TAKING STOCK BEFORE ITLOS TAKES OFF: A CITATION ANALYSIS AND OVERVIEW OF THE MARITIME DELIMITATION CASE LAW

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Abstract: Now that the International Tribunal for the Law of the Sea (ITLOS) in Hamburg shall have an opportunity to adjudicate its first maritime boundary delimitation case arising from the Bay of Bengal dispute between Bangladesh and Myanmar, it is useful to take stock and assess to what extent a *jurisprudence constante* can be said to have developed since the *North Sea Continental Shelf* ruling from 1969. The development of the modern international law of the sea undoubtedly has been aided by the decisions of various kinds of adjudicatory bodies over a 40-year period. This paper presents a simplified citation analysis of the maritime delimitation case law, surveying and reviewing the role which precedent has played in the 17 publicly available final rulings rendered since 1969 by the International Court of Justice, "pure" *ad hoc* tribunals and, most recently, tribunals established under Annex VII of the UN Convention on the Law of the Sea. The analysis shows that invoking "precedent" is not a contentious issue for standing and *ad hoc* bodies charged with maritime delimitation. Key among the many contributions of the maritime delimitation jurisprudence is the development of a multi-step delimitation methodology, which guides tribunals as well as coastal States in achieving an equitable solution. By developing a reasonably consistent case law supported by earlier decisions to which reference is made, judicial and arbitral bodies sitting in maritime delimitation cases have instilled considerable order and predictability in the dispute resolution system pertaining to maritime boundary cases, thereby enabling coastal States to submit their boundary disputes to third-party settlement with increasing confidence.

1. Introduction

Gilbert Guillaume, a former President of the International Court of Justice (ICJ), is reported to have observed during the fourth annual Lalive Lecture which he delivered in Geneva on 2 June 2010, that while international judicial bodies like the ICJ commonly refer to their own previous decisions, arbitration tribunals, with the exception of International Centre for Settlement of Investment Disputes (ICSID) tribunals, are reluctant to refer to arbitral precedents.[1] This paper tests that observation in relation to maritime delimitations through a citation analysis of the 17 decisions known to have been rendered by international courts and tribunals between 1969 and 2009.[2] Or to stay within the theme of the Sixth ABLOS Conference—"Contentious Issues in UNCLOS—Surely Not?"—: in an increasingly fragmented adjudicatory environment,

[1] See S. Perry, "Precedents should not be 'decorative,' warns judge," text available at <www.globalarbitrationreview.com/news/article/28452/>.

[2] For purposes of this paper, I have left out *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* (83 I.L.R. 1). The *ad hoc* tribunal in that case ruled that it was not called upon to reply to the question of the course of the line delimiting the maritime territories appertaining to the parties. I also have left out *Behring Sea Arbitration between Great Britain and the United States*, Award of 15 Aug. 1893, Consolidated Treaty Series, vol. 179, No. 8, p. 98.

is citing to each other's decisions a contentious issue for judicial and arbitral bodies charged with maritime delimitation?

As Table 1 shows, the earliest decision related to maritime delimitation dates back to the late-1960s, with the majority of rulings having been rendered from the 1980s onward. The most recent decision was issued in 2009.

In terms of the number of maritime delimitation decisions per court or tribunal, Table 2 shows that the ICJ is the clear frontrunner, with 11 out of the 21 cases of this kind ever submitted to adjudication having been decided by the principal judicial organ of the United Nations. While no fewer than four cases have been submitted to the ICJ in this millennium or on the eve thereof, the ICJ has been facing increasing competition from judicial and arbitral bodies formed under the United Nations Convention on the Law of the Sea (UNCLOS): four cases have been submitted to such bodies since 2004. Whereas by 1985 the ICJ and "pure" *ad hoc* tribunals had been used in equal numbers, the last case to have been referred to a "pure" *ad hoc* tribunal dates back to the mid-1990s. Since that time, nine cases have been referred to bodies that are not "pure" *ad hoc* tribunals, suggesting a shift away from such tribunals in favour of referrals to the ICJ and UNCLOS-related bodies.

As Table 3 demonstrates, the 21 maritime delimitation cases hitherto adjudicated have relied on consensual jurisdiction, i.e. without jurisdiction of the adjudicatory body being contested, in no fewer than 10 instances. Indeed, the first nine delimitation cases were all brought by special agreement between the parties. While this is no surprise for those cases which have been submitted to "pure" *ad hoc* tribunals, given that they necessarily derive their jurisdiction from a special treaty by which a dispute is submitted to them, the ICJ's record reveals a particularly interesting trend. Of the 11 ICJ cases concerning maritime delimitation, the first, and only, four were brought based on purely consensual jurisdiction (Special Agreement), the trend being in the opposite direction: the seven most recently filed cases have all been submitted to the ICJ by way of unilateral application.

Thus, maritime delimitation through third-party settlement has become an increasingly contentious process since the early-1990s, when Denmark sued Norway before the ICJ. One reason for this development might be that States perceive the maritime delimitation decisions of an increasing number of bodies as allowing them to make a well-informed decision about unilaterally referring a maritime boundary dispute to third-party settlement. This is especially the case for coastal States claiming a boundary based on the principle of equidistance, where none of the "relevant circumstances" developed in the jurisprudence are present, or appear to be of relatively minor importance to the delimitation exercise facing the tribunal seised in the matter.

2. Is there a maritime delimitation *jurisprudence constante*? A citation analysis of the maritime delimitation case law

What can we learn from the empirical data concerning citations, or cross-references, from one court or tribunal sitting in a maritime delimitation case to another, apart from the observation that such bodies operate in an increasingly contentious setting? For this we turn to Tables 4 and 5. While the number of citations in a given case does not necessarily provide information regarding the qualitative value of one precedent compared to another, the data reveal some

interesting facts which shall be highlighted in this section.[3]

At the outset, it should be emphasised that the principle of *stare decisis*—the binding nature of precedent—as it exists in Common law jurisdictions has no place in the ICJ, or in international law in general. For the ICJ, this is confirmed in Article 59 of its Statute, while Article 38 provides that judicial decisions constitute only "subsidiary means for the determination of rules of law." The ICJ's predecessor once observed that "[t]he object of [Article 59] is simply to prevent legal principles accepted by the Court in a particular case from being binding on other States or in other disputes."[4] As Judge Jessup has pointed out, however, in practice "[t]he influence of the Court's judgments is great, even though Article 59 of the Statute declares that the *decision* 'has no binding force except between the parties and in respect of that particular case,'"[5] concluding that "the influence of the Court's decisions is wider than their binding force."[6] One way to test this influence is by identifying ICJ citations in the rulings of the ICJ and other tribunals charged with maritime delimitation.

Recent rulings by the ICJ and other tribunals have in fact referred to jurisprudence as being an integral part of the maritime delimitation process. Thus, the ICJ referred to "its settled jurisprudence on maritime delimitation" in its most recent ruling.[7] The UNCLOS Annex VII tribunal in *Barbados-Trinidad & Tobago* went a step further by ascribing the following role to jurisprudence:

> The process of achieving an equitable result is thus constrained by legal principle, in particular in respect of the factors that may be taken into account. *It is furthermore necessary that the delimitation be consistent with legal principle as established in decided cases, in order that States in other disputes be assisted in the negotiations in search of an equitable solution* that are required by Articles 74 or 83 of the Convention.[8]

It bears reminding, however, as was emphasised by one of the earlier *ad hoc* tribunals, "each case of delimitation is a unicum."[9] The fact that a number of cases result in comparable or even identical outcomes is explained in part by the "trend toward harmonization of legal regimes"[10] (fueled partly by UNCLOS) as well as by the apparent willingness of courts and tribunals to adhere to "legal principle as established in [previously] decided cases."[11]

In any appraisal, it must be kept in mind that in maritime delimitation cases the essential objective, as dictated by the applicable law, whether conventional or customary, is to find an equitable solution, rather than creating predictability or consistency of the case law, whatever its

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[3] For purposes of this paper, I have included only references (including citations) by a given court or tribunal to any of the 17 published maritime delimitation rulings set forth in Table 1(A) in the portion of their ruling dealing strictly with delimitation issues, omitting case references ascribed to the parties and in non-delimitation sections of rulings.
[4] *German Interests in Polish Upper Silesia*, 1926 P.C.I.J. Ser. A, no. 7.
[5] Separate Opinion of Judge Jessup in *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970, p. 3, at 220, para. 106 (emphasis in original).
[6] Ibid. at 163, para. 9.
[7] *Romania-Ukraine*, para. 118.
[8] *Barbados-Trinidad & Tobago*, para. 243 (emphasis added).
[9] *Guinea/Guinea-Bissau*, para. 89 (emphasis in original). See also *Barbados-Trinidad & Tobago*, paras. 233, 242.
[10] *Barbados-Trinidad & Tobago*, para. 227.
[11] Ibid., para. 243.

status and content may be at any given point in time.[12]

2.1. Quantitative Analysis

Unsurprisingly in this context, the older decisions generally are cited more frequently compared to the more recent ones. The very first decision related to maritime delimitation, the ICJ's 1969 Judgment in the *North Sea Continental Shelf* Cases, stands out both in terms of the number of cases citing that decision and the total number of citations by courts and tribunals to the decision. Apart from the combined award by an *ad hoc* tribunal in *Western Approaches* (cited in 13 cases) and the ICJ's Judgment in *Tunisia/Libya* (cited in 10 cases), *North Sea Continental Shelf* is the only decision which has been cited by a majority of the maritime delimitation decisions. It is the sole decision to have been cited in each subsequent case. Moreover, the total number of citations which *North Sea Continental Shelf* has received (120) is more than double compared to the runner-up in Table 4. Table 4A graphically depicts the differences among the various decisions in terms of citation practice.

In the ICJ category, apart from *North Sea Continental Shelf*, one can discern two groups of decisions which are comparable in terms of both the number of cases citing decisions within each group and the total number of citations by courts and tribunals to those decisions, one being the threesome *Tunisia/Libya*, *Libya/Malta* and *Gulf of Maine* decided by the ICJ between 1982 and 1985, and the other being the threesome *Jan Mayen*, *Qatar-Bahrain* and *Cameroon-Nigeria* decided between 1993 and 2002, with the former receiving roughly double the number scored by the latter.

The data in Table 4 also suggest that the four decisions issued by the ICJ between 1969 and 1985 have been the most influential in the overall case law respecting maritime delimitation, judged by the number of citations: they account for 270 out of 409 references, or 66 percent of all citations. It is interesting to note that three ICJ Judges (Messrs. Gros, Lachs and Schwebel) each participated in three of those four cases, with Sir Robert Jennings and Shigeru Oda serving as counsel and later as ICJ Judge in several of these cases. The most significant non-ICJ decision rendered within that time period, the 1977-78 awards in *Western Approaches* (involving Messrs. Gros and Waldock as arbitrators and Messrs. Bowett and Jennings as counsel), while obtaining the second-highest score in terms of the number of cases citing this combined award, scored only 85 percent of the total number of citations which the fourth-highest-ranking ICJ case received.

The influence of André Gros on early precedent development appears to have been particularly important: Judge Gros sat on each deciding body in the first six cases, with the exception of *Dubai/Sharjah*. Another individual whose contribution stands out is Stephen Schwebel, having sat in no fewer than seven delimitation cases since the early-1980s. Schwebel is the only individual to have sat on all three categories of maritime delimitation bodies. It can be concluded that a select group of individuals has shaped the maritime delimitation case law.

When we compare the six maritime delimitation decisions rendered by "pure" *ad hoc* tribunals with each other, the combined award in *Western Approaches* stands out both in terms of the number of cases citing that award (13) and the total number of citations by courts and tribunals to the award (39). It has been cited by more than double the number of cases compared

[12] See *Guinea/Guinea-Bissau*, para. 88.

to the runner-up in this category, and it has received almost four times as many citations in the decisions of other bodies compared to the number two in the same category.

As Table 4 reveals, the awards in *Western Approaches* and *Guinea/Guinea-Bissau* have proven much more influential than the four subsequent *ad hoc* rulings, which have not been invoked much.

2.1.a International Court of Justice

In general, ICJ decisions feature considerably more references to earlier rulings in maritime delimitation cases than the rulings of "pure" *ad hoc* tribunals. While the total number of citations has remained high throughout all of the ICJ decisions concerning maritime delimitation, the ICJ seems inclined to cite generously to its own prior decisions and with roughly comparable frequency of citation in any given case. The Tunisia/Libya Court had only one prior ICJ decision to cite (*North Sea Continental Shelf*), and it cited that precedent 20 times. The ICJ has cited all, or almost all, of the available ICJ rulings in maritime delimitation cases in each case.

The ICJ also regularly invokes arbitral decisions, but the number of citations to *ad hoc* tribunal rulings is considerably lower than citations to ICJ decisions.[13] Early on that seems to reflect the fact that there were not many arbitral awards to cite. Thus, the first four ICJ decisions all mentioned the only available award. Of the subsequent ICJ rulings, only two decisions refer to three *ad hoc* precedents, while another cites two such precedents. The latest ICJ decision invokes only half of the available arbitral decisions.

The low number of total citations in ICJ decisions to *ad hoc* rulings generally—32, compared to 194 ICJ citations—and the fact that the number of *ad hoc* rulings cited did not rise as consistently over time in comparison to the number of ICJ decisions cited[14] suggests that the ICJ is less inclined to rely on arbitral awards than its own previous rulings in maritime delimitation cases.[15] This is not exceptional for a standing body.

2.1.b "Pure" *Ad Hoc* Tribunals

Ad hoc maritime delimitation tribunals tend to rely on other rulings at a lower citation rate than either the ICJ or UNCLOS Annex VII tribunals. Any given *ad hoc* decision, with the exception of the combined award in *Western Approaches*, has fewer total citations to other decisions and number of decisions cited compared to the ICJ.

Despite the steady increase in available rulings over the years, the number of decisions

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[13] See also I. Brownlie, *Principles of Public International Law*, 5th edn. (Oxford University Press, 1998), 19-20, nn. 118-19. Since 1998, the ICJ has cited between one and three arbitral decisions on at least 14 occasions in the four judgments it rendered between 2001 and 2009.

[14] In no case did the ICJ refer to more than half of the available arbitral precedents, with five out of eight cases mentioning only one such precedent. By comparison, both UNCLOS tribunals have cited two-thirds of the available arbitral precedents.

[15] Interestingly, the three most recent ICJ decisions all refer to the award in *Guinea/Guinea-Bissau*, which was decided by an *ad hoc* tribunal whose members were all sitting ICJ judges. At one point in its Award, the *ad hoc* tribunal refers to itself as the "Court" as opposed to the "Tribunal", the term used throughout the Award. See *Guinea/Guinea-Bissau*, para. 116.

cited remained low in the case of *ad hoc* tribunals both in absolute terms and when compared to the ICJ and UNCLOS tribunals. With one exception (*Dubai/Sharjah*), arbitral tribunals invoke the awards of other *ad hoc* bodies less often than they cite ICJ decisions. In terms of ICJ citations, each *ad hoc* ruling refers to all available ICJ precedents, the oldest and latest *ad hoc* awards constituting the sole exceptions in this regard.

2.1.c UNCLOS Annex VII Tribunals

UNCLOS tribunals, which so far have issued only two awards, namely in 2006-07, cite decisions by other bodies more frequently than both "pure" *ad hoc* tribunals and the ICJ. UNCLOS tribunals, like the ICJ, tend to cite most of the available rulings, especially ICJ decisions. Thus, the award in *Barbados-Trinidad & Tobago* contains 43 references to all available ICJ precedents and six references to four of the six "pure" *ad hoc* decisions, while the award in *Guyana-Suriname* refers 39 times to all available ICJ precedents and 11 times to four *ad hoc* awards.

UNCLOS tribunals appear more willing to refer to "pure" *ad hoc* tribunal rulings compared to the ICJ. Although there are only two UNCLOS precedents, it appears that UNCLOS tribunals are likely to have a relatively high number of citations to decisions of other UNCLOS tribunals. In *Guyana-Suriname*, the tribunal cited the only prior UNCLOS tribunal decision seven times. Only one other ruling was cited more frequently, namely the ICJ's decision in *Cameroon-Nigeria*.

2.2. Qualitative Analysis

While a qualitative analysis of the maritime delimitation jurisprudence is beyond the scope of this paper,[16] a review of that jurisprudence shows that international bodies charged with maritime delimitation have crafted a more or less consistent body of decisions while refraining from using precedent as "a mere decorative item."[17] By developing a reasonably consistent case law supported by earlier decisions to which reference is made, courts and tribunals sitting in maritime delimitation cases have instilled considerable order and predictability[18] in the dispute resolution system pertaining to maritime boundary cases, thereby enabling coastal States to submit their disputes to third-party settlement with increasing confidence.

It also appears to be true in the maritime delimitation context that "[a]lthough the force of *res judicata* does not extend to the reasoning of a judgment, it is the practice of the [ICJ], as of arbitral tribunals, to stand by the reasoning set forth in previous decisions."[19]

3. The case law's contribution to the maritime delimitation process

In maritime delimitation matters customary international law can "only provide a few

[16] Such an analysis would reveal, for example, that most citations to *North Sea Continental Shelf* involve references to the fundamental principle that "the land dominates the sea," the concept of natural prolongation and the principles of equidistance and non-encroachment.
[17] Guillaume, *supra* note 1.
[18] See *Barbados-Trinidad & Tobago*, para. 230 (referring to "[t]he search for predictable, objectively-determined criteria for delimitation, as opposed to subjective findings lacking precise legal or methodological bases").
[19] Separate Opinion of Judge Gros in *Barcelona Traction Case*, *supra* note 5, p. 268, para. 1.

basic legal principles, which lay down guidelines to be followed with a view to an essential objective,"[20] i.e. achieving an equitable solution. In this context, international bodies charged with maritime delimitation have developed, and more or less consistently applied, a certain delimitation "methodology" or process, in the course of which a number of principles have emerged. By proceeding in this manner, "[c]ertainty is thus combined with the need for an equitable result,"[21] or, to summarise the case law more accurately, the uncertainty inherent in the process is reduced.

When charged with maritime delimitation, courts and tribunals have adhered to a multi-stage process comprising defined stages or steps. This process can be summarised as follows:

Step	**Maritime Delimitation Methodology**
1	Identification of the "relevant area"
2	Construction of a provisional delimitation line, usually based on the principle of equidistance
3	Examination of the provisional (equidistance) line in the light of equitable factors (relevant circumstances) so as to determine whether it is necessary to adjust or shift that line in order to produce an "equitable solution"
4	Application of a final proportionality check

As a preliminary step in the delimitation process, the adjudicatory body will determine the relevant maritime area, i.e. the geographical context of the maritime delimitation to be undertaken. This step involves identification of the relevant coasts abutting upon the area to be delimited, as well as any islands and other geographical features.

This initial step is followed by a two-step process—an approach which is usually referred to as the "equitable principles/relevant circumstances" method.[22] While the case law is in agreement that there is no single obligatory method of delimitation and that several methods may be applied to the same delimitation, construction of a provisional line based on equidistance is generally considered "a practical starting point."[23] Thus, the initial stage of said approach, which is now firmly established in the practice of international tribunals, consists of constructing a provisional equidistance line—i.e. a line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the disputing States is measured—by plotting a line "on strictly geometrical criteria on the basis of objective data."[24] The equitableness of the equidistance method of delimitation is considered particularly apt for States with opposite coasts,[25] but less so in situations of adjacent coasts.[26]

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[20] *Gulf of Maine*, para. 81.
[21] *Barbados-Trinidad & Tobago*, para. 242.
[22] See *Cameroon-Nigeria*, para. 288; *Barbados-Trinidad & Tobago*, para. 304 (citing *Qatar-Bahrain*, para. 176).
[23] *Barbados-Trinidad & Tobago*, para. 242. See ibid., para. 306. According to settled jurisprudence, no privileged status should be assigned to any particular method of delimitation and there is no presumption in favour of the principle of equidistance. See *Tunisia/Libya*, para. 110; *Guinea/Guinea-Bissau*, para. 102 ("the equidistance method is just one among many and … there is no obligation to use it or give it priority, even though it is recognized as having a certain intrinsic value because of its scientific character and the relative ease with which it can be applied."); *Cameroon-Nigeria*, para. 293 (citing *Libya/Malta*, para. 63); *Nicaragua-Honduras*, para. 272 ("[T]he equidistance method does not automatically have priority over other methods of delimitation … .").
[24] *Romania-Ukraine*, para. 118.
[25] See, e.g., *Libya/Malta*, p. 13, at 47.

The ICJ has recognised that the "equidistance-special circumstances" rule in the 1958 Continental Shelf Convention can be assimilated with the rule of general international law requiring an "equitable result" based upon equitable principles.[27] Thus, the next step consists of considering whether there are case-specific factors or circumstances calling for the adjustment or shifting of the provisional line (typically an equidistance line) in order to achieve an equitable result. In this context, neutral criteria of a geographical nature, especially the length and the configuration of the coastlines[28] of the respective coastal States, are generally accepted as prevailing over socioeconomic considerations and area-specific criteria such as geomorphological aspects or resource-specific criteria such as the distribution of fish stocks.[29] Judicial and arbitral bodies have adopted a cautious approach with regard to oil wells/concessions, considering them only where the parties expressly or tacitly agreed on their location.[30]

While geographical configuration is not in itself an element open to modification, the disparity between the length of the parties' coastlines (if significant), the distance between the relevant coasts and concavity of coastlines—i.e. geographical context—within the area to be delimited are regularly considered as "relevant circumstances" which may dictate an adjustment of a provisional delimitation line.

As part of this process, courts and tribunals have endorsed the practice, developed in State practice, of establishing a multi-purpose or all-purpose single maritime boundary line covering the maritime territories containing the Exclusive Economic Zone and continental shelf, and sometimes also the territorial sea,[31] of the disputing parties "either by means of the determination of a single boundary line (*Gulf of Maine*, I.C.J. Reports 1984, p. 246; *Guinea/Guinea-Bissau*, 77 I.L.R. p. 635; *Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40) or by the determination of lines that are theoretically separate but in fact coincident (*Jan Mayen*, I.C.J. Reports 1993, p. 38)"[32] in the absence of explicit agreement by the parties. With one exception, this practice has become standard in maritime delimitation cases since the ICJ's ruling in *Gulf of*

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[26] See, e.g., *Western Approaches*; *Guinea/Guinea-Bissau*. In the case of delimitation between adjacent coasts, "an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case." *Romania-Ukraine*, para. 116 (referring to *Nicaragua-Honduras*, para. 281); *Barbados-Trinidad & Tobago*, para. 306.

[27] See *Jan Mayen*, para. 56.

[28] Given that "the starting point of any delimitation is the entitlement of a State to a given maritime area" (*Barbados-Trinidad & Tobago*, para. 224), the coast is the basis of entitlement over maritime areas based on the principle that "the land dominates the sea."

[29] See *Guyana-Suriname*, para. 356 (citing *Barbados-Trinidad & Tobago*, para. 228); *Guinea/Guinea-Bissau*, para. 89.

[30] While the ICJ in *Tunisia/Libya* (para. 118) acknowledged that the parties' conduct regarding oil concessions may determine the delimitation line, it has subsequently pointed out that oil wells and concessions are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of a provisional delimitation line unless based on express or tacit agreement between the parties. See *Cameroon-Nigeria*, para. 304. See also *Romania-Ukraine*, para. 198; *Nicaragua-Honduras*, paras. 254-56. For arbitral precedent, see *Eritrea/Yemen*, paras. 75-86; *Barbados-Trinidad & Tobago*, paras. 241 ("Resource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance"), 363; *Guyana-Suriname*, paras. 380-90. Earlier arbitral decisions also declined to take oil concessions into account. See *Cameroon-Nigeria*, para. 304 (citing *Guinea/Guinea-Bissau*, para. 63, and *St. Pierre & Miquelon*, paras. 89-91).

[31] E.g., *Qatar-Bahrain*, *Guyana-Suriname* and *Nicaragua-Honduras*.

[32] *Barbados-Trinidad & Tobago*, para. 235.

Maine.

The final stage of the test of equity of a delimitation consists of the application of a final proportionality check to verify the equitableness of the tentative delimitation. This check is applied by judicial and arbitral bodies alike to ensure that the final result is not tainted by some form of gross disproportion.

In this context, the presence of one or more islands in the relevant area constitutes one of the most controversial aspects in maritime delimitation. While there are no hard-and-fast "rules," as such, and therefore no *jurisprudence constante*, concerning the treatment to be given to islands, this final step in the maritime delimitation process in practice has caused international courts and tribunals to prevent small islands from having a disproportionate and inequitable effect upon maritime boundaries. This has resulted in eliminating the disproportionate effect of uninhabited islands[33] or in giving partial (usually one-half or three-quarters) effect[34] or even no effect[35] to islands, depending on, *inter alia*, whether the island concerned falls under the sovereignty of the parties or belongs to third States, the size of the island involved and the island's relationship to the coastline.

Finally, it is settled practice for international tribunals to effect a maritime delimitation "without prejudice to the position of any third State regarding its entitlements" in the area to be delimited.[36]

4. Conclusion

A review of the maritime delimitation jurisprudence since 1969 reveals that, with few exceptions, standing and *ad hoc* bodies have invoked prior decisions with roughly equal frequency, with rulings of the ICJ being cited more frequently across the board compared to rulings by other tribunals. With few exceptions, all three categories have referred to all available ICJ decisions in a given case. UNCLOS Annex VII tribunals have referred to ICJ decisions and arbitral awards even more frequently than the ICJ itself. The two most recent decisions by the ICJ and UNCLOS tribunals invoke precedents in all three categories. Clearly, invoking precedent is not a contentious issue for courts and tribunals charged with maritime delimitation.

Hence, the data presented in this paper suggest that Judge Guillaume's recent observation that international arbitration tribunals (i.e. tribunals other than the ICJ) are reluctant to refer to arbitral precedents does not apply to arbitral tribunals charged with maritime delimitation, just as he singled out ICSID tribunals. It is true, however, that "pure" *ad hoc* tribunals tend to cite to a given precedent in slightly lower numbers compared to the ICJ and UNCLOS Annex VII tribunals.

While a leading commentator has explained with regard to the ICJ that "Article 59 of the Statute in part reflects a feeling on the part of the founders that the Court was intended to settle disputes as they came to it rather than to shape the law,"[37] that same commentator has pointed out that "[a] coherent body of jurisprudence will naturally have important consequences for the

[33] E.g., *Libya/Malta*.
[34] E.g., *Tunisia/Libya*, *Qatar-Bahrain*, *Western Approaches*.
[35] E.g., *Dubai/Sharjah*.
[36] See, e.g., *Romania-Ukraine*, para. 114.
[37] Brownlie, *supra* note 13, p. 20.

law,"[38] a phenomenon supported by the maritime delimitation jurisprudence. Thus, the more consistent that jurisprudence becomes, the harder it will be for States to justify deviating from legal principle as developed in decided cases when negotiating boundaries or arguing cases and for tribunals, including the International Tribunal for the Law of the Sea, to ignore established jurisprudence when deciding maritime delimitation cases.

The maritime delimitation case law demonstrates that the judicial and arbitral bodies involved together have sought to develop "an approach that would accommodate both the need for predictability and stability within the rule of law and the need for flexibility in the outcome that could meet the requirements of equity … ."[39] As the first two decisions issued by tribunals established under UNCLOS indicate, in its inaugural delimitation case the ITLOS has rich jurisprudential material at its disposal in order to reach an equitable solution which is in line with legal principle as established in previously decided cases. While the ITLOS retains wide discretion in its judicial task and is not bound by precedent, let alone precedent developed by other bodies, it would be well-advised to adhere to legal principle as established in decided cases, lest it be perceived by potential customers as less predictable compared to other available options.

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[38] Ibid., p. 19.
[39] *Barbados-Trinidad & Tobago*, para. 232.

Table 1

MARITIME DELIMITATION DECISIONS

A. Decided (1969-2009)

1	1969	*North Sea Continental Shelf* (Germany/Denmark; Germany/Netherlands) (ICJ[1])
2	1977	*Dispute between Argentina and Chile concerning the Beagle Channel* (Argentina/Chile) (*Ad hoc* tribunal[2])
3	1977-78	*Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf* [*Western Approaches*] (Great Britain/France) (*Ad hoc* tribunal[3])
4	1981	*Dubai-Sharjah Border Arbitration* (Dubai/Sharjah) (*Ad hoc* tribunal[4])
5	1982	*Continental Shelf* (Tunisia/Libya) (ICJ[5])
6	1984	*Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/USA) (ICJ[6])
7	1985	*Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (Guinea/Guinea-Bissau) (*Ad hoc* tribunal[7])
8	1985	*Continental Shelf* (Libya/Malta) (ICJ[8])
9	1992	*Delimitation of the Maritime Areas between Canada and the French Republic* [*St. Pierre & Miquelon*] (Canada/France) (*Ad hoc* tribunal[9])
10	1993	*Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway) (ICJ[10])

[1] I.C.J. Reports 1969, p. 3. Composition: President Bustamante y Rivero; Vice-President Koretsky; Judges Sir Gerald Fitzmaurice, Tanaka, Jessup, Morelli, Sir Muhammed Zafrulla Khan, Padilla Nervo, Forster, Gros, Ammoun, Bengzon, Petrén, Lachs, Onyeama. Counsel included G. Jaenicke, S. Oda and H. Waldock.

[2] R.I.A.A., vol. XXI, p. 53. Composition: Sir Gerald Fitzmaurice, President; A. Gros, S. Petrén, C. Onyeama, H. Dillard, members. Counsel included R. Ago, R. Jennings, P. Reuter, P. Weil, I. Brownlie.

[3] 18 I.L.M. 397 (1979). Composition: E. Castren, President; H. Briggs, A. Gros, E. Ustor, Sir Humphrey Waldock, members. Counsel included R-J Dupuy, M. Virally, D. Bardonnet, I. Sinclair, R. Jennings, D. Bowett.

[4] 91 I.L.R. 543. Composition: P. Cahier, President; J. Simpson and K. Simmonds, members.

[5] I.C.J. Reports 1982, p. 18. Composition: President Sir Humphrey Waldock; Vice-President Elias; Judges Gros, Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara, El-Khani, Schwebel; Judges *ad hoc* Evensen, Jiménez de Aréchaga. Counsel included R. Jennings, R-J Dupuy, M. Virally, G. Abi-Saab, D. Bowett, H. Briggs, K. Highet, F. Vallat.

[6] I.C.J. Reports 1984, p. 246. Composition: President of the Chamber Ago; Judges Gros, Mosler, Schwebel; Judge *ad hoc* Cohen. Counsel included D. Bowett, I. Brownlie, Y. Fortier, G. Jaenicke, P. Weil, S. Riesenfeld.

[7] 25 I.L.M. 252 (1986). Composition: M. Lachs, President; K. Mbaye, M. Bedjaoui, members. Counsel included M. McDougal, M. Reisman, P. Cahier, J-P Queneudec.

[8] I.C.J. Reports 1985, p. 13. Composition: President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Ruda, Oda, Ago, El-Khani, Schwebel, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; Judges *ad hoc* Jiménez de Aréchaga, Castañeda. Counsel included D. Bowett, H. Briggs, K. Highet, G. Jaenicke, L. Lucchini, J-P Queneudec, F. Vallat, I. Brownlie, E. Lauterpacht, P. Weil.

[9] 31 I.L.M. 1145 (1992). Composition: E. Jiménez de Aréchaga, President; O. Schachter, G. Arangio-Ruiz, P. Weil, A. Gotlieb, members. Counsel included D. Bowett, Y. Fortier, G. Jaenicke, L. Lucchini, J-P Queneudec.

[10] I.C.J. Reports 1993, p. 38. Composition: President Sir Robert Jennings; Vice-President Oda; Judges Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Ajibola; Judge *ad hoc* Fischer. Counsel included E. Jiménez de Aréchaga, D. Bowett, I. Brownlie, K. Highet and P.

(continued…)

11	1999	*Eritrea-Yemen Arbitration (Second Stage: Maritime Delimitation)* (*Ad hoc* tribunal[11])
12	2001	*Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain) (ICJ[12])
13	2002	*Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria; Equatorial Guinea intervening) (ICJ[13])
14	2006	*Barbados v. Trinidad and Tobago* (UNCLOS Annex VII tribunal[14])
15	2007	*Guyana v. Suriname* (UNCLOS Annex VII tribunal[15])
16	2007	*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras) (ICJ[16])
17	2009	*Maritime Delimitation in the Black Sea* (Romania v. Ukraine) (ICJ)[17]

Weil.

[11] 40 I.L.M. 983 (2001). Composition: Sir Robert Jennings, President; S. Schwebel, A. El-Kosheri, K. Highet, R. Higgins, members. Counsel included J. Paulsson, R. Bundy.

[12] I.C.J. Reports 2001, p. 40. Composition: President Bedjaoui; Vice-President Schwebel; Judges Oda, Sir Robert Jennings, Tarassov, Guillaume, Shahbuddeen, Aguilar-Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma; Judges *ad hoc* Valticos, Ruda. Counsel included J-P Queneudec, I. Sinclair, F. Vallat, R. Bundy, E. Lauterpacht, J. Paulsson, P. Weil, M. Reisman, R. Volterra.

[13] I.C.J. Reports 2002, p. 303. Composition: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby; Judges *ad hoc* Mbaye, Ajibola. Counsel included A. Pellet, J-P Cot, B. Simma, I. Sinclair, I. Brownlie, A. Watts, J. Crawford, G. Abi-Saab.

[14] R.I.A.A., vol. XXVII, p. 214. Composition: S. Schwebel, President; I. Brownlie, V. Lowe, F. Orrego Vicuña, Sir Arthur Watts, members. Counsel included R. Volterra, E. Lauterpacht, M. Reisman, J. Paulsson, J. Crawford, C. Greenwood.

[15] Text available at <www.pca-cpa.org>. Composition: D. Nelson, President; T. Franck, K. Hossain, I. Shearer, H. Smit, members. Counsel included P. Sands, C. Greenwood, D. Colson, B. Oxman, A. Soons, A. Oude Elferink.

[16] I.C.J. Reports 2007, text available at <www.icj-cij.org>. Composition: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judges *ad hoc* Torres Bernárdez, Gaja. Counsel included I. Brownlie, A. Pellet, A. Oude Elferink, P-M Dupuy, C. Greenwood, P. Sands, J-P Queneudec, D. Colson.

[17] I.C.J. Reports 2009, text available at <www.icj-cij.org>. Composition: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judges *ad hoc* Cot, Oxman. Counsel included J. Crawford, V. Lowe, A. Pellet, R. Bundy, J-P Queneudec, M. Wood.

B. Pending

1	2001-	*Territorial and Maritime Dispute* (Nicaragua v. Colombia) (ICJ)
2	2008-	*Maritime Dispute* (Peru v. Chile) (ICJ)
3	2010-	*Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal* (Bangladesh v. Myanmar) (ITLOS)
4	2010-	*Bangladesh v. India* (UNCLOS Annex VII tribunal)

Table 2

MARITIME DELIMITATION CASES BY FORUM

International Court of Justice (11)	**International Tribunal for the Law of the Sea (1)**	**UNCLOS Annex VII tribunal (3)**	***Ad hoc* tribunal (6)**
North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands) (1969)	*Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal* (Bangladesh v. Myanmar) (pending)	*Barbados v. Trinidad and Tobago* (2006)	*Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf* [*Western Approaches*] (Great Britain/France) (1977-78)
Continental Shelf (Tunisia/Libya) (1982)		*Guyana v. Suriname* (2007)	*Dispute between Argentina and Chile concerning the Beagle Channel* (Argentina/Chile) (1977)
Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA) (1984)		*Bangladesh v. India* (pending)	*Dubai-Sharjah Border Arbitration* (Dubai/Sharjah) (1981)
Continental Shelf (Libya/Malta) (1985)			*Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (Guinea/Guinea-Bissau) (1985)
Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway) (1993)			*Delimitation of the Maritime Areas between Canada and the French Republic* [*St. Pierre & Miquelon*] (Canada/France) (1992)
Maritime Delimitation and Territorial Questions between			*Eritrea-Yemen Arbitration (Second Stage: Maritime*

Qatar and Bahrain (Qatar v. Bahrain) (2001)			*Delimitation)* (1999)
Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) (2002)			
Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribean Sea (Nicaragua v. Honduras) (2007)			
Maritime Delimitation in the Black Sea (Romania v. Ukraine) (2009)			
Territorial and Maritime Dispute (Nicaragua v. Colombia) (pending)			
Maritime Dispute (Peru v. Chile) (pending)			

Table 3

MARITIME DELIMITATION CASES: BASIS OF JURISDICTION

Consensual (special treaty) (10)	**Non-consensual (11)**
North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands) (1969)	*Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway) (1993)
Dispute between Argentina and Chile concerning the Beagle Channel (Argentina/Chile) (1977)	*Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain) (2001)
Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf [*Western Approaches*] (Great Britain/France) (1977-78)	*Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria; Equatorial Guinea intervening) (2002)
Dubai-Sharjah Border Arbitration (Dubai/Sharjah) (1981)	*Barbados v. Trinidad and Tobago* (2006)
Continental Shelf (Tunisia/Libya) (1982)	*Guyana v. Suriname* (2007)
Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA) (1984)	*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribean Sea* (Nicaragua v. Honduras) (2007)
Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea/Guinea-Bissau) (1985)	*Maritime Delimitation in the Black Sea* (Romania v. Ukraine) (2009)
Continental Shelf (Libya/Malta) (1985)	*Territorial and Maritime Dispute* (Nicaragua v. Colombia) (pending)
Delimitation of the Maritime Areas between Canada and the French Republic [*St. Pierre & Miquelon*] (Canada/France) (1992)	*Maritime Dispute* (Peru v. Chile) (pending)
Eritrea-Yemen Arbitration (Second Stage: Maritime Delimitation) (1999)	*Bangladesh v. India* (pending)
	Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar) (pending)

Table 4

MARITIME DELIMITATION DECISIONS: NUMBER OF CITATIONS FOR EACH CASE (SORTED BY TOTAL NUMBER OF CITATIONS)

International Court of Justice	**Number of Cases Citing**	**Total Number of Citations**
North Sea Continental Shelf (1969)	16	120
Tunisia/Libya (1982)	10	52
Libya/Malta (1985)	8	52
Gulf of Maine (1984)	9	46
Qatar-Bahrain (2001)	5	25
Jan Mayen (1993)	5	27
Cameroon-Nigeria (2002)	4	18
Nicaragua-Honduras (2007)	1	4
Romania-Ukraine (2009)	-	-
(Total)		(409)
***Ad Hoc* Tribunals**		
Western Approaches (1977-78)	13	39
Guinea/Guinea-Bissau (1985)	5	10
Eritrea/Yemen (1999)	3	5
Beagle Channel (1977)	1	2
Dubai/Sharjah (1981)	1	2
St. Pierre & Miquelon (1992)	3	3
(Total)		(61)
UNCLOS Annex VII Tribunals		
Barbados-Trinidad & Tobago (2006)	2	8
Guyana-Suriname (2007) (Total)	0	0 (8)

Table 4A

MARITIME DELIMITATION DECISIONS

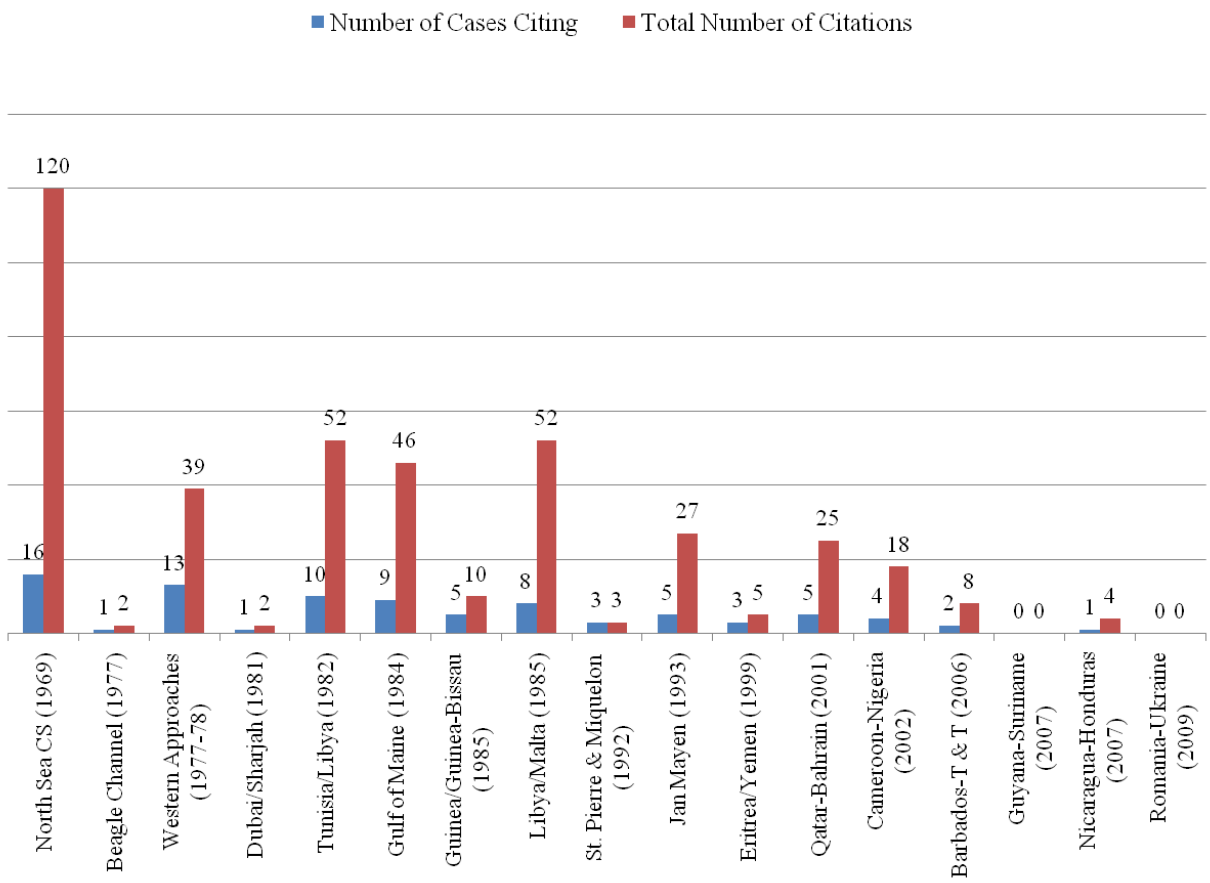

Table 5

PRECEDENTS CITED IN MARITIME DELIMITATION DECISIONS

Tribunals/*Decisions*	International Court of Justice Citations	*Ad Hoc* Tribunal Citations	UNCLOS Annex VII Tribunal Citations
(1) International Court of Justice			
North Sea Continental Shelf (1969)			
Tunisia/Libya (1982)	1 Case / 20 Citations[1]	1 Case / 2 Citations[2]	
Gulf of Maine (1984)	2 Cases / 16 Citations[3]	1 Case / 6 Citations[4]	
Libya/Malta (1985)	2 Cases / 34 Citations[5]	1 Case / 2 Citation[6]	
Jan Mayen (1993)	4 Cases / 38 Citations[7]	1 Case / 8 Citations[8]	
Qatar-Bahrain (2001)	4 Cases / 16 Citations[9]	2 Cases / 3 Citations[10]	
Cameroon-Nigeria (2002)	6 Cases / 21 Citations[11]	3 Cases / 5 Citations[12]	
Nicaragua-Honduras (2007)	6 Cases / 20 Citations[13]	1 Case / 3 Citations[14]	
Romania-Ukraine (2009)	8 Cases / 29 Citations[15]	3 Cases / 3 Citations[16]	1 Case / 1 Citation[17]

[1] *North Sea Continental Shelf*, 20 citations.
[2] *Western Approaches*, 1 citation.
[3] *North Sea Continental Shelf*, 9 citations; *Tunisia/Libya*, 7 citations.
[4] *Western Approaches*, 6 citations.
[5] *North Sea Continental Shelf*, 13 citations; *Tunisia/Libya*, 21 citations.
[6] *Western Approaches*, 2 citations.
[7] *North Sea Continental Shelf*, 8 citations; *Tunisia/Libya*, 2 citations; *Gulf of Maine*, 12 citations; *Libya/Malta*, 16 citations.
[8] *Western Approaches*, 5 citations.
[9] *North Sea Continental Shelf*, 3 citations; *Gulf of Maine*, 3 citations; *Libya/Malta*, 5 citations; *Jan Mayen*, 5 citations.
[10] *Western Approaches*, 1 citation; *Dubai/Sharjah*, 2 citations.
[11] *North Sea Continental Shelf*, 3 citations; *Tunisia/Libya*, 4 citations; *Gulf of Maine*, 4 citations; *Libya/Malta*, 3 citations; *Jan Mayen*, 3 citations; *Qatar-Bahrain*, 4 citations.
[12] *Western Approaches*, 1 citation; *Guinea/Guinea-Bissau*, 3 citations; *St. Pierre & Miquelon*, 1 citation.
[13] *North Sea Continental Shelf*, 4 citations; *Tunisia/Libya*, 3 citations; *Gulf of Maine*, 3 citations; *Libya/Malta*, 2 citations; *Qatar-Bahrain*, 5 citations; *Cameroon-Nigeria*, 3 citations.
[14] *Guinea/Guinea-Bissau*, 3 citations.
[15] *North Sea Continental Shelf*, 5 citations; *Tunisia/Libya*, 2 citations; *Gulf of Maine*, 1 citation; *Libya/Malta*, 7

(continued…)

(2) *Ad Hoc* Tribunals			
Beagle Channel (1977)	-	-	
Western Approaches (1977)	1 Case / 29 Citations[18]		
Western Approaches (1978)	1 Case / 1 Citation[19]		
Dubai/Sharjah (1981)	1 Case/ 5 Citations[20]	1 Case / 7 Citations[21]	
Guinea/Guinea-Bissau (1985)	3 Cases / 14 Citations[22]	1 Case / 2 Citation[23]	
St. Pierre & Miquelon (1992)	4 Cases / 14 Citations[24]	1 Case / 5 Citations[25]	
Eritrea/Yemen (1999)	1 Case / 3 Citations[26]	2 Cases / 2 Citations[27]	
(3) UNCLOS Annex VII Tribunals			
Barbados-Trinidad & Tobago (2006)	7 Cases / 43 Citations[28]	4 Cases / 6 Citations[29]	
Guyana-Suriname (2007)	7 Cases / 39 Citations[30]	4 Cases / 11 Citations[31]	1 Case / 7 Citations[32]

citations; *Jan Mayen*, 6 citations; *Qatar-Bahrain*, 1 citation; *Cameroon-Nigeria*, 3 citations; *Nicaragua-Honduras*, 4 citations.

[16] *Western Approaches*, 1 citation; *Guinea/Guinea-Bissau*, 1 citation; *Eritrea/Yemen*, 1 citation.

[17] *Barbados-Trinidad & Tobago*, 1 citation.

[18] *North Sea Continental Shelf*, 29 citations.

[19] *North Sea Continental Shelf*, 1 citation.

[20] *North Sea Continental Shelf*, 5 citations.

[21] *Western Approaches*, 7 citations.

[22] *North Sea Continental Shelf*, 6 citations; *Tunisia/Libya*, 6 citations; *Gulf of Maine*, 2 citations.

[23] *Western Approaches*, 2 citations.

[24] *North Sea Continental Shelf*, 3 citations; *Tunisia/Libya*, 1 citation; *Gulf of Maine*, 5 citations; *Libya/Malta*, 5 citations.

[25] *Western Approaches*, 5 citations.

[26] *North Sea Continental Shelf*, 3 citations.

[27] *Western Approaches*, 1 citation; *Guinea/Guinea-Bissau*, 1 citation.

[28] *North Sea Continental Shelf*, 5 citations; *Tunisia/Libya*, 2 citations; *Gulf of Maine*, 11 citations; *Libya/Malta*, 9 citations; *Jan Mayen*, 6 citations; *Qatar-Bahrain*, 9 citations; *Cameroon-Nigeria*, 3 citations.

[29] *Western Approaches*, 2 citations; *Guinea/Guinea-Bissau*, 2 citations; *Eritrea/Yemen*, 1 citation; *St. Pierre & Miquelon*, 1 citation.

[30] *North Sea Continental Shelf*, 3 citations; *Tunisia/Libya*, 4 citations; *Gulf of Maine*, 5 citations; *Libya/Malta*, 5 citations; *Jan Mayen*, 7 citations; *Qatar-Bahrain*, 6 citations; *Cameroon-Nigeria*, 9 citations.

[31] *Western Approaches*, 5 citations; *Beagle Channel*, 2 citations; *St. Pierre & Miquelon*, 1 citation; *Eritrea/Yemen*, 3 citations.

[32] *Barbados-Trinidad & Tobago*, 7 citations.