ADJUDICATION AND ADJUSTMENT— INTERNATIONAL JUDICIAL DECISION AND THE SETTLEMENT OF TERRITORIAL AND BOUNDARY DISPUTES*

By A. L. W. MUNKMAN

I. INTRODUCTION

THE *St. Croix River* case,[1] decided by a mixed commission appointed under the Jay Treaty (1794), is usually described as the first modern example of international adjudication. The Agent for the United States in those proceedings remarked of the decision, in a letter to the United States Secretary of State,

> . . . you will be surprised to hear that it was rather effected by negotiation than by a Judicial determination.[2]

Moore, commenting on this observation, wrote:

> It certainly is true that the decision did not fully allow the claim of either party; but it is permissible to take the view that what appeared to the advocate of one of the parties, and no doubt equally to the advocate of the other party, to be a 'negotiation' rather than a 'Judicial determination', since it required the abandonment by each of a part of his contentions, was after all only an example of the necessary process of adjustment, of the weighing of one consideration against another, by which, in the presence of proofs concerning the effect of which opinions may inevitably differ, concurrent and just human judgments, judicial and otherwise, are daily reached.[3]

More recent examples of this 'necessary process of adjustment' in operation are offered by the *Argentine–Chile Frontier*[4] and *Rann of Kutch*

* The author of this article was killed in a road accident on 23 December 1972. She did not see the proofs and the proof reading has been done by the editors.

Miss A. L. W. Munkman was a member of Girton College in the University of Cambridge. She graduated Bachelor of Arts after reading in both classics and economics with no great enthusiasm. She then turned to law and there found intellectual satisfaction and thereafter devoted her very great abilities to international law. She was called to the bar by the Middle Temple, read the international law section of the Cambridge LL.B. and was placed in the first class. After a short period of research at Cambridge, she was appointed a Lecturer in the Department of Public International Law in the University of Edinburgh in 1969.

The accident which killed Athene Munkman at the age of only 32 deprived international law of one of the keenest intellects of her generation. A highly gifted scholar and teacher, devoted to international law, there is no doubt that, had she been spared, she would have made a major contribution of the first importance to the development and understanding of both public and private international law.—R. Y. J.

[1] Moore, *International Arbitrations*, vol. 1, p. 1; *International Adjudications*, Modern Series, vols. 1 and 2.

[2] Ibid., vol. 2, p. 367. [3] Ibid., pp. 367–8.

[4] Published by Her Majesty's Stationery Office, 1966, and in *International Law Reports*, 38, p. 10. It is discussed below at p. 33.

arbitrations.[1] A glance at the diagram appended to the former award shows that the boundary line selected by the arbitrator does not follow the line claimed by either party, but, in effect, splits the disputed territory in half. The latter award also divides the territory in dispute: the major part was awarded to India; a smaller portion was awarded to Pakistan. Thus, superficially at least, awards ranging from the earliest to the most recent examples of modern international adjudication bear the marks of compromise.

Confronted with such 'compromise' awards, writers on the process of international adjudication have adopted three different standpoints.

(1) Some writers assert that 'compromise' is alien to the judicial function and characteristic only of 'diplomatic' procedures of dispute settlement—such as conciliation and mediation. These writers are therefore inclined to measure progress in the 'judicial' settlement of disputes by the elimination of 'compromise', and to regard adjudication by permanent courts as superior in that respect.[2]

(2) Other writers agree that 'compromise' should not be a part of the strictly 'judicial' settlement of disputes by a court, but regard it as a valuable characteristic of 'arbitration' which should be maintained. These writers therefore regard the procedure of 'arbitration' as midway between the procedures of mediation and conciliation and 'judicial settlement' by a permanent court, in that it offers a 'mediatory' or 'conciliatory', but binding, decision.[3]

(3) Still other writers assert that 'compromise' in some sense is a normal and essential element of the judicial function—whether exercised by an arbitrator or by a judge.[4] They describe this element of 'compromise' in a variety of terms: as, for example, 'adjustment',[5] the 'balancing of conflicting considerations',[6] the finding of 'the exact balance' between opposing claims,[7] or as the application of 'equity' to modify or supplement positive

[1] The *Introduction to the Award and the Conclusions of the Members of the Tribunal* are published by the Government of India Press (1968). The 'Introduction and Excerpts from the Conclusions' are also published in *International Legal Materials* (1968), pp. 633 et seq. The award is discussed below, p. 70.

[2] See, e.g., J. B. Scott, *An International Court of Justice*, pp. 64–5, and *The Status of the International Court of Justice*, pp. 21–6; Lapradelle and Politis, *Recueil des arbitrages internationaux* (introductions to successive volumes); also Hedges, 'The Juridical Basis of Arbitration', this *Year Book*, 7 (1926), pp. 110 et seq., and Moore, *International Adjudications*, vol. 1, especially at pp. lxxxv et seq. Cf. Dennis, 'Compromise, the Great Defect of Arbitration', *Columbia Law Review*, 11 (1911), p 493.

[3] See, e.g., Brierly, 'The Judicial Settlement of International Disputes' (reprinted in *The Basis of Obligation in International Law*, pp. 93 et seq.), at p. 95. Lachs makes a not dissimilar distinction (see below). See also the comments of the Netherlands Government on the International Law Commission's draft on arbitral procedure and the criticisms of the I.L.C. draft (see p. 6 n. 3 for references).

[4] See, e.g., Moore, *International Adjudications*, at p. xc; Descamps (quoted ibid. at p. lxxxviii); H. Lauterpacht, *The Function of Law in the International Community*. See also Corbett on 'The Diplomacy of Arbitration' in *Law in Diplomacy*, pp. 136 et seq.

[5] Moore, *International Adjudications*, vol. 2, p. 367.

[6] Moore, ibid., vol. 1, p. xc

[7] Lauterpacht, *The Function of Law*, p. 121.

law.[1] Certain writers feel it necessary further to distinguish this 'judicial' compromise from 'non-judicial compromise'. Thus it has been asserted that

> . . . a decision yielding a result which lies halfway between the claims advanced by the parties is not necessarily the consequence of a non-judicial compromise. As between individuals so also among States it is not unusual that legal claims and defences are on both sides stated in extreme terms. It is the function of the judicial process to find the exact balance.[2]

This assertion does not, however, clarify the distinction between 'judicial' and 'non-judicial' compromise. Such a distinction might, however, be based on either the procedure of settlement followed, or on the criteria adopted in reaching the compromise (or finding 'the exact balance'), or both.[3]

The existence of these different theoretical approaches to the place of 'compromise' in international adjudication raises practical problems in relation to the powers of international tribunals. It is generally accepted that an *excès de pouvoir* may render an award a nullity.[4] Consequently, if compromise is alien to the judicial process it may constitute an *excès de pouvoir*, and a 'compromise' award or recommendation may be invalid. This assertion has indeed been made of several awards, either by one or both of the parties as a reason for not accepting it,[5] or by writers criticizing an award which has, however, been accepted by the parties.[6] Similarly, *excès de pouvoir* has been alleged of awards motivated, in whole or in part, by considerations asserted to be unauthorized by the *compromis* or irrelevant in international law.[7] Some considerations, it is often said, may be

[1] Descamps (quoted in Moore op. cit. at p. lxxxviii).

[2] Lauterpacht, *The Function of Law*, p. 121.

[3] See below, pp. 112–13, on the distinction between 'political' and 'legal' considerations. Cf. negotiations inside and outside the tribunal in the *St. Croix*, *Passamaquaddy* and *Venezuela–British Guiana Boundary* cases.

[4] See, e.g., *Institut de Droit International*, resolution (1875), on arbitral procedure, Art. 27: 'La sentence arbitrale est nulle en cas . . . d'excès de pouvoir . . .'; I.L.C. model rules on arbitral procedure, Art. XXXV. Also Witenberg, *La Procédure et la sentence internationale*, pp. 367 et seq.; Lapradelle, 'L'Excès de pouvoir de l'arbitre', *Revue de droit international* (1928), pp. 5 et seq.; Verzijl, 'La Validité et la nullité des actes juridiques internationaux', ibid. (1935), p. 284; Castberg, 'L'Excès de pouvoir dans la justice internationale', *Recueil des cours*, vol. 35, pp. 357 et seq.; Guggenheim, ibid., vol. 74 at pp. 216–19; Jennings, 'Nullity and Effectiveness in International Law', in *Cambridge Essays in International Law*, pp. 64 et seq. Examples of challenged awards are collected in Politis, *La Justice Internationale*; Carlston, *The Process of International Arbitration*; Cukwurah, *The Settlement of Boundary Disputes in International Law*, pp. 200 et seq.; and Nantwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law*, pp. 85 et seq. See also on the *Venezuela–British Guiana Boundary* award in particular, Schoenrich, *American Journal of International Law*, 43 (1949), p. 523; Child, ibid., 44 (1950), p. 682; Dennis, ibid., p. 720.

[5] See examples in works listed above; also the *Arbitral Award of the King of Spain* case, *I.C.J. Reports*, 1960, p. 192—particularly the dissenting opinion of Judge Urrutia Holguín, pp. 221 et seq.

[6] See above examples.

[7] e.g. the *Honduras–Nicaragua* award, which was the subject matter of the *Arbitral Award* case.

properly taken account of by a mediator or conciliator, or a 'political' tribunal, but not by an arbitrator or judge.[1]

The following exploration of the practice of international tribunals adjudicating boundary and territorial disputes and the practice of States in accepting or rejecting their awards, is intended to show how the powers of tribunals have been interpreted in practice in this particular sector of international adjudication. This examination of practice seems desirable for two reasons.

(1) There is a lack of agreement in theory on the scope of the powers of international tribunals. It is therefore necessary to examine more closely the practical distinctions—if any—between the powers of a judge, an arbitrator and a conciliator or mediator. Linked with this is the question whether there is any valid distinction, in practice, between a judicial and a non-judicial compromise.

(2) There has been little study of the criteria which actually motivate awards. Such a study is, however, useful in two respects. First, because it is often stated that certain considerations are, and others are not, relevant to decisions based on law. The validity of this statement must depend on what considerations are in practice taken account of by tribunals directed or presumed to apply 'law'. Second, the criteria applied by tribunals in making awards, if uniform, are part of the 'law' applied by international tribunals and therefore of interest in themselves, whether or not they are generally regarded as part of customary international law.

Before turning to an examination of the practice of international tribunals, however, it is as well to examine the theoretical context more closely. Although theoretical discussions of the international judicial process afford no unequivocal guidance as to the limits of the authority of judicial tribunals, there has been no lack of discussion of the question. This discussion at least identifies, if it does not resolve, certain problems. In part, at least, these problems follow from the too ready adoption in the theory of international adjudication of municipal law concepts, such as 'equity', and theories of the nature and function of the judicial process within a municipal legal system—including attempts to distinguish 'judicial' and 'legislative' functions, 'legal' and 'political' methods of dispute settlement, and the application of 'legal' and 'political' criteria in resolving disputes.[2] Such an approach may be of interest *de lege ferenda*: it does not necessarily illuminate the present operation of the international judicial process.

The immediately notable characteristic of the literature relating to the powers of international tribunals is, indeed, the number of distinctions drawn. And, as Moore once remarked:

[1] See below, p. 113. [2] See below, pp. 5 et seq.

So prone is the human mind to distinctions that even those who share them seldom draw from them identical conclusions.[1]

Thus, it is customary to distinguish diplomatic from judicial methods of dispute settlement, justiciable from non-justiciable disputes, legal from political disputes, conflicts of right from conflicts of interests, legal from political claims, law from equity (and at least three functions of equity have been distinguished), law and equity from political considerations or 'expediency', and the application of law from legislation. A further characteristic is the indeterminate content of the expressions used, such as 'law', 'equity' and 'expediency'. It may be useful to examine briefly these distinctions and the content of the concepts used, in so far as they bear on the authority of international tribunals in general.

The major relevant theoretical distinction is that drawn between the 'diplomatic' and the 'judicial' settlement of disputes. Thus the procedures of negotiation, good offices and mediation, fact finding and conciliation are dubbed 'diplomatic', while arbitration and judicial settlement by permanent courts are claimed as 'judicial'.[2] This broad distinction refers in part to the procedural characteristics of the different methods. More substantially, it relates to whether the settlement has been accepted in advance as 'binding' or not, and particularly to the substantive rules applied by the tribunal to reach its decision. Thus arbitration, and *a fortiori* judicial settlement, may be distinguished from diplomatic procedures because (i) they involve a binding decision, and (ii) they are made on the basis of respect for law.[3] At this point terminological difficulties arise. In the *Mosul Boundary* case the Permanent Court felt it necessary to distinguish two meanings of the term 'arbitration': a 'wide sense'—implying only the first characteristic—and a 'more limited conception' implying the second characteristic also.[4]

[1] *International Adjudications*, vol. 1, p. xlix.

[2] See, e.g., Renault, in preface to Lapradelle and Politis, *Recueil des arbitrages internationaux*, vol. 1; and ibid., p. xx; Moore, *International Adjudications*, vol. 1, pp. xxxvi et seq. Mérignhac, *Traité de droit public international*, describes mediation and good offices as legal forms of dispute settlement—distinct from arbitration only in involving a recommendatory, as distinct from an obligatory, award.

[3] See the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907, Article 37: 'International arbitration has for its object the settlement of differences between states by judges of their own choice, and on the basis of respect for law.' Many writers emphasize that arbitration is a 'judicial' process: see, e.g., Carlston, *The Process of . . . Arbitration*, pp. 259 et seq.; Hudson, *International Tribunals*; Moore, op. cit. (in the preceding note). J. B. Scott sought to distinguish adjudication on the basis of respect for law from the application of principles of law: arbitrators might respect the law without following it. See *An International Court of Justice*, pp. 64–5, and Hedges, this *Year Book*, 7 (1926), pp. 110 et seq. Similar observations (in *The Status of the International Court of Justice*, pp. 21–6) were quoted by Judge Kellogg in the *Free Zones* case, *P.C.I.J.*, Series A, No. 24, pp. 34–5; Hudson, 2 W.C.R. 722 at p. 738, and see ibid. for Kellogg's own views on the distinction between arbitration and judicial settlement.

[4] See *P.C.I.J.*, Series B, No. 12; Hudson, 1 W.C.R. 722 at p. 738. See also Borel, *Annuaire de l'Institut de droit international* (1934), p. 210. Definitions implying the 'wide sense' of arbitration are found, e.g., in Fachiri, this *Year Book*, 9 (1928), p. 128, and Kozhevnikov (ed.), *International Law*, p. 384.

The existence of these two substantially different conceptions of arbitration is often left inexplicit in theoretical writings; and writers concerned to emphasize the 'judicial' character of arbitration often try to show that the narrower conception is now the accepted and predominant one.[1] It would, however, be mistaken to regard the broader conception of arbitration as obsolete: the continued provision in treaties for the peaceful settlement of disputes for the reference of disputes to arbitration *ex aequo et bono*;[2] the criticisms by States of the International Law Commission's draft on arbitral procedure because it contained provisions inappropriate to non-judicial arbitration;[3] and renewed proposals for an 'international equity tribunal',[4] are sufficient evidence of that.

Conflict between these two notions of arbitration appears in three contexts in particular:

(1) Arbitral procedures—including the choice of arbitrators. Emphasis is laid by some jurists on the need to ensure that an award is finally made despite the opposition of one of the parties, once an obligation to arbitrate has been accepted. The desirability that the arbitrators be impartial and versed in international law may also be emphasized. Others emphasize the flexibility and lack of constraint in traditional arbitral procedures, which should, in their view, be maintained in order to distinguish arbitration from judicial settlement by permanent courts.[5]

(2) The rules to be applied by the tribunal in reaching its decisions, and also the type of dispute which should be referred to it.[6]

[1] Cf. *Mosul* case above; see also Scelle's reports on arbitral procedure to the I.L.C., *I.L.C. Yearbook* (1950—II), p. 114; (1951—II), p. 110; (1952—II), p. 1; (1957—II), p. 1; (1958—II), p. 1.

[2] See, e.g., the European Convention for the Peaceful Settlement of Disputes (1957), Art. 26.

[3] See the discussions within the I.L.C., in *I.L.C. Yearbook* (1950—I); (1952—I); (1953—I); (1957—I); (1958—I); and 'Reports' of the I.L.C. in (1950—I); (1952—II); (1953—II); (1957—II); (1958—II). And for comments by governments on the drafts see 'Report of the I.L.C. on its 5th Session' (1953), Annex 1, ibid. (1953—II), and *G.A.O.R.*, Supplement 9 (8th Session), and Doc. A/2899 and Add. 1 and 2, ibid., Annexes, Agenda item 52, 10th Session. For discussions of the draft in the 6th Committee see the *G.A.O.R.*, 8th session (382nd to 389th meetings), 10th session (461st to 472nd meetings), 13th session (554th to 567th meetings). For the reports of the 6th Committee and the resolutions of the General Assembly, see *G.A.O.R.*, Annexes (8th session) Agenda item 53; same (10th session) agenda item 52; same (13th session) Agenda item 57.

[4] See Sohn, 'The Function of International Arbitration Today', *Recueil des cours*, vol. 108, pp. 1 et seq.; International Law Association, *Report of 52nd Conference, Helsinki, 1966*: Report of Committee, pp. 325 et seq., Resolution, pp. 318–19. On the particular advantages of arbitration for adjudication *ex aequo et bono* (rather than judicial settlement) see the Circular Note of the Secretary General of the Permanent Court of Arbitration (unofficial English translation in *American Journal of International Law*, 54 (1960), p. 933), quoting on this point Charles de Visscher, *Recueil des cours*, vol. 86, p. 551.

[5] The conflict between these two conceptions was sharply provoked by the International Law Commission's draft on arbitral procedure—and quite decisively and negatively resolved in favour of the traditional or 'diplomatic' conception. See the comments by Governments, discussions of drafts in the 6th Committee and General Assembly Resolutions in loc. cit. above, n. 3.

[6] See below regarding 'justiciable' and 'non-justiciable' disputes, 'law' and 'equity' etc., pp. 8 et seq.

(3) Terminology and classification. It may, for example, be asserted that arbitration *ex aequo et bono* is not 'arbitration' at all because it is not based on law. It has therefore been suggested that it be classified as 'conciliation'.[1] This reclassification, however, ignores the fact that the term 'conciliation' is generally accepted as referring to a procedure the final end of which is a 'recommendation' not a binding decision. Terminological confusion is enhanced by the suggestion that certain 'conciliation' commissions should be classified as arbitral tribunals—for the very reason that their decisions are accepted in advance as binding.[2] The decision of the '*amiable compositeur*' raises a difficulty similar to that of arbitration *ex aequo et bono*. Some writers regard the two terms as synonymous; others regard the terms as describing distinct procedures, and the *amiable compositeur* as having wider powers (especially of 'compromise') than the arbitrator *ex aequo et bono*.[3] A further problem of terminology and classification is raised by 'binding' decisions intended to settle disputes made by characteristically 'political' or 'diplomatic' bodies—e.g. heads of State, diplomatic conferences, organs of international institutions. These may or may not be described on their face as 'awards' or 'arbitrations'.[4] With regard to territorial settlements, at least,

[1] See, e.g., *Report of a Study Group on the Peaceful Settlement of International Disputes* (David Davies Memorial Institute of International Studies), Memorandum on Conciliation, p. 85, Memorandum on Arbitration, p. 93 n. 9 (noting the lack of uniformity in terminology). For an example of the problems of classification, see, e.g., *International Law Reports*, 29, pp. xix–xx.

[2] Ibid., p. 85.

[3] These different views are found, e.g., in the discussions in the International Law Commission of Scelle's report on arbitral procedure. Scelle's view was that all tribunals had the authority to adjudicate *ex aequo et bono*, i.e. *praeter*, but not *contra legem*, in his terminology. Decisions *contra legem* were thus the preserve of the *amiable compositeur*. See his report in *I.L.C. Yearbook* (1951—II), p. 118; (1952—II), pp. 38–9; for discussion of the question, see (1952—I), pp. 18–20.

[4] See, generally, Hertslet, *The Map of Europe by Treaty*, and *The Map of Africa by Treaty*, Hackworth, *Digest of International Law*, Whiteman, *Digest of International Law*, vols. 1–3, for territorial and frontier settlements by diplomatic conferences from the Congress of Vienna onwards. Examples of 'arbitral awards' include President Wilson's determination of the territorial frontiers of the newly established Armenian State (Hackworth, op. cit., vol. 1, p. 715); (particularly interesting because it includes an explanation of the reasons motivating it: the need for a 'natural frontier'; 'geographical and economic unity for the new state': ethnic and religious factors of the population were taken account of so far as compatible; security, and the problem of access to the sea, were other important considerations). Also the Vienna Awards of 1938 and 1940 which are not motivated: see Whiteman, op. cit., vol. 3, at pp. 145 et seq. and pp. 139 et seq. respectively. For reference to the General Assembly of the U.N. under the Treaty of Peace with Italy (1947), Art. 23 and Annex XI of the 'final disposal' of the Italian territories in Africa (Libya, Eritrea and Italian Somaliland) and 'the appropriate adjustment of their boundaries' see ibid., pp. 15 et seq. This is also interesting for the explicit statement of considerations to be taken account of by the Four Powers (or, failing their agreement, by the General Assembly): 'the wishes and welfare of the inhabitants and the interests of peace and security, . . . [and] the views of other interested Governments'. (Annex XI, para. 2). These are repeated in substance in the relevant resolutions of the General Assembly: e.g. Res. 289 A (IV) ('. . . having taken into consideration the wishes and welfare of the inhabitants of the territories, the interests of peace and security, the views of the interested Governments and the relevant provisions of the Charter . . .'), Res. 390 A (V) (on Eritrea) '*Whereas* by paragraph 2 of . . . Annex XI such disposal is to be made in the light of the wishes and welfare of the inhabitants and the interests of peace and security, taking into consideration the views of interested governments. . . .' The reasons for the recommendation are then set out in detail. Texts of resolutions are in Whiteman, op. cit., vol. 3,

it has been suggested that these bodies may be acting 'judicially'—at any rate if they decide 'in accordance with the law'.[1] In the *Mosul* case the Permanent Court was prepared to regard a decision of the Council of the League of Nations on the course of a boundary as an 'arbitral award' in the 'wide sense' of the term—and applied the maxim of judicial procedure that 'no one can be judge in his own suit' to the proceedings of the Council. It felt unable to regard the decision as arbitration in the more limited sense of a decision 'on the basis of respect for law' because the settlement of the dispute depended, for the most part, 'on considerations not of a legal character'. Furthermore, the Court considered that Article 13 of the Covenant referred to 'the more limited conception of arbitration' (this is surely doubtful)[2] which the Council—apparently because 'its first duty' was to 'settle political disputes'—was not regarded as fulfilling.[3] Some clarification of terminology would, it may be suggested, ensue if the term 'arbitration' were reserved for any procedure involving or intended to involve the elementary standards of judicial procedure, and, *a fortiori*, to decisions made on the basis of criteria laid down in advance. Categories of arbitration having their own peculiar characteristics or procedure or substantive norms to be applied could then be distinguished by appropriate adjectives.

A further reflection of the two concepts of arbitration is to be found in the distinction drawn between 'justiciable' and 'non-justiciable' disputes.[4]

pp. 21 et seq. Cf. Fischer Williams, this *Year Book*, 7 (1926), p. 24, esp. p. 34, and see below, pp. 99 et seq. and pp. 105 et seq. Also 'general comment' in Whiteman, ibid., pp. 1–4, who states, *inter alia* (p. 2) that 'the postwar diplomats . . . were more concerned with the problem of fixing boundaries which would serve the interests of peace and security than with the problem of determining appropriate ethnic lines'. In the provisions quoted, however, 'the wishes and welfare of the inhabitants' are linked with 'the interests of peace and security'—obviously the two are interconnected and cannot be isolated. Cf. the Atlantic Charter and the whole question of self-determination, and see Fischer Williams, loc. cit., and Kozhevnikov (ed.), *International Law*, pp. 185 et seq. Cf. also the views of Holdich (in *Political Frontiers and Boundary Making*) who regarded the ideal boundary as combining regard for 'strategic and ethnographical' factors.

[1] Brownlie, *Principles of Public International Law*, p. 127 n. 8. Cf. *P.C.I.J.*, Series B, Advisory Opinion No. 8 (*Jaworzina* case) at pp. 29, 38. See also Lapradelle, *La Frontière*, pp. 132–40.

[2] In view of the failure to distinguish arbitration on a basis of law from arbitration *ex aequo et bono* in Article 13 and the elaborate system of dispute settlement set up by bilateral and multilateral treaties of League members. See below, pp. 9 et seq.

[3] See above, p. 5 n. 4.

[4] For recent discussion of this question, see the *Reports of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States*: U.N. Documents A/5746/(1964), pp. 77–109; A/6230/(1966), pp. 76–124; A/6799/(1967), pp. 165–84 (Summary Records A/AC 119/SR 18–24, A/AC 125/SR 27–33, 49, 74–5, 79–80). Also *Report of a Study Group on the Peaceful Settlement of Disputes* (David Davies Memorial Institute of International Studies). It has, of course, been asserted by some jurists that there is no inherent difference between 'justiciable' and 'non-justiciable' disputes: see, e.g., Brierly, op. cit. (above, p. 2 n. 3); Castberg, *Recueil des cours*, vol. 35, pp. 409–10; Lauterpacht, 'La Théorie des différends non justiciables en droit international', ibid., vol. 34, p. 499; and *The Function of Law in the International Community*; Politis, *La Justice internationale*, pp. 72 et seq. Nevertheless, there are sensible reasons for not submitting disputes to international tribunals: see the Reports

These terms cover two different types of distinction which have been made in treaties for the settlement of disputes.[1] The first, and earliest, reflects the wider notion of arbitration as simply involving a binding decision. It distinguishes disputes to be referred to arbitration (sometimes further limited to 'legal' disputes, sometimes not) from disputes not arbitrable because they affect 'the vital interests, the independence, or the honour of the two contracting parties' (these may also be further limited).[2] The distinction here is one primarily of the importance of the dispute—whether it may safely be left to third party decision.[3]

The second and later type of distinction reflects the narrower notion of arbitration and judicial settlement as involving the application—normally —of law. Disputes are distinguished by a variety of formulae, all indicating a distinction between 'legal' and 'political' disputes both as to their inherent character and as to the procedures and substantive rules to be applied to their settlement. Thus, only disputes 'of a legal nature'[4] may be submitted to arbitration, or, perhaps more narrowly, any dispute . . . mainly political . . . [which] . . . does not allow of a decision based exclusively on legal principles'[5] may be excluded from the obligation to arbitrate.

A further refinement of the concept of disputes of a legal nature was the enumeration of certain categories of dispute as appropriate to arbitration or judicial settlement. This appears most notably in Article 13 of the League Covenant and Article 36 of the Statute of the Permanent Court, and is repeated in substance in many bilateral treaties.[6] The Locarno formula

of the Special Committee referred to above, and Brierly, op. cit.; Lauterpacht, 'Some Observations on the Prohibition of "non liquet" and the Completeness of the Law', in *Symbolae Verzijl*, p. 196 and Stone, 'Non liquet and the Function of Law in the International Community', this *Year Book*, 35 (1959), p. 124 and *Legal Controls of International Conflict*, p. 153; and see below, p. 18.

[1] See, generally, Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (covering 1918 to 1928); League of Nations, *Arbitration and Security—Systematic Survey of the Arbitration Conventions and Treaties of Mutual Security Deposited with the League of Nations*; United Nations, *Systematic Survey of Treaties for the Pacific Settlement of Disputes 1928–1948*; and *A Survey of Treaty Provisions for the Pacific Settlement of International Disputes 1949–1962*. Also Permanent Court of Arbitration, *Traités généraux d'arbitrage communiqués au Bureau International de la Cour Permanente d'Arbitrage*.

[2] See Habicht, op. cit. (in the preceding note), pp. 992 et seq. for other reservations including the Monroe Doctrine, the Covenant of the League of Nations, territorial integrity, constitutional principles, interests of third powers, matters solely within the domestic jurisdiction, procedure before national courts, past disputes. See also U.N., *Systematic Survey*, pp. 23 et seq.

[3] See, e.g., Habicht, op. cit., pp. 992–3: 'Such reservations excluded from judicial procedure those disputes which are most dangerous and most likely to lead to a rupture. The value of such treaties is thus reduced to an undertaking to resort to arbitration only in cases which are of secondary importance, and which do not affect too deeply the sensibilities of both parties.' This is not necessarily a bad idea: cf. Brierly, op. cit. (above, p. 2 n. 3). See also Borel, *Annuaire de l'Institut de droit internationale* (1934), p. 185.

[4] See examples cited in Habicht, *Post-War Treaties for the Pacific Settlement*, p. 972; and U.N. *Systematic Survey*, pp. 59 et seq.

[5] Habicht, op. cit. (in the preceding note).

[6] Habicht, ibid., pp. 972–3; U.N. *Systematic Survey*, pp. 59 et seq.

distinguished as appropriate to arbitral or judicial settlement: 'All disputes of every kind . . . with regard to which the Parties are in conflict as to their respective rights.'[1] A more complex formula, which combines both the concept of a claim of 'right', and the inherent justiciability of the dispute by the application of 'the principles of law or equity' is found in a series of United States treaties.[2]

With the existence of permanent courts, however, a further degree of sophistication has elaborated the broad categories of 'justiciable' and 'non-justiciable' disputes. The existence of this procedure of judicial settlement appropriate to the list of 'legal disputes' enumerated in Article 36 of the Statute of the International Court of Justice has provoked a further distinction between disputes appropriate to judicial settlement and disputes appropriate to arbitration.[3] Thus, some treaties provide for the compulsory adjudication of 'disputes with regard to which the parties are in conflict as to their respective rights' and arbitration of all other disputes.[4] With regard to these latter 'arbitrable' disputes, it is sometimes provided that the tribunal adjudicate *ex aequo et bono*.[5] Where this type of distinction is made, it is common to require the submission of the residuary category of disputes, not submitted to adjudication by a permanent court, to conciliation before arbitration.[6] In this case, arbitration is simply a means of securing an award binding on a party unwilling to accept a conciliatory recommendation.

But although these distinctions between procedures appropriate to certain types of dispute are found in some treaties, they are not found in all. Thus, some treaties provide for the arbitration, or the judicial settlement of *all* disputes; and sometimes they distinguish between disputes to be adjudicated *ex aequo et bono*, sometimes not.[7] Indeed, writers have pointed out that there is no inherent distinction between justiciable and non-justiciable disputes in the sense of legal and political disputes, since all disputes may be settled on the basis of law. Here, however, some writers enter *caveats* as to the advisability of referring disputes to judicial procedures in certain cases, particularly where the law is doubtful—because of the consequent heavy 'legislative' burden on the courts—or where the law is clear but unacceptable to one of the parties.

[1] Habicht, op. cit. (in the preceding note), pp. 973–4.
[2] Ibid., pp. 974–5.
[3] Cf. Borel, loc. cit. (above, p. 9 n. 3), p. 185.
[4] Habicht, op. cit. (above, p. 9 n. 4), pp. 982 and 983.
[5] Ibid., p. 975. Cf. General Act for the Pacific Settlement of International Disputes (1928), Art. 28 (ibid., p. 945), and European Convention for the Peaceful Settlement of Disputes (1957), Art. 26. (U.N. *Survey of Treaty Provisions for the Pacific Settlement of International Disputes 1949–1962*, p. 64).
[6] Habicht, op. cit. (above, p. 9 n. 4), p. 982.
[7] Ibid., pp. 978, 982, 984; U.N. *Systematic Survey*, pp. 3, 8. Habicht distinguishes eleven different systems of pacific settlement; the U.N. *Systematic Survey* distinguishes sixteen: see ibid., pp. 3 et seq.

The elaboration of a great variety of procedures for pacific settlement of disputes has led, not only to the drawing of fine distinctions in the types of dispute to be submitted to each procedure, but also to distinctions in the task of each procedure and the norms to be applied in it. Thus, the major emphasis in the so-called diplomatic third party procedures is on investigating facts, reconciling opposing claims and bringing the parties to an agreement.[1] Clearly, these procedures do not involve the application of abstract principles of law, but they do require the consideration of claims often based on supposed rules of law.[2] Thus, say, the report of a conciliation commission or commission of inquiry may be expected to contain 'legal considerations',[3] and its recommendations may be specifically required to be 'in its opinion . . . pertinent, just and advisable'.[4] The major feature of these diplomatic procedures, however, is not that they are characterized by the requirement to apply any particular rules to reach their decision—whether specifically political or legal considerations—but rather that they are relatively unhampered. It is, on the contrary, characteristic of procedures of binding settlement that they are restricted in the rules to be applied. This is natural enough, for it gives the parties a degree of security as to the scope of the resulting decision, and some greater control over it.[5]

Thus, treaties providing for procedures of binding settlement tend to elaborate rules for the resolution of disputes. But this is only possible to do in detail in *ad hoc compromis*.[6] Consequently general treaties of pacific settlement employ vaguer terms: for example, 'on the basis of respect for law', 'in accordance with the principles of law and equity', 'the principles of international law', 'the rules of international law', 'in accordance with considerations of equity' or '*ex aequo et bono*', 'in accordance with the principles of justice and equity' or confer 'the powers of an *amiable compositeur*'—or 'special umpire' or 'friendly arbitrator' or 'special referee' or 'friendly mediators'. More elaborate formulae are to be found in the Statute of the Permanent Court and of the International Court of Justice, and these and similar formulae are to be found in other multilateral and bilateral treaties.[7]

[1] See Habicht, op. cit. (above, p. 9 n. 4), pp. 1021 et seq. (on commissions of investigation and conciliation); *Systematic Survey*, pp. 243 et seq. (on conciliation); Hague Convention for the Pacific Settlement of International Disputes, 1907, Art. 4 (on mediation).

[2] Habicht, op. cit., pp. 1021–2 (on Bryan treaties).

[3] Ibid., pp. 1023–4.

[4] Washington Convention for the Establishment of International Commissions of Inquiry, 1923; Habicht, ibid., p. 1024.

[5] See also Borel, loc. cit. (above, p. 9 n. 3). These are simply the most salient characteristics of the two types of procedures; the categories, of course, overlap considerably.

[6] See below for examples in boundary and territorial disputes, at p. 21.

[7] See in general Habicht, op. cit. (above, p. 9 n. 4), pp. 1048 et seq., and U.N. *Systematic Survey*, pp. 116 et seq. for examples.

The significance of these formulae has provided a fertile field of speculation for writers. For at any rate one thing is clear: they are intended to restrict or define in some way, by reference to some criteria, the powers of tribunals empowered to make binding settlements. To go outside these limits could, therefore, entail an *excès de pouvoir* and perhaps the nullity of the settlement. This problem can be approached from two directions: either by defining the criteria excluded, or by defining more closely the criteria included. Neither approach yields a satisfactory solution, for all attempts to distinguish considerations which judicial tribunals may or may not take account of meet with two obstacles. First, there is an obvious requirement that if a dispute is referred to a tribunal by consent of both parties for settlement, the tribunal should, without too fine a regard for technicalities, settle the dispute.[1] Second, any tribunal must obviously pay close attention to all the facts offered for its consideration by the parties—for there are no general exclusionary rules of evidence in the practice of international tribunals.[2]

Writers—and sometimes arbitrators and judges—do however attempt to draw broad distinctions between 'legal' and 'political' considerations (or 'expediency'). Only the former may, it is said, be applied by truly judicial bodies, while the latter are generally applied by 'diplomatic' tribunals, or perhaps (and this is sometimes doubted)[3] by judicial tribunals if specifically authorized by the parties.[4] No practical dividing line is, however, offered; but in practice, this or that consideration may be dubbed 'essentially political' rather than legal,[5] and impliedly, unsuited to application by a

[1] Borel, loc. cit. (above, p. 9 n. 3). Technically, this is sometimes put in terms of a prohibition of a *non liquet*. See particularly, H. Lauterpacht, *The Function of Law in the International Community* and in *Symbolae Verzijl*; and de Visscher, *Problèmes d'interprétation judiciaire en droit international public*, pp. 22 et seq. See also the I.L.C. Model Rules on arbitral procedure, Art. XI. Other writers deny that there is any general rule to this effect: see, e.g., Politis, *La Justice Internationale*; Stone, *Legal Controls of International Conflict*, and '*Non liquet* and the Function of Law in the International Community', this *Year Book*, 35 (1959), p. 124. It is, at least, doubtful whether there is any *rule* one way or the other: probably the question is better seen in terms of the authority of the tribunal in individual cases, self-restraint and prudence on the part of tribunals entrusted with delicate and controversial questions, and regard for the acceptability of individual decisions to the parties and generally. See further below, p. 94.

[2] See, e.g., Sandifer, *Evidence before International Tribunals*, pp. 1–23.

[3] See, e.g., the observations of Judge Kellogg in the *Free Zones* case.

[4] See the *Free Zones* case.

[5] In the context of territorial and boundary questions, see, e.g., Jennings, *Acquisition of Territory in International Law*, pp. 69 et seq. (listing particularly geographical, historical considerations, and self-determination. See also his criticism of the concept of consolidation); Lindley, *The Acquisition and Government of Backward Territory in International Law*, pp. 207–36 (spheres of influence, geographical contiguity, economic and political considerations, security). Judicial pronouncements include Huber, in the *Island of Palmas* award, on 'contiguity', *R.I.A.A.*, vol. 2, p. 829, at pp. 854–5, 870; also *Island of Lamu* award, Moore, *International Arbitrations*, vol. 5, p. 4940; Judge McNair, in the *Anglo-Norwegian Fisheries* case, *I.C.J. Reports*, 1951, pp. 158 et seq., esp. pp. 169, 171, 184 (on economic and social interests, geographical peculiarities and the activities of private individuals); also Judge Read, ibid., p. 193 (geographical peculiarities). But contrast the judgment of the Court, referring to the same considerations in support of

judicial tribunal. However, there is frequently so much difference of opinion on any one particular consideration that it may be doubted whether any dividing line exists.[1]

The second approach has provoked a more extensive literature: this related in particular to the significance of the term 'equity', and to the relationship between the application of 'law' and 'legislation'.[2] Here again, theoretical distinctions do little more than point the virtual impossibility of applying them in practice—or at least of securing any degree of agreement on their application.

Three functions of 'equity' have been distinguished:[3]

(1) The modification of law to apply it to particular facts;[4]

its decision, at pp. 127–30, 133 and especially Judge Alvarez, ibid., p. 145, esp. at pp. 149 et seq. On considerations of a topographical, historical and cultural nature, see Judge Fitzmaurice in the *Temple* case, *I.C.J. Reports*, 1962, pp. 53–4. See also the *North Sea Continental Shelf* cases, ibid., 1969, p. 4. See generally below for discussion of the significance of these concepts in judicial decisions.

[1] See, e.g., the *Anglo-Norwegian Fisheries* case. In a different context the two contentious phases of the *South-West Africa* cases (*I.C.J. Reports*, 1962, p. 465, and ibid., 1966, p. 4) offer contrasting views of the legal relevance of 'moral principles'. Cf. *Corfu Channel* case, ibid., 1949, p. 4 at p. 22.

[2] See below, pp. 17 et seq.

[3] There is a large literature on this subject, of which the following are perhaps the most important examples: Carlston, *The Process of International Arbitration*, p. 155; Castberg, 'L'Excès de pouvoir dans la justice internationale', *Recueil des cours*, vol. 35, p. 368; 'La Méthodologie du droit international public', ibid., vol. 43, p. 313, esp. pp. 362 et seq.; Feller, *The Mexican Claims Commission*, pp. 225 et seq.; Friedmann, *The Contribution of English Equity to the Idea of an International Equity Tribunal*; Habicht, 'Le Pouvoir du juge international de statuer "*ex aequo et bono*"', *Recueil des cours*, vol. 49, p. 277 (English translation as *The Power of the International Judge to Give a Decision 'Ex Aequo et Bono'* in the series of New Commonwealth Research Institute Monographs); Hudson, *The Permanent Court of International Justice*, p. 615, and *International Tribunals*, pp. 99 et seq.; *Annuaire de l'Institut de Droit International* (1934), pp. 186 et seq.; Report by Borel on 'La Compétence du juge international en équité', and comments thereon by Fischer Williams, Politis, Huber, Hammarskjold, de Visscher, Wehberg, Strupp and Simons, ibid. (1937), p. 132; Resolution, ibid., p. 271; Jenks, '"Equity" in International Adjudication', in *The Prospects of International Adjudication*, p. 316; Lauterpacht, *Private Law Sources and Analogies of International Law*, pp. 60 et seq., *The Development of International Law by the International Court*, pp. 213–17, *The Function of Law in the International Community*, p. 314, 'Règles générales du droit de la paix', *Recueil des cours*, vol. 62, p. 95; Mouskhéli, 'L'Equité en droit international', *Revue générale de droit international public* (1933), p. 347; Nielsen, *International Law Applied to Reclamations*, p. 71; Politis, *La Justice internationale*; Raelbruch, 'Justice and Equity in International Relations', in *Justice and Equity in the International Sphere* (New Commonwealth Research Institute), p. 1; Ralston, *The Law and Procedure of International Tribunals*, pp. 1 et, seq., 36; ibid., *Supplement*, pp. 31 et seq.; *International Arbitration from Athens to Locarno* pp. 15, 23; Schindler, 'Les Progrès de l'arbitrage obligatoire depuis la création de la Société des Nations', *Recueil des cours*, p. 33; Sohn, 'The Function of International Arbitration Today', ibid., vol. 108, p. 1; Report on the 'Changing Role of Arbitration in the Settlement of International Disputes' in *International Law Association, Report of 52nd Conference* (Helsinki), p. 325; Simpson and Fox, *International Arbitration*, pp. 128 et seq.; Sørensen, *Les Sources du droit international*, pp. 191 et seq.; Stone, *Legal Controls of International Conflict*, p. 139; Strupp, 'Le Droit du juge international de statuer selon l'équité', *Recueil des cours*, vol. 33, p. 351; Witenberg, *L'Organisation judiciaire, la procédure et la sentence internationales*, p. 303.

Copious extracts from the relevant decisions of arbitral and judicial tribunals can be found in Jenks, cited above in this note; but the discussion of 'equity' in relation to the *Eastern Extension, Australasia and China Telegraph Company* case in Nielsen's *Report* is particularly interesting.

[4] See, e.g., Huber, *Annuaire de l'Institut de Droit International* (1934), p. 233: 'La conception la plus étroite de l'équité est celle qui comporte, entre plusieurs interprétations possibles du droit,

(2) The supplementing of law by filling in 'gaps' in the positive law;[1]
(3) The correction of law, or its supplanting as a distinct basis of decision.[2]

Furthermore, it now seems to be generally agreed by writers that 'equity' (in some sense) forms part of international 'law'—and therefore may and should be applied by tribunals required to apply international law—and that 'equity' (in another sense) may only be applied by tribunals specially authorized to do so—e.g. tribunals authorized to adjudicate *ex aequo et bono*, or as *amiable compositeur*.[3]

It will, however, be obvious from an examination of the above three classes of equity, that, although they may be distinguishable in theory, they overlap in any conceivable application in practice.[4] Thus, the modification of law to take account of particular facts may be with difficulty distinguishable from a decision avowedly *contra legem*. Similarly, the use of equity to supplement law by filling a gap, or, as in the *North Sea Continental Shelf* cases, when 'a rule of law . . . calls for the application of equitable principles', may be indistinguishable for practical purposes from the use of equity as an independent basis of decision. This practical difficulty is emphasized by the confusion and ambiguity of the terms used. The same writer who asserts

celle qui tient le mieux compte de la situation individuelle des parties en litige et de la balance des droits et obligations correspondants. L'équité ainsi comprise s'accommode facilement avec le règlement arbitral et même judiciaire. Tout autre est la situation, si l'équité est comprise comme une base indépendante du droit pour les décisions arbitrales.' Cf. Descamps, quoted in Moore, *International Adjudications*, Modern Series, vol. 1, p. lxxxviii; de Visscher, *Annuaire de l'Institut de Droit International* (1934), p. 239; Borel, 'Rapport définitif', ibid., p. 274; Judges Bustamante y Rivero and Ammoun in *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 58, 132.

[1] See, e.g., de Visscher, ibid., p. 249: 'l'équité intervient ici pour combler les lacunes de l'ordre juridique international positif . . .'. See also Politis, ibid., p. 228; Borel, ibid., pp. 274–5; cf. Descamps, op. cit. (in the preceding note); Ammoun, loc. cit. (in the preceding note), pp. 132 et seq.

[2] See, e.g., Huber, *Annuaire de l'Institut de Droit International* (1934), p. 233; de Visscher, ibid., p. 240; Borel, ibid., p. 275. Also Castberg, op. cit. (above, p. 13, n. 3); and Strupp, op. cit. (above, p. 13 n. 3).

[3] See, e.g., Institut de Droit International resolution (1875), Art. 27; *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 48 et seq.

[4] See the classic examples of the explicit reliance on principles of 'equity' (conveniently collected in Jenks, op. cit (above, p. 13 n. 3)). The principle of 'equity' referred to by Judge Hudson in the *Water from the Meuse* case, *P.C.I.J.*, Series A/B, No. 70, pp. 76–9, that 'in a proper case', the 'complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty' might be described as modifying, or correcting law, with equal reason. The 'equitable' concepts of estoppel and acquiescence operate to deny a 'legal' right. The use of 'equity' in the *Cayuga Indians* case, Nielsen's *Report*, p. 203, was, effectively, to create a right and might be classified as either filling a lacuna in the law or as correcting the law, or as a quite independent basis of decision. The use of 'equity' in the *Norwegian Ships* case (*American Journal of International Law*, vol. 17, p. 362) and in the *North Sea Continental Shelf* cases was not dissimilar. That the use of 'equity' in all its aspects, is 'legislative' admitting of modification and development of the law is brought out by Fischer Williams, *Annuaire de l'Institut de Droit International* (1934), pp. 227–8; see also the discussion by the British Agent of the meaning of the term in the *Eastern Extension, Australasia and China Telegraph Company, Ltd.* case, Nielsen, op. cit., pp. 68 et seq. And see below, p. 91.

that a wide 'legislative' power to fill gaps in the law is inherent in the judicial function in general and the powers of international judicial tribunals in particular, and that 'equity' is part of international law, may dub arbitration *ex aequo et bono* a non-judicial procedure because it involves a power of 'legislation'.[1] Conversely, it has been asserted that all tribunals have the power to adjudicate *ex aequo et bono*—in the sense that they may fill gaps in the law.[2] Others argue that judicial tribunals are restricted to the application of 'positive' law, and in order to fill gaps they require the additional authority to adjudicate *ex aequo et bono*.[3] Or it is urged that 'Whatever the legal reasoning of a Court of justice, its decisions must by definition be just, and therefore in that sense equitable', but that this can nevertheless be distinguished from adjudication *ex aequo et bono*.[4] A degree of terminological confusion may thus cover substantial disagreements on the powers of international tribunals, or serve to disguise adjudications *ex aequo et bono* as the 'equitable' application of law.

Some jurists, moreover, suggest that there is a difference in substance between the 'equity' applied by different tribunals. Thus, in the *Free Zones* case, Judge Kellogg distinguished the powers *ex aequo et bono* of the Permanent Court of International Justice and an arbitral tribunal. In his view:

> The authority given to the Court to decide *ex aequo et bono* merely empowers it to apply the principles of equity and justice in the broader signification of this latter word.[5]

Similar powers given to an arbitral tribunal would, however, permit it to 'decide questions upon grounds of political or economic expediency'.[6] Judge Lachs has also noted that equity has played a different role in arbitration and judicial settlement. In arbitration it had two important aspects: as an element of 'mutual accommodation' and in the decision of disputes to which legal criteria were inapplicable. In judicial settlement, however, the requirement that the court take foremost account of certain sources of law, and the narrower range of disputes submitted, limited the extent to which 'equity' might be applied.[7]

Apart from disagreements about the *function* of equity, there is little unanimity on—or elaboration of—the *content* of equity. Some writers see equity in terms of general notions of good faith, acquiescence, estoppel etc.;[8] others in terms of the maxims of English equity;[9] others as equivalent

[1] See, e.g., H. Lauterpacht, *The Development of International Law by the International Court*, pp. 155 et seq., esp. p. 213.
[2] See, e.g., Scelle, loc. cit. (above, p. 6 n. 1); cf. Fischer Williams, loc. cit. (above, p. 7 n. 4).
[3] See, e.g., Politis, loc. cit (above, p. 13 n. 3), and the resolution proposed by him in *Annuaire de l'Institut de Droit International* (1937), pp. 139–40.
[4] *North Sea Continental Shelf* cases, p. 48.
[5] *P.C.I.J.*, Series A, No. 24, p. 40.
[6] Ibid.
[7] *G.A.O.R.*, 6th Committee, 13th Session, Summary Records of the 563rd meeting.
[8] See, e.g., Lauterpacht, op. cit. (above, n. 1), p. 213.
[9] See, e.g., Jenks, op. cit. (above, p. 13 n. 3).

to 'general principles of law', 'justice' or 'objective justice';[1] other writers regard it as lacking explicit content, but rather as a process of taking account of all relevant circumstances—including political and economic factors and expediency.[2] It has already been mentioned that some writers regard the content of equity as differing according as it is applied as a part of international law or by an arbitrator *ex aequo et bono*—or perhaps according as it is applied in any form of arbitration as contrasted with strictly judicial procedures.[3] Thus 'legally relevant equity'[4] may be distinguished from other 'equity'. Other writers make no such distinctions as to content, but describe both the 'equity' applied by a court as part of international law and the 'equity' applied by an arbitrator *ex aequo et bono* as 'general principles of law' (or 'justice') or 'objective justice'. These writers distinguish only the procedure by which it is applied: either as supplementary to law or as a separate basis of decision.[5] They sometimes further distinguish the powers of the *amiable compositeur* as permitting reliance on considerations of 'expediency' rather than of 'objective justice'.[6] Other writers do not make this distinction, but regard considerations of 'expediency' as forming part of the equity applied by all international tribunals as part of international law.[7]

It is submitted that the use of the term 'equity' in the context of the process of international adjudication is unhelpful. It evokes, consciously or unconsciously, technical concepts of Roman and English law: consequently, it fails to direct attention to the substance of the matter. It is clear from the enumeration of the functions of equity which have been distinguished that the application of 'equity' is conceived as contrasted with the application of existing law. The direction to apply 'equity' or 'justice', or the like—or the power to adjudicate '*ex aequo et bono*'—is made, in arbitration agreements, to empower a tribunal to resolve a dispute, whether or not there be any positive law applicable. It is therefore best thought of simply as a power to legislate for the parties in a special, limited case. This is made clear in some arbitration treaties and discussions of the concept.[8] Consequently, it

[1] See, e.g., Castberg, op. cit. (above, p. 13 n. 3), Kellogg, loc. cit (above, p. 15 n. 5).

[2] See, e.g., Mouskhéli, op. cit. (above, p. 13 n. 3); also Huber, loc. cit. (above, p. 14 n. 2).

[3] See, in general, Borel's reports to the Institut de Droit International, in the *Annuaire* (1934).

[4] See Lauterpacht, in *Symbolae Verzijl*, p. 196.

[5] Castberg, op. cit. (above, p. 13 n. 3). The significance of the reference in the P.C.I.J. Statute to 'general principles of law', and the history of the drafting of that provision is described by Schindler in *Recueil des cours*, vol. 25, p. 233; Sohn, ibid., vol. 108, p. 1; and Kellogg in his observations in the *Free Zones* case.

[6] *Recueil des cours*, vol. 108, p. 1; cf. Scelle, loc. cit. (above, p. 6 n. 1).

[7] See, e.g., Mouskhéli, loc. cit. (above, p. 13 n. 3).

[8] As has been pointed out, the use of the term 'equity' or '*ex aequo et bono*' is confusing: sometimes its use seems to assume that *some* rules of law are applicable to the dispute, but these are insufficient to resolve the dispute in its entirety. See, e.g., General Act for the Pacific Settlement of Disputes, Art. 28: 'If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply the rules in regard to the substance of the matter

will be seen that it is immaterial whether the direction in the arbitration agreement authorizes the application of 'equity' or adjudication '*ex aequo et bono*' or the like formula. For the substance of the authority is simply the power to legislate for the individual case, whether by modifying an existing legal obligation, supplementing it, or making law for a particular case to which there appears to be no positive law applicable.

It may be thought, therefore, that the question of the extent of the authority of international tribunals might be illuminated by discussions of their 'legislative' powers. On this point, however, there is also considerable difference of opinion: some writers assert that courts do not and should not legislate, others that they do and should.[1]

This question is often discussed in relation to the admissibility of a *non liquet*: some writers assert that a *non liquet* on the grounds of insufficiency or obscurity of the law is prohibited; others that it is required in just those cases.[2] It is certainly true that the practice of tribunals is in favour of the

enumerated in Article 38 of the Statute of the Permanent Court of International Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*.' Cf. what is probably in substance the same provision in the European Convention for the Peaceful Settlement of Disputes. Still another way of saying the same thing is found in the Treaty of Conciliation, Arbitration and Compulsory Adjudication between Germany and Switzerland (1922) (Habicht, op. cit., above, p. 9 n. 1, No. 7), Art. 5. In these treaties, the authority to adjudicate '*ex aequo et bono*' or to legislate seems to be directed at permitting a decision: (1) where the 'law' applicable is inadequate in some respect—one might instance a boundary treaty which unintentionally fails to describe a certain part of the boundary. The 'interpretation' required to fill that 'gap' is then better seen as adjudication *ex aequo et bono* or legislation; (2) where the dispute is not a 'legal' dispute, because, e.g., by customary law it falls within the domestic jurisdiction of a party and there is no treaty obligation covering the dispute, but yet the parties wish to resolve the dispute constructively—an example is the problem of State responsibility for revolutionary damage. The additional provision in Art. 5 of the German–Swiss Treaty that 'if the Parties agree, the Tribunal may, instead of basing its decision on legal principles, give an award in accordance with considerations of "equity" (or "*ex aequo bono*")' seems intended to cover yet a third possibility: that there might be rules of 'law' applicable to the dispute, e.g. a treaty provision, but that the Parties would not want the dispute decided on the basis of those principles. It can of course be argued that no special authority is needed to cover the first two cases, on the ground that the 'general principles of law recognised by civilised nations' include 'equity' and sufficient legislative authority. But although this provision in the P.C.I.J. and I.C.J. Statutes may have been interpreted by those Courts as sufficient, it appears from the history of the drafting of paragraph 2 that the '*ex aequo et bono*' provision was intended to cover the filling of 'gaps' (see Schindler, op. cit. (above, p. 13 n. 3), and Kellogg, loc. cit. (above, p. 15 n. 5)), hence Kellogg's doubts as to whether it permitted (*a*) the resolution of non-legal disputes; or (*b*) decisions *contra legem*.

On the significance of references to 'equity' or '*ex aequo et bono*' in the 'legislative' sense see Fischer Williams, loc. cit. (above, p. 14 n. 4).

[1] Compare, e.g., Politis, *La Justice internationale*; Fitzmaurice, 'Judicial Innovation—Its Uses and its Perils', in *Cambridge Essays in International Law*, p. 24: 'It is axiomatic that courts of law must not legislate: . . .'—but goes on to qualify this by the statement that: '. . . it is equally a truism that a constant process of development of the law goes on through the courts, a process which includes a considerable element of innovation'. The line between 'legislation' and 'development' (including 'innovation') is clearly a fine one. Contrast Lauterpacht, *The Development of International Law by the International Court*, pp. 155 et seq.

[2] Cf. Lauterpacht and de Visscher, op. cit. (above, p. 12 n.1); contrast Politis, op. cit., Brierly, op. cit., Stone, op. cit. (above, pp. 13, 2, 8 nn. 3, 3, 4 respectively).

former view, since there are probably no recorded cases of a *non liquet* on those grounds.[1] But it is not necessarily legitimate to deduce from a general practice a rule of law: particularly when the arguments in favour of a *non liquet* in certain circumstances are cogent.

The major arguments in favour of a *non liquet* are put in terms of: (*a*) inherent limitations of the judicial function—that courts must not legislate or may legislate only within narrow limits;[2] (*b*) the intolerable burden of legislation that would be laid on international judicial tribunals if, in the undeveloped state of international law, they were prohibited from pronouncing a *non liquet*;[3] (*c*) the unsuitability of international judicial tribunals—either in general or in their particular composition—to the task of legislation;[4] (*d*) the restraint shown by municipal courts in refusing to adjudicate certain classes of dispute;[5] (*e*) the particular desirability of similar restraint by international tribunals, in view of the lack of effective legislative bodies to reverse undesirable judicial decisions.[6] It is not always clear from discussions of this question whether it is seen in terms of inherent limits of the judicial function in general, limitations on a particular delegated authority, or self-imposed limits of judicial policy. The weight of the arguments in favour of the *non liquet* seem to suggest the last. Thus the position is seen to be simply that (*a*) international judicial tribunals are endowed with legislative authority; (*b*) but in certain circumstances they ought not to be asked to, or if asked should refuse to, legislate.

Once it is conceded that international judicial and arbitral tribunals have some quasi-legislative authority, the question immediately arises: what criteria do they, and should they, apply in 'legislating'?[7] In examining this question, it must be borne in mind that the legislative functions conferred on judicial tribunals usually relate to the margins of the law, rather than to its basic principles. The type of dispute referred to judicial tribunals is, and probably should remain, of secondary importance and limited scope—and characteristically of significance to only two States. Moreover, occasion for such 'legislation' is relatively rarely accorded. Consequently, the characteristic of 'judicial legislation' is that it normally elaborates recognized

[1] The usual case given is the *Award of the King of the Netherlands*.

[2] This seems to be the view of Politis, op. cit. (above, p. 13 n. 3).

[3] Stone, this *Year Book*, 35 (1959).

[4] Brierly, op. cit. (above, p. 2 n. 3). Cf. the reasons generally given for not submitting disputes to international tribunals, particularly the I.C.J.: see, e.g., the successive reports of the Special Committee on Friendly Relations among States (see above, p. 8 n. 4, for references).

[5] Brierly, op. cit. (above, p. 2 n. 3); Brownlie, 'The Justiciability of Disputes and Issues in International Relations', this *Year Book*, 42 (1967), p. 123.

[6] Ibid.

[7] 'Legislation' is not used here in the sense of generally applicable legislation enacted by a legislature, but simply in the sense that (*a*) an international tribunal renders a decision which, whether or not based on pre-existing law, will be binding on the parties; and (*b*) this decision will be treated as a precedent of considerable persuasive force—especially in an underdeveloped branch of international law. A recent example of a decision with considerable potential interest and effect not only *inter partes*, but in general, is afforded by the *North Sea Continental Shelf* cases.

general principles on an *ad hoc* basis with respect to particular circumstances of fact. Although problems of general concern and basic principle are customarily aired in political bodies, where the interested States are represented, they are rarely referred to judicial tribunals. Indeed, it is frequently doubted whether judicial bodies—either in general or existing bodies in particular—are suited to consider this latter type of question: fundamentally because they are insufficiently representative of the general interest, being essentially organs of limited membership, or because the training of their members is perhaps inadequate to the task of broad legislation.[1]

It has been pointed out above that writers have seen the concept of 'equity' as affording appropriate criteria for judicial legislation. They have, however, failed to elaborate the content of equity sufficiently to make it serviceable to resolve concrete disputes. It is plain, for example, that such concepts as general notions of good faith, the maxims of English equity, or 'general principles of law' and 'objective justice' are either inadequate or unhelpful.[2] The notion of 'equity' as requiring that all the surrounding circumstances, including economic and political factors and 'expediency', be taken into account, is nearer the mark. But again this is insufficiently elaborate to provide a workable set of criteria for the resolution of particular disputes. It does, however, indicate that such legislation, even when very limited in scope, is a political act, and necessarily motivated by broadly 'political' criteria.

The criteria which tribunals have applied in the past are implicit in the rules of traditional international law. These rules reflect, and may sometimes appear essentially linked to, an obsolete or obsolescent international power structure and its requirements, or at least incompatible with aspirations for change. Thus the development of the law on the acquisition of sovereignty over territory met, in its different forms, the needs of European

[1] See above, p. 18 n. 8. An obvious example in the field of territorial disputes of a matter of considerable general interest referred to an international tribunal is the *Fisheries* case (below, p. 64). The decision of the I.C.J. involved a quasi-legislative determination of the criteria governing the measurement of the territorial sea of interest and application beyond the immediate parties; and the criteria adopted were accepted in the Geneva Convention on the Territorial Sea and Contiguous Zone. See also the *North Sea Continental Shelf* cases (below, p. 81). Other questions of general importance and interest considered by the I.C.J. have been, of course, the interpretation of certain provisions of the U.N. Charter, and the *South-West Africa* and *Northern Cameroons* cases: it may be suggested that the Court's failure to resolve these in a generally satisfactory manner, or its substantial refusal to adjudicate them, is evidence that such matters are not appropriate to judicial determination for one or more of the reasons listed above.

[2] Certain concepts, such as good faith, acquiescence and estoppel have undoubtedly been applied in territorial and boundary disputes. But they do not provide an altogether satisfactory basis for decision: they are insufficiently sophisticated to resolve complex problems. See further below, pp. 95, 105. No doubt the tendency to compromise in this type of dispute might be seen as an application of the maxim 'equality is equity'; but again this is too crude a concept to be a satisfactory criterion for decision. The detailed criteria which might be involved in a reference to 'objective justice' are obscure, to say the least.

colonizing powers in their relations *inter se*. The doctrine of 'discovery' as a root of title, loose requirements for the acquisition of title by 'occupation' and the doubtful status of 'adverse prescription' set broad limits to possible conflicts and indicated a general principle of respect for territorial claims. Increasing competition for land areas available for colonization and commercial exploitation, and perhaps higher standards of administrative responsibility, in the nineteenth century were manifested in the theoretical requirement of a higher level of activity in order to acquire sovereignty: i.e. that occupation must be 'effective'.[1] To the extent that these rules reflect only the needs of the international society which created them, they are clearly obsolete and require revision. In so far as claims to self-determination and decolonization have been effectively made, and colonization effectively rejected, the practice of States may be said to have modified or discarded some of the traditional rules—in particular, those relating to 'occupation' and 'conquest'.[2] This type of claim is, however, generally formulated in political bodies. The type of territorial dispute with which international judicial tribunals have been faced has characteristically been one between established States as to the precise course of a common boundary. The traditional rules of the law of territory relate to an essentially dynamic situation: the acquisition of territory. They do not, without considerable elaboration and refinement, answer the needs of established States for stability, or minor shifts of convenience, in their boundaries.

To meet the new requirements or aspirations of international society, writers have in the context of discussions of the legislative powers of international tribunals offered guidelines as to the considerations of which tribunals should take account, and the goals at which they should aim.[3] But usually these prescriptions are on a fairly high level of abstraction, and offer little concrete guidance to the solution of particular problems. Also, it is plain from the terms used—e.g. 'law of social inter-dependence', 'public order of human dignity'—that these writers mainly think in terms of solutions to large-scale problems in which the interests of all States are involved. Such problems, however, are rarely referred to judicial tribunals. These prescriptions can form a framework of principle but are insufficiently

[1] Lindley, *The Acquisition and Government of Backward Territory in International Law*; Moore, *Collected Papers*, vol. 1, p. 80; Kozhevnikov, *International Law*, p. 181.

[2] Cf. Jennings, *The Acquisition of Territory in International Law*, pp. 52 et seq., 78–87. With regard to 'conquest' see, e.g., reactions to the occupation by Israel of Syrian, Jordanian and Egyptian territory (and some territory of indeterminate sovereignty such as the Gaza strip) in June 1967. For references see below, p. 107 n. 1.

[3] See, e.g., Lauterpacht, *The Function of Law in the International Community*; Alvarez, *Le Droit international nouveau* (and see his separate and dissenting opinions in *I.C.J. Reports*, 1948, p. 67; ibid., 1949, pp. 39, 190; ibid., 1950, pp. 12, 174, 290; ibid., 1951, pp. 49, 145; ibid., 1952, p. 124; ibid., 1953, p. 73; ibid., 1954, p. 67); McDougal in, e.g., 'International Law, Power and Policy: a Contemporary Conception', *Recueil des cours*, vol. 82, p. 137; Jenks, 'The Concept of International Public Policy', in *The Prospects of International Adjudication*.

detailed to resolve particular disputes.[1] Consequently, judicial tribunals must look for guidance on detailed criteria to other sources.

One obvious source of guidance is the explicit directions sometimes found in agreements for arbitration. These directions sometimes afford specific criteria for *ad hoc* arbitration. A glance through the arbitrations collected in Stuyt, *Survey of International Arbitrations* (containing arbitrations up to 1938) affords the following information. Sixty-seven boundary arbitrations, and, allowing for duplication, nineteen arbitrations of territorial disputes, are listed since the Jay Treaty Commissions. There have, in addition, been a number of other arbitrations of boundary and territorial disputes since then, and several cases—not listed by Stuyt—have been referred to the Permanent Court and the International Court. But the general picture is as follows: by far the largest group of arbitrations relate to the interpretation of treaties—usually a boundary treaty;[2] a few require the interpretation of a previous award,[3] and one of a unilateral declaration of annexation.[4] The next largest category make, in the *compromis*, no stipulation as to the criteria to be applied by the arbitrator;[5] a few refer simply to 'principles' of international law.[6] More interesting are those which lay down some specific criteria—either to be applied on their own, or to modify the terms of a treaty. These may be broken down into historical, strategic, ethnographical and social, economic, and geographical criteria; possession; convenience; necessity; political and State interests; and equity. The following are examples of the formulae used.[7]

[1] Thus, for example, the principle of 'self-determination' does not provide a rule for the solution of all territorial problems. In the form of a criterion of the wishes and affiliations of the inhabitants of disputed territory it forms one of a complex of criteria which are taken into consideration in attributing sovereignty over territory: see below, pp. 99, 106. On the relevance of self-determination to boundary modifications see Kozhevnikov, op. cit. (above, p. 5 n. 4), pp. 185 et seq.: 'International law, which recognises territorial integrity as one of its fundamental principles, permits boundary changes in certain strictly defined circumstances. Under International Law and international practice, such changes are recognised as legitimate if they take place in accordance with the principle of self-determination.'

[2] A total of 32 (Stuyt, op. cit. (above, p. 21 (text)), Nos. 1, 11, 12, 13, 14, 27, 42, 61, 87, 95, 114, 129, 140, 147, 153, 163, 167, 184, 189, 193, 197, 198, 209, 224, 251, 265, 275, 278, 285, 288, 300, 336). Seven of these contain some additional direction: to modify the treaty provisions for reasons of 'convenience', 'equity' etc. (Nos. 140, 153, 285), or to apply also 'international law' (Nos. 275, 300, 336), or 'internal law' (No. 278).

[3] Ibid., Nos. 298 and 320. Also the *Argentine–Chile Frontier* case, below, p. 33.

[4] Stuyt, op. cit., No. 162 (the *Walfisch Bay* case, *R.I.A.A.*, vol. 11, p. 263).

[5] A total of 24 (Stuyt, op. cit.), Nos. 8, 51, 52, 62, 92, 107, 111, 113, 117, 118, 141, 146, 149, 157, 159, 164, 180, 204, 206, 293, 334, 396a, 408).

[6] Ibid. No. 240 (Brazil–Great Britain, below, p. 93 n. 4) is the only one which refers to these as the sole basis of decision; others (Nos. 275, 300, 366) combine reference to 'principles of international law' with directions to apply treaties.

[7] For further examples of similar directions to delimitation and demarcation commissions see Lapradelle, *La Frontière*, pp. 147 et seq., and Jones, *Boundary-Making*, pp. 19, 59 et seq. On the powers of both decision and adjustment which should be given to demarcation commissions compare Holdich, *Political Frontiers and Boundary-Making*, p. 212 and Trotter, 'The Science of Frontier Delimitation', in *Minutes of the Proceedings of the Royal Artillery Institution*, 24 (1897),

Historical criteria. The most familiar of the specific, agreed criteria is that applied in boundary disputes amongst South and Central American States—the line of *uti possidetis* of 1810 and 1821 respectively. This principle had the useful function of excluding possible acquisition of territory by reliance on a concept of 'effective occupation': it excluded the status of *territorium nullius* in South and Central America. But it frequently proved inadequate to determine precise boundaries: documents defining the territories of the old Spanish and Portuguese provinces were frequently ambiguous, the border areas unexplored and unadministered and the *de jure* and *de facto* jurisdiction of these provinces did not always coincide.[1] To draw precise boundaries, therefore, tribunals frequently had to have recourse to other criteria. They were sometimes explicitly authorized to apply considerations of equity,[2] and they sometimes inferred such authority from the terms of the *compromis*.[3]

Another example of the criterion of historic possession is to be found in the first of the rules which the arbitral tribunal adjudicating on the British Guiana–Venezuela boundary was required to apply:

> (*a*) Adverse holding or prescription during a period of fifty years shall make a good title . . .[4]

General mention of 'historical principles', amongst others, was made in the agreements for the settlement of boundary questions by Mixed Commissions by Latvia, Lithuania and Estonia.[5]

Possession. Apart from historical possession in the form of *uti possidetis* and prescription, some agreements explicitly exclude actual present possession from consideration unless it fulfils certain conditions. For example, the Guatemala–Honduras Convention of 1895 provides that:

> Possession shall only be considered valid so far as it is just, legal, and well founded,

p. 207; and see in general Jones, op. cit., pp. 192–6, and (for particular examples of 'faulty delimitation') pp. 66–71.

[1] See Lapradelle, *La Frontière*, pp. 76 et seq., and, e.g., the *Honduras Borders* case (*R.I.A.A.*, vol. 2, p. 1307). Express references to the *uti possidetis* criterion are found in Stuyt, op. cit. (above, p. 21), Nos. 121, 249, 393. For similar criteria establishing the boundaries of newly independent States in Africa and Asia see the resolution adopted at the O.A.U. Conference of Heads of State and Governments at Cairo in July 1964 (O.A.U. Doc. AHG/Res. 16 (I)) and the *Temple* and *Rann of Kutch* cases.

[2] See Stuyt, op. cit. (above, p. 21), No. 249 (*Bolivia–Peru*, 1902), Art. 4: 'Wherever the royal acts and dispositions do not define the division of a territory in clear terms, the arbitrator shall decide the question according to equity, keeping as near as possible to the meaning of these documents and to the spirit which inspired them' (Text of Award in *American Journal of International Law* (1909), p. 1029; *British and Foreign State Papers*, vol. 105, p. 572). The Award was controversial: see Carlston, op. cit. and Nantwi, op. cit. (above, p. 3 n. 4).

[3] *Guatemala–Honduras* case below, p. 50; cf. *Honduras–Nicaragua* case, below, p. 42.

[4] Stuyt, op. cit., No. 207; Award, not reasoned, in *British and Foreign State Papers*, vol. 92, p. 160.

[5] Stuyt, Nos. 331 and 336: 'In arriving at their decision the Commission will take into account ethnographical and historical principles and the State-political interests of each party (military, strategical, economical and communicational) and the interests of the local population.'

in conformity with general principles of equity, and with the rules of justice sanctioned by the law of nations.[1]

Other agreements expressly require that present occupation by subjects of either party, and acquired interests in general, be taken into consideration. The Great Britain–Venezuela Convention of 1897, amongst the rules which it set out for the determination of the British Guiana boundary, provides that:

> In determining the boundary line, if territory of one party be found by the Tribunal to have been at the date of this Treaty in the occupation of the subjects or citizens of the other party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require.[2]

Some other agreements refer to 'equity' as a basis for deviating for reasons of 'necessity' or 'convenience' from a boundary determined on other criteria.[3]

Ethnographical and social criteria. The Conventions between Latvia, Lithuania and Estonia required 'ethnographic' principles to be taken into consideration, as well as, in general terms, 'the interests of the local population'.[4] An early example of the application of interests of the local population is to be found in the treaty between Nassau and Prussia of 1815. This provides for delimitation of the boundary by Commissioners and requires that:

> Les Commissaires . . . auront un soin particulier pour que les rapports communaux, ecclésiastiques et industriels, actuellement existants, soient maintenus.[5]

Economic factors. In the boundary treaty between Nassau and Prussia mention is made explicitly of 'les rapports . . . industriels', and the treaty goes on to provide that '. . . sous les rapports industriels sont spécialement compris ceux qui regardent l'exploitation des mines'.[6] Reference is made to 'economic and transit interests' in the Conventions between Latvia, Lithuania and Estonia.[7]

Geography. The specific requirement that geographic factors be taken into consideration is found in the Nassau–Prussia Convention of 1815: 'Les Commissaires se conformeront au principe de la contiguïté de ces

[1] Stuyt, ibid., No. 185. See also No. 184 (*Honduras–Salvador*) and No. 249, and *American Journal of International Law* (1909), Official Documents, p. 384 (*Bolivia–Peru*).

[2] Stuyt, No. 207. See also the Guatemala–Honduras Convention of 1930, *R.I.A.A.*, vol. 2, p. 1307, and below, p. 50.

[3] See, e.g., Stuyt, Nos. 271 (*Colombia–Peru*, 1904), 281 (*Colombia–Peru*, 1905), 285 (*Colombia–Ecuador*, 1907).

[4] See above, p. 22 n. 5.

[5] Stuyt, No. 17. See also the Protocol for the delimitation of the Afghan frontier (*Great Britain–Russia*), ibid., No. 140.

[6] Ibid., No. 17.

[7] Ibid., Nos. 331 and 336.

portions avec les territoires respectifs.' In the Conventions between Latvia, Lithuania and Estonia, reference is made to 'transit' and 'communicational' interests.

Strategic factors. These are explicitly mentioned ('military, strategical' interests) in the Conventions between Latvia, Lithuania and Estonia.

Political and State Interests. The Latvia, Lithuania and Estonia Conventions provide that '. . . the Commission shall take into consideration . . . the political and State interests of each country (such as military, strategic, economic and transit interests) . . .'.

Convenience and necessity. A number of arbitration agreements on boundary disputes require account to be taken of 'convenience' and 'necessity'. For example, the Colombia–Ecuador Convention of 1907 provides that:

> The arbiters . . . may, leaving to one side strict law, adopt an equitable line in accordance with the necessities and convenience of the two countries.[1]

The Guatemala–Honduras Convention of 1895 provides that:

> The respective Governments may, if they hold it to be necessary or convenient, adopt the system of equitable compensation, bearing in mind the rules and usages established in international practice.[2]

Equity. Some conventions authorize the tribunal, in case it is unable to decide wholly in favour of either claim, to decide on the basis of equity or some more detailed criteria. Thus, the Great Britain–Portugal Convention of 1872 regarding claims to Delagoa Bay provided that:

> Should the Arbiter be unable to decide wholly in favour of either of the respective claims, he shall be requested to give such a decision as will, in his opinion, furnish an equitable solution of the difficulty.[3]

The Bolivia–Peru Treaty of 1902 provided that the tribunal should decide on the basis of the *uti possidetis* of 1810, but added:

> Whenever the royal acts and dispositions do not define the dominion of a territory in clear terms, the Arbitrator shall decide the question according to equity, keeping as near as possible to the meaning of those documents and the spirit which inspired them.[4]

Other agreements lay down quite generally that a boundary be determined on the basis of 'justice', 'equity' or 'fairness'. These concepts are no doubt synonymous. A variety of formulae have been adopted: commissioners have been required to decide 'to the best of their judgment, and according to justice and equity';[5] to fix 'the most equitable delimitation';[6]

[1] Stuyt, No. 285.
[2] Ibid., No. 185.
[3] Stuyt, No. 100. See also the Convention of 1869 regarding the Island of Bulama: ibid., No. 85.
[4] Ibid., No. 249.
[5] Ibid., No. 61 (*Great Britain–Guatemala*).
[6] Ibid., No. 194 (*France–Great Britain*).

to determine 'all that fairly belongs to the Kingdom of Sokoto'.[1] The Arbitrators of the Chaco boundary between Bolivia and Peru were authorized to determine it '*ex aequo et bono*' and were, in particular, required to take account of '. . . the experience accumulated by the Peace Conference and the advice of the military Advisers to that organization'.[2]

Although the terms 'political and State interests', 'necessity and convenience', and 'equity' are broad and relatively undefined, it may be assumed that they are roughly synonymous and include the historical, possessory, ethnographical, social, economic, geographical and strategic criteria which are, on occasion, set out more explicitly.[3] Admittedly these agreements only identify relevant criteria; they provide no hierarchy of priorities for their application—and obviously each criterion might dictate a different boundary.

A further source of guidance may be found in decisions taken by other organs of dispute settlement: in the context of the settlement of territorial disputes decisions of post-war peace conferences and institutions fulfilling a similar function are of particular interest. Once it is recognized that international judicial tribunals do perform some quasi-legislative tasks (even if only *ad hoc* and limited in scope) it should not cause surprise if they employ criteria similar to those employed by non-judicial bodies. A typical example of the latter is offered by the reasoning of the United Nations General Assembly Resolution on the disposal of the former Italian territory of Eritrea. This runs as follows:

Taking into consideration

(*a*) The wishes and welfare of the inhabitants of Eritrea, including the views of the various racial, religious and political groups of the provinces of the territory and the capacity of the people for self-government,

(*b*) The interests of peace and security in East Africa,

(*c*) The rights and claims of Ethiopia based on geographical, historical, ethnic or economic reasons, including in particular Ethiopia's legitimate need for adequate access to the sea,

Taking into account the importance of assuring the continuing collaboration of the foreign communities in the economic development of Eritrea,

Recognizing that the disposal of Eritrea should be based on its close political and economic association with Ethiopia, and

Desiring that this association assure to the inhabitants of Eritrea the fullest respect and safeguards for their institutions, traditions, religions and languages, as well as the widest possible measure of self-government, while at the same time respecting the Constitution, institutions, traditions and the international status and identity of the Empire of Ethiopia, . . .[4].

[1] Ibid., No. 163 (*France–Great Britain*); this was concerned with the delimitation of 'spheres of influence'.

[2] Ibid., No. 407.

[3] Cf. the Advisory Opinion on the *Jaworzina Boundary*, *P.C.I.J.*, Series B, No. 8, pp. 39–40.

[4] Whiteman, *Digest*, vol. 3, p. 21. See also the decisions referred to above, p. 7 n. 4.

The Resolution goes on to recommend a complex regime for the territory: it is unlikely that a judicial tribunal would be required to do that. But the essential considerations outlined—the 'wishes and welfare of the inhabitants', the regional 'interests of peace and security', and the 'geographical, historical, ethnic or economic' links of the territory—are amongst those referred to in the bilateral agreements analysed above. It will, indeed, appear from the examination of arbitral awards and judicial decisions in the following pages that these are the criteria adopted to resolve the fairly small-scale disputes referred to judicial tribunals.

These awards are discussed below under three headings: the attribution of sovereignty over land areas, sea areas, and areas *sui generis* (the Rann of Kutch and the North Sea Continental Shelf are examples of the latter). This is partly a classification of convenience; in part, however, it is a classification of substance—the customary international law of land and sea areas is generally supposed to differ, and areas such as uninhabited salt marsh, or submerged land, do not fit neatly into either category. In a concluding section the criteria applied by tribunals are summarized; an attempt is made to range them in a hierarchy of priorities; and the status of these criteria as international law, and the powers of tribunals to apply them, are considered.

II. The Attribution of Sovereignty over Land Areas by Judicial and Arbitral Tribunals

In this century there have been more than twenty-five judicial and arbitral awards relating to land territory. The awards analysed in detail here are therefore only a selection. The representative character of this sample may be tested against the characteristics of the total number of awards. First, the majority were rendered by arbitral tribunals. The International Court has been concerned with only seven.[1] Secondly, the majority of awards relate to the course of a boundary: only four relate to isolated pieces of territory—islands. These latter are among the best known[2] —perhaps misleadingly, since they can be of only rare occurrence in modern conditions, and, normally, would relate to areas of only trivial value. In consequence there is perhaps a tendency to regard the law relating to the acquisition and loss of territory as of little significance today. The traditional notions—of 'effective occupation' etc—and the old categories of *res nullius* and *res communis* are found inappropriate or unhelpful in the

[1] Two of these were Advisory Opinions given to the Council of the League of Nations on the legal effect of decisions taken by the Conference of Ambassadors (the *Jaworzina Boundary*, *P.C.I.J.*, Series B, No. 8, and the *Monastery of Saint-Naoum*, ibid., No. 9).

[2] *Clipperton Island* (*R.I.A.A.*, vol. 2, p. 1105); *Island of Palmas* (ibid., p. 829); *Eastern Greenland* (*P.C.I.J.*, Series A/B, No. 53, p. 22); the *Minquiers and Ecrehos* (*I.C.J. Reports*, 1953, p. 47).

solution of the problems raised by the ocean bed and continental shelf, polar regions and outer space. It may, however, be that more useful guidance is to be found in boundary awards. Boundary disputes are still of considerable frequency and importance, and, it will be suggested below, the criteria applied by tribunals to resolve boundary disputes may be found to be of more value in the resolution of modern territorial problems than are some more traditional formulations. The lucid exposition of the law on the acquisition of territory given by Max Huber in his *Island of Palmas* award has formed the basis of subsequent theoretical discussions;[1] but he did not draw on the considerable jurisprudence of tribunals adjudicating boundary disputes, and to that extent his award is an incomplete exposition of the law.

A third point worth noting is that the majority of awards relate to South and Central America: naturally enough, considering the problems of boundary delimitation and the tradition of arbitral settlement of the States of that region. These awards concerned the application of the *uti possidetis* principle to disputes between American States, and also disputes between the independent American States and their colonist neighbours.

Five boundary awards are examined here: the *Cordillera of the Andes Boundary* award (1902) concerns the interpretation of a treaty; the *Argentine–Chile Frontier* award (1966) interpreted a part of the 1902 award; the *Honduras–Nicaragua Boundary* award (1906) concerned the application of the *uti possidetis* principle, and also applied considerations of 'equity'; the judgment of the International Court on the *Arbitral Award of the King of Spain* (1960) concerned the validity of the 1906 award, including the power of the Arbitrator to apply equitable considerations; the *Honduras Borders* award (1933) concerned the application of the *uti possidetis* principle, and considered in some detail the application of supplementary criteria. The *Island of Palmas* award is included for comparison.

By way of preface, it should be noted that all the boundary awards afford a compromise between the claims of the parties. This may be regarded as evidencing a diplomatic desire to give some satisfaction, and to ensure that the award is acceptable to both parties; or it may be the result of taking into consideration all the interests argued by the parties—clearly these will rarely weigh in favour of one party alone. All these cases concern inhabited areas. In consequence, perhaps, greater regard is paid to the wishes and welfare of the inhabitants than traditional expositions of international law would admit. Generally, the customary and conventional international law which the arbitrators were directed to apply were found inadequate or even non-existent. The tribunals, however, showed concern to establish sound, practical solutions within the limits of the parties' respective claims.

[1] See, e.g., Jennings, op. cit. (above, p. 20 n. 2).

Cordillera of the Andes Boundary case (*Argentina* v. *Chile*)[1]

This dispute between Argentina and Chile concerned the course of the boundary between the two countries in the Cordillera of the Andes south of latitude 26° 52′ 45″. In 1856 the two parties had acknowledged by treaty as the boundaries between their respective territories the line of *uti possidetis* in 1810.[2] In 1881 a boundary treaty defined the boundary in greater detail; it provided as follows:

> The boundary between Chile and the Argentine Republic is from north to south, so far as the 52nd parallel of latitude, the Cordillera de los Andes. The boundary-line shall run in that extent over the highest summits of the said Cordillera which divide the waters, and shall pass between the sources (of streams) flowing down to either side.[3]

This treaty also provided that difficulties in its application should be solved amicably by a mixed commission of experts appointed by the respective Governments. In view of the difficulties which the experts had experienced in reaching agreement on the application of the 1881 treaty, a Protocol of 1893 reaffirmed that the Experts should hold the principle set out in the provision quoted above 'as the invariable rule in their proceedings'.[4] The Protocol drew the following conclusions from this principle:

> Consequently, there shall be held as perpetually belonging to the Argentine Republic and as under its absolute dominion all the lands and waters, . . . lying to the east of the line of the highest summits of the Cordillera de los Andes which divide the waters; and, as the property and under the absolute dominion of Chile, all the lands and all the waters, . . . lying to the west of the highest summits of the Cordillera de los Andes which divide the waters.[5]

In 1896 the parties reaffirmed, by another treaty,[6] that the expert commissions demarcating the frontier should apply the provisions of the treaty of 1881 and the protocol of 1893. They further provided that disputes relating to the region to the south of parallel 26° 52′ 45″, should, in default of prior amicable settlement between the two Governments, be referred to the arbitration of the British Government. The Arbitrator was to appoint a Commission to survey the disputed territory, and to pronounce an award in accordance with 'the strict application . . . of the provisions of the said Treaty and Protocol'.[7] In November 1898 Argentina and Chile formally submitted a dispute with respect to four sections of the boundary to Queen Victoria as Arbitrator. By a Protocol of 28 May 1902,[8] both countries invited the Arbitrator to appoint a Commission to fix on the ground the

[1] 1902. Award in *R.I.A.A.*, vol. 9, p. 31.
[2] *British and Foreign State Papers*, vol. 49, p. 1200.
[3] Ibid., vol. 72, p. 1103; also *R.I.A.A.*, vol. 9, p. 45.
[4] See ibid., p. 46.
[5] Article 1.
[6] *British and Foreign State Papers*, vol. 88, p. 553; also in *R.I.A.A.*, vol. 9, p. 35.
[7] Art. II.
[8] *British and Foreign State Papers*, vol. 95, p. 764.

boundary to be determined by the award. The Arbitration Tribunal set up to examine the dispute reported on 19 November 1902, and the award was made on the following day by King Edward VII.[1]

The dispute between the parties concerned the interpretation of the boundary treaty and protocol and their application to the ground in certain parts of the Andes. In the northern, and at the time that treaty had been drawn up the best explored part of the frontier, the crest-line of the Cordillera and the continental water divide (separating the rivers flowing into the Atlantic from those flowing into the Pacific) coincided. In the south, which had at that date been little explored, the Cordilleras were broken by transverse valleys, and in consequence the crest-line and the continental water-divide line did not coincide. In these circumstances, the parties differed as to the correct interpretation and application of the boundary agreement: naturally, each party claimed the line more favourable to it. Argentina claimed the line of 'the highest summits of the Cordilleras . . .'; Chile claimed the continental water-divide.[2]

The award does not state the principles upon which it is based; it simply lays down a line in the disputed sectors. It is, however, evident from the description of the line that it follows no such straightforward principle as either line contended for by the parties. The Report of the Tribunal of Arbitration,[3] annexed to the award, throws more light on the reasoning behind it. It notes the conflicting contentions of the parties,[4] and the geography of the disputed area,[5] and goes on to observe:

> In short, the orographical and hydrographical lines are frequently irreconcilable; neither fully conforms to the spirit of the Agreements which we are called upon to interpret. It has been made clear by the investigation carried out by our Technical Commission that the terms of the Treaty and Protocols are inapplicable to the geographical conditions of the country to which they refer. We are unanimous in considering the wording of the Agreements as ambiguous, and susceptible of the diverse and antagonistic interpretations placed upon them by the Representatives of the two Republics.
>
> Confronted by these divergent contentions we have, after the most careful consideration, concluded that the question submitted to us is not simply that of deciding which of the two alternative lines is right or wrong, but rather to determine—within the limits defined by the extreme claims on both sides—the precise boundary-line which, in our opinion, would best interpret the intention of the diplomatic instruments submitted to our consideration.
>
> We have abstained, therefore, from pronouncing judgement upon the respective contentions which have been laid before us . . . and we confine ourselves to the pronouncement of our opinions and recommendations on the delimitation of the boundary . . .[6].

[1] *R.I.A.A.*, vol. 9, p. 37.

[2] Report of the Tribunal, § 10 (ibid., pp. 39–40). For a discussion of the problems and a description of the disputed area see Holdich, *The Countries of the King's Award.*

[3] *R.I.A.A.*, vol. 9, p. 39.

[4] Report, § 10, ibid., p. 40.

[5] Ibid.

[6] Ibid., §§ 15–17, pp. 40–1.

The Report then describes the line recommended in the four sectors in dispute; the award reproduces this description in rather less detail.

Although it appears from the passage from the Report quoted above that the boundary described in the award and the Report represents a compromise between the opposing claims of the parties, neither the award nor the Reports provide any clue as to the specific considerations which determined the particular form which the compromise line took.

Considerable light is cast on this problem by certain documents of the Tribunal and of the Commission appointed by it to inspect the disputed area on the spot. The chief architect of the boundary set out in the Report and award seems to have been Sir Thomas Holdich, a geographer, who was both a member of the Tribunal of Arbitration and of the Commission appointed by the Tribunal to survey the disputed area. Holdich's report to the Tribunal on his inspection of the area, and his draft definition of the boundary prepared for the Tribunal,[1] throw light on the considerations which prompted the Tribunal's recommendation of the line described in the award.

In particular, the preparatory documents reveal the following facts:

(1) The possibility of a compromise of the opposing claims was discussed with Argentine and Chilean officials when the Commission visited the disputed area.[2]

(2) The need for some compromise solution was dictated by the geography of the disputed area. For in this southern area there was no continuous chain of highest peaks, such as that of the northern Andes; a north–south line drawn through them would descend frequently almost to sea-level. The continental divide claimed by Chile as the boundary was equally incompatible with the provisions of the treaty, for in parts the absence of any marked ridge coinciding with it made it 'a boundary of the plains and not of the mountains'.[3] Therefore, Holdich concluded that: '. . . both lines deflect seriously from these geographical conditions which are aimed at by the treaties; and, further, that no line can be indicated which will, in all respects, fulfil those conditions'.[4] Consequently, in Holdich's view, a compromise was the only reasonable solution.[5]

(3) The terms of the treaties pointed to a particular compromise which would fulfil the intentions of the parties to the treaties. In Holdich's view,

[1] These documents were printed as annexes to the Argentine and to the Chilean Memorials in the *Argentine–Chile Frontier* case (1966). Further comments by Holdich on the boundary are to be found in his *The Countries of the King's Award* and *Political Frontiers and Boundary Making*.

[2] Holdich, 'Narrative Report' on the visit of the Commission, *Chilean Memorial*, p. 54.

[3] Holdich, 'Summary of Conclusions', ibid., p. 103.

[4] Ibid.

[5] Holdich, 'Conditions other than Geographical', ibid., p. 106: 'The consideration of the geographical conditions, or physical configuration, of the area in dispute, therefore, points to a compromise as the only reasonable solution of the difficult problem of the boundary, and it seems to me that the reconcilable nature of the terms of the treaties and of the protocols themselves points to the same conclusion.'

the terms of the treaties suggested that both parties at the time they concluded the treaties contemplated a similar geographical structure along the whole length of the boundary; that is, in the south, as well as in the north, they assumed that the main chain of highest elevation would coincide generally with the continental divide. Thus, Holdich considered, 'the boundary ideal on both sides was practically identical, i.e. a main meridional chain of highest peaks possessing continuity as a water divide'.[1] Since no such chain existed, Holdich concluded:

> . . . we are therefore forced as much by the interpretation of the treaties themselves as by the structural disposition of ranges and valleys into a boundary of compromise which shall combine as far as possible the conditions of an elevated watershed with geographical continuity.[2]

(4) The general lines of the compromise which followed from the attempt to reconcile the intentions of the parties with the geography of the area and the requirements of a geographically satisfactory boundary were themselves modified by certain non-geographical considerations. These were set out by Holdich in the following terms:

> There are . . . certain conditions which cannot be overlooked in defining the position of an international boundary such as this, which may be found to militate against the idea of a central meridional dividing line. These are :—
>
> (1) the value of the property to be divided
> (2) present occupation
> and (3) strategic considerations.[3]

[1] Ibid. [2] Ibid.

[3] Ibid. In this document Holdich went on to particularize how these considerations had governed his proposal. *Inter alia*, he noted that there were few areas of value in the disputed territory, i.e. areas which were available for stock raising or agriculture. And also that . . . 'the chief prospective wealth of these tracts so far as it can be derived from the land surface is concentrated on or near the continental divide which represents the line of division claimed by Chile. . . . On either side, east and west, the pampas and mesetas of Argentina equally with the mountain slopes of the Andes are of less productive value. The cultivated or cultivable areas of the Patagonian plains are exceedingly narrow and the whole country is subject to excessive climatic vicissitudes. The Andine mountains on the other hand, are pervaded by an atmosphere of excessive humidity and the valleys are scoured by floods. It is about the outermost of the eastern ridges of the Andes that nearly all the valuable tracts are concentrated, and this fact renders it exceedingly difficult to define an equitable division of property (based on any assumption of economic productiveness), which can be represented by a central line. But again, the central line of continuous watershed which now divides Chile and Argentina to the north of the disputed area is subject to exactly the same conditions of inequality as to the value of the divided property, nearly all the best land lying on the Argentine side of it. Thus it would appear that if the original treaty-makers contemplated a central line of division, they were prepared to accept a partition that would favour Argentina' (ibid., pp. 107–8).

With respect to the question of giving effect to occupation of territory by nationals of either party, he said: 'So far as the present occupation of the land is concerned, I am of opinion that the conditions under which that occupation has been effected are of so elastic and loose a nature that it is only where considerable communities (such as exist only in the 16th October Colony, and in the Ultima Esperanza region) are distinctly affiliated by race and tradition, or by natural facility of intercourse, with either one Republic or the other, that the Tribunal need be concerned with the claims to which it would give rise. Individual claims, such as may be advanced by

In the introduction to the draft definition of the boundary which he proposed to the Tribunal, Holdich summarized the manner in which he had attempted to give effect to these considerations:

> In effecting a compromise, therefore, I should propose to assign to Chile all that is possible towards such a proportion of territory as will be of equal value with that retained by Argentina, respecting to the utmost the claims of all colonists or settlers who are affiliated with the Chilean Government. Strategic considerations, as well as those referring to occupation point to only one way in which anything like a satisfactory compromise of this nature can be effected, and that is, shortly, to assign to Chile as much as possible in the southern districts and to leave to Argentina lands which she has effectively occupied in the north. In other words, to allow Chile to retain possession of the grass uplands and forests of the regions about Ultima Esperanza and to assign to Argentina the valleys of 'the 16th of October' and Cholila. These are the two districts which are of really serious importance as possessing the greatest facilities for economic development and it is fortunate that the great mass of Chilean or of Argentine colonization within the disputed area gravitates towards these two districts respectively. Beyond these two districts there are others of minor importance amongst which an equal distribution of value will be attempted but the adjustment of the line as a whole should be regarded as being framed in these two most important features of it.[1]

The following points regarding the authority of the tribunal and the considerations of which it took account in determining the course of the boundary are worthy of note.

(1) The tribunal was required by the terms of the *compromis* to apply strictly the provisions of the boundary treaties between the parties. It did not do so, because the geography of the area did not permit the drawing of a boundary line in accordance with the verbal description in the treaties. Faced with this difficulty, the tribunal might have adopted a number of different courses. It might have adopted the view that its authority was limited to applying the provisions of the treaties, and since it could not do

isolated occupants of the remoter valleys will invariably be found to possess no solid legal basis. Frequently such occupation is simply that of the squatter who has made no agreement with either government. In other cases the terms of occupation are provisional and the settlers prepared for any eventuality. This is indeed the case more or less throughout the disputed area but still I think that it will certainly ensure a more satisfactory adjustment of the boundary and acceptance of the decision of the Tribunal if as far as possible the districts which are held by colonists with distinctly Argentine or Chilean derivation should be awarded to Argentina or to Chile as the case may be' (ibid., p. 109).

On 16 October Colony, see particularly Holdich's comment in *Political Frontiers and Boundary Making*, pp. 46–50. The effect of strategical considerations on the course of the boundary was put by Holdich in the following terms: 'Strategically considered, the boundary should be, as far as possible a solid barrier to interference on either side. Indeed, the only expression of opinion on the subject of the boundary which I have heard strongly advanced on both sides is the necessity for a formidable natural barrier which may prove a physical obstacle to aggression. This is, however, opposed altogether to the theory of the continental divide as the dividing line, and certainly tends to throw the boundary westward into the mountains (rugged and impassable, although they contain no continuous main chain of water-parting) of the Western Cordillera' (*Chilean Memorial*, pp. 109–10). In general, these views are in accordance with the principles of boundary-making espoused by Holdich in *Political Frontiers and Boundary Making*.

[1] *Chilean Memorial*, p. 111.

so, it must pronounce a *non liquet*.[1] Or it might have made *recommendations* to the parties as to the desirable course of the boundary. Alternatively, the tribunal might have held that the treaty had effectively determined the course of the boundary (and was not partially void) in the disputed sector, although in ambiguous terms; and that the tribunal must therefore give some authoritative interpretation of it. Such an interpretation might have been the adoption of either of the lines claimed by the parties, or a new line selected by the court, and claimed to correspond best to the intention of the parties. In fact, the Tribunal adopted this latter approach with certain modifications. It informally sought assurance that a 'compromise' decision would be acceptable, and, having that assurance, determined on a line which would fulfil certain conditions. In particular, it would attempt to give effect to the fundamental aims of the parties as to the form of the boundary; it would reconcile as far as possible the conflicting interpretations offered by the parties; and it would take account of the general requirements of good, practical boundary making, and of the various interests of the parties in the boundary area.

(2) The tribunal derived little assistance from the principles or rules of international law. Rules relating to the interpretation of documents or to the acquisition of territory were not mentioned. The only special rules of international law—the boundary treaties—were found to be ambiguous and their terms inapplicable. The tribunal did, however, apply certain criteria to drawing the boundary. It should be a compromise, it should correspond as far as the geography of the area admitted to 'the boundary ideal on both sides'. The general line following from these two criteria should be modified by certain other considerations: an equal distribution in value of the disputed territory; the interests and allegiance of nationals of either party who had occupied the area; and the advantage of a good strategic boundary. The parties accepted the award, and acquiesced in both the scope of the discretion exercised by the tribunal and in the criteria on which the award was based.

Argentine–Chile Frontier case[2]

This case concerned the interpretation of a part of the 1902 award and its application to the ground in a small stretch of the frontier. The area covered by the 1902 award was largely unexplored. Consequently, although

[1] This view was taken by Alvarez (in *Revue générale de droit international public*, 10 (1903), p. 651): he considered that the award was *ultra vires*. See also Carlston, op. cit. (above, p. 3 n. 4), pp. 95 et seq. Cf. Politis, *La Justice internationale*, pp. 62–70, for the view that it was only mandatory to apply the treaty if inspection on the spot (also authorized by the *compromis*) showed that it *could* be applied. If not the tribunal could determine the boundary according to the intention of the treaty—which decision would be binding on the parties if they accepted it, although perhaps technically *ultra vires*.

[2] 1966. Award published by H.M.S.O. and in *International Law Reports*, vol. 38, p. 10.

the Tribunal in 1902 was supplied with maps of the territory, and these were to some extent checked on the spot by the Commission, the maps upon which the Tribunal based its award and described the award line were not in all respects accurate. A Demarcation Commission appointed by the Arbitrator[1] demarcated the boundary in this disputed sector, but did not follow the entire course of the boundary described in the award and therefore did not realize that the award map was in part erroneous.

The relevant portion of the description of the line of the boundary in the 1902 award is as follows:

> From the fixed point on the River Palena, the boundary shall follow the River Encuentro to the peak called Virgen, and thence to the line which We have fixed crossing Lake General Paz.[2]

The award provided that it should be read with the Report of the Tribunal of Arbitration and the map upon which the line of the boundary was drawn.[3] The more detailed description of the boundary line in the Report was in the following terms:

> . . . it shall follow the lofty water-parting separating the upper basins of the Fetaleufu and of the Palena . . . above a point in longitude 71° 47′ W, from the lower basins of the same rivers . . .
>
> Crossing then Palena at this point, opposite the junction of the River Encuentro, it shall then follow the Encuentro along the course of its western branch to its source on the western slopes of Cerro Virgen. Ascending to that peak, it shall then follow the local water-parting southwards to the northern shore of Lago General Paz at a point where the Lake narrows, in longitude 71° 41′ 30″ W.

The award map depicted the line described in the Report and the award, and, in particular, depicted a river, named the Encuentro, with a course generally southerly and a western branch originating on the western slopes of a mountain, named Cerro Virgen.

The Demarcation Commission in 1903 erected Boundary Post 17 on the northern shore of Lake General Paz. This gave rise to no dispute. Boundary Post 16 was erected opposite the mouth of a river now known as the Encuentro. This river did not, however, have a source on the Cerro Virgen: indeed, some way above its mouth it divided into two channels, one flowing from the east (and a source in a range of mountains considerably to the east of its mouth) and the other flowing from the south or west (and a source not too far from Cerro Virgen at a point subsequently described as

[1] At the request of the Argentine and Chilean Governments by a Protocol of 28 May 1902, *British and Foreign State Papers*, vol. 95, p. 764.

[2] Art. III, § 2.

[3] Art. V: 'A more detailed definition of the line of frontier will be found in the Report submitted to Us by Our Tribunal, and upon the maps furnished by the experts of the Republics of Argentina and Chile, upon which the boundary which We have decided upon has been delineated by the members of Our Tribunal and approved by Us.'

Portezuelo de las Raíces).[1] The water-parting from Cerro Virgen to Boundary Post 17 did in fact exist. The problem remained a potential, and mainly dormant, dispute for more than half a century. Finally, in 1964, the dispute was referred to the Arbitration of the British Crown.[2]

The Compromiso formulated the question for the Court of Arbitration in the following terms:

> To the extent, if any, that the course of the boundary between the territories of the Parties in the Sector between boundary posts 16 and 17 has remained unsettled since the 1902 Award, what, on the proper interpretation and fulfilment of that Award, is the course of the boundary in that Sector?

It was further provided that:

> The Court of Arbitration shall reach its conclusions in accordance with the principles of international law.[3]

The Parties agreed that the 1903 Demarcation and, in particular, the placing of Boundary Posts 16 and 17, was binding on them; therefore, the line of the boundary in the area in dispute must link those two posts. They agreed, also, that the boundary must follow the River Encuentro. Their contentions concurred, therefore, from the mouth of the Encuentro to a point which formed the confluence of two channels of that river. From this point, the claims of the parties diverged. Chile contended that the eastern channel must be followed to its source; Argentina contended that the southern (or western) channel must be followed to its source, at the place where that had been designated by the Mixed Boundaries Commission. Neither of these channels originated on the Cerro Virgen, which both parties were agreed had been correctly described and located in the award and which could be easily identified on the ground. Both parties contended, however, that their claims were, in so far as the geography of the area permitted, applications of the award conforming as closely as possible to its terms. Argentina contended that its claim corresponded best to the actual wording of the Report and award, and the general line of the boundary shown on the Award Map. In particular, the Argentine line passed through the Cerro Virgen which was expressly mentioned as a point on the boundary in the award, and followed the water-parting from that peak to Boundary Post 17, as the award described. Furthermore, Argentina contended that the award required that the boundary follow the major channel of the Encuentro to its source, and, on grounds of geographical and geological characteristics, and the history of river nomenclature in the area,

[1] For a description of the geography of the area, see *Report of the Court of Arbitration*, pp. 40–54.

[2] The historical development of the dispute between 1903 and 1964 is recounted ibid., pp. 55–64.

[3] Agreement (Compromiso), Art. I, ibid., p. 14.

that the southern (or western) channel was, in fact, the major channel. Argentina also relied on the proposal of the Mixed Boundary Commission as being in part binding (in the sector unanimously approved), and, as a whole, authoritative (especially in the sector *recommended*). Various acts (including maps—especially a map of 1952 which showed the boundary as very similar to the line claimed by Argentina) of the Chilean Government were alleged to constitute acquiescence in the Argentine claim, and to estop the Chilean Government from making its present claim.

Chile conceded that its claim did not comply entirely with the wording of the award, but contended that it applied the intention behind the award best to the geography of the area as it was now known to be. Chile placed great reliance on the reports and draft description of the award line made by Sir Thomas Holdich as evidence of the intention behind the terms of the award. In particular, Chile emphasized the express general intention to describe a line '. . . which shall combine as far as possible the conditions of an elevated watershed with geographical continuity'.[1] Chile also considered that implied in the terms of the award as a whole was the principle of maintaining the unity of river basins. Chile contended that its claim constituted the best application to the terrain of these principles, and the one which the Tribunal, had it known the true geography of the area, would have selected. Chile also contended that the eastern channel of the Encuentro was the major channel on geographical grounds.[2] Argentine acquiescence in the Chilean claim was also asserted, and it was further argued that Argentina was estopped by various statements from putting forward its present claim.

An important feature of the Chilean case was the evidence of immigration into the disputed area of Chilean settlers since the date of the award. In 1902 the disputed sector had been uninhabited; immigration into the area began in 1910, and at the date of the present proceedings the northern part of the disputed sector contained a thriving community of Chilean affiliations. This community extended on both sides of the southern (or western) channel of the Encuentro, up to the eastern channel. Thus the boundary claimed by Argentina would split this community. Both parties asserted various acts of administration of the area. It appeared, however, that at least since 1927, the main contacts of the inhabitants of the area had been with Chile; the nearest town, Palena, had been founded in undisputedly Chilean territory at that date. Its gradually developing services for marketing, communications, registry of property, births, marriages and deaths, etc. had thenceforward been used in preference to the more distant Argentine centre. Chile contended that this evidence should be taken account

[1] See above, pp. 30 et seq.

[2] See submissions of the parties, *Report of the Court of Arbitration*, pp. 20–36.

of by the Court on two major grounds: as evidence of the 'fulfilment' of the 1902 award by the parties; and as a consideration influencing the exercise of any discretion to 'fulfil' the 1902 award which had been granted to the Court by the parties. No title by occupation or prescription independent of the award was asserted, apparently on the basis that the status of *territorium nullius* was excluded by the treaties preceding the 1902 award, and reliance on prescription would presuppose that the territory properly belonged (under the treaties and/or the 1902 award) to the other party. This conceptual dilemma illustrates the problems raised by the failure of customary international law (in theory) to admit the validity of evidence of *administration* of territory except under the rubric of 'occupation' or 'prescription'. These categories simply cannot be applied to factual and legal situations as ambivalent as they were in this case; but, equally clearly, such evidence is relevant—the difficulty is to find an appropriate legal category for it.

The diagram appended to the award shows that the line determined by the Court of Arbitration was—in the broadest sense—a compromise between the claims of the two parties. The reasoning of the Court's Report provides a partial, but incomplete, explanation of the precise course of the line. In brief, the Court's approach was as follows.

First, the Court emphasized that it was required to reach its conclusions in accordance with the principles of international law; and that it was not authorized to apply any special rules or decide in the character of a friendly mediator.[1]

Second, the Court interpreted the question put to it as falling into two parts:

> The first point is: to what extent, if any, has the course of the boundary between the territories of the Parties in the sector between Boundary Posts 16 and 17 remained unsettled since the Award of 1902? The second point is: what, on the proper interpretation and fulfilment of that Award, is the course of the boundary in that sector?[2]

In the view of the Court, this first point was a preliminary point, in the sense that before determining the course of the boundary 'on the proper interpretation and fulfilment of [the 1902] award', it must first determine the extent to which that award had settled the course of the boundary—if at all.[3] Both Parties had, in their respective pleadings, treated this first point as itself raising a question of interpretation, to be resolved by the principles of interpretation of legal documents, e.g. investigation of the intentions of the Arbitrator by reference to the terms of the award, its context, preparatory documents, etc., and to some extent by reference to 'subsequent

[1] *Report of the Court of Arbitration*, p. 65. [2] Ibid. [3] Ibid., p. 66.

practice', its interpretation and application by the parties to it.[1] The Court did not treat this first point as requiring the application of the usual principles of interpretation. It applied, instead, a concept akin rather to that of impossibility of performance or frustration, enunciating the following general rule:

> Since the 1902 award was a valid award, it must be assumed to have settled the entire boundary between Argentina and Chile in the area covered by it—including the boundary between Boundary Posts 16 and 17—except to the extent to which it is impossible to apply the Award to the ground. In other words, the decision as to what part of the boundary between Boundary Posts 16 and 17 remained unsettled after the award and the demarcation is the same as the decision as to what is the part of the boundary in that sector in which the 1902 award cannot be applied to the ground.[2]

From the application of this rule, the Court concluded that the 1902 award had settled the course of the boundary between Boundary Post 16 and the Confluence, and between Cerro Virgen and Boundary Post 17:

> . . . the Court has identified on the ground most of the features named in the award. It finds no difficulty in applying the award to the ground in the parts of the sector between Boundary Post 16 and the Confluence and between Cerro de la Virgen and Boundary Post 17. The Court therefore accepts Argentina's Submissions that the Award, taken together with the demarcation of 1903, settled the boundary between Boundary Post 16 and the Confluence and also between Cerro de la Virgen and Boundary Post 17.[3]

The Court was prepared to admit the possibility that

> . . . parts of the boundary thus found to have been settled in 1902–03 became unsettled since that time or became settled in a different way.[4]

But it found no conclusive evidence of this. The Court treated the Chilean evidence of immigration to the area by Chilean settlers and Chilean administration as relevant to this question but found that

> . . . taken as a whole, the evidence is just what one would expect in any disputed zone. It shows settlers not surprisingly turning to the authorities of both countries in case of need and doing their best to keep on good terms with both sides. The evidence is quite insufficient to establish any abandonment by Argentina of her rights under the 1902 award or any acquisition of title by Chile through adverse possession of territory adjacent to those parts of the boundary line settled in 1902–03. No more, in the Court's view, does the evidence establish that the parts of the line remaining unsettled in 1903 have subsequently become settled in the sense now contended for by Chile.[5]

Nor did the Court find any conclusive evidence of an implied or tacit agreement between the parties as to the course of the boundary, or that either party was estopped from putting forward its claim.[6]

[1] See, e.g., *Argentine Memorial*, pp. 201 et seq., *Counter-Memorial*, pp. 69 et seq.; *Chilean Memorial*, pp. 98 et seq., *Counter Memorial*, pp. 27 et seq.
[2] *Report of the Court of Arbitration*, p. 70. [3] Ibid., p. 72. [4] Ibid., p. 75.
[5] Ibid., p. 76. [6] Ibid.

The Court next turned to the second part of the question:

What, on the proper interpretation and fulfilment of the 1902 award, is the course of the boundary in the unsettled part of the sector, *i.e.*, the part between the Confluence and Cerro de la Virgen.[1]

The principles of interpretation to be applied to the 1902 award had been discussed at length by the parties, and their arguments are referred to in the Report. In the main, they assumed that the goal of interpretation was to ascertain the Arbitrator's intention; and in this sense, the Court derived little assistance from them. It said:

But with regard to the 1902 award, the Court is satisfied that, in order to determine the intention of the Arbitrator, it is not necessary to look outside the three documents of which the award consists, namely, the Award itself and the Report and Maps referred to in Article V of the award. It is not so much a question of the Arbitrator's intention as of that intention being frustrated by an incorrect appreciation of the geography.[2]

The extent of the authority of the Court to interpret and to 'fulfil' the 1902 award was also extensively debated by the parties. Both parties were agreed that, either implied in the task of interpretation (as Chile preferred) or explicit in the reference to 'fulfilment' in the Compromiso (as Argentina preferred), a certain discretion was conferred on the Court at least to take account of geographical factors in drawing a workable boundary. Chile contended that social and economic factors—the Chilean community in the Encuentro valley—should be taken account of also and that primarily 'fulfilment' referred to subsequent acts of the parties.[3] This was strongly contested by Argentina.[4] The Court interpreted the extent of its authority under the Compromiso in the following terms:

The Court believes this phrase to be the equivalent of 'interpretation and application' which appears in many compromissory clauses. The addition of the word 'application' ('fulfilment') is due to the desire of Parties to get disputes finally settled, which might not otherwise be the case if the tribunal authorised to decide the dispute were empowered to interpret only. Particularly is this true of boundary disputes, where questions of demarcation as well as delimitation are involved. The Court considers therefore that the phrase 'interpretation and fulfilment' is a comprehensive expression which authorises it to examine the demarcation of 1903 as well as the 1902 Award itself, and also authorises, nay requires, the Court, while avoiding any revision or modification of the 1902 award, nevertheless to supply any deficiencies therein in a manner consistent as far as possible with the Arbitrator's intention.[5]

The Court then formulated two principles to guide it in determining the precise course of the boundary from the confluence to Cerro Virgen:

The first is the general principle that where an instrument (for example, a treaty or an award) has laid down that a boundary must follow a river, and that river divides

[1] Ibid., p. 77. [2] Ibid.
[3] See, e.g., Chilean final submissions Nos. (24)–(27), *Report of the Court of Arbitration*, pp. 31–2.
[4] See, e.g., Argentine final submission No. (13), ibid., p. 27. [5] Ibid., p. 78.

into two or more channels, and nothing is specified in that instrument as to which channel the boundary shall follow, the boundary must normally follow the major channel. The question which is the major channel is a geographical question . . .

The second principle governing the Court in its approach to the problem now before it is that, whichever channel is followed—and this must normally be the major channel —the Court must never lose sight of the fact that it was the intention of the Arbitrator to make the boundary follow a river as far as Cerro de la Virgen.[1]

It will be noted that this second principle is less a principle of interpretation than a recognition that the Court had already decided that the Cerro Virgen–Boundary Post 17 sector had been settled. Consequently, somehow the line of the boundary must, for purely practical reasons, arrive at Cerro Virgen.

The Court determined that the eastern channel was the major channel of the Encuentro on 'historical and scientific grounds'.[2] The historical evidence relied on included the opinion of an Argentine surveyor in 1907, the statement in the Argentine Memorandum sent to the Chilean Ministry of Foreign Affairs in 1913, and a Report made by a Technical Adviser to the Argentine Ministry for Foreign Affairs and Worship in 1941.[3] The scientific evidence was more cogent: in the Court's opinion '. . . the three principal criteria to be applied . . . are length, size of drainage area, and discharge, preferably in terms of annual volume'.[4] The application of these three criteria were all in favour of the eastern channel as the major channel. Argentina, on the other hand, had laid stress on the geological history of the area, and, in particular, on the lineal continuity of the southern channel and its containing valley with the lower reaches of the Encuentro. The Court, however, attached '. . . more importance to the continuity of the general force of the river with that of the trunk stream and regards this as more apparent in the case of the Eastern Channel'.[5]

Mindful of the need for the boundary to arrive at Cerro de la Virgen, the Court decided that it was unnecessary that the boundary follow the major channel of the Encuentro to its source. Both parties had contended that it must do so, in order to conform with the description of the boundary in the 1902 Report. The Court, however, applied a broad principle of frustration as an effect of the geographical error under which the 1902 Tribunal had laboured. It put this concept in the following terms:

In the view of the Court, . . . the notion of following the Encuentro to its source is inextricably bound up with the erroneous idea that that river has a western branch the source of which is on the western slopes of Cerro de la Virgen. . . . The river which has its source on the western slopes of Cerro de la Virgen is not the Encuentro but the Salto/Azul or a tributary thereof . . . Given this error, and given also the fact that the reference in the Report of the Tribunal of 1902 to the 'western branch' of the

[1] *Report of the Court of Arbitration*, p. 80. [2] Ibid., p. 81. [3] Ibid., p. 82.
[4] Ibid. [5] Ibid., p. 83.

Encuentro is in reality a reference to the Salto and not to the Encuentro, it is not possible to give effect to these words in that Report. Rather the proper interpretation is to concentrate on the simple, straightforward words in the Award 'follow the River Encuentro to the peak called Virgen' . . . following (the major) channel until it begins to deviate in a marked degree from the direction of Cerro de la Virgen, at which point the line must leave the Encuentro altogether and make for Cerro de la Virgen in a manner as far as possible consistent with the general practice of the award.[1]

It is clear from the passage from the Report quoted above that the Court had a great deal of latitude in determining the course of the boundary between the confluence and Cerro Virgen. The Report is to some extent unsatisfactory in not explicitly enunciating the considerations which influenced it to select the boundary line. The reasons given in the Report do not provide a satisfactory explanation, for their application leads to no determinate line. Once the Court had decided that the boundary need not follow the River Encuentro to its source, but should leave the Encuentro at some point to make for Cerro Virgen, the application of this principle would permit the line of the boundary to leave the Encuentro at any point between the confluence and the source of the major (eastern channel). It was not even necessary for the boundary to follow the major channel beyond the confluence at all; a glance at the diagram appended to the award shows that the eastern channel of the Encuentro deviates 'in a marked degree' from the direction of the Cerro Virgen throughout its course from the confluence.

In the absence of more explicit reasons in the Report or the award, it may be legitimately conjectured that this boundary line was selected for the following reasons. First, it gave effect to interests of Chile and of the individual Chilean settlers in the area; for the effect of the award is to give the settled valley—the most important part of the disputed area—to Chile. By not, in terms, appearing to take account of these interests, the Court avoided setting a precedent; for along the course of the Argentine–Chilean frontier there are other colonies of Chilean immigrant settlers. Secondly, apart from the human geography of the area, the boundary chosen seems to have provided—at least along the course of the eastern channel of the Encuentro—a clearer and more physically impassable boundary than would the southern channel. The fact that both sides of the southern channel had been occupied by settlers, but they had not crossed the eastern channel, emphasizes the geographical, as well as social and economic, unity of the valley through which the southern channel flowed. Thirdly, the award line gave some satisfaction to both parties, for it gave to Argentina the larger, although mainly uninhabited, portion of the area in dispute. Also, very largely, it applied the Argentine interpretation of the 1902 award.

[1] Ibid., pp. 80–1.

Honduras–Nicaragua Boundary case[1]

By a Treaty of 1894, the Governments of Honduras and Nicaragua established a Mixed Boundary Commission '. . . to settle in a friendly manner all pending doubts and differences, and to demarcate on the spot the dividing line which is to constitute the boundary between the two Republics'.[2] This Treaty further laid down the rules which the Commission was to apply in the following terms:

1. Boundaries between Honduras and Nicaragua shall be those lines on which both Republics may be agreed or which neither of them may dispute.

2. Those lines drawn in public documents not contradicted by equally public documents of greater force shall also constitute the boundary between Honduras and Nicaragua.

3. It is to be understood that each Republic is owner of the territory which at the date of independence constituted, respectively, the provinces of Honduras and Nicaragua.

4. In determining the boundaries, the Mixed Commission shall consider fully proven ownership of territory and shall not recognise juridical value to *de facto* possession alleged by one party or the other.

5. In case of lack of proof of ownership the maps of both Republics and public or private documents, geographical or of any other nature, which may shed light upon the matter, shall be consulted; and the boundary line between the two Republics shall be that which the Mixed Commission shall equitably determine as a result of such study.

6. The same Mixed Commission, if it deems appropriate, may grant compensation and even fix indemnities in order to establish, in so far as possible, a well-defined, natural boundary line.

7. In studying the plans, maps and other similar documents which the two Governments may submit, the Mixed Commission shall prefer those which it deems more rational and just. . . .[3]

The Treaty provided that those sectors of the boundary not agreed by the Mixed Commission should be submitted to Arbitration.[4] The sector from the Portillo de Teotecacinte to the Atlantic was finally submitted to the arbitration of the King of Spain in 1904. In particular, the two Governments could not agree about the point on the Atlantic coast which should constitute the boundary between the two countries. Nicaragua claimed that Nicaraguan territory extended to Cape Camarón; Honduras claimed territory to Sandy Bay.

The award in effect made a compromise between these two claims, fixing the point of the boundary on the Atlantic coast at Cape Gracias á Dios.[5] The award gives a number of reasons for selecting this point. First, it notes that Rule 3 quoted above provides that

[1] 1906. Award in *R.I.A.A.*, vol. 11, p. 101. See also *I.C.J. Reports*, 1960, p. 192.
[2] Gámez-Bonilla Treaty, Art. I, *R.I.A.A.*, vol. 11, p. 107.
[3] Art. II.
[4] Arts. III et seq.
[5] *R.I.A.A.*, vol. 11, p. 117.

. . . it is to be understood that each of the Republics of Honduras and Nicaragua possesses such territory as on the date of their independence formed respectively the provinces of Honduras and Nicaragua belonging to Spain.[1]

The award then goes on to note evidence tending to show that this point had been selected as a boundary point, or was at any rate within the jurisdiction of Honduras at the date of its independence. Furthermore, the award states that there was no evidence that

. . . the expanding influence of Nicaragua has extended to the north of Cape Gracias á Dios, and therefore not reached Cape Camarón; and that in no map, geographical description or other document of those examined by said Commission is there any mention that Nicaragua had extended to said Cape Camarón, and there is no reason, therefore, to select said Cape as a frontier boundary with Honduras on the Atlantic coast as is claimed by Nicaragua.[2]

There was, however, evidence of Honduran influence beyond Cape Gracias á Dios, but the award disregarded this for the following reasons:

. . . though at some time it may have been believed that the jurisdiction of Honduras reached to the south of Cape Gracias á Dios, the Commission of investigation finds that said expansion of territory was never clearly defined, and in any case was only ephemeral below the township and port of Cape Gracias á Dios, whilst on the other hand the influence of Nicaragua has been extended and exercised in a real and permanent manner towards the aforementioned Cape Gracias á Dios, and therefore it is not equitable that the common boundary on the Atlantic coast should be Sandy Bay as claimed by Honduras.[3]

The award then went on to list further reasons for the selection of Cape Gracias á Dios. Thus, the selection of Sandy Bay or Cape Camarón would require 'artificial divisionary lines . . . (not) well-defined natural boundaries as recommended by the Gámez–Bonilla Treaty . . .'.[4] The majority of the pre- and post-independence maps showed the frontier as either at Cape Gracias á Dios or to the south of it; only five post-independence maps (three Nicaraguan and two foreign) placed the boundary north of that Cape. Geographical authorities had placed the boundary as near, at or to the south of this Cape.[5] Furthermore, Cape Gracias á Dios had been recognized as the boundary in several Nicaraguan diplomatic documents. The award consequently summarized the points in favour of the Cape:

. . . the point which best answers the purpose by reason of historical right, of equity and of a geographical nature, to serve as a common boundary on the Atlantic Coast . . . is Cape Gracias á Dios, and further, as this Cape fixes what has practically been the limit or expansion of encroachment of Nicaragua towards the north and of Honduras towards the south . . .[6]

It was, however, then necessary to determine a boundary line from Cape Gracias á Dios to the Portillo de Teotecacinte. The award noted that there

[1] Ibid., p. 112. [2] Ibid., p. 114. [3] Ibid.
[4] Ibid. [5] Ibid., p. 115. [6] Ibid.

was no suitable range of neighbouring mountains to serve as the boundary; and thereupon selected the near-by river Coco, Segovia or Wanks:

> The course of the said river, at least a good portion of it, owing to the direction in which it flows and to the conditions of its bed, offers the most precise and natural boundary which could be desired.[1]

Furthermore, this river had appeared as the frontier on many maps, public documents and geographical descriptions as the frontier, and there was evidence that this had been recognized as the frontier by both Honduras and Nicaragua and other States. Consequently, the bay and town of Gracias á Dios were in fact awarded to Nicaragua.

The award further determined that the boundary should leave the Coco at the confluence of the River Poteca—which had also been regarded as part of the boundary by 'several authorities'. Thence the boundary should follow the Poteca until it joined the River Guineo or Namasli, to arrive at the Portilla de Teotecacinte, leaving, however, the site of Teotecacinte within the jurisdiction of Nicaragua—following a demarcation of 1720.[2]

The Arbitrator supported the deviations of the boundary from 'territory held under undisputed sway', admitting that the boundary favoured Nicaragua at Cape Gracias á Dios, and Honduras was favoured in the northern valley of the Segovia, by reference to Rule 6 (quoted above) which permitted compensations and indemnifications 'to bring about if possible, well-defined natural boundaries'.[3]

Nicaragua contested the validity of the award on a number of grounds, including the allegation that the arbitrator had exceeded his powers by applying certain of the rules (in particular Rule 6) laid down for the mixed boundary commission to apply and in failing to apply others (in particular Rules 3 and 4). By an agreement of 1957 the dispute was referred to the International Court of Justice, which decided that the award was valid.[4]

The reasoning of the Court's decision, on the *excès de pouvoir* question as on the others, is based mainly on initial acceptance by Nicaragua of the award.[5] The Court did, however, consider the grounds of nullity alleged by Nicaragua, and rejected them. Regarding the alleged failure to apply Rules 3 and 4 by fixing a 'natural boundary line' rather than one in accordance with the *uti possidetis* line, it said:

> This complaint is without foundation inasmuch as the decision of the arbitrator is based on historical and legal considerations (*derecho historico*) in accordance with paragraphs 3 and 4 of Article II.[6]

Regarding the allegation that the arbitrator was not authorized to make compensations according to Rule 6 to establish a clearly defined natural

[1] *R.I.A.A.*, vol. 9, p. 115. [2] Ibid., p. 116. [3] Ibid.
[4] *I.C.J. Reports*, 1960, p. 217. [5] Ibid., pp. 213–14. [6] Ibid., p. 215.

boundary since that discretion was vested solely in the Mixed Commission, the Court said:

> The Court is unable to share this view. An examination of the Treaty shows that the rules laid down in Article II were intended not only for the guidance of the Mixed Commission to which they expressly referred but were also intended to furnish guidance for the arbitration. No convincing reason has been adduced by Nicaragua in support of the view that, while the remaining paragraphs of Article II were applicable to the arbitrator, paragraph 6 was excluded and that, if it was not excluded, the arbitrator, in applying it, exceeded his powers. In the view of the Court, the arbitrator was under obligation to take into account the whole of Article II, including paragraph 6, to assist him in arriving at his conclusions with regard to the delimitation of the frontier between the two States and, in applying the rules in that paragraph, he did not go beyond its legitimate scope.[1]

The Court thus hardly considered the problem of the powers of the arbitrator, and, in particular, his power to apply concepts of equity.

The dissenting opinion of Judge Urrutia Holguín[2] (the Nicaraguan Judge *ad hoc*) provides a more interesting and elaborate discussion of the problem. Primarily he emphasized that:

> The countries of Latin America whose constitutions had fixed their boundaries on the basis of the *uti possidetis juris* existing at the time when they became independent envisaged only strictly legal decisions when they undertook to submit the delimitation of their boundaries to arbitration.
>
> This rule which the parties laid down for recourse to arbitration was not merely academic but a condition precedent *sine qua non* which had its origin in the actual constitutions of the States.
>
> . . .
>
> The countries which asked the King of Spain to interpret the *uti possidetis juris* in accordance with the titles of Spanish sovereignty thus did so because they thought that he was the best qualified authority to interpret his own legal rules, but they certainly did not think of entrusting to 'his equity' the interpretation of constitutional clauses which had in fact been approved for the very purpose of throwing off the Spanish yoke.[3]

With regard to the rules laid down in Article II of the Gámez–Bonilla Treaty and the rules actually applied by the arbitrator, Judge Urrutia Holguín dissented from the majority view. In his view, a consequence of the primary emphasis accorded to the *uti possidetis juris* was that all the rules laid down in that Article had not the same importance.

> The rules which constituted a condition precedent governing the whole arbitration were those of paragraphs 3 and 4 on the fixing of the boundaries in accordance with the legal titles existing at the date of independence.[4]

[1] Ibid.

[2] Ibid., pp. 221 et seq.

[3] *I.C.J. Reports*, 1960, p. 226–7. Cf., however, the *Guatemala–Honduras* award, discussed below, p. 50. Judge Holguín cited this as an example of the infrequent reference to 'equity' as a basis of decision even where specific authority was conferred by the *compromis* (ibid., p. 233) But see the discussion of this award below.

[4] Ibid., p. 229.

Even if the King had the authority to make compensation, in Judge Holguín's view he had exceeded that authority in the actual terms of the award:

> . . . to compensate does not mean to conciliate . . . Compensation can only be granted in respect of territories that are equivalent. There is no kind of equivalence or compensation as between the few hectares of the village of Gracias á Dios and the whole northern basin of the Segovia River, and the King made use of the power conferred by paragraph 6 not to grant compensation but to settle the dispute as mediator or arbitrator of conscience.[1]

Furthermore, Judge Holguín considered that the Nicaraguan contention that the award was insufficiently reasoned was well founded, since the reasoning of the award referred insufficiently to legal considerations: '. . . if the King had not found sufficient reasons to make a decision on the basis of law, he should have declined to promulgate his Award . . .'.[2] That is, a *non liquet* would have been the appropriate solution.

Although this case directly raised the issue of the authority of an arbitrator to render a decision on the basis of a variety of considerations not always regarded as strictly 'legal', it gives no satisfactory answer. The issue could be, and was, avoided because broad powers were in fact conferred in the treaty of arbitration—though not explicitly on the arbitrator. Furthermore, inaction on the part of Nicaragua could be, and was, pointed to.

Consequently, the judgment of the Court is of more interest for its application of the concept of acquiescence to estop a party from challenging even what might have been an originally invalid award. Although the application of this concept may well have been justified on the facts of the case (Judge Holguín, at pp. 235 et seq., noted a degree of ambivalence in the attitude of both parties), it is a far from satisfactory doctrine for general application. In the judgment of the Court it is not clear what the legal effect of this acquiescence is supposed to be. In the quotation given above alternative considerations are mentioned: first, that a party is bound by an explicit recognition of the validity of an award, and cannot thereafter challenge its validity; second, that if a party fails to challenge an award for some indefinite period of time after knowing its full terms, it is estopped from future challenge. Both approaches require further elaboration, since they raise practical and theoretical difficulties. In the former case, where there is some explicit positive act of recognition, the theoretical basis for the validity of the 'award' is clear: although the award is a nullity there is a subsequent express agreement between the parties to define a frontier, say, in the same terms.[3] One practical difficulty is, however, that it may subse-

[1] *I.C.J. Reports*, 1960, p. 233. [2] Ibid., p. 235.

[3] See Judge Holguín (ibid., p. 222): 'In civil law there are acts which are null and void which cannot be given life even by subsequent acceptance by the parties. In international law, however,

quently appear that the award contains gaps, or other defects—is partially or totally vitiated by mistake, say (cf. the Argentine–Chile award). In this case presumably it is the subsequent agreement to carry out the terms of the award which is wholly or partially invalid, on the ground, perhaps, of 'error'. Clearly, however, recognition does not always have such definitive effects that it cannot be gone back on. On the other hand, although inaction may result in an estoppel, it is not easy to see how it can in any sense validate the award: inaction by one party could not render an invalid award binding on the other party. The result should surely be that the award, if invalid, remains so, and is, as such, unenforceable; if one party wishes to put it into effect and is in a position to do so, and demarcates the boundary, say, according to the terms of the award, the other party may be estopped by a period of inaction from challenging the *demarcation*, rather than the award itself. The *rationale* of this 'estoppel' would then be that 'stability of boundaries' emphasized in the *Temple* case.[1]

Island of Palmas case (*Netherlands* v. *U.S.A.*)[2]

This dispute related to sovereignty over the Island of Palmas (as it was called by the Netherlands), situated between the Philippines and the Netherlands East Indies. Sovereignty was claimed by both the Netherlands and the United States of America. The dispute was referred to the Permanent Court of Arbitration, and the two parties requested Max Huber (Switzerland) to act as sole arbitrator. The agreement for arbitration provided that:

> The sole duty of the Arbitrator shall be to determine whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory.[3]

The immediate foundation of the United States' claim was a Treaty of Peace of 1898 by which Spain had ceded the Philippines, including the Island of Palmas, to the United States. It was admitted, however, that this treaty could not be interpreted as transferring rights over territory to which Spain had no title. The validity of the United States' claim therefore

States are sovereign and are bound by no limitation upon their acceptance of or agreement to anything whatsoever.

'States may agree . . . to the carrying out of the provisions of a null and void award, but in that case the cause and the legal basis of the provisions of the award are not to be found in the award which is a nullity, but in the valid agreement between two sovereign States.

'If there are in the award itself any essential defects of which the parties cannot know before they receive the text of the award, it is possible to regard as acquiescence only some formal declaration by the competent organ of the State making clear that it expressly renounces the right to dispute the validity of the award.'

[1] See below, p. 96, for a discussion of certain difficulties surrounding the application of the concepts of acquiescence and estoppel in international law.

[2] 1928. Award in *R.I.A.A.*, vol. 2, p. 829.

[3] Art. I, ibid., pp. 831–2.

depended on whether Spain had an effective title to the island at that date. It was contended Spain had such a title, founded on both discovery and, by virtue of the principle of contiguity, on the geographical unity of the island with the Philippine group as a whole.

The claim of the Netherlands was founded on the exercise of rights of sovereignty through the medium of the East India Company, at least from 1677 to the date at which the dispute arose. This sovereignty was said to arise out of agreements with native princes, establishing Netherlands suzerainty over the territories of those princes.

The general remarks made in the award on territorial sovereignty are well known. It is sufficient to note the stress which Max Huber laid on the importance of a 'continuous and peaceful display of the functions of State within a given region' as 'a constituent element of territorial sovereignty', and decisive in cases of disputed title.[1] The island was awarded to the Netherlands on this ground.[2] It will be recalled that the acts of sovereignty relied on were scanty; the award notes that:

> The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the 18th and early 19th centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestation of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.
>
> It is not necessary that the display of sovereignty should be established as having begun at a precise epoch; it suffices that it had existed at the critical period preceding the year 1898. It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control. This is particularly the case, if sovereignty is acquired by the establishment of the suzerainty of a colonial Power over a native State, and in regard to outlying possessions of such a vassal State.[3]

The award goes on to state that, even were it admitted that the evidence was insufficient to establish 'continuous and peaceful display of sovereignty' over the island, still the arbitrator had authority under the *compromis* to award the island to the Netherlands in a decision 'founded on the relative strength of the titles invoked by each Party':[4]

> A solution on this ground would be necessary under the Special Agreement. The terms adopted by the Parties in order to determine the point to be decided by the Arbitrator (Article 1) presuppose for the present case that the Island of Palmas (or

[1] *R.I.A.A.*, vol. 2, p. 840.
[2] Ibid., pp. 866–9.
[3] Ibid., p. 867.
[4] Ibid., p. 869.

Miangas) can belong only either to the United States or to the Netherlands, and must form in its entirety a part of the territory either of the one or of the other of these two Powers, parties to the dispute. For since, according to the terms of its Preamble, the Agreement . . . has for object to 'terminate' the dispute, it is the evident will of the Parties that the arbitral award shall not conclude by a 'non liquet', but shall in any event decide that the island forms a part of the territory of one or the other of two litigant Powers.

The possibility for the Arbitrator to found his decision on the relative strength of the titles invoked on either side must have been envisaged by the parties to the Special Agreement, because it was to be foreseen that the evidence produced as regards sovereignty over a territory in the circumstances of the island in dispute might prove not to be sufficient to lead to a clear conclusion as to the existence of sovereignty.[1]

In this case, the island would still be awarded to the Netherlands, since that State had at least performed some acts of sovereignty, such as putting up flags and coats of arms on the island:

These facts at least constitute a beginning of establishment of sovereignty by continuous and peaceful display of State authority, or a commencement of occupation of an island not yet forming a part of the territory of a State; and such a state of things would create in favour of the Netherlands an inchoate title for completing the conditions of sovereignty. Such inchoate title, based on display of State authority, would, in the opinion of the Arbitrator, prevail over an inchoate title derived from discovery, especially if this latter title has been left for a very long time without completion by occupation; and it would equally prevail over any claim which, in equity, might be deduced from the notion of contiguity. International law, like law in general, has the object of assuring the coexistence of different interests which are worthy of legal protection. If, as in the present instance, only one of the conflicting interests is to prevail, because sovereignty can be attributed to but one of the Parties, the interest which involves the maintenance of a state of things having offered at the critical time to the inhabitants of the disputed territory and to other States a certain guarantee for the respect of their rights ought, in doubt, to prevail over an interest which—supposing it to be recognized in international law—has not yet received any concrete form of development.[2]

It will be recalled that a further basis for the claim of the United States was the concept of contiguity, represented by the geographical unity of the Philippines. The Arbitrator gave a number of reasons for rejecting this argument. First, he considered that contiguity alone was not a root of title sufficiently established in international law. It was, however, a consideration of equity. Second, the principle was not easily applicable to the island in question, which was both isolated and formed part of an extensive archipelago comprising both the Philippines and the Netherlands East Indies, 'in which strict delimitations between the different parts are not naturally obvious'. Third, the island was permanently inhabited and therefore acts of actual administration were of much weightier importance.[3]

[1] Ibid. This is criticized by Friedmann, loc. cit. (above, p. 13 n. 3), pp. 33–7.
[2] *R.I.A.A.*, vol. 2, p. 870. [3] Ibid., pp. 854–5, 870.

For present purposes the following are the most noteworthy features of this award:

(1) The importance attached to the 'continuous and peaceful display of the functions of a State within a given region' as 'a constituent element of territorial sovereignty', in contrast to the technical concepts of 'prescription' and 'occupation' which were not referred to.

(2) The doubts expressed by the Arbitrator as to whether even that requirement, modified still further in application to 'a small and distant island, inhabited only by natives', had been fulfilled.

(3) The view expressed by him that, even if the elastic criterion which he had formulated had not been met, he had authority under the *compromis* —and indeed was required by it—to award the island to one or the other party on the basis of 'the relative strength of the titles invoked on either side'.

An award on the basis of 'the relative strength of the titles invoked' in effect means a decision based on the relative interests of the parties in the territory—the sort of process seen in boundary awards. A similar approach, formulated in slightly different terms, was made by Judge Lagergren in the *Rann of Kutch* arbitration. Referring to Huber's award, he said:

> Territorial sovereignty implies . . . certain exclusive rights which have as their corollary certain duties. In adjudging conflicting claims by rival sovereigns to a territory, all available evidence relating to the exercise of such rights, and to the discharge of such duties, must be carefully evaluated with a view to establishing in whom the conglomerate of sovereign functions has exclusively or predominantly vested.[1]

Honduras Borders case (*Guatemala* v. *Honduras*)[2]

This dispute between Honduras and Guatemala related to the course of the boundary between them. It was referred to a Special Tribunal[3] by agreement between the parties. The Tribunal was composed of two members chosen by the Governments of Guatemala and Honduras respectively from the list of jurisconsults composing the International Central American Tribunal. The two Governments jointly named as third arbitrator and President of the Tribunal the Chief Justice of the United States of America, Charles Evans Hughes.[4]

[1] See below, p. 70.

[2] 1933. *R.I.A.A.*, vol. 2, p. 1307. See *American Journal of International Law*, 27 (1933), p. 403 for discussion of the award and map.

[3] The tribunal was 'organised in the manner prescribed in the Convention setting up an International Central American Tribunal' (Art. I). The parties disagreed as to whether the International Central American Tribunal had jurisdiction over this dispute: this was the preliminary question which the tribunal was required to decide. The tribunal answered this question in the negative (*R.I.A.A.*, vol. 2, p. 1321). Art. I of the Special Agreement further provided that, in that case, '. . . the same tribunal shall, acting as a special delimitation court, adjudicate the frontier dispute between the High Contracting Parties'. It was in this capacity of 'special delimitation court' that the tribunal made its award, therefore.

[4] Art. II.

The Special Agreement recorded that the parties were agreed that 'the only line that can be established *de jure* between their respective countries is that of the *Uti Possidetis* of 1821'. The Tribunal was therefore required to determine that line. It was, furthermore, required to modify that line to take account of interests acquired beyond that line since 1821 by either party, and to fix equitable compensation—territorial or otherwise—for such modifications.[1]

This award illustrates the practical difficulties of applying the principle of *uti possidetis*. The Parties disagreed on whether the Tribunal was required to establish the boundary on the basis of *uti possidetis juris* or *de facto*.[2] The Tribunal determined that the test was 'one of the administrative control held prior to independence pursuant to the will of the Spanish Crown.[3] This was in effect a compromise between the two possible interpretations: for the Tribunal indicated that the evidence which might be relied on to establish the boundary included not only explicit manifestations of that will—in the form of rescripts, laws and decrees, etc.—but also acquiescence in the face of assertions of administrative authority by the provinces.[4] Furthermore, the Tribunal emphasized the significance of the declarations and acts of the parties on attaining independence; this constituted:

> . . . a virtually contemporaneous and solemn declaration of the extent of administrative authority deemed to have been enjoyed by the preceding colonial entity. The Constitutions of the new States, and the governmental acts of each, especially when unopposed, or when initial opposition was not continued, are of special importance.[5]

But the Tribunal, having permitted itself this wide concept of the *uti possidetis* criterion, found it impossible to establish the line of *uti possidetis* in considerable portions of the boundary in dispute. It noted the difficulties in general terms:

> It must be noted that particular difficulties are encountered in drawing the line of '*uti possidetis* of 1821', by reason of the lack of trustworthy information during colonial times with respect to a large part of the territory in dispute. Much of this territory was unexplored. Other parts which had occasionally been visited were but vaguely known. In consequence, not only had boundaries of jurisdiction not been fixed with precision by the Crown, but there were great areas in which there had been no effort to assert any semblance of administrative authority.[6]

[1] Art. V. The High Contracting Parties are agreed that the only line that can be established *de jure* between their respective countries is that of the *Uti Possidetis* of 1821. Consequently, it is for the Tribunal to determine this line. If the Tribunal finds that either Party has during its subsequent development acquired beyond this line interests which must be taken into consideration in establishing the final frontier, it shall modify as it may consider suitable the line of the *Uti Possidetis* of 1821 and shall fix such territorial or other compensation as it may deem equitable for one Party to pay to the other.

[2] *R.I.A.A.*, vol. 2, p. 1322. [3] Ibid., p. 1324. [4] Ibid., pp. 1324–5.

[5] Ibid., p. 1325. [6] Ibid.

In particular disputed areas there might be other reasons why the criterion of *uti possidetis* could not be applied: at the date of independence the town of Omoa had been withdrawn from the control of the Provincial Government of Honduras, and placed under the separate control of the Captaincy-General of Guatemala. Thus it was not under the administrative control of either party at that date.[1] What administrative authority exercised control over the contiguous area of Cuyamel was also obscure.[2] In consequence, if the Tribunal was to determine the entire course of the disputed boundary, it was forced to apply criteria other than that of *uti possidetis* of 1821, and also to find authority for so doing.

The Tribunal found authority to determine the entire course of the boundary to be implied in the terms of the Special Agreement. The purpose of that Agreement was 'the establishment of a definitive boundary between Guatemala and Honduras'.[3] The Tribunal therefore concluded that:

> In the light of the declared purpose of the Treaty, the Tribunal is not at liberty to conclude that the lack of adequate evidence to establish the line of *uti possidetis* of 1821, throughout the entire territory in dispute, relieves the Tribunal of the duty to determine the definitive boundary to its full extent. The Tribunal, by the provisions of the Treaty as to the line of *uti possidetis* of 1821, is not required to perform the impossible, and manifestly is bound to establish that line only to the extent that the evidence permits it to be established. And as the Tribunal is expressly authorized in the interests of justice, as disclosed by subsequent developments, to depart from the line of *uti possidetis* of 1821, even where that line is found to exist, the Treaty must be construed as empowering the Tribunal to determine the definitive boundary as justice may require throughout the entire area in controversy, to the end that the question of territorial boundaries may be finally and amicably settled.[4]

The Tribunal further found the criteria that it should apply to be implied in the terms of the *compromis*. It will be recalled that the Tribunal was expressly authorized to *modify* the *uti possidetis* line to take account of 'interests' acquired by either party beyond that line 'during its subsequent development'.[5] Consequently, the Tribunal inferred a parallel implied authority to take account of interests derived from actual possession, settlement and exploitation to fill in gaps in the *uti possidetis* line.[6] It did not, however, consider that it had authority to give primary importance to geographical, or *potential* military or economic considerations. The Tribunal formulated its approach in the following terms:

> The criteria to be applied by the Tribunal in the exercise of this authority are plainly indicated. It is not the function of the Tribunal to fix territorial limits in its view of what might be an appropriate division of the territory merely with reference to geographical features or potential advantages of a military or economic character, apart from the historical facts of development. The Treaty cannot be construed as authorising

[1] *R.I.A.A.*, vol. 2, pp. 1335–6. [2] Ibid., pp. 1336–7. [3] Ibid., p. 1351.
[4] Ibid., p. 1352. [5] Art. V. [6] *R.I.A.A.*, vol. 2, p. 1352.

the Tribunal to establish a definitive boundary according to an idealistic conception, without regard to the settlement of the territory and existing equities created by the enterprise of the respective Parties. So far as may be found to be consistent with these equities, the geographical features of the territory indicating natural boundaries may be considered.

In fixing the boundary, the Tribunal must have regard (1) to the facts of actual possession; (2) to the question whether possession by one Party has been acquired in good faith, and without invading the right of the other Party; and (3) to the relation of territory actually occupied to that which is as yet unoccupied. In the light of the facts as thus ascertained, questions of compensation may be determined.[1]

The award deals with the definitive boundary in five sections, applying the general criteria listed above to the particular circumstances of the sections. In the first section—from the Salvadorean boundary to Cerro Oscuro—the award applied the line of actual possession; where, in the southern part of the section, the line of actual possession was not found to be clearly defined, and there were a number of conflicting land grants, the award applied a natural boundary, the Frio river. This incidentally placed within Guatemalan territory two Guatemalan settlements to the north of that river.[2] In the second section—from Cerro Oscuro to Angostura on the Managua river—the award followed the line of present possession 'with a few local changes which are necessary . . . in order to provide a practicable dividing line'. This line did not correspond to the *uti possidetis* of 1821, but the Tribunal found no means of measuring the respective equities of the parties, or of determining the balance of advantage resulting from the encroachments, or of rectifying the line to secure a more equitable boundary.[3] In the third section—the territory lying north-east of Angostura and east of the Managua river, and south and east of the Motagua river, and extending to the Merendon range—no line of *uti possidetis* in 1821 had been determined. The mountain range of the Merendon although clearly a natural boundary was excluded as part of the boundary, for its selection would have conflicted with the line of the boundary in areas not in dispute and also with the line of actual possession. Therefore, the Tribunal applied the criterion of 'the actual occupation established by the Parties in good faith'.[4] In case of conflict 'Priority in settlement in good faith would appropriately establish priority of right'.[5] In the fourth section—Omoa and the Cuyamel area—the line of *uti possidetis* in 1821 could not be applied, for Omoa was not then in the possession of either province. Honduras had been in possession of Omoa since 1832, and the town had originally belonged to the province of Honduras. It was therefore awarded to Honduras. The area

[1] Ibid. The Tribunal was empowered to utilize the services of experts, Art. XIII, and it therefore had an aerial survey of parts of the area made.

[2] Ibid., pp. 1353–5.

[3] Ibid., pp. 1355–7.

[4] Ibid., p. 1358.

[5] Ibid., p. 1359.

held by Honduras in the Cuyamel district was similarly awarded to Honduras.[1] In the fifth section—from Cerro Escarpado to the Tinto river flowing out of the Laguna Tinta—there was some conflicting activity of the parties. The award applied the principle of priority of activity.[2]

The important features of the award for present purposes may be summarized as follows:

(1) The Tribunal was expressly authorized only to determine the *uti possidetis* of 1821 in the disputed area, and to modify that line to take account of after-acquired interests. The Tribunal further considered that it was impliedly authorized to determine the entire course of the boundary, whether the *uti possidetis* could be established wholly or not. It considered, however, that the criteria on which it might base its determination were limited to those referred to in the agreement for arbitration, in particular 'the historical facts of development' rather than merely potential interests.

(2) Although the Tribunal was expressly directed to apply the rule of *uti possidetis* as of 1821, it found great difficulty in doing so. It was faced first with the problem of interpreting the rule—whether one of *uti possidetis juris* or *de facto*. This it resolved by a compromise interpretation, referring to the legal position as modified by custom and acquiescence and evidenced by the acts and declarations of the parties after attaining independence. Despite this liberal interpretation which permitted reference to evidence of administration both before and since 1821, the Tribunal was unable to establish the line in considerable sectors of the boundary. It filled the gaps on the basis of a number of criteria. First and foremost was that of actual present possession. This criterion of 'possession' was, it should be emphasized, not the traditional international law concept of 'prescription' or 'occupation'. It was not limited to State activity unambiguously '*à titre de souverain*', nor defined by any requirements of length of time or continuity of acts. It simply referred to an amalgam of State interests derived from both private and public activity both of central and local government organs and of nationals settling or exploiting a disputed area. In one area there was a conflict between State and private interests: a land grant had been made by one party to a national of the other. The territory in this case was awarded to the grantor State. In applying the criterion of possession, conflicts were resolved by adopting the criterion that priority in settlement gave priority of right. Where this could not be determined, the criterion of the 'natural' boundary (usually rivers) was applied. Where necessary, the boundary resulting from the line of actual possession was modified to give a 'practicable dividing line'. One sector, Omoa and Cuyamel, seems to have been awarded to Honduras on the criteria of both present possession and historical links.

[1] *R.I.A.A.*, vol. 2, pp. 1360–2. [2] Ibid., p. 1362–4.

III. The Attribution of Sovereignty over Sea Areas by Judicial and Arbitral Tribunals

The only awards of this century dealing significantly with the attribution of sovereignty over sea areas are the *Grisbadarna*, *North Atlantic Coast Fisheries*, *Gulf of Fonseca* and *Anglo-Norwegian Fisheries* cases. The first concerns the course of the maritime boundary between two neighbouring, and adjacent, States; the other three concern the boundaries between coastal States and a *res communis*—the high seas. The *North Atlantic Coast Fisheries* and *Gulf of Fonseca* awards discuss, *inter alia*, the criteria for the enclosure of bays within national waters. These criteria are of particular interest, because they were referred to in the Norwegian arguments in the *Anglo-Norwegian Fisheries* case. It may be assumed that they were reflected in that part of the Court's judgment where reference was made to the general criteria governing the enclosure of sea areas within national territory.

Certain significant characteristics of maritime, as contrasted with land, territory should be noted. Geographical and economic criteria for the attribution of sovereignty assume particular importance: this may be observed in the relationship between the geographical and legal concepts of a 'bay', and in the peculiar geographical situation where land and sea areas intermingle—as in archipelagos and coastal indentations and fringes —exemplified in the *Anglo-Norwegian Fisheries* case. Moreover, maritime areas are, in general, neither inhabited nor habitable, and thus are not—within the traditional terminology of territorial acquisition—subject to 'effective occupation'. They may, however, be exploited for their natural resources or for purposes of transit, etc., and such exploitation may clearly be linked with neighbouring land areas. Conversely, distant sea areas may be utilized and even intensively exploited by nationals of States with no geographical links with the area. Similarly, although adjacent sea areas may be important for the defence of land territory, they may also be used by, and of importance to, geographically unconnected States. Consequently, the delimitation of sea areas always has 'an international aspect'. It always involves the establishment of a boundary and the weighing and assignment of priorities to the interests of both coastal States and other users of the areas in question. Primarily these interests will be economic, commercial and military.

Where the boundary between only two States is in issue, the weighing of interests will be similar in character to that required in determining land boundaries. The determination of the boundary in the *Grisbadarna* case shows no particularly unusual features. But it may be suggested that the determination of the outer maritime boundaries of a State raises radically

different problems. Between two States, just shares in a limited resource can be reasonably objectively determined: the concept 'equality is equity' may be resorted to initially, and subsequently modified to take account of specific, clear interests. No such simple starting-point of what is 'fair' or 'equitable' is available in the case of conflicting claims to territory by an individual State and States in general. It is necessary to begin with a presumption in favour of one or the other which can only be determined by broader policy considerations. The problem is perhaps less difficult where, as in the *Anglo-Norwegian Fisheries* case, the dispute is still substantially between the conflicting interests of the two States.

Maritime Frontier case (*Norway* v. *Sweden*)[1]

This dispute between Norway and Sweden related to the sea boundary between the two countries. It was referred to arbitration by agreement between the two parties.[2] The Arbitral Tribunal consisted of a Norwegian and a Swede, with a Dutch President.[3]

The *compromis* directed the Court first to apply a Boundary Treaty of 1661—and the map annexed to it—and secondly, to have regard to circumstances of fact and the principles of international law in fixing any part of the boundary which the court did not find had been determined by the Treaty of 1661.[4]

The map illustrating the award shows the boundary determined by the Court to be a compromise between the Norwegian and Swedish claims. It favours Sweden, for it assigns the Grisbadarna to Sweden; but it assigns the Skjöttegrunde to Norway.

The reasoning of the award is complicated and ingenious. First, it asserts that under the *compromis* '. . . the Court retains complete freedom to determine upon the boundary within the limits of the respective pretensions'.[5] Second, the parties were in agreement on the line of the boundary up to a point XIX. Up to this point they applied the principle of a median line drawn between all islands, etc., which were not always submerged.[6] The parties considered that the Treaty of 1661 had applied that principle in so far as it had defined the boundary. From point XIX to XX, the claims of the parties diverged slightly; this difference depended on whether, to deter-

[1] Award (1909) in Wilson, *The Hague Arbitration Cases*, p. 102; Scott, *The Hague Court Reports*, p. 121.

[2] Ibid.

[3] Art. I.

[4] Art. III: 'The court of arbitration shall decide whether the boundary line should be considered, either wholly or in part, as fixed in the boundary treaty of 1661 with the map thereto annexed, and in what manner the line thus established, should be drawn, as also in so far as the boundary line shall not be considered as fixed by that treaty and map, the court shall fix the boundary line, having regard to the circumstances of fact and the principles of international law.'

[5] Wilson, op. cit. (above, n. 1), p. 119; Scott, op. cit. (above, n. 1), p. 126.

[6] Ibid.

mine that point, one determined the mid-point of a line drawn from the Heiefluer or the Hejeknub reefs on the Norwegian side, to Stora Drammen on the Swedish side.[1] The Court determined this question in favour of Sweden, on the basis that if the parties were applying a median line principle because they considered that it had been applied by the Treaty of 1661, then this

> . . . ought to have as a logical consequence that, in applying it in our times, one should take account at the same time of the circumstances in fact existing at the time of the Treaty.[2]

Therefore, in the opinion of the Court, because it was uncertain whether the Heiefluer reefs had emerged from the water in 1661, the line ought to be drawn from the Hejeknub.[3] This seems a somewhat curious decision; for it was agreed that the Treaty of 1661 did not itself cover the boundary as far as point XX, but only as far as an indeterminate point A situated somewhere between points XIX and XX.[4]

Thirdly, the claims of the two parties diverged considerably from point XX onwards. Each party claimed the Grisbadarna and the Skjöttegrunde. Both parties agreed that the boundary in this sector had not been determined by the Treaty of 1661.[5] Therefore, according to the *compromis*, it fell to be determined by the Tribunal 'having regard to the circumstances of fact and the principles of international law'. It was agreed that in this sector the maritime boundary had been partitioned automatically between the parties as a result of the Peace of Roskilde in 1658.[6] The Court agreed with this opinion, giving the reason that:

> [It] is in conformity with the fundamental principles of the law of nations, both ancient and modern, according to which maritime territory is a necessary appurtenance of the land territory, from which it follows that at the moment that in 1658, the land territory called Bohuslän was ceded to Sweden, the area of maritime territory forming the inseparable appurtenance of the land territory should automatically make a part of that cession. . . .[7]

In consequence, the Court considered that the principle of the intertemporal law must be applied.[8] The Court therefore rejected the Norwegian claim founded on the application of the median line principle, for the following reasons, *inter alia*. First, that the fact (which the Court doubted) that this principle had been followed in the Treaty of 1661 did not require its application in an area not explicitly covered by that Treaty;[9] and, second,

[1] Wilson, ibid., p. 121; Scott, ibid., pp. 126–7.
[2] Wilson, ibid.; Scott, ibid.
[3] Ibid.: 'Whereas, as the Heiefluer are reefs of which, with a sufficient degree of certainty, one cannot assume, at the time of the delimitation of 1661, that they had emerged from the water, . . . As, consequently, at that epoch they could not have served as a point of departure for a delimitation of frontier; . . . the Hejeknub ought to be preferred to Heiefluer . . .'.
[4] Wilson, op. cit. (above, p. 56 n. 1), p. 119; Scott, op. cit. (above, p. 56 n. 1), p. 126.
[5] Wilson, ibid., p. 121; Scott, ibid., p. 127.
[6] Ibid.
[7] Ibid.
[8] Wilson, ibid., p. 123; Scott, ibid., p. 127.
[9] Ibid.

that neither the principle of the median line, nor that of the *thalweg*, or the most important channel, had gained sufficient acceptance in the seventeenth century to be applied automatically.[1] The Court preferred to apply a principle of drawing a boundary perpendicular to the general direction of the coast:

> . . . it is . . . much more in accord with the ideas of the 17th century and with the notions of law prevalent at that epoch to admit that the automatic division of the territory in question ought to have been made according to the general direction of the land territory of which the maritime area forms an appurtenance, and consequently to apply, in order to reach a lawful and just determination of the boundary, the same principle in our day;
>
> . . . consequently, the line of automatic partition of 1658 ought to be determined, or . . . the partition of to-day ought to be made by drawing a line perpendicular to the general direction of the coast . . .'[2]

The Court did not apply this principle without modification however. It noted that it must take 'careful account of the need of indicating the boundary in a clear and unequivocal manner, and of making easy, so far as possible, the respect for the interests of those concerned'.[3] Consequently, after finding that a line perpendicular to the general direction of the coast would run 20° south of west, and that such a line would cut the Grisbadarna banks, and that 'the parties are in accord in recognizing the great inconvenience there would be in drawing the boundary line across the important banks',[4] the Tribunal found that a line 19° south would suit the purpose. The advantages of this line were that it 'would altogether avoid that inconvenience [of cutting the banks] since it would pass just north of the Grisbadarna and to the south of the Skjöttegrunde and . . . would not cross any other important bank'.[5]

The Court also referred to circumstances of fact in support of this decision, the effect of which was to assign the Grisbadarna banks to Sweden and the Skjöttegrunde to Norway. These facts were the following:

> a. The fact that the fishery for lobsters in the shoals of Grisbadarna has been carried on since a time much more remote, in a much more extended measure and by a much greater number of fishermen on the part of the inhabitants of Sweden than on the part of those of Norway,
>
> b. The fact that Sweden has performed in the region of Grisbadarna, particularly in recent times, many acts based on the belief that these regions were Swedish, as, for example, the placing of beacons, the survey of the sea and the locating of a lightship, which acts involved considerable expense and by which she did not think merely to exercise a right but even more still, to perform a duty; while Norway, by her own confession in these several respects has been much less or almost not at all concerned as to these regions. . . .[6]

[1] Wilson, *The Hague Arbitration Cases*, p. 125; Scott, *The Hague Court Reports*, p. 129.
[2] Ibid. [3] Wilson, ibid., p. 127; Scott, ibid., p. 129
[4] Ibid. [5] Ibid. [6] Wilson, ibid., pp. 127–9; Scott, ibid. p. 130

With regard to the facts in paragraph (a), the Court listed, *inter alia*, the following reasons for taking them into account:

(1) That 'in the law of nations, it is a well established principle that it is necessary to refrain as far as possible from modifying the state of things existing in fact and for a long time;'[1]

(2) That 'that principle has a very particular application when private interests are in question, which, once disregarded, cannot be preserved in an effective manner even by any sacrifices of the State, to which those interested belong';[2]

(3) That the most important lobster fishery was on the Grisbadarna banks, and these had been exploited first and most effectively by the Swedes, rather than by the Norwegians, and 'that fishery in general has more importance for the inhabitants of Koster (on the Swedish side) than for those of Hvaler (on the Norwegian side) . . .'.[3]

With regard to the facts in paragraph (b), the Court drew the implication from them that 'Sweden has no doubt of her right to Grisbadarna, as . . . she has not hesitated in incurring the cost resting on an owner or possessor of the banks even to a very considerable sum'.[4]

As to the justice of assigning the Skjöttegrunde to Norway, the Court gave the following reasons:

> . . . a demarcation which confers Skjöttegrunde—the less important part of the disputed territory—upon Norway is sufficiently supported, on one side, by the circumstance of the weighty fact that although one should conclude from different documents and witnesses that the Swedish fishermen . . . have engaged in fishing in the regions in dispute since a more remote time, in a wider measure and in greater number, it is certain on the other hand that the Norwegian fishermen have never been excluded from the fishing;
>
> . . . moreover, it is shown as to Skjöttegrunde, the Norwegian fishermen have almost all the time, and in a manner relatively much more effectively than in Grisbadarna, engaged in the fishery for lobsters.[5]

For present purposes the features of interest in this award may be summarized as follows:

(1) The Tribunal was expressly authorized to apply a treaty; to the extent that the treaty did not determine the boundary, it was authorized to fix the boundary taking account of 'circumstances of fact' and the 'principles of international law'. The Tribunal considered that it was impliedly authorized to fix a line within the limits of the claims of the parties. It also considered that it was impliedly authorized to modify a boundary based on

[1] Wilson, ibid., p. 129; Scott, ibid., p. 130.
[2] Ibid.
[3] Wilson, ibid., p. 129; Scott, ibid., p. 131.
[4] Wilson, ibid., p. 131; Scott, ibid., p. 131.
[5] Wilson, ibid., p. 133; Scott, ibid., p. 132.

the 'principles of international law' to take account of considerations of convenience and the interests of the respective parties and their nationals in the disputed area.

(2) The rules of international law applied explicitly by the Tribunal were those which it considered to have been prevalent in the seventeenth century. It is not clear from the award what justification the Tribunal had for assuming that the customary rule at that time was that the sea boundary should follow 'the general direction of the coast'. Clearly, the margin of discretion in determining the customary rules of an earlier period must be still greater than the latitude in determining the customs of the present day. It is worthy of note that the Court rejected the median line as the customary rule, although both parties agreed that this had been adopted in a treaty between them three years after the automatic delimitation of the boundary in accordance with customary rules. Unavoidably, there must be an element of fiction in such a decision. The line of the 'general direction of the coast' did, however, have certain advantages: it permitted the boundary to follow a course of compromise and divide the disputed territory. The median line claimed by Norway would have enclosed the Grisbadarna fishing banks within Norwegian territorial waters, and thereby deprived Sweden of a rich fishing ground which had been consistently exploited by Swedish fishermen for longer, and to a greater extent, than by Norwegians. Furthermore, the court rejected the *thalweg*, or most important channel, as the line of boundary.

Though the Tribunal expressly relied on rules of international customary law (albeit of the seventeenth century), it modified the application of these rules to take account of considerations of convenience (not cutting the fishing banks) and the interests of the parties. Furthermore, in support of its decision it referred to a variety of 'circumstances of fact'. Foremost amongst these were the private interests of Swedish fishermen in exploiting the Grisbadarna banks; their priority of appropriation and the greater economic value to the fishing communities on the Swedish side of the boundary than to the Norwegians. Another consideration was that Sweden had carried out certain improvements—placing of beacons, surveys, the stationing of a lightship—in the area in the belief that it was part of Swedish territory. Such considerations, especially the former, might well have led to the award of the whole of the disputed fishing banks to Sweden. The Skjöttegrunde were, however, awarded to Norway as 'the less important part of the disputed territory' which had been continuously fished by Norwegian fishermen, more continuously and effectively than had the Grisbadarna.

North Atlantic Coast Fisheries case (*United States* v. *Great Britain*)[1]

The *North Atlantic Coast Fisheries* award, rendered by a five-man Tribunal of the Permanent Court of Arbitration in 1910 only incidentally concerned sovereignty over maritime territory. The dispute related to the interpretation of certain provisions of a Convention of 1818 between the two parties on the subject of the fisheries off the coasts of Newfoundland and Labrador. Article I provided for rights of fishing for inhabitants of the United States in certain areas and further provided that

> . . . the United States hereby renounce forever, any Liberty heretofore enjoyed or claimed by the Inhabitants thereof, to take, dry, or cure fish on, or within three marine Miles of any of the Coasts, Bays, . . . of His Britannic Majesty's Dominions in America not included within the above-mentioned limits. . . .

The United States contended, *inter alia*, that the term 'bays' applied only to

> . . . bays six miles or less in width 'inter fauces terrae', those bays only being territorial bays, because the three mile rule is, as shown by this Treaty, a principle of international law applicable to coasts and should be strictly and systematically applied to bays.[2]

The Tribunal found itself unable to agree with this contention and gave, *inter alia*, the following reasons:

> . . . the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally in proportion to the penetration inland of the bay; but . . . no principle of international law recognises any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty. . . .[3]

In reply to a further contention by the United States that in the context of the Treaty the term 'bay' was intended to express and be equivalent to the word 'coast', the Tribunal said, *inter alia*,

> . . . the Tribunal is unable to understand the term 'bays' in . . . other than its geographical sense, by which a bay is to be considered as an indentation of the coast, bearing a configuration of a particular character easy to determine specifically, but difficult to describe generally.
>
> The negotiators of the Treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of 'bays' they most probably thought that everybody would know what was a bay. In this popular sense the term must be interpreted in the Treaty. The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of

[1] Award (1910) in Wilson, op. cit. (above, p. 56 n. 1), p. 134; Scott, op. cit. (above, p. 56 n. 1), p. 141.

[2] Wilson, ibid., p. 182; Scott, ibid., p. 183.

[3] Wilson, ibid., p. 182; Scott, ibid., pp. 183–4.

its width to the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general.[1]

Thus, in summary, the Tribunal considered that the definition of a bay —and hence its inclusion within the internal waters and territory of a State—depended on geographical, strategic and economic criteria, and perhaps a variety of other considerations applicable to specific cases, but not susceptible of formulation in rigid rules of law.

Gulf of Fonseca case (*El Salvador* v. *Nicaragua*)[2]

The Central American Court of Justice applied very similar criteria to the determination of historic bays in the *Gulf of Fonseca* case to those applied in the *North Atlantic Coast Fisheries* case. This case only incidentally concerned title to sea areas, but the grounds on which the Court declared that the Gulf of Fonseca is 'a historic bay possessed of the characteristics of a closed sea'[3] are of interest. The claim that it was a historic bay, and that the right of co-ownership—undivided by any delimitation of boundaries—was vested in the riparian States, was advanced by El Salvador on the basis of a number of historical, geographical and economic considerations.[4] It was alleged that the gulf had been discovered by Spain in the sixteenth century, and had thenceforward been uncontestedly part of the dominions of Spain until the Central American States obtained independence. Subsequently, the ownership had been exercised exclusively by the riparian States—El Salvador, Honduras and Nicaragua —and the waters had never been used for fishing, etc., by any other State. The claim to co-ownership was based on the history of the ownership of the bay, and the contention that no effective boundary demarcation had ever been made after the independence of the riparian States.

In brief, the Court stated the criteria which it applied in the following terms:

In order to fix the international legal status of the Gulf of Fonseca it is necessary to specify the characteristics proper thereto from the threefold point of view of history, geography and the vital interests of the surrounding States.[5]

The Court then went on to examine the historical and geographical considerations and the 'vital interests' of the riparian States in detail. The history of the gulf showed that the administrative authorities of the surrounding area—whether the Spanish provincial authorities or the successor

[1] Wilson, *The Hague Arbitration Cases*, p. 186; Scott, *The Hague Court Reports*, p. 187.
[2] *American Journal of International Law*, 11 (1917), p. 674.
[3] Ibid., p. 693.
[4] Ibid., pp. 677–80.
[5] Ibid., p. 700.

independent States surrounding the gulf—had asserted dominion over the gulf, and that this had met with general acquiescence. As to the relevant geographical considerations, the award remarks that with respect to the surrounding territories both the gulf and its archipelago were

> . . . a necessary dependency thereof for geographical reasons and purposes of common defence (for) . . . nature had indented (the Gulf) in that important part of the continent, in the form of a gullet.[1]

The 'vital interests' guarded by the gulf were detailed as, in particular, its commercial value as one of the best ports along the Pacific coast, and its general geographical position. Furthermore, the Court listed other factors which it regarded as still more decisively imparting to the gulf the character of a historic bay. These included the following: railways, existing and projected, leading from Honduran, Nicaraguan and El Salvadorean ports on the gulf to the interiors of those States. The establishment of a free port by El Salvador on one of the islands of the gulf.[2] Furthermore:

> The Gulf is surrounded by various and extensive departments of the three riparian countries. These are of great importance because they are destined to great commercial, industrial and agricultural development; their products, like those of the departments in the interior of those States, must be exported by way of the Gulf of Fonseca, and through that Gulf must come also the increasing importations.
>
> The configuration and other conditions of the Gulf facilitate the enforcement of fiscal laws and regulations and guarantee the full collection of imposts against frauds against the fiscal laws.
>
> The strategic situation of the Gulf and its islands is so advantageous and the riparian States can defend their great interests therein and provide for the defense of their independence and sovereignty.[3]

The Court summarized the criteria which it considered applicable to the determination of 'historic bays' in the following terms:

> (T)he Gulf of Fonseca belongs to the special category of historic bays and is the exclusive property of El Salvador, Honduras and Nicaragua . . . on the theory that it combines all the characteristics or conditions that the text writers on international law, the international law institutes and the precedents have prescribed as essential to territorial waters, to wit, secular or immemorial possession accompanied by *animo domini* both peaceful and continuous and by acquiescence on the part of other nations, the special geographical configuration that safeguards so many interests of vital importance to the economic, commercial, agricultural and industrial life of the riparian States and the absolute, indispensable necessity that those States should possess the Gulf as fully as required by those primordial interests and the interest of national defense.[4]

The Court emphasized that its decision was based on the decision of the *North Atlantic Coast Fisheries* case, and in particular on the views of Dr. Drago, one of the judges in that arbitration.[5]

[1] Ibid., p. 700. [2] Ibid., pp. 701–5. [3] Ibid., pp. 704–5.
[4] Ibid., p. 705. [5] Ibid., pp. 707–9.

Anglo-Norwegian Fisheries case (*United Kingdom* v. *Norway*)[1]

The facts of this case are well known. The dispute was between the United Kingdom and Norway and related essentially to the extent of the exclusive fishing zone claimed by Norway about its coasts. This zone, a four-mile belt, was not regarded by the United Kingdom as excessive because of its breadth, but because of the method of delimitation involving drawing straight base-lines of considerable length in certain areas of rock and island-fringed, deeply indented coast. Since the four-mile zone was measured from these base-lines, a considerable sea area was enclosed within Norwegian internal waters which would otherwise have been territorial waters; and a further area was included within the fishing zone which would otherwise have been high seas.

The United Kingdom application asked the Court:

> . . . to declare the principles of international law to be applied in defining the base-lines, by reference to which the Norwegian Government is entitled to delimit a fisheries zone, extending to seaward 4 sea miles from those lines and exclusively reserved for its own nationals, and to define the said base-lines in so far as it appears necessary, in the light of the arguments of the Parties, in order to avoid further legal differences between them.[2]

Thus, in effect, the United Kingdom requested the Court to declare the principles of international law to be applied in determining sovereignty and exclusive rights over maritime areas adjacent to the coast, and the criteria to be applied in delimiting the boundaries of state sovereignty over maritime areas.

The parties approached the problem very differently. The United Kingdom case was highly traditional: it sought to establish the existence of rigid and definite rules of customary law, modified only by certain equally well-defined exceptions. It was argued, that the customary rule required base-lines to be drawn following the sinuosities of the coast; the only exceptions to this rule were founded in the acquiescence of the international community, as in the exceptional ten-mile closing line admitted for bays, and the further exception, again depending on acquiescence, of historic bays, and historic titles to other maritime areas.[3]

The Norwegian approach was more novel, and it was largely followed by the Court in its judgment. It emphasized that the development of the law of the sea showed a historical process of adjustment of the conflicting interests of coastal States and users of the seas in general. The general modern trend had been against the coastal States, admittedly, with the gradual admission of the concept of the high seas as a *res communis*, and the

[1] *I.C.J. Reports*, 1951, p. 116.

[2] Ibid., pp. 118–19.

[3] See, e.g., United Kingdom Memorial, *Pleadings*, vol. 1, pp. 55 et seq.; Reply, ibid., vol. 2, pp. 391 et seq.

gradual desuetude of the large claims once made to extensive areas of maritime territory. But it was argued that this very trend created a presumption in favour of reasonable claims by coastal States. Furthermore, it was pointed out that there was a recent trend in the opposite direction, now that it had been recognized that the resources of the ocean and its bed were not inexhaustible. This trend was evidenced by the rapid development of the legal concept of the continental shelf and the lack of unanimity on the question of the breadth of the territorial sea. In the Norwegian view the evidence of customary rules as to the direction and length of base-lines put forward by the United Kingdom was not evidence of rigid rules and exceptions to them; rather did these rules demonstrate the diversity of application to different geographical circumstances of certain overriding principles. One of these principles was the concept of adjacent maritime areas as appurtenant to the land: consequently the base-lines from which these sea areas were measured must in general follow the general line of the coast. The second was the concept of reasonableness—in the light of all the circumstances—of the coastal States' claims to exclusive rights in adjacent waters. In testing the validity of any such claim, the legitimate interests of the coastal State must be taken account of, together with the interests of users of the seas in general. The legitimacy of those interests might be tested by an international tribunal, or evidenced by the acquiescence of States in general.[1]

The 'legitimate interests' alleged by Norway were to be found in the preamble to the Norwegian decree which was the subject of the dispute. This refers to 'well-established national titles of right', 'the geographical conditions prevailing on the Norwegian coasts' and the safeguarding of 'the vital interests of the inhabitants of the northernmost parts of the country'. The legitimate interests invoked were thus historical—the continuous and prior exploitation of the sea areas for fishing by Norwegian fishermen; the peculiar geographical characteristics of the coastal area, in which sea and land areas closely interpenetrated; and the economic and social interests of the inhabitants of the coast in the fishing in adjacent waters.

The judgment of the Court largely adopted the Norwegian approach. First, the Court held that the Norwegian system of drawing base-lines had 'not violated international law'.[2] In doing so, the Court did not accept the rules invoked by the United Kingdom as having the status of customary law. Thus, it took the view that the alleged rule that base-lines should follow the 'sinuosities' of the coast was merely a reflection of the general principle that 'the belt of territorial waters must follow the general direction

[1] See, e.g., Norwegian Counter-Memorial, ibid., vol. 1, pp. 342 et seq.; *Duplique*, ibid., vol. 2, pp. 229 et seq.

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

of the coast'.[1] The application of that fundamental principle—itself apparently derived from the concept of 'territorial waters as appurtenant to the land territory'[2]—depended on the geographical realities of a particular coast-line.[3] Similarly, the Court found no foundation for the contention that straight base-lines might only be drawn across bays,[4] and must not in any case (with the exception of historic bays) exceed ten miles in length.[5] Again, the Court emphasized that the application of any alleged rule must be tested against geographical realities and 'local conditions'.[6] It had decided that the line from which the territorial waters must be measured was the *skaergaard*—a rock and island fringe along the coast—on the grounds that this was 'dictated by geographic realities'.[7] For in effect 'the *skaergaard* . . . constitutes a whole with the mainland'.[8] Consequently:

> If the belt of territorial waters must follow the outer line of the 'skaergaard', and if the method of straight base-lines must be admitted in certain cases, there is no valid reason to draw them only across bays, . . . and not also to draw them between islands, islets and rocks, across the sea areas separating them, even when such areas do not fall within the conception of a bay. It is sufficient that they should be situated between the island formations of the 'skaergaard', *inter fauces terrarum*.[9]

The Court further found that there was no sufficiently uniform acceptance of the ten-mile rule alleged by the United Kingdom to give it 'the authority of a general rule of international law'.[10] Furthermore, 'in any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast'.[11] Having thus disposed of the rules of customary law invoked by the United Kingdom, the Court turned to consider what it regarded as the correct principles to which any unilateral delimitation of sea areas must conform.

The principles discussed by the Court did not constitute rigid rules but rather, as the Court put it, 'criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question'.[12] The Court derived these criteria from 'certain basic considerations inherent in the nature of the territorial sea, . . .'.[13]

The judgment lists three major considerations: first, 'the close dependence of the territorial sea upon the land domain'. From this consideration, the Court stated that:

> It follows that while . . . a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.[14]

[1] *I.C.J. Reports*, 1951, p. 129.
[2] Ibid., p. 128.
[3] Ibid.
[4] Ibid., p. 130.
[5] Ibid., p. 131.
[6] Ibid., pp. 128, 131.
[7] Ibid., p. 128.
[8] Ibid.
[9] Ibid., p. 130.
[10] Ibid., p. 131.
[11] Ibid.
[12] Ibid., p. 133.
[13] Ibid.
[14] Ibid.

A second 'fundamental consideration'—and one described as 'of particular importance in this case'—was 'the more or less close relationship existing between certain sea areas and the land formations which divide or surround them'.[1] For, in the Court's view,

> The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.[2]

The third consideration was the amalgam of economic and historic interests of the coastal region in its adjacent waters: 'certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage'.[3] The Court thereupon held that the Norwegian base-lines conformed to these principles.[4] Moreover, they had been acquiesced in by other States.[5]

One characteristic of this judgment—so frequent in territorial and boundary cases—is the lack of assistance found in rules of customary law. The only customary rule invoked by the United Kingdom which the Court found it possible to accept was that the breadth of the territorial sea should be measured from low- (as opposed to high-) water mark. And on this rule at least the parties were agreed! The judgment is unusual, not in basing itself on the weighing and adjustment of interests of the parties, rather than on precise rules, but in attempting to construct a framework of principle from what might otherwise be thought of simply as the equities of a particular case. The reason for this is obvious: the Court was not simply deciding a dispute between two parties, but charged with the interpretation and application of allegedly general rules of law. It could not be unaware of the general interest in its decision. It was deciding on the principles of delimitation of boundaries between State territory and a *res communis*, not on the boundaries between two particular States. The Court could have decided the case on more particular grounds: historic title or acquiescence.[6] Instead, it boldly swept aside rigid customary rules, to expose the fundamental principles upon which the attribution of sovereignty over territory is based. It is worthy of emphasis that the criteria which the Court applied as criteria of international law were geographical, economic, social and historical—exactly those criteria which have been found to have been applied, explicitly or implicitly, in other territorial and boundary awards. In that context, however, they have usually been described as 'equities' only.[7]

[1] Ibid. [2] Ibid. [3] Ibid.; see also p. 142.
[4] Ibid., p. 139. [5] Ibid., p. 138.
[6] Cf. Fitzmaurice, 'Judicial Innovation, its Uses and its Perils', in *Cambridge Essays in International Law*, p. 24, esp. at pp. 39 et seq.
[7] The Court's approach was of course formulated in general terms in Art. 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone without reference to any notion of

Apart from the judgment of the Court, the individual and dissenting opinions are of considerable interest. A conservative approach based on the premiss of the existence of rigid rules of law is expressed in the opinions of Judges Read[1] and McNair.[2] They were unwilling even to permit exceptions from the rules which they enunciated in application to the unusual geographical characteristics of the area in question. For the geography of the area, although unusual, was not unique. Judge McNair further emphasized that private interests, and economic interests in general, should not be taken into consideration in claims relating to the delimitation of the territorial sea.[3] Judge Hsu Mo also took a relatively conservative approach: he agreed with the decision of the majority, but emphasized that this was specifically on the grounds that the Norwegian geographical conditions were 'special', and her consistent practice had been 'acquiesced in by the international community as a whole'.[4]

The most interesting observations are to be found in the opinion of Judge Alvarez.[5] It lays down a series of fourteen principles relevant to 'the maritime domain and, in particular, the territorial sea'. Basically, these refer to the need to weigh the interests of the coastal States with 'the general interest': claims made by coastal States must meet the standard of 'reasonableness'. If they do not do so, they constitute '*abus de droit*'. In effect, his formulation generalizes, in broader terms and with general application for the delimitation of the territorial sea, the criteria applied specifically by the Court to the drawing of base-lines.[6]

'equity', nor did the Court refer to 'equity' in its judgment. The point made here is that tribunals and writers often rely on 'equity' as an amorphous 'hold-all' for considerations which can—by detailed formulation—be made more 'objective' and 'law-like' (see Conclusions below for a formulation, in general terms, of the criteria applied in the awards considered here). Cf. the I.C.J.'s approach in the *North Sea Continental Shelf* cases (below, p. 81) again listing criteria for an 'equitable' solution, which could be given detailed formulation in a rule as precise as that laid down in Art. 4, and of Alvarez's formulation, below, p. 68.

[1] *I.C.J. Reports*, 1951, pp. 186 et seq. [2] Ibid., pp. 158 et seq.
[3] Ibid., p. 161; see also Hsu Mo, p. 157. [4] Ibid., p. 154. [5] Ibid., pp. 145 et seq.
[6] See especially ibid., pp. 150–1, where he says:

'1. Having regard to the great variety of the geographical and economic conditions of States, it is not possible to lay down uniform rules, applicable to all, governing the extent of the territorial sea and the way in which it is to be reckoned.

'2. Each State may therefore determine the extent of its territorial sea and the way in which it is to be reckoned, provided it does so in a reasonable manner, that it is capable of exercising supervision over the zone in question and of carrying out the duties imposed by international law, that it does not infringe rights acquired by other States, that it does no harm to general interests and does not constitute an *abus de droit*.

'In fixing the breadth of its territorial sea, the State must indicate the reasons, geographic, economic, etc., which provide the justification therefor.

'In the light of this principle, it is no longer necessary to debate questions of base-lines, straight lines, closing lines of ten sea miles for bays, etc. as has been done in this case.

'Similarly, if a State adopts too great a breadth for its territorial sea, having regard to its land territory and to the needs of its population, or if the base-lines which it indicates appear to be arbitrarily selected, that will constitute an *abus de droit*. . . .

'9. Similarly, for the great bays and straits, there can be no uniform rules. The international

IV. The Attribution of Sovereignty over Areas *sui generis*

Certain areas the subject of territorial or boundary disputes raise peculiar problems owing to their anomalous character. An example is the Rann of Kutch, a seasonally flooded marsh, the subject of a boundary dispute between India and Pakistan. According to Judge Lagergren, the Chairman of the Arbitral Tribunal:

> The question whether the Rann on the whole is most closely akin to land or to what Pakistan has termed a 'marine feature', has no decisive bearing on the issues in the case. For the purpose of this opinion, it needs only to be observed that the Rann is a unique geographical phenomenon.[1]

The Rann of Kutch, however, is not the only area of territory which presents unique problems and cannot usefully be treated as analogous to land or sea. One can instance territory which is neither one nor the other —such as air and outer space—in which quite different criteria for the attribution of sovereignty may be appropriate. Sometimes land and sea may be closely intermingled, as in a deeply indented and island-fringed coastline or an archipelago. Territory may partake of some of the characteristics of both land and sea: permanent ice, for example. Areas, though technically sea, may be more appropriately assimilated to neighbouring land: bays perhaps offer an example of this. Inland seas and lakes, and river boundaries and straits have their own peculiar characteristics and require individual solutions. Areas which are technically land, such as the continental shelf and the ocean bed, are so very different from land in their characteristics and the type of activities of which they admit, that they demand very different criteria for the attribution of sovereignty, and can only sensibly be treated as areas *sui generis*. The *North Sea Continental Shelf* case affords an example of such treatment. Polar regions afford another example; and

status of every great bay and strait must be determined by the coastal States directly concerned, having regard to the general interest.'

[1] Conclusions (Opinion of the Chairman), *The Indo-Pakistan Western Boundary* (cited in full below, p. 70 n. 1), p. 107. It is not altogether clear what was intended by this statement. Whether a disputed area is to be treated as land or water must always be of some significance: it is this character that sets appropriate criteria for the attribution of sovereignty. In the absence of any overwhelming exercise of jurisdiction by one party, different geographical characteristics of an area suggest diverse presumptions. For example, if a land area forms a geographical unity, and a State claims sovereignty over the whole but effectively exercises jurisdiction over only a part, then the presumption would appear to be that sovereignty over the whole area must be attributed to that State (see the *Legal Status of Eastern Greenland* case, *P.C.I.J.*, Series A/B, No. 53). A similar presumption does not appear in relation to water areas, where the median line—either as a customary rule or a reflection of the most likely equitable division—tends to be favoured. The consequence of the implied rejection of the argument that the Rann was most aptly characterized as a 'marine feature' was therefore the rejection of the possible presumption in favour of the applicability of the principles of the median line and the 'nearness of shores'. Cf. also Judge Koretsky in *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, p. 161.

largely uninhabited land may even be allocated to claimants on the basis of criteria more usually applied to water: the median line was applied in the *Brazil–British Guiana boundary* case. Although they cannot afford rules directly applicable to different circumstances, it is suggested that the *Rann of Kutch* award and the *North Sea* case exemplify the approach of international tribunals to novel facts, and the criteria developed by them in relation to the individual case.

Rann of Kutch arbitration (*India* v. *Pakistan*)[1]

This dispute between India and Pakistan concerned the boundary between West Pakistan and Gujarat. It was referred to arbitration under an agreement between the Governments of the two countries concluded on 30 June 1965. This Agreement provided for a cease-fire to end the hostilities which had broken out between the two countries in April 1965, and to restore the *status quo* at 1 January 1965. It further provided procedures for the determination and demarcation of the boundary in the disputed area: first, a meeting of Ministers of the two Governments 'to agree on the determination of the border in the light of their respective claims, and the arrangements for its demarcation'; second, if no agreement were reached on the determination of the boundary within two months of the cease-fire, the dispute was to be referred to the final and binding decision of an arbitral tribunal.[2] The meeting of Ministers did not take place and the two Governments referred the dispute to the Tribunal.[3]

The Agreement provided for a three-man Tribunal, none to be nationals of either party, although one member was to be nominated by each Government. The third member, who was to be the Chairman, was to be selected jointly by the two Governments; if they failed to agree, they were to request the Secretary-General of the United Nations to nominate him.[4] The Government of India nominated as member of the Tribunal Ambassador Aleš Bebler, Judge of the Constitutional Court of Yugoslavia, and the Government of Pakistan nominated Ambassador Nasrollah Entezam, an Iranian and former President of the General Assembly of the United Nations. The two Governments failed to agree on a Chairman, and the Secretary-General of the United Nations nominated Judge Gunnar Lagergren, President of the Court of Appeal for Western Sweden.[5]

The Agreement made no explicit provision as to the law to be applied by the Tribunal. It simply provided that the Tribunal determine the border

[1] *The Indo-Pakistan Western-Boundary Case Tribunal (Constituted pursuant to the Agreement of 3 June 1965) Award, 19 February 1968* (Introduction, Conclusions, and Three Maps), Government of India Press (1968) (cited as *Award* in the notes, below). The Introduction to the award, with excerpts from the opinions of the three arbitrators, is reproduced in *International Legal Materials*, 7 (May 1968), pp. 633 et seq.

[2] Art. 3. [3] *Award*, p. 4. [4] Agreement, Art. 3 (iii). [5] *Award*, p. 4.

'in the light of their [the two Governments'] respective claims and evidence produced before it'.[1] The question arose whether the Tribunal had the power to decide the case *ex aequo et bono*:[2] Pakistan contended that it had, India that it had not. At the request of India this was determined by the Tribunal as a preliminary question. The Tribunal did not find that the Agreement authorized it 'clearly and beyond doubt to adjudicate *ex aequo et bono*'.[3] Since the parties had not conferred the power to adjudicate *ex aequo et bono* on the Tribunal by any subsequent agreement the Tribunal resolved that it did not have such power.[4] However, the Tribunal pointed out that both parties were agreed that equity forms part of international law; 'therefore, the Parties are free to present and develop their cases with reliance on principles of equity'.[5] The power to adjudicate *ex aequo et bono*, however, was, the Tribunal considered, a 'wider power . . . to go outside the bounds of law'. An international tribunal would have this power 'only if such power had been conferred on it by mutual agreement between the Parties'.[6]

The arguments of the parties are summarized in the award.[7] In effect, the parties were claiming as successors of the States of Sind on the Pakistan side of the Rann, and Kutch on the Indian side. One of the peculiarities of the case was, as already mentioned, the character of the Rann itself: whether it was most akin to land or was, as Pakistan put it, a 'marine feature'. The submissions of Pakistan were as follows:

(a) that during and also before the British period, Sind extended to the south into the Great Rann up to its middle and at all relevant times exercised effective and exclusive control over the northern half of the Great Rann;

(b) that the Rann is a 'marine feature' (used for want of a standard term to cover the different aspects of the Rann). It is a separating entity lying between the States abutting upon it. It is governed by the principles of the median line and of equitable distribution, the 'bets' in the Rann being governed by the principle of the 'nearness of shores';

(c) that the whole width of the Rann (without being a condominium) formed a broad belt of boundary between territories on opposite sides; that the question of reducing this wide boundary to a widthless line, though raised, has never been decided; that such widthless line would run through the middle of the Rann and that the Tribunal should determine the said line.[8]

The submission that Sind had exercised 'effective and exclusive control over the northern half of the Rann' was founded on a broad historical trend

[1] Agreement, Art. 3 (ii).
[2] *Award*, pp. 8–9.
[3] Decision of 23 February 1966; see *Award*, § 7.
[4] Ibid., § 8.
[5] Ibid., § 5.
[6] Ibid., § 6.
[7] Ibid., pp. 9 et seq.
[8] Ibid., p. 13.

of expansion of Sind control from the sixth century onwards, manifesting itself in invasions, and garrisoning of the area during part of the eighteenth century. Pakistan argued that the Rulers of Sind had manifested effective control and dominion over the Rann by their ability to cross it. These activities were stopped in 1816 by the advance of the British army, and, so Pakistan contended, the territorial extent of Kutch froze in 1819 when it entered into treaty relationships with Britain: consequently, the task of the Tribunal was to determine the extent of the sovereignty of Kutch in 1819. Pakistan further relied on statements by officials in the Sind administration during the period of British control to the effect either that the Rann itself was the boundary, or that the boundary lay in the middle of the Rann, and that the question of the boundary between Sind and the Indian States had never been solved. With regard to the British and post-independence period, the evidence on which Pakistan relied to show the exercise of Sind (or British) or Pakistan jurisdiction was primarily acts of private individuals —cultivation, fishing and grazing. Special importance was attached to grazing in Chhad Bet, Dhara Banni and Pirol Valo Kun: in these areas it was alleged that grazing had been protected by the British authorities and was of vital interest to the inhabitants of the Sind coast.[1] With regard to the period since independence, the evidence of exercise of jurisdiction was alleged to constitute a prolongation of the situation existing during the independent Sind and British periods,[2] and also as an independent source of title: nine years' 'continuous and peaceful display of State functions' (from 1947 to 1956).[3] Furthermore, it was alleged that India had recognized in part the Pakistan claim in 1955.[4]

India, on the other hand, contended that the boundary ran roughly along the northern edge of the Rann;[5] this was the boundary shown in pre-partition maps, and was the 'traditional, well-established and well-recognised boundary' which had, in the course of time, become 'crystallised and consolidated'. It had been 'acknowledged, recognised, admitted and acquiesced in by the Paramount Power'.[6] In particular, a part of the boundary had been explicitly settled—and the rest impliedly confirmed—by a resolution of the Government of Bombay in 1914.[7] India argued that the possessions of the Rao of Kutch in the first part of the eighteenth century had extended to the north of the Rann, necessarily implying that the Rann was within Kutch territory; that in Annual Administration Reports for over seventy-five years the assertion that the Rann was Kutch territory had been made, and these assertions had been acquiesced in by the British Governmental authorities; that the British Government had

[1] *Award*, pp. 19–20. [2] Ibid., p. 14. [3] Ibid., p. 23.
[4] Ibid. [5] Ibid., p. 13. [6] Ibid., p. 14.
[7] Ibid.

positively recognized in official publications and correspondence that the entire Rann belonged to Kutch, and that maps since 1871, prepared and published by the Survey of India, had consistently shown the northern edge of the Rann as the conterminous Sind–Kutch boundary.[1]

Both parties were agreed that the Tribunal was free to determine as the boundary a line different from the claims of either party.[2]

A further matter of dispute between the parties was the law to be applied by the Tribunal. Both parties were of course agreed that to events since the date of independence (15 August 1947) international law should be applied; and that similarly, international law should be applied to relationships between Kutch and other neighbouring Indian States and Sind during the period up to the conquest of Sind by the British in 1843. But difficulty was found in the period between 1843 and 1947, and in the relations between the British Government and Kutch from 1819. For Kutch was a vassal State of the Paramount Power, being under British suzerainty, and from 1843 Britain was, as sovereign of Sind, the neighbour of its own vassals. This question was of importance in the context of the question of 'acquiescence'. Pakistan argued that the relations between Britain and the Indian States were not governed by international law, and there could therefore be no question of acquiescence, or even of recognition—even treaty engagements were actually unilateral. India contended that even if the application of international law had been at the option of the Paramount Power, this fact could not be relied on by Pakistan, which had not inherited the principle of paramountcy. Furthermore, recognition and acquiescence were, in the circumstances of the case, matters of evidence rather than exclusively matters of international law. In fact, India relied on a version of the *uti possidetis* principle:

> On principle the proper thing is to say that the frontier was that which at that time (15 August 1947) the father country or the mother country acknowledged to be the frontier and it is right that that frontier should continue, unless there was something very striking at the time of partition or subsequent thereto which requires positively that it should be treated otherwise.[3]

Another difficulty which arose was over the authority of the Tribunal to apply principles of 'equity'.[4] India contended that the determination of where the boundary was was a question of fact: principles of equity could only be applied to mitigate hardship resulting from law, not fact. Principles of equity might be invoked in assessing evidence perhaps. In any case, given the acquiescence and recognition by the British Government of the boundary claimed by India, the successor of that Government could not as a matter of equity be allowed to deny what its predecessor had maintained.[5]

[1] Ibid., p. 16. [2] Ibid., p. 14. [3] Ibid., pp. 24–5.
[4] See above, p. 71. [5] *Award*, pp. 25–6.

Pakistan argued that since the Tribunal had ruled that equity formed part of the international law to be applied, the alignment of the boundary must be tested by principles of equity. In particular, it would be repugnant to equity and good conscience, and create an untenable situation, to allow India to encroach upon Pakistan at the inlets of the Thar Parkar sector of the Rann with fortifications or customs houses.[1]

The award of the Tribunal was not unanimous: the majority was formed by the Chairman of the Tribunal (Gunnar Lagergren) and the nominee of Pakistan (Nasrollah Entezam). The Indian nominee (Aleš Bebler) gave a strong dissenting opinion in favour of the Indian claim. The majority awarded the greater part of the territory to India, while awarding to Pakistan the sectors of major interest to that State. The reasoning of the award, in which the nominee of Pakistan concurred, is found in the opinion of the Chairman of the Tribunal, Judge Lagergren. In Judge Lagergren's opinion, the Tribunal was required to resolve three main issues:

> The first is whether the boundary in dispute is a historically recognised and well-established boundary. Both Parties submit that the boundary as claimed by each of them is of such a character.
>
> The second main issue is whether Great Britain, acting either as territorial sovereign, or a Paramount Power, must be held by its conduct to have recognised, accepted or acquiesced in the claim of Kutch that the Rann was Kutch territory, thereby precluding or estopping Pakistan, as successor of Sind and thus of the territorial sovereign rights of Great Britain in the region, from successfully claiming any part of the disputed territory. One question which arises in considering this issue is the true meaning of 'the Rann' in the context of related documents.
>
> The third main issue is whether the British Administration in Sind and superior British authorities, acting not as Paramount Power but as territorial sovereigns performed acts, directly or indirectly, in assertion of rights of territorial sovereignty over the disputed tract which were of such a character as to be sufficient in law to confer title to the territory, or parts thereof, upon Sind, and thereby upon its successor, Pakistan, or, conversely, whether such exercise of sovereignty on the part of Kutch and the other States abutting upon the Great Rann, to whose rights India is successor, would instead operate to confer title on India to the territory, or to parts thereof.[2]

A preliminary issue was the 'critical date' for the determination of these three main issues. In the Chairman's view, the parties were not agreed on any one particular date for the application of the *uti possidetis* principle. However:

> It is true that one important element of a notion of this kind is common ground and therefore binds the Tribunal, *viz.* the agreement between the Parties that the boundary between India and Pakistan is a conterminous boundary and that the disputed territory must therefore belong to one or the other of them and cannot belong to any third party.[3]

[1] *Award*, p. 26. [2] Ibid. [3] *Award* (Conclusions), p. 108.

Nevertheless, 'it does not necessarily follow from this proposition . . . that the territory cannot at any relevant time have had an undefined status'.[1] Consequently '[this] territorial dispute . . . does not differ in essence from other like disputes in which opposing claims have been made in reliance upon conflicting testimony, and where a judgment has to be rendered on the relative strength of the cases made out by two parties'.[2] Although there was no agreed 'critical date', several dates had 'particular relevance': in particular, two dates, the 13 October 1819, when the East India Company concluded the last of three treaties with the Rulers of Kutch; and the date of independence, 15 August 1947.[3] Thus the Chairman did not select any one 'critical date', being ready rather to treat both 1819 and 1947 as 'relevant', and admitting evidence of acts even after that date as relevant on some ground at least, although not decisive.[4]

With regard to the first main issue, the Chairman took the view that in 1819 the boundaries in the Rann had not been determined and the Rann in fact formed a broad belt of frontier territory.[5] He found no conclusive evidence either way for the period between 1819 and 1871, and finally concluded that 'there did not exist at any time relevant in these proceedings a historically recognised and well-established boundary in the disputed

[1] Ibid.

[2] Ibid. See also p. 145: '. . . The dispute is one of great complexity. It is also one in which the claims and the evidence adduced in support of them are in respect of certain parts of the territory at issue almost evenly balanced. The ultimate determination therefore is both difficult and in exceptional measure dictated by considerations which do not heavily outweigh those considerations that would have motivated a different solution.'

[3] *Award* (Conclusions), pp. 108–9. The Chairman said:

'One such date is 13 October 1819, when the East India Company concluded the last of the three treaties with the Rulers of Kutch. Both Parties submit that the boundary of Kutch has remained unchanged since the Treaty of 1819 . . . India, however, maintains that the boundary after 1819 may have become crystallised and consolidated.

'Both Parties have developed their cases with primary reference to and in reliance on evidence relating to the long period of British rule on the sub-continent. The attitudes and actions of the British Government both as Suzerain Power and as territorial sovereign at various times during this epoch have on each issue been deemed by both Parties to be of crucial significance. For that reason, the date of Independence is of decisive importance.

'With regard to the period after 1947, the main difference between the Parties' cases is that Pakistan relies upon certain acts of jurisdiction as constituting additional independent sources of title to the disputed territory, while India denies that they are of such character.

'Pakistan, at a late stage in the proceedings, introduced the argument that the rights claimed by Pakistan are those of the people of the Muslim unit which was conquered by the British in 1843 and then, as it were, restored to the Moslem State of Pakistan in 1947. According to this submission, Sind would have been held in trust by the British Government in a capacity of territorial sovereign incapable of acting as such, while Sind itself would have been a fettered sovereign possessing latent territorial rights; the dispositions of Great Britain during the century of its administration of Sind would in such an eventuality be without effect in this case . . . While the principle of which it is an illustration is of interest, application of such a principle would be difficult and would introduce an element of instability in the relationships between nations which for a long time have been under foreign domination.'

[4] Compare Bebler, who described 1947 (the various Independence, etc., dates) as the 'critical date' (ibid., p. 3) and Entezam, who described 1819 as the 'relevant date' (ibid., p. 79).

[5] *Award* (Conclusions), pp. 113–14.

region'.[1] Judge Lagergren then explained the basis for the determination of the boundary:

(T)he conclusion that a recognised and well-established boundary did not exist in the disputed region east of the Western Trijunction on the eve of Independence . . . does not in the context of this case imply that the disputed territory was a *terra nullius*. According to the joint submissions of the Parties, the Rann of Kutch in modern times could only have formed part of the territory of a sovereign whose territory abutted upon it. Since the Rann until recently has been deemed incapable of permanent occupation, the requirement of possession cannot play the same important role in determining sovereign rights therein as it would have done otherwise. Therefore, special significance must be accorded to display of other State activities and the attitudes expressed or implied by one or several of the sovereign entities abutting upon the Rann in regard to the actual extension of their respective dominions.

. . . (T)he overall general principle that would apply during the British epoch in determining issues turning upon notions of territorial sovereignty was usage.[2]

This 'usage', in Lagergren's approach, involved a combination of the evidence relevant to the second and third main issues—in legal terms, recognition, acquiescence, estoppel and the exercise of territorial sovereignty. The most significant evidence of usage was Kutch administrative reports in which incidental assertions that Kutch territory included the Rann were made by the Ruler; *Bombay Gazetteers* in which similar assertions were made; and survey of India maps showing the boundary as claimed now by India—all this for a period of about seventy-five years preceding independence. On the other side were statements during the same period by British officials in Sind favourable to the Pakistan claim. With respect to the former, Judge Lagergren observed that they:

. . . constitute acts of competent British authorities which—if viewed as being in response to claims by Kutch or other Indian States that the Rann was Indian State territory—may be interpreted as acquiescence in, or acceptance of, such claims, and which—if viewed as unilateral, administrative acts not prompted by such representa-

[1] There were, however, two relatively small areas to which sovereignty had, the Chairman held, been determined. The first was the 'Sayra lands' an area originally populated and part of Kutch territory, which were submerged in an earthquake in 1819. Pakistan had argued that sovereignty over Sayra lapsed when it was destroyed. The Chairman observed: 'Had Sayra been an island in the high seas, this argument might have been cogent. The transformation of a territory from cultivable land to a lake, or to a swamp, marsh or desert, cannot, however, by itself affect established sovereign rights over it.'

In addition, a portion of the boundary between Kutch and Sind, to the west of the present area in dispute, had been demarcated in 1924 in pursuance of a 'boundary award' made in 1914 by Resolution of the Government of Bombay. This line ran to what was termed in this case the 'Western Terminus'. Furthermore, at the request of the ruler of Kutch, a further stretch of boundary, lying in a vertical line north from the 'Western Terminus' was demarcated at the same time by the demarcation commission. This line did not form part of the original Resolution, but the Chairman found it to have been accepted by both the Ruler of Kutch and the British authorities in Sind as the Kutch–Sind boundary.

[2] Ibid., p. 145. In this context, it may be noted that the Chairman did not accept the applicability of a 'regional custom' asserted by Pakistan to have been applied generally to territorial disputes in the area by the British: a combination of the 'median line' and the determination of sovereignty over the 'bets' on the basis of 'nearness of shores' (ibid.).

tions—may amount to a voluntary relinquishment, whether conscious or inadvertent, of British territorial rights in the Rann.

The absence of a demonstrable connection between representations of the Rao of Kutch or rulers of other neighbouring Indian States and the British administrative acts in question leads me to conclude that the acts constituted a relinquishment of potential rights rather than the explicit acceptance of claimed rights. Hence, it may be argued that, being in the nature of unilateral acts conferring the benefits upon a third party, as it were, of grace, or by policy and not as of right, the actions should be restrictively interpreted in favour of the conceding party and its successor in title. An important guiding factor in a determination of the precise legal effects of the relevant administrative acts would then be whether and to what extent the third party beneficiary acted in reliance upon them, or remained passive.[1]

With respect to the latter, he said:

The statements . . . made subsequent to 1903 emanated from rather subordinate officials . . . who had [however] direct and intimate knowledge of actual conditions and of locally recognised boundary conceptions. At the same juncture of history, the acknowledgments in various forms by higher British authorities to the effect that the Rann of Kutch was Kutch territory began to appear. Taken as statements, if unaccompanied by any action, the pronouncements to the effect that the boundary lay in the middle of the Rann . . . or in dispute or not settled, cannot outweigh the evidence to the opposite effect upon which India's claim rests. . . . (T)hey weaken but cannot invalidate India's claim.[2]

Although Judge Lagergren treated this evidence rather as creating and rebutting presumptions than as creating estoppels one way or the other, Judge Bebler did, following the *Temple* case and, in particular, Judge Alfaro's separate opinion in that case, regard the first group of acts as creating an estoppel against the British authorities binding on Pakistan.[3] It is therefore perhaps apposite to note Entezam's contrary observations which emphasize the difficulties of applying concepts of estoppel in such cases.[4] It is, indeed, a general difficulty of applying concepts of 'estoppel'

[1] Ibid., p. 135. [2] Ibid., pp. 150–1. [3] *Award* (Conclusions), pp. 22 et seq.

[4] Ibid., p. 98. 'Since I am not a lawyer by training, the technicalities of estoppel, as discussed by the Parties, are mostly beyond my depth. As a matter of common sense, however, one thing seems clear to me. If some British officials said that the Rann belonged to Kutch, and others said it was "no man's land", and still others exercised jurisdiction in half of it on behalf of Sind, and still others apportioned parts of it between different coastal states; if the Administration Reports of Kutch saying that the whole of the 9000 square miles of the Rann belonged to Kutch, and the administration reports of some of the other coastal States saying that a part of those 9000 square miles belonged to one or the other of those coastal States were left equally uncontradicted; if one Gazetteer gave the area of Kutch 'exclusive of the Rann' and another 'exclusive of a portion of the Rann'; if in spite of the absence of any reservation as to the Rann in respect of the area of a coastal State, a portion of the Rann did admittedly belong to that State; if statistical abstracts, without reservation relating to the area of a State owning a part of the Rann, were laid before Parliament along with those of Kutch with a reservation; then which of these mutually inconsistent positions are the British supposed to have acquiesced in and which of them is to be taken to be the one in relation to which they are supposed to be estopped? Another thing that to my lay mind seems clear is that what is expressed in deeds corresponds far more accurately to what is in the mind than what is expressed merely in words. In the diplomatic field . . . that would seem obvious. Even more obvious to me is that silence of a political officer is hardly ever equivalent to assent. . . .'

and 'acquiescence' to States, that they rarely, especially in territorial matters, speak with one voice.

With regard to the third question, Judge Lagergren first stated his views generally as to the problem of attributing sovereignty over the area in dispute:

> Territorial sovereignty implies, as observed by Judge Huber in the *Island of Palmas* case, certain exclusive rights which have as their corollary certain duties. In adjudging conflicting claims by rival sovereigns to a territory, all available evidence relating to the exercise of such rights, and to the discharge of such duties, must be carefully evaluated with a view to establishing in whom the conglomerate of sovereign functions has exclusively or predominantly vested.
>
> The rights and duties which by law and custom are inherent in, and characteristic of, sovereignty present considerable variations in different circumstances according to time and place, and in the context of various political systems. The sovereign entities relevant in this case prior to independence were, on both sides of the Rann, agricultural societies. The activities and functions of Government—leaving aside the military organisation—were in their essence identical in Sind and Kutch, being limited mainly to the imposition of customs duties and taxes on land, livestock and agricultural produce in the fiscal sphere, and to the maintenance of peace and order by police and civil and criminal courts and other law enforcement agencies in the general public sphere.
>
> In these societies . . . the borders between territories under different sovereignty still marked a strict division of economic rights as well as of Government functions. Significantly, ownership by an Indian ruler of agricultural property could imply and carry with it such a measure of sovereignty over it as to include taxing authority, and civil and criminal jurisdiction. . . .
>
> Because of the close dependence of the taxation system on the land and the agricultural production even in Sind, State and private interests coincided and were necessarily so closely assimilated with each other that it would be improper to draw as sharp a distinction between them as is called for in the context of a modern industrial economy. The sole important revenue, apart from customs duties, derived from the land, and was earmarked for the State and the landholder in fixed proportions.
>
> It is in the light of these facts and circumstances that the evidence relating to acts of 'jurisdiction' in the northern half of the Rann has to be analysed. The object of such an appraisal is to define and delimit with the greatest possible accuracy which of the two contending sovereigns . . . in actual fact enjoyed the rights of sovereignty over the disputed territory, and which of them carried the burden of discharging the duties inherent in sovereignty in that territory at each relevant period of time . . .
>
> The principal evidence of facts of sovereignty in the disputed territory falls into four categories, *viz.* customs, police surveillance and police jurisdiction, criminal jurisdiction, and the material relating to Dhara Banni and Chhad Bet. . . .[1]

Interesting parts of this statement are the reference to the question 'in whom the conglomerate of sovereign functions has exclusively *or predominantly* vested'; and the line of reasoning directed to permitting private (or community) grazing and agricultural interests to be taken into account.

[1] *Award* (Conclusions), pp. 135–6, 674–5.

In the area of the northern sector outside Dhara Bhanni and Chhad Bet, Judge Lagergren found that:

> In this century, prior to independence . . . the police and criminal jurisdiction of Sind authorities over disputed territory extended, in the sector between the eastern loop and Dhara Banni, to Ding, Vighokot and Biar Bet. There is, however, no evidence which affirmatively proves in a conclusive fashion that the jurisdiction of Sind police and Sind courts encompassed areas west of the eastern loop, or east of Chhad Bet. Conversely, no proof is offered that Kutch either assumed or exercised such jurisdiction over any part of the disputed territory.[1]

With regard to Dhara Banni and Chhad Bet, the President found that 'for well over one hundred years, the sole benefits which could be derived from these areas were enjoyed by inhabitants of Sind'.[2] There was also some evidence that the maintenance of law and order was undertaken by Sind—and certainly not by Kutch. Registration of births, deaths and epidemics was made in Sind. Kutch did, however, collect, or attempt to collect, grazing fees in the period before 1845 and after 1927. However,

> . . . at no time were these tax levies fully effective, as is evidenced by the small amounts recovered, which fell far short of the expenditure incurred in the collection. More significantly, . . . the imposition of the levy was opposed, not only by the local villagers, but by the British Government authorities concerned . . . Taken in all, these activities by Kutch cannot be deemed to have constituted continuous and effective exercise of jurisdiction. By contrast, the presence of Sind in Dhara Banni and Chhad Bet comes as close to effective peaceful possession and display of Sind authority as may be expected in the circumstances. Both the inhabitants of Sind who used the grazing grounds, and the Sind authorities, must have acted on the assumption that Dhara Banni and Chhad Bet were British territory.[3]

The President drew the following conclusions from these circumstances. The maps produced by the survey of India from 1907 onwards were the strongest evidence in favour of the Indian claim, since they consistently showed a conterminous boundary which conformed by and large to India's claim. But they were not 'a conclusive and authoritative source of title to territory' so much as 'a rather tentative indication of the actual extension of sovereign territorial rights'. The evidence of Pakistan, that at the time these maps were being produced statements were made by Sind authorities that half of the Great Rann was British territory, 'cannot outweigh the evidence to the opposite effect' on which the Indian claim was based.[4] He therefore concluded:

> Reviewing and appraising the combined strength of the evidence relied upon by each side as proof or indication of the extent of its respective sovereignty in the region, and comparing the relative weight of such evidence, I conclude as follows. In respect of those sectors of the Rann in relation to which no specific evidence in the way of display

[1] Ibid., p. 676. [2] Ibid., pp. 144, 677. [3] Ibid., pp. 677–8.
[4] Ibid., p. 688.

of Sind authority, or merely trivial or isolated evidence of such a character, supports Pakistan's claim, I pronounce in favour of India. These sectors comprise about ninety per cent of the disputed territory. However, in respect of sectors where a continuous and for the region intensive Sind activity, meeting with no effective opposition from the Kutch side, is established, I am of the opinion that Pakistan has made out a better and superior title. This refers to a marginal area south of Rahim ki Bazar, including Pirol Valo Kun, as well as to Dhara Banni and Chhad Bet, which on most maps appears as an extension of the mainland of Sind.[1]

An explicit application of principles of 'equity' was made with regard to the two deep inlets on either side of Nagar Parkar:

. . . it would be inequitable to recognise these inlets as foreign territory. It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistan territory, also be regarded as such.[2]

This award has a number of interesting features: having found that there was no 'historically recognised and well-established boundary' in the Rann, the majority decision turned on the weighing of a variety of considerations and activities of the parties, their predecessors and their subjects in the Rann. Actions were considered in so far as they might constitute recognition or acquiescence, estopping either party from its claims, and establishing in which party 'the conglomerate of sovereign functions has exclusively or predominantly vested'. In establishing the latter, considerable reliance was placed on activities of private individuals, subjects of Sind and subsequently Pakistan, in the area—in particular, grazing. Although the reason for this was expressly given as the peculiarities of government and sovereignty in the area, it does in fact coincide with the general approach of tribunals to boundaries in other areas. A further aspect of interest is the treatment of maps as evidence of the boundary: here a more flexible approach than that adopted by the International Court of Justice in the *Temple* case is revealed (cf. also the *Argentine–Chile* award). The boundary described on the maps—virtually uniformly in favour of the Indian claim—was treated as establishing a presumption in favour of that line, rebuttable by evidence of Sind (Pakistan) sovereignty in specific areas.

The award does not conform to the claims of either party: in effect, it is another example of a compromise. But this apparent compromise results from a weighing of the relative interests of each party in different parts of the disputed territory, and its links with the area.

The award is also noteworthy for the explicit acknowledgement that equity forms part of international law, and that consequently the parties might rely on principles of equity in their claims. A distinction was made between this power to take into account equitable principles and the power

[1] *Award* (Conclusions), p. 690. [2] Ibid., p. 692.

to adjudicate *ex aequo et bono*. It is not, however, obvious that a different decision would—in the absence of a 'historically recognised and well-established boundary'—have been reached by a tribunal empowered to adjudicate *ex aequo et bono*. The reasoning of the majority decision is not based on any clear principles of law. Explicit reference to equity as a basis of decision is made in regard to only one part of the boundary: the two deep inlets on either side of Nagar Parkar. Here the principles of equity are equated with 'the paramount considerations of promoting peace and stability' in the region. This phraseology recalls that of the General Assembly resolution on Eritrea: 'The interests of peace and security in East Africa'; and is yet further evidence of the 'political' character of 'equity' in boundary and territorial disputes.

North Sea Continental Shelf cases (*Federal Republic of Germany* v. *Denmark*; *Federal Republic of Germany* v. *The Netherlands*)[1]

These cases concerned disputes between the Federal Republic and the Netherlands and Denmark over the boundaries of their respective submarine areas beneath the North Sea. The Federal Republic concluded agreements with Denmark and the Netherlands delimiting the boundaries near the coast—up to points 55° 10′ 03·4″ N, 7° 33′ 09·6″ E and 54° N, 6° 06′ 26″ E respectively—in 1964 and 1965. These boundaries were delimited on the basis of the equidistance method set out in Article 6 (2) of the Geneva Convention on the Continental Shelf. Denmark and the Netherlands contended that the whole of the continental shelf boundaries both between themselves and the Federal Republic should be delimited on the basis of the median line and equidistance methods described in Article 6. The Federal Republic considered that such delimitations would be inequitable to the Federal Republic because of its concave coastline. Thereupon, on 31 March 1966 Denmark and the Netherlands concluded an agreement delimiting the boundary as between themselves: this agreement necessarily assumed that the areas claimed by the two States were coterminous and that the entire Denmark/Federal Republic and Federal Republic/the Netherlands boundaries were delimited by the equidistance method.

On 2 February 1967 the three Governments signed two Special Agreements for the submission to the International Court of Justice of the question:

> What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundaries determined by the Conventions of 1964 and 1965? [2]

[1] *I.C.J. Reports*, 1969, p. 3. [2] Art. 1 (1).

The three Governments further agreed to ask the Court to join the two cases and to 'delimit the continental shelf in the North Sea as between their countries by agreement in pursuance of the decision requested from the International Court of Justice'.[1]

In substance the case of Denmark and the Netherlands was that delimitation was governed 'by the principles and rules of international law which are expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf'.[2] They contended that since the Parties were in disagreement,[3] and 'special circumstances which justify another boundary line [had] not . . . been established, the boundary between the Parties is to be determined by application of the principle of equidistance . . .'.[4] The Federal Republic had not ratified the Continental Shelf Convention; Denmark and the Netherlands contended, however, that the Federal Republic was bound by Article 6 (2) by reason of having accepted it by its conduct, or because the median line and equidistance rules set out in Article 6 represented at their inception or had subsequently become customary international law.[5] An alternative basis for delimitation by the equidistance method was contended for in what the Court described as 'what might be called the natural law of the continental shelf'.[6]

> . . . the boundary is to be determined between the Parties on the basis of the exclusive rights of each Party over the continental shelf adjacent to its coast and of the principle that the boundary is to leave to each Party every point of the continental shelf which lies nearer to its coast than to the coast of the other Party.[7]

The Federal Republic on the other hand contended that the equidistance method was not a rule of customary international law;[8] that even if the rule in Article 6 (2) were applicable between the parties 'special circumstances within the meaning of that rule would exclude the application of the equidistance method in the present case';[9] that '. . . the equidistance method cannot be used for the delimitation of the continental shelf unless it is established by agreement, arbitration, or otherwise, that it will achieve a just and equitable apportionment of the continental shelf among the States concerned';[10] and that in the case of the particular boundaries in dispute, Denmark and the Netherlands could not rely on the application

[1] Art. 1 (2).

[2] *I.C.J. Reports*, 1969, Final Submission, No. 1. Art. 6 (2) provides: 'Where the same continental shelf is adjacent to the territories of two adjacent states, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.'

[3] Ibid., No. 2. [4] Ibid., No. 3. [5] Ibid., pp. 23–46. [6] Ibid., pp. 28–9.

[7] Ibid., Final Submission, No. 4. [8] Ibid., Nos. 2 (a) and (b).

[9] Ibid., No. 2 (c). [10] Ibid., No. 3 (a).

of the equidistance method 'since it would not lead to an equitable apportionment'.[1] On the positive side, the Federal Republic contended that

> . . . the delimitation of the continental shelf between the Parties in the North Sea is governed by the principle that each coastal State is entitled to a just and equitable share . . . based on criteria relevant to the particular geographical situation in the North Sea.[2]

The arguments of the parties and, as will be seen, the judgment of the Court, demonstrate the close interrelationship between the bases on which territory is acquired or attributed and its delimitation,[3] and the importance for both of the geographical background. For the Court rejected the Danish/Netherlands arguments that the 'equidistance/special circumstances' mode of delimitation prescribed in Article 6 of the Continental Shelf Convention was opposable to the Federal Republic—either as such (by reason of acceptance by conduct, recognition or estoppel), or as representing, or having become, a rule of general or customary international law.[4] Consequently the remaining opposing contentions of the parties related essentially to whether rules or principles of delimitation of boundaries could be derived of necessity from the principles on which the continental shelf was attributed to coastal States—that is, from what the Court described as 'the natural law of the continental shelf'.

The Federal Republic, although agreeing that the submarine areas of the North Sea constituted 'continental shelf within the meaning of Article 1 of the Continental Shelf Convention', considered that the North Sea formed a 'special case' because 'its submarine areas constitute a single continental shelf which must be divided up among the surrounding coastal States in its entirety' as distinct from 'areas where the continental shelf constitutes but a narrow belt off the coast'. In this situation, where 'by virtue of their geographic position', two or more coastal States can claim that a continental shelf appertains to each of them, 'the necessity arises of apportioning that common continental shelf between them. . . . The problem of division which poses itself . . . is a problem of "distributive justice" (*justitia distributiva*). If goods or resources which are held in common by several parties by virtue of the same right have to be divided up between these parties, it is a recognised principle in law that each of these parties is entitled to a just and equitable share which is to be meted out in accordance with an appropriate standard equally applicable to all of them. This principle . . . *the principle of the just and equitable share*, is a basic legal principle emanating from the concept of distributive justice and a generally recognised principle inherent in all legal systems, including the legal system of the international community.'[5]

[1] Ibid., No. 3 (b). [2] Ibid., Nos. 1 and 4.
[3] See esp. Separate Opinion of Judge Ammoun, ibid., pp. 101 et seq.
[4] Ibid., pp. 23–46. [5] *I.C.J. Reports*, 1969; Memorial of the Federal Republic, §§ 30–1.

Thus the Federal Republic asserted, in essence, that the submarine areas of the North Sea were owned in common with the co-riparian States. Moreover, the 'appropriate standard' according to which it was to be apportioned was primarily the length of North Sea coastline, measured, not following its curves and indentations but rather by its 'coastal frontage'—'the degree of the natural connection of the land territory with the submarine areas adjoining the coast'.[1] Other factors mentioned, but not emphasized, included the position of navigable channels, historical, economic and technical factors 'in particular . . . the geographical distribution of the mineral resources of the continental shelf and . . . the maintenance of the unity of their deposits' and the Federal Republic's economic needs (with reference to population, industrialization, power supply and exploitation capacity). But with respect to the first group it was stated that 'up to now no such particular factors are ascertainable which would have to be taken into account'; and with respect to the latter group, 'Germany does not wish to base its claim on these considerations'.[2] In its pleadings, but not in its formal submissions, the Federal Republic offered alternative specific methods of delimitation to give effect to the principle of the 'just and equitable share': it was suggested that delimitation be founded on what were in effect, straight base-lines drawn across the extremities of the German North Sea coastline (between the islands of Borkum and Sylt)—the German 'coastal frontage'; and on the 'sector principle': 'in an apportionment of maritime areas which are surrounded by a number of States, it would be an equitable principle of division for every coastal State to receive a portion which extended to the middle of the sea'.[3] This 'sector principle' was of course derived by analogy from the delimitation of claims to polar areas where the convenience of delimitation by degrees of longitude is obvious. Its application to what is merely a more or less oval, semi-enclosed sea clearly rests on more tenuous grounds.

Denmark and the Netherlands contended, on the other hand, that Article 1 of the Continental Shelf Convention represented customary international law in so far as it declared that 'adjacent' submarine areas appertained *ipso facto* by reason of their 'adjacency' to the coastal State. From the principle of appurtenance on the basis of adjacency could then be derived the following principle of delimitation: that those areas appertained to a State which were 'adjacent' in the sense of being in 'closer proximity' to that State than to any other. Only the equidistance method could effect such delimitation and, in the view of Denmark and the Netherlands, this was therefore a mandatory rule inherent in the concept of the continental shelf.[4]

[1] *I.C.J. Reports*, 1969; Memorial of the Federal Republic, § 69. [2] Ibid., § 79.
[3] Ibid., § 81. [4] Ibid., Judgment, p. 29.

The Court did not accept the contention of Denmark and the Netherlands that 'adjacency' must be identified with 'proximity'. It found the terminology generally used in State claims (such as 'adjacent', 'near', 'close', 'contiguous', etc.) to be 'of a somewhat imprecise character' and, in particular, that there was 'no necessary, and certainly no complete, identity between the notions of adjacency and proximity'.[1] Rather 'the notion of adjacency . . . only implies proximity in a general sense, and does not imply any fundamental or inherent rule the ultimate effect of which would be to prohibit any State (otherwise than by agreement) from exercising continental shelf rights in respect of areas closer to the coast of another State'.[2]

The Court found the more fundamental basis of States' rights over the continental shelf in the notions of 'prolongation', 'continuation' or 'extension' of a State's land domain. It said:

> More fundamental than the notion of proximity appears to be the principle—constantly relied on by all the Parties—of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal State because—or not only because—they are near it. They are near it of course; but this would not suffice to confer title any more than, according to a well-established principle of law recognized by both sides in the present case, mere proximity confers *per se* title to land territory. What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea. From this it would follow that whenever a given submarine area does not constitute a natural—or the most natural—extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State;—or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.[3]

Consequently, the Court did not accept that the equidistance method, although possessing a 'combination of practical convenience and certainty of application',[4] formed part of 'the natural law of the continental shelf' for

> . . . the use of the equidistance method would frequently cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another, when the configuration of the latter's coast makes the equidistance line swing

[1] Ibid., p. 30. [2] Ibid., pp. 30–1. [3] Ibid., p. 31.
[4] Ibid., p. 23.

out laterally across the former's coastal front, cutting it off from areas situated directly before that front.[1] [As in the case of the German North Sea Coast.]

The Court did not, however, find it possible to accept the contentions of the Federal Republic 'at least in the particular form they have taken'.[2] It said:

. . . having regard both to the language of the Special Agreements and to more general considerations of law relating to the regime of the continental shelf, its task in the present proceedings relates essentially to the delimitation and not the apportionment of the areas concerned, or their division into converging sectors.[3]

The Court went on to define what it understood by the term 'delimitation':

Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.[4]

In the Court's view, not only was the notion of 'equitable apportionment' inconsistent with that of 'delimitation' referred to in the Special Agreements, but also:

More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, namely that the 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 *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in the exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right.[5]

Consequently, in the Court's view:

. . . even in such a situation as that of the North Sea, the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected . . . the fundamental concept involved does not admit of there being anything undivided to share out.[6]

The Court was here adopting certain arguments put forward by Denmark and the Netherlands on the nature of the determination of boundary disputes,[7] and it went on to put this view in more general terms:

Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim, so that any delimitation

[1] *I.C.J. Reports*, 1969, pp. 31–2. Compare the Dissenting Opinions of Judge Tanaka, pp. 172 et seq. and Judge Morelli, pp. 197 et seq.
[2] Ibid., p. 21. [3] Ibid., p. 22. [4] Ibid. [5] Ibid., p. 23. [6] Ibid.
[7] Ibid., Common Rejoinder, §§ 15–16.

of it which does not leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division had been made. But this does not mean that there has been an apportionment of something that previously consisted of an integral, still less an undivided whole.[1]

It may be useful to consider further this distinction between 'delimitation' and 'apportionment', particularly in relation to the task of the Court. It has been suggested that the history of a boundary can be analysed into four stages: 'allocation' of territory, 'delimitation' (verbal definition of the boundary), 'demarcation' (the marking out of the boundary on the ground) and 'administration'.[2] Now the Court in these cases was requested to decide the 'principles and rules of international law . . . applicable to the delimitation' of the boundaries in dispute. It was not, as the Court itself noted,[3] required to 'delimit' the boundary. The arguments of the parties, as has been seen above, related both to the bases of the attribution of the continental shelf (allocation of territory), and to particular technical methods of delimitation (definition of the boundary by equidistance lines, sectors, etc.). Thus the Court's was a compound task, relating both to the 'allocation' and 'delimitation' stages, and it is, therefore, possible to disagree with the view that the concept of 'apportionment' (which seems to have been used by the Federal Republic to draw analogies from the notions of equitable apportionment of natural resources—rivers, etc.—but might better have been termed 'allocation') was outside the Court's task.[4] 'Apportionment' or 'allocation' of territory were no more incompatible with the 'inherent right' of States in their adjacent continental shelves than was, say, the allocation of territory in the *Minquiers and Ecrehos* or the *Guiana Boundary* cases in which it was agreed that the territory in dispute must be allocated to one or other party.

Although the Court did not accept the rules put forward by Denmark and the Netherlands as customary international law, it did find broader rules of customary international law in the practice of States in making claims to submarine areas, namely, 'that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles'.[5] In the Court's view, 'the ideas which have always underlain the development of the legal regime of the continental shelf in this field' were:

(a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation

[1] Ibid., Judgment, p. 23.
[2] Jones, op. cit. (above, p. 21 n. 7), p. 57. See below, p. 114.
[3] *I.C.J. Reports*, 1969, p. 46.
[4] Cf. ibid., Judge Morelli, pp. 211–12.
[5] Ibid., p. 46. See, for the Court's reasons, pp. 32–6 (citing, *inter alia*, the Truman Proclamation to which it attached particular importance).

as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case where either of them insists upon its own position without contemplating any modification of it;

(b) the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied—for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved;

(c) . . . the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State.[1]

In the present context, the most interesting feature of this statement is the prescription of the application of 'equitable principles' to delimitation, and the 'circumstances' to be taken into account.

The Court had found the basis for the application of 'equitable principles' in the practice of States—in particular in the formal claims to continental shelf areas such as the Truman Proclamation and its successors, and in the work of the International Law Commission, but in face of the objection raised by Denmark and the Netherlands that the Federal Republic, in calling for the application of 'equity' by the Court, was in effect asking for adjudication *ex aequo et bono*, the Court was forced to draw a distinction between the two. It said:

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. There is consequently no question in this case of any decision *ex aequo et bono*, such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court's Statute.[2]

The distinction is clearly a very fine one, for it would be possible to say that in any situation—including all territorial and boundary disputes—the customary rules of international law required the application of 'equity'. The Court indeed referred to the problem of assessing compensation for injury in the *I.L.O. Administrative Tribunal*[3] and *Corfu Channel* cases (as setting precedents).[4]

The Court went on to point out the circumstances in which the application of the equidistance method 'leads unquestionably to inequity':

(a) The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been seen that in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from

[1] *I.C.J. Reports*, 1969, p. 47.
[2] Ibid., p. 48.
[3] *I.C.J. Reports*, 1956, p. 100.
[4] *I.C.J. Reports*, 1949, p. 249.

the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity.

(b) In the case of the North Sea in particular, where there is no outer boundary to the continental shelf, it happens that the claims of several States converge, meet and intercross in localities where, despite their distance from the coast, the bed of the sea still unquestionably consists of continental shelf. A study of these convergences, . . . shows how inequitable would be the apparent simplification brought about by a delimitation which, ignoring such geographical circumstances, was based solely on the equidistance method.[1]

The Court then went on to state what, in its view, were the considerations of equity to be applied:

Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy. But in the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal to or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. . . . It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.[2]

But although the Court laid major stress (as of course had the Federal Republic) on the criterion of coastal length, it also noted that

. . . in fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.[3]

It seems, therefore, clear that non-geographical considerations might well reasonably be taken account of in the name of 'equity': one need only recall the significance attached to socio-economic factors in the *Anglo-Norwegian Fisheries* case. It is perhaps unfortunate that the problem raised by all the equities—on the side of Denmark and the Netherlands also—was not examined in this case.[4] Thus the Court in listing the factors to be taken

[1] *I.C.J. Reports*, 1969, p. 49. [2] Ibid., pp. 49–50. [3] Ibid., p. 50.

[4] The Federal Republic mentioned them but avoided reliance on them; ibid., Memorial, § 7a. The equities in favour of Denmark and the Netherlands were touched on very lightly by Sir Humphrey Waldock (11 November 1968, ibid., Verbatim Record, pp 32–5). For a discussion

account of by the parties noted only the 'geology' of the continental shelf, that is, its 'configurational features' which might 'point-up' the notion of the appurtenance of the continental shelf to a particular State, the 'geographical configuration' of the coastline, the 'unity of any deposits' and coastline length. As summarized in the *dispositif*, the Court stated:

(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;

(2) if . . . the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a regime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them;

(D) in the course of the negotiations, the factors to be taken into account are to include:

(1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;

(2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;

(3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.[1]

The noteworthy features of this case for present purposes are the following:

1. The great significance attached to geographical and geomorphological factors. One may, however, query the correctness of the Court's emphasis on the legal necessity for the continental shelf to be a 'natural prolongation' of the land domain of the claimant State. Claims to the continental shelf and submarine areas have not been in such unambiguous terms and an area might reasonably be described as 'adjacent' without being a continuation of the mainland.[2] Moreover, the contention of the Federal Republic that areas surrounded by a group of States formed a special case for 'apportionment' and delimitation may well appear more reasonable than the concept offered by the Court of overlapping or converging natural prolongations. In this context it is noteworthy that for such cases the Court suggested

of the influence of oil and gas resources see the Separate Opinion of Judge Jessup, pp. 67 et seq. (and, in particular, on the influence of concessions already granted, see pp. 79–81); see also Dissenting Opinion of Judge Lachs, at p. 239.

[1] *I.C.J. Reports*, 1969, pp. 53–4.

[2] For a distinction between 'contiguous' and 'adjacent' areas see, e.g., Australian Pearl Fisheries Act, 1952–1953, S. 5 (5) (*U.N. Legislative Series, Laws and Regulations on the Regime of the High Seas*, Supplement, p. 4).

division 'in agreed proportions' or 'equally': the contention of the Federal Republic might have been put similarly in terms that the entire continental shelf of the North Sea formed a 'natural prolongation' of the land domains of each coastal State, and therefore required division on a similar basis. It is also noteworthy that the Court, not accepting the applicability of the 'equidistance/special circumstances rule', approached the question on a broad basis of 'equity', while certain judges who regarded the 'equidistance/special circumstances rule' as a rule of customary international law, came to a substantially similar conclusion in favour of the Federal Republic by regarding the configuration of the German North Sea coast, or the North Sea as an entity, as a 'special circumstance' within the meaning of that rule.[1]

2. Another feature of importance is the rejection by the majority of the Court of any rigid rule of delimitation such as the 'equidistance' rule as part of customary international law. It may be recalled that Judge Bebler in the *Rann of Kutch* case similarly declared that the 'median' line, in application to lake and sea areas, was not a mandatory rule of international law.

3. It is, moreover, of interest that the Court felt able to apply as the basis of its decision principles of 'equity' overtly, although it had not been authorized to adjudicate *ex aequo et bono*. In such a case the distinction between adjudication *ex aequo et bono* and the application of 'equity' as being directed by a rule of law becomes remarkably fine. However, it is noteworthy that in the *Anglo-Norwegian Fisheries* case the Court found it possible to take account of geographical and socio-economic considerations in its judgment (and these same considerations were subsequently formulated in Article 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone) without reference to considerations of 'equity' at all.

Conclusions

This exploration of the practice of international adjudication seems to warrant the formulation, at least tentatively, of the following conclusions.

(i) *Specific directions to tribunals are frequently inadequate*

International tribunals frequently find the rules which they may have been directed to apply inadequate to resolve the particular dispute referred to them. Thus, for example, the provisions of treaties, awards or legislation which purport to delimit a boundary may be found to be ambiguous, inconclusive or incomplete.[2]

[1] See, e.g., Separate Opinion of Judge Padilla Nervo, *I.C.J. Reports*, 1969, pp. 85 et seq.; Separate Opinion of Judge Ammoun, pp. 148 et seq.; Dissenting Opinion of Judge Morelli, pp. 197 et seq.

[2] For treaties, see in Section II: *Cordillera of the Andes Boundary* case; *Chamizal* award. In Section III: *Grisbadarna* case. For awards, see in Section II: *Argentine–Chile Frontier* case. For

Professor Kelsen has this to say about the process of interpretation:

> The function of authentic interpretation is not to determine the true meaning of the legal norm thus interpreted, but to render binding one of the several meanings of a legal norm, all equally possible from a logical point of view. The choice of interpretations as a law-making act is determined by political motives. . . .[1]

Granted, then, that interpretation is 'a law-making act' of 'giving a meaning to the text',[2] it is sometimes still suggested that there are, or ought to be, restrictions on the evidence which may be considered. Since there are no exclusionary rules of evidence in international law, discussion whether this or that item (such as *travaux préparatoires*)[3] should or should not be referred to, might be thought mere pedantry. Attempts have, however, been made to list the types of evidence to which recourse may be had. The *Harvard Draft* provides that:

> A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in the circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purposes which the treaty is intended to serve.[4]

Clearly, in substance this simply means that the treaty must be interpreted in the light of all the evidence, relating to the periods before, during and after the conclusion of the treaty, which may be offered by the parties. Indeed, this approach is followed in a more recent statement of the factors to be taken into account in the process of interpretation: the *American Law Institute Restatement* lists nine factors to be considered, and adds: 'There is no established priority as between the factors indicated . . . or as between them and additional factors not listed.'[5] It may be suggested, however, that in the context of specific types of dispute, the factors considered can be given more concrete form, and, indeed, priorities may be assigned to them. The factors particularly important in boundary and territorial problems have already been listed, and the priorities assigned them by international tribunals are discussed below.

The most significant problems of interpretation which have arisen in practice have related to events subsequent to the document—treaty, award or legislation—to be interpreted. In particular, administrative practices

legislation, see in Section II, *Honduras–Nicaragua* and *Honduras Borders* (for *uti possidetis*) and the *Meerauge* award.

[1] *The Law of the United Nations*, p. xv.

[2] *Harvard Research Draft on the Law of Treaties*, p. 946.

[3] The *Island of Timor* case, *R.I.A.A.*, vol. 11, p. 481, affords one example where the *travaux préparatoires* were probably decisive.

[4] Art. 19. Cf. Vienna Convention on the Law of Treaties, Arts. 31 and 32.

[5] Section 147.

may have developed—perhaps diverging at central and local government levels—and previously unpopulated areas may become populated.[1] It is, of course, generally admitted that a treaty may be modified or even terminated by a development of practice or change of circumstances subsequent to its conclusion.[2] This may be done explicitly by agreement of the parties, or it may be done implicitly by a tribunal applying concepts, for example, of acquiescence, preclusion (or estoppel). There is the possibility of the application of the *clausula rebus sic stantibus*; but this controversial concept, though applied in the practice of States either to modify or terminate obligations, has been avoided by judicial tribunals. Its function can often effectively and more circumspectly be fulfilled by the concepts of acquiescence and preclusion.

Tribunals have also had difficulty in applying certain specific criteria: in particular, that of *uti possidetis*.[3] The reasons for this are clearly explained and exemplified in the *Honduras Borders* case. Like any historical criterion —treaties and awards, since they purport to 'freeze' a situation at a particular date may be thought of as historical criteria—it suffers the defect of being difficult to elucidate at a later date, and also, perhaps, of not corresponding to the requirements of the situation of fact at the date when its application is questioned. Moreover, there has been the problem—also arising in the application of treaties and awards—of inadequate knowledge of the geographical circumstances at the date of the decrees relied on, and the fact that territory—frequently unexplored—may never have been under any effective administration.[4]

It is almost unnecessary to point out the inadequacy and inappropriateness of the formulations of rules of customary international law traditionally offered. That the traditional modes of acquiring State territory—discovery, occupation, prescription, accretion, cession and subjugation (or conquest) —together with their corresponding modes of losing State territory are

[1] See the *Argentine–Chile Frontier* case in Section II (above, p. 33 n. 2). Cf. the *Frontier Land* case, *I.C.J. Reports*, 1959, p. 209.

[2] The inevitable and proper tendency to take account of events, etc., subsequent to the relevant treaty, award, *uti possidetis* date, etc. (albeit under the guise of an aid to establishing the situation at the earlier date) indicates the artificiality of the 'critical date' concept as elaborated by Fitzmaurice, this *Year Book*, 32 (1955–6), pp. 20–44. Cf. Jennings, op. cit. (above, p. 20 n. 2), pp. 31–5.

[3] See above, p. 22. See especially the comments of Lapradelle, *La Frontière*, pp. 76–87. *Uti possidetis* could be described as a form of 'critical date' with a general application—but it seems no more useful to describe it thus than, say, a treaty of cession. Indeed, the legal notion behind the application of *uti possidetis* to actually determining the course of a boundary (as distinct from using the concept simply to exclude 'occupation' and colonization—a form of Monroe Doctrine) is, in a sense that sovereignty was ceded by the former sovereign. The point is, that the very concept of a rigid 'critical date' is not found useful in deciding disputes—yet if the date is left flexible it probably serves no purpose at all. See, e.g., the *Argentine–Chile Frontier* case (above, p. 33 n. 2), pp. 68–9.

[4] See the *Cordillera of the Andes Boundary* and *Honduras–Nicaragua* cases, also the *British Guiana Boundary* case, *R.I.A.A.*, vol. 11, p. 11.

insufficient to do more than provide theoretical explanations of the holding of unchallenged territory has been demonstrated frequently in the examples given above.[1] Thus, 'prescription' is of a very doubtful status[2]—and in the only case in which a definition was laid down in the *compromis* it was not explicitly applied.[3] Definitions of 'occupation' by tribunals have had to be progressively attenuated to meet the problem that 'acts of sovereignty' are frequently exiguous—until the concept may now be said to have been effectively and gratefully jettisoned by both tribunals and jurists.[4] Moreover, the distinction between 'occupation' and 'prescription' has itself been obliterated in favour of the flexible but vague concept of 'consolidation'.[5] Certainly those 'modes' afford no solution to disputes in which two or more parties claim territory relying on different—or even sometimes the same—'mode'. To this problem, the traditional formulations offer no solution—or applicable rules—at all. Furthermore, boundary delimitation and demarcation practices—e.g. methods of drawing base-lines (and their length), equidistance and median lines, watershed and crest-lines—may be pressed by the parties as mandatory rules, but find no support as such in the practice of tribunals or the general practice of States.[6]

(ii) *Tribunals interpret their authority extensively in order to resolve disputes definitively*

Nevertheless, the examples discussed above show that international tribunals adjudicating boundary and territorial disputes consider themselves to be required to resolve disputes definitively. There are few examples—none in this sample—of refusals to adjudicate.[7] Tribunals,

[1] See, e.g., the *Brazil–British Guiana Boundary, Meerauge* (R.D.I. L.C. (1908) 38), *Island of Palmas* and *Rann of Kutch* awards.

[2] See the *Chamizal* (*R.I.A.A.*, vol. 11, p. 309) and *Meerauge* awards (above, in the preceding note).

[3] See *British Guiana Boundary* case (*Great Britain* v. *Venezuela*), *British and Foreign State Papers*, vol. 92, p. 160: the views of the parties on its application (and the relevant date) conflicted —compare, e.g., British Counter Case, ibid., pp. 107 et seq., with Venezuelan Argument, pp. 353 et seq.

[4] See the *Island of Palmas* and *Rann of Kutch* awards; also the *Eastern Greenland* case (*P.C.I.J.*, Series A/B, No. 53, p. 22), the *Minquiers and Ecrehos* case (*I.C.J. Reports*, 1953, p. 47).

[5] See de Visscher, *Theory and Reality in International Law*, pp. 200–3; Johnson, [1955] *Cambridge Law Journal*, p. 219; Schwarzenberger, *American Journal of International Law* (1957), p. 303. Compare, however, Waldock, 'Disputed Sovereignty in the Falkland Islands Dependencies', this *Year Book*, 25 (1948), p. 311; Johnson, 'Acquisitive Prescription in International Law', ibid., 27 (1950), p. 332; Lauterpacht, 'Sovereignty over Submarine Areas', ibid., p. 376, at pp. 393 et seq. An alternative approach has been to lay greatest stress on the role of 'acquiescence (and recognition) often in the form of 'estoppel' or 'preclusion': see in particular the writers cited below, p. 96 n. 2.

[6] See the *North Atlantic Coast Fisheries, Anglo-Norwegian Fisheries, Rann of Kutch* and *North Sea Continental Shelf* cases above, pp. 61, 64, 70, 80 nn. 1, 1, 1, 1.

[7] The *Northeast Boundary* case is the usual example. See also *Peru* v. *Ecuador*, Carlston, op. cit. (above, p. 3 n. 4), p. 207, and Judge Urrutia Holguín, loc. cit. (above, p. 46 n. 1).

finding the criteria which they are explicitly directed (e.g. by the *compromis*) to apply so often inconclusive, interpret their authority so as to permit a decision based on other criteria.

(iii) *States acquiesce in these interpretations by tribunals of their own authority*

The examples discussed above are admittedly only a selection from the major disputes of this century. But even of the total number, relatively few have been questioned by the parties as vitiated by *excès de pouvoir*, and all have subsequently been put into effect—albeit sometimes with reservations or modifications.[1] It may be said that the acceptance of an award is governed less by abstract legal considerations (of *excès de pouvoir*, etc.) than by the award's inherent merits—and even an unsatisfactory solution may be better than none.

(iv) *Criteria applied by tribunals to resolve territorial disputes*

International tribunals have in practice developed a number of criteria for attributing sovereignty to one or other party.

(*a*) *Recognition, acquiescence and preclusion (or estoppel)*

Understandably, the first search of a tribunal faced with a dispute is to find a solution upon which the parties can be said to have agreed. In a sense, this is always an artificial approach: if there were any real agreement, there would be no dispute. Yet it is clear that a solution which purports to give effect to some pre-existing 'agreement' of the parties may be more acceptable, and, indeed, form some protection to an award against allegations of *excès de pouvoir*. Consequently, where genuine bilateral agreement in the form of treaties or the fulfilment of some recognized criterion such as *uti possidetis* is lacking or inconclusive, more artificial concepts of consent in the form of unilateral acts have been developed. Most notably in territorial cases these have been applied by the Permanent Court (in the *Eastern Greenland*[2] case, for example) and the International Court (where the *locus classicus* is of course the *Temple* case[3] and also the *Arbitral Award of the King of Spain*[4] case).

This approach forms one major trend in the jurisprudence of the International Court. It should, however, be contrasted with the approach of

[1] In this selection, the *Honduras–Nicaragua* and *Chamizal* awards. Other boundary awards are the *Bolivia–Peru* award (1909) (*R.I.A.A.*, vol. 11, p. 133)—subsequently accepted by the parties and modified by treaty—and the *Colombia–Costa Rica* (1900) (La Fontaine, *Pasicrisie internationale*, p. 396) and *Costa Rica–Panama* (1914) (*R.I.A.A.*, vol. 11, p. 519) awards. The latter, which modified the former, was effectively enforced by the United States.

[2] *P.C.I.J.*, Series A/B, No. 55, p. 22.

[3] *I.C.J. Reports*, 1962, p. 6.

[4] *I.C.J. Reports*, 1960, p. 214.

arbitral tribunals, which have not generally relied on the concepts of recognition, acquiescence and estoppel, but rather base their decisions on the substantial practical links of a disputed territory.[1] This approach too may be seen in the jurisprudence of the International Court (most clearly in the *Anglo-Norwegian Fisheries*, *Minquiers and Ecrehos*, and *North Sea Continental Shelf* cases), but an alternative basis of decision in terms of acquiescence, etc., is usually emphasized. The reasons for this slight difference of approach are not altogether obvious: they may include the reason offered above; the lack of attention accorded the jurisprudence of arbitral tribunals; and the difficulty encountered by a body such as the International Court in reaching agreement on substantive rules of law—and its consequent tendency to stress rules and concepts predominantly of procedure and evidence.

It has been suggested by some writers that acquiescence (especially as creating an estoppel) plays a major role in the acquisition of title to territory.[2] Thus, according to Schwarzenberger, 'Titles to territory are governed primarily by the rules underlying the principles of sovereignty, recognition, consent and good faith.'[3] On closer examination this formula reduces to 'the actual exercise of territorial jurisdiction' (sovereignty) and 'estoppel' (which is the primary effect of the principles of recognition, consent and good faith). In Blum's view the major element in a 'historic title' is 'acquiescence'.[4] This approach affords, for a number of reasons, an unsatisfactory legal basis for decision.

First, reliance on unilateral acts of recognition or acquiescence as precluding a party from contesting a claim can appear notably unjust. The *Arbitral Award of the King of Spain* and the *Temple* cases are not above criticism. In the former, it might be thought that excessive stress was laid on a failure to protest against an award for five and a half years—a relatively short period—and a considerable delay in instituting proceedings for settling the dispute. The latter decision has been criticized for attaching too great weight to a failure to protest by a weak State against an encroachment by its powerful imperial neighbour. In a condition of organization of international relations in which bilateral negotiations are the typical method of settling disputes, judicial settlement is rarely resorted to, and, in any event, compulsory jurisdiction is still undeveloped, it can appear

[1] See below, under (*b*).

[2] See Lauterpacht, 'Sovereignty over Submarine Areas', this *Year Book*, 27 (1950), p. 376, at pp. 393 et seq.; MacGibbon, 'Some Observations on the Part of Protest in International Law', ibid., 30 (1953), p. 293, 'The Scope of Acquiescence in International Law', ibid., 31 (1954), p. 143, and 'Customary International Law and Acquiescence', ibid., 33 (1957), p. 115; Bowett, 'Estoppel before International Tribunals and its Relations to Acquiescence', ibid., p. 176; Blum, *Historic Titles in International Law*; Schwarzenberger, 'Title to Territory: Response to a Challenge', *American Journal of International Law* (1957), p. 308.

[3] Op. cit. (above, n. 2), p. 324.

[4] Ibid., pp. 38 et seq.

unreasonable that delay in instituting proceedings for binding settlement of a dispute is taken for acquiescence in a claim. Similarly, it has been cogently observed that to attach too high a probative value to acquiescence is to put a premium on constant and vigorous protest—surely inimical to equable international relations.[1] Furthermore, the concept of estoppel by acquiescence can put a relatively weak State, with no desire to, or good reason to, antagonize a powerful neighbour, at a considerable disadvantage if it finds itself in a position to assert a right later. This point was made very strongly by Judges Spender and Wellington Koo in the *Temple* case.[2] Clearly apart from the extreme situation of Thailand and France in that case, there are frequently reasons why States may prefer to let an issue—and the territorial cases which have come before international tribunals, particularly the International Court, are frequently of very minor importance—lie dormant for a time.

There are two further difficulties in applying the concept of estoppel to inter-State relations. They are, briefly, that States have a long life span (much longer, on average, than an individual), and are agglomerations of many organs—each of which is made up of many individuals. The application of the concept of estoppel in the broad terms formulated by Judge Alfaro in the *Temple* case therefore meets considerable difficulties of practical application. He put it in the following terms:

> . . . a State party to an international litigation is bound by its previous acts or attitudes when they are in contradiction with its claims in the litigation.[3]

Now even in the case of individuals, of whom singleness of mind over a period of time may reasonably be expected, the fact that this broad concept of 'good faith' may work injustice is recognized in the restrictions and technicalities by which the broad rule becomes hedged. In particular, as Judge Fitzmaurice described it (in more restrictive terms than Judge Alfaro) in the same case,

> . . . the essential condition of the operation of the rule . . . is that the party invoking the rule must have 'relied upon' the statements or conduct of the other party, either to its own detriment or to the other's advantage . . . [T]hese statements, or this conduct, must have brought about a change in the *relative* positions of the parties, worsening that of the one, or improving that of the other, or both.[4]

[1] Johnson, *International and Comparative Law Quarterly* (1962), p. 1183, at p. 1203; cf. MacGibbon, this *Year Book*, 30 (1953), p. 293.

[2] *I.C.J. Reports*, 1962, p. 6, at pp. 85 et seq. (esp. p. 91), and pp. 129 et seq. See also Kelly, 'The *Temple* Case in Historical Perspective', this *Year Book*, 39 (1963), p. 462. A similar point was made by Judge Bebler in the *Rann of Kutch* arbitration, above, p. 77.

[3] *I.C.J. Reports*, 1962, p. 40.

[4] Ibid., p. 63. The rule is framed similarly in the *North Sea Continental Shelf* judgment, § 30. Cf. the limitations of the scope of estoppel in English law, e.g. estoppel by deed: Cross, *Evidence* (3rd ed.), pp. 283–4.

In applying this rule to inter-State relations, it is arguable that even greater restrictions should be placed on it. The long life of States, their multiple and changing representation and the multiplicity of their interests, combine to make 'inconsistency' and 'blowing hot and cold' not a sign of 'bad faith' in any morally blameworthy sense, but simply a normal and natural feature of their acts over any prolonged period of time.

Apart from the temporal difficulty in applying the concept of estoppel, there is the further difficulty that a State does not necessarily speak with one voice at the same time. Illustrations of this in territorial cases are to be found in the *Frontier Land*,[1] *Temple*,[2] *Argentine–Chile Frontier*[3] and *Rann of Kutch*[4] cases. These cases show that it is quite possible for a State to be, say, practically administering territory at a local level which does not appear on its official maps, or failing to administer territory which does appear on its maps, and that such a situation can persist for a considerable period of time without its arousing attention at the diplomatic level. Similarly, it is apparently possible for more than one State to be administering, to a greater or lesser extent, the same territory. In such cases no simple, tidy estoppels can really be made out. The situation requires a weighing of the activities and positions taken by the claimants.

Perhaps unfortunately, recent decisions of the International Court have seemed to give a greater importance to maps than to administrative activities in attributing sovereignty.[5] Reasons for this may be that official maps are preferred as acts more closely related to a central governmental authority; whereas administrative activities mostly operate on the local level. Furthermore, maps may afford more notorious evidence of claims to other possible claimants and to third parties. However, equally cogent arguments might be adduced in favour of emphasizing administrative activities. As Judge Lauterpacht remarked in his dissenting declaration in the *Frontier Land* case,

> . . . the fact that local conditions have necessitated the normal and unchallenged exercise of Netherlands administrative activity provides an additional reason why, in the absence of clear provisions of a treaty, there is no necessity to disturb the existing state of affairs and to perpetuate a geographical anomaly.[6]

A consequence of these problems of both time and multiplicity of representation of States is that not only can a theoretical 'estoppel' easily be made out against one party, but also frequently against both. This situation arose in the *Temple* case: Thailand failed to protest about the maps, while

[1] *I.C.J. Reports*, 1959, p. 209. [2] Ibid., 1962, p. 6. [3] See above, p. 33.
[4] See above, p. 70 and in particular the comments of Entezam.
[5] For criticism of this see Weissberg, 'Maps as Evidence in International Boundary Disputes: A Reappraisal', *American Journal of International Law* (1963), p. 781. Cf. the *Argentine–Chile Frontier* case and the *Rann of Kutch* award, above, pp. 33, 70, for recent examples of a less rigid approach to maps as evidence. [6] *I.C.J. Reports*, 1959, p. 230.

the French authorities in Cambodia failed to protest the acts of administration undertaken by Thailand in the disputed area. In the *Argentine–Chile Frontier* case both parties tried to establish estoppels—in maps, statements in diplomatic correspondence, and acquiescence in administrative activities. In such cases a court might: attach more weight to one type of activity than another, e.g. maps in the *Temple* case; state that technically the claims of estoppel by both parties have been made out, and both parties are estopped from their respective claims; state that neither party has made out an estoppel against the other and weigh the activities as simply part of the general picture of the evidence. Substantially this latter was the course adopted in the *Argentine–Chile* case; in the *Rann of Kutch* arbitration *relatively* greater, but not conclusive, weight was attached to maps—so as to create a presumption in favour of the boundary there described, but rebuttable by evidence of a contrary factual situation.[1]

(*b*) *The attribution of territorial sovereignty on the basis of preponderant administrative, social, geographical, historical and cultural links*

Although the application of concepts of acquiescence and estoppel have found most favour with the International Court, arbitral tribunals—and the International Court in the *Eastern Greenland*,[2] *Anglo-Norwegian Fisheries*[3] and *Minquiers and Ecrehos*[4] cases—have tended to adopt a different approach. The principles applied in the resolution of the majority of the disputes outlined above have been, broadly, the weighing of all the considerations put forward by the parties, and the award of the disputed territory to the claimant to which it is most closely linked.

The considerations put forward by the parties may be roughly divided into the following categories. Evidence of actual *administration* of disputed areas; if the territory is inhabited, the *affiliations of the inhabitants*; *geographical links* including the strategic importance of the area, of the disputed area with the territory of the claimant; similar *economic links*; *historical, social* and *cultural* links; general considerations of *convenience*. The weighing of these connecting factors is not simply quantitative. The decisions examined reveal certain priorities, and some divergences in the criteria applied to attributing sovereignty over land and sea and inhabited and uninhabited areas appear.

Land areas. Actual administration of territory is here the most important single factor.[5] This is easily comprehensible: it is both an obvious reflection

[1] There are interesting observations from a geographer's point of view on the value which should be attached to maps, etc., appended to verbal descriptions of boundaries in Jones, *Boundary-Making*, pp. 64–5, 86 et seq.

[2] *P.C.I.J.*, Series A/B, No. 53, p. 22.

[3] *I.C.J. Reports*, 1951, p. 116.

[4] Ibid., 1953, p. 47.

[5] See, e.g., the *Minquiers and Ecrehos* case, *I.C.J. Reports*, 1953, p. 47, at p. 57: 'What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the

of a close interest in territory, and a reflection of the virtual impossibility of ousting a State in clear possession of an area in favour of a claimant. Where the territory is inhabited, the affiliations of the inhabitants will be of great—but, probably, because of the considerations militating in favour of the State in actual possession, secondary—importance.[1] Where the administration is itself disputed and doubtful, the affiliations of the inhabitants will probably be decisive.[2] In inhabited areas considerations of geography, strategy, etc., will usually be a very secondary consideration.[3] Economic, historical, cultural and social factors, and considerations of convenience will usually correspond to the affiliations of the inhabitants. But these considerations, even if they do not all weigh on the same side, will probably only call for some adjustment of a boundary delimited primarily on the basis of the affiliations of the inhabitants.[4]

In uninhabited or sparsely inhabited areas acts of administration are usually scanty and the notion of 'possession' is somewhat fictional. Affiliations of the inhabitants, of course, will be non-existent. Here geographical considerations become of paramount importance. It is in this context that the concepts of 'natural frontiers', 'contiguity', the unity of islands and archipelagos, and the 'sector' theories of division of polar regions appear and are of considerable practical value. In the adjudication of territorial disputes of this type, there is normally no trace of any concept of 'reasonableness' of claims, such as seems to be found with respect to maritime claims, but rather an emphasis on natural geographical units and boundaries.[5] For the tribunal is normally only given the authority to determine to which of two claimants the territory belongs. And there is no general interest of the international community in land territory such as there is in the high seas and sea bed; the trend of both State practice and international adjudication is to eliminate the status of *territorium nullius* for all practical purposes.[6] Where even the geography of the area is insufficiently established, lines of compromise and convenience may be drawn.[7]

Sea areas. The important considerations here are not dissimilar to those applied in uninhabited land territory. The major distinction is that, because

Ecrehos and Minquiers groups.' There are similar statements in the *Island of Palmas* and *Walfisch Bay* (*R.I.A.A.*, vol. 11, p. 267) cases.

[1] See, e.g., *Andes Boundary* case, *Argentine–Chile Frontier* case, *Minquiers and Ecrehos* case.

[2] See, e.g., *Brazil–British Guiana Boundary* case, *Honduras Borders* case and cases cited in the preceding note.

[3] See, e.g., *Honduras Borders* case.

[4] They may be of importance in themselves where the population is nomadic. See *Walfisch Bay* case for grazing grounds of semi-nomadic tribe as of significance.

[5] See, e.g., *Andes Boundary*, *Meerauge*, and *Guiana Boundary* cases.

[6] *Clipperton Island* (*R.I.A.A.*, vol. 2, p. 1105) and *Eastern Greenland* case.

[7] See, e.g., *Barotseland Boundary* case (*R.I.A.A.*, vol. 11, p. 59) and Lindley, op. cit. (above, p. 12 n. 5), pp. 123 et seq. In *sui generis* areas such as the sea bed and its sub-soil (continental shelf, other shallow-water areas and the ocean bed) the concepts both of *territorium nullius* and of a general interest of the international community may still be relevant, however.

(since in this case the outward boundaries of maritime claims separate State territory from a *res communis*) the interests of the general international community must be taken account of, a concept of 'reasonableness' has been applied. Actual administration of sea areas is, of course, somewhat fictional. Actual exploitation of the resources of the disputed area is probably the most decisive consideration.[1] Except, perhaps, in cases of conflict of activities, it is not material whether the exploitation is carried on by State or private agencies.[2] In either event, the activities of nationals in an area provide occasion for some form of administrative activity by the State. If there is a conflict between State and private activities, then probably State activity establishes a priority of interest—this is particularly so if the private activity by nationals of one claimant is in pursuance of a licence granted by the other claimant.[3] The position where there is a prior private activity by nationals of one State and a subsequent State or State-licensed activity by another is more doubtful: probably an international tribunal would be inclined to take advantage of any ambiguities in the situation to safeguard private interests;[4] otherwise, State interests would probably prevail.[5] An actual economic interest is probably decisive whatever the precise geographical circumstances. A potential economic interest is probably of considerable weight only where linked to geographical considerations.[6]

Apart from such primarily economic considerations, geographical circumstances are probably the next most important criterion for attributing sovereignty over sea areas.[7] All the concepts which have been developed in the practice of States—e.g. internal waters, territorial waters, fishing zones, the continental shelf—derive from these considerations of geographical appurtenance and national security, and the interest of States in exploiting the waters off their coasts. These interests are of course balanced by two further factors: the interests of other States in those same sea areas and the capacity of the coastal State to assert and protect its interests—forcibly if necessary.[8] In international adjudication these factors are reflected in a balancing of the interests of the coastal State with those of the other users of the disputed waters; and this appears in a concept of 'reasonable'

[1] *Grisbadarna, North Atlantic Coast Fisheries, Gulf of Fonseca* and *Anglo-Norwegian Fisheries* cases.

[2] *Grisbadarna* and *Fisheries* cases.

[3] *Honduras Borders* case, at p. 1359.

[4] *Grisbadarna* case.

[5] *Honduras Borders* case, at p. 1352.

[6] Cf. the *Honduras Borders* case, above, p. 50 n. 2.

[7] See the *North Atlantic Coast Fisheries, Gulf of Fonseca* and *Anglo-Norwegian Fisheries* cases.

[8] Cf. Judge Read in the *Anglo-Norwegian Fisheries* case: 'The only convincing evidence of State practice is to be found in seizures where the coastal State asserts its sovereignty over the water in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration' (*I.C.J. Reports*, 1951, p. 191). Cf. MacGibbon, this *Year Book*, 30 (1953), p. 293.

claims.[1] It should be noted that, although general concepts of 'equity' and reasonableness may be said to underlie the rules of convention and practice for delimiting maritime boundaries—e.g. the median line, the line of equidistance, the sector principle, distance limits—these are lines akin to those once frequently used for the delimitation of uninhabited and unexplored land areas, of which little or nothing was known in detail. Thus, although they may superficially appear 'equitable' or 'convenient', they may be far from appropriate when their demarcation is attempted.[2] Practice provides useful tests against which the 'reasonableness' of claims to maritime territory may be tested, but it cannot sensibly be taken to legislate for all special circumstances.

Areas sui generis. The criteria which have been applied in State practice and by tribunals in regard to land and sea areas of differing characteristics provide a store of criteria for the attribution of sovereignty over any area. It is not possible to offer an exhaustive set of priorities applicable to every area, or even to select appropriate analogies. Thus, in the case of the Rann of Kutch it was not unreasonable to suggest that a median line—on the analogy of maritime areas—would offer an appropriate presumptive division. Instead, greater stress was laid on the relevant weight of maps and activities of the claimant States and their predecessors and their citizens in the area. The sort of criteria more usually applied to disputes over land territory were applied to the Rann. On the other hand, to the technically land area of the sea bed State practice seems to be evolving diverse criteria for the continental shelf and the deep ocean bottoms. In State practice prior to the Geneva Convention on the Continental Shelf and in that Convention the analogy of land areas is mainly applied: emphasis is laid on the continental shelf as a continuation of the land domain of a coastal State. Even though in the Continental Shelf Convention a geographical definition is not adopted—partly in order to include areas within the ambit of the Convention which were not, in the strict sense 'continental shelf'—in areas where there is a 'continental shelf' in the geographical sense its edge probably provides an outer limit to claims based on that Convention. The criterion for the attribution of sovereignty is, in effect, geographical continuity.[3] With regard to the continental slope and the ocean bottom,

[1] See especially the *Anglo-Norwegian Fisheries* case: note also the concept of 'natural prolongation' in the *North Sea Continental Shelf* judgment.

[2] For an example of an 'inequitable' result of an equidistance line, see the *North Sea Continental Shelf* cases. See Jones, op. cit. (above, p. 21 n. 7) for the practical problems inherent in demarcating boundaries delimited on one general principle (pp. 94–165); for geometrical boundaries in particular see pp. 151–62, and for 'faulty delimitations', see pp. 66–71.

[3] Cf. *North Sea Continental Shelf* cases, loc. cit. (above, p. 81 n. 1), p. 22: 'the 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 *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it . . .'.

however, it may be that criteria analogous to those used in sea areas may be developing: that the concepts of the 'general interest', *res communis* and 'reasonableness' may be of greater significance.

(v) *The status as international law of the criteria adopted by tribunals for the attribution of sovereignty*

The question must now be considered of the status as international law of the criteria described in the preceding section. First of all, it may be useful to compare these criteria with the theoretical formulations of the law of territory which have been offered by writers.

The purely theoretical constructions which do not claim to be founded on the practice of international tribunals are, primarily, the traditional analogy of Roman private law on the modes of acquiring property; and rules drawn from certain fundamental principles of international law: sovereignty, recognition, consent and good faith. It has been mentioned above that these latter rules are expressed in 'the actual exercise of territorial jurisdiction' and 'estoppel'. The inadequacies of these formulations have been pointed out above.[1]

Theories which are offered as primarily based on the practice of States or of international tribunals are those associated with the names of Max Huber, Charles de Visscher and Sir John Fischer Williams.

Huber's theory was that—apart from the traditional modes of acquiring territory—'the continuous and peaceful display of territorial sovereignty . . . is as good as a title'. Essential constituents of this concept were: State activity *à titre du souverain*; continuity over some undefined period of time, and, to the extent appropriate to the territory, over the disputed area; some element of acquiescence by other States.[2] This definition might serve as an adequate justification for undisputed territorial sovereignty, and suffice to determine disputes such as the *Island of Palmas*, where the basis of the claimant title was the exiguous one of mere discovery, but it could not serve to determine disputes in which no, or conflicting, acts of sovereignty were asserted, or the elements of a passage of time, or acquiescence, were not fulfilled.

De Visscher's concept of 'consolidation' reflects the experience of the *Anglo-Norwegian Fisheries* case: it provides a fair description of the criteria applied in that decision, and in other decisions relating to sea areas, such as the *North Atlantic Coast Fisheries* and *Gulf of Fonseca* cases.[3] The essentials of this formulation are 'proven long use' allied to 'a complex of interests and relations which in themselves have the effect of attaching a

[1] At p. 96. [2] Jennings, op. cit. (above, p. 20 n. 2), pp. 20–3.

[3] *Theory and Reality in International Law*, pp. 200–3; see also Bastid, 'Les Problèmes territoriaux dans la jurisprudence de la cour internationale de justice', *Recueil des cours*, vol. 107, p. 361.

territory or an expanse of sea to a 'given State' and 'acquiescence' or 'a sufficiently prolonged absence of opposition'.[1] Its major defects are its vagueness—it makes no attempt to analyse the 'complex of interests and relations' involved—and that it merely purports to be yet another 'mode' of acquiring title added to the existing traditional list. Furthermore, it does require some time element ('long use', 'prolonged absence of opposition') to operate, and also some element of acquiescence, whether 'properly so called' or not. Consequently, it provides insufficient guidance for the decisions of concrete disputes.

The theoretical formulation which best approximates to the detailed criteria actually followed by tribunals is that of Fischer Williams. He sets them out in the following form:

> If we ask, not what is in fact the basis on which the actual international ownership of territory rests, but what are the considerations by which an international tribunal would usually be guided if called on to decide the fate of a territory, we shall find perhaps the most authoritative statement of these considerations in the recitals to the treaty . . . [of] October 28, 1920, between the Principal Allied Powers . . . and Roumania, for regulating the destinies of Bessarabia . . . [T]he reasons given are (1) the interests of the general peace of Europe, (2) geographical, ethnographical, historical and economic considerations, (3) proof given that the population desired the actual settlement made, and lastly (4) the desire of Roumania to guarantee good government generally, and, in particular, protection of racial, religious and linguistic minorities.[2]

This formulation provides a modern set of considerations appropriate to territorial changes, and also accords surprisingly accurately—although not founded on them—with the considerations which have been applied by judicial tribunals to resolve questions of disputed sovereignty over land territory.

Apart from the various 'modes' of *acquiring* territory, the *extent* of the territory acquired (by whatever mode) has been little discussed by modern writers. The most useful discussions are to be found in nineteenth century writings,[3] but the criteria offered are generally geographical (including

[1] For comment, see Johnson, [1955] *Cambridge Law Journal*, and Jennings, op. cit. (above, p. 20 n. 2).

[2] 'Sovereignty, Seisin and the League', this *Year Book* 7 (1926), p. 24, at p. 34. On the importance of the wishes of the population see pp. 33–4: 'To the wishes (of the population), if an international tribunal has to decide to whom a territory is to be awarded, some weight, at any rate, must be given, not perhaps receiving a decisive weight to the neglect of all other considerations, but *some* weight.' Cf. Kozhevnikov, op. cit. (above, p. 5 n. 4), pp. 185 et seq., and the awards, especially of President Wilson and of the U.N. General Assembly, above, p. 7 n. 4.

[3] For probably the most useful discussions see Hall, *International Law* (2nd ed.), pp. 101–7, 114–16; Phillimore, *International Law*, vol. 1, pp. 237–65; Twiss, *The Law of Nations*, pp. 190 et seq., and *The Oregon Question Examined*; also Hyde, *International Law*, vol. 1, pp. 439 et seq.; Fiore, *Le Droit international codifié*, Ss. 1044–54, 1070–2; De Martens, *Précis du droit des gens moderne de l'Europe*, vol. 1, pp. 120 et seq. (and Note 21 to 2nd ed.). A useful collection of treaty provisions and views of writers on river boundaries is collected in U.N. Doc. E/ECE/136, Annexes 1 and 2. On the 'median line' as a rule of international law see Bebler's Opinion in the *Rann of Kutch*; and the *North Sea Continental Shelf* cases.

'security'). For example, they suggest that there is a presumption in favour of the unity of moderate sized islands and the assimilation of nearby islands to the mainland; in the case of river boundaries, the *thalweg* and median line are offered as presumptions or rules. The more difficult problem perhaps is that of the boundaries of the area deemed to be 'constructively occupied' by a settlement, for example, on a continent or large island: here watersheds, water-basin, median lines between settlements (and in the case of settlements divided by rivers, *thalweg* and median line boundaries) are suggested. The legal significance to be attributed to influence over the native inhabitants of colonized areas also provides yet more controversial problems. It has further been argued whether the 'mode' by which territory is acquired has any effect on the extent of the territory thereby acquired: e.g. whether 'occupation' affords constructive title to some reasonable extent of territory not in fact settled, while 'prescription' or 'conquest' give title only to the area in fact occupied. But although writers sometimes purport to offer general 'rules' it can only usefully be concluded that each individual situation requires treatment on its own merits.

(*a*) *Recognition, acquiescence and preclusion*

Now of the criteria applied by tribunals to resolve territorial disputes, the legal status of recognition, acquiescence and preclusion may be regarded as non-controversial. They require elaboration and refinement and their application to particular facts may be difficult and unsatisfactory, but they are admittedly 'legal' concepts. Administrative, social, economic, geographical, strategic, historical and cultural criteria are, although more concrete, controversial. Some writers have described such considerations as for the most part 'political' not 'legal',[1] or at best as a 'penumbra of equities'.[2] This criticism can take two forms: it may be suggested that certain criteria are inappropriate to be taken into consideration by a judicial tribunal, or simply that a legal title cannot be founded on these criteria alone.

It may be suggested that the first criticism is groundless. It has been pointed out above that no satisfactory line has been drawn between 'legal' and 'political' considerations, and that the development of the international law of territory has been stimulated and shaped by social, economic, geographical, etc., considerations. Furthermore, whatever the legal weight to be attached to these considerations, these are, at the least, part of the

[1] Jennings, op. cit. (above, p. 20 n. 2), Chapter 5.

[2] Brownlie, op. cit. (above, p. 8 n. 1), p. 156. See also Jenks, op. cit. (above, p. 13 n. 3), p. 357: 'In boundary cases it may sometimes be particularly difficult to distinguish clearly the application of principles of equity, recommendations for action . . . and decisions *ex aequo et bono*.' And (p. 421): 'In territorial matters equity is a composite of history and geography which it is difficult to express as a principle.'

facts of the individual case, and must necessarily be taken into consideration on that account.

The criticism that a legal title to territory cannot be founded on such considerations alone is of greater significance. Thus, all the criteria mentioned are elements of some theory of sovereignty over territory.

(*b*) *Possession and administration*

Possession or administration of territory is an element of the traditional 'modes' of occupation, prescription and conquest; it is a precondition for the operation of the process of recognition or acquiescence, and is an important element of 'the continuous and peaceful display of territorial sovereignty', and the concept of 'consolidation'. All these formulations require something in addition, however; either the passage of an indeterminate period of time, coupled with acquiescence or simple absence of opposition of the international community in general or of particular interested States, or some positive act of recognition. It may be suggested, however, that emphasis on the passage of time or on acquiescence as legally necessary to the perfection of title by possession is mistaken. These additional elements simply serve to show whether there are in fact any rival claimants seeking to administer the same territory, or whether there is general opposition—for example, to the acquisition of territory by force—implying that the territory is insecurely held. In either of these latter cases, the resolution of the dispute, were it referred to an international tribunal, would have to be based on the variety of other considerations outlined above; where territory has been acquired by force, then international law on the use of force and the validity of title by 'conquest' would require consideration also.

It is conceded in the order of priority of application of criteria suggested above that social, economic and geographical considerations cannot in isolation found a title to territory. Since actual administration takes priority, they cannot normally prevail against clear evidence of possession. It is probably only where such evidence of administration is ambivalent or absent that other criteria have decisive weight.

(*c*) *Affiliations of the inhabitants of disputed territory*

This is probably one of the more theoretically controversial criteria.[1] It must be remembered, however, that the traditional theories of territorial sovereignty were developed with reference to uninhabited areas, or with respect to relations between colonizing powers *inter se* in areas inhabited by 'natives'.[2] Today, there are few significant uninhabited areas, and the

[1] But see Fischer Williams and Kozhevnikov, loc. cit. (above, p. 5 n. 4).

[2] See above, p. 20 and especially Lindley, op. cit. (above, p. 12 n. 5): relations with the native inhabitants were generally secured and formalized by treaties of protection or cession. Some of them are criticized by Westlake, in *Chapters on International Law*, pp. 143 et seq.

principle or right of self-determination and the doubtful status of title by 'conquest' (whether by the lawful or unlawful use of force)[1] have probably led to considerable modification of the traditional law. Furthermore, modern territorial and boundary disputes generally concern not situations of dynamic expansion of frontiers, but relatively static situations where boundaries are settled in principle or within relatively narrow limits. Claims now generally affect relatively small areas of territory and are concerned less with territorial aggrandisement than with the establishment of a convenient and stable boundary.

Furthermore, in most disputes concerning inhabited territory, the affiliations of the inhabitants will be bound up with, and reflected in, the actual administration of the territory.[2] It must be remembered that most acts of administration commonly relied on to establish sovereignty require the voluntary co-operation of the inhabitants, and, in frontier areas, involve a choice by the inhabitants between the facilities offered by each of the claimant States. This is true, for example, of acts of administration involving voluntary registration: e.g. of births, marriages and deaths, of transactions relating to property and of livestock, etc. The payment of rates and taxes and so forth may also involve some degree of choice between the claims of neighbouring authorities. Such matters are always the stuff of administration, and in isolated or sparsely populated areas may be virtually the only evidence of continuous administration.

(*d*) *Geographical considerations*

It has been mentioned that these have always, and unsurprisingly, shaped the development of claims to both maritime and sea areas. Not only have they affected the customary law of the sea, but they have also found expression in attempts to codify that law. Thus, in the Geneva Convention on the Territorial Sea and Contiguous Zone, it is provided that the criteria for drawing straight base-lines, i.e. for including sea areas within internal territory, are (1) that they 'must not depart to any appreciable extent from the general direction of the coast', and (2) that 'the sea areas lying within

[1] See Jennings, op. cit., pp. 52 et seq. and the views expressed in the U.N. General Assembly (during the 5th Emergency Special Session) on the status of Israel in the territories occupied after the 1967 June war. For a different view (distinguishing the 'lawful' and the 'unlawful' use of force) see Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria', *Israel Law Review*, 3 (1968), p. 279, and E. Lauterpacht, *Jerusalem and the Holy Places*.

[2] See, e.g., the *Brazil–British Guiana Boundary*, *Honduras–Nicaragua*, *Island of Palmas*, *Honduras Borders*, *Argentine–Chile* (1902 and 1966) and *Rann of Kutch* awards. Cf. the *Grisbadarna* and *Norwegian Fisheries* cases. See also *Costa Rica–Panama* (*R.I.A.A.*, vol. 11, p. 519), *Barotseland Boundary* (ibid., p. 59), *Walfisch Bay* (ibid., p. 263), *Colombia–Venezuela* (ibid., vol. 1, p. 263), *Minquiers and Ecrehos* (*I.C.J. Reports*, 1953, p. 4), *The Legal Status of Eastern Greenland* (*P.C.I.J.*, Series A/B, No. 53, p. 22). The *Frontier Land* case (*I.C.J. Reports*, 1959, p. 209) is, of course a marked exception to this approach. See also the views of Sir Thomas Holdich, *Political Frontiers and Boundary Making*, on the *desiderata* of boundary-making; also Jones op. cit. (above, p. 21 n. 7).

the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters'.[1] The provisions of this Convention for delimiting boundaries of the territorial sea between opposite and adjacent States admit the exception of 'historic title or other special circumstances'.[2] The concept of the continental shelf is fundamentally a geographical concept translated—perhaps not very satisfactorily—into legal terms. The essential elements of the legal concept of the continental shelf are the geographical concepts of 'adjacency' and 'continuity' of submarine land areas to the mainland. It is again noteworthy that reference to 'special circumstances' is made in relation to the problem of boundary delimitation.[3] Of course, such 'special circumstances' need not be all geographical, but they must surely include geographical considerations.

More contested in theory have been reliances on geographical considerations in claims to land areas. But undoubtedly they have served in practice to delimit the boundaries of claims to uninhabited regions.[4]

(*e*) *Economic considerations*

These, like the affiliations of inhabitants, are perhaps controversial. In the practice of international adjudication, it has been noted that they are applied mainly in claims to sea areas.[5] Together with geographical concepts, they have provided the motive force behind claims to exclusive fishing zones and to the continental shelf. Indeed, it may be said that they are the basis of these claims, and that the claims are limited only by geographical considerations. No doubt economic factors should be classed amongst the 'special circumstances' relevant to sea and continental shelf delimitation. They have also generated claims to uninhabited land territory.

(*f*) *Historical considerations*

These, in alliance with possession, have always been recognized by theorists as of significance. In theoretical formulae they are reflected in the concept of the passage of time as an element in title. In one sense, almost all the evidence relied on to substantiate any title or claim is historical, whether it be length of actual administration, or documentary evidence in the form of treaties, grants and awards, etc., or special rules such as ***uti possidetis***. Difficulties arise only when historical considerations such as a prior administration of an area are divorced from actual possession where

[1] Art. 4 (2). [2] Art. 12 (1). [3] Art. 6.

[4] *Brazil–British Guiana Boundary* case; see also the discussion of the 'Hinterland' doctrine—and the conditions for its application, in the *Walfisch Bay* case. See further the writers referred to above, p. 104, n. 3, and the views of Holdich in *Political Frontiers and Boundary-Making*, and of Lord Curzon in *Frontiers*.

[5] *Grisbadarna*, *Anglo-Norwegian Fisheries* case; and also, to submarine areas, *North Sea Continental Shelf* cases above, p. 81, for the question of unity of deposits, and to socio-economic questions which might (on the model of the *Fisheries* case) have been taken into consideration.

clearly it is necessary to apply some criterion of 'remoteness', such as is found in the traditional significance of the passage of time as an element in title and concepts of acquiescence and 'a sufficiently prolonged absence of opposition'. Yet these traditional concepts provide no firm guide-line as to the length of time necessary, or even the elements of acquiescence. No strict line is probably even desirable or possible.

(*g*) *Other considerations*

Within this category might be included such links as cultural unity, and a host of considerations which can only be lumped together under the heading of 'convenience'. Their status as a basis for territorial claims on their own would be very controversial and probably unacceptable. They no doubt do in practice have importance as additional factors supporting the more weighty considerations set out above. They may indeed in exceptional circumstances tilt the scale one way or another, and they may be decisive in modifying in minor ways a boundary determined on the basis of other criteria.

In summary the status of the criteria applied by international tribunals may be stated thus. The criteria of administrative, geographical, social and economic links are regularly applied by 'political' tribunals in the settlement of territorial problems. They are also regularly relied on as cogent evidence in support of their claims by the parties to judicial and arbitral proceedings. They are, indeed, simply the sort of considerations on which any sensible decision to attribute sovereignty should clearly be based. They are applied regularly by international judicial and arbitral tribunals with or without explicit authority in the *compromis*. This weight of practice of both States and international institutions cannot but suggest that, even if they do not commonly find a place in the textbooks, they are generally recognized as appropriate criteria which any decision on territorial sovereignty must regard. Furthermore, these criteria do play a part as elements in most theoretical formulations of the law on the acquisition of territory.

It is probably not appropriate to describe these criteria as rules of customary law, since they are not very easily formulable as rules. The elements to which tribunals must have regard—apart from straightforward documents of title—in territorial cases can be listed. They can be ranged in order of priorities. But since the whole point of this approach is not to apply rules of thumb, but to weigh all the links of the territory with each claimant, and to award sovereignty to the claimant with preponderant links with the whole of the territory—or, if the authority is given, to split the territory—the process cannot be merely quantitative, and the criteria listed can serve only as guide-lines, not rules. The description in the *Anglo-Norwegian Fisheries* case of the role of certain of these considerations in

decisions on the delimitation of the territorial sea may serve to explain the role of all of them:

> . . . certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decision, which can be adapted to the diverse facts in question.[1]

It is therefore not as rules but as 'criteria . . . which can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question' that the administrative, social, geographical, economic, etc., considerations can best be seen. It may be noted that the absence of 'precise' criteria or rules is not a feature only of the customary international law of attribution of territory. It is typical of the law on the attribution of other competences: for example, jurisdiction in civil and criminal matters, and the conferment of nationality.

(vi) *The powers of tribunals to make awards on the basis of criteria not explicitly set out in the* compromis

Turning now to the problem of the powers of international tribunals to make awards on the basis of criteria which they were not expressly authorized to apply, and which may—in theory—be of doubtful status as rules of international law, it is useful to recall the conclusions drawn from the practice of international tribunals:

(i) Tribunals consider that they are both authorized and required to render a definitive decision of the dispute referred to them.[2]

(ii) To this end, they employ criteria which they are not expressly authorized by their constituent instrument to apply.

(iii) The criteria applied are derived by analogy or implication from any special rules laid down in the agreement for arbitration, or from the arguments presented by the parties. Tribunals seem to regard themselves as implicitly restricted to such considerations.

(iv) Similarly, awards rendered by tribunals—even those which consider themselves to have been given a very wide authority—never exceed, and

[1] *I.C.J. Reports*, 1951, p. 116 at p. 133.

[2] There are numerous arguments against the adjudication of particular categories of dispute and particular cases, and numerous examples of judicial restraint in both international and municipal judicial practice (see p. 18 above and works cited there). But in the practice of international tribunals such examples of restraint seem to be mainly of tribunals with *compulsory* jurisdiction, to the exercise of which one party objects. If both parties want the tribunal to resolve their dispute, then surely the tribunal would be correct in implying the necessary powers to do so. See, e.g., the *Honduras Borders* case (whether the reference to *uti possidetis* signified *de jure* or *de facto* possession) and the *Honduras–Nicaragua* case (whether the powers expressly conferred on a mixed commission by the Gámez–Bonilla treaty were impliedly conferred on a single arbitrator dealing, under the provisions of that treaty, with a disagreement between the members of the mixed commission).

often fall short of, the claims of the parties. That is, the *non ultra petita* principle is applied—with a further tendency towards compromise.

(v) On the whole, States acquiesce in this exercise of authority.

Now this is certainly the pattern found in the decisions examined above. But it is doubtful whether any satisfactory generalization which would amount to a customary rule can be made. If, however, one were to make the attempt, the rule might run thus:

(A) International tribunals have implied authority to give a definitive decision of each dispute referred to them. Moreover, they are required to do so, and are not entitled to refuse to adjudicate, if the parties concur in their doing so.

(B) In that case, they must apply such criteria as are expressed or implied in any special rules laid down in the *compromis*. Failing these—which are, of course, the criteria which *both* parties agree should be employed—they must apply such criteria as have been put forward in the arguments of the parties. The tribunal thus has a discretion to select from the submissions of the parties the criteria to motivate its decision.

(C) A tribunal is not entitled to award more to a party than it has claimed.[1]

It will be obvious that in any particular case problems may arise over rule (ii). They may arise in connection with the interpretation of the rules laid down, or the claims of one party may be based on considerations which seem quite extravagant to the other. Yet no precise line of demarcation between 'extravagant' and 'reasonable' considerations can be made, once it is admitted that international tribunals are required to take account of—and do—a host of considerations the legal validity of which can only be determined in relation to the particular case. This does leave a very wide discretion to a tribunal, and suggests that without further circumscription it is unlikely to be accepted in all cases by the parties.

Further circumscription of this wide judicial discretion can be suggested along the following lines. In practice, parties may give their assent to an act of a judicial tribunal either in advance, during the course of the proceedings before it, or afterwards; similarly, of course, they may express their dissent. It might therefore be suggested that a party cannot challenge the *vires* of

[1] This assumes that the claim has been phrased in some definite form. There are perhaps three ways in which a question regarding territory or a boundary might be put to a tribunal: (i) whether sovereignty over a determinate area is vested in one party or another (e.g. *Clipperton Island, Island of Palmas, Minquiers and Ecrehos*); (ii) where a boundary lies—whether as claimed by one party or the other, with implied authority to determine a median line—as in the *Argentine–Chile* and *Rann of Kutch* cases; (iii) what is the *status* of a territory, or what principles/rules should be applied to the definition of a boundary—e.g. the *Eastern Greenland* and *Status of South-West Africa* cases exemplify the former and the *North Sea Continental Shelf* cases exemplify the latter. In (i) and (ii) the *non ultra petita* rule clearly applies. In (iii), where the tribunal is asked an abstract question of legal principle, *non ultra petita* may have no application. See further below.

a decision on the ground that it was motivated by unauthorized considerations under the following circumstances:

(*a*) if the considerations applied were expressed or implied in the agreement for arbitration;[1]

(*b*) if they were invoked by that party during the course of the proceedings; or conceded to be within the tribunal's authority;

(*c*) if the decision was subsequently acquiesced in, i.e. either explicitly accepted or not challenged within a reasonable period of time.

These are obvious practical rules. (*a*) is theoretically non-controversial, though there can obviously be scope for dispute as to the criteria 'implied' in an agreement. Thus, it may be queried to what extent the process of 'interpreting' a treaty should go, or what precisely is implied in a reference to 'the principles of international law'; but in practice these may often be resolved by reference to (*b*), which is certainly controversial, because it formed one of the bones of contention in the *Honduras–Nicaragua* case. The arbitrator, the King of Spain, had, in making the award in question, taken account of certain considerations of which he regarded himself as authorized to take account by the *compromis*. During the proceedings, the representatives of Nicaragua—which challenged the validity of the award—had conceded the authority of the arbitrator to apply these considerations. It was subsequently contended that this was not binding on Nicaragua.

The argument under (*c*) above is supported by the decision of the International Court in the *Arbitral Award* case. The difficulties of application have been pointed out above. In any event, what is 'reasonable' should be interpreted in the light of the factors discussed above.[2]

(vii) *The limits of the judicial function in territorial and boundary disputes*

It has been pointed out above that the criteria which judicial and arbitral tribunals customarily employ to attribute sovereignty are similar to the criteria which they are sometimes explicitly required to take into account and also to the criteria applied by political bodies for the same purpose. This is hardly accidental: these criteria represent current views on sound boundary-making. They accord with the needs of States for geographical

[1] For problems, see n. 1 on the preceding page. It is a generally accepted rule that an arbitral tribunal is judge of its own competence and has the power to interpret the *compromis* (see, e.g., I.L.C. *Model Rules on Arbitral Procedure*, Art. IX). But this is balanced by the further principle that an award may be challenged on the ground that the tribunal has exceeded its powers (e.g., ibid., Art. XXXV (a)). There is an interesting discussion of this problem and the relevant State practice on the question by Judge Urrutia Holguín in the *Arbitral Award* case—slightly spoiled by referring to the *Honduras Borders* award as an instance of a strict application of the *uti possidetis* rule and therefore a decision strictly in accordance with law.

[2] At pp. 105 et seq.

unity, economic viability and a cohesive population. Since these criteria are generally applied by judicial arbitral tribunals, however, it may be suggested that it is fallacious to draw a distinction between judicial and political means of dispute settlement (e.g. conciliation, mediation, etc.) on the basis of the criteria applied. The only generally valid and basic distinction is that 'political' means of settlement are rarely binding decisions, while judicial settlement is.

There are, however, differences of technique in the application of these criteria. Since judicial tribunals are of their nature required to apply law, they cannot be so free in their reasoning as political bodies. Thus, if documents of title such as treaties or laws are relied on by the parties to a dispute, or claims based on customary law are made, they cannot be ignored by a judicial tribunal: they must be interpreted. It has been pointed out that the principles of interpretation are so flexible, and customary rules of such doubtful status or value, that they hardly limit the decision which a tribunal may make. But they do restrict its mode of reasoning. Furthermore, there may be some inherent limits to the function of interpreting, say, treaties, which can make its exercise beyond a certain point unconvincing. In addition, a judicial tribunal must operate within limits acceptable to the parties: and these may suggest some caution in the exercise of quasi-legislative powers. Despite these unclear and indefinite limitations, it is suggested that this exploration of the practice of international tribunals shows that tribunals exercise a function distinguishable from both the simple 'application' of law, and from the general making of 'policy' or legislation for the international community as a whole. Their major function in adjudicating territorial and boundary disputes has been to resolve disputes of detail, rather than issues of principle, according to practical criteria appropriate to sound boundary-making. In effect, they exercise a power of delegated legislation for the individual case.

It is perhaps necessary to consider at this point the view that arbitrators dispose of wider powers of adjustment or minor legislation, a greater discretion in taking account of the 'equities' of the particular situation, than do strictly judicial tribunals, that is, permanent courts. There seems to be no real basis for any suggestion that the scope of considerations which judicial, as opposed to arbitral, tribunals may take account of is narrower: a wide range of social, economic and geographical criteria were explicitly taken account of in the *Anglo-Norwegian Fisheries* and *North Sea Continental Shelf* cases, and historical and cultural considerations were not of themselves described as irrelevant in the *Temple* case. In the *Jaworzina*[1] case, the Permanent Court explicitly invoked the notion of the historic boundaries of the States in dispute, and the ethnographical factors

[1] Series B, No. 8.

presuming in their favour. In the *Minquiers and Ecrehos* case, the International Court relied for its decision on the broad range of connections of the disputed island with Jersey, manifested mainly in the activities of individuals—fishermen from Jersey. In the *Gulf of Fonseca* case a wide range of economic, geographical and strategic criteria were explicitly set out by the Central American Court of Justice as appropriate to determining the legal status of waters as 'bays'.

If international courts do, however, sometimes display a greater caution in their reasoning or in their decisions—and the *Arbitral Award*, *Frontier Land* and *Temple* cases perhaps offer examples of this—the reason may lie not in any inherent limitations on the judicial as opposed to the arbitral process, but rather in the characteristics of permanent courts. Their very permanence, and the fact that they are of regional or world-wide composition and have some degree of compulsory jurisdiction can encourage caution in the setting of precedents and the development of law, unless there is reasonable certainty that their decisions will command the approval, not only of the parties to the individual dispute, but more generally of the States which accept their jurisdiction. There is also clearly greater difficulty in obtaining agreement on any specific rules of law from a body of considerable size and disparate composition. It may therefore be suggested that there is a range of disputes of significance only to the parties, and perhaps their immediate neighbours, which are most fittingly settled by *ad hoc* arbitration or by appropriate regional tribunals.

A further factor which may be of significance in imposing restrictions on the judicial and arbitral function may be the type of dispute which is referred to adjudication. Thus, Jones[1] distinguishes four stages in the history of a boundary: '(1) Political decisions on the allocation of territory, (2) delimitation of the boundary in a treaty, (3) demarcation of the boundary on the ground, and (4) administration of the boundary'. Following McMahon's terminology,[2] he distinguishes 'delimitation' and 'demarcation': 'Delimitation means the choice of a boundary site and its definition in a treaty or other formal document. It is a more precise step than the general allocation of territory which preceded it, but less precise than the demarcation which usually follows.'[3] Of course, these stages may overlap, even so far as to be barely distinguishable where they are performed more or less simultaneously. Thus, say, a broad decision on allocation of territory may be made by treaty, e.g., on ethnographic criteria or on the basis of the

[1] Op. cit. (above, p. 21 n. 7), p. 5. Cf. Lapradelle, op. cit. (above, p. 8 n. 1), who distinguishes the stages of 'preparation', 'decision', 'execution' and 'voisinage'. See also Prescott, *The Geography of Frontiers and Boundaries*.

[2] 'International Boundaries', *Journal of the Royal Society of Arts*, 84 (1935–I), p. 2.

[3] Loc. cit. (above, p. 21 n. 7), at p. 57. He also notes 'A treaty *defines* a boundary, the final report of the demarcation commission *describes* it'.

status quo, and commissioners may be charged with both delimiting and demarcating the boundary on this basis; or allocation and delimitation may be performed by the same body, say, an international conference, and commissioners subsequently charged with demarcation.

Now clearly any one of these stages may be referred to international adjudication, and one might classify the territorial and boundary disputes discussed above according to the stages to which they relate.[1] The *Island of Palmas*, *Clipperton Island* and the *Minquiers and Ecrehos* cases are 'allocation' disputes and awards. The *Eastern Greenland* case was an example of 'allocation' which could, if the Court had found in favour of Norway, have required a decision on 'delimitation' of the boundary between Norwegian and Danish possessions in Greenland. The *North Sea Continental Shelf* cases afford in substance a decision of 'allocation' rather than, as the Court averred, 'delimitation'—it will be recalled that the Court was not there asked to 'delimit' the boundaries in dispute, but to perform the preliminary task of deciding 'What principles and rules of international law are applicable to the delimitation . . .'. The Court put its decision in terms of a finding of a pre-existing customary 'inherent right' to continental shelf areas constituting a 'natural prolongation' of a State's land territory; yet this was by no means previously uncontroversial, and the finding of this principle constituted in effect a decision on 'allocation' (or, as the Federal Republic termed it 'apportionment'), although—perhaps as a matter of judicial technique—this was explicitly denied.

In the *British Guiana Boundary* cases decisions on 'allocation' of substantial portions of territory and on the 'delimitation' of the boundary between the areas awarded to each party were combined—as also in the *Rann of Kutch* award. In the *Jaworzina Boundary* case the Permanent Court in effect gave a decision on the allocation and delimitation of a boundary on the basis of the *status quo ante*. The *North Atlantic Fisheries* and *Gulf of Fonseca* cases (in so far as they related to bays) and the *Anglo-Norwegian Fisheries* case involved decisions on the allocation of sea areas and their delimitation and, in the latter case, the technical problem of base-line demarcation.

In some cases the adjudicating tribunal has been required to demarcate the boundary: thus in the *Andes Boundary* case the tribunal was in effect required to delimit, and, via a demarcation commission, demarcate the boundary. Examples of awards which relate purely to the 'demarcation' stage are the *Monastery of Saint-Naoum*, *Colombia–Venezuela Boundary* and the *Argentine–Chile Frontier* cases.

Now although the factors of which account should be taken in settling disputes at any one of these stages will include some or all of the factors

[1] We are not here concerned with disputes relating to the 'administration' of a boundary.

discussed above, it is evident that discretion of the tribunal will be progressively limited as the boundary is more closely defined. In the allocation of territory the tribunal will be most free to take account of the widest considerations of policy.[1] Once territory has been allocated on the basis of some principle—such as *uti possidetis*—the range of discretion is necessarily narrowed, and will be progressively more attenuated as the boundary is more closely defined by custom, treaty or prior award, until, in disputes at the demarcation stage, the tribunal has scope only to make minor adjustments to fit the boundary as defined to the ground.

[1] As an 'allocation' question in an unusual context the I.C.J. advisory opinion on the *Status of South-West Africa* may be instanced—an opinion in which broad policy considerations may be regarded as having been paramount.