The International Court of Justice and the Law of the Sea*

La Corte Internacional de Justicia y el derecho del mar

Bernardo **Sepúlveda Amor****

A la memoria de Jorge Castañeda Alvarez de la Rosa, Canciller ejemplar, innovador del derecho del mar, amigo inolvidable.

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RESUMEN: El propósito de este ensayo es examinar la contribución de la Corte Internacional de Justicia en el desarrollo del derecho del mar. La jurisprudencia de dicha Corte sobre la delimitación marítima ha tenido un impacto importante en la clarificación de los principios y normas de delimitación, así como en la unificación de sus normas. El artículo examina esta jurisprudencia y subraya la importancia que tuvo en la creación del moderno derecho del mar. El autor presta especial atención a la evolución reciente del derecho del mar a través de los casos de Nicaragua contra Honduras, Nicaragua contra Colombia, Malasia contra Singapur y Rumania contra Ucrania. Esta visión general de la jurisprudencia del Tribunal de Justicia en el Derecho del Mar ilustra la continua importancia de la Corte en la solución de las controversias marítimas, lo que refleja el carácter verdaderamente universal de la jurisdicción de la Corte.
Palabras clave: Derecho del mar, delimitación marítima, Corte Internacional de Justicia, Convención de Derecho del Mar.

ABSTRACT: The purpose of this essay is to examine the contribution of the International Court of Justice to the development of the law of the sea. The ICJ's case-law on maritime delimitation has had a major impact on the clarification of the principles and rules of delimitation, as well as on the unification of the rules concerning the delimitation of all the maritime zones, the article examines this case law and remarks the importance it had in the creation of modern law of the sea. The author pays special attention to the recent developments in law of the sea through the cases Nicaragua v. Honduras, Nicaragua v. Colombia, Malaysia v. Singapore and Romania v. Ukraine. This overview of the Court's jurisprudence in the law of the sea illustrates the Court's continuing importance in the settlement of maritime disputes involving States, reflecting the truly universal character of the Court's jurisdiction.
***Descriptors**: Law of the Sea, Maritime Delimitation, International Court of Justice, Convention on the Law of the Sea.*

RÉSUMÉ: Le but de cet essai est d'examiner la contribution de la Cour Internationale de Justice dans le développement du droit de la mer. La jurisprudence de la Cour Internationale de Justice sur les frontières maritimes a eu un impact majeur sur la clarification des principes et des règles de délimitation, ainsi que l'unification de leurs normes. L'article examine cette affaire et souligne l'importance qu'il avait dans la création du droit moderne de la mer. L'auteur accorde une attention particulière à l'évolution récente du droit de la mer à travers le cas du Nicaragua contre Honduras, Nicaragua contre Colombie, la Malaisie contre Singapour et de la Roumanie contre l'Ukraine. Cet aperçu de la jurisprudence de la Cour de justice dans le droit de la mer illustre l'importance continue de la Cour pour trancher les différends maritimes, ce qui reflète le caractère véritablement universel de la compétence de la Cour.
***Mots-Clés**: Droit de la mer, la délimitation maritime, la Cour Internationale de Justice, Convention sur le Droit de la Mer.*

I. Introduction

The purpose of this essay is to examine the contribution of the International Court of Justice to the development of the law of the sea. It is not intended to be an exhaustive overview of the Court's jurisprudence, but rather a *tour d'horizon* of the most important decisions related to law of the sea issues. The Court's judgments have undoubtedly played a crucial role in the process of codification and progressive development of certain fundamental rules and principles of the law of the sea, which are today mainly embodied in the 1982 *United Nations Convention on the Law of the Sea*. The Convention provides a comprehensive legal regime for the use of the world's largest resource, including regulation of use, assignment of maritime zones, and the provision of compulsory dispute settlement procedures. It is especially the modern law of maritime delimitation which has been forged to a large extent through a series of legal decisions —emanating not only from the International Court of Justice, but also from a number of arbitral tribunals— beginning with the *North Sea Continental Shelf* cases, which contributed to the subsequent evolution of the continental shelf regime in international law.

Concerns that the proliferation of international tribunals might produce substantial inconsistencies and fragmentation have not materialized. On the contrary, the decisions of the International Court of Justice and the International Tribunal for the Law of the Sea (ITLOS) are serving the common goal of a mutually reinforcing corpus of international law in the settlement of international maritime disputes.[1] Over

[1] The scopes of jurisdiction *ratione personae* and *ratione materiae* of the International Court of Justice and the ITLOS are differentiated: While only States can appear before the Court in contentious cases, the Tribunal is open to various non-state actors, the Seabed Chamber having an even broader range of potential parties. As regards jurisdiction *ratione materiae,* the jurisdiction of the International Court of Justice is both wider and narrower than that of the Tribunal: on the one hand, the International Court of Justice is the only international body to possess general subject-matter jurisdiction; on the other hand, several categories of cases in the law of the sea can be brought to the Tribunal but not to the International Court of Justice, such as the cases referred to in Article 187, paras. *(b)* to *(e)* UNCLOS (involving cases between States Parties and the Seabed Authority), which are intended to be resolved by the Seabed Disputes Chamber. Further, even in cases where the International Court of Justice

the past thirteen years, the ITLOS has regularly referred to the Judgments of the International Court of Justice with respect to questions of international law and procedure. The International Court of Justice, for its part, has been following the Tribunal's work closely, especially its well-developed jurisprudence on provisional measures.

In general, it can be noted that a greater range of international legal fora means that more disputes are submitted to international judicial settlement, to the benefit of all parties concerned. It must be borne in mind that the Court enjoys a more general and comprehensive jurisdiction than specialized judicial bodies. That explains why cases involving the law of sea thus continue to come before the International Court of Justice, but they are rarely concerned with purely maritime issues. Over the last decade, the International Court has decided several cases where the question of territorial title was anterior to the issue of maritime delimitation, such as *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (2001) and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (2008).

In the last three years, the Court has also decided two cases concerning "pure" maritime delimitations: *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea* and *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*. In the Court's docket there is another "pure" delimitation case: the one concerning a maritime dispute between Peru and Chile. There is further a case on the Court's docket involving both territorial and maritime issues: *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* which is still pending on the merits, after the Court delivered its judgment on the preliminary objections raised by Colombia.

It is interesting to note that the very first cases heard by the Permanent Court of International Justice and the International Court of Justice involved the law of the sea: the *S.S.Wimbledon* case in 1923 and the *Corfu Channel* case in 1947. In the *Wimbledon* case, the Permanent Court declared that an artificial waterway used for international navigation between two parts of the high seas should be assimilated to an interna-

could have jurisdiction *ratione materiae,* the drafters of UNCLOS expressed preference for the Tribunal to handle disputes over the prompt release of vessels or the indication of provisional measures pending the constitution of an arbitral tribunal in Articles 290 and 292.

tional strait, where freedom of navigation exists even for warships of belligerent states.[2]

The definition of an international strait, and the right of innocent passage through such straits, was also at issue in the *Corfu Channel* case, where the United Kingdom had asserted its right of passage through international straits by sending a naval force through the Corfu Channel without complying with Albanian regulations requiring prior authorization. Albania claimed that its sovereignty had been violated by the passage, arguing that the Corfu Channel was not an international strait since it was used almost exclusively for local traffic and was only an alternative route between the Adriatic and the Aegean Seas.

The Court rejected this argument and held that "the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation". The Court established that, as a matter of customary law, warships —and hence, *a fortiori,* merchant ships— had a right of innocent passage through international straits, which could not be suspended by the coastal State.[3] This definition was subsequently incorporated into Article 16, para. 4, of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (which at the same time extended the right of innocent passage to straits connecting the high seas with the territorial sea of another State) and later in the relevant provisions of UNCLOS relating to straits used for international navigation (*inter alia* Articles 37 and 45,[4] extending the concept to straits connecting the exclusive economic zones of two States).

[2] *P.C.I.J. Series A, 1923, No. I,* p. 28.

[3] *I.C.J. Reports 1949,* p. 28: "It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace".

[4] Article 37 UNCLOS establishes the right of transit passage, which is broader than the right of innocent passage, on straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. The régime of innocent passage still applies to straits excluded from

In the *Corfu Channel* case, the Court further specified the criterion of "innocence"; it referred to the *manner* of passage as decisive element, holding that as long as the passage was conducted in a fashion which presented no threat to the coastal State it was to be regarded as innocent. This definition is reflected in Article 14, paragraph 4 of the Territorial Sea Convention, which provides that passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State, as well as in Article 19, paragraph 1 UNCLOS, which is couched in identical terms.[5]

The right of innocent passage was dealt with by the Court in a number of more recent cases. In the *Nicaragua* case, the Court held that the extension of the right of innocent passage in the territorial sea to voyages to or from internal waters in order to access ports was established in customary law, as codified in Article 18 *(b)* UNCLOS.[6] The customary nature of the right of innocent passage in the territorial sea was further confirmed in the Court's Judgment in the *Qatar* v. *Bahrain* case.[7]

II. The delimitation of maritime zones

It may well be that the most significant contribution of the International Court of Justice to the development of the law of the sea is the delimitation of maritime zones between opposite or adjacent States. The Court's case-law on maritime delimitation has had a major impact on the clarification of the principles and rules of delimitation, as well as on the unification of the rules concerning the delimitation of all the maritime zones.

the application of the regime of transit passage or straits between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State (Article 45).

[5] Paragraph 2 of the same provision specifies the type of activities that are considered to be prejudicial to the peace, good order or security of the coastal State.

[6] *I.C.J. Reports 1986,* p.1 11, para. 2 13.

[7] *I.C.J. Reports 2001,* para. 152 *(2) (b).*

In the *Anglo-Norwegian Fisheries* case (1951), the Court pronounced its famous *dictum* on the nature of maritime delimitation, emphasizing that delimitation of sea areas is always governed by international law:

> The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.[8]

In the same case, the Court introduced an important innovation to the previously predominant rules for the establishment of the breadth of the territorial sea, by recognising the validity, in international law, of the drawing of straight baselines for coasts deeply indented or fringed with islands. The Court noted that such straight baselines become "independent of the low water mark, and can only be determined by means of a geometric construction".[9] This decision was widely regarded as a piece of "judicial legislation", which led to the incorporation of the system of straight baselines in the Territorial Sea Convention (Art. 4) and in the UNCLOS (Art. 7).

Although it upheld the validity of straight baselines in international law, the Court made it clear that the coastal State does not have an unfettered discretion as to how it draws straight baselines; it laid down a number of conditions governing the drawing of such baselines. Notably, they shall "not depart to any appreciable extent from the general direction of the coast" and they must be drawn so that the "sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters".[10] These two conditions have been incorporated into Article 7, para. 3**,** UNCLOS, following *verbatim* the language of the Court's Judgment. The Convention further follows the Court's Judgment in providing that, in determining particular baselines, "account may be taken… of economic interests peculiar

[8] *I.C.J. Reports 1951*, p. 132..

[9] *I.C.J. Reports 1951*, p. 129.

[10] *I.C.J. Reports 1951*, p. 133.

to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.[11] Obviously, fishing is usually the most important economic interest at issue.

The validity of the system of straight baselines has been affirmed by the Court in subsequent cases; at the same time, the Court has made it clear that the method of straight baselines is an exception to the normal rules for the determination of baselines and must therefore be applied restrictively. In the *Qatar* v. *Bahrain* case, the Court concluded that Bahrain was not entitled to apply the method of straight baselines since certain maritime features off the coast could not be assimilated to fringe islands constituting a whole with the mainland.

III. Maritime delimitation: the equitable solution approach

A further milestone in the development of the law of maritime delimitation was the Court's Judgment in the *North Sea Continental Shelf* cases in 1969. The North Sea delimitation cases, opposing the German Federal Republic to Denmark and the Netherlands, touched upon a phenomenon which until then had never been explored in international jurisprudence, namely the continental shelf. For that reason, the Court went beyond the particular delimitation it was considering and established what can be called a continental shelf doctrine; it dealt with the physical description of the continental shelf, with the way in which, as a matter of law, it attaches to a coastal State and with its legal structure. Due to its far-reaching scope, this decision has been a fertile source of subsequent jurisprudence.

Most importantly, the Court defined the continental shelf as the "natural prolongation" of the coastal State's land territory into and under the sea:

> [T]he rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist

[11] Article 7, para. 5, UNCLOS; see also Article 4, para. 4, of the Territorial Sea Convention.

ipso facto and *ab initio* by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short there is here an inherent right.[12]

The idea that coastal States should enjoy certain rights over their continental shelves was generally accepted at that time, after a relatively short period of State practice following the famous Truman Proclamation in 1945. The 1958 Continental Shelf Convention provided that these rights should be "sovereign rights for the purpose of exploring and exploiting" the resources of the continental shelf (Art. 2). The Court recognized the customary character of the coastal States rights over their continental shelf (as codified in Articles 1 to 3 of the Continental Shelf Convention).[13] Although the law on the delimitation of the continental shelf has undergone a substantial evolution since the 1960's, the terms of the Court's definition can still be traced in Article 76 UNCLOS. The said provision has introduced the criterion of distance to complement the geological element of the continental shelf; areas of the sea bed which lie beyond the physical continental margin are included, so long as they are within 200 miles off the coast.

The *North Sea Continental Shelf* cases were also of fundamental importance as they enunciated for the first time the Court's concept of equity in international law:

> Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles". (*I.C.J. Reports 1969*, p. 48, para. 88.)

The Court was asked by the Parties to determine the principles and rules of international law applicable to the delimitation as between them of the areas of the continental shelf in the North Sea. It stated that such delimitation must be "effected in accordance with equitable prin-

[12] *I.C.J. Reports 1969*, p. 22.
[13] *I.C.J. Reports 1969*, p. 39.

ciples… taking into account all the relevant circumstances.[14] The Court thus dismissed the argument that the equidistance/special circumstances rule set out in Article 6, para. 2, of the Continental Shelf Convention had to be applied and equally rejected Germany's claim to a "just and equitable share". In relation to equity, the Court stressed that it was concerned with equity *infra legem* and not exercising an autonomous equity or a judicial discretion *ex aequo et bono*. It demonstrated that equidistance did, in certain geographical conditions lead to inequity (such as concavity or convexity of the coasts, or convergence and overlap between several continental shelves). Finally, the Court emphasized that the method of delimitation was subordinated to the goal to be attained, which is to provide an equitable solution, and that it was not necessary to confine oneself to a single method if a combination of several methods was a better guarantee of an equitable solution.[15]

The Court's decision influenced the debates at the Third United Nations Conference on the Law of the Sea, concerning both delimitation of the continental shelf and the exclusive economic zone between adjacent or opposite States. The concept of equitable principles established by the Court found reflection in the deliberately ambiguous provisions of Articles 74 and 83 of UNCLOS. So far as the exclusive economic zone is concerned, Article 74 *(1)* provides that delimitation "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". The same formula is employed in Article 83 *(1)* for the delimitation of the continental shelf.

The Court's departure from the equidistance/special circumstances rule created a certain amount of legal uncertainty and unpredictability in the law of maritime delimitation. This development was intensified in a number of subsequent decisions, notably in the *Tunisia/Libya* case in 1982, where the Court interpreted equity in the process of maritime delimitation as requiring first and foremost an equitable result. It emphasized that the goal of reaching an equitable result had to determine the means for achieving it and thereby reduced the degree of normati-

[14] *I.C.J. Reports 1969*, p. 53, para. 101.

[15] *I.C.J. Reports 1969*, pp. 49-50, paras. 88-92.

vity of applicable principles and rules to *a posteriori* reflection of equity depending on the facts of the particular case.[16] This reasoning was followed in the *Gulf of Maine* case, decided in 1984, where the Chamber held that "delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring… an equitable result".[17] The need for constant re-examination arose both from the complexity of geography and the specific features of each case. The evolution of the Court's jurisprudence on maritime delimitation thus reveals the difficult balancing of the polarity between normativity and predictability on the one hand and individualization of the law and equity of the particular case on the other.

In the 1985 *Libya/Malta* case, the previous approach, focusing exclusively on the equitable result, was abandoned in favour of a more balanced doctrine, characterized by the dual requirement of equitable principles and results, by equity anchored in law. The *Libya/Malta* case further contributed to the clarification of the legal concepts of the exclusive economic zone (EEZ) and the continental shelf: the Court found that the institution of the EEZ had become part of customary international law. In the light of the close interrelation between the legal regimes of the continental shelf and the EEZ, the Court moreover recognised that the distance criterion for the definition of the EEZ (200 nautical miles from the baselines used for the measurement of the territorial sea) equally applied to the continental shelf, the concepts of natural prolongation and distance being complementary.[18]

[16] *I.C.J. Reports 1982*, p. 59, para. 70: "The result of the application of equitable principles must be equitable… The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result".

[17] *I.C.J. Reports 1984*, p. 300, para. 112.

[18] *I.C.J. Reports 1985*, paras. 26-35, see particularly p. 33, para. 34: "This is not to suggest that the idea of natural prolongation is now superseded by that of distance. What it does mean is that where the continental margin does not extend as far as 200 miles from the shore, natural prolongation, which in spite of its physical origins has throughout its history become more and more a complex and juridical concept, is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. The concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf…".

IV. Maritime delimitation: the equidistance/special circumstances rule

Since 2001, the Court has moved back to the application of the equidistance/special circumstances rule enshrined in Article 6 of the Continental Shelf Convention, in a series of cases including *Qatar* v. *Bahrain* (2001), *Cameroon* v. *Nigeria* (2002) and *Romania* v. *Ukraine* (2009). Today, adjusted equidistance is thus firmly established in the Court's jurisprudence as the preferred method of delimitation for the EEZ and continental shelf as well as for territorial seas.

As regards the circumstances calling for an adjustment of the equidistance line in order to achieve an equitable result, no clear-cut criteria have been established in the Court's jurisprudence given that each case has its very specific characteristics. The Court has, on several occasions, decided not to take account of very small islands or not to give them their full potential entitlement to maritime zones, should such an approach have a disproportionate effect on the envisaged delimitation line. The Court has further consistently taken into consideration a marked disparity in the lengths of the coasts in order to avoid a disproportionate result.

Moreover, an important trend can be observed in the Court's recent jurisprudence towards the delimitation of a single maritime boundary involving all three maritime zones: the territorial sea, the continental shelf and the EEZ. Such a boundary is not provided for in UNCLOS or any other multilateral treaty; the Court is thus only empowered to draw such an all-purpose boundary when the Parties agree in requesting it -this occurred namely in the recent cases opposing Qatar and Bahrain (2001) and Nicaragua and Honduras (2007).

In the context of these cases, the Court seized the opportunity to contribute towards the unification of the rules of maritime delimitation by declaring the equidistance/special circumstances method to be applicable not only for purposes of continental shelf and EEZ delimitations but also for the delimitation of the territorial sea as set out in Article 15 UNCLOS.[19] In the *Qatar* v. *Bahrain* case, the Court confirmed

[19] Article 15 provides that the equidistance method should be used unless historic title or "special circumstances" apply.

the customary character of the "equidistance/special circumstances" rule embodied in the said provision (and Article 12, paragraph 1 of the Convention on the Territorial Sea and the Contiguous Zone), stating that the approach to be followed is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances constituted the most logical and widely practised approach (*I.C.J. Reports 2001*, p. 111, para. 230).

V. Other contributions

After this short overview of the Court's case-law in maritime delimitation, it is worth mentioning that the Court's jurisprudence has also contributed to the clarification of certain other questions of the law of the sea, such as the nationality of ships or the protection of the marine environment. To illustrate the point, the requirement of a "genuine link" for the ascription of nationality to ships in Article 5 of the High Seas convention[20] was strongly influenced by the Court's Judgment in the *Nottebohm* case delivered in 1955. In that decision, the Court held that where a State claimed to exercise diplomatic protection in respect of one of its nationals, nationality should be the legal reflection of a factual, a "genuine" link between the individual and the State. The transposition of the requirement of a "genuine link" to the nationality of ships has, regrettably, not been widely observed, as evidenced by the practice of so-called "flag of convenience" or "open registry" States. Nevertheless, the requirement of a "genuine link has bee incorporated into Article 91 UNCLOS.

In the field of environmental law, the Court has not been given, so far, the opportunity to decide specific questions related to the protec-

[20] Article 5 reads as follows: "Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag".

tion of the marine environment. It has, however, already in its early jurisprudence (namely in the *Corfu Channel* case), acknowledged the existence of "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" as a "well-recognised principle".[21] More recently, in its Advisory Opinion on the *Legality of Threat or Use of Nuclear Weapons,* the Court affirmed "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national jurisdiction" as being "part of the *corpus* of international law relating to the environment".[22] This principle has been codified in Article 194, para. 2, UNCLOS.[23]

The Court's finding was reaffirmed in 1997 in the *Gabčíkovo-Nagymaros Project (Hungary / Slovakia)* case[24] concerning a dispute between Hungary and Slovakia over the construction and operation of dams on the River Danube. In that decision, the Court further recognised the importance of the concept of sustainable development, involving the need to reconcile economic development with the protection of the environment; it also emphasized that States are under an obligation to give proper weight to recently developed standards and rules of environmental law, "not only when contemplating new activities but also when continuing with activities begun in the past".[25] These general obligations pro-

[21] *I.C.J. Reports 1949*, p. 22.

[22] *I.C.J. Reports 1996*, para. 29.

[23] Article 194, para. 2, reads as follows: "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention".

[24] *I.C.J. Reports 1997*, p. 41, para. 53.

[25] *I.C.J. Reports 1997*, p. 78, para. 140: "The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind —for present and future generations— of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades.

nounced by the Court may become important in future cases related to the protection of the marine environment.

VI. Recent developments

It will be useful to pay special attention to the most recent judgments rendered by the Court in the area of maritime delimitation, covering the period since February 2006.

1. *Nicaragua v. Honduras*

The first one is the Judgment in the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* issued in October 2007. Nicaragua asked the Court to determine the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras in the Caribbean Sea. While Nicaragua maintained that this maritime boundary had never been delimited, Honduras contended that there already existed a traditionally recognized *uti possidetis* boundary along the 15th parallel. Honduras argued in the alternative that the 15th parallel had been tacitly agreed between the parties to be their maritime boundary. During the oral proceedings, Nicaragua made a specific request that the Court pronounce on sovereignty over cays located in the disputed area to the north of the 15th parallel. Although the claim was formally a new one, the Court considered it to be admissible because it was inherent in the original claim. Since "the land dominates the sea", in order to plot the maritime boundary the Court would first have to determine which State has sovereignty over the islands and rocks in the disputed area.

Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".

In respect of sovereignty over the four cays, Honduras had relied on the principle of *uti possidetis juris* as the basis of sovereignty. The Court observed that *uti possidetis juris* may, in principle, apply to offshore possessions and maritime spaces *(Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992)*. It concluded, however, that in the present case, the Parties had neither provided evidence clearly showing whether the islands were attributed by the Spanish Crown to the colonial provinces of Nicaragua or of Honduras prior to or upon independence nor persuaded the Court of the existence of colonial *effectivités*. The Court thus found that it had not been established that either Honduras or Nicaragua had title to these islands by virtue of *uti possidetis*. After examining the evidence, the Court concluded that Honduras had sovereignty over the four islands on the basis of post-colonial *effectivités*.

As for the delimitation of the maritime areas between the two States, the Court considered Honduras's alternative arguments of *uti possidetis juris* and tacit agreement. The Court rejected the *uti possidetis* argument, finding that the 1906 Arbitral Award, which indeed was based on the *uti possidetis juris* principle, did not deal with the maritime delimitation between Nicaragua and Honduras. As regards the existence of a tacit agreement, the Court carefully considered the evidence Honduras produced, including sworn statements by a number of fishermen attesting to their belief that the 15th parallel represented and continued to represent the maritime boundary.

Having reviewed all of the practice placed before it, the Court concluded that there was no tacit agreement in effect between the Parties of a nature to establish a legally binding maritime boundary. Thus, the Court had to draw the boundary itself.

The Court was asked to draw a single maritime boundary between the areas of territorial sea, continental shelf and EEZ until it reaches the area where the rights of third States may be affected. Delimitation on the basis of the equidistance method proved to be difficult in the specific circumstances of the case. Cape Gracias a Dios —where the Nicaragua Honduras land boundary ends— is a sharply convex territorial projection with concave areas on both sides. This limited the choice of base points the Court could use, and any variation or error in situating those

points would become disproportionately magnified in the resulting equidistance line.

Moreover, the mouth of the River Coco, which joins the sea at Cape Gracias a Dios, is constantly changing its shape, with unstable islands forming, moving and disappearing over time. Taking all of this into consideration, the Court could not follow the preferred practice of establishing an equidistance line. So far as the territorial sea was concerned, the Court found that it was faced with the "special circumstances" referred to in Article 15 of UNCLOS. The Court looked at the work that the ILC had undertaken during the drafting of the 1958 Convention on the Territorial Sea and the Contiguous Zone and found that it was indeed envisaged that a special configuration of the coast was a circumstance that might require a method of delimitation other than the equidistance method.

The Court therefore decided to construct a bisector line, finding that this method provided the delimitation line with greater stability as it was less affected by land movements of the area around Cape Gracias a Dios, and also significantly reduced the risk of error. The Court found that the Parties agreed "that the sediment carried to and deposited at sea by the River Coco have caused its delta… to exhibit a very active morphodynamism" (*I.C.J. Reports 2007*, p. 742, para. 277). The Court was thus unable to return to the equidistance method for the continental shelf and EEZ without there being a departure line from the coast based on that principle. Thus, the bisector method was used for the entire boundary. The line was then adjusted to take into account the territorial seas of the four cays. The use of the bisector method will be seen as a necessary exception to the now well-established equidistance method. And the Court made sure that it was absolutely clear from the text of the Judgment that the general principle of equidistance remains firmly in place.

One of the interesting sections of the Judgments concerns how to identify the relevant coasts for the drawing of the bisector line. Honduras suggested very narrow sectors of coast to the Court, whereas Nicaragua contended that the *entire* coasts of each State facing the Caribbean Sea should be used as the reference point. In the end, the Court selected coastal fronts that avoided the problem of "cutting off" Hondu-

ran territory and at the same time provided a façade of sufficient length to account properly for the coastal configuration in the disputed area.

2. *Nicaragua v. Colombia*

Two months later, in December 2007, the Court issued a Judgment on Preliminary Objections in another case submitted by Nicaragua: *Territorial and Maritime Dispute (Nicaragua* v. *Colombia).* The case concerns sovereignty over islands and cays in the western Caribbean and the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone.

There is no need in this essay to recount in detail the Court's reasoning on the very complex and technical questions related to the preliminary objections raised by Colombia. As regards the question of sovereignty over territory, namely the islands and other maritime features claimed by the Parties, it is important to note that the Court upheld Colombia's first preliminary objection, to the effect that the 1928 "Treaty concerning Territorial Questions at Issues between Colombia and Nicaragua" and its 1930 Protocol were valid and had already settled the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina named in that Treaty. This was a finding that the Court could make at the preliminary objections stage. However, various other questions before the Court —the scope and composition of the rest of the San Andrés Archipelago, sovereignty over certain cays, and the question of maritime delimitation— were held not to have been settled by the 1928 Treaty; the Court found that it had jurisdiction to decide them, but at the merits stage of proceedings. The Court is now moving ahead to the merits in this case.

3. *Malaysia / Singapore*

After this line of cases involving Latin American States, the Court issued a Judgment in May 2008 on the merits in a case between two Asian States: *Sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and*

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South Ledge (Malaysia/Singapore). This case was brought to the Court by special agreement between the Parties. The dispute once again involved sovereignty over maritime features: Pedra Branca/Pulau Batu Puteh (a granite island on which Horsburgh lighthouse stands), Middle Rocks (consisting of some rocks that are permanently above water) and South Ledge (a lowtide elevation).

Malaysia contended that it had an original title to Pedra Branca/Pulau Batu Puteh (dating back from the time of its predecessor, the Sultanate of Johor) and that it continued to hold this title, while Singapore claimed that the island was *terra nullius* in the mid-1800's when the United Kingdom (its predecessor) took lawful possession of the island in order to construct a lighthouse.

After reviewing the evidence submitted by the Parties, the Court found that the territorial domain of the Sultanate of Johor did cover in principle all the islands and islets within the Straits of Singapore and did thus include Pedra Branca/Pulau Batu Puteh. This possession of the islands by the Sultanate was never challenged by any other Power in the region and therefore satisfied the condition of "continuous and peaceful display of territorial sovereignty". The Court thus concluded that the Sultanate of Johor had original title to Pedra Branca/Pulau Batu Puteh. This ancient title was confirmed by the nature and degree of the Sultan of Johor's authority exercised over the people who inhabited or visited the islands in the Straits of Singapore, including Pedra Branca/Pulau Batu Puteh and made this maritime area their habitat.

The Court then looked at whether this title was affected by certain developments in the period between 1824 and the 1840's and concluded that none of them brought any change to the original title.

The Court turned next to the legal status of Pedra Branca/Pulau Batu Puteh after the 1840's to determine whether Malaysia and its predecessor retained sovereignty over the island. In this regard, it examined the events surrounding the selection process of the site of the lighthouse, its construction, as well as the conduct of the Parties' predecessors between 1852 and 1952, but was unable to draw any conclusions for the purposes of the case.

The Court placed great emphasis on a letter written on 12 June 1953 to the British Adviser to the Sultan of Johor in which the Colonial

Secretary of Singapore asked for information about the status of Pedra Branca/Pulau Batu Puteh in the context of determining the boundaries of the "Colony's territorial waters". In a letter dated 21 September 1953, the Acting State Secretary of Johor replied that the "Johore Government [did] not claim ownership" of the island. The Court found that the reply showed that as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh.

The Court finally examined the conduct of the Parties after 1953 with respect to the island. It found that certain acts, including the investigation of shipwrecks by Singapore within the island's territorial waters and the permission granted or not granted by Singapore to Malaysian officials to survey the waters surrounding the island, may be seen as conduct à *titre de souverain*. The Court concluded that by 1980 (when the dispute crystallized) sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore and still lay with Singapore.

As for Middle Rocks, the Court observed that the particular circumstances which led it to find that sovereignty over Pedra Branca/Pulau Batu Puteh stayed with Singapore did not apply to Middle Rocks. It therefore held that original title to Middle Rocks should remain with Malaysia as the successor to the Sultanate of Johor. As for South Ledge, the Court noted that this lowtide elevation fell within the overlapping territorial waters generated by Pedra Branca/Pulau Batu Puteh and by Middle Rocks. As the Court had not been asked by the Parties to draw the line of delimitation with respect to their territorial waters, the Court concluded that sovereignty over South Ledge belonged to the State in the territorial waters of which it is located.

4. *Romania v. Ukraine*

The most recent case of maritime delimitation was decided by the Court in February 2009: *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. The dispute concerned the establishment of a single maritime boundary delimiting the continental shelf and exclusive economic zones between the two States in the Black Sea.

The Parties differed as to the exact scope of the Court's jurisdiction. The Court noted that it did not have jurisdiction to determine the Parties' territorial seas but that its jurisdiction to delimit the Parties' continental shelf and their exclusive economic zones could be exercised in such a way as to result in "a delimitation between, on the one hand, the exclusive economic zone and the continental shelf of one State, and, on the other hand, the territorial sea of the other State at its seaward end".

The Parties further disagreed as to whether there already existed an agreed maritime boundary around Serpents' Island, a maritime feature situated approximately 20 nautical miles to the east of Ukraine's mainland. They therefore also disagreed on the starting-point of the delimitation to be effected by the Court. The Court began "with the determination of the startingpoint of the delimitation as a function of the land boundary and territorial sea boundary as already determined by the Parties". After having carefully reviewed the evidence before it, the Court concluded that, in 1949, the Parties had agreed that the boundary between Romania and the USSR would, from a specified startingpoint, follow the 12mile arc around Serpents' Island, but without any endpoint being specified. It added that pursuant to the 2003 State Border Régime Treaty "the endpoint of the State border between the Parties was fixed at the point of intersection where the territorial sea boundary of Romania meets that of Ukraine", a point referred to by the Court as "Point 1".

The Court next turned to the question of whether, as Romania claimed, a boundary delimiting the exclusive economic zones and continental shelf beyond Point 1, and extending around Serpents' Island, was established by a series of agreements concluded in 1949. It pointed out that paragraph 4 of Articles 74 and 83 of UNCLOS is relevant in this respect, since it provides that where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone and the continental shelf "shall be determined in accordance with the provisions of that agreement". Having reviewed all the evidence placed before it, the Court concluded that there was no agreement in force between Romania and Ukraine delimiting between them the exclusive economic zone and the continental shelf.

The Court thus proceeded to draw the boundary itself. To this end, the Court first had to identify the relevant coasts and maritime areas. It recalled that, from a legal point of view, the relevant coasts can play two roles in relation to the delimitation of the continental shelf and the exclusive economic zone: First, it is necessary to identify the relevant coasts in order to determine what constitutes in the specific context of a case the overlapping claims to these zones. Second, the relevant coasts need to be ascertained in order to check, in the third and final stage of the delimitation process, whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the delimitation line. In the present case, the Court excluded a segment of the Ukrainian coast, namely the coasts of Karkinits'ka Gulf since the coasts of this gulf face each other and their submarine extension cannot overlap with the extensions of Romania's coast.

As regards the delimitation methodology, the Court again followed the now well-established equidistance method. It began by drawing a provisional equidistance line between the adjacent coasts of Romania and Ukraine, which then continued as a median line between their opposite coasts. At the second stage, the Court considered whether there were factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result. At a third stage, it verified that the said line did not lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line.

In respect of the selection of basepoints for the construction of the provisional equidistance line, it is interesting to note that the Court rejected the seaward end of the Sulina dyke used by Romania, a 7.5 km-long construction out to sea. It concluded that Sulina dyke could not be regarded as "permanent harbour works which form an integral part of the harbour system" within the meaning of Article 11 UNCLOS, which concerns the delimitation of the territorial sea, since no convincing evidence had been presented that this dyke serves any direct purpose in port activities.

The Court further observed that the text of Article 11 and the *travaux préparatoires* do not preclude the possibility of interpreting restrictively

the concept of harbour works so as to avoid or mitigate the problem of excessive length of such works. The Court thus decided to use the landward end of the Sulina dyke as a basepoint, which had the advantage of "not giving greater importance to an installation than to the physical geography of the landmass".

The Court further considered it inappropriate to select any base points on Serpents' Island since the island does not form part of the general configuration of the coast.

As for the relevant circumstances calling for an adjustment of the provisional equidistance line, the Court concluded that the presence of Serpents' Island did not call for any adjustment, notably in the light of the specific geographical configuration, given that any continental shelf and exclusive economic zone entitlements possibly generated by Serpents' Island could not project further than the entitlements generated by Ukraine's mainland coasts. It concluded that Serpents' Island should have no effect on the delimitation in this case, other than that stemming from the 12 nautical-mile territorial sea which was attributed to it pursuant to previous agreements between the Parties.

Besides the presence of Serpents' Island in the area of delimitation, the Court considered five other factors as possible relevant circumstances: the possible disproportion between lengths of coasts, the enclosed nature of the Black Sea and the delimitations already effected in the region, the conduct of the Parties (oil and gas concessions, fishing activities and naval patrols), any cutting off effect and certain security considerations of the Parties. However, the Court did not see in these various factors any reason that would justify the adjustment of the provisional equidistance line.

The Court checked finally that the result arrived at, so far as the envisaged delimitation line was concerned, did not lead to any significant disproportionality by reference to the respective coastal lengths and the apportionment of areas that ensue. Noting that the ratio of the respective coastal lengths for Romania and Ukraine, as it has measured them, was approximately 1:2.8 and the ratio of the relevant area between Romania and Ukraine is approximately 1:2.1, the Court was not of the view that the line it has constructed requires any alteration