para. 3.

[64] Award, para. 55.

[65] Award, paras. 72, 149.

[66] Award, para. 283.

would recognise and protect Barbadian fishing activities by delimiting the Barbados EEZ in the manner illustrated on Map 3."[67] As illustrated in that map, the boundary advocated by Barbados in the western sector would extend beyond the equidistance line to embrace much of the area to the north of the limits of the territorial sea off Tobago. In this respect Barbados argued that it does not assert an exclusive right based on the traditional artisanal fishing practices of its nationals, and stated that it is "only because Trinidad and Tobago refuses to accommodate this non-exclusive right by recognising a regime of access for some 600 Barbadian nationals to continue to fish in the maritime zones at issue that a special circumstance arises that requires an adjustment to the provisional median line in favour of Barbados."[68]

Noting that "[r]esource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance," the Tribunal derived the specific standard it applied from the passage in the *Gulf of Maine* case rejecting "the respective scale of activities connected with fishing" as a relevant circumstance:

> What the Chamber would regard as a legitimate scruple lies … in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned (I.C.J. Reports 1984, p. 246, at p. 342, para. 237).[69]

While accepting "that communities in Barbados are heavily dependent upon fishing, … that the flyingfish fishery is central to that dependence" and that deprivation of this fishery "is profoundly significant for them, their families, and their livelihoods," the Tribunal concluded that Barbados had not succeeded in demonstrating that the result would be catastrophic.[70]

The Tribunal did not however stop there. It went on to state that

> even if Barbados had succeeded in establishing one or all of its core factual contentions, it does not follow that, as a matter of law, its case for adjustment would be conclusive. Determining an international maritime boundary between two States on the basis of traditional fishing on the high seas by nationals of one of those States is altogether exceptional. Support for such a principle in customary and conventional international law is largely lacking. Support is most notably found in speculations of the late eminent jurist, Sir Gerald Fitzmaurice, and in the singular circumstances of the judgment of the International Court of Justice in the *Jan Mayen* case (I.C.J. Reports 1993, p. 38). That is insufficient to establish a rule of international law.[71]

It would be difficult to make a clearer statement that, notwithstanding the fact that most delimitation disputes concerning the EEZ and the continental shelf are about control of and access to natural resources, both the location and the utilization of those resources will rarely, if ever, directly influence the location of an adjudicated maritime boundary.

Indirect influence is of course not addressed. The question of catastrophic effect arises only after a tribunal has drawn a provisional equidistance line and considered whether to adjust it to take into account relevant circumstances, notably including coastal geography. A legal realist would not be surprised that the line drawn in the *Gulf of Maine* case based solely

[67] Award, para. 58. Map 3 is reproduced as the Tribunal's Map I, at p. xxx. .
[68] Award, para. 135.
[69] Award, para. 241.
[70] Award, para. 267.
[71] Award, para. 269.

on the Chamber's appreciation of the relevant coastal geography was not deemed to produce catastrophic effects with respect to fishing interests described at length in the pleadings.

In this case, the Tribunal had an opportunity outside the law of maritime delimitation to address the concerns articulated by Barbados. Drawing upon the obligation of neighboring coastal States to co-ordinate and ensure the conservation and development of trans-boundary fish stocks under Article 63, paragraph 1 of UNCLOS, noting that it is "well established that commitments made by Agents of States before international tribunals bind the State, which is thenceforth under a legal obligation to act in conformity with the commitment so made," and referring to statements made by both Parties affirming their willingness to negotiate an access agreement, including the assurance of the Agent of Trinidad and Tobago on the last day of the hearing, the Tribunal decided that

> Trinidad and Tobago and Barbados are under a duty to agree upon the measures necessary to co-ordinate and ensure the conservation and development of flyingfish stocks, and to negotiate in good faith and conclude an agreement that will accord fisherfolk of Barbados access to fisheries within the Exclusive Economic Zone of Trinidad and Tobago, subject to the limitations and conditions of that agreement and to the right and duty of Trinidad and Tobago to conserve and manage the living resources of waters within its jurisdiction.[72]

This approach to the problem was presumably regarded as consistent with the Tribunal's finding that "it has no jurisdiction to render a *substantive* decision as to an appropriate fisheries regime to apply in waters which may be determined to form part of Trinidad and Tobago's EEZ."[73] Such an approach, by carefully distinguishing between the substantive role of the parties and the procedural role of a tribunal, could facilitate the application of other jurisdictional limitations in Article 297 of UNCLOS, without which there would have been no agreement on compulsory jurisdiction, especially the comprehensive limitation in paragraph 1.

VIII. CONCLUSION

There can be no doubt that this Award arrived at a reasonable result explicated by a well-reasoned opinion that will be widely cited and broadly influential. The question is the future effect of a change in approach that it accepts and advances.

The Award was rendered a half century after controversy emerged in reaction to the equidistance/special circumstances rule for delimitation of the continental shelf proffered by the International Law Commission in 1953 and included (subject to reservation) in the 1958 Convention on the Continental Shelf. That controversy culminated in rejection of the rule in the landmark decision of the International Court of Justice in the *North Sea Continental Shelf* cases, and the rule was successfully opposed, along with any other precise formulation, in the negotiation of the delimitation provisions of the United Nations Convention on the Law of the Sea. Nevertheless, international arbitral tribunals, and later the International Court of Justice, gradually reintroduced the equidistance/relevant circumstances approach under the general umbrella of equitable principles enunciated by the ICJ and the requirement of an equitable result enunciated by the Law of the Sea Convention. The emergence in that Convention of the EEZ, and the alternative 200-mile seaward limit for the continental shelf, facilitated the process as States increasingly opted for a single maritime boundary delimiting both the EEZ and the continental shelf.

[72] Award, paras. 288, 291, 292, 385(3).
[73] Award, paras. 217, 384 (emphasis added).

This Award cogently articulates and illustrates the modern approach to delimitation of a single maritime boundary that has been the result, with its emphasis on beginning the analysis with a provisional equidistance line. Those with a sense of the history of the law of maritime delimitation cannot help but be struck by the extent to which the equidistance/special circumstances approach – *faute de mieux* – has been resurrected and reinvigorated in the quest for objectivity and legal constraint on the range of judicial discretion. Coastal geography has emerged as all but the sole determinant, not only of the provisional equidistance line, but of the relevant circumstances that might suggest an adjustment.

The fact that each Party in this case argued for a significant adjustment of the equidistance line may have kept somewhat less determinate considerations in the foreground and helped mediate the tension between the determinacy of strict equidistance and the normative flexibility of equitable result. At the same time, the fact that the provisional equidistance line was adjusted only modestly in favor of one of the Parties and not at all in favor of the other may tend to call to mind the familiar saying, albeit in a different context, that in diplomacy nothing is more permanent than the provisional.

It remains to be seen whether this is what States desire. Most delimitation disputes tend to arise because at least one of the parties is opposed to equidistance. If the perception emerges that international tribunals are not disposed to wander far from strict equidistance, one possibility is that the opponents will soften their stance in negotiations. Another possibility is that proponents of equidistance will be less willing to compromise, thus perpetuating disputes. That uncertainty suggests that the importance of maintaining arbitration and adjudication as attractive options for resolving maritime delimitation disputes may transcend the law of delimitation itself.