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International Maritime Boundaries: Political, Strategic and Historical Considerations

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INTERNATIONAL MARITIME BOUNDARIES: POLITICAL, STRATEGIC, AND HISTORICAL CONSIDERATIONS

BERNARD H. OXMAN*

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I. INTRODUCTION

Why do states seek to agree on maritime boundaries? Three typical situations might be distinguished in this regard:

- * substantial activities subject to coastal state jurisdiction are

being conducted or are likely to be conducted in an area of actual or potential dispute;

- * one or both states wish to stimulate uses, particularly fixed uses, of the area in question;
- * there is no significant activity or interest in the area requiring a boundary.

A. Substantial Activities Being Conducted

The first situation arises where substantial activities subject to coastal state jurisdiction are being conducted or are likely to be conducted in an area of actual or potential dispute. In this case, if either or both states attempt to enforce their jurisdiction, particularly against each other's nationals or licensees, there is a risk of serious escalation of the dispute. The consequences might include a decline in useful economic activity, inability to apply meaningful environmental or economic regulations, political animosity extending beyond those persons whose livelihoods are affected, private violence, or demands for escort with the attendant risk of direct confrontations between the armed forces of the two states.

The transfer of control over vast high seas fisheries to coastal states by virtue of extensions of fisheries jurisdiction to 200 nautical miles presents the typical case. Once jurisdiction is extended, both coastal and distant-water fishermen who visited the area yesterday (and perhaps many yesterdays) need to know where they may fish tomorrow. The basic choices governments have for avoiding confrontation arising from overlapping claims are explicit or tacit agreement on a permanent or interim boundary, explicit or tacit joint management within a defined area, explicit or tacit agreement on mutual restraint with respect to the exercise of jurisdiction over at least each other's nationals within a defined area, or unreciprocated unilateral restraint.¹

This probably explains the reasons for a significant number of delimitation agreements concluded after one or both states extended jurisdiction over fisheries to 200 miles, in most cases

1. Absent express or tacit agreement on geographic limits roughly defining the disputed area, the "defined area" for joint management or mutual restraint might encompass areas extending well beyond those likely to be in dispute, potentially embracing the full economic zones of both parties.

during or following the Third United Nations Conference on the Law of the Sea.² From this perspective, the delimitation agreement can be seen as a response to a need to agree on something and an inability or unwillingness to rely on restraint or tacit arrangements at least over the long term.

In almost all cases, the agreement also reflects a preference for a unilateral rather than joint management regime in principle, notwithstanding the practical need for joint arrangements to conserve and manage migrating fish stocks and transboundary ecosystems and the probable transboundary effort patterns of fishermen. The overwhelming majority of states has responded to the fisheries problem with defined geographic boundaries. No state appears to have entrusted a court or arbitral tribunal in a delimitation dispute with the authority to impose biologically and economically inspired fisheries management and allocation arrangements as part of a boundary regime in lieu of or in addition to a fixed boundary.

This suggests the continuing influence of the dominant political and legal approach to formal accommodation of states' competing claims to use and control on land: geographic partition with fixed, preferably precisely defined, geographic boundaries. To put it differently, while the extension of coastal state jurisdiction over fisheries places a mobile resource exploited by mobile vessels under the potential control of more than one state, the choice of a geographic boundary as the preferred formal means for accommodating and partitioning the respective interests, even where that boundary divides single stocks, ecosystems and effort patterns, may well reflect the dominance of political factors and legal habits over ostensibly dominant conservation and economic concerns.³

2. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261 [hereinafter U.N. Convention on the Law of the Sea]. For example, Mexico wished to settle its maritime boundary with Cuba prior to the effective date of its decree establishing an exclusive economic zone that extended its fisheries jurisdiction to 200 miles. See Agreement Concerning the Delimitation of Sea Space, July 26, 1976, Cuba-Mex., *Limits in the Seas*, No. 104 (1985). The relatively rapid agreement between the United States and Cuba may be due in part to the fact that a dispute over fisheries enforcement could have been quite nasty, particularly if it involved Cuban exiles residing in Florida. See Maritime Boundary Agreement, Dec. 16, 1977, U.S.-Cuba, S. Exec. Doc. H., 96th Cong., 1st Sess. 1 (1979) [hereinafter U.S.-Cuba Maritime Agreement].

3. The history of the Gulf of Maine adjudication is instructive. Two agree-

Apologists for this system may argue that after, or at least in connection with, agreement on the boundary it becomes easier to address the problem of mutual cooperation in management in a formal manner. They might point to the Australia-Papua New Guinea agreement with respect to fisheries.⁴ They might also point to the practice of arriving at unitization agreements where a fluid nonliving resource such as an oil or gas deposit is traversed by a political boundary or concession limit.

B. Desire to Stimulate Uses

The second situation prompting a delimitation agreement arises where one or both states wish to stimulate uses, particularly fixed uses, of the area in question. The classic example would be exploration and exploitation of the continental shelf for oil and gas, preceded perhaps by prospecting or scientific research. The organization of the oil and gas industry generally assumes an exclusive legal right to extract the resources of an area with respect to which major site-specific investments are to be made.⁵ A dispute between neighboring states over the area casts doubt on that right.

As compared with fishing, exploitation of seabed hydrocarbons is a relatively recent development. By the middle of the Twentieth century, virtually all of the world's seabed hydrocarbons were still unexplored and unexploited. There was plenty of room for the new industry outside boundary regions. The rapid emulation by other states of the Truman Proclamation's claim to the continental shelf⁶ did not pose an immediate practical need

ments were presented to the United States Senate. One submitted the question of a single maritime boundary to a Chamber of the International Court of Justice. The second dealt with fisheries, moderating the effect of an adjudicated boundary on the fishing interests of the parties. The Senate approved the first but not the second agreement. The first agreement was not amended to permit the Chamber to impose measures to moderate the effect of the boundary on fisheries' interests and the parties did not commit themselves to do so before the Chamber. However, Canada described the general bilateral fisheries management relationship between the parties in glowing terms. It should surprise no one that the line drawn by the Chamber appears in effect to be sensitive to certain fisheries' allocation problems.

4. Treaty Concerning Sovereignty and Maritime Boundaries in the Area Known as Torres Strait, Dec. 18, 1978, Austl.-Papua N.G., 1978 Austl. T.S. No. 4 [hereinafter Australia-Papua New Guinea Treaty].

5. Indeed, it would seem that this need for exclusivity was a major driving force behind the formulation of the legal doctrine of the continental shelf.

6. Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945).

for delimitation agreements in most areas. Not surprisingly, this need was first perceived in oil-rich shallow semi-enclosed seas such as the Persian Gulf.

While the lure of potential seabed riches has a significant political impact on governments, it would appear that potential boundary disputes with respect to the seabed are more manageable than fisheries disputes, and pose less of a political risk of escalation. Governments that wish to avoid provoking their neighbors may refrain from taking affirmative actions necessary to authorize oil and gas activities, or may make them subject to future boundary arrangements.⁷ Legal uncertainty will itself have some restraining effect on the oil and gas investor, typically a transnational company with substantial alternatives for investment.

Put simply, in the case of oil and gas, it will usually take some affirmative governmental action to trigger an escalation. In the case of fisheries, the fishermen may well force the issue. This is particularly so because those with the fewest alternative economic options are likely to be the coastal fishermen of the states concerned and the coastal communities they help support.

This is not to suggest that governments are unmoved by the risk of an escalating dispute in seeking to agree on seabed boundaries in areas of potential economic interest. The fear of an unfavorable *status quo* and the desire to achieve a favorable *status quo* are omnipresent in politics and diplomacy. Governments are under constant pressure to take potentially provocative actions designed to reinforce their claims. Lawyers trained in the influence of history and possession upon legal rights and in doctrines of estoppel may themselves add to this pressure. Taken together, the opinions of the Court in the *Eastern Greenland*,⁸ *Temple of Preah Vihear*,⁹ and *Tunisia-Libya Continental*

7. In theory, the coastal state's rights with respect to the continental shelf including commercial prospecting and scientific research should accelerate the pressure for reaching a boundary agreement. These activities, however, are conducted from ships over broad areas and generally do not require economic exclusivity. To some degree, satellite data obviates the need for on-site observation. Thus, either neglect or mutual restraint can postpone the pressure to agree on precise delimitation.

8. Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (Ser. A/B) No. 53 (April 5).

9. Concerning the Temple of Preah Vihear (Cambodia v. Thai.), 1962 I.C.J. 6

*Shelf*¹⁰ cases may have some unforeseen, arguably unjustified, but nevertheless unsettling effects in this regard.

The argument for a fixed boundary as opposed to a joint management arrangement may be stronger in the case of fixed uses such as oil and gas development than in the case of fisheries. The resource is not mobile. The exploitation activity is not mobile. Judge Jessup's observation in the *North Sea Continental Shelf* cases¹¹ that the real issue in continental shelf delimitation is allocation of valuable resource deposits seems not to have stimulated very much interest in joint management regimes. It is also not clear that the imposition of a direct joint management system on a disputed field or resource deposit is the best way to stimulate new investment or manage the resource. Some joint arrangements provide for geographic division of management authority between the states concerned.

The environmental effects of oil and gas development, however, are not necessarily localized. Pollution in a boundary region may affect several coastal states. While the United States made some arguments in this regard in support of its position concerning the location of the maritime boundary in the Gulf of Maine,¹² as in the case of fisheries there appears as yet to be no significant tendency to deviate for environmental reasons from the political tradition of a fixed boundary, except perhaps in the unusually sophisticated agreement between Australia and Papua New Guinea.¹³

C. *No Significant Activity or Interest*

The third situation is perhaps the most intriguing. It arises when governments seek to agree on a maritime boundary despite the absence of significant activity or interest in the region requiring a boundary.

(June 15).

10. Concerning the Continental Shelf (Tunis. v. Libyan Arab Jamahiriya), 1982 I.C.J. 18 (June 24) [hereinafter Tunisia-Libya Continental Shelf Case].

11. North Sea Continental Shelf (F.R.G. v. Den.), 1969 I.C.J. 3 (separate opinion of Jessup, J.); North Sea Continental Shelf (F.R.G. v. Neth.), 1969 I.C.J. 3 (separate opinion of Jessup, J.) [hereinafter North Sea Continental Shelf Cases].

12. Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, Oct. 12, 1984, 23 I.L.M. 1197.

13. See *supra* note 4, at 4.

In this regard one might bear in mind that, with the notable exception of areas where the land boundary divides a navigable river at its mouth or an otherwise important navigation channel or route is involved, navigation and overflight are activities that do not normally require a precise determination of which state has jurisdiction in a particular area, especially when that area is beyond the territorial sea. Freedom of navigation and overflight beyond twelve miles from the coast is generally respected. Even within the territorial sea, ships of all states enjoy a right of innocent passage. Ships and aircraft are frequently able to avoid disputed boundary regions close to shore. It would appear that extended coastal state jurisdiction over pollution from ships at sea is too new (and the potential source of pollution too transitory) to generate much pressure for a maritime boundary for pollution regulation purposes.

If there is no significant activity requiring a boundary, why do governments negotiate boundaries in such circumstances?

A possible answer can be found in the desire to avoid potential disputes in the future where there are now none.¹⁴ It is unclear whether this objective, in and of itself, often explains the behavior of governments. It is nevertheless likely to influence lawyers, and lawyers are likely to influence maritime boundary policy.

There may also be something special about boundaries that strengthens the desire to settle them even in the absence of a significant problem. Biologists might point out that some other mammals mark their territory, and that this marking has the effect of controlling disputes. Scope of jurisdiction lies at the heart of administrative law. Bureaucracies are preoccupied with jurisdictional limits. There is an almost palpable desire to demonstrate clearly (in this case, on a map) where power and responsibility do, and do not, exist.

Thus, it is not surprising to discover that some governments have embarked on a general program for the purpose of settling maritime boundaries in areas of extended maritime jurisdiction.

14. Canada and Denmark are said to have been motivated by the desire to avoid future disputes in a largely unsettled area where Greenland faces the Canadian Arctic. See *Agreement Relating to the Delimitation of the Continental Shelf between Greenland and Canada*, Mar. 13, 1974, Den.-Can., 950 U.N.T.S. 147.

Such a program is most evident in the case of states that must negotiate boundaries with a significant number of other states. Colombia, France, Indonesia, the United Kingdom, and the United States are among the examples.

When one examines these examples, one is struck by the amount of activity related to islands and dependencies located at some considerable distance from the continental mainland or main islands. The United States has concluded a substantial number of maritime boundary agreements with respect to its islands in the Caribbean Sea and the Pacific Ocean, but has yet to agree on three of its four extended maritime boundaries with Canada or its boundary with the Bahamas. Colombia's boundary dispute with Venezuela remains unresolved.

The most obvious explanation is that it is easiest to reach agreement in the case of small islands surrounded by the deep waters of the Caribbean Sea or the Pacific Ocean where the boundary regions are unlikely to contain hydrocarbons or localized fisheries.¹⁵ While the interest of small Pacific island states in regulating foreign tuna fleets may explain some of their interest in maritime boundaries, the highly migratory patterns of tuna greatly reduce the significance of the location of any particular boundary. There is little to inspire attempts to deviate significantly from equidistance in areas between small islands of comparable size where few if any resources are at stake.

There may however be other political factors at work. One possible implication of a maritime boundary agreement is recognition of the right of the state party to the agreement to conclude the agreement on behalf of the land territory from which the maritime jurisdiction extends.¹⁶ The studies of Colombia's

15. Not much is known about commercial concentrations of high grade manganese nodules in most places, not to mention subsurface hard mineral deposits. In light of factors such as alternative sources of supply, market demand and cost of extraction, their present economic value, if any, is not regarded as great.

16. Delimitation negotiations between Australia and the Solomon Islands began within three months of Solomon independence. See *Agreement Establishing Certain Sea and Sea-bed Boundaries*, Sept. 13, 1988, *Austl.-Solom. Is.*, 12 *LOS Bull.* 19 (1988). The delimitation agreement between Bahrain and Iran was concluded shortly after Iran abandoned its claim to Bahrain. See *Agreement Concerning Delimitation of the Continental Shelf*, June 17, 1971, *Iran-Bahr.*, 826 *U.N.T.S.* 227. The boundary studies dealing with the Baltic Sea and the former German Democratic Republic suggest that the GDR may have seen maritime boundary agreements as reinforcing its position as a sovereign independent state. Especially in light of the long period of non-recognition of the GDR by the Federal Republic of Germany and other

attempts to negotiate maritime boundaries in the Western Caribbean suggest a close link between these efforts and Colombia's dispute with Nicaragua over sovereignty with respect to the islands in question. One assumes Indonesia was not unaware of the political implications of a delimitation agreement with Australia dealing with the so-called Timor Gap in light of the controversy surrounding Indonesia's annexation of the former Portuguese colony.¹⁷

It is possible that extra-regional metropolitan powers are particularly interested in reinforcing the recognition of their territorial role in a region even in the absence of a specific territorial dispute,¹⁸ bearing in mind that a potential boundary dispute in the future might be more difficult to resolve if the issue of the right to represent the territory in question was raised in that context. Conversely, a state may wish to provide a dependency with established maritime boundaries as a prelude to independence in order to protect the interests of the inhabitants and minimize foreign policy problems for the newly independent state.¹⁹

Western states prior to the pursuit of the so-called Ostpolitik of the Federal Republic in the early 1970s. The delimitation agreement between the GDR and the FRG is considered a direct result of *détente* between the parties. See Protocol Note between the Federal Republic of Germany and the German Democratic Republic Concerning the Boundary in Lübeck Bay, Oct. 1, 1974, F.R.G.-G.D.R., G Bl. II, 438 (1974) (G.D.R.) [hereinafter F.R.G.-G.D.R. Protocol Note].

17. These considerations apparently were not sufficient to persuade Indonesia to yield to Australia, in respect of Timor, as much as it had yielded geographically years earlier in respect of other areas. However, it may explain Indonesian willingness to accept a joint management arrangement as the basis of the settlement on the Australian side of the Timor Trough. See Treaty on Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, Dec. 11, 1989, Indon.-Austl., 29 I.L.M. 475. On the other hand, Indonesia yielded even less in geographic terms in the provisional fisheries delimitation agreement in which Timor was not as prominent an issue. See Memorandum of Understanding Concerning the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement, Oct. 29, 1981, Austl.-Indon. (on file with Dep't of Foreign Affairs and Trade, Canberra, Australia) [hereinafter Provisional Fisheries Surveillance].

18. It is curious that the text of the boundary agreement between France and Saint Lucia does not refer to Martinique, the French island concerned. See Delimitation Convention, Mar. 4, 1981, Fr.-St. Lucia, I Can. Annex. 675 (1983).

19. For example, the United Kingdom sought to establish offshore boundaries among the Trucial States while it was still responsible for their foreign affairs. Sharjah and Umm al Qaywayn accepted. See Seabed Boundary Agreement, 1964, Sharjah-Umm al Qaywayn, I Can. Annex 99 (1983); see also Orders in Council, Sept. 11, 1958, Sarawak-North Boreo-Brunei, U.K. Stat. Inst. (Nos. 1517-18), describing a

In a similar vein, one possible way to obtain or enhance recognition of baselines is to enter into a delimitation agreement based on equidistance in which the boundary is clearly measured from those baselines.²⁰ This factor might influence archipelagic states such as Indonesia.²¹ Although the difference is not always easy to establish, this situation should be distinguished from one in which the primary purpose of the baselines is to influence the maritime boundary negotiations.

A related factor is the desire to "consolidate" coastal state jurisdiction newly acquired under international law.²² This ap-

1958 United Kingdom line drawn with respect to North Borneo and Sarawak and Brunei. Australia, on behalf of Papua New Guinea, settled the land boundary and completed a missing segment of the maritime boundary with Indonesia in contemplation of New Guinea's scheduled independence in 1975. See *Agreements between Australia and Indonesia Concerning Certain Boundaries between Papua New Guinea and Indonesia*, Feb. 12, 1973, Papua N.G.-Indon., 975 U.N.T.S. 4 [hereinafter *Australia-Indonesia Certain Boundaries Agreements*].

20. As a strictly legal matter, absent more specific references in the agreement, an equidistant line measured from a baseline does not necessarily imply recognition of the baseline as such, but merely acknowledgement that the claimed baseline represents an appropriate point of departure for applying equidistance principles (for example, a construction line representing the general direction of the coast). Of course, regardless of the effect of the claim on the boundary, a state may obtain recognition of its claim in connection with the boundary agreement. Panama obtained recognition of its claim that the Gulf of Panama is historic waters in its boundary agreements with Colombia and Costa Rica; only in the former case did the baseline affect the delimitation. See *Treaty on the Delimitation of Marine and Submarine Areas and Associated Matters*, Nov. 20, 1976, Pan.-Colom., I Can. Annex. 417 (1983) [hereinafter *Panama-Colombia Treaty*]; see also *Agreement Relating to the Delimitation of their Marine and Submarine Areas in the Pacific Ocean and to their Maritime Cooperation*, Apr. 6, 1984, Colom.-Costa Rica, *Diario Oficial de Colom.* (June 18, 1985). There is speculation that North Korea may have obtained Soviet recognition of its unusually long 300-mile baseline in exchange for a maritime boundary favorable to the Soviet Union. See *Agreement on the Delimitation of the Soviet-Korean National Border*, Apr. 17, 1985, U.S.S.R.-Korea [hereinafter *Soviet-Korea National Border Agreement*], reprinted in *INTERNATIONAL MARITIME BOUNDARIES* 1135 (Jonathan I. Charney & Lewis M. Alexander eds., 1993).

21. It is interesting that the maritime boundary between Indonesia and Singapore, which generally follows the deep draught tanker route, moves within the Indonesia archipelagic baselines at one point. See *Agreement Stipulating the Territorial Sea Boundary Lines in the Strait of Singapore*, May 25, 1973, Indon.-Sing., *Limits in the Seas*, No. 60 (1974) [hereinafter *Indonesia-Singapore Sea Boundary Agreement*].

22. In some sense, it would appear to reflect a feeling that the existence of the close is tentative or inchoate until it is actually enclosed and precisely separated from the neighboring close. One way to identify a thing is to describe its perimeter (a circle for example). Perhaps looming in the background is Grotius' (in this context disconcerting) observation that because the vagrant waters of the sea cannot be enclosed they are necessarily free. The U.N. Conference on the Law of the Sea did

pears to be particularly true in enclosed and semi-enclosed seas where the peaceful enjoyment of extended maritime jurisdiction is especially dependent upon arrangements with one's neighbors.²³ The series of British and other delimitation agreements in the North Sea followed immediately upon the entry into force of the Continental Shelf Convention on 10 June 1964, designed in part to consolidate the conventional regime in the North Sea.²⁴ A similar process occurred in the Caribbean Sea with respect to the exclusive economic zone. A desire to consolidate 200-nautical-mile limits is identified as one reason for the delimitation agreement between Denmark and Norway.²⁵

The decision to conclude a maritime boundary agreement may be influenced by political factors extraneous to the boundary itself. The objective need for agreement, particularly where relations are already strained, may become a convenient basis for governments to take tentative steps toward improving their relations. One notes, for example, that the United States negotiated a maritime boundary agreement with Cuba at a time when broader attempts were being made to improve bilateral relations.²⁶

not pursue a United States proposal to establish coastal state jurisdiction over fishing for stocks that reside in coastal areas beyond the territorial sea without fixing distance limits.

23. It is interesting to note that many states, while implementing the continental shelf doctrine and delimiting their respective continental shelves in the area, have thus far refrained from implementing exclusive economic zones or 200-mile fisheries zones in the Mediterranean Sea, even when the same states have asserted such jurisdiction outside the Mediterranean Sea.

24. This point is made in a number of North Sea boundary studies, especially Netherlands-United Kingdom (1965). See *Agreement Relating to the Delimitation of the Continental Shelf under the North Sea, Together with Amending Protocol*, Oct. 6, 1965, Neth.-U.K., 595 U.N.T.S. 105. For the states concerned, the consolidation of the regime of the Continental Shelf Convention in the North Sea included not only the principles and rules of coastal state jurisdiction, but the delimitation rules set forth in Article 6. *Convention on the Continental Shelf*, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter *Convention on the Continental Shelf*].

25. See *Agreement Concerning the Delimitation of the Continental Shelf in the North Sea/Norwegian Sea and Establishing the Boundary between the Faroes Fishing Zone and the Norwegian Economic Zone*, June 15, 1979, Den.-Nor., I Can. Annex 603 (1983).

26. Because of strained political relations between the parties, the U.S. Senate has yet to approve the treaty. Provisional application has been renewed periodically by the parties. See *U.S.-Cuba Maritime Agreement*, *supra* note 2.

II. POLITICAL FACTORS

A. Introduction

Four important political decisions can be identified in connection with maritime boundaries: the decision to negotiate, the decision to propose a particular boundary,²⁷ the decision to make concessions with a view to reaching agreement,²⁸ and the decision to agree on a particular boundary. Even the decision to respect a tribunal's legally binding determination of a boundary is political.

The study of factors potentially influencing the location of maritime boundaries is a study of the influence of these different factors on the ultimate political decisions of governments. Unless it influences the decisions of those with political authority, any given factor is irrelevant to a particular boundary. The "objective" importance of any given factor — assuming such a thing could be measured — does not necessarily explain its political impact.²⁹

When a tribunal is asked to decide a dispute regarding a maritime boundary under international law, the tribunal will limit itself to examining factors it regards as legally relevant to

27. Some states have announced a public position related to the location of the boundary prior to negotiation, whether for tactical or political reasons or because of the need to define some (temporary) geographic limit on domestic regulatory or enforcement actions.

28. The temporal relationship among the first three decisions involves complex questions of subjective intent, information regarding the other side's attitudes, management of domestic political pressures, and negotiating strategy and style. Some seasoned negotiators would argue that, once sufficient information is available regarding the other party's interests, the best approach to reaching agreement is to collapse the second and third decisions into one "reasonable" position around which one is prepared to negotiate at the margins but from which one is not prepared to retreat in principle. They would presumably regard as unfortunate the possible implication in the North Sea Continental Shelf cases that this approach might not satisfy the duty to negotiate in good faith. The International Court of Justice noted that the parties "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it." North Sea Continental Shelf Cases, *supra* note 11, ¶ 85.

29. For example, the ocean policies of a major industrialized maritime state with global economic and strategic interests like the United States can be substantially influenced by local coastal fishing industries that represent a very small proportion of its economy.

the resolution of the issues in dispute. Much has been written about the rich and growing jurisprudence of the International Court of Justice and other tribunals in this connection. However flexible the articulated legal standard of "equitable principles," "relevant circumstances," and "equitable results" may be, there can be no doubt that while the parties are free to take into account virtually anything they wish in fashioning their negotiating positions, a tribunal asked to apply international law is more limited.

The law of maritime delimitation may require the parties to negotiate in good faith. But it places few if any limitations on the location of an agreed boundary or related arrangements. Provided they agree, the parties are largely free to divide as they wish control over areas and activities subject to their jurisdiction under international law. They may be guided principally, in some measure, or not at all by legal principles and legally relevant factors a court might examine, and by a host of other factors a tribunal might well ignore such as relative power and wealth, the state of their relations, security and foreign policy objectives, convenience, and concessions unrelated to the boundary or even to maritime jurisdiction as such.³⁰

From this perspective, it is difficult and arguably misleading to isolate political from other factors when analyzing agreed boundaries. Yet it would make little sense even to attempt to replicate here what is so ably presented by other authors elsewhere in this field of study.

This being said, it should be noted that maritime boundary issues do not normally seem to engage the same level of political attention as many disputes over land territory. The resultant agreements are often viewed as economic or technical. Indeed, it can be argued that few maritime boundary agreements are regarded as overwhelmingly political, with the notable exception of the agreement between Argentina and Chile.³¹

30. It is said that Italy settled for less than full effect for its islands in exchange for a wider package on various political and economic questions, including Italian fishing in exchange for one billion lire per year. *See Agreement Relating to the Delimitation of the Continental Shelf*, Aug. 20, 1971, Italy-Tunis., I Can. Annex (1983).

31. The agreement followed the Beagle Channel Arbitration, Argentina's rejection of the result, fears of armed conflict, and mediation by the Vatican. Its title is

In addition to the difficulty of isolating political considerations from other considerations affecting maritime boundaries, one must add the difficulty of accumulating relevant data on political factors. Virtually every boundary agreement is described, often in its preamble, as designed to foster good relations between the parties.³² Yet governments may be reluctant to state publicly that for reasons of good relations they accepted a less favorable boundary than they might otherwise have obtained.³³ Governments could almost never be expected to assert that they received more because they had greater overall leverage in the bilateral relationship.³⁴

Treaty of Peace, Friendship and Maritime Delimitation. The treaty was submitted to a plebiscite in Argentina. Agreement between the Government of Argentina and the Government of Chile Relating to the Maritime Delimitation between Argentina and Chile, Nov. 29, 1984, Arg.-Chile, 24 I.L.M. 1 [hereinafter Argentina-Chile Agreement].

32. It might be noted that maritime boundary lines are frequently simplified by reducing the number of turning points, using a long line perpendicular to the general direction of the coast, or in other ways. The primary reason is to simplify compliance and enforcement. In order to avoid problems with inadvertent violations by fishermen, Chile, Ecuador, and Peru agreed to permit the neighboring state's national to fish in a ten-mile zone on either side of the maritime boundary beyond twelve miles from the coast. Agreement between the Government of Chile and the Government of Peru Relating to the Maritime Boundary between Chile and Peru, Aug. 18, 1952, Chile-Peru, Limits in the Seas, No. 86 (1979) [hereinafter Chile-Peru Agreement]; Agreement between the Government of Ecuador Relating to the Maritime Boundary between Peru and Ecuador, Aug. 22, 1985, Peru-Ecuador, Limits in the Seas, No. 88 (1979) [hereinafter Peru-Ecuador Agreement].

33. There are exceptions. The rapporteur of the France-Monaco treaty is quoted as stating to the French Senate, "Because of the close and exceptional nature of French-Monégasque relations, France has accepted provisions that the rules of international law did not oblige it to accept." The reference was to the Monégasque relations, France has accepted provisions that the rules of international law did not oblige it to accept. The reference was to the Monégasque corridor leading out into the Mediterranean in a shore. See Maritime Delimitation Agreement between Monaco and France, Feb. 16, 1984, Fr.-Monaco, No. 8-3, J.O. 6 July 1985, p. 11,600 (French) [hereinafter Monaco-France Delimitation Agreement]. Some readers of the opinions in the North Sea Continental Shelf cases, *supra* note 11, and the Guinea-Guinea-Bissau arbitration might question the statement. Award of 14 February 1985 of the Arbitration Tribunal for the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, 25 I.L.M. 252 (English translation of official French text) [hereinafter Guinea-Guinea-Bissau Award]. Senegal was no less generous to The Gambia. See Agreement between The Gambia and the Republic of Senegal, June 4, 1975, Gam.-Senegal, Limits in the Seas, No. 85 (1979) [hereinafter Gambia-Senegal Agreement]. Norway may have accepted a result that gave Iceland all of its 200-mile zone in part because Iceland is highly dependent on fishing. See Agreements between Iceland and Norway Establishing Maritime Boundaries between Iceland and Jan Mayen (1) Agreement Concerning Fishery and Continental Shelf Questions, May 28, 1980, Ice.-Nor., Official Gazette C9/1980 [hereinafter Iceland-Norway Agreement].

34. Two authors suggest that the relative strength of the parties was a factor

B. Related Accommodations

A further analytical difficulty relates to the question of when a factor is deemed to have influenced the location of the boundary. The easy case is one in which the actual location of the boundary represents the accommodation of the interest concerned, for example where a boundary follows a navigation channel. A more difficult problem arises when the interest of a state is accommodated not by adjusting the position of the boundary, but by concurrent agreement that imposes an obligation on the other state with respect to areas on the latter's side of the boundary.

It seems reasonable to assume that in such cases the interest did indeed influence the location of the boundary in the sense that agreement might not have been reached on such a boundary absent the related accommodation. For example, a state concerned about navigation rights in a channel that is closer to its neighbor's coast than its own might prefer to use the channel as the boundary, but might in some circumstances settle for an equidistant line boundary in exchange for treaty guarantees of free navigation. That same state presumably would resist an equidistant line boundary absent related navigation guarantees.

The relationship between boundaries and related accommodations is sometimes overlooked in analyses of maritime boundary law because it does not form part of the formal jurisprudence. The reason for this is that the International Court of Justice and arbitral tribunals have not been asked by the parties to fashion a broader boundary region regime that accommo-

in determining the location of the line. Its perception of Indian power may have influenced the Maldives government not to argue that Minicoy Island should be given reduced effect. See Agreement between India and Maldives on Maritime Boundary in the Arabian Sea and Related Matters, Dec. 28, 1976, India-Maldives, Limits in the Seas, No. 78 (1978) [hereinafter India-Maldives Maritime Agreement]. The delimitation line in the Bay of Biscay, more favorable to France than an equidistant line, was concluded at a time when Spain, under Franco, may have been in a somewhat weaker position diplomatically. See Conventions between France and Spain (1) Concerning the Delimitation of the Territorial Sea and Contiguous Zone and (2) Concerning the Delimitation of the Continental Shelf of the Bay of Biscay, Jan. 25, 1974, Fr.-Spain, (U.N. Legislative Series) U.N. Doc. No. ST/LEG/SER/B/19, 395 (1980) (France-Spain).

dates their interests. Determining the location of a maritime boundary has generally been the sole means at the disposal of judges and arbitrators for accommodating relevant interest.³⁵

C. Effect of Political Factors

It is often difficult to discern what, if any, effect political considerations had on the location of an agreed maritime boundary.³⁶ A state's desire to maximize the areas subject to its jurisdiction and its interest in achieving agreement on a maritime boundary may well conflict. It stands to reason that if dispute avoidance is a primary purpose for seeking agreement, then a government is unlikely to maintain a position on the location of the boundary that itself stimulates a dispute. This proposition is, however, difficult to document from public sources.

Authors with knowledge of the factors influencing the U.S. decision to give full effect to Aves Island in the delimitation agreement with Venezuela point out that "as a political matter, there was little to gain and potentially much to lose in asserting a broader U.S. boundary interest, particularly in light of the marginal resource interest in the area."³⁷ One is struck by the comment that "France was so accommodating as to allow Australia to use Middleton Reef, a low-tide elevation 125 nautical miles offshore, as a basepoint" for determining the location of the equidistant line.³⁸ One of the reasons cited for Norwegian

35. The Iceland-Norway Conciliation Commission recommended a joint development zone with respect to the continental shelf. It should be noted that the Commission included prominent Icelandic and Norwegian diplomats and made a unanimous recommendation as requested. See *Iceland-Norway Agreement*, *supra* note 33, at C9; Evensen, *La Délimitation du Plateau Continental entre la Norvège et l'Islande dans le Secteur de Jan Mayen*, 27 *Ann. Fr. Dr. Int.* 711 (1981).

36. Political factors may sometimes influence even technical questions, such as the issue of which chart to use to depict the agreed boundary. National prestige may account for the fact that both Italian and Yugoslav charts were used by the parties, giving rise to differences in numerical identification and location of points. See *Agreement between Italy and Yugoslavia Concerning the Delimitation of the Continental Shelf between the Two Countries*, Jan. 8, 1968, *Italy-Yugo.*, *Gazz. Uff.*, Supp. to No. 302 of 29 Nov. 1968 (Italy).

37. Feldman & Colson, *The Maritime Boundaries of the United States*, 75 *AM. J. INT'L L.* 729, 747 (1981). One notes that the U.S. did more than just avoid a fight; it negotiated a treaty giving Venezuela what it wanted, to the chagrin of some of Venezuela's other neighbors. Two additional factors are potentially relevant. First, the U.S. had a general practice of giving full effect to islands in agreements applying equidistance. Second, Venezuela concluded its agreements with the U.S. and The Netherlands at the same time.

38. *Agreement on Marine Delimitation between the Government of Australia*

acceptance of a full 200-mile zone for Iceland was avoidance of a fishing dispute over capelin.³⁹ The boundary studies note Indonesia's generally accommodating attitude toward the location of its maritime boundaries with its neighbors.⁴⁰ It is not clear whether the fact that most of the joint development zone falls on the Japanese side of a hypothetical equidistant line with South Korea is related in some measure to historical problems in Japanese-Korean relations.

In those situations in which the desire for agreement outweighs actual or potential interest in areas that might be disputed, a state is likely to propose a boundary primarily with a view to facilitating negotiation. The proposal therefore is likely to be one that the negotiating partner would regard as acceptable, at least in principle.

In theory, all one need do is split the pie (that is the areas of overlapping jurisdiction) in half. In practice, geographic characteristics of the respective coasts and their geographic relationship to each other make delimitation a more difficult task even where states are not focusing on particular resources or areas.

The case of delimitation between relatively small islands usually presents the most notable exception. There an equidistant line will often halve the pie quite nicely. Thus it is not surprising that equidistant lines between islands have been used extensively in deeper parts of the Caribbean Sea and Pacific Ocean.

A rarer exception arises where relatively regular coasts of adjacent states face in the same general direction. In that case, either an equidistant line or a line perpendicular to the general direction of the coast (in effect an equidistant line modified to ignore coastal irregularities) will also often halve the pie quite nicely. Given the great depths off the Pacific coast of South America, rendering disputes over specific resources in seaward regions less likely, and the political desire of the states con-

and the Government of the French Republic, Jan. 4, 1982, Austl.-Fr., 1983 Austl. T.S. No. 2.

39. Iceland-Norway Agreement, *supra* note 33.

40. See, e.g., the discussion of political strategic, and historical considerations in the Agreement between Australia and Indonesia Establishing Certain Seabed Boundaries, May 18, 1971, Austl.-Indon., 974 U.N.T.S. 307 (1975) [hereinafter Australia-Indonesia Seabed Agreement].

cerned to maintain solidarity in support of their new and controversial claims of 200-mile zones, it is not surprising that this general type of approach was used by Chile, Ecuador and Peru in the 1952 Santiago Declaration, albeit in the somewhat unusual form of parallels of latitude that are not precisely perpendicular to the general directions of the coasts at the land frontiers.⁴¹

What this indicates is that equidistance or some simple equivalent is likely to be used where the desire to agree on both sides is stronger than the interest in maximizing claims, where specific resources or areas are not a major issue, and where the coastal characteristics are such that the resultant division of overlapping claims seems fair. In other situations, it cannot be asserted either that the use of equidistance necessarily reveals the existence of a dominant political interest in reaching agreement on the part of one or both parties or that the failure to use equidistance necessarily represents the absence of a dominant political interest in reaching agreement on the part of at least one of the parties. The reason is that in those situations, the question of fairness is more complex; equidistance may well represent a victory for one party and a defeat for the other.

D. Legal Factors

Whatever its relative interest in achieving rapid agreement, a government must take into account the effect of any proposals it makes on its relations with its neighbors. Powerful states may be loath to appear like bullies. Strong and weak alike have an interest in credibility. Unless a state is prepared to expend unrelated resources (whether as carrots or sticks) to obtain a favorable maritime boundary, its proposal must be grounded in more than unrestrained self-interest. The search for a platform of principle will entail, at least in part, a search for a proposal that has a plausible legal and equitable foundation.

In this context, as in many others, governments can be expected to consult legal sources that are likely to be regarded as authoritative or at least persuasive by both parties. Thus, to some degree, maritime boundary agreements may be analyzed in

41. One is tempted to wonder whether the use of parallels of latitude may have been related to the fact that the jurisdiction asserted in the declaration extended "not less than" 200 miles from the coast. See Chile-Peru Agreement, *supra* note 32; Peru-Ecuador Agreement, *supra* note 32.

terms of the chronology of major developments in the law of maritime delimitation as articulated by multilateral conferences and international tribunals.

Following the entry into force of the Continental Shelf Convention,⁴² the United Kingdom and other North Sea states set about implementing the Convention, including the delimitation rule in Article 6. A few years later, however, in direct response to this effort, the International Court of Justice in the *North Sea Continental Shelf* cases refused to apply Article 6 to a nonparty, and enunciated a broader set of equitable principles, with substantial emphasis on the nature of the continental shelf as a natural prolongation of the land territory of the coastal state.⁴³

The impact of the Court's dictum was unmistakable.⁴⁴ The United States for the first time made clear its view that the maritime boundary in the Gulf of Maine should place all of Georges Bank on the U.S. side.⁴⁵ Australia was driven by the "natural prolongation" language in the opinion to seek, and in large measure obtain, a continental shelf boundary extending to the deep trench off the Indonesian coast.⁴⁶ The summary report on North Europe notes that the 1969 opinion marks the turning

42. Convention on the Continental Shelf, *supra* note 24.

43. North Sea Continental Shelf cases, *supra* note 11.

44. Perhaps its most wide-ranging effect is the new alternative definition of the continental shelf in the U.N. Convention on the Law of the Sea as the natural prolongation of the land territory for a state extending to the outer edge of the continental margin. U.N. Convention on the Law of the Sea, *supra* note 2, at 10.

45. The position taken by the U.S. in 1970 diplomatic discussions was that "a boundary in accordance with equitable principles should follow the line of deepest water through the Northeast Channel, which would bring all of Georges Bank under U.S. jurisdiction." Feldman & Colson, *supra* note 37, at 755. For its part, Canada, which had consistently emphasized equidistance in the Gulf of Maine, later extended its claim to give reduced effect to Cape Cod and associated islands, relying on the opinion in the Anglo-French arbitration. It is possible this move was a largely tactical one related to the forthcoming litigation regarding the Gulf of Maine; it is also possible this move was not unrelated to the dispute regarding delimitation with respect to the French islands of St. Pierre and Miquelon off the Canadian coast.

46. The analysis of the 1972 Australia-Indonesia seabed boundary agreement points out that not much was known about the resource potential of the seabed areas in question at the time. See Agreement between Australia and Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, Oct. 9, 1972, Austl.-Indon., 974 U.N.T.S. 319 (1957) [hereinafter Australia-Indonesia Timor and Arafura Seabed Agreement]. The study does not advert to contemporaneous rumors that Indonesia reaped certain political benefits in connection with this agreement.

point from equidistance to equitable principles in the region. As tribunals made clear in subsequent opinions, any legal presumption in favor of equidistance, if it ever existed, was gone.

The International Court of Justice subsequently retreated from natural prolongation in the *Tunisia-Libya*⁴⁷ case and especially in the *Libya-Malta* case.⁴⁸ The provisional continental shelf agreement between Australia and Indonesia establishing a zone of cooperation in the so-called Timor Gap⁴⁹ as well as their provisional fisheries surveillance and enforcement arrangement⁵⁰ reveal a substantial retreat from the influence of geomorphology in the earlier continental shelf agreement.

The impact of the opinion in the *Guinea-Guinea-Bissau* arbitration is not limited to Africa. A specific reaction to that decision is noted in the study of the Colombia-Honduras delimitation.⁵¹

The foregoing are mere illustrations of the fact that while states are free to ignore their legal rights *inter se* in reaching agreement with each other, legal sources may well influence their claims and expectations, sometimes decisively.⁵²

47. *Tunisia-Libya Continental Shelf Case*, *supra* note 10 .

48. Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. Rep. 13 [hereinafter *Libya-Malta Continental Shelf Case*].

49. Treaty between Australia and Indonesia on the Zone of Cooperation in an Area between East Timor and Northern Australia, Dec. 11, 1989, Austl.-Indon., 29 I.L.M. 469.

50. Memorandum of Understanding between Indonesia and Australia Concerning Fisheries Surveillance and Enforcement Arrangement, Oct. 29, 1981, Austl.-Indon. (unpublished).

51. See Maritime Delimitation Treaty, Aug. 2, 1986, Colom.-Hond., (Rep. 2-4), reprinted in INTERNATIONAL MARITIME BOUNDARIES, *supra* note 20, at 502.

52. One might compare the comments of knowledgeable American and British foreign ministry lawyers in this regard. The former state that U.S. maritime boundary treaties "are not agreements of maximum advantage for either side. Nor are they driven by particular theories of international law. They are negotiated agreements based on mutual interest and applying methodologies suitable to expressing that interest in the particular circumstance" See Feldman & Colson, *supra* note 37, at 742. The latter (Anderson) states that the Irish-United Kingdom agreement "has been cited as a model for reaching pragmatic solutions to previously intractable boundary disputes. Geographical and legal factors played an important part in a successful effort to reach an equitable solution, acceptable to the respective governments and legislatures." Agreement on the Delimitation of the Continental Shelf between the Two Countries, Nov. 7, 1988, Ir.-U.K., U.K.T.S. No. 20 (1990) [hereinafter *Ireland-United Kingdom Agreement*].

E. Effect on Third States

A state faced with the negotiation of several maritime boundaries will need to consider the effect of its approach to one boundary on the others. Thus, for example, the United States has demonstrated a consistent practice of giving full effect to islands in agreements in which equidistance is used.

At the simplest level — influenced in part by debates of the issue during the Third U.N. Conference on the Law of the Sea — the text of delimitation agreements may expressly recite the reliance of the parties on equitable principles⁵³ or on equidistance.⁵⁴ Governments may regard such statements as a means of reinforcing their position of principle with respect to a third state; they may also be attempting to deal with arguable inconsistencies between the result they accepted in the agreement and the result they propose elsewhere.

In an effort to retain flexibility, some states will wish to avoid too precise or consistent an articulation of the underlying rules. Legal and advocacy considerations apart, it is not surprising that while Canada, in the Gulf of Maine dispute, was adhering fairly closely to an equidistance approach, it articulated the underlying rules in terms of equitable principles and relevant circumstances. At the time, other Canadian maritime boundaries remained to be determined. France and the United States have taken similar approaches in explaining the various equidistance boundaries that they negotiated.

53. For example, the Dominican Republic-Venezuela agreement refers to equitable principles, arguably reflecting Venezuela's underlying position in other contexts. See Treaty on the Delimitation of Marine and Submarine Areas, Mar. 3, 1979, Dom. Rep.-Venez., G.O., No. 1634, Extraordinario July 28, 1980 (Venez.) [hereinafter Dominican Republic-Venezuela Treaty]. The Turkey-U.S.S.R. agreement similarly refers to equitable principles, presumably reflecting the underlying position of both parties in other areas, including the Turkish position with respect to Greece in the Aegean. See Agreement on the Delimitation of the Continental Shelf in the Black Sea, June 23, 1978, Turk.-U.S.S.R., T.C. Resmî Gazete No. 17226 (1981) (Turkey-U.S.S.R.).

54. For example, the agreement between Greece and Italy refers to the "principle of the median line" and "mutually approved minor adjustments" thereto. Both parties may have had other delimitations in mind where they favor equidistance and full effect for islands. It is interesting that the agreement gives reduced effect to some islands. See Agreement on the Delimitation of the Zones of the Continental Shelf Belonging to Each of the Two States, May 24, 1977, Greece-Italy, Limits in the Seas, No. 96 (1982) [hereinafter Greece-Italy Delimitation Agreement].

Others may wish to use one or more agreements to influence an outstanding delimitation either directly or indirectly. The classic example of this approach is the equidistant line drawn by Denmark and the Netherlands as part of a more general implementation of the equidistance principle in Article 6 of the Convention on the Continental Shelf in the North Sea that included, in addition to these two states, Norway and the United Kingdom. It represented not only an attempt to reinforce the use of equidistance in the North Sea but, by extending the line to a point equidistant from their coasts and the German coast, an effort to apply equidistance directly to their respective boundaries with Germany. Similarly, the Denmark-U.K. and Netherlands-U.K. equidistant lines in practice met at a tri-junction point, a result inconsistent (except perhaps in mathematical theory) with Germany's view that its continental shelf extended to the middle of the North Sea.

The fact that this effort failed has not necessarily deterred others. In reaching their continental shelf delimitation agreement with each other, Ireland and the United Kingdom "had common cause in opposing claims to part of the area by third States," presumably Denmark and Iceland.⁵⁵ The equidistant line between Sicily and Tunisia was drawn as if Malta did not exist.⁵⁶

Agreements delimiting areas claimed by third states are not, however, common. There is ample evidence of restraint. Numerous bilaterally drawn boundaries are terminated short of the tri-junction point with a third state even in the absence of any known dispute.⁵⁷

In both the *Tunisia/Libya*⁵⁸ and *Libya/Malta*⁵⁹ cases, the Court took care to protect the interests of a concerned third state that, in each case, was unsuccessful in its efforts to inter-

55. Ireland-United Kingdom Agreement, *supra* note 52, at 20.

56. Agreement of the Delimitation of the Continental Shelf between Two Countries, Aug. 20, 1971, Italy-Tunis, Limits in the Seas, No. 89 (1980). The boundary terminates in the southeast at a point roughly equidistant between Malta and the Italian island of Lampedusa; the latter was accorded only a thirteen-mile zone as against Tunisia.

57. An example is the Greece-Italy boundary, which stops short of the tri-junction points with Albania in the north and Libya in the south. Greece-Italy Delimitation Agreement, *supra* note 54.

58. Tunisia-Libya Continental Shelf case, *supra* note 10.

59. Libya-Malta Continental Shelf Case, *supra* note 48.

vene. In the first case, the Court did not specify the northeast terminus of the final segment of the boundary running in the direction of Malta. In the second case, the Court did not specify a boundary between the parties in areas claimed by Italy.

Efforts at indirectly influencing the boundaries with third states nevertheless persist:

- * the boundary studies suggest that Venezuela embarked on a strategy of entering into delimitation agreements giving Aves Island full, or substantial effect in hopes of influencing other governments to do the same, choosing to conclude the initial agreements with The Netherlands and the United States simultaneously,⁶⁰ and with France two years later;⁶¹
- * Colombia appears to have attempted to structure its delimitation agreements with Costa Rica,⁶² Honduras⁶³ and Panama⁶⁴ to be consistent with its position with regard to the use of the 82 degrees W meridian under a 1930 exchange of notes in connection with its dispute with Nicaragua;
- * Denmark and Sweden apparently felt that agreeing to give full effect to Bornholm in their agreement with each other would strengthen the Danish position vis-à-vis the GDR and Poland and the Swedish position in support of full effect for Gotland vis-à-vis Poland and the U.S.S.R.;⁶⁵

60. Delimitation Treaty between Netherlands and Venezuela, Dec. 15, 1978, Neth.-Venez., Tractenblad van Het Koninkrijk der Nederlanden, Jaargang 1978, No. 61.

61. Delimitation Treaty between Venezuela and France, July 17, 1980, Fr.-Venez., G.O., No. 3026, Jan. 28, 1983 (Venez.).

62. Treaty on the Delimitation of Marine and submarine Areas and Maritime Cooperation, Mar. 17, 1977, Colom.-Costa Rica, Limits in the Seas, No. 79 (1978).

63. Maritime Delimitation Treaty, Aug. 2, 1986, Colom.-Hond., U.N., Oficina de Océánicos y del Derecho del Mar. Boletín No. 10, (Nov. 1987).

64. Treaty on the Delimitation of Marine and Submarine Areas, Nov. 20, 1976, Colom.-Pan., Limits in the Seas, No. 79 (1978). Colombia's recognition of Panama's historic claim to the Gulf of Panama was apparently phrased not only to protect its nonrecognition of Venezuela's claim in the Gulf of Venezuela but, according to the boundary study, to advance Colombia's position that Venezuela's claim must be recognized by Colombia in order to influence the delimitation.

65. Eric Franckx, *Baltic Sea Maritime Boundaries*, in INTERNATIONAL MARITIME BOUNDARIES 345, *supra* note 20. See also Agreement between Denmark and Sweden on the Delimitation of the Continental Shelf and Fishing Zones, Nov. 9, 1984, Den-

- * in advance of reaching agreement on a precise boundary, Brazil and Uruguay issued a joint declaration supporting the use of equidistance. This may have been intended to counter an Argentine desire to duplicate the practice on the west coast of South America and use a parallel of latitude in its delimitation with Uruguay.⁶⁶

The tribunal in the *Guinea-Guinea-Bissau* arbitration⁶⁷ devoted a great deal of attention to the problem of cut-off or enclavement, which occurs when a state's boundaries with neighboring (usually adjacent) states join at a point off its coast. This problem can be avoided if the boundaries on either side are coordinated so as to avoid a cut-off effect. The difficulty is that only the boundary between the parties to the arbitration is at issue. By emphasizing the need to avoid enclavement, determining the broad general direction of the coast with reference to the coasts of the immediate neighbors of both parties, and establishing the longest seaward segment of the boundary as a perpendicular to that general direction, the tribunal in effect was taking an approach of broader utility in West Africa, and appears to have been aware of this.

F. Sovereignty Disputes

In principle, all areas of land, including small islands and rocks above water at high tide, are entitled to some maritime jurisdiction.⁶⁸ If strict equidistance is the method of delimitation, they will have the same effect as promontories on much larger islands or longer continental coasts. Accordingly, the

mark-Sweden, *Sveriges överenskommelser med främmande makter* 1985:54 (Sweden). Neither party was completely successful.

66. Agreement Relating to the Maritime Delimitation between Brazil and Uruguay, July 21, 1972, Braz.-Uru., 1120 U.N.T.S. 133. Given the generally northeastward direction of the coast, the use of a parallel of latitude by Argentina and Uruguay would either have disadvantaged Brazil were such a parallel to be used between Brazil and Uruguay, or would have resulted in a substantial enclavement of the Uruguayan zone between the parallel to the south and an equidistant line with Brazil to the north.

67. *Guinea-Guinea-Bissau Award*, *supra* note 33.

68. See U.N. Convention on the Law of the Sea, *supra* note 2, art. 21. That article specifies by way of exception "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

existence of sovereignty dispute over insular or other coastal territory in an area requiring delimitation is likely to affect the delimitation agreement including, in many cases, the boundary itself.

If only one party to the negotiations is affected, the other may be reluctant to get involved. For example, the boundary drawn by Australia and France is terminated to the east at a point that avoids involving Australia in the territorial dispute between France and Vanuatu over certain islands controlled by France and also claimed by Vanuatu.⁶⁹ The same problem has apparently delayed Fiji's ratification of its delimitation agreement with France.⁷⁰ The terminus of the Atlantic maritime boundary between Trinidad and Tobago and Venezuela was shifted slightly to the north of a hypothetical tri-junction point with Guyana in order to avoid involving Trinidad and Tobago in any dispute between Guyana and Venezuela.⁷¹

If the sovereignty dispute is between the two states establishing the maritime boundary, they may use the same technique employed in the Australia-France agreement, namely terminating the boundary at a point where they agree that the disputed territory would not influence the location of the boundary. For example, this approach has been used with respect to disputed islands by Japan and South Korea⁷² as well as France and Mauritius.⁷³ It was also used by Canada and the United States in the Gulf of Maine, where the landward terminus of the boundary the Chamber was asked to draw was located at sea in a manner designed to avoid the issue of sovereignty over Machias Seal Island and North Rock.⁷⁴ Italy and Yugoslavia's

69. Agreement on Marine Delimitation, Jan. 4, 1982, Austl.-Fr., 1983 Austl. T.S. No. 2.

70. Agreement Relating to the Delimitation of an Economic Zone, Jan. 19, 1983, Fr.-Fiji, (Rep. 5-6), reprinted in *INTERNATIONAL MARITIME BOUNDARIES*, *supra* note 20, at 995.

71. Treaty on the Delimitation of Marine and Submarine Areas, Apr. 18, 1990, Trin. & Tobago-Venez., G.O., No. 34745, July 23, 1991 (Venez.).

72. Agreement Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf, Jan. 30, 1974, Japan-S. Korea, Limits in the Seas, No. 75 (1979).

73. Agreement on the Delimitation of the French and Mauritian Economic Zones, Apr. 2, 1980, Fr.-Mauritius, Limits in the Seas, No. 75 (1979).

74. Treaty to Submit to Binding Dispute Settlement on the Delimitation of the Maritime Boundary in the Gulf of Maine Area, Mar. 29, 1979, Can.-U.S., 23 I.L.M.

maritime boundary originally stopped short of the Gulf of Trieste because the land border in the Trieste region was not settled.⁷⁵ It appears that the extensive delimitations agreed by the Irish Republic and the United Kingdom do not include delimitations measured from Northern Ireland.⁷⁶

Another approach is to resolve the sovereignty dispute and the maritime boundary simultaneously. Perhaps the best known examples are the treaty between Italy and Yugoslavia settling both their land and territorial sea boundary in the Trieste region⁷⁷ and the Treaty of Peace, Friendship, and Maritime Delimitation between Argentina and Chile following the Beagle Channel arbitration, Argentina's rejection of the award, and mediation by the Vatican.⁷⁸ There are others.⁷⁹ In some cases, the maritime boundary is expressly identified as the line dividing sovereignty over islands as well;⁸⁰ there may even be spe-

1197. It might also be noted that Art. 298(1)(a)(i) of the U.N. Convention on the Law of the Sea, *supra* note 2, permits a party to exclude from arbitration, adjudication or conciliation a maritime boundary dispute "that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory." *Id.*

75. Agreement on the Delimitation of the Continental Shelf between the Two Countries, Jan. 8, 1968, Italy-Yugo., 7 I.L.M. 547.

76. Ireland-United Kingdom Agreement, *supra* note 52.

77. Treaty between Italy and Yugoslavia, Nov. 10, 1975, Italy-Yugo., Gazz. Uff., Supp. to No. 77 of Mar. 21, 1977 (Italy) [hereinafter Italy-Yugoslavia Treaty].

78. Argentina-Chile Agreement, *supra* note 31, at 11.

79. The following are some examples. Because of its desire not to inhibit friendly relations, the United States abandoned its insular sovereignty claims in its delimitation agreements with the Cook Islands and with New Zealand with respect to Tokelau. See Treaty on the Delimitation of the Maritime Boundary between the United States of America and the Cook Islands, June 11, 1980, Cook Islands-U.S., T.I.A.S. No. 10774; Treaty on the Maritime Boundary between Tokelau and the United States of America, Dec. 2, 1980, N.Z.-U.S., T.I.A.S. No. 10775. New Zealand acknowledged that Swains Island is part of American Samoa. Bahrain and Saudi Arabia simultaneously divided disputed islands. See Agreement Concerning Delimitation of the Continental Shelf, Feb. 22, 1958, Bahr.-Saudi Arabia, 409 (U.N. Legislative Series), U.N. Doc. ST/LEG/SER. B/16 (1974). The 1973 agreement between Australia and Indonesia settling the land boundary between Indonesia and Papua New Guinea (which Australia then represented) also settled a landward gap in the maritime boundary. Australia-Indonesia Certain Boundaries Agreements, *supra* note 19. North Korea and the U.S.S.R. simultaneously settled their boundary in the Tumen River and their territorial sea boundary. Soviet-Korea National Border Agreement, *supra* note 20. Interestingly, Abu Dhabi and Dubai simultaneously moved their land frontier and their previously agreed maritime boundary ten kilometers to the west. Offshore Boundary Agreement between Abu Dhabi and Dubai, Feb. 18, 1968, Abu Dhabi-Dubai, I Can. Annex 151 (1983) [hereinafter Abu Dhabi-Dubai Offshore Boundary Agreement].

80. The following are some examples: The division of sovereignty over islands

cific reference to islands that may emerge in the future.⁸¹ In some cases, the islands with respect to which sovereignty is resolved are given reduced effect in the maritime delimitation.⁸²

III. STRATEGIC FACTORS

A. Introduction

While it is reasonably clear that at least some maritime boundaries were influenced by security interests, those interests are almost never adverted to in the text of the agreement and only rarely, and then often obliquely, in related commentary of governments. In this connection, it should be borne in mind that defense ministries are often consulted as governments develop their maritime boundary positions.⁸³ At times those ministries are represented on negotiating delegations. It seems reasonable to conclude that, whatever the apparent factors influencing its location, the acceptability of the boundary may well be reviewed from a security perspective.

between Australia and Papua New Guinea under article 2 of the agreement is in part based on the seabed delimitation line. See Australia-Indonesia Certain Boundaries Agreements, *supra* note 19. The same approach was used by Abu Dhabi and Qatar. See Agreement on Settlement of Maritime Boundary Lines, Mar. 20, 1969, Qatar-U.A.E., 403 (U.N. Legislative Series) U.N. Doc. No. ST/LEG/SER.B/16 (1974).

81. See Agreement on the Delimitation of the Maritime Boundary in the Adaman Sea, Dec. 23, 1986, Burma-India, art. 5, 27 I.L.M. 1144 [hereinafter Burma-India Agreement].

82. Burma abandoned its claim to Narcondam Island and India did not insist on the maximum possible claims from either Narcondam Island or Barren Island. See Agreement on the Boundary in Historic Waters between India and Sri-Lanka, June 26-28, 1974, India-Sri Lanka, 13 I.L.M. 1442 [hereinafter India-Sri-Lanka Agreement]. In the agreement regarding Palk Strait and Bay, the island is not counted at all in the delimitation, and there is provision for access to the island for fishermen and pilgrims. The Iran-Saudi Arabia agreement limits the effect of the islands to twelve miles. See Agreement Concerning the Delimitation of the Boundary Line Separating Submarine Areas, Oct. 24, 1968, Iran-Saudi Arabia, 696 U.N.T.S. 189. It is not clear what influence a 1927 Icelandic letter reserving rights to the resources of Jan Mayen, prior to the formal Norwegian claim to Jan Mayen in 1929, had on the agreement to accord Iceland a full 200-mile exclusive economic zone in areas where the distance between the coasts is less than 400 miles, or on the Conciliation Commission's decision to establish a substantial joint management area with respect to seabed resources, mostly on the Jan Mayen side of that 200-mile line. Iceland-Norway Agreement, *supra* note 33.

83. In some cases, the navy is the primary internal source of charts, technical data, or maritime expertise.

A number of economic and other factors dealt with in other chapters of this study may engage the perceived security interests of a particular state. In a narrow sense, the term "security" might refer to the right to conduct and, conversely, the right to restrict military activities at sea, principally by warships, coast guard vessels, and state aircraft. Yet even in that narrow sense, it is difficult to distinguish commercial navigation interests from security interests. Moreover, governments have asserted that the movement of international trade, and access to and control over mineral and hydrocarbon resources of the seabed, engage not only their economic but their security interests.⁸⁴ In the broadest sense, a state's efforts to accumulate friends and control the emergence or leverage of adversaries are fundamentally tied to its security.

B. Types of Security Concerns

Two different aspects of security are potentially affected by maritime delimitation. One is the desire of a state to exclude or control activities of foreign states off its coast that it perceives to be prejudicial to its security.⁸⁵ The other is the desire of a state to be able to ensure that its own or foreign activities that are important to its security may be conducted without foreign interference, including protection of its access to the open sea and communications by sea and air with foreign states.

Under the regimes set forth in the United Nations Convention on the Law of the Sea,⁸⁶ these interests are unquestionably affected in waters subject to the sovereignty of the coastal state, namely internal waters, archipelagic waters, and the territorial sea. That sovereignty is qualified by the right of innocent passage, which is subject to certain coastal state regulatory powers as well as the power to take measures to prevent passage that is not innocent and the power to suspend innocent passage outside straits. That sovereignty is also qualified by the right of ships

84. Soviet experts have spoken of environmental security, using the same Russian word that is used in "Security Council" and "Committee on State Security" (KGB). The cognates for "security" in many Romance languages may share the arguably broader meaning of "safety."

85. The political reality of this perception of security is to be distinguished from its substantive merits. Some might argue that, in certain situations, demagoguery, paranoia, or xenophobia are better explanations for the perception.

86. U.N. Convention on the Law of the Sea, *supra* note 2.

and aircraft to transit passage of straits and archipelagic sea lanes passage.

As the tribunal in the *Guinea-Guinea-Bissau* arbitration observed,⁸⁷ the continental shelf and the exclusive economic zone are not zones of sovereignty, but rather areas in which the coastal state exercises more limited sovereign rights and jurisdiction for specific purposes. These are identified in detail in the United Nations Convention. In particular, freedom of navigation and overflight are expressly protected in the provisions dealing with the exclusive economic zone as well as the continental shelf. There are nevertheless aspects of these regimes that states may perceive as affecting their security interests:

- * The United Nations Convention provides that artificial installations used for resource or other economic purposes are subject to coastal state control in the exclusive economic zone and on the continental shelf. The same is true of scientific installations as well as any other installations that may interfere with the exercise of the rights of the coastal state.⁸⁸
- * The coastal state largely has a free hand in determining where it will permit installations (and the safety zones around them) to be placed in its exclusive economic zone and on its continental shelf, subject to a somewhat narrowly phrased duty to avoid recognized sea lanes essential to international navigation,⁸⁹ supplemented in the U.N. Convention, by a general duty to avoid interference with navigation.⁹⁰ A neighboring state could be concerned about its

87. *Guinea-Guinea-Bissau Award*, *supra* note 33, at 124.

88. U.N. Convention on the Law of the Sea, *supra* note 2, arts. 60, 80, 81.

89. U.N. Convention on the Law of the Sea, *supra* note 2, art. 60, ¶ 7, repeating art. 5, ¶ 6 of the Convention on the Continental Shelf, *supra* note 24.

90. U.N. Convention on the Law of the Sea, *supra* note 2, arts. 56(3), 58, 78(2), 87. While Article 87 of the U.N. Convention includes among the express freedoms of the high seas the freedom to lay submarine cables and pipelines, this freedom is "subject to Part VI" dealing with the continental shelf. Pursuant to Part VI, Article 79, the coastal state duty not to impede the laying or maintenance of cables and pipelines is subject to its right to take reasonable measures for the exploration of the continental shelf, the exploration of its natural resources and the prevention, reduction, and control of pollution from pipelines. Moreover, the delineation of the course for the laying of pipelines on the continental shelf is subject to the consent of

access routes.

- * The U.N. Convention accords the coastal state enforcement rights over foreign ships in its exclusive economic zone with respect to pollution in contravention of international standards or internationally approved coastal state standards (and, in limited circumstances such as dumping or ice-covered areas, unilateral coastal state standards). The complex and carefully balanced provisions of the Convention on this matter are sometimes omitted from national laws on the exclusive economic zone that nevertheless contain a generalized assertion of jurisdiction with respect to control of pollution.
- * The trend in the twentieth century has been one of expanding coastal state jurisdiction in both a geographic and a functional sense. This trend may continue, either in terms of a gradual coastal shift in the balance between coastal and other interests in the exclusive economic zone or in some other way. Governments concerned with protecting their access to the sea may consider it prudent to deal with that contingency. In this connection it remains unclear whether the United Nations Convention on the Law of the Sea will eventually receive widespread adherence and, in any event, precisely how it will be interpreted and exactly how much of a restraining influence it will be.

C. Exclusionary Interest

There is very little evidence of boundaries being drawn to reflect a security interest of the coastal state in excluding or controlling foreign activities off its coast.⁹¹ That security inter-

the coastal state.

91. It is said that strategic considerations influenced the strong position taken by Sweden in favor of full effect for Gotland in its negotiations with the U.S.S.R. Sweden eventually settled for seventy-five percent effect. Agreement on the Delimitation of the Continental Shelf and of the Swedish Fishing Zone and the Soviet Economic Zone in the Baltic Sea, Apr. 18, 1988, Swed.-U.S.S.R., 27 I.L.M. 295. It is possible that traditional Soviet sensitivity concerning the security of the Arctic coast, at times associated with the so-called sector principle, was a factor that encouraged the Soviet Union to regard the line set forth in the 1867 U.S.-Russia Convention ceding Alaska as the maritime boundary; north of the Bering Strait, the line follows a meridian of longitude due north into the Arctic Ocean. See Maritime Boundary Agreement, June 15, 1990, U.S.-U.S.S.R., 29 I.L.M. 941 (1990) [hereinafter U.S.-U.S.S.R. Boundary Agreement].

est is sometimes perceived in terms of proximity to the coast.⁹² An equidistant line, usually regarded as based exclusively on geographic factors, or some other line reasonably far from the coast might accordingly commend itself to some parties as an appropriate accommodation of their respective coastal security interests. Since the security factor is masked, it is difficult to tell whether it actually influenced the behavior of governments.

In the *Libya-Malta* case, the Court noted that the delimitation resulting from its judgement is "not so near to the coasts of either Party as to make questions of security a particular consideration in the present case."⁹³ The tribunal in the *Guinea-Guinea-Bissau* arbitration made a similar point, noting that security implications are avoided under its proposed solution by the fact that each state controls the maritime territories opposite its coasts and in their vicinity.⁹⁴ It may well be that governments, like these two tribunals, are more likely to test particular proposed results against this security concern than to shape a proposal specifically in response to this concern.

It is also sometimes difficult to tell whether a boundary drawn to maximize access to and from a naval base, for example, is not — at least in the territorial sea — also designed to maximize that state's control over foreign activities near the base. It is reported that Soviet strategic interests with respect to the main Pacific fleet naval base at Vladivostok produced a territorial sea boundary more favorable to the U.S.S.R. than a hypothetical equidistant line.⁹⁵ There can be no doubt that access to and from the base was a primary strategic concern. It is

92. Malta associated security interests with proximity to the coast in its arguments before the International Court of Justice regarding the delimitation of its continental shelf with Libya. See *Libya-Malta Continental Shelf Case*, *supra* note 48. Guinea-Bissau did much the same in its arbitration with Guinea-Guinea-Bissau Arbitration, *supra* note 33. The Truman Proclamation on the Continental shelf, *supra* note 6, might suggest an analogous view of security (however unlikely the provenance of that limited vision from the world's dominant maritime power might appear to some observers). The preamble includes, as the final item in the list of justifications for the assertion of jurisdiction over the resources of the continental shelf, the statement, "since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources." *Id.*

93. *Libya-Malta Continental Shelf Case*, *supra* note 48, ¶ 51.

94. See *Guinea-Guinea-Bissau Award*, *supra* note 33, at 251.

95. *Soviet-Korea National Border Agreement*, *supra* note 20.

not clear that this was the only strategic concern.

D. Access to and from the Open Sea

There is ample evidence that concerns about access to and from the sea have influenced maritime boundaries either directly by altering or confirming their location or indirectly by prompting simultaneous agreement on substantive provisions protecting navigation rights. The summary report with respect to the Baltic Sea notes that only navigation interests were strong enough to prevail over the general use of equidistance in that region.

It is often difficult to tell whether a state's preoccupation with navigation derives primarily from economic or security concerns. In this connection, it must be borne in mind that security concerns regarding access relate not only to the naval and air forces of the particular coastal state, but to access for the forces of friendly states and, beyond that, to the protection of trading and communications routes fundamental to the economy of the state.

One would expect most explicit concerns with naval access to be manifested by major naval powers. It is nevertheless interesting that Soviet boundaries figure prominently in the references in the boundary studies to maritime boundaries configured in response to concerns about naval access.⁹⁶ This may reflect the circumstances of Soviet geography, the historic Russian and

96. See *Id.*; see also Agreement Concerning the Sea Frontier in the Varangerfjord of 15 February 1957 and Protocol of 29 November 1957, Feb. 15, 1957; Nov. 29, 1957, Nor.-U.S.S.R., Limits in the Seas, No. 17 (1970) in the "strategically and politically sensitive" area of the Varangerfjord, where the "boundary runs, broadly speaking, across the broad mouth of the Gulf leaving plenty of water on either side for access from the fjord to the Barents Sea"; see also Agreement Concerning the Boundaries of Sea Areas and of the Continental Shelf in the Gulf of Finland, May 25, 1966, Fin.-U.S.S.R., 566 U.N.T.S. 37, where the territorial sea boundary in the Gulf of Finland established by the 1940 and 1947 peace treaties between the parties was heavily influenced by Soviet security concerns, and where Gogland (Suursaari) Island was given only limited effect to safeguard free navigation north of it. The elaborate provisions in the Turkey-Soviet Union territorial sea agreement for range markers and for situations where the markers are seen as overlapping (possibly causing a vessel to cross the line inadvertently) presumably reflect an underlying concern about protecting navigation in an area of zealous coastal security enforcement. See Protocol Concerning the Territorial Sea Boundary Between the Two States in the Black Sea, Apr. 17, 1973, Turk.-U.S.S.R., Limits in the Seas, No. 59 [hereinafter Turkey-U.S.S.R. Protocol].

Soviet preoccupation with access to the sea, greater emphasis on security concerns in Soviet policy-making, or a tendency by outside observers to emphasize security factors in their analyses of Soviet motives.

The Soviet Union is not, however, alone. While it is common in connection with base rights agreements to provide for rights of access through the waters and air space of the host state, the Cyprus-United Kingdom agreement went further. It established lines extending seaward from the U.K. bases between which Cyprus may not claim territorial waters.⁹⁷ The United States' desire to protect transit routes to and from San Diego, where it has a major naval base, is cited as a factor supporting the decision to give full effect to islands in a delimitation based on equidistance.⁹⁸ France made strategic arguments, particularly regarding access to the port of Cherbourg, in the *Anglo-French* arbitration. In effect, the tribunal gave priority to French interests in navigation and security between the eastern and western parts of the English Channel.⁹⁹

States may desire to ensure that specific navigation routes are within their own waters, or at least outside the waters of the neighboring state. The Soviet, U.K., U.S., and French examples already cited are generally of this type. There are, however, others.

The practice of dividing the deep channel continues to be used close to shore. This may be done when the channel extends seaward from a land boundary in a river: the inner part of the line used in the *Guinea-Guinea-Bissau* arbitration follows an

97. Treaty Concerning the Establishment of the Republic of Cyprus, Annex A, Aug. 16, 1960, Cyprus-U.K., 382 U.N.T.S. 10 [hereinafter *Cyprus Treaty*].

98. Exchange of Notes Effecting Agreement on the Provisional Maritime Boundary, Nov. 24, 1976, Mex.-U.S., T.I.A.S. 8805 [hereinafter *Mexico-United States Exchange of Notes*]; Treaty about Maritime Boundaries, May 4, 1978, Mex.-U.S., 17 I.L.M. 1073.

99. Agreement on the Shelf Boundary in the Eastern Channel and Southern North Sea, June 24, 1982, Fr.-U.K., U.K.T.S. No. 20 [hereinafter *United Kingdom-France Shelf Boundary Agreement*]. While navigation factors apparently did not affect the negotiated boundary as such, in general the east-west lane of the traffic separation scheme is on the U.K. side while the west-east lane is on the French side. Agreements between France and United Kingdom Relating to the Delimitation of the Continental Shelf in the English Channel, July 10, 1975, U.K.T.S. No. 20 (1983).

"historic" boundary using the thalweg.¹⁰⁰ It may also be done when the channel lies between the opposite coasts of the parties: the Indonesia-Singapore boundary generally follows the deep draught tanker route, even extending within the Indonesian archipelagic baselines at one point.¹⁰¹ In other cases, the channel may be of principal concern to one state. The boundary between the Federal Republic of Germany and the former German Democratic Republic in Lübeck Bay located the entire shipping route to the FRG ports on the FRG side.¹⁰²

On occasion, a state may limit its objectives to ensuring that a navigation route or other areas, although not within its own waters, are outside the waters, or at least the territorial sea, of the neighboring state.¹⁰³ The Argentina-Chile treaty limits the territorial sea, as between the parties, to three miles in some areas.¹⁰⁴ The Australia-Papua New Guinea treaty limits the territorial sea of certain islands to three miles, and in other respects limits the territorial seas and archipelagic waters of the parties.¹⁰⁵ The agreement between Poland and the former German Democratic Republic is specifically designed to protect the northern access route to Polish ports, in part by limiting the territorial sea and other jurisdiction of the GDR.¹⁰⁶

Two interesting agreements specifically limit certain types of coastal state jurisdiction in the exclusive economic zone and on the continental shelf. The Netherlands-Venezuela agreement places limits on the exercise of jurisdiction to prevent pollution from ships and requires mutual agreement for emplacing struc-

100. Guinea-Guinea-Bissau Award, *supra* note 33, ¶¶ 45, 111.

101. Indonesia-Singapore Sea Boundary Agreement, *supra* note 21.

102. F.R.G.-G.D.R. Protocol Note, *supra* note 16. The boundary study notes that the FRG may also have considered its submarine testing areas near Nuestadt in connection with this boundary.

103. The Cyprus-U.K. Agreement discussed above is an example. See Cyprus Treaty, *supra* note 97.

104. Argentina-Chile Agreement, *supra* note 31, at 11.

105. See Australia-Papua New Guinea Treaty, *supra* note 4.

106. Treaty between German Democratic Republic and Poland Concerning the Delimitation of the Sea Areas in the Oder Bight, May 22, 1989, G.D.R.-Pol., GBl. II, No. 9, 28 July 1989, at 150-151 (G.D.R.) (discarding Treaty between the German Democratic Republic and Poland Concerning the Delimitation of the Continental Shelf in the Baltic Sea, Oct 29, 1968, G.D.R.-Poland, 768 U.N.T.S. 260 (1971). In the interim, a dispute over navigation erupted between the parties that was extensively debated in the Polish parliament. See Treaty between Germany and Poland Concerning the Confirmation of the Frontier Existing between Them, Nov. 14, 1990, F.R.G.-Pol., reprinted in INTERNATIONAL MARITIME BOUNDARIES, *supra* note 20, at 2023.

tures that may obstruct recognized sea lanes.¹⁰⁷ The Australia-Papua New Guinea agreement defines an area within the central Torres Strait, where the fisheries and seabed delimitation lines diverge, in which the exercise of "residual jurisdiction" requires the concurrence of the other party. "Residual jurisdiction" is defined as jurisdiction other than seabed and fisheries jurisdiction as well as seabed and fisheries jurisdiction not directly related to the exploration or exploitation of resources.¹⁰⁸

A number of agreements are structured so that each party's vessels can travel to and from its ports on its own side of the boundary. In many situations this objective can be achieved by any of several plausible maritime boundaries, and thus may not be evident in the specific location or discussion of the boundary.

With respect to the France-Italy delimitation in the Straits of Bonifacio, it is suggested that the "desire of both parties to reach a delimitation which would permit passage through the Mouths without entering the territorial sea of the other party might have influenced the negotiations."¹⁰⁹ A similar consideration is said to have influenced the Italy-Yugoslavia territorial sea boundary in the Gulf of Trieste; in this connection, the Italian Foreign Minister referred to the navigation of large tonnage ships without the necessity of passing through Yugoslav waters.¹¹⁰ Navigation interests prevailed over effect for the island of Ven in the 1932 territorial sea delimitation in the Sound between Denmark and Sweden.¹¹¹

107. Delimitation Treaty between the Netherlands and Venezuela, Mar. 31, 1978, Neth.-Venez., 1978 Tractenblad va het Koninkrijk der Nederlanden No. 61 (Neth.) [hereinafter Netherlands-Venezuela Agreement].

108. Australia-Papua New Guinea Treaty, *supra* note 4.

109. Convention between Italy and France Relating to the Delimitation of the Maritime Boundaries in the Area of the Mouths of Bonifacio, Nov. 28, 1986, Fr.-Italy, Gazz. Uff., Suppl. to No. 48 of 27 Feb. 1989 (Italy) [hereinafter Italy-France Convention].

110. Italy-Yugoslavia Treaty, *supra* note 77.

111. Agreement between Denmark and Sweden on the Delimitation of the Continental Shelf and Fishing Zones, Nov. 9, 1984, Den.-Swed., Sveriges överenskommelser med frammande makter 1985:54 (Swed.).

E. Enclavement

A particular problem is posed by the so-called cut-off or enclavement effect that can arise when the maritime boundaries between a state and its neighbors meet at a point off its coast. In the case of enclosed and semi-enclosed seas, some cut-off effects are unavoidable. Despite this fact, extension of a state's jurisdiction so as to avoid enclavement by its boundaries with some states (e.g., adjacent states) can minimize the number of states whose zones stand between the "enclaved" state and the open sea. Thus, for example, as a result of the agreements implementing the decision in the *North Sea Continental Shelf* cases, the German continental shelf connects directly with the British for a small distance.¹¹²

The concern about enclavement may engage both types of perceived security interests. States prefer not to be surrounded by their neighbors. In some measure this concern may be political and psychological. States have articulated security concerns about their capacity to conduct and control activities off their coast. More concretely, states may be concerned about access between their territory and the open sea.

In three cases, the maritime zones of small states with the same coastal neighbor on either side were protected from enclavement by the use of parallel lines defining the small state's zones.¹¹³ With respect to The Gambia, parallels of latitude were extended out into the open Atlantic.¹¹⁴ Monaco received a corridor up to the outer limit of the territorial sea, as well as a corridor beyond extending up to an equidistant line with the opposite coast on the island of Corsica.¹¹⁵ The boundary lines between Dominica, on the one hand, and Martinique and Guadeloupe on the other, were extended in quasi-parallel fashion up to 200 miles on the Atlantic side.¹¹⁶

112. Agreement between the Federal Republic of Germany and the United Kingdom Relating to the Delimitation of the Continental Shelf under the North Sea between the Two Countries, Nov. 25, 1971, F.R.G.-U.K., 880 U.N.T.S. 185. See U.N. Convention on the Law of the Sea, *supra* note 2 and accompanying text.

113. The land territory of the state concerned is itself surrounded by the other state in the first two cases.

114. Gambia-Senegal Agreement, *supra* note 33.

115. Monaco-France Delimitation Agreement, *supra* note 33. As Corsica is part of France, some "enclavement" by French zones was ultimately unavoidable.

116. Agreement on Maritime Delimitation between Dominica and France, Sept. 7,

Where a state's boundaries with more than one state pose the risk of enclavement, one cannot be certain the risk has been avoided absent agreement on maritime boundaries with all of the neighboring states concerned. Boundaries between only two states nevertheless can be drawn so as to minimize the risk of enclavement when future boundaries are completed, thereby attempting as far as possible to assure each state access to the open ocean through its own zones and to avoid the presence of a foreign zone opposite a state's coast. This is precisely what the arbitral tribunal did in the *Guinea-Guinea-Bissau* arbitration.¹¹⁷ Parallels of latitude were apparently used for this purpose in the seaward segments of the Kenya-Tanzania¹¹⁸ and Mozambique-Tanzania¹¹⁹ delimitations.¹²⁰

F. Specific Clauses Protecting Navigation

Delimitation agreements sometimes contain specific clauses protecting navigation interests. A number of these arise in a context where the clause appears to be related to the navigation implications of the particular maritime boundary. Others seem to reflect a more general concern about navigation that is not necessarily associated with any particular boundary location or configuration. It is not always easy to tell the difference.

The Argentina-Chile treaty makes elaborate provision for

1987, Dominica-Fr., Rev. Gèn. D.I. Pub. 486-90 (1989).

117. *Guinea-Guinea-Bissau Award*, *supra* note 33.

118. Agreement between Kenya and Tanzania on Delimitation of the Maritime Boundary between the Two States, July 9, 1976, Kenya-Tanz., (U.N. Legislative Series) U.N. Doc. ST/LEG/SER.B/19 (1980).

119. Agreement between Tanzania and Mozambique, Dec. 28, 1988, Tanz.-Mozam. (Rep. 4-7), *reprinted in* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 20, at 893.

120. The 1969 Brazil-Uruguay joint declaration supporting equidistance may have been prompted by a desire to demonstrate to Argentina that the use of a parallel of latitude between Uruguay and Argentina would have an enclavement effect when coupled with a Brazil-Uruguay equidistant line, that the acceptability of a parallel of latitude method to Uruguay was therefore (apart from other objections) rationally dependent upon its acceptability to Brazil, and that Brazilian agreement was not likely. See Agreement between Brazil and Uruguay Relating to the Maritime Delimitation between the Two Countries, July 21, 1972, Braz.-Uru., 1120 U.N.T.S. 133 (1978). Although Argentina was not threatened with enclavement as such, the Argentina-Chile treaty reflects Argentine concerns about any cut-off of its extension into the Atlantic Ocean, and offers some support for the so-called bi-oceanic principle defended by Argentina. See Argentina-Chile Agreement, *supra* note 31.

the protection of navigation, including a reaffirmation of freedom of navigation in and in the approaches to the Strait of Magellan.¹²¹ The Australia-Papua New Guinea treaty contains extensive provisions designed to protect navigation and overflight in the Torres Strait area.¹²² In the Maroua Declaration extending the maritime boundary between Cameroon and Nigeria, the "two Heads of State further reaffirmed their commitment to freedom and security of navigation in the Calabar/Cross River channel of ships of the two countries as defined by International Treaties and Conventions."¹²³ In these cases, there appears to be a fairly close substantive link between these provisions and the underlying delimitation issues.

There are strong navigation and overflight provisions in the Netherlands-Venezuela agreement,¹²⁴ and a guarantee of transit passage between the islands of Trinidad and Tobago in the Trinidad and Tobago-Venezuela agreement.¹²⁵ More general clauses protecting navigation rights can be found in other agreements.¹²⁶ These clauses may have facilitated agreement either by constituting a *quid pro quo* for a particular boundary or in a more general sense.

IV. HISTORICAL FACTORS

A. Introduction

Historical factors are perhaps easier to isolate than political factors. Yet in the context of maritime boundaries, there is a great deal of overlap with other factors. Historic fishing may be

121. Argentina-Chile Agreement, *supra* note 31.

122. Australia-Papua New Guinea Treaty, *supra* note 4.

123. Agreement between Cameroon and Nigeria, June 1, 1975, Cameroon-Nig., Maritime Boundary Agreements (1970-84) 97 (1987).

124. Netherlands-Venezuela Agreement, *supra* note 107.

125. Treaty between Trinidad and Tobago and Venezuela on the Delimitation of Marine and Submarine Areas, April 18, 1990, Trin. & Tobago-Venez., G.O., No. 34745, June 28, 1991 (Venez.).

126. See, e.g., Agreement between Argentina and Uruguay Relating to the Delimitation of the River Plate and the Maritime Boundary between the Two Countries, Nov. 19, 1973, Arg.-Uru., U.N.T.S., No. 21424; Panama-Colombia Treaty, *supra* note 20; Dominican Republic-Venezuela Treaty, *supra* note 53, at 1634 (preambular reference to Venezuelan navigation interests); India-Maldives Maritime Agreement, *supra* note 34. France and the United Kingdom made a separate joint declaration on navigation contemporaneously with their 1982 delimitation agreement. United Kingdom-France Shelf Boundary Agreement, *supra* note 99.

viewed as a resource or economic factor. The question of using, or extending, an "historical" boundary (or even a prior *modus vivendi*) for maritime delimitation purposes is laden with political as well as legal content.¹²⁷ In a strict sense, questions of historic bays or waters frequently may be regarded as baseline questions.

B. Land Boundaries

In the normal case, a land boundary is better viewed as a geographic rather than an historic factor. The land boundary determines the allocation of coastlines from which maritime jurisdiction extends. In the case of adjacent states, the intersection of the land boundary with the sea constitutes the starting point for the maritime boundary. There are, however, some situations in which the land boundary takes on a broader historic significance with respect to a maritime boundary.

127. Article 15 of the U.N. Convention on the Law of the Sea, *supra* note 2, like art. 12 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, specifies with respect to delimitation of the territorial sea that the equidistance rule applicable in the absence of agreement to the contrary "does not apply . . . where it is necessary by reason of historic title or other special circumstances to delimit the territorial sea of the two States in a way which is at variance" therewith. Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205. The delimitation rule in Article 6 of the 1958 Convention on the Continental Shelf specifies that the equidistance rule applies "[i]n the absence of agreement, and unless another boundary line is justified by special circumstances;" there is no mention of historic title. Convention on the Continental Shelf, *supra* note 24. The delimitation rules articulated in Arts. 74 and 83 of the U.N. Convention on the Law of the Sea with respect to the exclusive economic zone and the continental shelf do not address the location of the boundary in the absence of the agreement: they require that delimitation "be effected by agreement on the basis of international law . . . in order to achieve an equitable solution," that the States concerned resort to the dispute settlement procedures provided for in the Convention "[i]f no agreement can be reached within a reasonable period of time," and that pending agreement "the States concerned . . . shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement." Article 298(1)(a) permits either party, at a minimum, to submit a maritime boundary dispute to conciliation. Article 298(1)(a) permits a party to declare that it does not accept arbitration or adjudication of disputes "relating to sea boundary delimitations, or those involving historic bays or titles," but in that event requires acceptance of submission of the matter to conciliation at the request of any party to the dispute. See U.N. Convention on the Law of the Sea, *supra* note 2.

1. Rivers Flowing into the Sea

One such situation arises in an essentially technical context, namely where the center or thalweg of a river that flows into the sea constitutes the land boundary. Either the shore line at the mouth of the river in the case of a center-line boundary, or the channel in the case of a thalweg, may change position over time.

Mexico and the U.S. had to deal with this problem in establishing their territorial sea boundary in the Gulf of Mexico beyond the mouth of the Rio Grande.¹²⁸ The position of the Rio Grande at its mouth, as indeed in other places, changes over time. It is evident that the parties attached significant political, historical, and practical importance to the maintenance of the Rio Grande as the boundary: in contemporaneous settlements of outstanding disputes regarding their land boundary, their solution to the problem was cession of territories that fell on opposite sides of the river and agreement to attempt to stabilize the course of the river in the future.¹²⁹ In the case of the maritime boundary, a fixed point was established somewhat seaward of the mouth of the Rio Grande. Seaward of that point, a fixed maritime boundary was established. However, landward of that point, the boundary will migrate over time, connecting the fixed point with the center of the mouth of the river.

In the *Guinea-Guinea-Bissau* arbitration, the tribunal was faced with a similar problem of linking a fixed maritime boundary with the land boundary, namely the thalweg of the Cajet River. Noting that the thalweg might migrate, the tribunal began the fixed boundary seaward of the mouth of the river, and specified that landward of that point the boundary would extend in the direction of the thalweg.¹³⁰

128. Mexico-United States Exchange of Notes, *supra* note 98.

129. Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and the Colorado River as the International Boundary between the United States and Mexico, Nov. 23, 1970, 23 U.S.T. 371. Mexico-United States Exchange of Notes, *supra* note 98; *see also* Convention for the Solution of the Chamizal Problem, Aug. 29, 1963, 15 U.S.T. 21, 505 U.N.T.S. 185.

130. Guinea-Guinea-Bissau Award, *supra* note 33, ¶ 129.

2. Direction of the Land Boundary

Adjacent states sometimes argue that a maritime boundary should be established by extending the land boundary in the same direction out to sea. The territorial sea boundary prolongs the last segment of the land boundary between Turkey and the U.S.S.R. in the same direction.¹³¹

The International Court of Justice rejected the Libyan argument that the maritime boundary should continue in the northward direction of the land frontier in the *Tunisia/Libya* case.¹³² In the *Gulf of Maine* case, the United States argued that the general orientation of the continental boundary between the two countries suggested a generally east-west orientation of the maritime boundary, while Canada argued that the general orientation of the land boundary in the coastal region between Maine and New Brunswick suggested a generally north-south orientation of the maritime boundary. The Chamber appeared unimpressed by both arguments, and established the orientation of the maritime boundary seaward of the Gulf of Maine as a perpendicular to the generally northeast-southwest orientation of the coast.¹³³

3. Lines at Sea

It is not uncommon for treaties dealing with cessions or allocations of sovereignty over islands or other territory to define the areas ceded or allocated between those states on the basis of lines drawn at sea. The essential purpose of those lines is to provide a convenient reference for determining which islands and territories are ceded or allocated to a particular party. Among other things, this approach avoids the need to identify precisely all islands and other territory ceded.

The question posed is whether those same lines (in light of

131. Turkey-U.S.S.R. Protocol, *supra* note 96.

132. *Tunisia-Libya Continental Shelf Case*, *supra* note 10, ¶ 85. The Court did not however identify "the factor of perpendicularity to the coast and the concept of the prolongation of the general direction of the land boundary" as "relevant criteria to be taken into account." *Id.* ¶ 120.

133. *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12) [hereinafter *Gulf of Maine Case*].

the precise text of the relevant treaty, the original intent of the parties¹³⁴ or subsequent practice, or otherwise as a relevant historical circumstance) are also to be used as maritime boundaries. For newly independent states, in particular, this issue may be linked to the importance they attach to the principle of *uti possidetis* as a means of avoiding boundary disputes and maintaining stable and peaceful relations.¹³⁵

In the *Guinea-Guinea-Bissau* arbitration, after extensive analysis of the text of the treaty, its negotiating history, and subsequent practice, the tribunal rejected Guinea's argument that the line extending far out to sea drawn in an 1866 Franco-Portuguese treaty dividing their West African territories constituted a maritime boundary as such.¹³⁶ It nevertheless used this line, deeming it a relevant factor and otherwise equitable, for determining the location of the maritime boundary in a fairly significant area in the vicinity of the coast up to a point twelve miles seaward of Guinea's Alcatraz Island.¹³⁷ The tribunal pointed out that use of the seaward portions of the line as a maritime boundary would aggravate the problem of enclavement it was trying to find means to solve in the broader context of the West African coast.

The 1990 U.S.-U.S.S.R. agreement expressly identifies the maritime boundary as the line identifying the areas ceded in the 1867 U.S.-Russia Convention regarding the purchase of Alas-

134. It should be borne in mind that while at least parts of the lines in question may be great distances from the nearest land, many of the treaties in question were concluded at a time when the territorial sea was the only generally accepted form of coastal state jurisdiction, and prevailing views regarding the maximum permissible breadth of the territorial sea revolved around the traditional three-mile limit or little more. On the other hand, this circumstance does not in itself resolve the question of whether a cession or allocation was so defined as to constitute a limit of such maritime jurisdiction as might be claimed by a party or permitted by international law at the time or in the future.

135. The Solemn of 1964 by the Heads of State and Governments of the Organization of African Unity honoring existing boundaries at the time of independence is unquestionably regarded as fundamental by African experts who recognize the chaos that could result from challenges to the legitimacy of boundaries on grounds such as their imperial provenance or demographic rationality. It should be noted Guinea-Bissau unsuccessfully challenged a 1960 maritime boundary agreed to by Portugal and France (on behalf of Senegal). *Guinea-Guinea-Bissau Award*, *supra* note 33; see also *Application of Guinea-Bissau to the I.C.J.*, 1989, (Aug. 23 Annex).

136. Since the tribunal decided that the treaty did not establish a maritime boundary as such, it was able to avoid considering the effect of the *uti possidetis* principle. *Guinea-Guinea-Bissau Award*, *supra* note 33, ¶ 85.

137. *Guinea-Guinea-Bissau Award*, *supra* note 33, ¶¶ 105, 106, 111(a).

ka.¹³⁸ The line drawn in the 1867 Convention is located entirely at sea and extends across the Bering Sea and due north into the Arctic Ocean.¹³⁹ It is the longest single maritime boundary in the world between two states, and delimits the territorial sea, the exclusive economic zone, and the continental shelf beneath and beyond the 200-mile exclusive economic zone. The agreement includes a transfer by each party to the other of coastal state jurisdiction beyond the maritime boundary to which the transferor but not the transferee would otherwise be entitled under international law.¹⁴⁰

There are a number of other situations in which both parties may regard similar lines as constituting their maritime boundaries. These are not free from uncertainty.¹⁴¹ An example is the following comment from the study of the maritime boundary between Burma (Myanmar) and Thailand:¹⁴²

The eastern terminus [of the boundary defined in the agreement] is about forty-seven nautical miles from the mouth of the Pakchan River which marks the boundary between Burma and Thailand; it is suspected that the line joining this

138. U.S.-U.S.S.R. Boundary Agreement, *supra* note 91. The text of the 1867 Convention contains a comprehensive cession of all "territory and dominion" east of the line. Convention Ceding Alaska, Mar. 18/30, 1867, 15 Stat. 539.

139. Some historical features of the 1867 line may be of interest. It was originally drawn by the Russian Imperial Navy in connection with the Russian proposal to sell Alaska to the United States. The report of the Chairman of the Foreign Relations Committee to the U.S. Senate in connection with its consideration of the 1867 Convention identifies as one of the benefits of the purchase the rich fisheries resources in extensive relatively shallow areas above what we would now call the continental shelf.

140. The 1990 agreement followed an exchange of notes in the late 1970s in which each state indicated that it intended to respect the 1867 line in connection with its extension of fisheries jurisdiction to 200 miles. Subsequent to that exchange of notes, the parties found that they differed as to the proper depiction of the 1867 line and needed to address aspects of its effect. The precise line drawn in the 1990 agreement coincides with the 1867 line where the parties agreed on its depiction and, in the Bering Sea, is composed of segments all of which lie between or coincide with the differing depictions of the 1867 line as a loxodromic or a geodetic line.

141. The regional summary report refers to the apparent use in the vicinity of the adjacent coasts of Malaysia and Thailand of a line drawn on a rough sketch in the protocol attached to a 1909 treaty which separated the territories of British Malaya from Thailand. The report also refers to the apparent use between Malaysia and Singapore of the line agreed in 1924 by Britain and the Sultan of Johore to define the extent of Singapore; that line coincided with the deep channel of Johore Strait.

142. Burma-India Agreement, *supra* note 81.

river mouth to the eastern terminus is the line shown on a map which was part of the boundary agreement [dividing islands] between Britain and Thailand dated 30 April and 3 July 1868, when Britain ruled Burma.

An analogous situation is presented by the maritime boundary between Finland and Sweden. Three turning points and one terminal point of the continental shelf boundary coincide with points established in the 1921 Convention concerning the non-fortification and neutralization of the Åland Islands.¹⁴³ However, subsequent fishing lines drawn by each of the parties do not use those points.

C. Prior Maritime Boundaries

While widespread assertion and acceptance of coastal state jurisdiction over the continental shelf generally occurred in the decade or so following the 1945 Truman Proclamation on the continental shelf, widespread assertion and acceptance of coastal state jurisdiction over fisheries, or a more comprehensive exclusive economic zone, extending to 200 miles did not occur for another thirty years or so, in many cases in conjunction with the emerging consensus at the Third United Nations Conference on the Law of the Sea. Thus, states that established a maritime boundary beyond the territorial sea for one purpose, for example delimitation of the continental shelf, may face the question of whether to use the same boundary to delimit jurisdictions claimed subsequent to the establishment of the maritime boundary, for example fisheries or exclusive economic zone jurisdiction.

The agreements between Finland and the U.S.S.R. illustrate an affirmative response to that question. The parties used the two previously established continental shelf boundaries for fisheries delimitation purposes.¹⁴⁴ Subsequently they converted

143. Agreement between Finland and Sweden Concerning the Delimitation of the Continental Shelf in the Gulf of Bothnia, the Åland Sea and the Northernmost Part of the Baltic Sea, Sept. 29, 1972, Fin.-Swed., (U.N. Legislative Series) U.N. Doc. ST/LEG/SER.B/18, 49 (1976). The history can be traced further back to the 1809 Peace Treaty of Fredrikshavn between Russia and Sweden.

144. Agreement between Finland and U.S.S.R. on the Delimitation of the Economic Zone and Fishery Zone in the North Eastern Baltic Sea, Feb. 25, 1980, Fin.-U.S.S.R., 33 Vedomosti Verkhovnogo Soveta S.S.S.R. (Communications of the Supreme Soviet of the U.S.S.R.) 676 (1987).

those continental shelf and fisheries jurisdiction boundaries into all-purpose single maritime boundaries, including the exclusive economic zone.¹⁴⁵ Similarly, Turkey and the U.S.S.R. used their previously established continental shelf boundary to delimit their respective exclusive economic zones.¹⁴⁶ The line drawn in the historic 1942 seabed delimitation agreement between the United Kingdom and Venezuela with respect to the Gulf of Paria has been used, with some technical changes, in the single maritime boundaries drawn in the 1989 and 1990 agreements between Trinidad and Tobago and Venezuela.¹⁴⁷ On the other hand, the provisional fisheries surveillance and enforcement line agreed by Australia and Indonesia, for example, is substantially different from their earlier continental shelf boundary.¹⁴⁸

History or prior practice may not alone explain the decision to use a previous line drawn within the 200-mile zone. That decision may be related to the recent practice of drawing a single maritime boundary for all purposes. Attempts to use different lines for different purposes within the zone raise a number of practical problems of allocation of jurisdiction demonstrated, for example, by the treatment of "residual jurisdiction" in the

145. Economic Zone, Fishery Zone, and Continental Shelf in the Gulf of Finland and the North Eastern Baltic Sea, Feb. 5, 1985, Fin.-U.S.S.R., 25 *Vedomosti Verkhovnogo Soveta S.S.S.R.* (Communications of the Supreme Soviet of the U.S.S.R.) 1 (1987).

146. Delimitation of the Exclusive Economic Zones in the Black Sea, Dec. 23, 1986 — Feb. 6, 1987, Turk.-U.S.S.R., T.C. Resmi Gazete No. 19386 (1987) (Turkey-U.S.S.R.).

147. Treaty between the United Kingdom and the United States of Venezuela Relating to the Submarine Areas of Gulf Paria, Feb. 26, 1942, Trin. & Tobago-Venez., Limits in the Seas, No. 11 (1970). Delimitations of Marine and Submarine Areas, Trin. & Tobago-Venez., G. O., No. 34645, Apr. 18, 1990 (1991) (Venezuela).

148. Understanding between Indonesia and Australia Concerning Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement, Oct. 29, 1981, Austl.-Indon., (Rep. 6-2(4)), reprinted in *INTERNATIONAL MARITIME BOUNDARIES*, *supra* note 20, at 1238. It might be noted that the earlier continental shelf boundary between Australia and Indonesia in the area, presumably in partial response to Australian reliance on the concept of natural prolongation, was influenced by geomorphological factors. See *Australia-Indonesia Timor and Arafura Seabed Agreement*, *supra* note 46. Opinions of the International Court of Justice subsequent to that time placed substantially less emphasis on the concept of natural prolongation in continental shelf delimitation. The change in the Court's approach was itself influenced by the fact that the U.N. Conference on the Law of the Sea included sovereign rights over the resources of the seabed and subsoil within the concept of the 200-mile exclusive economic zone and defined the outer limit of the continental shelf alternatively in terms of natural prolongation or a 200-mile limit.

Australia-Papua New Guinea agreement.¹⁴⁹

A similar question may be presented where the territorial sea is extended to twelve miles in areas that were previously subject to claims of more limited jurisdiction. Some segments of the territorial sea boundary between France and Italy in the Straits of Bonifacio follow the alignment of a 1908 fishing delimitation agreement.¹⁵⁰ The boundary between Poland and Sweden in part follows a previous provisional fisheries boundary.¹⁵¹ Following extension of the territorial sea to twelve miles, France and the U.K. agreed to modify the status of the boundary in the Straits of Dover from a continental shelf boundary to a territorial sea boundary.¹⁵²

In the *Guinea-Bissau-Senegal* arbitration, the tribunal, by a vote of 2-1, agreed with Senegal that the 1960 Franco-Portuguese agreement delimiting the territorial sea, contiguous zone, and continental shelf bound the parties. The President, who voted in the majority, declared separately that because the 1960 agreement did not delimit the exclusive economic zone, the tribunal should have addressed that delimitation question. Guinea-Bissau instituted proceedings in the International Court of Justice to void the award. The Court declined to do so.¹⁵³

An interesting variant of this issue involves the treatment of essentially the same question in successive maritime boundary agreements with different states. Thus, for example, the issue of reduced effect for Gotland was resolved between Poland and Sweden on the same basis that it was previously resolved between Sweden and the U.S.S.R., namely seventy-five percent effect.¹⁵⁴ The *North Sea Continental Shelf* cases nevertheless provide ample evidence of the limits of any strategy designed to impose such a result on a reluctant party.

149. See discussion preceding *supra* note 109.

150. Italy-France Convention, *supra* note 109.

151. Agreement on the Delimitation of the Continental Shelf and the Fishery Zones, Feb. 10, 1989, Pol.-Swed., Regeringens Proposition 1988/89:97 (Swed.) [hereinafter Continental Shelf and Fishery Zones Agreement].

152. Agreement on the Territorial Sea Boundary in the Straits of Dover, Nov. 2, 1988, Fr.-U.K., 1989 Gr. Brit. T.S. No. 26 (Cmd. 1732).

153. Award of Arbitral Tribunal (Guinea-Bissau), 1989 (July 31), Application of Guinea-Bissau to the I.C.J., 1989, (Aug. 23 Annex); Case Concerning the Arbitral Award (Guinea-Bissau v. Senegal) 1989 (July 31), 1990 I.C.J. 64 (Request for Indication of Provisional Measures Order).

154. Continental Shelf and Fishery Zones Agreement, *supra* note 151.

D. Informal or De Facto Lines

In some instances, an informal or *de facto* line used by both parties may become the basis for a maritime boundary. The maritime boundary agreed between Abu Dhabi and Dubai in 1965 was initially established as an administrative frontier for oil concession purposes in 1951.¹⁵⁵ In the *Tunisia/Libya* case, the International Court of Justice used a 1919 line drawn by Italian authorities when they were in control of Libya, noting that this was the *de facto* line respected by the parties as dividing their oil concessions.¹⁵⁶

Determining the political or juridical effect of informal or *de facto* lines poses a delicate problem. It is desirable to encourage parties that are unable to reach agreement on a maritime boundary for the time being to find some interim *modus vivendi*.¹⁵⁷ Fears that a *modus vivendi* may, for political or juridical reasons, evolve into a permanent boundary or boundary regime may limit the ability of the parties to find means to control the scope and intensity of their dispute.¹⁵⁸

E. Unilateral Claims

Whatever their effect on baselines used for purposes of measuring equidistant lines¹⁵⁹ — which appears to be scant — there is no evidence that the limits of historic claims determine the location of modern maritime boundaries as such. In the *Tunisia/Libya* case, the International Court of Justice noted the distinction between historic rights or waters and rights over the continental shelf which arise *ipso facto* and *ab initio*.¹⁶⁰ It re-

155. Abu Dhabi-Dubai Offshore Boundary Agreement, *supra* note 79.

156. *Tunisia-Libya Continental Shelf Case*, *supra* note 10, ¶¶ 93-96, 117, 120. It should be noted that this line is roughly perpendicular to the coast at the land boundary.

157. See U.N. Convention on the Law of the Sea *supra* note 2, common ¶ 3, arts. 74, 83 (1983).

158. See U.N. Convention on the Law of the Sea *supra* note 2, arts. 74 and 83 (specifying that provisional arrangements "shall be without prejudice to the final delimitation").

159. See generally Louis B. Sohn, *Baseline Considerations*, in INTERNATIONAL MARITIME BOUNDARIES, *supra* note 20.

160. *Tunisia-Libya Continental Shelf Case*, *supra* note 10, ¶ 100.

jected use of a unilateral Tunisian fishing line and noted that the Libyan northward line on its official petroleum regulation map was insufficient even to constitute a formal claim.¹⁶¹

In connection with the influence of geomorphology in the Australia-Indonesia continental shelf boundary, one might note the earlier reference to a 100-fathom limit in the Australian Pearl Fisheries Act of 1952-53, as well as the limits specified in the 1967 continental shelf legislation in Australia dealing with the problem of competing state and federal assertions of jurisdiction.¹⁶² Even if these references were not designed to deal with delimitation, but only with the general question of the definition and seaward limit of the continental shelf,¹⁶³ it is possible that the legislation, including the state-federal settlement, added to the political pressure on the Australian government to achieve a delimitation rooted in geology or geomorphology.

It is interesting to note that the agreement between India and Sri Lanka establishing a maritime boundary in Palk Strait and Bay deals with an area that the parties both regarded as historic waters originally appertaining to the United Kingdom prior to the independence of the two states concerned. The agreement provides for reciprocal recognition of traditional rights in that area.¹⁶⁴

F. Prior Seabed Concessions

Related to the question of unilateral claims, but distinguishable therefrom, is the problem posed by prior authorizations by a state for exploration or exploitation of the seabed. Absent acceptance or some adequate manifestation of acquiescence by the neighboring state concerned, unilateral seabed concessions do not establish maritime boundaries. The problem of private investment and expectations based on such authorizations nevertheless persists. The state that issued the authorizations may

161. *Id.* ¶ 92.

162. Australia-Indonesia Timor and Arafura Seabed Agreement, *supra* note 46.

163. See 4 Whiteman DIG. OF INT'L. L. at 757, 758. Australian authorities were doubtless aware that the press release accompanying the 1945 Truman Proclamation on the continental shelf referred to the continental shelf as extending to a depth of approximately 100 fathoms. The Australian legislation in question was enacted prior to the decision in the North Sea Continental Shelf cases, *supra* note 11.

164. India-Sri-Lanka Agreement, *supra* note 82.

be responding to a variety of factors, including political pressure from its licensees, fear of liability to its licensees, or general considerations of fairness.

Denmark and the Federal Republic of Germany adjusted the line designed to implement the Court's decision in the *North Sea Continental Shelf* cases so as to permit some existing Danish licensees to remain on the Danish continental shelf.¹⁶⁵ Abu Dhabi and Qatar agreed to share ownership and revenues from a disputed field, but under the existing Abu Dhabi concession agreement.¹⁶⁶ The agreement between Australia and Papua New Guinea provides for certain protections under the laws of Papua New Guinea for holders of Australian exploration permits.¹⁶⁷

G. Traditional Fisheries

There are some cases where traditional fisheries might be regarded as an historic factor influencing the boundary agreement. Since some of these arrangements involve artisanal fisheries by indigenous peoples who are culturally or ethnically distinct or at least geographically isolated from the general populations of the states concerned, a political (if not juridical) factor relating to the protection of such peoples may also be discerned.

The most elaborate arrangement is to be found in the agreement between Australia and Papua New Guinea. It establishes a Protected Zone in the Torres Strait area providing for the continuation not only of traditional fishing but other traditional activities. Paragraph 3 of Article 10 provides:

The principal purpose of the Parties in establishing the Protected Zone, and in determining its . . . boundaries, is to ac-

165. *North Sea Continental Shelf* (Den.-F.R.G.) 1969 I.C.J. 81 (Feb. 20) (separate opinion of Jessup, J.) (suggesting some arrangement in this regard).

166. Agreement on Settlement of Maritime Boundary Lines and Sovereign Rights over Islands between Qatar and Abu Dhabi, Mar. 20, 1969, Qatar-U.A.E., (U.N. Legislative Series) U.N. Doc. ST/LEG/SER.B/16 (1974). The agreement between Sharjah and Iran regarding Abu Masa (claimed by both) provides that offshore petroleum will continue to be produced by Sharjah's concessionaire with governmental revenues being shared equally by the parties. See Agreement on Seabed Boundary between the Rulers of Sharjah and Umm al Qaywayn, 1964, Sharjah-Umm al Qaywayn, I Can. Annex 99 (1983).

167. Australia-Papua New Guinea Treaty, *supra* note 4.

knowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement.

Pursuant to Article 11, "each Party shall continue to permit free movement and the performance of lawful traditional activities in and in the vicinity of the Protected Zone by the traditional inhabitants of the other Party."¹⁶⁸

Prior settlement of issues related to the control of Indonesian traditional fishing apparently facilitated the negotiation of the provisional fisheries enforcement line between Australia and Indonesia.¹⁶⁹ In the case of the India-Sri Lanka boundary in the Gulf of Manaar and Bay of Bengal, Sri Lankan claims of historic fishing rights in Wedge Bank did not alter the location of the line, but did result in agreement on respect for Sri Lankan fishing rights for three years and a Sri Lankan right to purchase fish thereafter.¹⁷⁰

In North America, the negotiation of a maritime boundary was regarded as part of a larger attempt to settle historic French rights to fish off Canada.¹⁷¹ On the other hand, United States efforts to demonstrate historic fishing patterns and other historic activities in support of its position that it should receive all of Georges Bank did not succeed in the *Gulf of Maine* case. It should be noted, however, that the line drawn by the Chamber was more favorable to the United States than a hypothetical equidistant line, and that the Chamber implied that a line totally unresponsive to Canadian fisheries activities in the northeastern part of the bank would not be equitable.¹⁷²

168. *Id.*

169. Provisional Fisheries Surveillance, *supra* note 17.

170. Agreement between India and Sri Lanka on the Maritime Boundary between the Two Countries in the Gulf of Manaar and the Bay of Bengal, Mar. 23, 1976, India-Sri Lanka, (U.N. Legislative Series) U.N. Doc. ST/LEG/SER.B/19 (1980).

171. Agreement between Canada and France Concerning Mutual Fishing Relations off the Atlantic Coast of Canada, Mar. 27, 1972, Can.-Fr., 862 U.N.T.S. 209 (1973).

172. Gulf of Maine Case, *supra* note 133, ¶¶ 237-38; Treaty between Canada and United States to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area, Mar. 29, 1979, Can.-U.S., 1984 I.C.J. 246.

V. CONCLUSION

There is no doubt that political factors influence the question of whether, and if so when, a maritime boundary will be negotiated or submitted to a tribunal for determination. The question of timing alone may influence the location of the boundary in response to an evolving jurisprudence in the field of maritime boundaries and changes in the regimes of the law of the sea more generally.

It is often difficult to demonstrate what particular influence political factors have on the precise location of a specific boundary. In this regard, however, it must be borne in mind that the interests governments seek to protect are frequently the result of a political analysis that may or may not reflect a hypothetical "objective" analysis of those interests. A government's reasons for taking into account its neighbor's interests and perceptions in the context of a negotiated boundary are, at least in some respects, different in kind and degree from its reasons for doing so in its presentations before a tribunal.

There is no direct evidence that tribunals take political factors as such into account in determining maritime boundaries. It can be argued that the broader regional analysis of the problem faced by the tribunal in the *Guinea-Guinea-Bissau* arbitration was to some, widely regarded as felicitous, degree "political." This author would be among those who believe the tribunal was, in effect, sensitive to the broader principles and purposes of the U.N. Charter and the OAU Charter in seeking means to promote peaceful relations among states.

The fact that adjudicated or arbitrated maritime boundaries tend to fall between those proposed by the parties may or may not reflect a tendency to strike a compromise. It can be argued that such results are inevitable where parties take maximum or extreme positions. At all events, the issue is merely one aspect of the broader question of whether arbitrators are prone to seek compromise results and, if so, whether that tendency is properly characterized as political.

Security factors are most prominent in dealing with maritime boundaries close to the coast, but they have influenced

some boundary arrangements beyond the territorial sea. The evidence that states take security factors into account in negotiating maritime boundaries is probably insufficient to indicate the extent to which this is in fact done. In many situations security interests and other interests (such as commercial navigation or resource interests) coincide, and in many situations a variety of maritime boundaries may accommodate perceived security interests.

While states have raised security interests in arbitrations or adjudications, the arguments appear to have had different effects. In the *Libya/Malta* and *Guinea-Guinea-Bissau* cases, the tribunals tested the lines arrived at for other reasons against the coastal security concerns raised by the parties and found them sufficient. In the *Anglo-French* arbitration, the result was arguably responsive to France's security concerns about access in the English Channel. In the *Gulf of Maine* case, the United States, having noted that an equidistant line would extend as far south as Philadelphia, outlined its perception of Canadian tendencies to expand coastal state jurisdiction both geographically and functionally; the point had no explicit effect on the Chamber's analysis.

Historical factors can influence both negotiated and adjudicated boundaries. The most significant effect occurs in the use of lines primarily drawn for some other purpose, such as delimitation of a different form of maritime jurisdiction or allocation or cession of islands and other land territory. There is evidence of some tendency to use continental shelf boundaries to delimit fisheries or exclusive economic zones. On the whole, however, there is no consistent pattern. Each case must be examined closely in terms of the legal significance of the historical factor as well as the political, security, geographic, and economic impact of taking it into account or failing to do so.