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Thank you.



Options for boundary settlement when negotiations break down



Martin Pratt

bordermap consulting

Geographical intelligence for international
boundary-making and dispute resolution

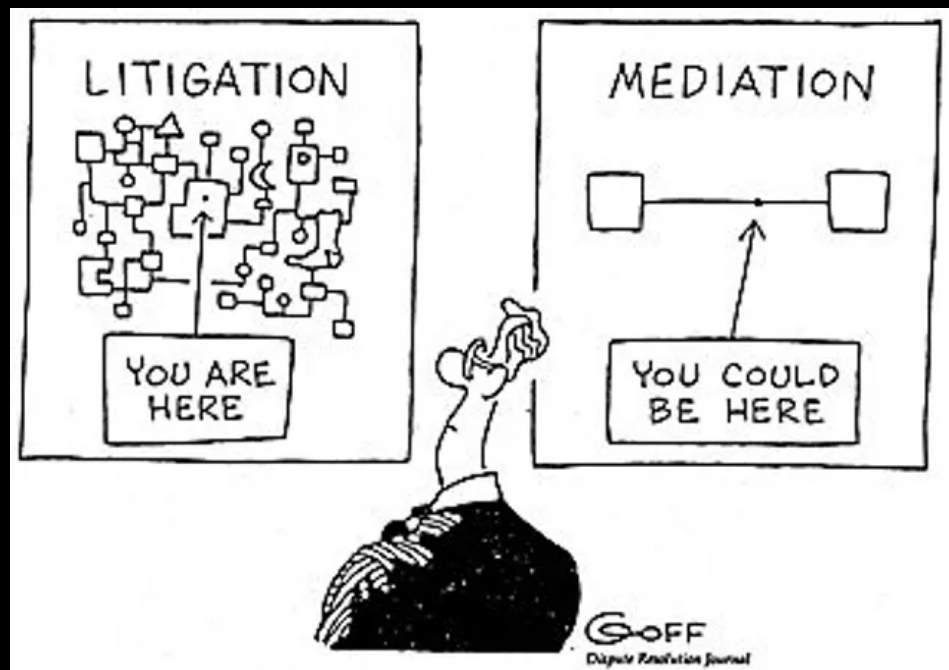
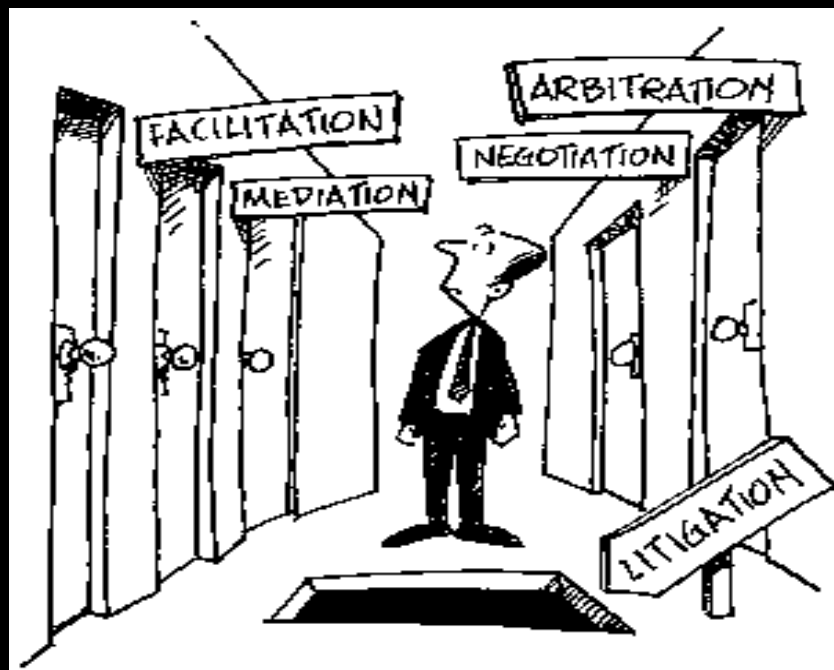
The UN Charter and dispute resolution

Article 2

All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Article 33(1)

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by **negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.**

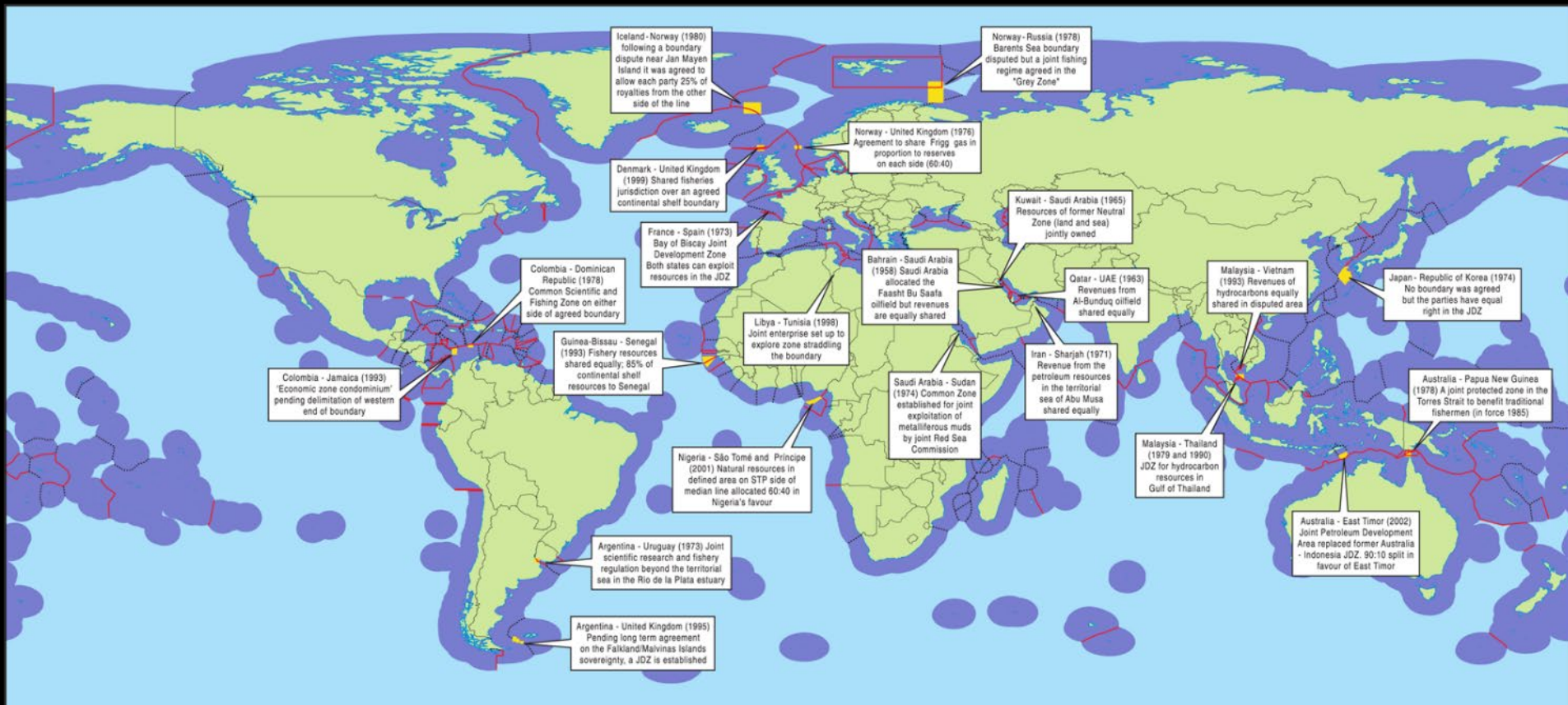


EEZ / continental shelf delimitation

UNCLOS Articles 74 & 83

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in **Part XV**.
3. Pending agreement ... the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into **provisional arrangements of a practical nature** and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

Joint development zones around the world



Provisional arrangements in lieu of delimitation

- **Kuwait-Saudi Arabia** in the Gulf (1965)
- **Japan-South Korea** in the Sea of Japan (1974)
- **Sudan-Saudi Arabia** in the Red Sea (1974)
- **Australia-Indonesia** in the Timor Sea (Timor Gap) (1989)
- **Malaysia-Thailand** in the Gulf of Thailand (1990)
- **Malaysia-Vietnam** in the Gulf of Thailand (1993)
- **Nigeria-São Tomé & Príncipe** in the Gulf of Guinea (2001)
- **Australia-Timor Leste** in the Timor Sea (2002, 2006)
- **Barbados-Guyana** in the western Atlantic (2003)
- **China-Japan** in the East China Sea (2008)

Joint zones as an addition to delimitation

- Bahrain-Saudi Arabia in the Gulf (signed 1958)
- Qatar-UAE (Abu Dhabi) in the Gulf (1969)
- France-Spain in the Bay of Biscay (1974)
- Colombia-Dominican Republic in the Caribbean (1978)
- Australia-Papua New Guinea in the Torres Strait (1978)
- Iceland-Norway in the North Atlantic (1981)
- Faroes-UK in the North Atlantic (1999)
- Kuwait-Saudi Arabia in the Gulf (2000)
- Australia-Timor Leste in the Timor Sea (2018)

Bahrain-Saudi Arabia



Settlement of disputes under UNCLOS

Part XV and related annexes

- Part XV Settlement of disputes
- Annex V Conciliation
- Annex VI ITLOS statute
- Annex VII Arbitration
- Annex VIII Special arbitration

UNCLOS Part XV

General

- Procedures provided for in Part XV do not apply where parties to a dispute have agreed to seek settlement by a peaceful means of their own choice unless no settlement has been reached (Article 281).
- Where a dispute arises, the parties are obliged to exchange views regarding its settlement (Article 283).

UNCLOS Part XV

Conciliation

- A State Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, section 1, or another conciliation procedure (Article 284).
- The invitation to conciliation does not have to be accepted.

UNCLOS Part XV

Compulsory procedures entailing binding decisions

- “Any dispute concerning the interpretation or application of UNCLOS shall, where no settlement has been reached ... be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this Section” (Article 286).

UNCLOS Part XV

Compulsory procedures entailing binding decisions

- States may make choice of procedure upon ratification of UNCLOS (Article 287):
 - International Tribunal for the Law of the Sea (ITLOS)
 - International Court of Justice (ICJ)
 - Arbitration under Annex VII
 - Special arbitral tribunal under Annex VIII*

UNCLOS Part XV

Compulsory dispute resolution: exceptions

- Fundamental requirement of consent.
- Such consent will be absent where:
 - one (or both) of the negotiating States is not an UNCLOS party.
 - the negotiating States have agreed to seek settlement of their dispute by a means of their own choice (Article 280).
 - one (or both) of the negotiating States has made a declaration under Article 298(1) of UNCLOS that it does not accept the applicability of Section 2 with regard to certain types of dispute (including boundary delimitation).

UNCLOS Part XV

Compulsory dispute resolution: exceptions

- Even if a State has made a declaration under Article 298(1)(a)(i), if a dispute arises subsequent to the entry into force of the Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, the State which has made the declaration shall, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2.

Any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission.

- After the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree.

UNCLOS Part XV

Implications and considerations

- States involved in an ongoing dispute need to be aware of the possibility of having to defend proceedings brought under Part XV (and evaluate the pros and cons of making an Article 298 declaration)
- States contemplating submission of a maritime boundary dispute to binding dispute resolution under Part XV should:
 - avoid premature unilateral submission where negotiations have not lasted a “reasonable time”
 - be aware of the risk of an Article 298 declaration by the neighbouring state (i.e. don’t wait too long)
 - identify the likely forum
 - ensure that they are well prepared

Other forms of consent to third-party adjudication

- ICJ Statute Article 36(2) ('Optional Clause')
- Regional treaties
e.g. American Treaty on Pacific Settlement ('Pact of Bogotá')

Non-binding methods of dispute resolution

- Mediation
- Conciliation
- Track-two diplomacy

Mediation

A confidential and consensual process in which an impartial person or body helps parties in dispute to settle their differences, i.e. facilitated negotiation.

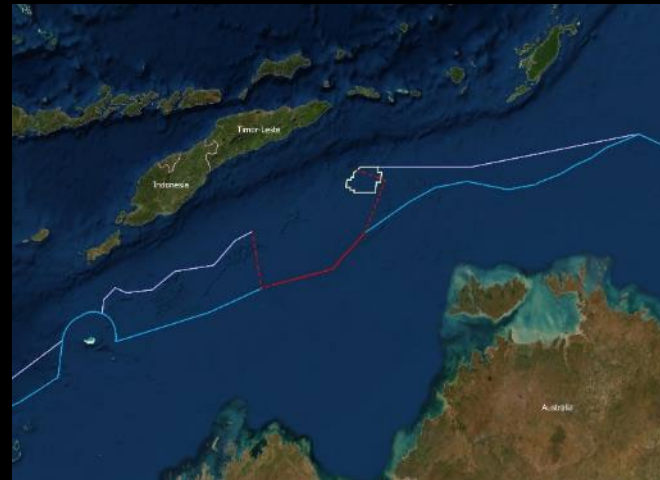
- Argentina-Chile: Beagle Channel – the Pope
- Equatorial Guinea-Gabon: islands in Corisco Bay – UN
- Guyana-Venezuela – UN



Conciliation

A formalised form of mediation involving the establishment of a joint commission to examine the evidence and define recommended terms for settlement.

- Iceland-Norway Conciliation Commission (1980)
- Belize-Guatemala (2000-02) – Panel of Facilitators
- Australia-Timor Leste Conciliation Commission (2016-18)
(UNCLOS Annex V conciliation)



Track II diplomacy

Track I

Official government-to-government diplomatic interaction.

Track II

Unofficial, non-governmental, analytical, policy-oriented, problem-solving efforts by skilled, educated, experienced and informed private citizens interacting with other private citizens.

- Geneva Accords (Israel-Palestine)
(<http://www.geneva-accord.org>)
- ‘Managing Potential Conflicts in the South China Sea’

Fora for binding third-party dispute settlement

- International Court of Justice
- International Tribunal for the Law of the Sea
- Arbitration
 - *ad hoc* arbitration
 - UNCLOS Annex VII arbitration



Maritime delimitation cases

ICJ cases

Gabon/Equatorial Guinea (L, M, S) #
Guatemala/Belize (L, M, S) #
Nicaragua v. Colombia (M) #
Somalia v. Kenya (M) 2021
Costa Rica v. Nicaragua (M) 2018
Peru v. Chile (M) 2014
Nicaragua v. Colombia (M, S) 2012, 2022
Romania v. Ukraine (M) 2009
Nicaragua v. Honduras (M, S) 2007
Cameroon v. Nigeria (L, M, S) 2002
Qatar v. Bahrain (M, S) 2001
Denmark v. Norway (M) 1993
El Salvador/Honduras (L,M,S) 1992
Libya/Malta (M) 1985
Canada/USA (M) 1984
Tunisia/Libya (M) 1982
Germany/Denmark/Netherlands (M) 1969

ITLOS cases

Mauritius/Maldives (M) #
Ghana/Côte d'Ivoire (M) 2017
Bangladesh/Myanmar (M) 2012

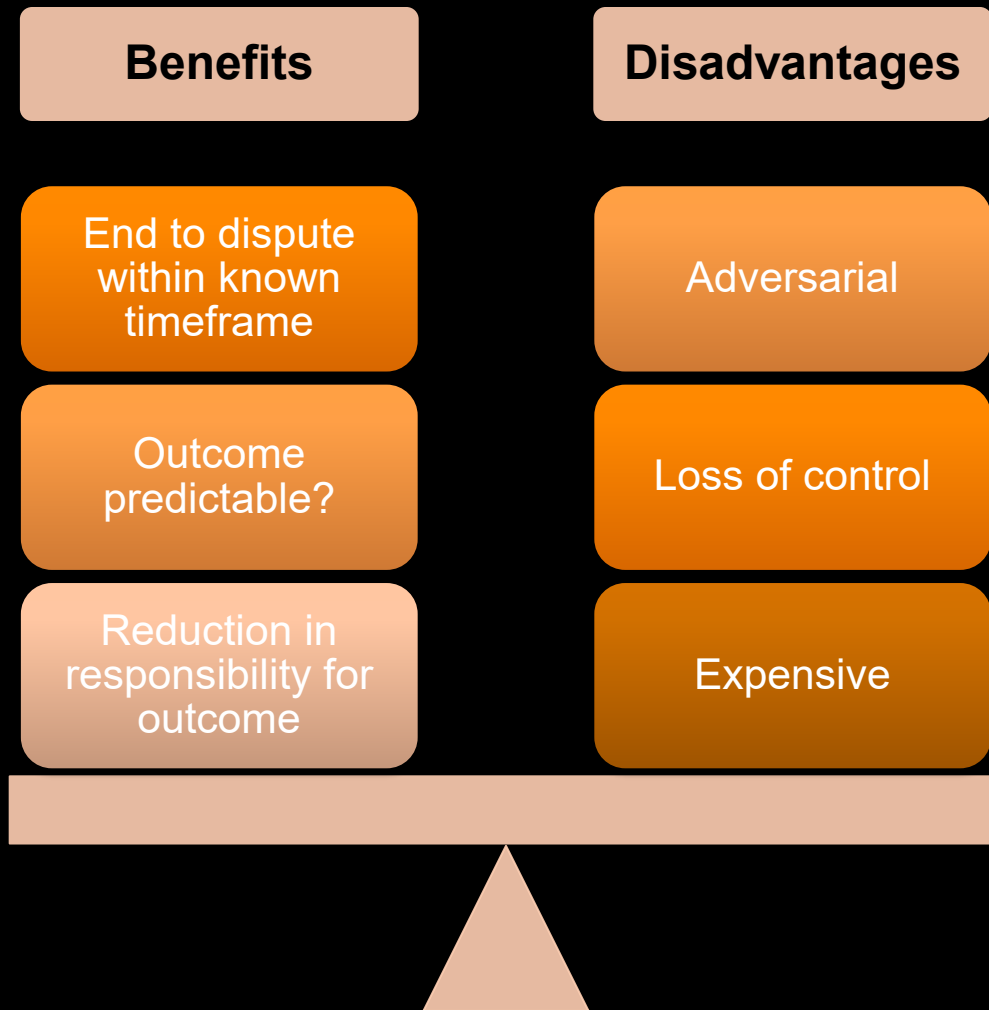
Arbitrations

Croatia-Slovenia (L, M) 2017
Bangladesh-India (M)* 2014
Guyana-Suriname (M)* 2007
Barbados-Trinidad and Tobago (M)* 2006
Eritrea-Yemen (S, M) 1999
Canada-France (M) 1992
Guinea-Guinea Bissau (M) 1985
France-UK (M) 1977
Newfoundland/Labrador-Nova Scotia (M) 2002
Dubai-Sharjah (M) 1981

Third-party adjudication compared

	ICJ	ITLOS	Arbitration
Location	The Hague	Hamburg	Anywhere
Judges	15 judges elected by UN General Assembly Chamber (3+ judges) option available	21 judges elected by UNCLOS States Parties Maritime Delimitation Disputes Chamber (8 judges)	Judges appointed by parties
Rules and procedures	Statute + Rules	Statute (UNCLOS Annex VI) + Rules	Defined by parties and/or UNCLOS Annex VII
Confidentiality	Written pleadings published at start of oral hearings; oral pleadings generally open to public	Written pleadings published at start of oral hearings; oral pleadings generally open to public	Pleadings and judgment may remain confidential
Costs	Venue and Registry paid for; trust fund available	Venue and Registry paid for; trust fund available	All costs borne by parties
Potential weaknesses	Slow proceedings Poor track record in use of experts and technical aspects of boundary delimitation	Limited track record in maritime delimitation Unable to address maritime boundary disputes in which territorial sovereignty is also disputed?	Cost and administrative overheads May be difficult to agree on judges / rules / procedures No enforcement mechanism?

Benefits and disadvantages of adjudication



Judicial delimitation today: a three-stage process?

1. Construct a provisional equidistance line.
2. Consider whether any relevant circumstances justify adjustment of the provisional equidistance line to produce an equitable solution.
3. Confirm that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.

Potentially relevant circumstances in determining an equitable solution

- Historic rights
- The previous conduct of the parties
- Socio-economic factors
- Security interests
- Environmental factors
- Geology and geomorphology
- Coastal geography

Coastal geography

- Coastal configuration (concavity, convexity etc.)
- Relevant coastline length
- Location and status of offshore islands and low-tide elevations

“In virtually all situations
coastal geography is primary”

Jonathan Charney, Introduction to *International Maritime Boundaries*

Coastal configuration / cut-off as a relevant circumstance

North Sea

Bangladesh/Myanmar

Bangladesh-India

Somalia v. Kenya

Cameroon v. Nigeria

Barbados-Trinidad and Tobago

Ghana/Côte d'Ivoire

Relevant coastline length disparity as a relevant circumstance

(Canada/USA: 1.32 : 1)

Libya/Malta: 8 : 1

Denmark v. Norway: 9 : 1

Barbados-Trinidad and Tobago: > 7 : 1

Nicaragua v. Colombia: 8.2 : 1

Romania v. Ukraine : 2.8 : 1

Ghana/Côte d'Ivoire: 2.5 : 1

Islands in maritime delimitation

Islands as the main unit of entitlement given reduced effect because of a significant disparity in coastline length:

- Libya/Malta: **Malta**
- Denmark v. Norway: **Jan Mayen**
- Barbados v. Trinidad and Tobago: **Barbados**
- Nicaragua v. Colombia: **San Andrés and Providencia**

Islands in maritime delimitation

Islands given reduced or no effect because of otherwise inequitable influence on the delimitation line:

- France/UK: Scilly Islands
- Tunisia/Libya: Djerba, Kerkennah Islands
- Libya/Malta: Filfla*
- Eritrea/Yemen: Jabal al-Tayr, Zubayr Islands
- Qatar v. Bahrain: Qit'at Jaradah
- Newfoundland/Labrador-Nova Scotia: Sable Island
- Romania v. Ukraine: Serpents' Island
- Bangladesh/Myanmar: St Martin's Island
- Nicaragua v. Colombia: Quitasueno*, Serrana
- Costa Rica v. Nicaragua: Corn Islands

* Considered to be a rock

Previous conduct: oil and gas

- **Tunisia/Libya:** oil practice created a *de facto* maritime boundary, which was considered a relevant circumstance. Where oil blocks were aligned, the boundary followed the block boundaries.
- **Cameroon v. Nigeria:** oil concessions and oil wells are not in themselves to be considered as relevant circumstances. Oil and gas practice should only be taken into account if it is based on express or tacit agreement.
- **Ghana-Côte d'Ivoire:** oil practice, no matter how consistent it may be, cannot in itself establish the existence of a tacit agreement on a maritime boundary.

Socio-economic factors

- Potentially significant if they are likely to be “catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned”.

Gulf of Maine

Barbados/Trinidad and Tobago

Somalia v. Kenya

- Access to fisheries:

Denmark v. Norway

Trends in the judicial selection of basepoints for the provisional equidistance line

- All basepoints will probably be located on coastal features
 - straight / archipelagic baselines will probably be ignored
- Prominent man-made features will probably be ignored
- Low-tide elevations will probably be ignored
- Larger islands may be ignored
- Judges may surprise you with their choice of basepoints!

Thank you!



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