THE DISTANT ISLAND PROBLEM: THE ARBITRATION ON THE DELIMITATION OF THE MARITIME ZONES AROUND THE FRENCH COLLECTIVITÉ TERRITORIALE OF SAINT-PIERRE-AND-MIQUELON

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INTRODUCTION

On July 29, 1991, an international court of arbitration convened in New York City to hear arguments by France and Canada in their thirty year-old dispute over rights to the waters surrounding the French possession of Saint-Pierre-and-Miquelon. The court, which is chaired by the Honorable Eduardo Jimenez de Arechaga of Uruguay, a former justice of the International Court of Justice in the Hague, will render a binding and unappealable decision in the arbitration in early 1992.

A. Overview of the Franco-Canadian Dispute

Saint-Pierre-and-Miquelon are a group of small islands lying 15 miles off the south coast of Newfoundland outside of the Gulf of St. Lawrence and the Cabot Strait on the edge of the Laurentian Channel in the Atlantic Ocean. The islands have a surface area of 93 square miles, a coast line of 10.5 miles, and, according to recent figures, a population of approximately 6500. The main industries of the islands are fishing and tourism. Prior to 1976, the islands were a French territoire d'outremer. In 1976, they became a département, and in June, 1985, they were made a collectivité territoriale.

Since the 1960s, France and Canada have been locked in a dispute over the fishing and hydrocarbon rights in the zone surrounding the islands, and in 1966 a moratorium on oil and gas exploration was put in place. In the early 1970s, the fishing dispute was complicated when Canada closed the Gulf of St. Lawrence to foreign fishing

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1 See Appendix, Figures 1a and 1b.
vessels. In 1972, France and Canada negotiated an agreement that permitted France's fishing rights to be phased out over a period of fifteen years.

France’s declaration in 1976 of a 200-mile exclusive economic zone around the islands and Canada’s declaration in the same year of a 200-mile fishery zone along its coast brought the claims of the two countries directly into conflict. When the phase-out period for French fishing rights in the Gulf of St. Lawrence expired in 1986, the controversy flared up again, exacerbated by political pressures in both countries. In Canada, these political pressures were due in part to the aftermath of a dispute between the central government and the Maritime Provinces over rights to the continental shelf, and in part to the dissatisfaction of the inhabitants of Newfoundland, Canada’s poorest province and one heavily dependent on its fishing industry, over the concessions on fishing quotas granted to France by Canada in the latter’s pursuit of a definitive settlement of the boundary dispute. On the French side, these political pressures took the form of vigorous and occasionally violent opposition by the Saint-Pierrais on one hand and the Breton deep-sea fishing fleet on the other to the fishing policy pursued by the metropolitan government.

The expiration at the end of 1987 of a fishing agreement between Canada and the European Community, and, thus, of any rights that France might have had under that agreement, somewhat simplified the parameters of the boundary dispute between France and Canada.

In 1987, Canada and France agreed in principle to submit the delimitation question to arbitration, and in 1989 agreement on the terms of the arbitration was finally reached. At the same time, the
parties reaffirmed the existing moratorium on oil and gas exploration and reached an agreement on fishing quotas in the disputed waters through the end of 1991, the expected duration of the arbitration. With respect to delimitation, the tribunal was asked to draw a single line that would serve for all purposes, including rights to the floor of the continental shelf, fishing rights, and exclusive economic zone rights.

Initial memorials were to be submitted by June 1, 1990, and countermemorials were to be returned by February 1, 1991. The international court of arbitration convened on July 29, 1991, and heard arguments through August 23, 1991. The court is composed of five members. In addition to Justice Jimenez de Arechaga, there is one judge from each of the parties, as well as a judge from the United States and another from Italy. Silence has been imposed on the parties with respect to any settlement proposals, and a decision by the tribunal is expected in early 1992.

The present study analyzes the background to the Franco-Canadian arbitration and the question submitted to the arbitral tribunal, details the positions asserted by each party to the extent that these have been made public or can be inferred, discusses the considerations that may govern the eventual decision of the arbitral tribunal, and suggests the form that a lasting settlement might usefully take.

B. Proportionality and the Distant Island Problem

The Franco-Canadian dispute raises a problem known as “the distant island problem.” Where delimitation involves an island be-

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7 Agreement Relating to Fisheries for the Years 1989-91, March 30, 1989, Can.-Fr., 29 I.L.M. 7 (1990) (done at Paris and Toronto) [hereinafter 1989 Fisheries Agreement]. Article 5 of the agreement provides that the quotas may be extended through the end of 1992 if an arbitral award is not forthcoming before then.
8 Maritime Arbitration Agreement, supra note 6, at art. 6(2).
10 Maritime Arbitration Agreement, supra note 6, at art. 7(7).
longing to one of two states that are adjacent or opposite, arbitral
panels have generally employed the equidistance principle as the
starting point for delimitation, making subsequent adjustments as
equity demanded.\textsuperscript{13} The same principle has been employed where the
delimitation involved an island that was a sovereign entity and an
opposite or adjacent state.\textsuperscript{14} Where the delimitation involves an island
that is a dependency whose sovereign state is neither adjacent nor
opposite to the other state, however, it has been argued that appli-
cation of the equidistance principle is likely to produce an inequitable
result. The principle of proportionality, it is urged, militates in favor
of enclaving and against the use of the modified equidistance principle
even as the starting point for delimitation. As one commentator has
put it, “[p]roportionality, no less than equality, proceeds from the
general concept of equity, and equity may require either equal or
proportionate treatment depending on the particular circumstances
of the case.”\textsuperscript{15} Under a broad construction of the proportionality
principle, consideration as a full baseline point should not be accorded
an entity, particularly a dependent entity, whose population, land
mass, or shoreline are grossly disproportionate to those of the other
party.\textsuperscript{16} In its narrowest and most mechanical application, the pro-
portionality principle would take as the starting point for delimitation
the ratio between the dry land areas or the length of the coastlines\textsuperscript{17}
of the two parties.

Because of Saint-Pierre-and-Miquelon’s status as a dependency of
a distant sovereign; because of the disproportion between the islands’
land mass, shore line, and population and those of Canada; because
of their “awkward” proximity to the Canadian coast; and because
of the inability of the parties over a period of twenty-five years to
reach a negotiated settlement of the delimitation question, the con-
troversy over Saint-Pierre-and-Miquelon raises the distant island prob-

\textsuperscript{13} See Arbitration Between the United Kingdom and Northern Ireland and the
14, 1977 (Cmd. 7438, 1979), reprinted in 18 I.L.M. 397 (1979) [hereinafter Channel
Islands Arbitration].

\textsuperscript{14} Continental Shelf (Libya v. Malta), 1985 I.C.J. 4 at 13 (June 3).

\textsuperscript{15} Gunther Jaenicke, \textit{The Role of Proportionality in the Delimitation of Maritime
Zones, in Realism in Law-Making} 51, 51 (Adriaan Bos & Hugo Siblesz eds. 1986).

\textsuperscript{16} Consideration as a full baseline point means that an entity is entitled to full
territorial rights in the maritime zone adjacent to it (i.e., the rights to a territorial
sea, an exclusive economic zone, and a continental shelf zone), undiminished by
considerations of proportionality.

\textsuperscript{17} Jaenicke, \textit{supra} note 15, at 52.
lem in its most acute form. It has been asserted that no previous negotiation or arbitration of a delimitation involving the distant island question offers an exact parallel with, and hence useful guidance for, the present controversy. For these reasons, the present arbitration will be obliged to wrestle with a problem for which neither existing legal principles nor past adjudications offers a ready solution.

II. HISTORICAL BACKGROUND TO THE ARBITRATION

A. Dispute over Hydrocarbon Resources on the Continental Shelf

The Atlantic Coast of Canada contains significant hydrocarbon reserves. According to one report, there have been fifty discoveries of oil and gas in the continental shelf. While the hydrocarbon potential of the area disputed in the present arbitration has not been fully assessed, there have been discoveries of oil to the north of the disputed area in the Hibernia field off the coast of Newfoundland and discoveries of natural gas to the south in the Sable Island field off the coast of Nova Scotia.

Beginning in the mid-1960s, both France and Canada issued exploration permits on the continental shelf to the south of the islands within the exclusive economic zone claimed by France in 1976. Significantly, the French permits were issued to Petropar, the state-owned petroleum company. A moratorium on exploration in this area was apparently agreed to in 1966 and renewed in 1976, immediately after Canada announced its 200-mile fishery zone and France its 200-mile exclusive economic zone, although the terms of the moratorium have never been made public. The moratorium appears to have lapsed in 1981; and in 1983 a French seismic vessel, escorted by a French naval vessel, began exploration in the area. The

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19 Id. at 160 n.1.
20 McDorman, Canada and France Agree to Arbitration, supra note 11, at 359.
21 Douglas Day, Maritime Boundaries, Jurisdictional Disputes, and Offshore Hydrocarbon Exploration in Eastern Canada, 23:3 J. CAN. STUDIES 60, 69 (1988). For a map showing the location of oil and gas leases in the disputed area, see Appendix, Figure 2.
22 The French leases were subsequently transferred to Elf-Aquitaine, while the Canadian leases were issued to Gulf Oil and later to Mobil and Texaco. Day, supra note 21, at 69, 73.
23 McDorman, Drawing a Line, supra note 18, at 161 and n.24.
French initiative triggered a Canadian protest and, in June 1984, resulted in a new agreement, which similarly remains unpublished but which reportedly provides that neither country will interfere with the activities of the other in the disputed zone. The moratorium was again threatened on June 9, 1987 when France announced a decision to begin issuing oil exploration permits in the disputed zone, apparently in retaliation for Canada’s decision of March 17th to close Canadian ports to French fishing vessels and for a lack of progress in the negotiations to reopen them. Canada immediately protested, and no permits appear to have been issued.

The area claimed by France is delimited on the landward side of the islands by the line established in the 1972 Fisheries Agreement and on the seaward side by a median line between the islands and the coast of Nova Scotia that extends to a point beyond the 2000-meter isobath on the continental shelf. While this area represents a 200-mile exclusive economic zone, under the 1982 United Nations Law of the Sea Convention France could, in theory, assert rights to the continental shelf that would extend considerably farther, to the seaward margin of the continental rise. Since the technology to search for oil and gas at depths below 2000 meters apparently will be available in the not-too-distant future, it is possible that France will argue that the delimitation to be handed down by the arbitral tribunal should take account of both an exclusive economic zone and a full continental shelf claim.

There is no indication that any hydrocarbon discoveries have been made in the disputed area, although this is probably a function of the successive moratoria on exploration and development rather than a reliable index of the area’s potential. Reportedly, the area north of 45°30’N is unpromising, while the area south of this line contains thick Tertiary and Mesozoic sediments similar to those that have

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24 *Id.* at 159.

25 Agreement on Mutual Fishing Relations, Mar. 27, 1972, Can.-Fr., 862 U.N.T.S. 209, 218 [hereinafter 1972 Fisheries Agreement]; see Appendix, Figure 3. This line, which connects nine points, was established according to strict equidistance with respect to five of the nine, the ninth of which is 12.85 nautical miles from Newfoundland and 14.5 nautical miles from Miquelon.

26 *See* Appendix, Figure 4.


28 *Id.* at art. 77; *see* Appendix, Figure 5.
yielded substantial hydrocarbon reserves in other areas. The moratorium on exploration remains in effect, and a systematic exploration of the area awaits a resolution of the boundary dispute.

Commentators have speculated that energy-dependent France has clung so tenaciously to its claims to an exclusive economic zone around the islands because of this potential. This explanation is of particular interest, since it suggests that the heat generated by the dispute over fishing rights masks deeper concerns on the part of each government over the as yet unrealized potential for significant hydrocarbon discoveries in the disputed area. If this is the case, it has considerable significance in determining the positions of the parties and the solution that might be acceptable to each.

B. The Dispute over Fishing Rights Along Canada’s Atlantic Coast

Saint-Pierre-and-Miquelon constitute France’s oldest overseas possession. When France relinquished its possessions in Canada to England in 1763, England ceded the islands to France “to serve as a shelter to the French fishermen.” During the 19th Century, fishing in the Gulf of St. Lawrence and along the Atlantic Coast of Canada became a major activity of the French deep-sea fishing fleets. A series of treaties dating back to the Treaty of Utrecht of 1713 and culminating in the 1972 Fisheries Agreement protected this fishing.

1. The 1972 Fisheries Agreement

The Fisheries 1972 Agreement grew out of Canada’s decision in 1971 to declare the Gulf of St. Lawrence an exclusive fishing zone. To that end, it negotiated a series of phase-out agreements with countries whose fleets fished in the Gulf. With two exceptions, these

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29 Day, supra note 21, at 71. See Appendix, Figure 2.
30 See 1989 Fisheries Agreement, supra note 7, at art. 4(b).
34 The rights of the Faroese to fish by longline for porbeagle shark were extended for successive periods of two years, subject to cancellation on one year’s notice. Pharand, supra note 3, at 631.
other phase-out agreements terminated in 1976. Because France’s fishing rights were protected by treaty, vessels from metropolitan France were permitted to continue to fish in the Gulf “on an equal footing with Canadian vessels” for fifteen years, that is through May 15, 1986.\(^{35}\)

In return for France’s renunciation of its fishing rights in the Gulf at the end of that fifteen-year period, fishing vessels from metropolitan France would be permitted to fish in all Canadian waters beyond the 12-mile territorial sea off Canada’s Atlantic Coast in the event that Canada extended the limits of its territorial sea or fishery zone.\(^{36}\) In other words, following any declaration of a Canadian fishery zone, vessels from metropolitan France would have fishing rights both in the disputed area off Saint-Pierre-and-Miquelon and in other, entirely undisputed Canadian waters off the Atlantic Coast.\(^{37}\) Such fishing rights would, however, be subject to “measures for the conservation of resources, including the establishment of quotas.”\(^{38}\) Article 2 of the 1972 Fisheries Agreement was Canada’s first assertion of its right unilaterally to set quotas in its coastal waters, a right that it has asserted with greater vigor since its declaration of a 200-mile fishery zone in 1976.\(^{39}\)

With respect to Saint-Pierre-and-Miquelon, coastal vessels and ten trawlers registered in the islands were permitted to continue to fish along the Newfoundland and Nova Scotia coasts and within the Gulf in those areas where they had traditionally fished,\(^{40}\) while Canadian vessels were granted reciprocal rights to fish off the coast of the islands.\(^{41}\) This was described as “an arrangement between neighbors” that was undertaken “in view of the special situation of Saint-Pierre-and-Miquelon.”\(^{42}\)

A median line was drawn between the landward coast of the islands and the Newfoundland coast.\(^{43}\) The line extends for fifty-four nautical

\(^{35}\) 1972 Fisheries Agreement, supra note 23, at art. 3.

\(^{36}\) Id. at art. 2.

\(^{37}\) See Appendix, Figure 6 for the present limits of Canada’s fishery zone.

\(^{38}\) 1972 Fisheries Agreement, supra note 25, at art. 2.

\(^{39}\) Canada’s right to set quotas unilaterally in the Gulf of St. Lawrence was confirmed by the arbitral tribunal in the La Bretagne Arbitration. 90 REVUE GÉNÉRALE DE DROIT INT’L PUBLIc 713 at 752, 754-756 (1986) (paras. 58, 61, & 63). See infra note 45.

\(^{40}\) 1972 Fisheries Agreement, supra note 25, at art. 4.

\(^{41}\) Id. at art. 2.

\(^{42}\) Id. at art. 4.

\(^{43}\) See Appendix, Figure 3.
miles and demarcates the territorial waters of Canada and "the zones submitted to the fishery jurisdiction of France." 

Finally, the 1972 Agreement established a Commission to arbitrate any future disputes and contained a clause preserving "the future claims of [both Parties] concerning . . . territorial waters or jurisdiction with respect to fisheries of the continental shelf." This agreement superseded all previous treaties on the subject, and no date was set for its expiration.

2. *The Relevé des Conclusions of May 26, 1972*

In 1972 France, and Canada signed a confidential document, designated a Relevé des Conclusions, concerning delimitation of the maritime zone around the islands. The Relevé's binding effect, and hence its relevance to the present controversy, will certainly be disputed by the parties. The Relevé has never been published, and knowledge of its contents derives largely from the references thereto made by the arbitral tribunal in the Channel Islands Arbitration. Under the terms of the Relevé, France is said to have accepted a 12-mile zone of territorial sea around the islands, effectively enclaving them, in exchange for joint management of the hydrocarbon reserves

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47 *Id.* at art. 1.
in the disputed area. While the Channel Islands arbitral panel treated the Relevé as a "provisional" agreement, it is reported that the agreement never took effect because it was rejected by Canada. Commentators generally sympathetic to the Canadian position in the dispute have treated the Relevé as a fully consummated agreement that should be accorded full precedential value. While these commentators assert that the Relevé was cited by France as one of the precedents for enclaving the Channel Islands, it is not clear from the arbitral decision whether the Relevé was raised by France or Great Britain. Because the Relevé apparently gave France a fishing zone of only twelve miles but rights to the continental shelf over a much larger area, it is not illogical that Great Britain rather than France should have argued the precedential value of the Relevé to the Channel Islands dispute. If this is, indeed, the case, then it will be more difficult for Canada, who had refused to adopt the Relevé, to uphold its authority as persuasive precedent in the present dispute.

3. Declaration of 200-mile Zones by France and Canada

On July 16, 1976, France passed enabling legislation permitting the declaration at a later date of a 200-mile exclusive economic zone around the shores of metropolitan France and all overseas possessions. On November 1 of the same year, Canada declared a 200-mile fishery zone, stressing, however, that the Canadian declaration was intended "to be without prejudice to any negotiations or to any positions which may have been or may be adopted respecting the limits of maritime jurisdiction in such areas." On February 25, 1977, France declared, "sous réserve d'accords de délimitation avec

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49 McDorman, Drawing a Line, supra note 18, at 168 n.66.
50 See Channel Islands Arbitration, supra note 13, at para. 177.
51 McDorman, Drawing a Line, supra note 18, at 168 n.66; see also D.M. McRae, Delimitation of the Continental Shelf Between the United Kingdom and France: The Channel Arbitration, 15 CAN. Y. B. INT'L L. 173, 190 n.60 (1977).
52 McDorman, Drawing a Line, supra note 18, at 181; Symmons, supra note 33, at 159. No commentator has argued in favor of the French position, and I failed to locate any article on the subject written by an author from metropolitan France save the periodic "Chroniques des faits internationaux" of Professor Rousseau in the REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC.
53 See Channel Islands Arbitration, supra note 13, at para. 177.
le Canada," a 200-mile exclusive economic zone around Saint-Pierre-and-Miquelon, the first such zone declared by France for one of its insular possessions.\textsuperscript{56}


A constant theme of the fisheries dispute between France and Canada has been the allegations of French over-fishing, described by pro-Canadian commentators as "massive"\textsuperscript{57} and a "plundering of resources."\textsuperscript{58} Over-fishing was a central issue in the \textit{La Bretagne Arbitration}, which recognized the ability of French factory freezer trawlers to take catches far in excess of existing quotas.\textsuperscript{59} Following the conclusion of the 1972 Fisheries Agreement, France and Canada met periodically to negotiate quotas for the disputed zone and the other areas in which France was permitted to fish under the terms of the agreement. At the first meeting following the expiration of the provision phasing out fishing in the Gulf of St. Lawrence by metropolitan vessels, France indicated that it intended to take 26,000 metric tons of cod in Division 3Ps, which covers the disputed zone.\textsuperscript{60} This represented a dramatic increase over the 6400 metric ton quota previously allotted to France by Canada.\textsuperscript{61} France challenged the scientific data, furnished to Canada by the North Atlantic Fisheries Organization, on which Canada relied in setting quotas. It also asserted its right to take 50% of the allowable catch in the disputed area. This dispute led directly to the 1987 \textit{Conclusions Agrées}.

5. \textit{The Conclusions Agrées on Arbitration and Interim Fishing Rights of January 24, 1987}

Under the terms of an arrangement reached in early 1987, the two parties were to undertake negotiations to conclude an agreement to submit the delimitation question to international arbitration.\textsuperscript{62} This arrangement, aptly described by one commentator as "a negotiated

\begin{footnotes}
\textsuperscript{56} Decree no. 77-169 of Feb. 25, 1977, 1977 J.O. 1102.
\textsuperscript{57} Pharand, \textit{supra} note 3, at 638.
\textsuperscript{58} McDorman, \textit{Drawing a Line}, \textit{supra} note 18, at 163.
\textsuperscript{59} \textit{90 Rev. Générale de Droit Int'l Public} 713, 754-757 (1986) (paras. 61-63).
\textsuperscript{60} See Appendix, Figure 6.
\textsuperscript{61} The Canadian figure of 6400 tons represents 15.6\% of the total allowable catch (TAC) for the disputed waters, a percentage based, according to the Canadians, on historic fishing patterns. McDorman, \textit{Canada and France Agree to Arbitration}, \textit{supra} note 11, at 357 and n.4.
\textsuperscript{62} See \textit{supra} note 5.
\end{footnotes}
'non-agreement,'" was not a formal agreement but an exchange of notes referred to by the parties as the *Conclusions Agrées*. In addition, the parties were to negotiate quotas for the period 1988-1991 for French fishing vessels in Canadian waters outside of the disputed area.

In order to obtain France's consent to pursue a final arbitration of all claims, Canada made the significant concession of offering France cod fishing rights in extensive areas off the coasts of Labrador and Newfoundland during the period of the arbitration. In a note of December 30, 1986, Canada reaffirmed the quota for French vessels of 6400 metric tons for Division 3Ps. On January 27, 1987, in a second note Canada increased the number of divisions open to French fishing and increased quotas in divisions already open, but decreased the French quota in Division 3Ps to 2300 metric tons. The arrangement also maintained in place the 1984 agreement not to interfere with the activities of vessels belonging to the other party in the disputed zone.

The second Canadian note stressed that the quotas granted "exceed[ed] the legal obligations of Canada" and had been granted "only so as to facilitate the process leading to the settlement of the dispute." France protested strenuously against the level of the quotas granted and against their unilateral imposition, asserting that these quotas had always in the past been the subject of bilateral negotiations, and announced its own quota of 28,000 metric tons for 1988 and 26,000 metric tons for 1989 in the disputed area.

Shortly after the *Conclusions Agrées* were put in place, relations between France and Canada deteriorated dramatically. On February 10, 1987, the premiers and representatives of Canada's ten provinces called on the federal government to review the *Conclusions Agrées* and to improve its consultation process with the provinces, accusing the government of selling out Newfoundland fishermen in a "dirty deal." On March 17, 1987, in response to France's announcement of its intention to disregard the Canadian quotas, Canada closed all of its ports to French fishing vessels and threatened to arrest any French vessels caught fishing on the Burgeo Bank, an area inside

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63 McDorman, *Canada and France Agree to Arbitration*, supra note 11, at 360.
64 These areas encompassed Divisions 2G, 2H, 2J, 3K, 3L, 3N, 3O, 4R, 4S, and 4Vn; see Appendix, Figure 6.
66 See *supra* text accompanying note 24.
67 *Quoted in* Pharand, *supra* note 3, at 636.
Division 3Ps but outside of the disputed zone. In protest, France broke the talks in June. Negotiations were not revived until August 30th, following Jacques Chirac's arrival in Canada for an official visit. In October, the talks broke down again, and Canada announced the suspension of France's fishing rights in Canadian waters.

In April 1988, the Canadians arrested the *Croix de Lorraine*, a fishing trawler registered in Saint-Pierre, for fishing in Canadian waters. The French reciprocated in May, seizing a Canadian trawler allegedly fishing in French waters. Nevertheless, the talks resumed in April, and shortly thereafter the parties reached an agreement on a formula for the arbitration.

On November 2, 1988, Inter-American Development Bank President Henrique Iglesias was named as mediator, and on March 30, 1989, agreements on arbitration and interim quotas were signed. The flavor of the negotiations and the tensions that have accompanied them are eloquently revealed by the *procès-verbaux* accompanying the 1989 Fisheries Agreement and setting quotas in the disputed zone.

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70 The Canadian Department of External Affairs wrote:

The annual cod quota set by the Canadian authorities for French vessels in sub-division 3Ps, including the part of this zone which is claimed by each party (the "disputed zone"), will be 15.6% of the TAC set by the Canadian authorities annually. Fishing by French vessels in the undisputed Canadian part of subdivision 3Ps will be allowed each year up to the date on which a quantity equal to this quota has been taken by French vessels in the subdivision as a whole. For this purpose, "disputed zone" shall have the same meaning as it has had in practice up to now.

The Canadian authorities have taken note of France's intention of unilaterally setting an annual quota of 15,600t for 1989, 15,100t for 1990 and 14,600t for 1991, for French vessels in subdivision 3Ps. They reaffirm as in the past that such a measure has no legal basis and that any fishing by French vessels in excess of the quota set by the Canadian authorities constitutes overfishing which can be tolerated only in consideration of the present special circumstances.

With regard to the fish quotas specified in the *procès-verbal* of this date, the Department emphasizes that these quotas exceed Canada's legal obligations under the Canada-France fisheries agreement of March 27, 1972, and that they have been allocated solely to facilitate the process leading to the settlement of the dispute between France and Canada concerning the maritime claims of the two States off the coasts of Canada and Saint-Pierre and Miquelon.

It is not without difficulty that these quotas have been granted. The French authorities have no doubt noted the radical measures Canada has been obliged to impose on its own fishermen in several zones, particularly in 2J3KL. It is therefore essential, for each stock affected by quotas for
THE ELEMENTS OF A SOLUTION

A. The Question to Be Answered by the Arbitral Tribunal

The arbitral tribunal was set the following task:

Ruling in accordance with the principles and rules of international law applicable in the matter, the Court is requested to carry out the delimitation as between the Parties of the maritime areas appertaining to France and of those appertaining to Canada. . . . The Court shall establish a single delimitation which shall govern all rights and jurisdiction which the Parties may exercise under international law in these maritime areas.\(^{71}\)

. . . .

The decision of the Court shall be final and binding.\(^{72}\)

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the French vessels, that the amount set in the procès-verbal be the maximum taken from that stock.

1989 Fisheries Agreement, supra note 6, at 12-13.

The French Ministry of Foreign Affairs replied:

The French authorities take cognizance of the mechanism described in paragraph 2 of the note from the Department of External Affairs of Canada. However, they note that the reference to 15.6% of the TAC set annually by Canada in the 3Ps sector has no justification. They object most strenuously to the statement that any fishing activity beyond the level represented by this percentage would constitute overfishing. As the Canadian authorities know, France is legally at liberty to set fish quotas in the "disputed zone", which constitutes its own exclusive economic zone over which it exercises sovereign rights as determined by international law. The French authorities point out, moreover, that the state of the stocks in this sector does not justify the assertion that any quota higher than that determined by the aforementioned percentage would represent over-exploitation of the biological resource, which France opposes as much as Canada does. They confirm their intention to fix the total amount of the fish quotas allocated to French vessels in 3Ps at the levels recommended by the mediator.

The French authorities believe that the agreement resulting from the procès-verbal of this date constitutes an application of the France-Canada agreement of March 27, 1972, which is the legal basis for Franco-Canadian relations in the areas concerned. They categorically reject the statement that the agreed allocations of resources were determined only in order to facilitate the process of settling the dispute between Canada and France regarding the maritime claims of the two States off the coasts of Canada and France between Saint-Pierre-and-Miquelon and Newfoundland. In this respect, they recall that the only connection between the two problems is that established by the "conclusions agréées" of January 24, 1987, by which both parties agreed to establish simultaneously a procedure for third party boundary delimitation and to set fish quotas during the period required for this procedure.

\(\text{Id. at 13-14.}\)

\(^{71}\) Maritime Arbitration Agreement, supra note 6, at art. 2(1).

\(^{72}\) Id. at art. 10(1).
The parties chose not to submit their dispute to the International Court of Justice but to a specially convened arbitral tribunal. It may be that this was done at France's insistence, since it has withdrawn from the general jurisdiction of the Court.

The tribunal has been instructed to draw a single line of delimitation for all uses, a solution that limits the discretion of the tribunal to propose more imaginative solutions (e.g., different boundaries for different purposes, joint management or development zones). It is not impossible, of course, that the tribunal will disregard the strict terms of its mandate and choose another solution.

B. The Respective Positions of France and Canada

The Canadians are likely to assert that because they are an "anomaly" on the Canadian coast, the islands are entitled only to a twelve-mile territorial sea, a position that the Canadians have stated publicly in the past. The Canadian government has also stated publicly its adherence to the principle of proportionality as the key to delimiting the disputed maritime zones. It has taken the position that the French claim to a 200-nautical-mile exclusive economic zone on the seaward side of the islands is "unrealistic" in view of the relative land areas of the islands and the mainland. Under this view, enclaving would represent a straightforward application of the equitable principles-relevant circumstances rule. The relevant circumstance would be the gross disproportion between the land masses and shore lines of the two parties. In making this argument, Canada will likely rely heavily on the decision in the Channel Islands Arbitration. Canada is also likely to assert its need to retain control over its shipping lanes into the Gulf of St. Lawrence and to assert its right to the waters based on the fact that it has historically provided the region's military, coast guard, and environmental services.

73 Id. at art. 1.
74 Pharand, supra note 3, at 637.
76 As Howard Strauss, lead attorney for the Government of Canada, has declared, "The key factor is geography and respective length of the coasts . . . which in our view makes equitable the 12-mile zone" that Canada would impose on the islands. Canada and France in Court over Territorial Dispute, Reuters, July 30, 1991, available in LEXIS, Nexis Library, Omni File.
77 See supra notes 48-51 and accompanying text.
The Canadian appointee to the arbitral tribunal is Alan Gottlieb, former official in the Department of External Affairs and Ambassador to the United States. One commentator has suggested that his appointment indicates that Canada expects to rely on proportionality, an argument that is less legalistic than political, requiring the skills of a seasoned negotiator and diplomat.78

France will undoubtedly assert, in accordance with Article 121 of the Law of the Sea Convention,79 that inhabited islands are entitled to be treated like any other land territory. Since the islands are able to sustain human habitation and economic life, this much of the French claim would seem incontrovertible. France will certainly take the position that the islands are entitled to a 200-mile exclusive economic zone, and perhaps, as noted above, to a zone extending to the seaward margin of the continental rise, with delimitation to be accomplished by application of the strict equidistance principle, which accords the islands full weight as base points.80 The French appointee to the tribunal is Professor Prosper Weil, author of a recent work that argues that strict equidistance must be the starting point for maritime boundary adjudication.81 His appointment is revelatory of the position that the French are likely to adopt. It is likely, however, that each party will argue not for a strict application of its favored methodology—enclaving or equidistance—but for the use of that methodology as the starting point for a provisional delimitation to which adjustments would subsequently be made in order to ensure the equitableness of the ultimate solution.82

78 McDorman, Canada and France Agree to Arbitration, supra note 11, at 360.
79 Law of the Sea Convention, supra note 27, at art. 121. The text of the article reads in pertinent part:
Art. 121: Régime of Islands
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.
80 As Jean-Pierre Puessochet, head of the French legal team, put it, "In principle, islands, wherever they are located, have the right to a continental shelf and an exclusive economic zone." Canada and France in Court over Territorial Dispute Reuters, July 30, 1991, available in LEXIS, Nexis Library, Omni File.
82 McDorman, Drawing a Line, supra note 18, at 171.
C. Finding the Relevant Rule of Decision

It is significant that the parties do not specify what law is to govern the tribunal’s decision. Both are parties to the 1958 Geneva Convention on the Continental Shelf, while as of May 31, 1989, neither had ratified the Law of the Sea Convention, (which, in any event, has not entered into force).

Subsequent adjudications of maritime boundaries have set aside the principle articulated in Article 6 of the 1958 Geneva Convention on the Continental Shelf, according to which equidistance is to be employed unless there are special circumstances that would make an equidistance line inequitable. In the North Sea Continental Shelf Case, the International Court of Justice rejected the assertion that equidistance modified by special circumstances had become the basic rule of delimitation as a matter of customary law. The Court held that “delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances.” In the Channel Island Arbitration, the Court found that the equidistance-special circumstances rule satisfied the principles of equity. The Court reaffirmed the equitable principles-relevant circumstances rule in 1985 in the Libya-Malta Adjudication. Similarly, the Law of the Sea Convention stresses the role of equity in the delimitation of maritime boundaries. It has been noted that previous tribunals in maritime boundary disputes have attached little weight to state practice or the decisions of prior tribunals, preferring instead

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86 Channel Islands Arbitration, supra note 13, at 422.
87 Continental Shelf (Libya v. Malta), 1985 I.C.J. 4 at 31, 38 (June 3) (paras. 29 and 45).
88 The Law of the Sea Convention, supra note 27, at art. 74(1), states: Article 74: Delimitation of the exclusive economic zone between States with opposite or adjacent coasts
1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution. See also art. 83(1), mandating the same role for equity in delimitations of the continental shelf.
to craft solutions carefully tailored to the particular circumstances of the case before them.\textsuperscript{90}

In the \textit{Libya-Malta Adjudication}, the International Court of Justice adopted the principle of equidistance in its initial delimitation of the continental shelf between the parties.\textsuperscript{90} It then adjusted this provisional line to the disadvantage of Malta in view of the disproportion in the size of the two parties, hinting that the adjustment would have been even less favorable to Malta had it been a dependent entity.\textsuperscript{91}

Equidistance has been the rule of decision in most agreements involving distant dependent islands.\textsuperscript{92} Exceptions to this rule include the agreements involving the Netherlands Antilles and Venezuela\textsuperscript{93} and the recommendations of a conciliation commission concerning Jan Mayen and Iceland.\textsuperscript{94} Enclaving and semi-enclaving have provided the rule of decision in a small number of agreements.\textsuperscript{95} The most

\textsuperscript{90} McDorman, \textit{Drawing a Line}, supra note 18, at 158 and n.4.

\textsuperscript{91} Id. at 42 (paras. 52-53).


\textsuperscript{95} Treaty Concerning Sovereignty and Maritime Boundaries, Dec. 18, 1978, Papua
prominent, however, is the decision in the *Channel Islands Arbitration*. It is a major irony of the present dispute that France must take a position diametrically opposite to that which it asserted in the earlier case. In the Anglo-French dispute, France raised the principle of proportionality as an argument for enclaving. The Court in the Anglo-French dispute stressed the differences between the Channel Islands dispute and that involving Saint-Pierre-and-Miquelon, and the solution that the Court adopted—a median line between opposite states modified by the enclaving of islands "on the wrong side of the median line" is entirely inapplicable to the present dispute. The Court's statement that the open waters to the south and east of Saint-Pierre-and-Miquelon allowed more scope for redressing inequalities than did the narrow waters of the English Channel implies that enclaving is a solution most appropriate to narrow waters.

D. Towards an Equitable Solution

The equitable principles-relevant circumstances rule is today widely accepted in maritime boundary delimitations. This rule gives preference neither to equidistance, nor to enclaving, nor to any solution dictated by judicial precedent or past practice. It is rather a rule designed for application on a case-by-case basis to the end of producing a solution carefully crafted to the problem at hand. It is a rule that lends itself to compromise and to inventive solutions. For this reason, it is unfortunate that the parties have taken the step of precluding any solution other than a single all-purpose line. Joint access to fishing and joint development of hydrocarbon reserves in the disputed area would seem to be two obvious areas where an innovative solution might be found. Moreover, any solution that does not provide for cooperation in the management of fish stocks will be sadly defective, although the mandate to draw a single line does not *a priori* preclude the inclusion of a cooperative mechanism.


96 *Channel Islands Arbitration*, supra note 13.

97 *Id.* at 437, 438 (paras. 161 and 166).

98 See *id.* at 444 (para. 200).

99 *Id.* at 437 (para. 159).

100 *Id.* at 444 (para. 200).

It seems likely that the tribunal will eschew the strict application of either the equidistance or the proportionality principle, instead using one or the other as the starting point for a delimitation that will subsequently be modified in the interests of equity. Of the two possibilities, it seems slightly more probable that the tribunal will choose the modified equidistance principle. First, this is the principle that has been applied in the majority of delimitations and adjudications involving islands. Second, in granting France extensive interim fishing rights in undisputed Canadian waters, Canada has strengthened France's position, since a tribunal removing these rights will have a strong incentive to replace them with substantial fishing rights in the disputed zone. Finally, the islands presently enjoy the status of a collectivité territoriale and are listed in Annex IV of the Treaty of Rome\textsuperscript{102} as an entity to which the law of the European Community does not apply. Both these classifications are generally reserved for entities that may become independent states.\textsuperscript{103} If the tribunal is persuaded that the islands are a potentially independent state, it is highly unlikely that it will choose to enclave them. If the tribunal does employ the modified equidistance principle, it may be that, as in the Libya-Malta Arbitration, it will adjust the boundary to the detriment of the islands in recognition of the demands of proportionality. Even if it grants the islands a full 200-mile exclusive economic zone, it seems unlikely that it will accord them rights to the continental shelf beyond that zone.

\textsuperscript{102} Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

\textsuperscript{103} McDorman, \textit{Drawing a Line}, supra note 18, at 187.
Figure 1a

Figure 1b

Figure 3

Figure 4

Figure 5

Figure 6\textsuperscript{110}

\textsuperscript{110} Donat Pharand, \textit{The Cod War Between Canada and France}, 18 \textit{REV. GÉN.} 627, 629 (1987).