DELIMITATION BY A SINGLE MARITIME BOUNDARY A PRELIMINARY VIEW

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I. Introduction

The consolidation of the law relating to the Continental Shelf following the 1945 United States Proclamation on the Continental Shelf [1] encouraged many States to claim jurisdiction over the Shelf resources. In a number of cases these claims brought about boundary disputes [2]. For a number of years most States chose to delimit their Shelf claims without delimiting the superjacent waters. By the late seventies however there was firm evidence to suggest that under customary law a coastal State had the right to claim an Exclusive Fishery Zone (E.F.Z) up to 200-nautical miles (n.m.) in breadth. This development was complemented by the practice of a growing number of States which supported or claimed an Exclusive Economic Zone (E.E.Z) [3]. This institution enabled the coastal State to claim *inter alia* sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources up to 200-n.m. from the coast [4].

1. *Proclamation with Respect to the Natural Resources of the Subsoil and Sea-bed of the Continental Shelf*, 28 September, 1945 *(New Directions in the Law of the Sea)*, Vol. I (1973), pp. 106 et seq.
2. *Vide, e.g., North Sea Continental Shelf Cases (Denmark, Netherlands v Germany) Judgement) International Court of Justice (I.C.J.) (1969), pp. 1 et. seq.*
3. For a comprehensive study on the E.E.Z., vide Attard, D.J.: *The Exclusive Economic Zone in International Law* (Oxford University Press 1986 Publication).
4. *Vide,* Article 56 of the 1982 *United Nations Convention on the Law of the Sea.*

By 1982 the International Court of Justice was prepared to state in the *Tunisia/Libya Shelf* Judgment that the E.E.Z. "may be regarded as part of modern international law ....." [5] . Indeed in the *Malta/Libya* Judgment the Court was prepared to go further: " It is in the Court's view incontestable that ..... the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become part of customary law ....." [6]

It should be noted that whilst the E.E.Z. and the Shelf regimes cover the same seabed and subsoil, they are autonomous. A coastal State's rights over its Shelf do not depend on occupation, effective or notional, or any express proclamation [7] . They are exclusive in the sense that if the coastal state does not explore its Shelf or exploit its natural resources no one may undertake these activities without its express consent. With respect to the E.E.Z., the general view is that a coastal State's rights depend on express proclamation [8] Consequently whilst a Coastal State may have a Shelf without an E.E.Z., the converse is not possible.

For several years, States did not feel the need to claim an E.E.Z. as they could rely on the E.F.Z. regime to exploit the living sources found in the waters above the Shelf. However with the improvements in marine technology valuable resources, other than fisheries, (e.g. production of energy from the water, currents and winds) have become more readily available. This has encouraged States to declare an E.E.Z..Furthermore, new resources have been discovered in the water column. Whilst it is still not technologically possible to exploit them on a commercial basis, it is envisaged that in the years to come the necessary technology will be developed. In this respect, one would do well to note the foresight demonstated by the United States. In 1983, it proclaimed an E.E.Z. (estimated to measure some 2,831,4000 - square nautical miles) enabling it to control all resources found therein. In a Fact Sheet on the United States Oceans Policy issued by the White House dated March 10, 1983, it was stated that the E.E.Z. will give the United States

> "in particular, new rights over all minerals (such as nodules and sulphide deposits) in the zone that are not on the continental shelf but are within 200 nautical miles. Deposits of polymetallic sulphides and cobalt/manganese crusts in these areas have only been recently discovered and are years away from being commercially recoverable. But they could be a major future source of strategic and other minerals important to the U.S. economy and security." [9]

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5. *I.C.J.* Reports (1982), para. 100.
6. *I.C.J. Reports* (1985), para. 34.
7. *Vide.*, e.g. Article 77 of the 1982 *United Nations Convention on the Law of the Sea.*
8. *Attard op. cit.* Chapter 3 Section 2.
9. Volume XXII *International Legal Materials* (1978), p. 461.

It is therefore not difficult to understand why a large number of States, including a number of maritime States, have felt the need to declare an E.E.Z. Indeed by November 1985 there were some 69 States which had declared an E.E.Z. [10] These claims were generally accompanied with delimitation problems. In such cases the parties had a number of options. Where a Shelf boundary had already been established, the parties could agree to adopt that boundary as their E.E.Z. boundary. In cases where no Shelf boundary had been agreed upon, the parties could agree to establish two boundaries which need not necessarily be coincidental. Another alternative would be that of establishing a single maritime boundary which would delimit the Shelf and the E.E.Z. of the parties. This study is mainly concerned with the last alternative. In the forthcoming Sections it is proposed to examine the solutions adopted in the delimination disputes between Malta and Libya [11], the United States and Canada [12], and Guinea-Bissau [13]. Reference will also be made to State Practice on the matter [14]

II. Malta/Libya Dispute

If one examines the history of the *Malta/Libya* dispute, it becomes evident that the main concern of the parties was the right to explore the Shelf and exploit its resources. It is significant that whilst the two States could not agree on the exploitation of the Shelf resources, they made substantial progress with respect to the exploitation of the living resources of the Shelf's superjacent waters [15]. Nevertheless Libya, early in the dispute, submitted a draft Special Agreement which referred specifically to the delimitation of the Shelf and the E.E.Z. [16] Malta did not agree with this proposal and wanted to restrict the Court's judgment to the delimitation of the Shelf [17]. In fact the 1976 Special Agreement between the parties to refer their desputes to the International Court only referred to the delimitation of the Shelf [18]. It should be pointed out that at the time of the 1976 Agreement none of the parties had declared an E.E.Z. [19] Indeed the precise juridical contents of the E.E.Z. regime was still not very clear [20].

10. *Vide*, Annex I for a list of E.E.Z. claimants.
11. *Infra*, Section II.
12. *Infra*, Section III.
13. *Infra*, Section IV.
14. *Infra*, Section V.
15. *Vide*, e.g., the *Agreement for the Setting up of a joint fishing venture* of June 10, 1975; and the *Agreement on the establishment of a Maltese-Libyan fishing company* of July 1978.
16. *Vide*, Vol. I of the *Memorial* (April 26, 1983) submitted by Libya to the International Court, pp. 66 . Vide also the Maltese *Memorial* (April 26, 1983) p. 26.
17. *Vide*, *Reply* (July 12, 1984), p. 27 submitted by Malta.
18. *Vide*, Article I of the Special Agreement signed at Valletta on May 23, 1976. This Agreement is reproduced in the International Court's judgment in *Malta/Libya* case, *I.C.J. Reports* (1985), para. 2.
19. *Vide*, *Reply* (July 12, 1984), p. 27 submitted by Malta.
20. Professor I. Brounlie in his *Principles of Public International* (3rd Edition, 1979) only considered the E.F.Z. to be part of customary law. However, he did indicate that the position may evolve.

III. The Gulf of Maine Judgement

In this section and the next, it is proposed to review the single maritime boundary established in the *Gulf of Maine* case and the *Guinea/Guinea-Bissau* case. In both cases, the parties requested the adjudicator to delimit by a single boundary the sea-bed and its superjacent waters. It is noteworthy that in both cases the adjudicators found no legal impediment to drawing a single boundary nor did they find that the task requested was materially impossible [21]

On October 12, 1984, a special Chamber of the Internatiol Court delivered its judgment in the *Gulf of Maine Case* between Canada and the United States [22] . This judgment, unlike those previously delivered by the International Court,did not relate exclusively to the Shelf, but to both the Shelf and the E.E.Z. The parties, in fact, requested the Chamber to draw a single maritime boundary which would be applicable to all aspects of the parties' jurisdiction "not only jurisdiction as defined by international law in its present state, but also as it wil be defined in future." [23]

The Chamber interpreted the request to delimit the maritime boundary as one relating

> ''to a delimitation between the different forms of partial jurisdiction, i.e. the 'sovereign rights' which, under current international law, both treaty-law and general law, coastal States are recognized to have in the marine and submarine areas lying outside the outer limit of their respective territorial seas, up to defined limits.'' [24]

Whilst both parties claimed 200n-m. fishery zones, only the United States proclaimed an E.E.Z., which coincided with its fishery zone.

The Chamber, like the International Court in the 1982 *Tunisia/Libya Judgement* [25] found that with regard to the shelf of the parties it had to ''proceed without reference to any real factor of natural separation ....'' [26] It also found that even in the ''water column'', which covered the whole of the sea-bed in question, there were no'.....genuine, sure and stable ''natural boundaries'' .....' [27] . The said mass of water ''essentially possesses the same character of unity and uniformity already apparent from an examination of the sea-bed, ...'' [28]. Under these circumstances, the Chamber concluded that there were ''no geological, geomorphological, ecological, or other factors sufficiently important, evident and conclusive to represent a single, inconvert-

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21. *Vide.* e.g., the Judgement in the *Gulf of Maine* case, *I.C.J. Reports* (1984), para. 27.
22. *I.C.J. Reports* (1984), pp. 246 et seq.
23. *Ibid.*, para. 26.
24. *Ibid.*, para. 19.
25. *Ibid.*, (1982), para. 68.
26. Ibid., (1984), para. 47.
27. *Ibid.*, para. 54. The U.S. had argued that there were three identifiable oceanographic and ecological regimes in the waters of the area which were divided by natural boundaries; vide *ibid.*, para. 51 et seq.
28. *Ibid.*, para. 55.

ible natural boundary.'' [29]

The Chamber then proceeded to review the rules of international law governing the dispute between the parties. On the basis of this review, it defined the said rules as follows:

> ''(1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sougth and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.
>
> (2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring with regard to the geographic configuration of the area and other relevant cicumstances, an equitable result.'' [30]

In its effort to identify the applicable ''equitable criteria'' and ''practical methods'', the Chamber could obtain no assistance from general customary law [31] . It, therefore, felt obliged to consider whether guidance could be sought from the ''special international law'' in force between the parties [32] It concluded that whilst the 1985 *Shelf Convention* was in force between the parties, its application was not mandatory as the dispute referred not solely to the delimitation of the Shelf but to a "maritime boundary concerning a much wider subject-matter ....." [33] . Neither did the Chamber find it possible to accept the view that the ''combined equidistance special circumstances rule'', found in the said Convention [34], was customary international law [35]

The Chamber also examined whether there were any binding legal obligations deriving from the conduct of the parties [36] . The question had been argued at length between the parties. Howevr, the Chamber found it impossible to conclude from the said conduct that there was a binding legal obligation, in the parties bilateral relations, to make use of a particular delimitation method [37]

In view of the abovementioned analysis, the Chamber felt it was not bound to apply particular criteria or use particular practical delimitation methods, but was free to consider the whole range of available possibilities and to select the criteria and method or combination of practical methods, the application of which would lead to an equitable solution [38]

29. *Ibid.*, para. 56.
30. *Ibid.*, para. 112.
31. *Ibid.*, para. 114.
32. *Ibid.*
33. *Ibid.*, para. 124.
34. Art. 6.
35. *I.C.J. Reports* (1984), paras. 122 - 125.
36. *Ibid.*, para. 126 et seq.
37. *Ibid.*, para. 154.
38. *Ibid.*, paras. 156, 191.

With regard to the choice of the applicable criteria, the Chamber pointed out that the delimitation in question had a twofold objective, i.e. the delimitation of the Shelf and the E.F.Z.'s. Consequently, it had to exclude those criteria which were found to be typically and exclusively bound up with the particular characteristics of the sea-bed or the water column [39]. Thus, for example, it noted the

> "difficulty, if not the impossibility, of adopting, for the purpose of such a dual delimitation, a criterion disclosed by objective analysis to be essentially ecological." [40]

The Chamber concluded:

> "in reality, a delimitation by a single line, such as that which has to be carried out in the present case, i.e., a delimitation which has to apply at one and the same time to the continental shelf and to the superjacent water column can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these two objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them. In that regard, moreover, it can be foreseen that with the gradual adoption by the majority of maritime States of an exclusive economic zone and, consequently, an increasingly general demand for single delimitation, so as to avoid as far as possible the disadvantages inherent in plurality of separate delimitations, preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation." [41]

In the Chamber's view, criteria derived from geography, possessed a "neutral character" and therefore appropriately applicable. In fact, its basic choice favoured a criterion which in principle, while having regard to the special circumstances of the Case, aimed at "an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap." [42] This criterion was not rigid, it stated, and certain corrections to some effects of its application, through the use of auxiliary criteria, may not be unreasonable [43]

> "Having regard to the special characteristics of the area, the auxiliary criterion which the Chamber has particularly in mind is that whereby a fair measure of weight should be given to a by no means negligible difference within the delimitation area between the lengths of the respective coastlines of the countries concerned. It also has in mind the likewise auxiliary criterion whereby it is held equitable

39. *Ibid.*
40. *Ibid.*
41. *Ibid.*, para. 194.
42. *Ibid.*, para. 195.
43. *Ibid.*, para. 196.

> partially to correct any effect of applying the basic criterion that would result in cutting off one coastline, or part of it, from its appropriate projection across the maritime expanses to be divided, or then again the criterion - it too being of an auxiliary nature - involving the necessity of granting some effect, however limited, to the presence of a geographical feature such as an island or group of small islands lying off a coast; when strict application of the basic criterion might entail giving them full effect or, alternatively, no effect.'' [44]

After deciding on the said criterion of division and other auxiliary criteria, the Chamber proceeded to consider the appropriate practical methods. These methods must also, it stated, be basically founded upon geography and be suitable to both the sea-bed and superjacent waters. ''In the outcome, therefore, only goemetrical methods will serve.'' [45] The Chamber again stressed that the special circumstances of the case may not warrant a strict compliance with the canons of geometry [46] . It referred to potential disadvantages inherent in any method which takes islets, rocks or low-tide elevations as basepoints for the drawing of a line intended to effect an equal division [47] Similarily, the Chamber noted that whilst a method which produced a complicated or even a zigzag path, may be acceptable for delimitation of the sea-bed, its application was less justified with respect to the water column [48]

The Chamber's reliance on geography led it to observe that the course of a maritime boundary was dependant upon the coastal configuration [49] . It concluded that the configuration of the Gulf of Maine coastline excluded any possibility of the boundary being formed by a basically unidirectional line [50]. It found that the Gulf of Maine was geographically divided into two sectors. In the first sector the parties' coasts were adjacent: ''Accordingly..... geography itself demands that, whatever the practical method selected, the boundary should be a lateral delimitation line.'' [51] . In the second sector the parties' coasts were opposite:

> ''It is once again geography which prescribed that the delimitation line should rather be a median line (whether strict or corrected remains to be determined) for delimitation as between opposite coasts, and it is moreover geography yet again which requires that this line, given the almost parallelism of the two facing coasts involved, should also follow a direction practically parallel to theirs''. [52]

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44. *Ibid.*, para. 196.
45. *Ibid.*, para. 199.
46. *Ibid.*, para. 200.
47. *Ibid.*, para. 201, *vide* also para. 210.
48. *Ibid.*, para. 202.
49. *Ibid.*, para. 205.
50. *Ibid.*
51. *Ibid.*, para. 206.
52. *Ibid.*, para. 206.

For the first sector the Chamber found that there were no special circumstances which stood in the way of an equal division of the overlapping area [53] . It noted that the application of a lateral equidistant line would not produce the desired result [54] . The method, it decided upon, consisted of drawing perpendiculars to the two basic coastal lines from the point of departure [55], decided upon by the parties, of the maritime boundary and bisecting the reflex angle so formed [56] . This method, it stated, had "the advantages of simplicity and clearity" and produced " a result which is probably as close as possible to an equal division of the first area to be delimited." [57] The finishing point of the first segment was automaticlaly determined by its intersection with the line containing the segment [58]

With respect to the second segment, the Chamber noted, that the oppositness of the parties' coasts called for the application of a median line which had to be corrected to take into account the difference in the lenght of the respective coastlines [59] , and the presence of Seal Island [60].

The third segment drawn by the Chamber concerned the area which lies outside and over against the Gulf of Maine. Consequently, it observed, that there was "no point of reference outside the actual shores of the Gulf, that can serve as a basis for carrying out the final operation required [61] . Under these circumstances, the Chamber felt that the only practical method which could be considered was a geometrical one. It therefore decided to draw a perpendicular to the closing line of the Gulf as the third point of the boundary [62]. The Chamber obersved that its third segment had practically the same orientation as that given by the parties themselves [63] . The starting point of this segment was deemed to be its intersection with the end of the second segment [64], whilst its finishing point was to coincide with the last point the said perpendicular reaches within the parties' overlapping 200-n.m. zones [65] .

Recalling the fundamental norm that it was bound to reach an equitable result, the Chamber applied this test to the boundary it drew [66] . With respect to the first two segments, the Chamber felt, that such a verification was not "absolutely necessary" as their parameters had been determined by geography [67] . It was with regard to the third segment that such a verification

53. *Ibid.*, para. 209
54. *Ibid.*, paras. 210-211.
55. The Judgement refers to this point of departure as Point A; *ibid.*, para. 20.
56. *Ibid.*, para. 213.
57. *Ibid.*, para. 213.
58. *Ibid.*, para. 214.
59. *Ibid.*, paras. 218, 221, 222.
60. *Ibid.*, para. 222.
61. *Ibid.*, para. 224.
62. *Ibid.*
63. *Ibid.*, para. 225.
64. *Ibid.*, paras. 226, 227.
65. *Ibid.*, para. 228.
66. *Ibid.*, para. 230.
67. *Ibid.*, para. 231.

was called for particularly as it transversed the Georges Bank which was the real subject of the dispute. In view of its living and non-living resources, it felt the need to examine whether, apart from factors provided by geography, others had to be taken into account [68]

In this respect, the Chamber noted that for the United States, the decisive factor was its long history of fishing and maritime activities in the area [69] . Canada, on its part, gave more importance to the socio-economic factors, such as the maintenance of the existing fishing patterns which were vital to the coastal communities [70] . The Chamber was unable to take these circumstances into account [71] . In its view:

> ''legitimate scruple lies rather in concern lest the overall result even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect should unexpectedly be revealed as radically unequitable that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned.''[72]

It concluded that no such danger existed with respect to the third segment [73]

The Chamber's preference for a ''neutral'' criteria to the exclusion of other criteria, which whilst ''relevant'' were not ''neutral'' as they were exclusively bound up with either the sea-bed or superjacent waters, is not difficult to understand particularly in view of the parties' insistence that a single maritime boundary was to be drawn. Nevertheless, it has to be admitted that its formula is a weak one. One of its main deficiencies results from the fact that certain criteria, however equitable in themselves, will not be considered or applied. There can, for example, be no doubt that a criterion based on the respect for the unity of ecosystems or ecological regimes may be extremely appropriate to the delimitation of the superjacent waters where fisheries are an important element. If the Chamber's formula is used,this criterion will not generally be taken into account as it bears little or no relevance to the Shelf's delimitation. The possibility, it is submitted, that such criteria are not given any weight may prevent States from insisting upon a single maritime boundary when referring their delimitation disputes to third party settlement.

IV. Guinea/Guinea-Bissau Award

On February 14, 1985 the Arbitral Tribunal established by Guinea and Guinea-Bissau delivered its Award on the maritime boundary delimiting the

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68. *Ibid.*, para. 232.
69. *Ibid.*, para. 233.
70. *Ibid.*, para. 234.
71. *Ibid.*, paras. 235, 236.
72. *Ibid.*, para. 237.
73. *Ibid.*, paras. 238-241.

parties' territorial seas, E.E.Z's and shelves. The first question submitted to the Tribunal was whether a Convention of May 12, 1886 between France and Portugal fixed the maritime boundary between their possessions in West Africa [74] . In a second related question, the Tribunal was asked what was the legal significance of the *travaux preparatoires* of the 1886 Convention for the purpose of interpreting it [75] . The Tribunal, after examining the two questions, concluded that the 1886 Convention, and in particular the line representing the "southern limit" of the area demarcated therein, did not fix any maritime boundary between the French and Protuguese possessions [76]

The Tribunal then proceeded to answer the final question which requested it to determine the course of a single line delimiting the territorial waters, E.E.Z's and shelves. At the outset the Tribunal felt it necessary to note, as the Chamber did in its 1984 Judgment [77], that in cases concerning maritime delimitation customary law provides only a few basic legal principles which lay down guidelines to be followed with a view to achieving an essential objective [78] . In the particular case to be decided:

> "Le but essentiel que se fixe le Tribunal consiste à aboutir à une solution équitable en se référant aux termes des articles 74, paragraphe 1, et 83, paragraphe 1, de la convention du 10 décembre 1982 sur le droit de la mer. C'est lá une régle de droit international reconnue par le Parties et qui s'imbpose au Tribunal. Mais son application au cas d'espèce nécessite le recours à des facteurs et l'application de méthodes dont le choix relève fu pouvoir du Tribunal. Cela ne signifie pas toutefois que le Tribunal soit doté d'un pouvoir discrétionnaire ou soit habilité à décider *ex aequo et bono*. Il ne s'appuiera que sur des considerations de droit." [79]

The factors and methods used, it noted, must be founded in law even though they are derived from physical, mathematical, historical, political, economic or other data [80] . However, there were no limits to their number, and none were obligatory on the Tribunal for every case concerning delimitation was unique. [81]

In order to place a delimitation on an equitable and objective basis, the Tribunal felt that it should make every effort possible to ensure that each party controls the maritime areas situated in front of its coast and in their vicinity [82] . In this respect, it found that an important factor was the configuration and direction of the parties' coastlines, including the coastal islands of the area and the Bijagos archipelago [83]

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74. *Maritime Boundary Award* (1985), para. 1.
75. *Ibid.*
76. *Ibid.*, paras. 44 - 85.
77. *I.C.J. Reports* (1984), para. 81.
78. *Maritime Boundary Award* (1985), para. 88.
79. *Ibid.*
80. *Ibid.*, para. 89.
81. *Ibid.*
82. *Ibid.*, para. 92.
83. *Ibid.*, para. 98.

With respect to the applicable methods, the Tribunal held that the equidistance method enjoyed no priority nor was it obligatory but was one of a number of methods which could be applied [84] . Nevertheless, it was prepared to recognize its scientific character and the relative ease with which it could be applied [85] . The method to be used, in its view, should have no other goal but the division of the maritime areas and territories subject to the jurisdiction of different States by seeking to apply objective factors which allow the attainment of an equitable result.

> "Une telle démarche exclut tout recours à une méthode choisie à priori. Elle exige au contraire un raisonnement juridique objectif et la méthode à utiliser ne peut qu'en être le résultat. Toutefois le Tribunal devra examiner les lignes proposées par les Parties et discutées par elles, conformément à une bonne administration de la Justice." [87]

The Tribunal noted that, taken together, the coasts of the parties including islands, were concave [88] . The application of the equidistance method in this situation, the Chamber observed, would cut off Guinea's maritime area in front of its coasts and would tend to enclave it between the maritime areas apertaining to Guinea-Bissau and Sierra Leone [89]

Whilst confirming its conclusion that the "southern limit", found in Article 1 of the 1886 Convention, did not represent a general maritime boundary, the Tribunal did not discard it as completely irrelevant [90] . In its view the said limit could be used, from the extremity of the land boundary as far as the elevation of the Guinean island of Alcatraz, to obtain an "equitable result" [91] . In this respect, the Tribunal referred to the *Tunisia/Libya* judgment which noted that one of "the relevant circumstances which the area" is "the position of the land frontier, or more precisely the position of its intersection with the coastline, to be taken into account" [93] . The employment of the "southern limit" beyond the island of Alcatraz would however, the Tribunal noted, produce a cut-off effect and might well lead to an "enclavement" which, in this case, would operate against Guinea-Bissau [94] .

Under these circumstances, the Tribunal felt that it should not limit itself to the "short coast" but that it should consider the "long coast" by focusing upon the entire West African region [95] . In its view, such an exercise led

84. *Ibid.*, para. 102.
85. *Ibid.*
86. *Ibid.*
87. *Ibid.*
88. *Ibid.*, para. 103.
89. *Ibid.*, para. 104.
90. *Ibid.*, para. 106.
91. *Ibid.*, para. 107.
92. *Ibid.*, para. 106.
93. *I.C.J. Reports* (1982), para. 81.
94. *Maritime Boundary Award* (1985), para. 107.
95. *Ibid.*, para. 108.

to the conclusion that an equitable delimitation had to be carried out by following a direction which takes overall account of the convex shape of the West African coastline, and would be adaptable to the pattern of present or future delimitations in the regions [96]

In considering which method best took into account the general configuration of the West African coastline, the Tribunal stated:

> "Un second système consisterait à utiliser la facade maritime et à choisir pour cela une ligne droite reliant deux points côtiers sur le continent. Cela aurait l'avantage de donner plus d'importance à l'orientation générale du littoral, au risque de partir d'une droite traversant les îles et même empiétant sur le continent."[97]

It felt that a straight line proceeding from Almadies Point in Senegal to Cape Shilling in Sierra Leone "traduit cette circonstance avec plus de fidélité"[98] . Accordingly an equitable solution, the Tribunal concluded, would be derived by pursuing the "southern limit" up to 12-n.m. west of the island of Alcatraz, and then, to the south west, a straight line with a bearing of 236°, *grosso modo* perpendicular to the Almadies/Shilling line [99]

> "Le Tribunal constate que pareille ligne réduirait au minimum les risques d'enclavement ....." [100] .

Having decided upon a boundary, the Chamber examined whether certain circumstances invoked by the parties should effect its decision. The first circumstance related to the concept of natural prolongation. Whilst referring to the shelf definition found in Article 76 (1) of the 1982 Convention [101], the Tribunal found that there was no possibility of invoking any features based on the said concept since the shelves of the parties comprised a single whole, without sufficiently marked divisions [102]

Proportionality between the extent of maritime areas to be allocated and the length of the coastlines [103], was another circumstance which the Tribunal felt it had to consider [104] . In the particular case, however, it concluded that the "règle" of proportionality should not enable either party to claim any additional advantage, since, the fact that the islands had been taken into account

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96. *Ibid.*
97. *Ibid.*, para. 110.
98. *Ibid.*, para. 110.
99. *Ibid.*, para. 111.
100. *Ibid.*
101. This provision adopts the natural prolongation concept as a criterion for determining the extent of the Shelf. It also adopts the 200-nautical miles distance as an alternative criteria.
102. *Maritime Boundary Award* (1985) paras. 113 - 117.
103. The Tribunal did not consider proportionality between the land mass and the extent of maritime areas to be allocated as constituting a relevant circumstance in the case, *ibid.*, para. 119.
104. *Ibid.*, para. 118.

resulted in the coasts of the two States being considered by the Tribunal as having the same lenght [105]

Neither did the Tribunal find that any of the economic circumstances invoked by the parties were of a sufficiently durable nature to be taken into account for delimitation purposes [106] . Finally, the Tribunal considered circumstances derived from Security. The implications of this circumstance, it felt, were already resolved by the fact that in proposing its solution, the Tribunal had paid attention to ensure that each State controls the maritime territories situated in front of its coasts and in their vicinity [107]

As was predicted by the Chamber [108], the Arbitral Tribunal preferred criteria and methods which because of their "neutral" character were appropriate for the delimitation of both the sea-bed and the superjacent waters. In this respect, its Award chimes with the 1984 Judgment. Indeed, it seems safe to assert that, at least in cases where the parties request a single boundary, the adjudicator will rely heavily, if not exclusively, on the geographical factors and coastal configurations of the case.

In this respect, States may find it hazardous to impose upon the adjudicator the obligation to draw a single maritime boundary. For in doing so they risk certain factors, even though relevant, not being considered let alone being given any weight in the delimitation process. It is not difficult to agree with Judge Gros in his Dissenting Opinion to the *Gulf of Maine Judgment* when he said.

> "..... after having discarded the continental shelf, to strike an equal balance according to the logic of the Judgment, one must also exclude the fisheries; it is a sea deprived of all meaning, an empty sea, which is to be divided - which was not among the Parties' themes'." [109]

V. State Practice

There is clear evidence of a growing State practice favouring the establishment of a single maritime boundary [110] . In fact, the large majority of delimitation agreements concluded in the last five years have adopted such a

105. *Ibid.*, para. 120.

106. *Ibid.*, paras. 121 - 123.

107. *Ibid.*, para. 124.

108. *I.C.J. Reports* (1984), para. 194.

109. *I.C.J. Reports* (1984), pp. 368, para. 14; *vide* also Bowett, D.: *Exploitation of Mineral Resources and the Continental Shelf* a paper presented to the Rome Conference.

110. *Vide* Annex II for a list of agreements establishing a single maritime boundary. Other early examples are: the 1952 *Agreement on the Maritime Zone* between Chile and Ecuador, Peru; and the 1960 Guinea-Bissau/Senegal: *Exchange of Notes regarding the Maritime Boundary*.

boundary. The 1976 *India/Sri Lanka Agreement,* for example, provides for a single boundary with each part having:

> "sovereign and exclusive jurisdiction over the continental shelf and the exclusive economic zone as well as over their resources, whether living or non-living, falling on its own side of the boundary".

The United States has established common maritime boundaries with Cuba (1977), Venezuela (1978), Mexico (1978), Cook Islands (1980), and New Zealand (1980). The Agreement with Cuba, for example, states that either party will not "claim or exercise sovereign rights or jurisdiction over the waters or sea-bed and subsoil," beyond their side of the boundary [111] .

France has concluded a number of single maritime boundary agreements: Mauritius (1980), Tonga (1980), Venezuela (1980), Brazil (1981), Saint Lucia (1981), Australia (1982), Fiji (1983). The France/Tonga *Treaty Establishing a Maritime Boundary,* for example, delimits the parties E.E.Z.s: Article I states

> "La linge de délimitation entre la zone économique de la République française an large de Wallis et Futuna et la zone économique esclusive de Tonga est la ligne médiane ou d'équidistance" [112] .

In view of this widespread State practice favouring a single maritime boundary, it is reasonable to ask whether under customary law States are now obliged to establish such a boundary? Is it permissible for States to delimit their shelf and its superjacent water by two boundaries which may not be coincidental?

It is submitted that whilst the advantages of a single maritime boundary are great [113] , there is no obligation upon States to establish such a boundary. As has been seen above, particularly when discussing the *Gulf of Maine* judgment [114] , there are certain factors which might influence the Shelf boundary but not the E.E.Z. boundary and vice-versa. Criteria derived from geological or geomorphological considerations may be relevant to the delimitation of the Shelf, but are unlikely to be relevant in the delimitation of the E.E.Z.

Faced with this problem, the adjudicator has, at least, two possible options. The first is that adopted by the Chamber in the *Gulf of Maine* case and the Arbitral Tribunal inthe *Guinea/Guinea-Bissau* case. It does not give any consideration to criteria or methods which are derived from factors appertaining solely to the delimitation of the sea-bed or the water-

111. Art. 111, XVII *International Legal Materials* (1978), pp. 110 -; for an interesting commentary on the U.S. maritime boundaries by two lawyers who were involved in the U.S. maritime boundary programme *vide*, Feldman, M.B., and Colson D. ; "The Maritime Boundaries of the United States" 75 *A.J.I.L.* (1981), pp. 729 et. seq.

112. *Journal Officiel de la Republique Française*, 11 January 1980.

column. The criteria or methods to be applied must be "neutral", that is they must be applicable to the delimitation of both elements. This approach, however, neglects criteria or methods which are only relevant to the delimitation of one of the above-mentioned elements. Despite its weakness, this option is not difficult to understand, if the parties to a dispute insist on a single maritime boundary.

If the parties do not exclude the possibility of two seperate boundaries, then the adjudicator has another option [115] . Where there exist circumstances which are only related to either the delimitation of the sea-bed or that of the water column, the adjudicator may take them into consideration, if they are relevant, even though this may produce two different boundaries. This approach enables the adjudicator to consider all equitable considerations in order to effect an equitable delimitation.

If the adjucator decides that the sea-bed boundary and the water-column boundary should not be coincidental, then whilst State A may have jurisdiction over the Shelf, State B would enjoy jurisdiction of the superjacent waters. It is not difficult to imagine the practical and adminsitrative problems. that could arise in such cases, particularly as the exploitation of sea-bed resources often involves the superjacent waters. Despite these problems, States may prefer this approach particularly if it takes into account all the relevant considerations raised by the parties.

Indeed, it is possible to find at least one example of this approach in State pracitice. The 1978 *Treaty Between Australia and Papua New Guinea Concerning the Sovereignty and Maritime Boundaries in the Area between the Two Countries, including the Area known as Torres Strait, and Related Matters* did not establish a Shelf boundary which was identical with that of the water-column [116] . This approach was adopted because the parties wanted to take into account socio-economic considerations which were relevant to the delimitation of the water-column but not to that of the sea-bed [117] The Preamble of the Treaty, in fact, refers to, *inter alia*, the "importance of protecting the traditional way of life and livelihood of Australians who are Torres Strait Islanders and of Papua New Guineas who live in the coastal area of Papua New Guinea in and adjacent to the Torres Strait;". The sea-bed boundary coincides with the water-column boundary except in the central Torres Strait.

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113. Professor D. Bowett states: "..... that a coincidence of shelf and E.E.Z. boundaries is much more practical, and more easily administered, so that the presumption must be for an identity of boundaries.": *The Legal Regime of Islands in International Law* (1979), p. 189

114. *Supra*, Section III.

115. It is of course possible for the sea-bed boundary to be only partly coincidental with the water-column boundary.

116. 18 December, 1978, VIII New Directions in the Law of the Sea (1980) (Oceana), pp. 216 et seq.

117. *Vide*, further Burnmester, H. : "The Torres Strait Treaty : Ocean Boundary Delimitation by Agreement", 76 *A.J.I.L. (1982) pp. 321 et seq.*

In the area where jurisdications overlap, the parties agreed to consult each other only on measures not directly related to the sea-bed's control of fisheries [118] . Thus jurisdiction over an oil-rig is enjoyed only by the State with jurisdiction over the sea-bed. This Treaty, demonstrates that States do not consider that under international law a single maritime boundary is compulsory. Furthermore, it also shows that it is possible for States to devise legal mechanisms which will facilitate the co-existance of different overlapping national jurisdictions.

VI. Conclusions

There can be little doubt that a single maritime boundary offers both practical and administrative advantages. Indeed, it is difficult to disagree with the view that a presumption exists in favour of such a boundary. However, this does not mean that it is obligatory upon States wishing to delimit their sea-bed and the superjacent waters.

States are free to establish different boundaries for the sea-bed and the superjacent waters. Unless this were so, problems would arise with respect to established shelf boundaries. It would seem unreasonable to require the water-column boundary to automatically follow a boundary which may be a reflection of considerations which are relevant only to the delimitation of the Shelf.

In view of the approach by the 1984 *Gulf of Maine* judgment - which was followed in the 1985 *Guinea/Guinea-Bissau* award, - States would be well-advised not to insist upon a single maritime boundary when referring their disputes to third party settlement. By requiring the adjudicator to decide upon a single maritime boundary, they risk the exclusion of considerations - which may be relevant but which do not possess a "neutral" character - from delimitation process. The existance of the "Torres Strait Treaty" demonstrates that it is possible to devise legal mechanism to deal with the practical and administrative problems which may occur when different national jurisdictions overlap.

118. *Vide*, Art., 4(3) and (4).

ANNEX I

Table of Exlusive Exonomic Zone Claimants

1. Antigua and Barbuda
2. Bangladesh
3. Barbados
4. Burma
5. Cape Verde
6. China (R.)
7. Colombia
8. Comoros
9. Cook Islands
10. Costa Rica
11. Cuba
12. Democratic Kampuchea
13. Democratic People's Republic of Korea
14. Democratic Yemen
15. Djbouti
16. Dominica
17. Dominican Republic
18. Equatorial Guinea
19. Fiji
20. France
21. Grenada
22. Guatemala
23. Guinea
24. Guinea Bissau
25. Guyana
26. Haiti
27. Honduras
28. Iceland
29. India
30. Indonesia
31. Ivory Coast
32. Kenya
33. Kiribati
34. Madagascar
35. Malaysia
36. Maldives
37. Mauritania
38. Mauritius
39. Mexico
40. Morocco
41. Mozambique
42. New Zealand
43. Nigeria
44. Niue
45. Norway
46. Oman
47. Pakistan
48. Philippines
49. Portugal
50. Qatar
51. St. Christopher and Nevis
52. St. Lucia
53. St. Vincent and the Grenadines
54. Sao Tomé and Principe
55. Seychelles
56. Solomon Island **
57. Spain
58. Sri Lanka
59. Suriname
60. Thailand
61. Togo
62. Tonga **
63. Union of Soviet Socialist Republics
65. United States
66. Vanuatu
67. Venezuela
68. Vietnam
69. Western Samoa.

** Legislation has been enacted but is not yet in force.

Annex II
Talbe of Single Maritime Boundary Agreements

1972	
Brazil / Uruguay	Agreement on the Maritime Boundary, 21 July 1972
1973	
Austrialia / Indonesia	Agreement concerning certain Boundaries between Indonesia and Papua New Guinea, 12 February 1973
1974	
India / Sri Lanka	Agreement on the Boundary in Historic Waters, 26 - 28 June 1984
1975	
Gambia / Senegal	Agreement Delimiting Maritime Boundaries in the North Atlantic Ocean, 4 June 1975
Colombia / Ecuador	Maritime Boundary Agreement, 23 August 1975
1976	
India / Sri Lanka	Agreement on the Maritime Boundary in the Gulf of Manaar and the Bay of Bengal and Related Matters, 23 March 1976
India / Sri Lanka	Supplementary Agreement on the Extension of the Maritime Boundary in the Gulf of Manaar from the Position 13m to the Trijunction point between India, Sri Lanka, and Maldives 22 November 1976
India / Maldives	Agreement on the Delimitation of Maritime Boundary in the Arabian Sea, 28 December 1976.
1977	
Colombia / Costa Rica	Treaty on Delimitation of Marine and Sub-marine Areas and Maritime Cooperation, 17 March 1977
Cuba / Haiti	Agreement regarding the Delimitation of the Maritime Boundaries, 27 October 1977
Cuba / United States	Maritime Boundary Agreement, 16 December 1977

1978

Colombia / Dominican Republic	Agreement on the Declaration of Marine and Submarine Areas and Maritime Cooperation, 13, January 1978
Colombia / Haiti	Agreement on Maritime Limits, 18 February 1978.
United States / Venezuela	Maritime Boundary Treaty, 28 March 1978
Netherlands Antilles / Venezuela	Agreement on the Maritime Boundary, 31 March 1978
Mexico / United States	Treaty on Maritime Boundaries, 4 May 1978.
Colombia / Panama	Treaty on Maritime Boundaries, 3 November 1978.

1979

Domincian Republic / Venezuela	Treaty on the Delimitation of Marine and Submarine Areas, 3 March 1979

1980

France / Tonga	Treaty Establishing a Maritime Boundary between Tonga and Wallis and Futuna, 11 January 1980.
Costa Rica / Panama	Treaty concerning Delimitation of Marine Areas and Maritime Cooperation, 2 February 1980
France / Mauritius	Convention on the Delimitation of the French and Mauritian Economic Zones between the Island of Reunion and Mauritius , 2 April 1980
Cook Islands / United States	Treaty on Friendship and Delimitation of the Maritime Boundary, 11 June 1980
France / Venezuela	Maritime Delimitation Treaty, 17 July 1980
Burma / Thailand	Agreement on the Delimitation of the Maritime Boundary in the Andaman Sea, 25 July 1980
New Zealand / United States	Treaty on the Delimitation of the Maritime Boundary between the United States and Tokelau, 2 December 1980

1981	
France / St. Lucia	Agreement on the Delimitation of Maritime Areas, 4 March 1981
France / Brazil	Maritime Delimitation Treaty, 30 January 1981
1982	
Australia / France (New Caledonia)	Maritime Delimitation Agreement, 9 January 1982
1983	
Fiji /France	Maritime Delimitation Agreement, 13 January 1983
1984	
Argentina / Chile	Treaty of Peace and Friendship, 18 October 1984.

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