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Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement

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by

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Contents

List of Figures

Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement

Nuno Sérgio Marques Antunes

1. Introduction

A defined territory is one of the constitutive elements of a state, that is, it is one of the essential criteria of statehood.[1] Naturally, states place a great weight on territorial issues; most importantly, because territory constitutes the spatial reference for the exercise of sovereign powers, and conveys the notion of *consistance*.[2] Territorial and boundary disputes are consequently a major concern to states. Taking into consideration that international law "*is based on the concept of state*", it becomes easy to conclude that territory has acquired, as a concept, a fundamental status in international law.[3]

Furthermore, a stable international territorial order has undeniably become one of the cardinal aims of international law. Jennings is of the view that the

> *problem of the legal ordering of territorial stability and territorial changes lies at the heart of the legal ordering of international society*.[4]

The existence of a comprehensive set of norms and principles favouring the continuity of boundaries and territorial regimes is thus an understandable reality.

In contemporary international law, territorial changes can only take place, *prima facie*, if carried out in accordance with the principle of consent. As the International Court of Justice (hereinafter "ICJ") remarked, "*to define a territory is to define its frontiers*", and "*[t]he fixing of a frontier depends on the will of the sovereign states directly concerned*."[5] However, neither are territories and boundaries always defined by consent,[6] nor are the manifestations of consent by states always absolutely clear and unequivocal.

Acquiescence, recognition and estoppel[7] are juridical concepts to which international

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1 Jellinek, 1973: 295-325. Malanczuk, 1997: 75; Nguyen *et al*., 1987: 372-381.

2 Nguyen *at al*., 1987: 379.

3 Shaw, 1997a: 137.

4 Jennings, 1963: 87.

5 *Case Concerning the Territorial Dispute* (Libyan Arab Jamahiriya *vs* Chad), *ICJ Reports 1994*: 23, 26, paras. 45, 52. Prescott, 1987: 13, defines a boundary as a line and frontier as a zone. The Court uses the term frontier as meaning boundary, that is, not as referring to a zone, but as referring to a line. See also Bothe, 1992: 443.

6 One example of this are the cases in which the principle of *uti possidetis* becomes applicable in the definition of boundaries between states. Another situation where the principle of consent does not prevail is in cases where the boundary is imposed externally (e.g. the demarcation of the boundary between Iraq and Kuwait, effected by the United Nations Iraq-Kuwait Boundary Demarcation Commission in conformity with the 1963 Minutes, may have *de facto* imposed a boundary on Iraq).

7 It should be mentioned that the concept of *estoppel* is typical of common law systems. In other legal systems, the term *preclusion* is used instead with a similar meaning.

tribunals[8] have resorted in order to reach decisions in situations

> *[w]here the evidence based on treaties and custom is found inadequate or the application of […] "uti possidetis" is seen to be inconclusive*.[9]

Furthermore, in ordering territorial stability and territorial changes, the fundamental rule of *quieta non movere* must always be kept in sight. This concept, which states that *de facto* situations that have remained stable for a long time should not be disturbed, is a key principle in this matter.[10]

In territorial and boundary dispute adjudication, international tribunals have to deal, somewhat frequently, with arguments based on acquiescence, recognition and estoppel. It has been considered that they will constitute "*relevant considerations, and factors to be taken into consideration by any international tribunal faced with a dispute over territorial sovereignty*."[11] Importantly, consolidation of territorial titles has to be seen as a "*gradual process*" of transformation of an (initially) relative title into an (aspired) absolute title.[12] This perspective may also be applied, by analogy, to the consolidation of boundaries.

These concepts are particularly relevant throughout this consolidating process. The purpose of this *Briefing* is to describe how they have been dealt with by international courts in both territorial and boundary dispute settlement. The analysis of the relevant case law attempts to highlight the different ways in which the above-mentioned concepts have been used. It endeavours, moreover, to scrutinise the contents and the application of those concepts, and to look at some of the problems that may result.

2. Preliminary Aspects

Before turning to case law, reference will first be made to a few preliminary aspects in order to establish the foundations for this study. Acquiescence, recognition and estoppel will be analysed in greater detail in Part 4. A brief notion of these concepts is nonetheless put forward here, in order to provide a starting point for the analysis. The structure of territorial and

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8 The expression *"international tribunals"* will be used throughout this text as including any judicial or arbitral decision-making body able to decide disputes between states impartially, regardless of its precise designation. Therefore, the words tribunal and court will be used as having usually the same meaning. However, if the word court is used with a capital letter (Court), it refers either to the International Court of Justice (ICJ) or to the Permanent Court of International Justice (PCIJ), depending on the context.

9 Sharma, 1997: 201-202. The expression "*uti possidetis juris*" has been used in legal terminology to refer to a general principle according to which *"pre-independence boundaries of former administrative divisions all subject to the same sovereign remain in being"* (Brownlie, 1998: 133). Difficulties with the principle of *uti possidetis* may appear because, as Bérnardez (1994: 436) highlights, it has to be seen in light of "*the rules of international law governing, for example, succession, self-determination, acquisition of title to territory, frontiers and other territorial régimes, treaty law, inter-termporal law*." Moreover, the application of this principle may give rise to difficulties in situations where there is no line, there is a dispute in relation to the *de facto* location of the line or where the location of the line is not supported by *effectivités* (Shaw, 1997b: 153).

10 AJIL, 4 (1910), Grisbadarna arbitration: 233.

11 Jennings, 1963: 40.

12 Schwarzenberger, 1957: 311.

boundary disputes will also be looked at *en passant*. Finally, the distinction between territorial and boundary disputes will briefly be addressed.

In relation to the concepts of acquiescence, recognition and estoppel, two points have now to be made. First, it should be noted that these concepts overlap, and "*form an interrelated subject-matter [within which] it is far from easy to establish the points of distinction*."[13] Secondly, they are all founded, to a certain extent, on the broad notion of consent, and stem from the principles of good faith and equity: "*Both recognition and acquiescence […] are manifestations of a legal operative consent on the part of a state*."[14]

2.1 Acquiescence

In lay terms, acquiescence means simply 'tacit agreement'. Juridically, however, its meaning is much stricter. The "*absence of opposition per se [does] not necessarily or always imply*" consent.[15] Silence or lack of protest is only relevant in circumstances that would call for a response expressing disagreement or objection in relation to the conduct of another state. The interpretation of the *silence* of states is normally made in relative terms by contrasting states' conducts which are directly related. As Nguyen *et al*. put it,

> *la jurisprudence ne comporte pas de précédents très éclairants, car le juge ou l'arbitre statuera en termes d'opposabilité des comportements des états.*[16]

The diplomatic protest is the typical way by which a state may react when circumstances so require in order to assert its rights. As such, it may be defined as a unilateral act by which a state, whose rights are being challenged by the conduct of another state, reserves its juridical position in relation to those rights, thus preventing the formation of adverse rights.[17] This reaction becomes crucial, therefore, in situations where the state inaction can be interpreted as an "*explicit or implicit consent*" to another state's conduct.[18] Acquiescence may therefore be characterised as "*a type of qualified inaction*."[19]

2.2 Recognition

Unlike acquiescence, recognition represents consent expressed by affirmative action. The distinction between acquiescence and implicit recognition, however, may not be easy to make. Nonetheless, it may be said that while the former is derived from silence, the latter has always some active conduct at its base.

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13 Brownlie, 1998: 158.

14 Jennings, 1963: 36. See also Shaw, 1997a: 350, to whom these concepts "*rest […] upon the notion of consent*."

15 Fitzmaurice, 1954: 33.

16 *"The jurisprudence does not comprise very enlightening precedents, for the judge or arbitrator will decide in terms of opposability of the conduct of states"* (Nguyen *et al*., 1987: 330).

17 Nguyen *et al*., 1987: 331.

18 Sharma, 1997: 202. However, as pointed out by MacGibbon, 1956: 183, *"[t]he presumption of consent which may be derived from acquiescence may…be rebutted by a clear indication of a contrary intention*."

19 Müller and Cottier, 1992: 14.

> *[E]ven though it may not always be easy in practical situations to distinguish the one from the other especially where an implied or tacit recognition is in point,*

it may be said that

> *[w]hereas recognition […] is the adoption of a positive acknowledgement on the part of a state, acquiescence may arise from a mere omission to protest against a situation where a right to protest existed and its exercise was called for.*[20]

Recognition may thus be defined as an act by which a state asserts the existence of certain juridical acts or facts. The recognising state is seen as admitting that the recognised acts or facts may be opposed to itself. An express act of non-recognition, in contrast, usually intends to exclude this effect.[21]

Recognition has a very wide application in international law, and covers a great number of situations. It is probably the most important and the most frequently used of the unilateral acts, and is always related to the conduct of another state, thus appearing as a response to it. It can take the form of, for instance, governmental declarations, a vote (with statement or not) in an international organisation (such as the United Nations or the European Union), effective acts on the ground (withdrawal from a certain territory) or statements implied in treaties, joint communiqués or official archive material.[22]

The somewhat specific and confined role of recognition in territorial and boundary disputes between existing states, is the issue this *Briefing* intends to address.[23] The object of recognition acts are, in this framework, the conduct of states which, within the limits of international law, have some degree of relevance to territorial or boundary disputes.

2.3 Estoppel

Estoppel is a juridical concept according to which a party is prevented from arguing and rebutting a previously made (explicit or tacit) statement of fact or representation on one same issue. As will be shown later, the circumstances in which that party is hindered from subsequently altering its position and denying the truth of a prior statement are, nonetheless, very restricted. An important distinction has to be made. Acquiescence and recognition, as expressions of consent, are the "*method[s] by which a situation becomes opposable to a state*." Estoppel, on the other hand, is not in itself a manifestation of consent. It is a *sanctio*

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20 Jennings, 1963: 36, emphasis added. As stated by Shaw, 1997a: 310, "*[r]ecognition itself need not be express […] but may be implied in certain circumstances.*"

21 A point has to be made in relation to the "*doctrine of non-recognition*." Undoubtedly, this doctrine is particularly relevant in terms of territorial changes. It may be described as an attitude maintained by states in regard to a situation which is characterised, first, by its unlawfulness (for it constitutes a breach of an international obligation), and secondly, by the territorial implications resulting therefrom. The purpose of this text is, however, to assess the existence of a role for recognition in territorial and boundary disputes, other than in the context of the doctrine of non-recognition. For this reason, this doctrine will not be addressed here.

22 Nguyen *et al.*, 1987: 331.

23 The recognition of states, concerning the emergence of a new state, is a question which is outside the scope of this work (see Jennings, 1963: 37-38). Similarly, the question of recognition of governments, which is not a territorial issue, will also not be addressed.

juris that operates provided that certain prerequisites are met.[24] In practical terms, however, the distinction is barely feasible, because

> *the same facts concerning the respondent state's conduct may be regarded as showing the attitude it did adopt, or as estopping it from denying that it had adopted that attitude, even if it had not*.[25]

2.4 The Complex Structure of Territorial and Boundary Disputes

International territorial disputes are sometimes classified in legal and political disputes, on the basis of the nature of the arguments that are put forward.[26] Whilst the former are founded on claims of title to territory, supported by the relevant factual evidence, the latter rely upon a diversity of non-legal arguments, such as history, ethnography, geography, cultural links, geopolitics, strategy, or economic motives.[27] However, "*disputes based solely on legal arguments […] are comparatively rare*." The "*largest number of territorial disputes lack any significant legal component*." In most situations, non-legal arguments are of a greater prominence.[28] Importantly, it should be borne in mind that these disputes usually have their roots in *realpolitik.*

Territorial and boundary disputes have thus a complex structure, which always has to be taken into account. The different nature of arguments seems irrelevant as to the way in which territorial and boundary disputes are adjudicated. International tribunals resort usually to both legal and non-legal types of arguments while rendering their decisions.[29] Acquiescence, recognition and estoppel are legal criteria that amongst other legal and non-legal criteria are taken into consideration by international tribunals.[30] It is noteworthy that some of the non-legal considerations may, through the operation of these concepts, acquire a decisive juridical relevance.

2.5 The Distinction between Territorial and Boundary Disputes

Although territory is one of the constituent elements of a state, the absence of a delimited boundary, or the existence of a poorly-delimited boundary, does not prevent the existence of a state.[31] As stated by the ICJ, international law has no rule establishing that the boundaries of a state "*must be fully delimited and defined*."[32] This premise constitutes the basis for the distinction between territorial and boundary disputes. Clearly, "*a principal title may be defined even before the territorial boundaries are precisely established*."[33] The distinction seems to be

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24 MacGibbon, 1958: 475.
25 Thirlway, 1990: 30.
26 Prescott, 1987: 103; Sharma, 1997: 30.
27 Munkman, 1975: 21-25; Prescott, 1987: 107-115.
28 Prescott, 1987: 107.
29 Sharma, 1997: 30; Munkman, 1975: 26-91.
30 Munkman, 1975: 91-116.
31 Nguyen *et al*., 1987: 379-380; Malanczuk, 1997: 76.
32 *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Denmark; Federal Republic of Germany *v*. Netherlands), ICJ Judgement of 20 February 1969, *ICJ Reports 1969*: 33, para.46, citing the *Monastery of Saint Naoum*, Advisory Opinion of the PCIJ.
33 Jennings, 1963: 14, referring to the *Mosul Boundary* case decided by the PCIJ.

reflected in the different course followed by the Libyan and the Chadian claims before the ICJ. While Libya considered the "*dispute [as] regarding [the] attribution of territory*", Chad viewed it as "*a dispute over the location of a boundary*."[34]

Looking at the implications at the international law level, Sharma notes that whereas territorial dispute settlement is based upon the application of the "*traditional rules regarding the modes of acquisition of title*", boundary disputes "*involve those rules which are relevant to specifying functions performed in the fixation and maintenance of boundaries*."[35] In a geographically-oriented approach, Prescott, distinguishing between *territorial* and *positional* boundary disputes, considers that both types "*can only be solved in favour of the claimant state by altering the position of the boundary*."[36]

There seems to be, therefore, a clear conceptual difference between the two types of disputes. But the question that has to be asked is whether this distinction leads to any practical consequences. Referring to acquiescence, recognition and estoppel in the context of acquisition of territory, Malanczuk notes, very sharply, that these juridical techniques "*are not, strictly speaking, modes of acquisition*" of territory.[37] In fact, none of them is an "*actual process whereby territorial sovereignty is attained and [title to territory] thereby acquired*."[38] As juridical concepts, they are neither modes of acquisition of territory, nor boundary defining techniques. They operate, indistinctly, in both territorial and boundary disputes, as well as in any other kind of legal disputes, in exactly the same way and with the same limitations.

In practical terms, the distinction between territorial and boundary disputes, although existing conceptually, is irrelevant insofar as the application of acquiescence, recognition and estoppel is concerned.

3. Selected Case Law

The following analysis is not an exhaustive one. Nevertheless, the selected cases will hopefully provide a comprehensive illustration as to the way in which acquiescence, recognition and estoppel have been applied by international tribunals in territorial and boundary dispute adjudication. The cases are presented in a chronological order, and no conclusions should thus be drawn in terms of their relative importance. The examination of each case will comprise a very brief contextual note about the issues raised in the dispute, and the relevant conclusions of

34 *Case Concerning the Territorial Dispute* (Libyan Arab Jamahiriya *v*. Chad), ICJ Judgement of 3 February 1994, *ICJ Reports 1994*: 14-15, para.19.

35 Sharma, 1997: 23-24. To this author, the former type of disputes would take place "*when one state by drawing a boundary seeks to supersede or eliminate another in relation to a particular area of land*", while the later would arise "*where two (or more) governmental entities contend about the line to be drawn between their respective territorial domains*." Reference is made, in terms of modes of acquisition of title to territory, to discovery, occupation, conquest, cession and prescription, and in relation to boundary fixation and maintenance, to aspects of determination, delimitation, demarcation and administration.

36 Prescott, 1987: 98. To him, *territorial* disputes concern "*some quality of the neighbouring borderland*", while *positional* disputes involve a different interpretation of "*terms used in defining the boundary at the stage of allocation, delimitation, or demarcation.*"

37 Malanczuk, 1997: 154.

38 Bernardez, 1986: 496.

the tribunal concerning the application of acquiescence, recognition and estoppel. Finally it must be highlighted that, although these concepts have been made use of by federal states in order to resolve internal territorial and boundary issues, this analysis only covers the decisions of international tribunals.

3.1 The Grisbadarna Arbitration[39]

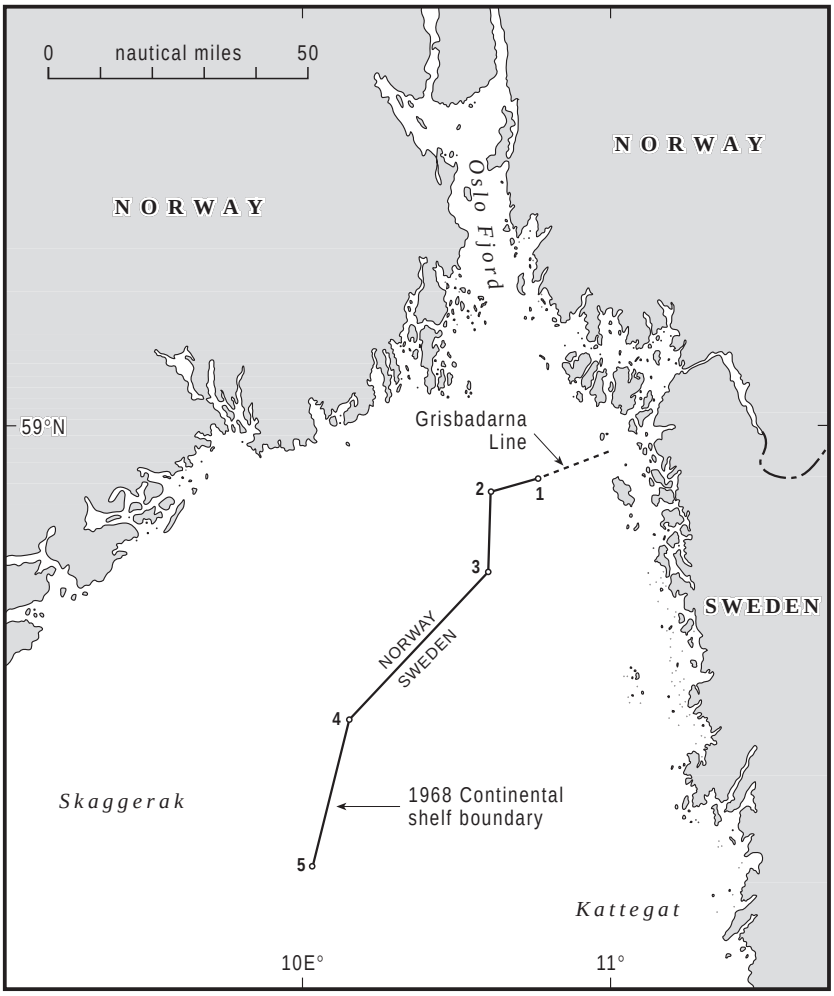

Figure 1: The Grisbadarna Arbitration

The Permanent Court of Arbitration (PCA) was requested to "*determine the [maritime] boundary line*" between Norway and Sweden, from a point agreed by both parties up to "*the limit of the territorial waters*", in the area of the *Grisbadarna Banks*. The tribunal was also asked to decide whether the boundary line had been "*fixed by the boundary treaty of 1661*"

[39] *Maritime Boundary Dispute between Norway and Sweden*, Permanent Court of Arbitration, Decision of 23 October 1909, *American Journal of International Law* (*AJIL*), Volume 4, 1910: 226-236, hereinafter referred to as the *Grisbadarna* arbitration.

and, if it had not, to fix that boundary "*taking into account the circumstances of fact and the principles of international law*."[40]

In its reasoning, the tribunal drew attention to the acts performed by Sweden in the Grisbadarna area, which showed that "*she not only thought she was exercising her right but even more that she was performing her duty*." It emphasised, moreover, that those acts had been carried out "*without meeting any protest […] of Norway*." The Court concluded then that "*Sweden had no doubt as to her rights over the Grisbadarna and that she did not hesitate to incur in the expenses incumbent on the owner and possessor.*" Resorting to the principle of *quieta non movere*, the court had "*no doubt whatever that the assignment of the Grisbadarna banks to Sweden [was] in perfect accord with the most important circumstances of fact.*"[41]

Amongst the evidence weighed was the setting up and maintenance of a light-boat and of a large number of navigation beacons. Norway kept silent in relation to Sweden's conduct, thus taking the risk of giving rise to acquiescence. In the tribunal's view, Sweden's reliance upon the Norwegian inaction, which led to the installation of expensive infrastructures, gave rise to an estoppel which precluded Norway from claiming title over the *Grisbadarna Banks*.[42]

3.2 The Eastern Greenland Case[43]

On 10 July 1931, Norway proclaimed the occupation of Eastern Greenland (the eastern coast of Greenland), by "*taking possession*" of the area "*situated between Carlsberg Fjörd on the South and Bessel Fjörd on the North, and extend[ed] from latitude 71° 30' N to 75° 40' N*", known as 'Eirik Raudes Land', and placing it "*under Norwegian sovereignty*."[44] Two days after the Norwegian proclamation, Denmark instituted proceedings before the Permanent Court of International Justice (PCIJ), and asked the Court to adjudge that the "*declaration of occupation and of any steps taken in [its] respect by the Norwegian Government constitute[d] a violation of the existing legal situation*", being consequently "*unlawful and invalid.*" In its counter-case, Norway advanced the view that, firstly, Denmark had no sovereignty over Eirik Raudes Land because, at the time of occupation, it was *terra nullius*, and secondly, Norway had acquired sovereignty over that territory.

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40 *AJIL*, 4 (1910), *Grisbadarna* arbitration: 226, 227.

41 *AJIL*, 4 (1910), *Grisbadarna* arbitration: 233-235.

42 Bowett, 1958: 201, arguing for a restrictive perspective of estoppel, admits that "*a state may, in genuine ignorance of the fact that a portion of territory lies within the boundaries of another, indulge in considerable expenditure on that territory to its improvement.*" To him, "*[i]n such circumstances that other state would be estopped by its inaction from asserting its ownership of the portion of territory affected.*" The estoppel generated in these circumstances could, then, still be included in restricted perspectives of estoppel, since it may be seen as an exceptional case where "*the difference between between estoppel and acquiescence as an element of in the acquisition of title by prescription would be negligible.*" See also MacGibbon, 1958: 507.

43 *The Legal Status of Eastern Greenland*, Permanent Court of International Justice, Judgement of 5 April 1933 (PCIJ Series A/B No.53); *World Court Reports* (*WCR*), Volume III (1932-1935); Hudson, O. (1938) (ed.) *A Collection of Judgements, Orders and Opinions of the Permanent Court of International Justice*, Manley, Washington: 148-231, hereinafter referred to as the *Eastern Greenland* case.

44 *WCR*, Vol. III, *Eastern Greenland* case: 154. It has to be noted that the occupation of a territory by a state could only be carried out in the assumption that the land to be occupied had the status of *terra nullius*.

In its judgement, the Court concluded that, "*in consequence of the various undertakings resulting from the separation of Norway and Denmark*",[45] and also by signing, and being a party to, treaties "*in which Greenland [was] described as a Danish colony or as forming a part of Denmark or in which Denmark [was] allowed to exclude Greenland from [its] operation*", Norway had "*recognised Danish sovereignty over the whole Greenland*" and had "*debarred herself from contesting Danish sovereignty*."

In relation to the *Ihlen Declaration*, the Court found itself "*unable to accept*" that it implied a recognition of the Danish sovereignty over Greenland. Nonetheless, it declared that the Norwegian conduct amounted to an "*unconditional and definitive promise*" of not occupying Greenland, and not opposing an extension of the Danish sovereignty to the whole of Greenland. Upholding Denmark's position, the Court declared the Norwegian occupation "*unlawful and invalid.*"[46] "*[B]oth the anxiety of Denmark to collect recognitions from third states of her pretensions over Greenland, and the importance which the Court was willing to attach them*" as evidence of an existing title are noteworthy.[47]

3.3 The Fisheries Case[48]

During a period of several decades, Norway had been using straight baselines off her northern coast (Figure 2). These straight baselines were the lines from which the breadth of Norway's exclusive fishing zone was being measured. To support this practice, Norway also promulgated three Decrees (in 1869, 1889 and 1935) which defined the straight baseline system in different parts of her northern coast. The 1812 Decree had not originally been promulgated for the purposes of the fisheries zone, but for the purposes of maritime neutrality. It was later adapted to fisheries purposes when circumstances so required.[49]

Following a series of incidents involving British trawlers, the United Kingdom (UK) contested, before the ICJ, the use of those straight baselines along the Norwegian coast. Proceedings were instituted in September 1949 challenging the validity, under international law, "*of the lines of delimitation of the Norwegian Fisheries zone laid down by the Royal Decree of July 12th, 1935, as amended by a Decree of December 10th, 1937.*"[50] The UK argued, *inter alia*, that the Norwegian baselines were not in conformity with international law inasmuch as straight baselines could only be drawn across the natural entrance points of the mouth of bays.[51] Consequently, it considered that the burden of proof lay with Norway to demonstrate the validity of those baselines. Norway replied on several grounds, namely, legal aspects (presenting a different perspective of the relationship between the freedom of the seas and the appropriation of the sea by coastal states), geographical aspects (the exceptional character and shape of its coasts), historical aspects (title to the coastal waters), and social-economic factors. Finally, it ended by requesting the Court to "*declare that the*

45 The Convention of 1 September 1819 settled the disputes derived from the separation of Norway and Denmark.
46 *Ibid*.: 189-195.
47 Jennings, 1963: 38, 39.
48 *Fisheries Case* (United Kingdom *v*. Norway), ICJ Judgement of 18 December 1951, *ICJ Reports 1951*: 116-206.
49 *ICJ Reports 1951*: 135.
50 *Ibid*.: 118.
51 *Ibid*.: 120-123.

delimitation of the fisheries zone […was] not contrary to international law."[52]

In order to reach a decision, the Court considered it necessary to determine if "*the application of the Norwegian system [had] encountered any opposition from foreign countries*." Its findings were that

> *[t]he notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom*.

Accordingly, it then concluded that states "*did not consider [the Norwegian practice] to be contrary to international law*." [53]

The Court never used the term estoppel, but it was "*almost like raising the acquiescence of Great Britain as an estoppel against her*."[54] Moreover, since the Norwegian claim was directly related with the appropriation of a *res communis* (the high seas), acquiescence by the "*international community as a whole*" appeared to be a *conditio sine qua non* for its acceptance.[55] Therefore, it may be said that third states' conduct did influence the generation of an estoppel against one single state, although this concept operates, theoretically, only *inter partes*.[56]

52 *Ibid*.: 124. It must be noted that the use of these straight baselines had not been accepted by the majority of the states at the Hague Conference of 1930; see Waldock, 1952: 114.

53 *ICJ Reports 1951*: 139.

54 Bowett, 1958: 199.

55 This question was discussed by Judges Hsu Mo (Separate Opinion, *ICJ Reports 1951*: 154) and Read (Dissenting Opinion, *Ibid*.: 194). It should also be noted that the outcome of this judgement, declaring the acquiescence of the international community to this kind of straight baselines, was decisive to the creation of a new rule of customary law of the sea, which was later embodied in the Geneva Convention on the Territorial Sea and Contiguous Zone of 1958 (Article 4) and in the United Nations Convention on the Law of the Sea of 1982 (Article 7).

56 Jennings, 1963: 40; Bowett, 1958: 200.

Figure 2: Norway's Straight Baselines

3.4 The Arbitral Award Case[57]

On 23 December 1906, the King of Spain rendered an Arbitral Award concerning a disputed sector of the boundary between Honduras and Nicaragua, in conformity with what was established in the *Gómez-Bonilla Treaty*. This Treaty was signed in 7 October 1894, between Honduras and Nicaragua, and established a Mixed Commission with the task of settling

> *in a friendly manner all pending doubts and differences, and to demarcate on the spot the dividing line which [was] to constitute the boundary between the two Republics.*

Any unsettled sectors of the boundary were to be referred to arbitration.[58] The Mixed Commission was "*unable to agree on the boundary from [Portillo de Teotecacinte] to the Atlantic Coast and recorded its disagreement at its meeting of 4 July 1901.*"[59] This part of the boundary was the object of the Arbitral Award of the King of Spain of 23 December 1906. However, in 1912 Nicaragua claimed the invalidity of the Award, thereby re-igniting the boundary dispute.

In 1958, Honduras seised the ICJ of this dispute, and asked the Court to declare that Nicaragua was "*under the obligation to give effect to the Award.*"[60] In its Counter-Memorial, Nicaragua requested the Court to declare that the arbitral decision did not "*possess the character of a binding arbitral award*", that it was incapable of execution due to its "*contradictions and obscurities*", and that, concerning their boundary dispute, the same legal situation as before the award remained.

First, the designation of the King of Spain as arbitrator was contested by Nicaragua but the Court concluded that the designation had been made "*well within the currency of the Treaty*" and "*freely agreed to by Nicaragua*", and that since Nicaragua had "*fully participated in the arbitral proceedings before the King, it [was] no longer open to Nicaragua to rely on any of these contentions.*"[61]

Secondly, the grounds on which Nicaragua supported its argument of nullity of the Award were three: excess of jurisdiction (violation of the rules of the *Gómez-Bonilla Treaty*); essential error; and lack of reasoning to support the arbitrator's decision.[62] The Court found, in its judgement, that "*Nicaragua [had], by express declaration and by conduct, recognised the Award as valid.*" Amongst the facts considered by the Court as supporting its reasoning were:[63]

(a) A telegram from the President of Nicaragua congratulating the President of Honduras on the outcome of the arbitral decision;

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57 *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906* (Honduras *v.* Nicaragua), ICJ Judgement of 18 November 1960, *ICJ Reports 1960*: 192-239, hereinafter referred to as the *Arbitral Award* case.

58 Articles I and III of the English translation of the Treaty, *ICJ Reports 1960*: 199-202.

59 *Ibid*.: 202.

60 It is worth noting that whilst in this case there was a gap of 46 years between the emergence of the dispute and the institution of proceedings before the ICJ, in the Eastern Greenland case that same gap was of two days (between the Norwegian proclamation and the application of the case before the PCIJ by Denmark).

61 ICJ Reports 1960: 209.

62 *Ibid*.: 210.

63 *Ibid*.: 210-213.

(b) A Note from the Foreign Minister of Nicaragua to the Spanish *Chargé d'Affaires* in Central America;
(c) The publication of the full text of the award in the Official Gazette of Nicaragua.

Accordingly, the Court considered that by failing "*to raise any question with regard to the validity of the Award for several years*",[64] Nicaragua was no longer in a position to challenge its validity. In the Court's view, "*repeated acts of recognition*" debarred Nicaragua "*from relying subsequently on complaints of nullity*."[65] Once again, the Court refrained from using the term "*estoppel*." According to Judge *ad hoc* Holguín,[66] this was due to the fact that, "*since Honduras had not proved any effective reliance on the conduct of Nicaragua*", the prerequisites of estoppel were not fulfilled.

3.5 The Temple Case[67]

A 1904 Treaty established, in very general terms, that the boundary line between Siam (to which Thailand succeeded) and France (French Indo-China, to which Cambodia succeeded) should run along the watershed line between "*the basins of the Nam Sen and the Mekong […] and the Nam Moun*."[68] The boundary delimitation was to be effected, in accordance with the Treaty, by a Mixed Commission. A map showing the boundary line was produced and published by a French firm (allegedly) following the instructions of French officers acting on behalf of the Mixed Commission.[69] It was later realised that this map showed a boundary line that, in the vicinity of the Temple of Preah Vihear, departed from the watershed line, leaving the Temple (erroneously) to Cambodia. The Cambodian Memorial asked the Court to declare that the territorial sovereignty over the Temple was vested on Cambodia. In its Counter-Memorial, Thailand rejected that view and requested the Court to declare the Thai sovereignty over the Temple.

The Court's findings were that, in fact, the map had never been approved by the Mixed Commission, which had ceased meeting before the map was completed and published. Moreover, it considered that no evidence existed to show that "*the map and the line were based on any decisions or instructions given by the Commission*."[70] Despite all this, the Court considered that:[71]

(a) The frontier had effectively been "*surveyed and fixed*";
(b) The "*Siamese Government […] had officially requested that French topographers should map the frontier region*";

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64 The Court found that in the period between 23 December 1906 and 19 March 1912 (a little more than five years) Nicaragua never raised any protest against the validity of the Award.
65 *ICJ Reports 1960*: 213-214.
66 Dissenting opinion, *ICJ Reports 1960*: 222, 236; Sinclair, 1996: 109-110; Thirlway, 1990: 31.
67 *Case Concerning the Temple of Preah Vihear* (Cambodia *v.* Thailand), ICJ Judgement of 15 June 1962, *ICJ Reports 1962*: 6-146, hereinafter referred to as the *Temple* case.
68 Article I of the Treaty (*Ibid*.: 16).
69 The map was filed in the proceedings as Annex I to the Cambodian Memorial. It should be noted that during the delimitation process of this boundary two Commissions were set up. They are referred to in the Judgement as the first (1904) and the second (1907) Commissions. The latter was established under a Treaty signed on 23 March 1907.
70 *Ibid*.: 21.
71 Respectively, to each sub-paragraph, *Ibid*.: 18, 20, 20 and 23, 22.

(c) The maps had been "*in due course communicated to the Siamese Government*" and given wide publicity;
(d) "*[I]t was certainly within the power of the Governments to adopt [any] departures*" from the watershed line.

Furthermore, the Court found that Thailand had been given several opportunities to raise the question of the line shown on the map, either by protesting or by making any reservation. However, it had failed to do so for more than fifty years, until 1958. The following situations were identified by the Court as moments when Thailand could and should have reacted against the line in the map:[72]

(a) In 1934-35, following a survey carried out by Thailand in the Temple area, which had in Thailand's view demonstrated "*a divergence between the map line and the watershed line*", thereby "*placing the Temple in Cambodia*"; (b) "*The negotiations for the 1925 and 1937 Treaties of Friendship, Commerce and Navigation between France […] and Siam*";
(c) The situation in which Thailand, being in possession of the Temple area, agreed to "*the Settlement Agreement of November 1946, [and] accepted a reversion to the status quo ante 1941*", not only making no reference to the question of rectification of the map line during the works of the Conciliation Commission, but also filing "*with the Commission a map showing Preah Vihear as lying in Cambodia*";
(d) The visit of Prince Damrong (at the time Minister of Interior) to the Temple in 1930, during which he was "*officially received*" by French officials "*with the French flag flying*."

Most importantly, the Court considered that Thailand's failure to react to the latter event, "*an occasion that called for a reaction in order to affirm or preserve title in the face of an obvious rival claim […] amounted to a tacit recognition*."[73] *Qui tacet consentire videtur si loqui debuisset ac potuisset*.[74] As a result, the Court was of the view that Thailand had enjoyed the benefits of the 1904 Treaty and had by her conduct "*accepted the frontier […] as it was drawn on the map, irrespective of its correspondence with the watershed line*." Since "*Cambodia [had] relied on Thailand's acceptance of the map*", concluded the Court, Thailand was "*precluded by her conduct from asserting that she [had] not accept[ed]*" the map.[75]

72 Respectively, to each sub-paragraph, *Ibid*.: 27, 27, 28, 30.
73 *Ibid*.: 31.
74 "*He who keeps silent is held to consent if he should and could speak.*"
75 *Ibid*.: 29, 32.

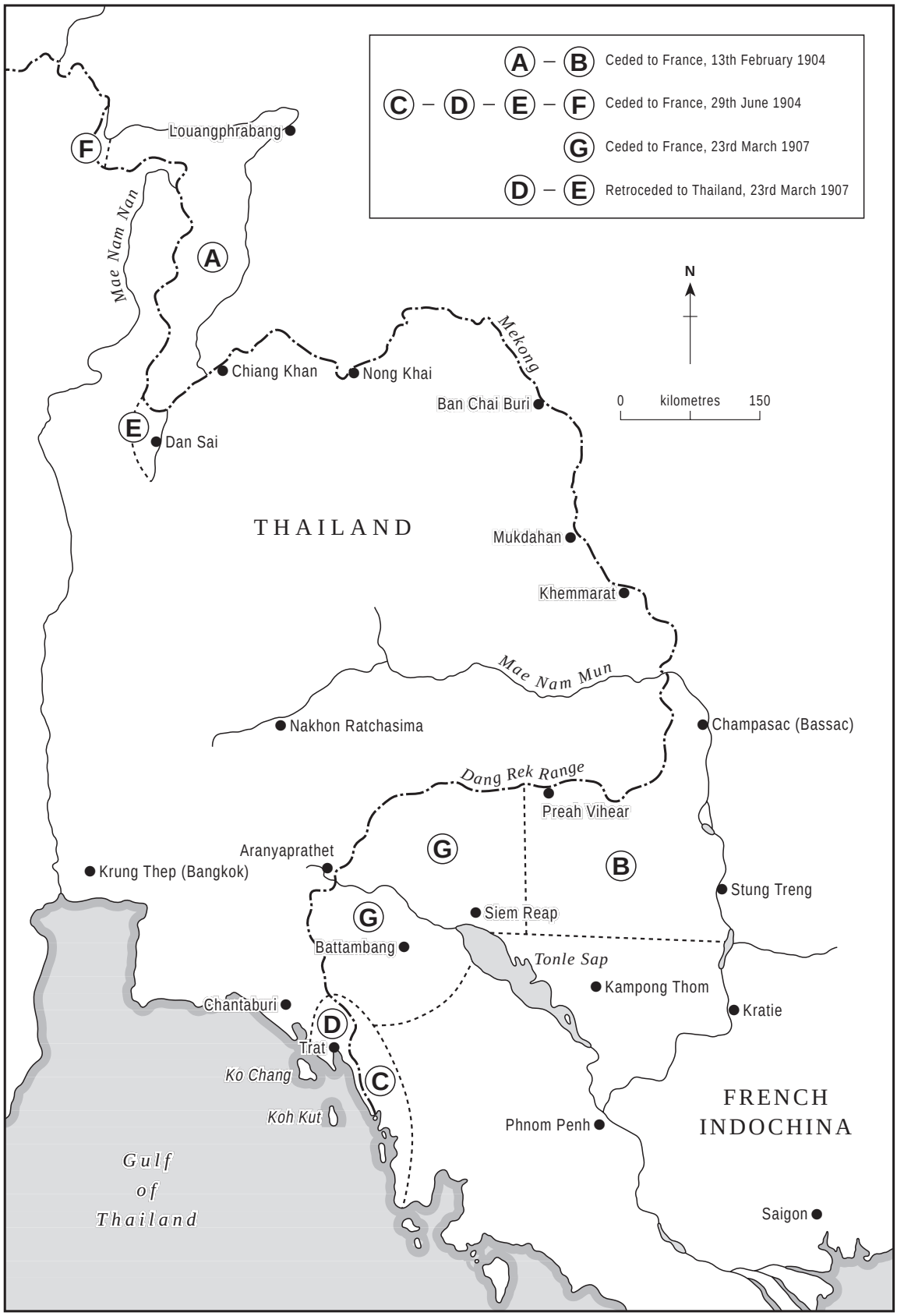

Figure 3: The Location of Preah Vihear

The separate and dissenting opinions are, in this case, as important as the judgement itself. Not only do they illustrate the difficulties and divergence involved in applying these concepts, but they have also been frequently used as reference by other tribunals.[76] Vice-president Alfaro confirmed in his Separate Opinion the existence of a principle of international law according to which

> *a state party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation*.[77]

He pointed out that the principle has been referred to by terms such as estoppel, preclusion, forclusion or acquiescence. Nonetheless, he abstains himself "*from adopting any […] particular designations*", since none "*of them fits exactly to the principle or doctrine as applied in international law*." To him, this "*principle that condemns contradiction between previous acts and subsequent claims is not to be regarded as a mere rule of evidence or procedure*." On the contrary, it is "*substantive in character*" and "*constitutes a presumption juris et de jure*" (*i.e*. not rebuttable), the legal effects of which "*are so fundamental that they decide by themselves alone the matter in dispute*."

The importance of the distinction between acquiescence and estoppel was particularly emphasised by Judge Fitzmaurice. He stated that, whilst acquiescence indicates an effective consent by a party, estoppel operates where a party "*did not give the undertaking or accept the obligation in question (or there is room for doubt whether it did)*." Furthermore, in his view

> *the party invoking the rule [of estoppel] must have 'relied upon' the statements or conduct of the other party, either to its own detriment or to the other's advantage*.[78]

Judge Spender, acknowledging the affinity between preclusion, recognition and acquiescence, confirmed nonetheless that the

> *principle of preclusion is […] quite distinct from the concept of recognition (or acquiescence), though the latter may, as any conduct may, go to establish […] preclusion.*

The "*relying conduct*" of the state claiming estoppel, resulting in its detriment or in the advantage of the other party, was also highlighted by Spender as a prerequisite for preclusion to operate. Advocating a very restrictive interpretation of the facts, he considered that the evidence presented did not "*establish any clear and unequivocal representation on the part of France*." But even if that had occurred, he concluded that "*France did not rely upon any conduct of Thailand in relation*" to the map, that neither France or Cambodia had "*suffered any prejudice*", nor had Thailand enjoyed any benefit. Therefore, Thailand was "*not precluded from alleging that the line on [the map was] not the frontier line*."[79] Judge Koo also considered that there was no "*substantial ground for the application of the principle of*

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76 For example, the *Palena* and the *Rann of Kutch* arbitrations.
77 *ICJ Reports 1962*: 39-41.
78 Separate Opinion, *Ibid*.: 63.
79 Dissenting Opinion, *Ibid*.: 131, 144-146.

preclusion", since there was no evidence that France had "*ever relied on Thailand's silence to her detriment.*"[80]

3.6 The Palena Arbitration[81]

Argentina and Chile agreed, by a treaty of 30 August 1850, that the former Spanish territorial division would prevail in the definition of the territories of the two states. Another treaty, of 23 July 1881, established that the boundary between them should follow "*the line of the highest peaks of the mountains, passing between the sources of streams flowing down to either side.*"[82] The watershed line was assumed as being the line following the Andes ridge. As this proved not to be the case in the southern Andes, a dispute arose between the two states which, as provided for in the 1850 treaty, was submitted to arbitration.

The arbitral award was rendered by King Edward VII of Great Britain on 19 November 1902. In relation to one of the sectors (between boundary Posts 16 and 17), it determined that the boundary line should run from a fixed point on the River Palena along the River Encuentro until the Cerro Virgen (a peak), and from there to the northern shore of lake General Paz. The River Encuentro, however, had two courses both referred to by the same name. Due to this fact, the water course represented on the Award Map was not the one the arbitrator had in mind. This identification error was also maintained by the demarcation commission which, in 1903, drew the boundary line.

The resulting dispute, which involved an area of land known as 'California', was referred to arbitration and decided by an award rendered on 9 December 1966 by Queen Elizabeth II.[83] On the one hand, Chile contended, *inter alia*, that due to Argentina's "*representations to Chile in her diplomatic Notes of 1913-15 regarding the course and source of the river whose mouth is opposite to Post 16*", and also the diplomatic correspondence of 1952, this state was now debarred from denying the Chilean interpretation of the boundary line. On the other hand, Argentina argued that "*by reason of a series of official Chilean maps issued between 1913 and 1952*" Chile was not in a position to put forward its present claim.[84]

The tribunal accepted the Chilean explanation that its "*erroneous cartography*" resulted from its "*ignorance of the error in the Award Map*", which led it to continue "*to be influenced by*

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80 Dissenting Opinion, *Ibid*.: 97, para. 47. In both dissenting opinions there is a divergent view of how the relevant evidence should be interpreted and assessed by the Court. The issue of the lack of protest by France against the administration acts performed by Thailand in the Temple area, which was not conveniently addressed by the Court, is also raised (see Munkman, 1975: 98-99).

81 *Argentina-Chile Frontier Case*, Arbitral Award of Her Majesty Queen Elizabeth II of 9 December 1966 (Report of the Court of Arbitration of 24 November 1966), *International Law Reports* (*ILR*), Volume 38, 1969: 10-99, hereinafter referred to as the *Palena* arbitration.

82 *Ibid*.: 11.

83 By a Joint Declaration of 6 November 1964, both states agreed to submit the dispute to the United Kingdom, for arbitration, in conformity with the régime of the General Treaty of Arbitration of 28 May 1902. Chile claimed that, due to a "*topographical error relating to the position of the Encuentro*", the course of the boundary in that sector was "*totally ruptured*." Accordingly, the boundary line should be determined "*by reference to the real intentions*" of the 1902 Award. On the other hand, Argentina's main contention was that the cartographic error did not lead to the nullity of the Award (*Ibid*.: 13-14).

84 *Ibid*.: 77, 79.

that Map" over a period of 40 years. It nonetheless remarked that this view could not be reconciled with the other Chilean claims: that the 1902 Award had been fulfilled in accordance with the boundary line claimed by Chile; and that Chile had been effectively administering the disputed area. More importantly, in the tribunal's view, such cartographic evidence precluded Chile from claiming that it had relied upon the Argentinean diplomatic Note of 1913 (which favoured the Chilean position).

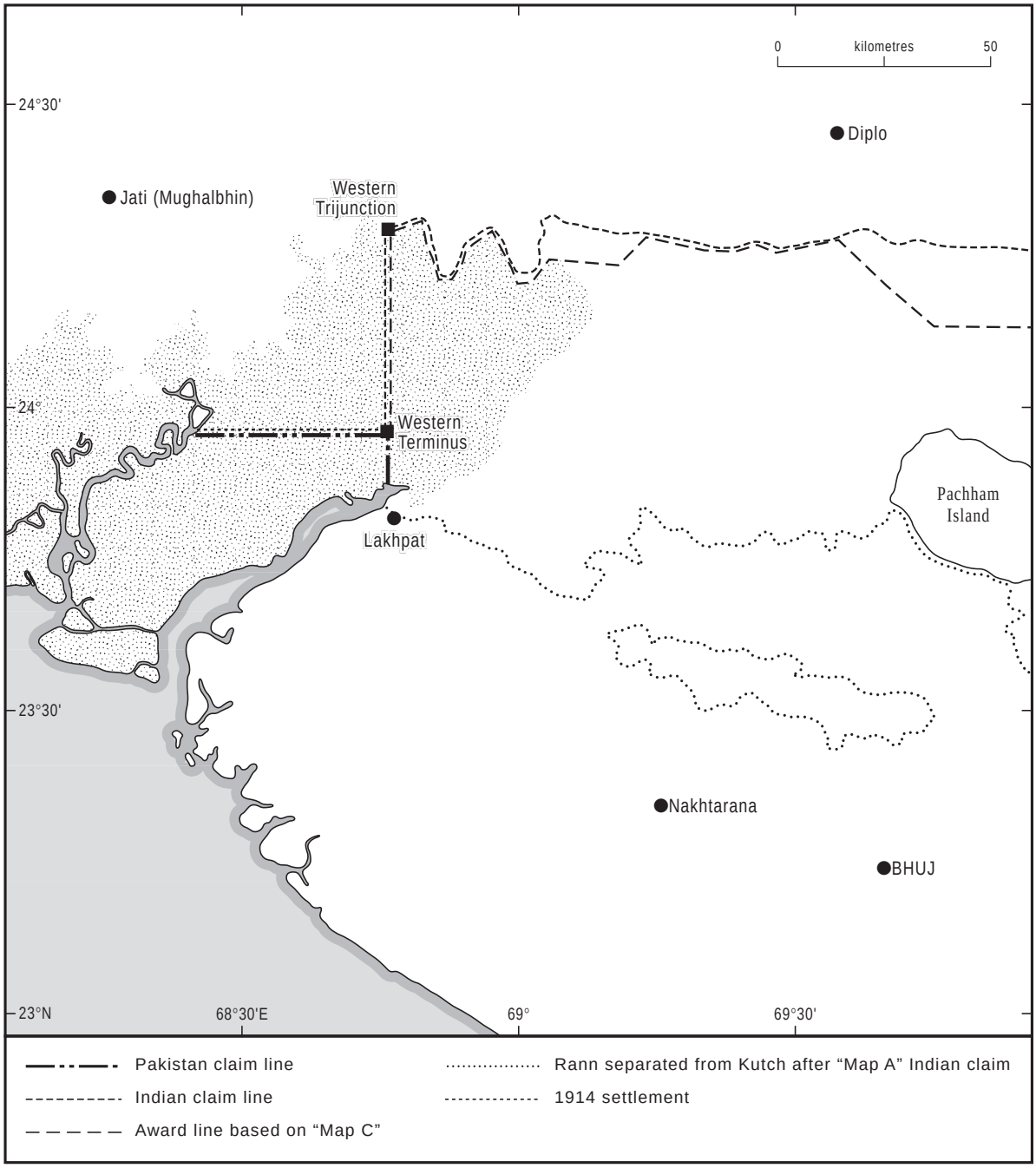

Figure 4: The Rann of Kutch

Concerning the 1952 diplomatic correspondence, the court considered that the "*Parties were not sufficiently ad idem as to the extent of the 'River Encuentro' and the meaning of the even vaguer term 'California'*." Chile's view as to where the boundary should run was thus not seen as having been agreed, neither implicitly, nor explicitly, by the diplomatic correspondence of 1913-15 and 1952. The final conclusion reached by the tribunal with regard to the claims of estoppel was that "*no claim of estoppel [had been] made out by either Party against the other*", and that therefore both parties were in a position to put forward any contention in relation to the line followed by the boundary.[85]

3.7 The Rann of Kutch Arbitration[86]

India and Pakistan emerged as states from British India in 1947. With the division of the former colonial territory, the former vassal state of Kutch was incorporated into India, while the province of Sind became part of the Pakistani territory. In the area of the Rann,[87] which has the Kutch to the north and the Sind to the south, the boundary between these two territorial entities had never been accurately defined. As the internal boundary turned into an international boundary, the existing dispute regarding the precise location of the boundary acquired an international character and was at least partially responsible for the outbreak in hostilities between the two states in 1965.

The dispute was then submitted to arbitration, following an Agreement signed on 30 June 1965. Pakistan, emphasising the 'marine nature' of the Rann, claimed that the boundary should run along the median line. In favour of its case, Pakistan made reference to the "*cultivation, fishing and grazing by inhabitants of the Sind coast*", and to the exercise of jurisdiction by Sind over the disputed area. Contending that the whole of the Rann had always been part of the Kutch territory, India claimed that the boundary line should follow the northern edge of the Rann. India supported her case, *inter alia*, with the following arguments: continuing and effective exercise of state authority by Kutch over the whole of the Rann; "*[r]epeated assertions by Kutch of its sovereignty over the Rann*" which, not being contested by the British authorities, led to the emergence of acquiescence; and several British official maps and documents depicting and referring to the Sind-Kutch boundary at the northern edge of the Rann.[88]

The tribunal upheld in most part the Indian claim by two votes against one (India's nominee, Aleš Bebler). In relation to the "*vertical line between the Western Terminus and the Western Trijunction*", the court found that it had been demarcated on the ground together with the "*horizontal blue dotted line"*, which had been "*undisputedly laid down as a boundary between Sind and Kutch by the Resolution of the Government of Bombay of 24 February 1914.*"

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85 *Ibid*.: 78-79.

86 *Case Concerning the Indo-Pakistan Western Boundary* (India *vs* Pakistan), Arbitral Award of 19 February 1968, *International Law Reports* (ILR), Volume 50, 1976: 2-521, hereinafter referred to as the *Rann of Kutch* arbitration.

87 The Rann is a *sui generis* area which constitutes a "*homogeneous geographical depression*", distinct from the surrounding country, that is uninhabited and not cultivated, except for some areas mainly used for grazing. It is similar to a lake during the wet season, and it is a desert and salted marshy area for the other half of the year. India tried to highlight the *land* character of the Rann, whilst Pakistan attempted to demonstrate its *marine* nature. *ILR*, 50: 2-3, 32; Conrad, 1981: 240.

88 *ILR*, 50: 2-4; Conrad, 1981: 241.

Additionally, although Pakistan argued that the *vertical line* had been demarcated by the demarcation commission in *excès de pouvoir*, the tribunal considered that such demarcation should be accepted and "*viewed as one indivisible undertaking.*" Moreover, in the tribunal's view Pakistan was precluded from denying that the boundary followed the *vertical line*, because its inclusion in the demarcation process had been agreed by the Commissioner in Sind, and had not been subsequently challenged or censured by any of the relevant authorities. It was thus "*not open to the tribunal to disturb a boundary settled […] and accepted and acted upon […] for nearly a quarter of a century.*"[89]

It should be noted that an interesting distinction was made by Bebler, referring to the relations between the Kutch and Great Britain, in terms of interpretation of a silent conduct as between suzerain and vassal states:

> *The silence of a […] suzerain […] before an adverse assertion by the vassal […] is a fully convincing proof of its acceptance or its acquiescence in the vassal's claim. The silence of the vassal […] before an adverse assertion of the suzerain and neighbour […] is, on the contrary, not a fully convincing proof of its acceptance of or acquiescence in the [suzerain's] will.*[90]

Undoubtedly, it is very tempting to accept this view, which in *realpolitik* terms reflects the essence of relations between states. In strict legal terms, in an international legal order where one of the main foundations is the principle of equal sovereignty of states, this view is difficult to support.

3.8 The North Sea Continental Shelf Cases[91]

In 1966, Denmark and the Netherlands agreed to delimit their continental shelf boundary on the basis of the equidistance principle. This agreement assumed, nonetheless, that the Federal Republic of Germany (Germany) would also accept this principle, and that its continental shelf would not extend beyond the tri-point derived therefrom. Both Denmark and the Netherlands were parties to the Geneva Convention on the Continental Shelf of 1958 which, in its article 6, established that the continental shelf boundary line should, in the absence of agreement between the involved states and unless special circumstances would determine otherwise, follow the "*median line, every point of which is equidistant from the nearest point of the baselines.*" Germany however, not being a party to this convention, did not accept the use of equidistance as the delimiting principle.In 1967, the ICJ was requested to decide which principles and rules of international law were applicable to the delimitation of the continental shelf in the North Sea. Denmark and the Netherlands contended that, although not obliged on the basis of conventional international law, Germany was bound to accept the equidistance principle. Allegedly, "*by conduct, by public statements and proclamations*" Germany had "*recognised it as being generally applicable to the delimitation of the continental shelf areas*",

89 *ILR*, 50: 474-475.

90 Dissenting Opinion, *Ibid*.: 415. He nonetheless admits that "*from the legal point of view there was nothing to prevent the vassal from speaking.*"

91 *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Denmark; Federal Republic of Germany *v*. Netherlands), ICJ Judgement of 20 February 1969, *ICJ Reports 1969*: 4-258.

"*in such a manner as to cause […] Denmark and the Netherlands to rely on the attitude thus taken up*."[92]

The Court's view was that "*only the existence of a situation of estoppel could suffice to lend substance to this contention*." Consequently, Germany would only be precluded "*from denying the applicability of the conventional régime*" if it had "*clearly and consistently evinced acceptance of that régime*" and, "*had [also] caused Denmark or the Netherlands, in reliance of such conduct, detrimentally to change position or suffer some prejudice*."[93] The Court defined here very strict requirements for estoppel to operate, and which seem to be applicable only to estoppel *stricto sensu*. In situations where the conduct of a State has given rise to acquiescence or recognition, these requirements will not be applicable. Concluding that there was "*no evidence whatever in the present case*",[94] the Court rejected the Danish and Norwegian claim.

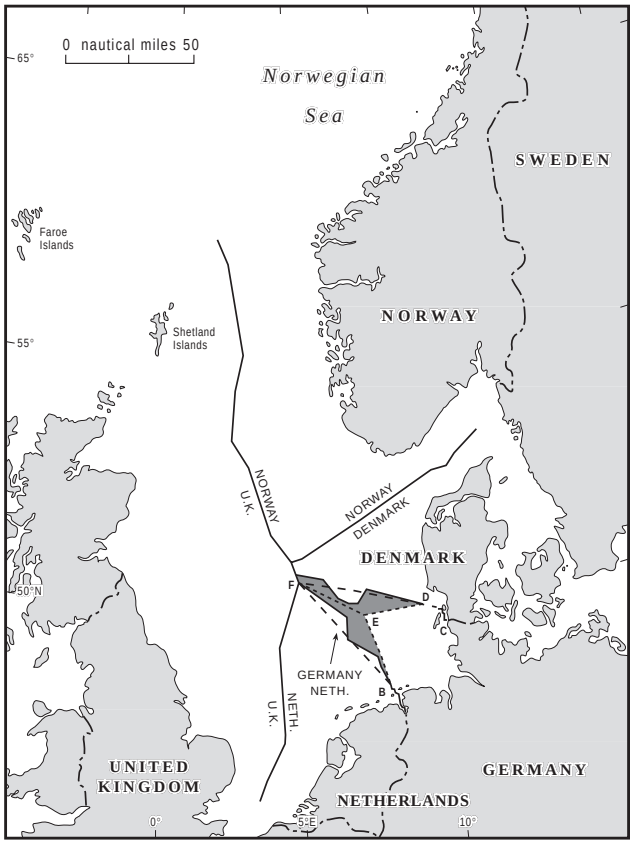

Figure 5: The North Sea Continental Shelf Cases

92 *Ibid*.: 26, para.27.

93 Confirming this very restrictive approach, the Court considered, in the *Case Concerning the Continental Shelf* (Tunisia *v*. Libyan Arab Jamahiriya), when addressing the possibility of the existence of a *de facto* recognised maritime boundary, that a *modus vivendi* line, "*resting only on the silence and lack of protest*" of one of the parties, fell "*short of proving the existence of a recognised maritime boundary*" (ICJ Judgement 24 February 1982, *ICJ Reports 1982*: 18-323, at p.70, para.95). Although this case is not dealt with in this study, it is worth mentioning briefly this part of the Court's reasoning.

94 *ICJ Reports 1969*: 27, para.30.

3.9 The Anglo-French Channel Arbitration[95]

The court of arbitration set up by the United Kingdom and France was empowered to define the course of the continental shelf boundary in the Channel, westwards of 000° 30' W longitude to as far as the 1,000-metre isobath. Taking into account that both states were parties to the Geneva Convention on the Continental Shelf of 1958, the tribunal defined most of the boundary on the basis of the equidistance line (albeit modified in the Atlantic region), as provided by article 6 of that Convention. The exception was the Channel Islands region. The

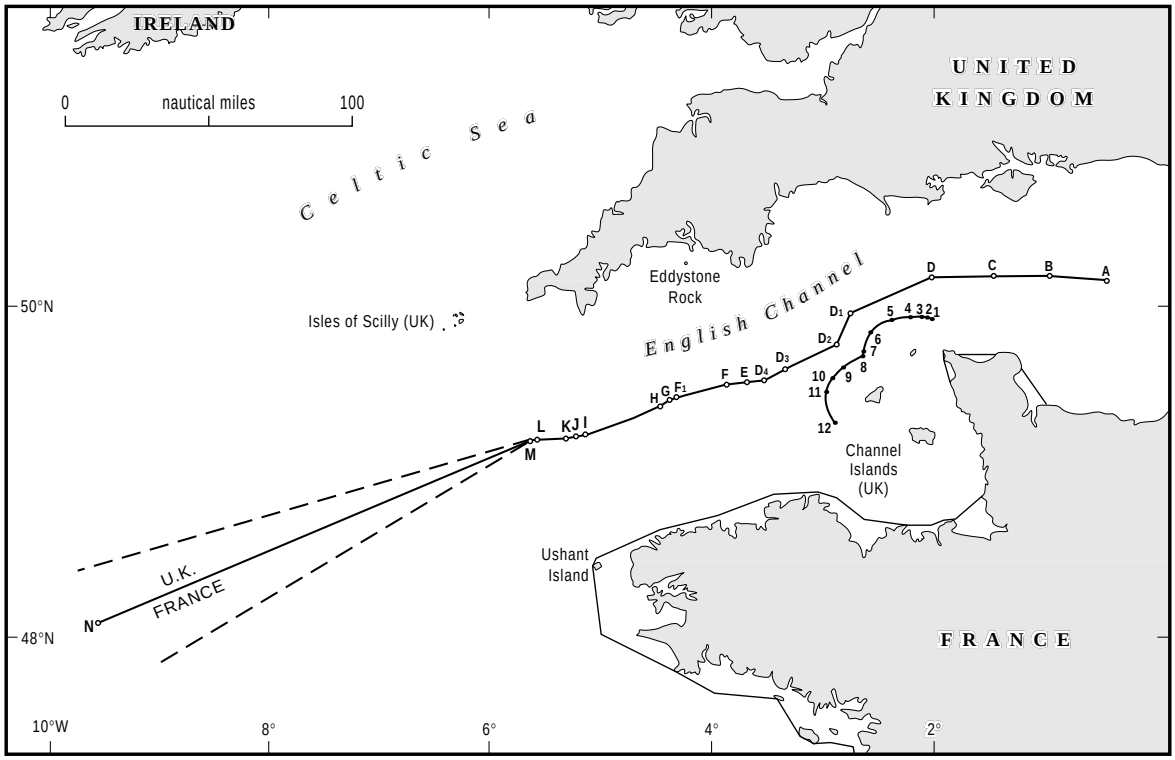

Figure 6: The Anglo-French Channel Arbitration

exact location of these islands was considered an exceptional circumstance, leading the court to deal with the delimitation in a different way.

In applying the equidistance principle, the use of one feature as a basepoint deserved the court's particular attention: Eddystone Rock.[96] According to the vertical datum then used in British charts and legislation, Eddystone Rock was an island, and should be used as a basepoint in the determination of the equidistance line. Furthermore, the United Kingdom argued that France had, by previous conduct, "*acquiesced in the use of the Eddystone Rock as a base-point for the measurement of United Kingdom territorial waters and fisheries zones.*"[97]

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95 *Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, Arbitral Decision of 30 June 1977, *Reports of International Arbitral Awards* (RIAA), Volume XVIII: 3-129.

96 *Ibid*.: 66-74, paras.121-144.

97 *Ibid*.: 69, para.128.

France however, using a more extreme vertical reference argued that that feature was no more than a low-tide elevation which should therefore not be used as a basepoint. In relation to the claim of acquiescence, she replied, *inter alia*, that she had "*neither contested nor accepted officiellement*" the use of Eddystone Rock as a basepoint.[98]

The tribunal brushed aside the problem of the legal status of Eddystone Rock.[99] Defining the true status of this insular feature became irrelevant once the court considered that there had been a conduct amounting to acquiescence. After considering that the French authorities had previously acquiesced to treat this feature as a basepoint in the delimitation of the United Kingdom's fisheries limits, it concluded that they were not in a position to reject its use in the delimitation of the continental shelf.[100] This decision precluding France from refusing the use of Eddystone Rock as a basepoint has a similar effect to that of an estoppel. Notwithstanding this finding, no express reference was made in the court's reasoning to the prerequisites of 'reliance' and 'detriment', or to the term 'estoppel'. This seems to indicate that the tribunal, although deriving from acquiescence an effect analogous in practice to that of estoppel, acknowledged the conceptual difference between these two juridical concepts.

3.10 The Gulf of Maine Case[101]

In this case, an ICJ Chamber was requested to define a single maritime boundary between Canada and the USA in the area of the Gulf of Maine. The single maritime boundary had to comprise both continental shelf and fisheries jurisdiction. Both states were parties to the Geneva Convention on the Continental Shelf of 1958, which established the use of equidistance as a method of delimitation. However, the fact that the parties had agreed to, and requested, a *single maritime boundary* for the Gulf of Maine area, led the Chamber to conclude that there was no legal obligation to apply the provisions of the Geneva Convention.[102]

Eventually, Canada argued that the conduct of the USA "*involved a substantive consent […] to the application of the equidistance method*." Canada had been granting "*long-term options (permits) for the exclusive exploitation of hydrocarbons*", and although the fact was known to the USA authorities, neither had they protested against them nor did they inform Canada about the permits that had been issued by the USA in the disputed area.[103] Amongst the facts referred to by Canada was the so-called *Hoffman letter*, which,

> *acknowledge[d] receipt of the documents [showing the areas where the permits had been issued] and mentioned, inter alia, the exact position of the median line*.[104]

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98 *Ibid*.: 71-72, paras.135-138; emphasis added.

99 *Ibid*.: 72, para.139.

100 *Ibid*.: 74, paras.143-144.

101 *Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada *v.* United States of America), ICJ Judgement of 12 October 1984, *ICJ Reports 1984*:246-390, hereinafter referred to as the *Gulf of Maine* case.

102 *Ibid*.: 303, para.125.

103 The whole question of the principles of acquiescence and estoppel is discussed by the Chamber in paras.126-154 of the judgement (*Ibid*.: 303-312). The facts and arguments put forward by Canada are described at pp. 304-307, paras.126-136.

104 *Ibid*.: 305-306, paras.131-134.

This was thus, according to Canada's view, "*evidence of genuine acquiescence in the idea of a median line […] and of a resultant estoppel against the United States*."[105]

Acknowledging that the USA conduct "*showed a certain imprudence in maintaining the silence after Canada had issued the first permits*", the Chamber concluded, however, that, since there was no clear, sustained and consistent acceptance by the USA over a long period, "*any attempt to attribute to such silence […] legal consequences taking the concrete form of an estoppel, seem[ed] to be going too far*."[106]

The Chamber drew the distinction between acquiescence and estoppel *stricto sensu*, on the

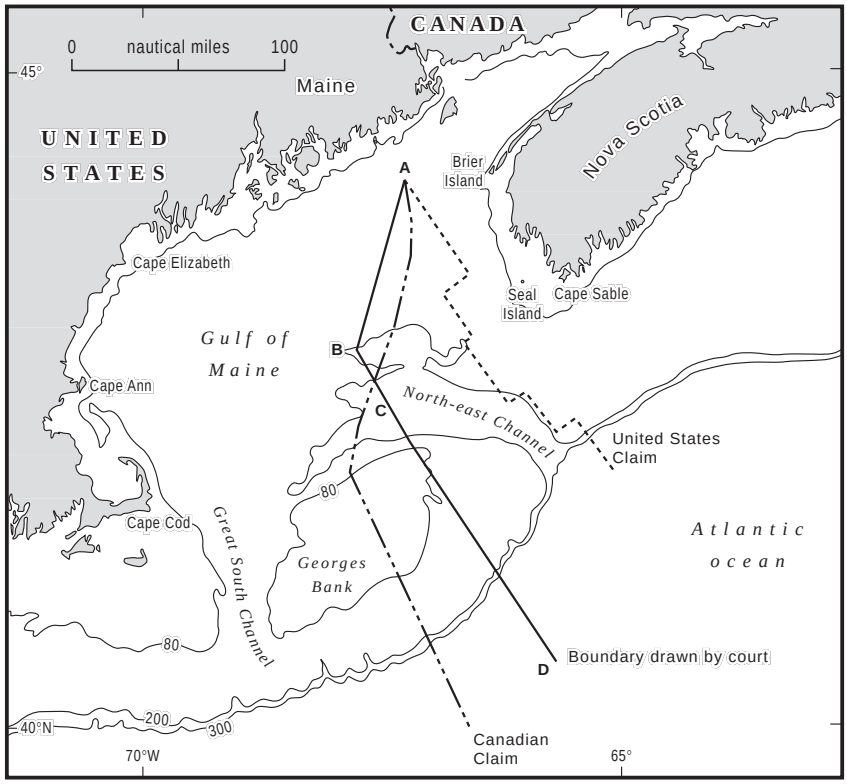

Figure 7: The Gulf of Maine Case

basis of the "*element of detriment or prejudice caused by a State's change of attitude.*" Pointing out that although both are "*different aspects of the same institution*", the former "*is equivalent to tacit recognition manifested by unilateral conduct*", whilst the latter "*is linked to the idea of preclusion.*"[107]

A comparison with the *Fisheries* case led it to remark that "*[n]either the long duration of the Norwegian practice (70 years), nor Norway's activities in manifestation of that practice*" would allow an extrapolation to this case. Resorting to the *Arbitral Award* case, it once again

105 *Ibid*.: 304, para. 128. "*In the Canadian argument, the terms 'acquiescence' and 'estoppel' are used together and practically for the same purposes…Canada stated in the oral hearings that estoppel is 'the alter ego of acquiescence' […]* " (*Ibid*.: 304, para.129).

106 *Ibid*.: 308, para.140; 309, paras. 145-146; 310, para.148.

107 *Ibid*.: 309, para.145-146; 305, para.130.

underlined that the relevant conduct should be maintained "*over a long period*." Referring to the *North Sea Continental Shelf* cases and the *Grisbadarna* arbitration, the Chamber then stressed that both acquiescence and estoppel presuppose "*sufficiently clear, sustained and consistent*" acceptance.[108] It concluded, finally, that because estoppel does not have to be based upon a conduct effectively conveying consent (it may only *look like consent*),[109] there are other requirements which are not applicable in the case of acquiescing conducts: reliance and detriment.[110]

3.11 The Land, Island and Maritime Frontier Dispute Case[111]

An adjudication *compromis* signed by Honduras and El Salvador established that a Chamber of the ICJ would delimit the land boundary in disputed areas between the two states, and decide upon the juridical status of islands and maritime spaces on the Gulf of Fonseca.[112] In this case, the role of the *uti possidetis* principle in general, and its relationship with the concepts of acquiescence and recognition in particular, were one of the crucial issues for the Chamber.

Considering that "*[i]f the uti possidetis juris position can be qualified by adjudication and by treaty*", the Chamber stated that "*[t]here seems to be no reason in principle why [acquiescence or recognition] would not operate*." "*[S]ufficient evidence to show that the parties [had] clearly accepted a variation, or at least an interpretation, of the uti possidetis juris position*", was seen as the condition that must be fulfilled.[113] Therefore, according to the Court, states may "*vary the boundaries between them by agreement; and some forms of activity, or inactivity, might amount to acquiescence in a boundary other than*" the one resulting from the application of the *uti possidetis juris*. Considering that the "*situation was susceptible of modification by acquiescence in the lengthy intervening period*", the Chamber concluded "*that the conduct of Honduras from 1881 until 1972 [could] be regarded as amounting to such acquiescence in a [particular sector of the land] boundary*."[114]

The significance of the conduct of the parties in relation to the disputed islands "*during the period immediately after independence*", as well as the "*[c]laims then made, and the reaction – or lack of reaction – to them*", were also analysed by the Chamber "*as possibly constituting acquiescence*."[115] The widely publicised Salvadorian *effectivités* on Meanguera island, which

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108 *Ibid*.: 309, paras.144-146; 310, para.148. In the *Arbitral Award* case, the element "*period of time*" was much shorter than in the *Fisheries* case (a little more than five years compared to sixty years); see paras. 3.3. and 3.4. *supra*.

109 Judge Fitzmaurice's Separate Opinion in the Temple case (see para. 3.5. *supra*).

110 North Sea Continental Shelf cases (see para. 3.8. *supra*).

111 *Case Concerning the Land, Island and Maritime Frontier Dispute* (El Salvador *v*. Honduras; Nicaragua intervening), ICJ Judgement of 11 September 1992, *ICJ Reports 1992*: 351-761.

112 Article 2 of the Agreement established that the Chamber was requested: (1) "*To delimit the boundary line in the zones or sections not described in Article 16 of the General Treaty of Peace of 30 October 1980*"; (2) "*To determine the legal situation of the islands and maritime spaces*" (*Ibid*.: 357). Considering that "*Nicaragua had shown that it had an interest of a legal nature*", the Chamber permitted its intervention in the case (*Ibid*.: 359-360, paras.12-15).

113 *Ibid*.: 401, para.67.

114 *"[T]he Chamber does not consider that the effect of the application of the principle of the uti possidetis juris in Spanish America was to freeze for all time the provincial boundaries which, with the advent of independence, became the frontiers between the new states*" (*Ibid*.: 408, para.80).

115 *Ibid*.: 559, para.333; 563, para.343.

supported the claim of this State, were carefully weighed by the Chamber,[116] which concluded that:

> *[t]hroughout the whole period covered by the documentation produced by El Salvador concerning Meanguera, there is no record of any protest made by Honduras to El Salvador, with [one single and recent] exception.*[117]

Amongst the publicised facts that strengthened the Salvadorian claim to sovereignty over Meanguera island, were the *Note of Protest* and the *Circular Letter of 12 October 1854*, the publication in the Salvadorian official journal of reports on administrative acts on the island (in 1856), and of an announcement of an auction sale of vacant land of Meanguera (1879), which never raised any Honduran reaction.[118] The Chamber concluded that, since the "*conduct of Honduras […] reveal[ed] an admission, recognition, acquiescence or other form of tacit consent [to] the situation*",[119] title was vested in El Salvador. The fact that Honduras had "*laid before [the Chamber] a bulky and impressive list of material relied on to show Honduran effectivités relating to the whole of the area in litigation*", but failed to do the same in relation to Meanguera island, was also considered to reach the final decision. Again, no direct reference is made to estoppel, apparently maintaining the perspective that, when consent is somehow given, estoppel does not operate.

3.12 The Jan Mayen Case[120]

The delimitation of the maritime boundary or boundaries, in the area between the east coast of Greenland (Denmark) and Jan Mayen island (Norway), was the subject of the proceedings instituted by Denmark before the ICJ. Denmark claimed that Greenland was entitled to a full 200 mile fishery zone and continental shelf *vis-à-vis* Jan Mayen, whilst Norway argued that the fishery zone and continental shelf boundary was the median line between the relevant coasts. Both states were parties to the Geneva Convention on the Continental Shelf of 1958, and strictly speaking, the Court was not asked to adjudge on a single maritime boundary.[121]

In support of its median line claim, Norway argued, *inter alia*, that "*up to some ten years ago at least*", the Danish Government had, "*by its various public acts expressly recognised*", and with its "*general pattern of conduct*" acquiesced to, the median line. "*[T]ogether with knowledge and long-standing position of the Norwegian Government*", Denmark should accordingly be prevented "*from challenging the existence and validity of the median line boundary*."[122] The public acts and general conduct referred to by Norway included Danish

116 The Salvadorian *effectivités* on Meanguera island are described in detail in para. 359 (*Ibid*.: 572-574).

117 *Ibid*.: 574, para.361.

118 *Ibid*.: 568-571, paras.352-357.

119 *Ibid*.: 577, para.364.

120 *Case Concerning the Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark *v.* Norway), ICJ Judgement of 14 June 1993, *ICJ Reports 1993*: 38-314, hereinafter referred to as the *Jan Mayen* case.

121 As stated by the Court (*ICJ Reports 1993*: 56-57, paras.41-43), "*the situation is [here] quite different from that in the Gulf of Maine case*", since the parties did not reach any agreement as to whether the Court should define a single delimiting line (Denmark) or two lines of delimitation concerning the continental shelf and the fisheries zone (Norway, to whom the lines, although conceptually distinct, would be in this case coincident).

122 *Ibid*.: 53, para.33.

legislative acts, diplomatic correspondence between the two countries, and the Danish position adopted during the Third United Nations Conference on the Law of the Sea, in terms of maritime boundary delimitation.[123]

The Court considered that Danish acts and general conduct were explainable by the "*concern not to aggravate the situation pending a definitive settlement of the boundary*", and the endeavour to "*avoid difficulties with Norway*". It concluded that it could not be "*deduced from the conduct of the Parties*" that a "*median boundary line [was] already 'in place', either as the continental shelf boundary, or as that of the fishery zone*."[124]

3.13 The Territorial Dispute Case[125]

The dispute between Libya and Chad must be seen against a background of great complexity involving the activities of several states in the area. Moreover, all sorts of arguments, both legal and non-legal, were put forward by the two states. Simplistically, it may be said that Libya and Chad had been unable to agree to the location of their common boundary. The dispute was then referred to the ICJ. Libya claimed that there was no boundary agreed by virtue of international treaty, and requested that the Court determine one. The Libyan case, based "*on a coalescence of rights and titles*", was that it possessed title over the whole of the territory north of the line put forward in its claim. On the contrary, Chad argued that a conventionally agreed boundary existed between the two states as a result of the *Treaty of Friendship and Good Neighbourliness between the French Republic and the United Kingdom of Libya of 10 August 1955*. Alternatively, this state argued that the French *effectivités* in the area would either turn the lines referred to in that treaty into definitive boundaries, or "*irrespective of treaty provisions*" support Chad's title over the area.[126]

The 1955 Treaty was accepted by Libya as valid. Libya contended, however, that in interpreting this treaty the Court should take into account that, at the time of its signature, Libya was "*placed at a disadvantage in relation to the provisions concerning boundaries*", due to its "*lack of knowledge of the relevant facts*."[127]

123 *Ibid*.: 53-56, paras.34-39.

124 As a result, the Court rejected firmly the Norwegian claim (*Ibid*.: 54-56, paras.35-40).

125 *Case Concerning the Territorial Dispute* (Libyan Arab Jamahiriya *v*. Chad), ICJ Judgement of 3 February 1994, *ICJ Reports 1994*: 6-103, hereinafter referred to as the *Territorial Dispute* case.

126 *ICJ Reports 1994*: 15, para.21.

127 The Treaty was "*recognised by both Parties as the logical starting-point for consideration of the issues before the Court*" (*Ibid*.: 20, para.36). The Treaty addressed the boundary issue in its Article 3, which referred to the Annex I and was the relevant provision to decide whether a conventional boundary had been agreed by the Parties or not (*Ibid*.: 20, paras.37-38).

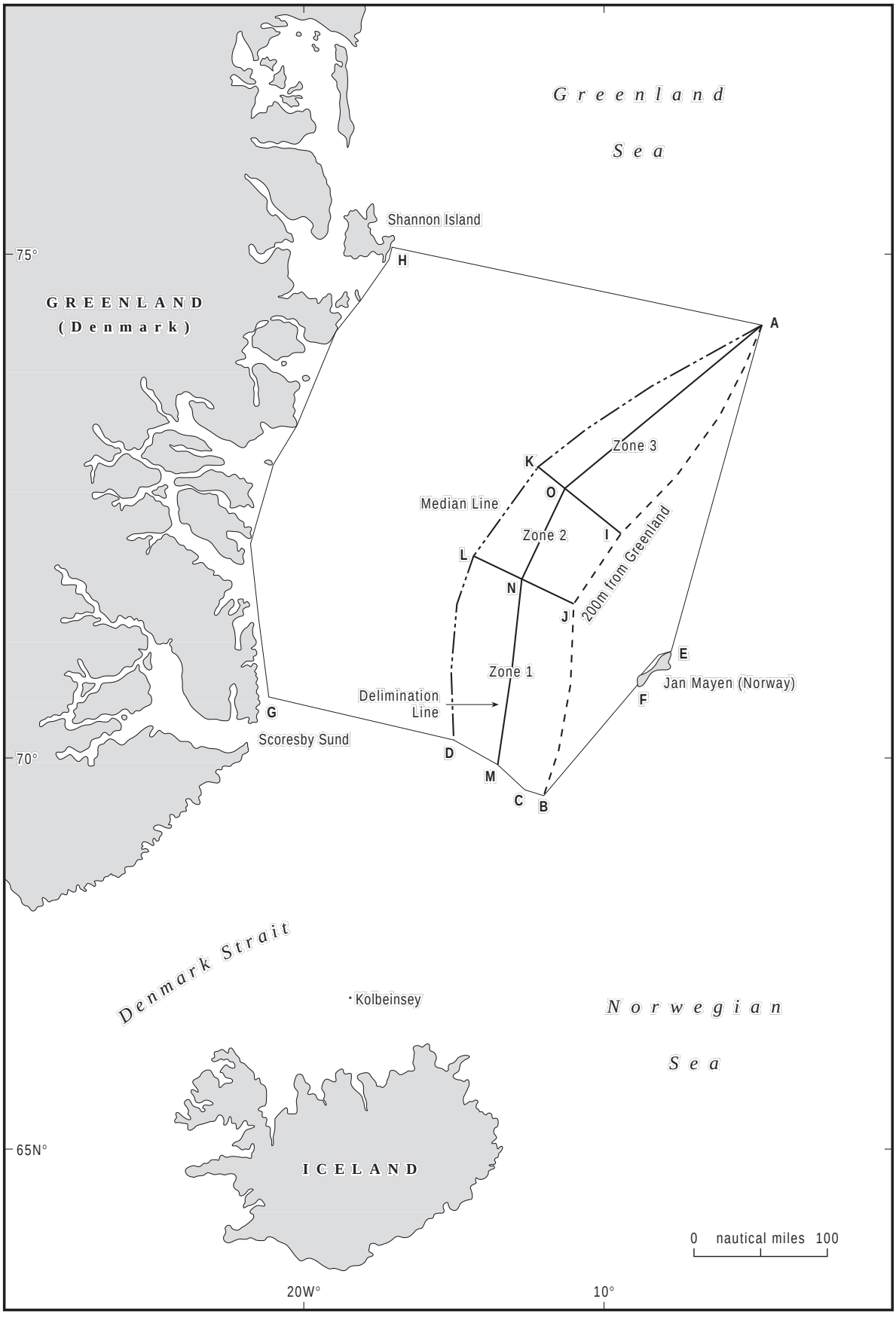

Figure 8: The Jan Mayen Case

Article 3 of the 1955 Treaty states that "*the parties recognise [reconnaissent] that the frontiers […] are those that result*" from the international instruments listed in Annex I to the treaty. To the Court, the use of the term 'recognise' indicated that "*a legal obligation [had been] undertaken*", and that the parties had thereby renounced the right to contest the boundaries in the future.[128] The Court upheld the Chadian claim considering that the boundary between the two countries had been defined by the 1955 Treaty.

The term estoppel was not used by the Court to describe the Libyan legal position in the dispute. Nevertheless, Judge Ajibola, following an extensive review of estoppel concluded "*that Libya was estopped from denying the 1955 Treaty boundary since it had acquiesced in and in fact recognised it.*"[129] According to this extensive interpretation, acquiescence and recognition always result in an estoppel. As has been mentioned throughout this *Briefing*, the concept of estoppel adopted by the courts, in particular by the ICJ in the North Sea Continental Shelf cases, seems to be a somewhat more restrictive one, differentiating acquiescence and recognition from estoppel.

Since the Court found proof that Libya had agreed to the boundaries by an international convention, which meant that consent had expressly been manifested, estoppel appears not to operate in this case. This assertion may have some importance since the 1955 Treaty had been agreed to have an initial duration of 20 years, followed by periodical renewals. Boundary provisions included in a treaty with a limited duration had thus to be converted into definitive boundaries. Furthermore, as highlighted by Judge Sette-Camara, this could not be discarded easily.[130] The general principle of stability and finality of boundaries seems, thus, to have played an extensive part in the decision of this case.

4. Appraisal

Treaties, customary law and the *uti possidetis* doctrine undoubtedly play a dominant role in territorial issues. Situations may exist, however, where considerations and evidence of another nature must be taken into account in order to reach a final decision in territorial and boundary disputes. In such circumstances, typically, the relative legal position of states is equivocal and the plethora of non-legal arguments impedes any straightforward perception of the dispute. The conduct of states may then acquire an utmost importance. Acquiescence, recognition and estoppel have been used by international tribunals to *interpret* that conduct, thereby deciding disputes between states.

4.1 Significant Evidence

Significant evidence is constituted essentially by facts (acts or omissions) that, on the one hand, convey some degree of juridical-territorial relevance and, on the other hand, may be

128 *Ibid*.: 22, paras.42-43. The Court was of the view that "*the terms of the Treaty signified that the parties thereby recognised complete frontiers*" between them, and *that "no relevant frontier was to be left undefined*."

129 Separate Opinion, *Ibid*.: 77-83, paras.96-114. He makes reference to authors such as MacGibbon and Schwarzenberger who adopt an "*extensive concept of estoppel*" (Müller and Cottier, 1995: 117).

130 Dissenting Opinion, *Ibid*.: 98.

imputed to a state. Unilateral acts of states especially have a very prominent status. They "*may give rise to international legal obligations*" and "*may [therefore] be used as evidence of a particular view taken by the state in question.*"[131] Amongst the evidence to which courts have been attributing relevance when analysing the conduct of states likely to lead to acquiescence, recognition or estoppel are:

(a) International conventions and non-binding agreements;
(b) Governmental and diplomatic correspondence;
(c) Internal legislative and regulating acts;
(d) Maps, journals or other publications with an official nature;
(e) Statistical records and archives;
(f) Unilateral acts, particularly political acts or statements with external relevance;[132]
(g) Most importantly, the reaction, and lack of reaction, in relation to any relevant facts.

The importance of this evidence is nonetheless variable on a case-to-case basis, considering all the circumstances *in concreto*. Furthermore, when directly derived from unsuccessful negotiations between states, evidence must be seen as not prejudicing any claim.[133] Usually, evidence amounts to a sovereign assertion (explicit or implicit) regarding the status of a certain (disputed) territory or boundary line, conveying therefore some "*risk of loss of title*" to the other disputant. These facts and acts are either the object of, or a manifestation leading to, acquiescence, recognition or estoppel which have territorial or boundary dispute repercussions.

4.2 Operative Criteria

Evidence does not have in itself any intrinsic juridical relevance. Its weight in a dispute depends on other factors which function as operative criteria that determine how and when certain evidence is relevant. To begin with, whenever territorial rights[134] are challenged by another state's conduct, the higher the risk of their loss, the greater the need to react against the challenging conduct in order to preserve those rights. Preserving territorial rights is therefore the teleological element that determines the need for a prompt response by the state whose rights are being challenged.[135] States must ensure that other states, disputant or not, do not interpret their conduct erroneously.

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131 Shaw, 1997a: 95-96. As stated by the International Court of Justice (ICJ), "*States may take cognisance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created is respected*" (*Nuclear Tests* case, *ICJ Reports 1974*, para.46). For this to happen, it must be shown that the act may be imputed to a state, that the organ or agent of the state was acting within the limits of its capacity, and that the act is sufficiently publicised as incorporating the will of the state (Nguyen *et al*., 1987: 330).

132 "*[T]he precise nature and limits of [obligations derived from unilateral acts] must be understood in accordance with the actual terms in which they have been publicly expressed*" and not in terms of "*the view expressed by another state which is in no way a party to the text*" (*Nuclear Tests* case, *ICJ Reports 1974*, paras.51 and 48).

133 As shown by the following statement of the ICJ: "*[T]he Court cannot take into account declarations, admissions or proposals which the Parties made during direct negotiations between themselves, when such negotiations have not led to a complete agreement*" (*Nuclear Tests* case, *ICJ Reports 1974*, para. 54, citing the *Factory at Chorzów* case (Merits), PCIJ, Series A, No. 17: 51).

134 Although the law of acquiescence is nowadays applicable in other types of situations, it arose "*mainly in the context of territorial disputes*" (Müller and Cottier, 1992: 15). Also Jennings, 1963: 36.

135 Sharma, 1997: 202 ; MacGibbon, 1956: 182; Müller and Cottier, 1992: 14.

Some characteristics have been highlighted as describing the 'essential nature' of the claiming and of the reacting acts. Importantly, they must be carried out *à titre de souverain*. Furthermore, their juridical significance has to be assessed in relation to other states' conduct. Aspects such as overall consistency, clearness and unambiguity of meaning, duration and continuity through time, notoriety and imputation to state organs have also been emphasised.

When and where territorial control becomes relevant, the existence of disputing claims, as well as the effectiveness and peacefulness of the acts, have to be weighed. Importantly, it must be noted that the meaning of effective control "*varies from place to place*."[136] It may be any official activity revealing some degree of sovereignty, such as: the establishment of official institutions or public undertakings (schools, hospitals, roads, etc); the organisation of censuses; the exercise of civil and criminal jurisdiction on the basis of the territorial principle; the exercise of police, sea patrolling and military authority; the exercise of taxation and customs (regulating and executing) powers; the undertaking of geodetic, hydrographic and cartographic surveys; and the exercise of regulating powers related to private activities (e.g. commercial, industrial, mining, fishing, farming and grazing activities). The interpretation of a silent conduct, on the other hand, may give rise to difficulties. The above considerations will apply to omissions *mutatis mutandis* only when and where possible.

4.3 Re-defining the Concepts

4.3.1 Acquiescence and recognition

The concepts of acquiescence, recognition and estoppel have to be more precisely established at this stage, in view of their role in territorial and boundary dispute settlement. Acquiescence may be seen as a juridically *relevant silence* which implies some degree of consent. On the contrary, recognition presupposes an *affirmative conduct*.[137] The former has already been considered as being "*equivalent to tacit recognition*."[138] Their practical relevance may be perceived in different ways. They may be used, for instance, to measure the admissibility of a claim, to uphold a certain interpretation of a legal instrument, to validate an originally illegal practice, to supersede the effect of a *juris tantum* presumption (the *uti possidetis juris*, for instance), to conclude for the existence of an intention of a state to relinquish a right or, to impede an acquiescing (recognising) state from contesting its previous conduct.[139] Although their effects are usually bilateral, third party acquiescence or recognition may sometimes play a key part. The significance of acquiescence or recognition by third states has nonetheless to be carefully weighed.[140]

To determine whether acquiescence or recognition was generated by the conduct of a state, one

136 Schwarzenberger, 1957: 317.

137 It has been proposed that "*recognition can be employed as an independent root of title*" to territory (Schwarzenberger, 1957: 318).

138 *Gulf of Maine* case, *ICJ Reports 1984*, para.130.

139 MacGibbon, 1956: 182.

140 See the *Eastern Greenland* and the *Fisheries* cases.

must look at several factors.[141] First, the provenance of the *relevant conduct* has to be considered. The acts must proceed from organs of the state, that is, they must have a *sovereign character*. Moreover, their legal weight depends upon the echelon (hierarchic level of the state) from which they originated. Finally, by analogy with article 46 of the Vienna Convention on the Law of Treaties of 1969, if it is "*objectively evident*" that the recognising or acquiescing acts were carried out in violation of "*a rule […] of fundamental importance regarding the competence to perform such act, its invalidity may be argued*."[142]

Secondly, the relevant conduct must have a public nature. In principle, it must be constituted by *public* and *official* acts of the state, as affirmed by the Court, for example, in the *Eastern Greenland* and the *Gulf of Maine* cases. [143]

Thirdly, the elapsed time is also of extreme importance. In the *Fisheries* case, the Court found that although the Norwegian practice of "*consistently and uninterruptedly*" using straight baselines dated back to 1869, the United Kingdom had only protested formally in 1933.[144] In the *Temple* case, the Court considered that the Thai (Siamese) authorities were aware of the map since 1908 and never protested its contents (particularly the boundary line around the Temple) until as late as 1958.[145] In the *Land, Island and Maritime Frontier Dispute* case, the Court assessed the value of the Honduran silence "*throughout the whole period covered by the documentation produced by El Salvador*", which refers to the period 1854-1991.[146]

An evaluation of the *Eastern Greenland* and *Arbitral Award* cases seems to indicate that the period of time required for recognition to operate is somewhat smaller than in the case of acquiescence (in the latter, the period considered by the Court, during which Nicaragua manifested its recognition, was less than six years). The question of the length of time is also raised in the other cases, in terms of being or not being a sufficiently long period (in the *Gulf of Maine* case, for instance, a period considered as not sufficiently long was amongst the reasons to dismiss the Canadian claim).[147] A "*prolonged abstention from reaction*" is seen as an essential condition for acquiescence to arise.[148] However, the lapse of time has to be seen in relation to the validity, in terms of international law, of the claim put forward by the challenging state. Whenever the claim is "*believed to be contrary to international law*", there should be in principle no need for protests until any attempt is made to "*apply or enforce*" that claim.[149]

Fourthly, the notoriety of the claim and the knowledge of it by the *consenting* state have also to be weighed. The *official character* or the *clear notoriety* of the challenging conduct, by the state whose rights are being challenged, is considered as a *conditio sine qua non* for the

141 Recognition and acquiescence are "*forms of acknowledgement of a legal or factual position [and] may [therefore] be of a great probative or evidentiary value even when not themselves an element in the substantive law of title*" (Jennings, 1963: 38).

142 See, for example, the *Eastern Greenland*, the *Nuclear Tests*, and the *Gulf of Maine* cases (respectively, *WCR*, Vol. III: 192; *ICJ Reports 1974*: 269, para.49; *ICJ Reports 1984*: 306, paras.133-134).

143 *WCR*, Vol. III: 192; *ICJ Reports 1984*: 306, para.134. See also the *Nuclear Tests* case, *ICJ Reports 1974*: 269-270, paras.49-51.

144 *ICJ Reports 1951*: 138.

145 *ICJ Reports 1962*: 27-32.

146 *ICJ Reports 1992*: 570-574, paras.356-361.

147 *ICJ Reports 1984*: 308, para.140.

148 Müller and Cottier, 1992: 15.

149 Fitzmaurice, 1957: 34-35; also Sharma, 1997: 202-203, citing Lauterpacht.

emergence of acquiescence and recognition. Moreover, a *formal notification* is not required.[150] Although in different ways, the prerequisite of notoriety or knowledge of the facts from which acquiescence and recognition may be derived is clearly visible, for example, in the *Grisbadarna* arbitration, and in the *Eastern Greenland*, *Fisheries*, *Temple* and *Land, Island and Maritime Frontier Dispute* cases. Fitzmaurice criticises the Court's reasoning in the *Fisheries* case, particularly in relation to the knowledge of the Norwegian claims by the United Kingdom and the need for protesting them.[151]

Finally, the contextual consistency of the conduct and of the meaning conveyed thereby are also of a decisive relevance. In the *Fisheries* case, the Court considered "*that too much importance need not be attached to a […] few uncertainties or contradictions, real or apparent*", as long as they can be "*understood in the light of the variety of facts and conditions prevailing in [a] long period*" of analysis.[152] The consistency of the *relevant conduct* as a prerequisite is mentioned for example in the *Fisheries*, *Temple*, *North Sea Continental Shelf*, *Gulf of Maine*, and *Land, Island and Maritime Frontier Dispute* cases. If the alleged acquiescing (recognising) acts are consistent over some period of time, their meaning is clearer than if they consisted of only one isolated act. Moreover, if they are consistent with practice on the ground, again their meaning is much clearer than in the opposite situation. Finally, if there is a consistent pattern of acts in both higher and lower echelons, and central and local organs, the claim of acquiescence (recognition) is more easily accepted.

4.3.2 Estoppel

Acquiescence and recognition must apparently be distinguished from estoppel. In the *Gulf of Maine* case, the Chamber acknowledged that "*the same facts are relevant to both acquiescence and estoppel*."[153] The difficulty in effecting the distinction is due to the fact that, as mentioned *supra* citing Brownlie, these are overlapping concepts which "*form an interrelated subject-matter*", thus being "*far from easy to establish the points of distinction*."[154]

The most common view amongst authors seems to be that acquiescence does not always "*become tantamount to an estoppel*",[155] and that "*it is by no means clear that recognition always work an estoppel*."[156] Although this seems the most generally accepted view, some authors affirm that explicit or implicit recognition will deprive the recognising state of the right of arguing subsequently the invalidity and/or illegality of the recognised acts. That seems to be the conclusion drawn by Schwarzenberger when affirming that "*recognition estops the state which has recognised the title from contesting its validity at any future time*."[157]

150 Amongst others Fitzmaurice, 1957: 34; Müller and Cottier, 1992: 15; MacGibbon, 1956: 173-182).
151 Fitzmaurice, 1957: 32-42.
152 *ICJ Reports 1951*: 138.
153 *ICJ Reports 1984*: 305, para.130.
154 Brownlie, 1998: 158.
155 Bowett, 1958: 200, 201.
156 Jennings, 1963: 44.
157 Schwarzenberger, 1957: 316.

In this author's opinion, it may be said that while acquiescence and recognition are expressions of consent, estoppel may be generated without the existence of any manifestation of consent.[158] Although both acquiescence and recognition may lead to consequences similar to those of estoppel, this is not always necessarily true. Whereas the (potentially) acquiescing (recognising) state may, by proof of the contrary, quash any claim affirming that it had already given its consent (presumption *juris tantum*), estoppel turns the interpretation of a conduct into a "*presumption juris et de jure*", which may not be rebutted. The latter may be regarded as an "*anti-inconsistency rule*" the legal effects of which "*are so fundamental that […they] decide by themselves alone the matter in dispute*." What is a mere interpretation of a fact, becomes a "*legal fact*."[159] As a result of these substantive differences, the requirements of reliance and detriment have always to be verified for estoppel to operate.

Various cumulative requirements are put forward by the jurisprudence as essential for estoppel to arise (regardless of any actual existence of consent).[160] To begin with, there must have been a relevant conduct which may be imputed to a state, and that has been freely adopted by it. The requirements for that conduct to be relevant are, in terms of provenance and publicity, similar to those aforementioned to acquiescence and recognition. "*[D]uress or fraud of any material kind will nullify the plea of estoppel*." A parallel situation occurs if "*the conduct of the party lacks a voluntary character by reason of that party's inability to act otherwise. Where a representation is made conditionally […] it cannot create a binding estoppel.*" The non-existence of an express or implied authority of the person making the statement or representation will also turn the statement or representation unreliable. In other words, the "*representation must be voluntary, unconditional and authorised*."[161]

Then, that relevant conduct has to unambiguously and consistently induce the idea of acceptance or assertion in relation to a situation of right or of fact. The element of consistency should be seen, again, in the same terms as in relation to acquiescence and recognition. Importantly, it depends upon the appraisal of the factual circumstances. For example, the *Temple* case judgement and the Dissenting Opinions formulated therein illustrate how different that appraisal can be. As mentioned above, the elements of time during which the conduct is maintained, consistency, and clearness and unambiguity of the conduct, are absolutely crucial.

Furthermore, the state invoking the estoppel must have dealt with that conduct as if it was an actual fact. In this respect, it must be noted that an assessment in relation to any acceptance of a claim or assertion is to be made in the perspective of the invoking state, acting in good faith. It is this subjective view of the *status quo*, regardless of how true and accurate it really is, that has to be considered. One must never forget that estoppel may even prevent "*the assertion, [by the state against which it is raised], of what might in fact be true*."[162]

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158 "*The real field of operation…of estoppel…is where it is possible that the party concerned did not give the undertaking or accept the obligation in question (or there is room for doubt whether it did), but where that party's subsequent conduct has been such, and has had such consequences, that it cannot be allowed to deny the existence of an undertaking, or that it is bound*" (Judge Fitzmaurice's Separate Opinion in the *Temple* case, *ICJ Reports 1962*: 63).

159 Separate Opinion of Vice-President Alfaro in the *Temple* case (*ICJ Reports 1962*: 41, 51).

160 The *North Sea Continental Shelf* case is the main source of reference (*ICJ Reports 1969*: 27, para.30). Also the Separate Opinion of Judge Fitzmaurice and the Dissenting Opinions of Judges Koo and Spender in the *Temple* case (*ICJ Reports 1962*: 63, 97, 131). See Bowett, 1958: 188-194, 202; Brownlie, 1998: 645-647; Thirlway, 1990: 36-44.

161 Bowett, 1958: 188-191.

162 Müller, 1995: 116; Jennings, 1963: 42.

More importantly, the invoking state must have relied, in good faith, in that assumption of facts, and have been misled thereby. Moreover, if it is possible for the invoking state to perceive (by other facts which actually occurred or by conduct of the state against which estoppel is claimed) that the conduct did not convey any acceptance or assertion, then the principle of estoppel will not operate.

Finally, for estoppel to produce its effects, the change of the assumed fact has to cause some detriment to the relying state and/or some benefit to the other state.[163] There should be no possibility of invoking estoppel in situations where there is no prejudice to the relying state, and/or advantage to the state whose conduct was relied upon. The rationale for this requirement is that, since estoppel may be raised against what may actually be the *truth*, it has to be restricted to the cases where reinstating that *truth* would result in an actual damage to the invoking state or an unacceptable benefit to the other state. This prerequisite was remarked, amongst others, in the *Grisbadarna* arbitration, and the *Temple*, the *North Sea Continental Shelf* and the *Gulf of Maine* cases.

According to this perspective, not all acquiescing or recognising conducts will amount to estoppel. For while the former can be rebutted by proof to the contrary, the latter cannot. Importantly, emphasis has consistently been put by jurisprudence on two points. First, the legal conduct of the invoking state must have been conditioned by its reliance on the *assumed fact*. Secondly, the subsequent alteration of the *assumed fact* must cause some prejudice to the relying state, and/or some benefit to the other state. In these terms, the concept of estoppel is clearly derived from the need "*for some measure of predictability in the pattern of state conduct*", and "*its essential aim is to preclude a party from benefiting by his own inconsistency*."[164]

4.4 The Dangers of an Intemperate Application

The operativity of acquiescence, recognition and estoppel is not exempt from difficulties, due to the peculiarities that characterise such concepts. Firstly, these notions overlap to some degree, and this may blur any analysis. Secondly, their application depends very much upon the interpretation of factual circumstances, which may be assessed somewhat subjectively. Thirdly, considerable emphasis is put on inaction and protest as part of state conduct, rather than on objective and clear conducts.

Munkman notes that "*reliance on unilateral acts of recognition and acquiescence as precluding a party from contesting a claim can appear notably unjust*."[165] This author stresses that, for instance, the *Temple* and the *Arbitral Award* cases "*are not above criticism*." In relation to the *Temple* case, she remarks that a "*relatively weak state*" may not want "*to antagonise a powerful neighbour*." This perspective is also put forward by Bebler in his

163 As Müller and Cottier, 1995: 117, affirm that "*[c]lear and unequivocal representation, prejudice and detriment are not simply addenda; they trigger the very justification for specific protection of settled expectations*."

164 Jennings, 1963: 41-42; Bowett, 1958: 176-180; Müller and Cottier, 1995: 116; MacGibbon, 1958: 469; Sinclair, 1996: 104-105; Sharma, 1997: 210.

165 Munkman, 1975: 96. This view was referred to by Judges Spender (p.146) and Koo (pp.96-97) in their Dissenting Opinions in the *Temple* case.

dissenting opinion in the *Rann of Kutch* arbitration. In relation to the *Arbitral Award* case, the criticism is aimed at the failure of protesting the award for a period that may be seen as "*relatively short*" (less than six years).

Interpreting in juridical terms *silent* or *tacit conducts* will always bear a considerable degree of subjectivity. As highlighted before, since estoppel is a presumption *juris et de jure*, it does not admit proof to the contrary. Thus, its consequences cannot be treated lightly. On the other hand, the practical effects of acquiescence and recognition are similar to that of estoppel. For this reason, the burden of proof must lie totally on the party invoking them. In this light, it seems clear that the existence of acquiescence, recognition and estoppel as a result of state conduct must always be carefully assessed. They must be seen as no more than one type of considerations that have to be addressed by courts in territorial and boundary disputes. Most importantly, estoppel should not be presumed as an immediate consequence of acquiescence and recognition.

Various reasons can be pointed out to support this view. First, in international law the interpretation, manifestations, character and scope of these juridical concepts are not absolutely precise and clear.[166] Secondly, within the complex context of territorial and boundary disputes, it may not be easy to reconcile the role of acquiescence, recognition and estoppel with other relevant aspects of international law such as the rules of acquisition of title to territory, the principle of self-determination, treaty law or the rules of state succession. Finally, although the requirements of reliance and detriment seem not to exist in acquiescence and recognition, the practical preclusive effect of these notions is similar to that of estoppel. Thus, taken together these arguments seem to uphold the view that restrictive interpretations of the application of acquiescence, recognition and estoppel should be favoured. Indeed, the ICJ seems to be completely aware of the dangers of an intemperate application of these concepts. A restrictive application of estoppel, based on the above-mentioned elements, appears to have been a safe trend.[167]

5. Conclusions

Acquiescence, recognition and estoppel are juridical concepts that stem from the principle that *allegan contraria non est audiendus*. Indisputably, they play an important part in territorial and boundary dispute settlement. The circumstances where they may have a key relevance are usually related to situations such as:

(a) areas where title to territory or the location of boundaries is disputed;
(b) existence of error in the delimitation of a boundary;
(c) misplacement of an agreed boundary;

166 Brownlie, 1998: 645-646. Separate Opinion of Vice-president Alfaro in the *Temple* case, *ICJ Reports 1962*: 39-51.

167 In the *North Sea Continental Shelf* cases, the Court stated, referring to the Danish and Dutch claim of acceptance of the equidistance principle by Germany: "*The dangers of the doctrine here advanced by Denmark and the Netherlands, if it had to be given general application in the international law field, hardly need stressing*" (*ICJ Reports 1969*: 28, para.33). It was in this case that the Court defined the comprehensive prerequisites conditioning a claim of estoppel.

(d) adverse possession of land or maritime areas, either against another state or against the international community as a whole;
(e) transfer of title over a certain territory;
(f) situations where title is claimed but not possessed;
(g) interpretation of treaties concerning transfer of territory or boundaries; and,
(h) interpretation and application of the *uti possidetis juris* principle.

On a general scale, international tribunals never brush these arguments aside *in limine*. Their consideration within the *overall picture* of the dispute has been a trend independent of the geographical location of the dispute. Furthermore, because these concepts may be of utmost relevance to the doctrine of stability and finality of boundaries and territorial regimes, they can never be disregarded lightly.[168] As a result, not only must their weight in the litigation strategy of states be carefully assessed, but their consideration in the decision-making process of tribunals should also be expected:

> *Practitioners in international law, particularly those involved as counsel in long-standing territorial disputes, are aware that arguments founded on notions of estoppel, [recognition] and acquiescence figure prominently in the armour of weapons at their disposal*.[169]

The stability and predictability promoted by the application of these juridical concepts must nonetheless be considered in contrast with the difficulties that may arise therefrom. As shown, there is wide room for subjective interpretation of the factual circumstances from which they are derived. Assessing the relevant evidence thus becomes crucial.[170] The restraint and caution of international tribunals (particularly the ICJ) in their use is, however, a token of the conscientious and refining elaboration that is underway.[171]

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168 Kaikobdad, 1984: 122.

169 Sinclair, 1996: 104. "*[R]ecognition and […] acquiescence are almost always prima facie relevant considerations, and factors to be taken into consideration by any international tribunal faced with the dispute over territorial sovereignty*" or boundary location (Jennings, 1963: 40).

170 "*Where there is no evidence, the claims of acquiescence and recognition will remain inconclusive and disproved. In other words, each situation…has to be examined individually with due consideration of all the facts regarding it…*" (Kaikobad, 1984: 126).

171 One trend seems to deserve some thought. In all decisions concerning maritime boundary delimitation between states, the ICJ never accepted claims of *de facto* boundary lines based on acquiescence, recognition or estoppel. See the *North Sea Continental Shelf* cases (*ICJ Reports 1969*: 26-28, paras.27-33); *Tunisia-Libya Continental Shelf* case (*ICJ Reports 1982*: 69-71, paras.92-95); *Gulf of Maine* case (*ICJ Reports 1984*:303-312, paras.126-154); *Jan Mayen* case (*ICJ Reports 1993*: 53-56, paras.33-409). The only maritime boundary adjudication where these juridical concepts seem to have played a decisive role was the *Grisbadarna* arbitration.

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Abbreviations

AJIL	American Journal of International Law
ICJ	International Court of Justice
ICJ Reports	International Court of Justice: Reports of Judgements, Advisory Opinions and Orders
ILM	International Law Reports
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RIAA	Reports of International Arbitral Awards
WCR	World Court Reports

Glossary of Legal Terminology

à titre de souverain	– an act "à titre de souverain" is an act performed by a state acting as a sovereign entity, that is, it is an expression of the sovereignty of a state.
ad idem	– of the same mind, agreed.
allegan contraria non est audiendus	– he who makes statements mutually inconsistent is not to be listened to.
conditio sine qua non	– condition that is essential to a certain event or fact; for a certain event or fact to happen or to be valid the condition has to be verified.
excès de pouvoir	– in literal terms means "excess of power"; expression usually used to refer to a decision in which the decision-making body exceeded the powers conferred upon it.
in concreto	– in actual terms, that is taking into account the actual circumstances of a certain case or situation.
in limine	– preliminary; used for example to describe an objection or pleading.
juris et de jure presumption	– presumption that may not be rebutted by proof to the contrary.
juris tantum presumption	– presumption that may be rebutted by proof to the contrary.
mutatis mutandis	– with the necessary changes in points of detail.
sanctio juris	– juridical sanction; legal sanction.
stricto sensu	– in a strict sense, or in the strictest of the various possible meanings.
terra nullius	– land territory over which there is no sovereign, that is, title over such territory is not vested in any state (or in any similar political entity capable of exercising sovereignty).