

ISLANDS AND THE CONSTRUCTION OF A MARITIME BOUNDARY: PUSHING THE LIMITS OF STATE SOVEREIGNTY

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Abstract

Islands play a crucial role in fixing the limits of the States' sovereignty over maritime spaces as they can considerably distort the final delimitation line. However, islands often give rise to controversy and most of the contentious cases have entailed major problems and divergence of views as the proper impact of islands on the construction of a boundary line. The maritime delimitation case law provides practitioners and States with a wide variety of scenario that deprives the law on this issue from transparency, coherence and predictability. The aim of this paper is to give a comprehensive approach of the influence of islands in the construction of a maritime boundary. Indeed, a thorough analysis of the case law, including the most recent, reveals that international judges or arbitrators have - rightly so - chosen a conservative approach, consisting in attributing a largely secondary role to these features. Interestingly, a categorization of the methods of adjustment of boundary lines can now be convincingly identified depending on their status (insular States, accessory islands, archipelagic islands, constitutive islands etc.).

Keywords: island, construction, maritime boundary.

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I. INTRODUCTION

The treatment of islands in defining maritime limits and boundaries is generally recognized as “*one of the most delicate issue in the field of maritime boundary delimitation*”¹.

Article 121 of the United Nations Convention on the Law of the Sea signed in Montego Bay in 1982 (hereinafter, “UNCLOS”) however describes quite simply – even simplistically according to some authors² - the regime of islands : an island, “*a naturally formed area of land, surrounded by water which is above water at high tide*” has a territorial sea, a contiguous zone, an economic zone and a continental shelf that

¹ T. Cottier, *Equitable Principles of Maritime Boundary Delimitation: the Quest for Distributive Justice in International Law*, Cambridge University Press (2015).

² P. Von Mühlendahl, *Tiny Land Features in Recent Maritime Delimitation Case Law*, *The International Journal of Marine and Coastal Law*, Volume 31, 2016.

“are determined in accordance with the provisions of this Convention applicable to other land territory”.

In practice, the inclusion of islands in the delimitation process is eminently more complex due to the particularity of these features. Unlike a landmass, an island usually is a small territory, sparsely populated or even uninhabited, with variable economic importance. Granting this territory the same weight as the one of a landmass would produce an inequitable result. Moreover, on top of the difficulty resulting from the disparity in size and population, its location usually leads to the second difficulty: when it is located in very close proximity to the starting point of the maritime boundary or, to the contrary, very far from the coasts of its State, the island can lead to such a distortion of the boundary line that reaching an equitable result – as advocated by UNCLOS - is not easy.

Case law and State practice have found solutions to these difficulties and a legal regime specific to islands now provides practitioners and States with concrete guidance on their inclusion in the construction of a maritime boundary. However, these solutions clearly lack the transparency, predictability and coherence that are nevertheless necessary with regards to the complex process of maritime delimitation. The aim of this article is to give a comprehensive approach of the influence of islands in the construction of a maritime boundary by analyzing the reasoning of the international judges and arbitrators in the case law and identifying guidelines for future maritime delimitations.

The lack of readability of the effect of islands in the delimitation process is mainly due to two parameters: firstly, each delimitation is unique and the reasoning followed by international courts and tribunals reflects the wide heterogeneity of geographical configurations. This was clearly stated in the *Bangladesh/Myanmar* decision rendered by the International Tribunal for the law of the Sea in 2012: *“the effect to be given to an island in the delimitation of the maritime boundary in the exclusive economic zone and the continental shelf depends on the geographic realities and the circumstances of the specific case. There is no general rule in this respect. Each case is unique and requires specific treatment, the ultimate goal being to reach a solution that is*

equitable”³. Secondly, the law of maritime delimitation is in perpetual evolution and is trying to find equitable solutions. Hence, although often innovative, there is a cruel lack of coherence.

However, this study will attempt to identify, where possible, some guidelines regarding the effect of islands on maritime delimitation by international jurisdictions⁴. It will first identify the distinction between constitutive islands and constitutive and accessory islands (II) and then review the process of delimitation with regards to constitutive and accessory islands (III) and constitutive islands (IV).

II. THE DISTINCTION BETWEEN CONSTITUTIVE ISLANDS AND CONSTITUTIVE AND ACCESSORY ISLANDS

There are actually two types of islands and as we shall see, each of these two types of islands has its own legal regime⁵.

The first type of island concerns the “**constitutive and accessory**” islands. These islands are coastal islands located in the area to be delimited, off the land territory of a State over which it exercises its sovereignty. These islands are “constitutive” inasmuch as, like any land territory, they are capable of generating - constituting - a title of the coastal State over the maritime area to be delimited, but they are also “accessory” to the extent that they are the basis of an accessory title to the main title of the State, which derives from the coastal projections of its landmass. The classic example of this type of island is the archipelago of Zanzibar and especially Pemba Island. This island, under Tanzanian sovereignty, is located less than 40 nautical miles from the terminal point of the land boundary between Tanzania and Kenya and partially faces the Kenyan coasts. Thus, in the area to be delimited, Tanzania has a dual title - a main title grounded on its landmass and an accessory title

³ *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgement, ITLOS Reports 2012*, par. 317.

⁴ If such an exercise is possible with regard to international case law which systematically reduces the effect of islands, it must be observed that State practice, which is profoundly casuistic, is devoid of *opinio juris* and does not reveal any trend regarding the treatment of islands likely to facilitate future maritime delimitations.

⁵ T. Cottier, *Equitable Principles of Maritime Boundary Delimitation: the Quest for Distributive Justice in International Law*, Cambridge University Press (2015).

grounded on Pemba Island - while Kenya only has one main title, that of its landmass.

The second type of island concerns the “constitutive” islands. These islands are the only title of the State exercising its sovereignty in the area to be delimited. This qualification brings together two types of situation: first, the island is considered constitutive when it is a State in itself (the classic example is Malta or Madagascar). It will also be described as constitutive when, located very far from the landmass of the State on which it depends, this island only - excluding the landmass - will constitute the basis of the title of the State in the area to be delimited. The classic example is the Canary Islands under the sovereignty of Spain whose landmass is not in the area to be delimited with the Moroccan coasts.

International jurisdictions adopt a very conservative approach to the influence of the islands in the complex process of maritime boundary delimitation: they will systematically reduce their influence in order to take into account this geographical peculiarity that is likely to prejudice the interests of the neighboring State and then, nullify the quest for the equitable result, as advocated by UNCLOS.

However, this exercise of reducing the influence of the islands is carried out in a totally distinct way according to whether they are dealing with a constitutive and accessory island or a constitutive island. Regarding constitutive and accessory islands, in spite of the great heterogeneity of the solutions chosen by the judges and arbitrators, the main case law leads to a positive exercise to rescue the island’s effect: it generally does not place any basepoint on these constitutive and accessory islands, but in a second step, gives them an effect either by deviating the boundary line or by creating an enclave. In the case of constitutive islands, jurisprudence leads to an inverse reasoning and generally carries out a negative exercise to reduce the effect of the island: base points are validly placed on the coasts of islands but the influence of these islands is then reduced by adjusting the line in favor of the continental State and to the detriment of the insular State.

III.THE DELIMITATION OF CONSTITUTIVE AND ACCESSORY ISLANDS: A POSITIVE EXERCISE TO RESCUE THE EFFECT OF THE ISLAND

A thorough reading of the case law reveals a real heterogeneity in the effect that it grants to constitutive and accessory islands in the delimitation of maritime boundaries: sometimes the island will have no influence on the delimitation, sometimes a basepoint will be located on its coasts but a reduced effect will be given to this point to mitigate the weight of the island in the delimitation process, sometimes no basepoint will be located on the island's coasts but the judges will deviate the line in order to grant a maritime space to the island, finally, an enclave could be created.

Despite the wide range of possibilities presented by the case law, it is possible to identify the following guidelines:

- 1° An island will have no influence on the delimitation of maritime borders unless it is sufficiently significant. The underlying idea is that if an island, as a land territory, is likely to influence the course of a maritime boundary, it must be sufficiently significant. Failing that, its consideration would be unfair. The result is therefore without appeal: if the island is not significant enough, the judges will deny all existence to this island and proceed to the delimitation of the maritime boundary without taking into account the existence of this island⁶.
- 2° If the island is located in the delimitation area and is sufficiently close to the coast of the State, it will form an integral part of the coastline and, moreover, of the relevant coastlines of the State. The case law will therefore give full effect to the basepoints located on that island that are needed for the construction of the provisional equidistance line.
- 3° On the other hand, if the positioning of a base point on this island generates disproportionate consequences, the case law will seek a means to grant it a maritime space while reducing these consequences,

⁶ Hence, the island of Filfla, an uninhabited island under the sovereignty of Malta, with an area of 0.06 km² and located less than 5 km from the coasts of Malta, has not been taken into account by the Court when delimiting the maritime boundary between Libya and Malta, see *Continental Shelf (Libyan Arab Jamahiriya /Malta)*, Judgment, I.C.J. Reports 1985, p. 48, par. 64.

in order to reach an equitable solution. These disproportionate consequences can be identified in at least three situations, all of which relate to the location of the island:

- where the island is situated in the immediate vicinity of the starting point of the maritime boundary - and therefore of the provisional equidistance line - and thus results in an unfair deviation of the boundary line. This was the case in the Bangladesh/Myanmar case concerning the influence of the island of Saint Martin in the exclusive economic zone and the continental shelf and in *Nicaragua v. Honduras* regarding the islands of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay;
 - when the island, because of its location, profoundly modifies the general configuration of the coasts of its State. This was the case in *Tunisia/Libya* regarding the Kerkennah Islands, and in *Romania v. Ukraine* regarding Serpents' Island;
 - when the island blocks the projection of the coasts of the neighboring State, as in the case concerning the Delimitation of the Continental Shelf between the United Kingdom and France in the case of the Channel Islands.
4. Two approaches are used by the judges to grant a maritime space to the island while reducing these disproportionate consequences. First, the judges place a basepoint on the island but give it a reduced effect *a posteriori*. This was the reasoning of the Court in the case of the *Delimitation of the Continental Shelf between the United Kingdom and France*, where a partial effect was granted to the archipelago of the Scilly Islands⁷ since their projection “*constitute an element of distortion which is material enough*”⁸ of the provisional equidistance line. Similarly, in the case *Tunisia-Libya*, the Court granted a half effect to the Kerkennah Islands in order to avoid giving them an “*excessive weight*”⁹ (*Annex I*).

⁷ *Case concerning the delimitation of the Continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Award, 30 June 1977, RSA*, vol. XVIII, p. 255, par. 251.

⁸ *Ibid.*, p. 252, par. 244.

⁹ The Court thus drew two segments to the east of the islands (thus giving them full effect) and to the west of the islands (thus depriving them of full effect) and calculated the bisector of these two segments, in order to generate a half effect, and then transposed the azimuth of this bisector to the point of deviation of the boundary line, see

In a second approach, which is the most widely used and, in our view, the most valid, the judges do not position any basepoint on the island but give it an effect at a later stage when they drew the boundary line, by deviating this line or creating enclaves in order to grant them a maritime space. This positive exercise to rescue the effect of the island has been applied in a number of decisions¹⁰, including:

- i) in the case of the *Delimitation of the Continental Shelf between the United Kingdom and France*¹¹, the Channel Islands, under British sovereignty, including the islands of Guernsey, Sark and Jersey, were located about 70 nautical miles from the French coast in Grandville Bay. The Arbitral tribunal constructed a provisional equidistance line without taking into account the presence of these islands and then, finding that they were situated south of the boundary line and on the “wrong side of it”, the arbitrators created an enclave (the boundary line between points X and Y in the sketch in *Annex 2*, excerpt from the arbitral award) of 12 nautical miles in order to grant them maritime space.
- ii) in the *Dubai/Sharjah* case¹², the arbitrators did not establish any basepoints on the island of Abu Musa, under the sovereignty of the United Arab Emirates (as Sharjah). However, at the stage of adjustment of the line, the boundary line was diverted in order to grant the island a maritime space of 12 nautical miles (*Annex 3*)
- iii) in *Nicaragua v. Honduras*, four islands (cays) under Honduran sovereignty, were located in the immediate vicinity (41 nautical miles for the furthest) of Cape Gracias a Dios, the starting point of the maritime boundary. Nicaragua claimed a maximalist position

Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, par. 128.

¹⁰ It should be noted that in *Romania v. Ukraine*, the Court refused to place a basepoint on Serpents’ Island, a very small Ukrainian island (0.17 km²) with no stable population, located about 20 nautical miles away from the starting point of the maritime boundary. The Court deviated the final boundary line to grant it a territorial sea of 12 nautical miles only because of the existence of an agreement between the Parties (§187-188).

¹¹ *Case concerning the delimitation of the Continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Award, 30 June 1977, RSA*, vol. XVIII, p. 255.

¹² *Dubai/Sharjah Border Arbitration (Dubai/Sharjah)*, 91 ILR (1993), p. 543.

by which it completely deprived these islands of effect (the line it claimed was passing to the north of these islands). The Court ultimately used the bisector method, so that no basepoint was situated on the coasts of States, and *a fortiori* on the islands. Nevertheless, these four islands have not been integrated into the coasts used for the construction of a bisector line, thus denying them any effect at this first stage of the course of the boundary. However, finding that these islands lie south of the boundary line adopted by it, the Court decided to deviate it in order to grant them a territorial sea of a width of 12 nautical miles (*Annex 4*)¹³.

IV. THE DELIMITATION OF CONSTITUTIVE ISLANDS: A NEGATIVE EXERCISE TO REDUCE THE EFFECT OF THE ISLAND

The negative exercise of reducing the effect of constitutive islands is explained by the two characteristics peculiar to this type of island: on the one hand, they are the sole basis of the title of one of the States whose boundary is to be delimited and hence, constitute the only possible location of the basepoints for the construction of the provisional equidistance line. On the other hand, the length of their coasts is generally much less than that of their neighbor, particularly when the boundary is to be delimited with the landmass of the latter and their effect on the course of the maritime boundary is generally less important than that of the neighboring State.

The reasoning of the international judges and arbitrators is therefore the following:

1. To the extent that constitutive islands are the sole basis of the title of one of the States, basepoints are generally located on their coasts. Otherwise, the delimitation process would be deprived of purpose. Only one situation leads judges to refuse to place basepoints on constitutive islands: when the constitutive island is actually a string of islands (such as the Colombian islands off Nicaragua) - some of which being very small in size – and their consideration in the

¹³ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, 8 October 2007, I.C.J. Reports 2007, par. 302.

construction of the provisional equidistance line would entail an excessive distortion of this line.

Thus in the case of *Qatar v. Bahrain*, the island of Qit'at Jaradha, under the sovereignty of Bahrain (an archipelago consisting of thirty-three islands), and situated almost equally distant from Qatar and Bahrain, “a very small island, uninhabited and without any vegetation” was excluded from the process of delimitation by the International Court of Justice which considered that placing a base point on that island would amount to giving “a disproportionate effect to an insignificant maritime feature”¹⁴.

Similarly, in *Nicaragua v. Colombia*, no basepoint was placed on two Colombian islands, although considered to be islands according to Article 121 (1) of UNCLOS: the island of Serrana on the one hand, on the grounds that it is “a comparatively small feature, whose considerable distance from any of the other Colombian islands means that placing a base point upon it would have a marked effect upon the course of the provisional median line which would be out of all proportion to its size and importance” and the island of Quitasueno on the other hand, considering that “in addition to being a tiny feature, it is 38 nautical miles from Santa Catalina and its use in the construction of the provisional median line would push that line significantly closer to Nicaragua”¹⁵ (*Annex 5*).

2. On the other hand, the line will be diverted in order to take into account the disparity in coastal lengths between the two territories and thus give a lower weight to the insular territory than to the territory of the neighboring State. Constitutive islands are generally small in relation to the continental States and, a *fortiori*, the length of their coasts is generally much less than that of their neighbor, especially when the boundary is delimited between a constitutive island and its neighbor's landmass.

In almost all cases relating to constitutive islands, judges and arbitrators relied on the disparity in length of coast between the two States to justify the adjustment of the line in favor of the continental

¹⁴ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, 16 March 2001, I.C.J. Reports 2001, par. 219.

¹⁵ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, I.C.J. Reports 2012, par. 202.

State and to the detriment of the constitutive island. This was the reasoning of the judges and arbitrators in the *Gulf of Maine* case¹⁶ (the ratio was 1:1,38 in favor of the United States), the *Libya/Malta* case¹⁷ (the ratio was 1:9 in favor of Libya), the *Saint Pierre et Miquelon* case¹⁸ (the ratio was 1:15,3 in favor Canada), in the *Jan Mayen* case¹⁹ (the ratio was 1:9,2 in favor of Greenland under the sovereignty of Denmark), and in *Nicaragua v. Colombia*²⁰ (the ratio was 1:8,2 in favor of Nicaragua)²¹. On the other hand, where the coastal lengths are similar, as was the case in *Qatar v. Bahrain*²², the provisional equidistance line is not adjusted.

3, Once the need for adjustment is accepted, it is necessary to opt for a method of adjustment to reduce the effect of the island. In the five cases referred to above, the courts applied four different methods of adjusting the provisional equidistance line.

i) the proportional adjustment method in the *Gulf of Maine* case.

With respect to the central segment of the Canada-US maritime boundary²³, the Court adjusted the provisional equidistance line by

¹⁶ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984, p. 246.*

¹⁷ *Continental Shelf (Libyan Arab Jamahiriya /Malta), Judgment, I.C.J. Reports 1985, par. 68* ; the Libyan relevant coasts were 192 nautical miles and Malta's were 24 nautical miles.

¹⁸ *Case concerning the delimitation of maritime areas between Canada and France* RSA, XXI, Award, 10 June 1992, p. 281, par. 33 ; the Canadian relevant coasts were 455,6 nautical miles long, and Saint Pierre et Miquelon's were 29,85 nautical miles long.

¹⁹ *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993, par.69* ; Greenland's relevant coasts were 504,3 km long, and Jan Mayen's 54,8 km long.

²⁰ *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, 19 November 2012, I.C.J. Reports 2012, par. 211*; the relevant coasts of Nicaragua are 531 km long, where the ones of the Colombian islands are 65 km long.

²¹ The *Barbados v. Trinidad and Tobago* case is excluded from this list since the coasts disparity was taken into account only regarding the area situated to the east of the maritime boundary, where the States' coasts were actually adjacent.

²² *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, 16 March 2001, I.C.J. Reports 2001, p. 114, par. 243.*

²³ The bisector method was used to determine the first segment of the maritime boundary.

applying the ratio of the coastal lengths of the two states: the line was adjusted with regards to the ratio of the two States' coastal lengths, i.e., 1: 1, 38 in favor of the United States²⁴.

The solution chosen has the advantage of simplicity and predictability, but in our view it can only be applied if there is a relatively low ratio of coastal disparity, as was the case in the *Gulf of Maine* case. Indeed, if the ratio were higher (such as that of 1: 9 in *Libya v. Malta and Jan Mayen*), this method would produce a very unfair result for the insular state. This purely mathematical method was, thus, rejected in the *Jan Mayen* case: “*It should, however, be made clear that taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front of [the Parties]*”²⁵.

ii) the adjustment by reference to a third State in the *Libya / Malta* case²⁶.

The delimitation between Libya and Malta had a particular geographical configuration involving three states: Libya to the south, Malta to the center and the Italian island of Sicily to the north. To adjust the provisional equidistance line in view of the large disparity in coastal lengths of Malta and Libya (1: 9 in favor of Libya), the Court proceeded as follows: it began by plotting the provisional equidistance line between Libya and Malta, then the provisional equidistance line between Libya and Sicily (totally denying the existence of Malta) and finally calculated the median line of these two lines, which became the finale boundary line between Libya and Malta²⁷ (*Annex 6*).

This solution is highly open to criticism in that it proceeds to the construction of the maritime boundary between two States by reference to a third State that is not a party to the proceedings. Such position is contrary to the reasoning developed in numerous judgments where third parties to the proceedings play no role in the construction of

²⁴ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, par. 222.

²⁵ *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, par. 69.

²⁶ *Continental Shelf (Libyan Arab Jamahiriya /Malta), Judgment, I.C.J. Reports 1985*, par. 64.

²⁷ This line will be substantially adjusted in view of various circumstances.

maritime boundaries²⁸. The weight given to Italy in the delimitation of the maritime boundary between Libya and Malta was, moreover, strongly contested by Judges Oda and Schwebel in their dissenting opinions, where they considered that the reasoning of the Court led to the denial of the status of Malta as an independent State and to granting a disproportionate influence to Italy²⁹.

iii) the adjustment with reference to the 200 nautical mile line in *Jan Mayen*

The disproportion between the lengths of the coasts of Greenland (under the sovereignty of Denmark) and the island of Jan Mayen (under the sovereignty of Norway) was 1: 9 in favor of Greenland. In order to reduce the effect of Jan Mayen in the delimitation process, the Court adopted a new method for determining the area to be delimited. It considered that it stood between the provisional equidistance line between Greenland and Jan Mayen (between A and D - blue dotted on the sketch of *annex 7*) and the 200 nautical miles line from the coast of Greenland (between A and B - the easternmost line). It then calculated the median line between those two lines, which it finally adjusted in light of other circumstances, in particular the fishing rights of the two States³⁰.

This approach seems to us to be more justifiable than the two previous ones because of its simplicity of application. It nevertheless has a strong weakness: the closer the insular state is to its neighbor's coast (and therefore far from its 200-nautical-mile line), the more its maritime space will be reduced, which will lead to deep inequity in some cases.

²⁸ *Inter alia*, see *Case concerning the land and maritime boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, regarding Bioko Island under the sovereignty of Equatorial Guinea; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, regarding the interests of Myanmar; *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, regarding the interests of Venezuela.

²⁹ *Continental Shelf (Libyan Arab Jamahiriya /Malta)*, Judgment, I.C.J. Reports 1985, Dissenting opinion of Judge Oda, Dissenting opinion of Judge Schwebel.

³⁰ *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, I.C.J. Reports 1993.

iv) the *equiratio* method in *Nicaragua v. Colombia*

Finally, in *Nicaragua v. Colombia*, the Court was to delimit the maritime boundary between the landmass of Nicaragua and a string of Colombian islands located about 300 nautical miles from Colombia but close enough to the coasts of Nicaragua (about 100 nautical miles). Both sides claimed maximalist positions: according to Nicaragua, no island could accommodate a basepoint, and they should be granted only a 3 or 12 nautical mile enclave, depending on their size and location.

According to Colombia, the Court had to apply the equidistance/relevant circumstances method and the islands close to the coast of Nicaragua should have full effect in the delimitation of the maritime boundary without any adjustment of the provisional equidistance line. The Court adopted a middle position. First, it excluded from the process of construction of the provisional equidistance line the islands of Serrana and Quitasueno³¹, as previously mentioned. However, it placed basepoints on the other islands of the archipelago. With regard to the adjustment of the provisional equidistance line, the Court drew a distinction between the two areas to be delimited:

- on the one hand, the western zone between the Nicaraguan landmass and the Colombian islands: on the ground of the large disproportion of the lengths of the states' coasts (the ratio in this case was 1: 8.2 in favor of Nicaragua), the Court adjusted the provisional equidistance line by granting 1/3 effect to the Colombian basepoints (*Annex 5*).

The adjustment method used here is innovative. It is based on the same reasoning as in previous judgments, namely to adjust the line in order to give less influence to the islands than to the landmass, but in its practical application it differs from other cases, especially from the one used by the judges in *Jan Mayen*. In this latter judgment the judges had adjusted the provisional equidistance line by establishing a median line between this provisional equidistance line and the 200-nautical-mile line of the coasts of Greenland. The adjustment was therefore effected by a division of the maritime area between these two lines and the basepoints were not used for the construction of this boundary line. In

³¹ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, I.C.J. Reports 2012, par. 202.

Nicaragua v. Colombia however, the Court adjusted the line by giving a reduced effect to the basepoints (1/3 effect to the Colombian basepoints and 2/3 to the Nicaraguan basepoints) and it is from these basepoints (and not by a simple division of the maritime space located between the two States) that the new line was built. This method is called by some commentators the “*equiratio*” method³².

- on the other hand, the eastern zone located to the east of the Colombian islands but within the 200-nautical-mile limit of Nicaragua: in this area, “*where the relationship is more complex*”³³ according to the Court, the judges used another innovative method³⁴. Considering that a disproportionate maritime area would be granted to the Colombian islands if the provisional equidistance line was continued north and south of its extreme points (points 1 and 5 of the line), the Court opted for a route in the form of a corridor consisting in extending the boundary line along parallel lines to the 200 nautical mile limit of Nicaragua³⁵ (*Annex 5*).

The variety of adjustment methods proposed by case law is not desirable. It results in a lack of transparency, predictability and coherence, but above all, it generates very significant differences as far as lines are concerned, from one case to another. Stephen Fietta and Robin Cleverly³⁶ have compared the lines used in each case with those that would have been obtained if the methods used in the other cases had been applied to them. This analysis shows several findings:

- the method used in *Libya v. Malta* can be applied only in the presence of a third State (in this case Italy), which ultimately renders

³² S. Fietta & R. Cleverly, *A practitioner’s guide to maritime boundary delimitation*, Oxford University Press (2016).

³³ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, *I.C.J. Reports 2012*, par. 232.

³⁴ The corridor method had also been used thirty years earlier in the *Saint Pierre et Miquelon* case, see *Case concerning the delimitation of maritime areas between Canada and France RSA, XXI, Award, 10 June 1992*, p. 281.

³⁵ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, *I.C.J. Reports 2012*, par. 236.

³⁶ S. Fietta & R. Cleverly, *A practitioner’s guide to maritime boundary delimitation*, Oxford University Press (2016).

- it impracticable in other cases,
- the one used in *Jan Mayen* can only be applied in cases where the two States are situated more than 200 nautical miles but less than 400 nautical miles from each other, which again makes it little transposable,
 - the proportional adjustment method used in the *Gulf of Maine* case certainly has the advantage of simplicity and predictability, but it will result in a deep inequity in many cases, particularly where the disparity of the coasts is very high,
 - finally, the *equiratio* method adopted in *Nicaragua v. Colombia* necessarily implies subjectivity from judges in choosing the appropriate adjustment ratio.

Nevertheless, the method used in the latter case seems to be the most convincing one. It is simple to use and leaves to the judges and arbitrators this part of subjectivity that is necessary for both the respect of the unique character of each maritime delimitation and the search for an equitable result as advocated by UNCLOS.

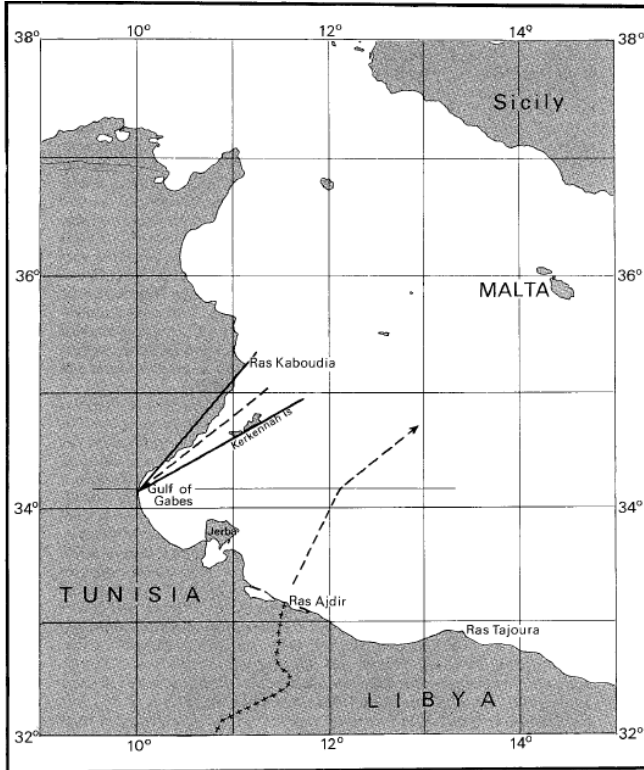
V. CONCLUSION

The island regime in the process of delimiting maritime borders is complex despite the identification of guidelines that tend to reduce the uncertainty of the influence to be given to islands on the delimitation of maritime boundary. Many maritime boundaries remain to be delimited on all continents and the process of delimitation – whether done by the States themselves through negotiations or by international judges or arbitrators - will be a central issue for many States.

It is therefore essential that international courts seek to define and apply a clear and coherent regime of the influence of islands in the maritime delimitation process. Future decisions, and especially the future delimitations to be made, which are already the source of conflicts between States, will help satisfy this need for coherence and readability.

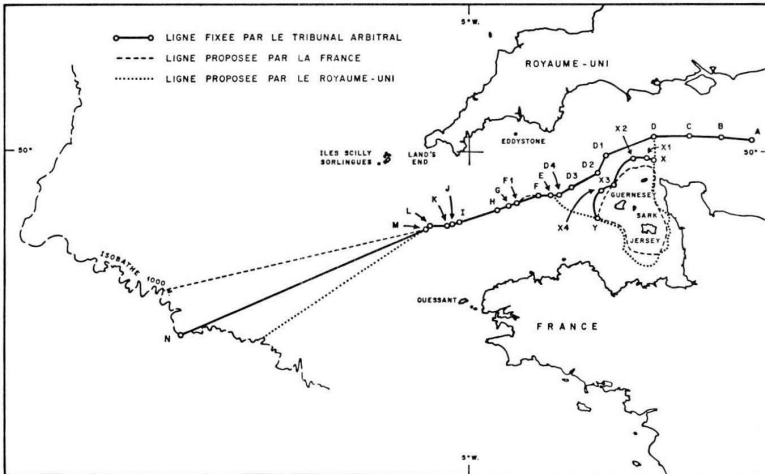
Annex 1

Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment dated 24 February 1982



Annex 2

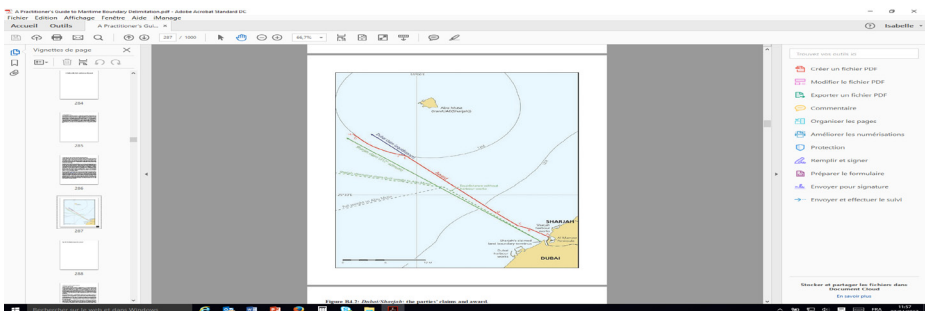
Case concerning the delimitation of the Continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Award, 30 June 1977



- boundary line determined by the Tribunal
- - - boundary line claimed by France
- boundary line claimed by the United Kingdom

Annex 3

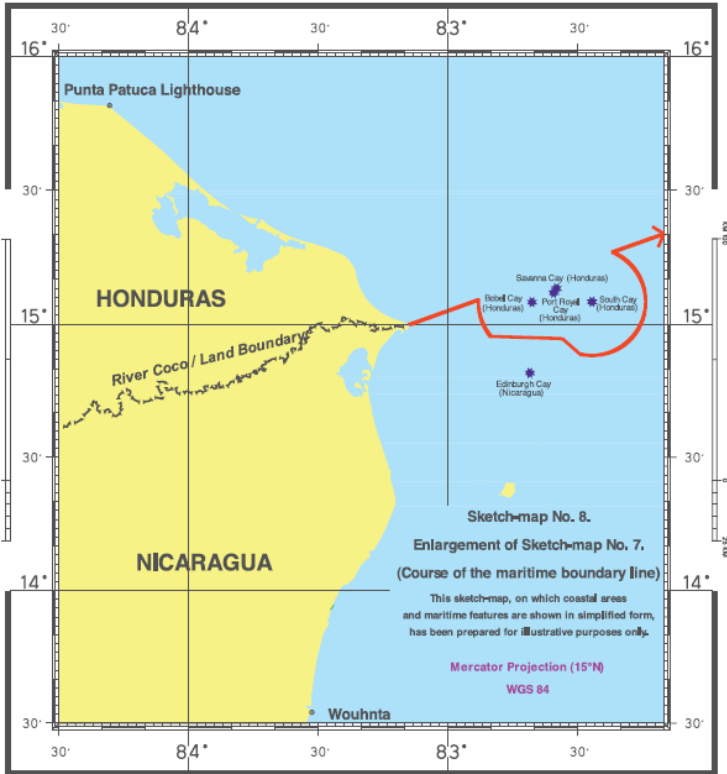
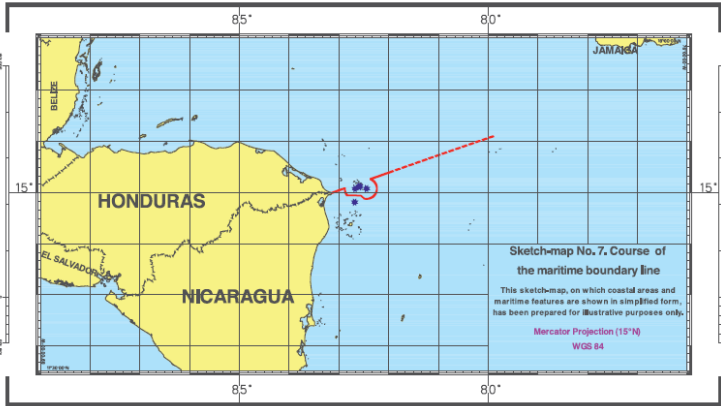
Dubai/ Sharjah Border Arbitration (Dubai/ Sharjah), 91 ILR (1993), 543



Source : S. Fietta & R. Cleverly, *A practitioner's guide to maritime boundary delimitation*, Oxford University Press (2016)

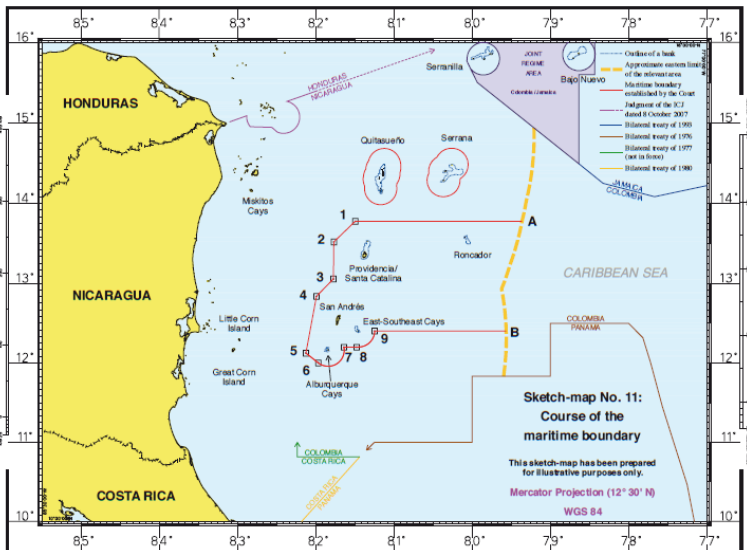
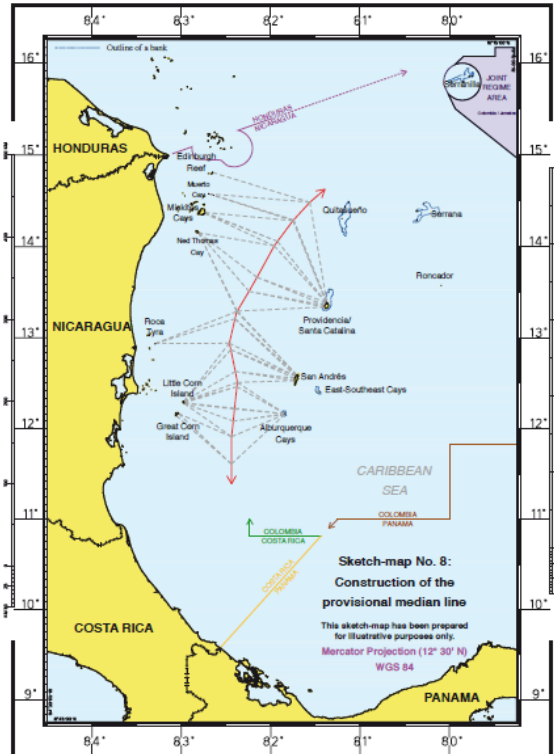
Annex 4

Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment dated 8 October 2007



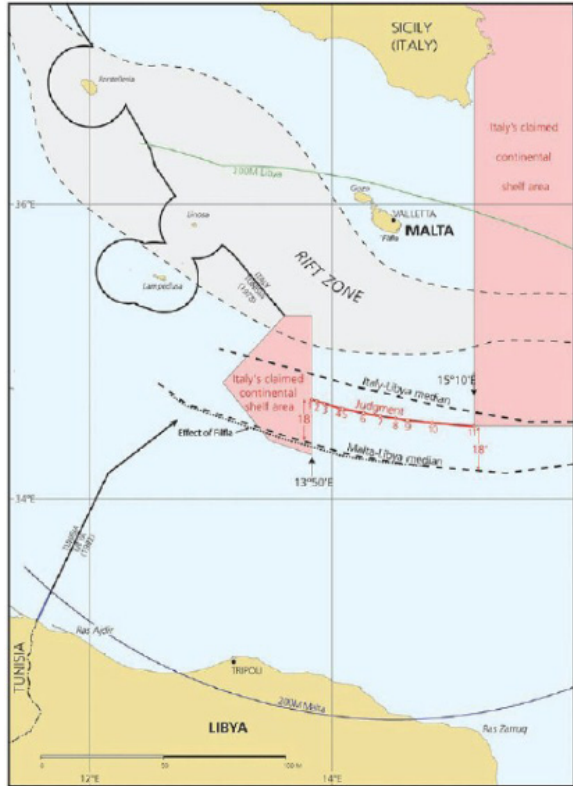
Annex 5

Territorial and Maritime Dispute (Nicaragua v. Colombia),
 Judgment dated 19 November 2012



Annex 6

Continental Shelf (Libyan Arab Jamahiriya /Malta), Judgment dated 3 June 1985



Source : S. Fietta & R. Cleverly, *A practitioner's guide to maritime boundary delimitation*, Oxford University Press (2016)

Annex 7

Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment dated 14 June 1993

