

FROM THE DESERT TO THE SEA:
THE MARITIME JURISDICTION
OF
AN INDEPENDENT WESTERN SAHARA

Thesis

Master of Laws in International Law

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ABSTRACT

Western Sahara is the last colonial territory in Africa. Its people have been unable to realize their right of self-determination since the former colonial power, Spain, ceded the territory to Mauritania and Morocco in 1975.

The presumptive maritime or ocean jurisdiction of an independent Western Sahara, formally known as the Saharawi Arab Democratic Republic (the SADR), is examined. The analysis begins with the history of the territory's creation, the establishment of its land boundaries in the colonial era and its natural resources. The events relating to the territory's stalled decolonization are then canvassed. The current maritime jurisdictional claims of States in the Saharan Atlantic region are considered, together with continuing fisheries uses in Saharan waters, as well as the results of the 2009 enactment of the author's ocean jurisdiction legislation for the SADR. The law of maritime delimitation, which includes the 1982 United Nations Convention on the Law of the Sea, decisions of the International Court of Justice and other tribunals, and state practice, is reviewed and applied to determine the likely or probable maritime jurisdiction of the SADR, including its territorial sea, contiguous zone, exclusive economic zone and continental shelf. Issues concerning a possible claim to the extended continental shelf are addressed. Conclusions about maritime jurisdictional areas (or zones) are given in a series of purpose-drawn maps showing the SADR's likely maritime boundaries. The possibility of the SADR acceding to the Law of the Sea Convention is then addressed in the context of remedial measures to restrain the taking of ocean resources from the maritime area of the territory pending resolution of the "question" of Western Sahara and the exercise by its people of their right of self-determination.

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Notes on Usage, Dates, Geographic Coordinates and Translations

Usage. The name “Sahara” is an Anglicism of the Arab noun “*essah-râ*” meaning, literally, plain or open desert. The generally accepted collective noun in English for the people of Western Sahara is Sahrawi and, in the plural, Sahrawis, meaning “[a person/people] of the Sahara”, with the following standard script spelling: *الصحرراويين*

A phonetic spelling of the word *Sahrāwī* compares usefully to its ordinary spellings in French (*Sahraoui* and also *Saharoui*) and Spanish (*Saharai* - male gender and *Saharaita* - female gender).

The versions “Sahrawi” and “Saharan” are used interchangeably herein and, where appropriate, the proper noun “Saharawi” is also used, notably as part of the formal name of the Saharawi Arab Democratic Republic.

Dates. All dates are given in western chronology, including those of the enactment and coming into force of legislation in Morocco and Mauritania in the Islamic calendar (*Anno Hirji*). An example is Morocco’s *Dahir* portant loi n° 1.73.221 du 26 Moharram 1383, A.H. establishing limits of the territorial sea and an exclusive fishing zone on the equivalent date 2 March 1973 C.E.

Geographic coordinates. Colonial boundary treaties delimiting the extent of the Spanish possessions *Río de Oro* and *Sakiet el-Hamra* after 1885 applied geographic coordinates based on the Paris and Madrid (also known as *St. Fernando*) meridians of longitude. The Paris meridian, discontinued belatedly after the Washington International Meridian Conference of 1884, lies 2° 20’ 14.025” east of the Greenwich (or Prime) meridian. As an example, the French-Spanish agreement of October 3, 1904 for a boundary in southern Morocco along the 26th parallel of north latitude (26° N) extending inland “to meet the meridian 11° west of Paris” extends accordingly to a point 8° 39’ 45.875” degrees west of the Prime (Greenwich) meridian. The Madrid meridian was 6° 12’ 19.5” west of the Prime meridian. Unless otherwise indicated, all references herein are to the Prime meridian.

Translations. All translations from the French and Spanish into English are those of the author except where indicated.

Technical Note: Preparation of Maps

*A correct technical definition of the boundary is required
with a view to prevent future disputes in regard to its location.**

The United Nations *Convention on the Law of the Sea* does not prescribe technical standards for maritime boundary delimitation. However, uniform nautical survey and charting standards are maintained by the International Hydrographic Organization. These, together with current standards for geodetic datums, technical guidance by cartographers and surveyors, and the application of delimitation techniques in maritime boundary award decisions, enable the accurate drafting of maritime jurisdiction and boundary maps.

Here, the ArcGIS ARCMAP software (version 9) with an African Equidistant Conic projection applying the WGS 84 datum was used together with geodesic lines in the preparation of charts and boundary depictions. The varying projections and information in source charts, scale distortion, incomplete survey and chart information, apparent inaccuracies in boundary (baseline) points prescribed in Spanish legislation, the lack of information about a tidal datum on the Saharan coast and the boundary delimitation techniques applied (*i.e.* strict equidistance, simplified equidistance, bisector lines application, the use of parallels and meridians, and calculations of proportionality).

The five maps accompanying this paper are simplified depictions derived from the following sources:

- (1) Caris LOTS depictions of north west Africa.
- (2) Admiralty Chart 3133. *Africa - West Coast: Casablanca to Islas Canarias (including Arquipélago da Madeira)*. Taunton: UK Hydrographic Office, 1997.
- (3) Admiralty Chart 3134. *Africa – West Coast: Islas Canarias to Nouakchott*. Taunton: UK Hydrographic Office, 1998.
- (4) Admiralty Chart 4104. *North Atlantic Ocean: Lisboa (Lisbon) to Freetown*. Taunton: UK Hydrographic Office, 1992.
- (5) United States National Geospatial-Intelligence Agency Chart 51022. *Africa – West Coast: Morocco/Western Sahara/Mauritania Cap Juby to Baie Lévrier including the Islas Canarias*. Bethesda, MD: Defense Mapping Agency, 1996.

* Nuno Sérgio Antunes, *Towards the Conceptualization of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (Boston: Martinus Nijhoff, 2003) at 147.

- (6) United States National Geospatial-Intelligence Agency Chart 51260. *Islas Canarias – Western Group*. Bethesda, MD: Defense Mapping Agency, October 2002.
- (7) United States National Geospatial-Intelligence Agency Chart 51320. *Sidi Ifni to Cap Juby (Africa-West Coast)*. Bethesda, MD: Defense Mapping Agency, October 2002.
- (8) United States National Geospatial-Intelligence Agency Chart 51022. *Africa – West Coast: Morocco/Western Sahara/Mauritania Cap Juby to Baie Lévrier including the Islas Canarias*. Bethesda, MD: Defense Mapping Agency, 1996.
- (9) United States National Geospatial-Intelligence Agency Chart 51380. *Islas Canarias – (Eastern Group)*. Bethesda, MD: Defense Mapping Agency, October 2002.
- (10) United States National Geospatial-Intelligence Agency Chart 51400. *Laayoune to Punta de Juan Torno*. Bethesda, MD: Defense Mapping Agency, October 2002.
- (11) United States National Geospatial-Intelligence Agency Chart 51420. *Punta de Juan Torno to Punta Durnford*. Bethesda, MD: Defense Mapping Agency, October 2002.
- (12) United States National Geospatial-Intelligence Agency Chart 51440. *Punta Durnford to Cap Blanc (West Coast of Africa)*. Bethesda, MD: Defense Mapping Agency, October 2002.
- (13) United States National Geospatial-Intelligence Agency Chart 51460. *Cap Blanc to Nouakchott*. Bethesda, MD: Defense Mapping Agency, October 2002.
- (14) United States National Geospatial-Intelligence Agency Chart 51461. *Approaches to Nouadhibou (Africa-West Coast)*. Bethesda, MD: Defense Mapping Agency, October 2002.
- (15) *Mapa de las Provincias de Ifni y Sahara y del Archipiélago de Canarias: Aauin*. Madrid: Talleres del Servicio Geográfico del Ejército, 1963. (Harvard College Reference 8235.1957)

The following technical papers were relied upon in preparation of the charts accompanying this paper:

Adler, Ron. *Geographical Information in Delimitation, Demarcation and Management of Land Boundaries*. Durham, UK: International Boundaries Research Unit, 2001.

Antunes, Nuno Sérgio Marques. *The Importance of the Tidal Datum in the Definition of Maritime Limits and Boundaries*. Durham, UK: International Boundaries Research Unit, 2000.

Calderbank, Bruce; MacLeod, Alec M.; McDorman, Ted L. and Gray, David H., eds., *Canada's Offshore: Jurisdiction, Rights, and Management*. Bloomington, Indiana: Trafford Publishing, 2006.

Carleton, Chris and Schofield, Clive. *Developments in the Technical Determination of Maritime Space: Delimitation, Dispute Resolution, Geographical Information Systems and the Role of the Technical Expert*. Durham, UK: International Boundaries Research Unit, 2002.

Division for Ocean Affairs and the Law of the Sea (United Nations Office of Legal Affairs). *Training Manual for delineation of the outer limits of the continental shelf beyond 200 nautical miles and for preparation of submissions to the Commission on the Limits of the Continental Shelf*. United Nations: New York, 2006.

Lathrop, Coalter. "The Technical Aspects of Maritime Boundary Delimitation, Depiction, and Recovery," *Ocean Development & International Law* 28 (1997): 167.

Nordquist, Myron H., Moore, John Norton and Heidar, Tomas H., eds. *Legal and Scientific Aspects of Continental Shelf Limits*. Boston: Martinus Nijhoff Publishers, 2004.

Dedication

This paper is dedicated to the memory of **Thomas Franck** (1931-2009), American lawyer, professor and judge, whose work advanced the science of international law;

and to

the memory of **Sir Ian Brownlie**, CBE, QC, FBA (1932-2010), of the Bar of England, scholar of international law, expert on African boundary issues.

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**From the desert to the sea:
The maritime jurisdiction of an independent Western Sahara**

J.J.P. Smith*

*He unleashed the two seas so that they merge together,
and yet there is a barrier between them which they may not overstep.*¹

Introduction

THIRTY-FIVE YEARS AFTER its interrupted decolonization from Spain and occupation by Morocco, Western Sahara remains an intractable problem of international law. Neither properly independent nor merely a non-self governing territory, the world's efforts to secure lasting certainty for the people of the former colony have failed. Western Sahara is the last significant case of decolonization in the list of peoples and territories that have completed the process self-determination envisioned by the community of states and the United Nations in the second half of the twentieth century. Adding to the complexities of the case and its current impasse, the territory's land and adjacent ocean areas continue to be developed by Morocco as an occupying State.

Irony in the literal sense is not often found in international law. The development and application of rules of law among States is a serious, Cartesian exercise. Yet, in the instance of Western Sahara, international law in its various disciplinary manifestations – human rights, self-determination of peoples, access to and jurisdiction over natural

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¹ *The Holy Koran*, Sura 55, Aya 19-20. M. Fakry, *An Interpretation of the Qur'an* (New York: New York University Press, 2004) at 543.

resources, to name a few – has advanced during the past 35 years to confer benefits to an eventually independent Western Sahara that would not have been realized during the long hiatus of its arrested existence after 1975. By not enjoying norms of international law as they emerged and could be assumed by other States, Western Sahara as an independent State would now benefit even more from such advances in law over the past four decades.

In normative analysis as a matter of international law, the “question” of Western Sahara has been primarily one of self-determination and human rights; issues laden with the political. Concerns about territorial definition and the preservation of natural resources pending the exercise of the right of its people to self-determination are subordinate to this. However, such matters do not stand in isolation from each other. Conceptually, an aspiration to realize self-determination can be expected to bring with it the hope that the natural resources endowing a territory can be preserved until the issue is resolved, to ensure in part some basis for economic development. At a more esoteric level, a restraint – imposed or otherwise – on the use and exploitation of a non-self governing territory’s natural resources can have a salutary political effect, to better preserve the status quo during the self determination process.

In any event, the question of Western Sahara occupies a unique niche in international law. While the territory is invariably treated as a case for self-determination, politically and legally it has important incidents of Statehood. There exists a government in exile,

with substantial international and diplomatic presence abroad. The territorial extent of Western Sahara is well defined. And the nascent State enjoys considerable formal recognition by other States, notably among those of the African Union. Western Sahara may not be so much a case of self-determination as the assertion of existing independence. The definition of jurisdiction and sovereign rights to the seas is, and would be, one part of this.

In this paper I address the maritime jurisdiction of a presumptively independent Western Sahara. The analysis begins with an examination of the historical, legal and geographic setting of the territory, together with its colonial origins and events leading up to and resulting from its occupation by Mauritania and Morocco in 1975. It then turns to the development of international maritime boundary law in the analysis of a presumptive maritime jurisdiction. Boundary issues and problems are then discussed, together with conclusions about the preservation of ocean resources pending the exercise by the Saharawi people of their right to self-determination and independence. Recent maritime law decisions from the International Court of Justice, the International Tribunal for the Law of the Sea and the Permanent Court of Arbitration, together with advances in State practice are considered.

The issue of Western Sahara suffers considerable uncertainties. This need not be so in the case of the territory's ocean development and maritime jurisdiction. International

law has advanced considerably in respect of such affairs and a definite analysis can be undertaken.

I – FROM THE DESERT

*[I]t became evident to the Mission that there was an overwhelming consensus among Saharans within the territory in favour of independence and opposing integration with any neighbouring country.*²

Western Sahara – The historical and colonial setting

WESTERN SAHARA, prominent on the northwest coast of Africa, is bordered by Morocco in the north, Mauritania to the south and east, and Algeria to the northwest.³ Spain's Canary Islands lie offshore to the northwest, with their closest point some 55 nautical miles from Cape Tarfaya (or Cape Juby) on the African mainland. The Saharan territory, shaped broadly as an inverted, right facing "L", encompasses an area of some 266,000 square kilometers.⁴ Initially occupied through Sanhaja Berber migrations around 1,000 B.C.E., Western Sahara saw its first colonial contact with the Kingdom of Spain in

² Report of the United Nations Visiting Mission, given after its May 8 - June 9, 1975 tour of the Spanish Sahara territory, at UN Doc. A/10023/Add. 5, Annex at 48.

³ "Western Sahara" is used here in its geographic context, being the accepted English language name for the territory. Governing authority over the occupied part of the territory is exercised by the Kingdom of Morocco. Over a small remaining portion in the east and northeast, the Polisario Front exercises jurisdiction, functioning in part as a government-in-exile. See generally *Constitution de la RASD* (accessed 2 March 2010) ("SADR Constitution"); available at: www.arso.org/03-const.99.htm The name "Spanish Sahara" is used here in its colonial context as the name of the territory adopted by Spanish decree on January 10, 1958. "Sahrawi" is meant to apply to persons and the people of the territory and its derivative, Saharawi, is used as part of the formal name of the Saharawi Arab Democratic Republic. Finally, "Saharan" is employed in a geographic context, for descriptions of the Saharan territory, including the territory's coast.

⁴ "The country's internationally recognized land borders (i.e., those predating the attempted annexation by Morocco, whose claim of sovereignty over Western Sahara has not been recognized by the UN, the OAU or any foreign governments) extend for 2,045 km., of which 435 km. border Morocco in the north, 30 km. border Algeria in the northeast and 1,570 border Mauritania in the east and south. The country is bounded in the west by 1.062 km. of Atlantic coastline." Tony Hodges, *Historical Dictionary of Western Sahara* (London: The Scarecrow Press, 1982) at 1.

the 15th Century. The expansion of maritime commerce and European colonial interests led to greater formality in the Spanish Crown's presence on the coast of the territory. These developments were consistent with other Spanish and Portuguese colonies, which had long had a limited parent State presence, the extent and definition of such colonies becoming formalized in the second half of the nineteenth century C.E.

By 1884, on the eve of the Congress of Berlin, the European colonial presence became formal with the division of the Cape Blanc (Cap Blanc) peninsula in the far south between Spain and France. It was largely the issue of fisheries that led to this division, France having occupied the Island of Arguin in the southern part of the Bay of Lévrier. Spain's occupation of the Western Sahara's southern coastline from Cap Bojador (Boujdour) to Cape Blanc was confirmed in 1887. By treaty with Morocco, the territory's land frontiers were extended north in 1904 and again to their present location in 1912.⁵ After the First World War and the 1936 Spanish civil war, the territory became known as and was declared "Spanish West Africa", coming to include Spain's colonial enclave Sidi Ifni on the Atlantic coast of Morocco, directly east of the Canary Islands.⁶

⁵ The 1904 and 1912 boundary treaties are discussed below. On the colonial history of Western Sahara see Tony Hodges, *Western Sahara: The Roots of a Desert War* (Westport, Lawrence Hill, 1983) at 40-52 and *Western Sahara: Volume 1, Request for Advisory Opinion, Pleadings, Oral Arguments, Documents* (The Hague, International Court of Justice: 1979) ("Advisory Opinion Documents") at 225-312. See also Y.H. Zoubir and D. Volman, eds., *International Dimensions of the Western Sahara Conflict* (London: Praeger, 1993); Toby Shelley, *Endgame in the Western Sahara: What Future for Africa's Last Colony?* (London: Zed Books, 2004); and M. Martin, *El colonialismo español en Marruecos* (Paris: Ruedo Ibérico, 1973). An accessible English language online history (accessed 12 January 2010) is available at: www.arso.org/05-0.htm#Anchore

⁶ Spain ceded Sidi Ifni to the Kingdom of Morocco in 1969. It retains the fifteenth century C.E. possessions of the northern coastal enclaves of Ceuta and Melilla together with several small inshore islands. One, Isla Perejil, three miles from Ceuta, was occupied briefly by Moroccan forces in 2002.

The current legal status of Western Sahara traces its provenance to two events: Morocco's independence in March 1956 and the beginning of the United Nations decolonization process in the early 1960s. Later developments must also be noted, namely Spain's withdrawal from the territory in 1975 followed by Morocco's and Mauritania's occupation a short time later.⁷

Almost immediately after its independence, Morocco claimed sovereignty over Western Sahara. In July 1957 The Kingdom published a map depicting "Greater Morocco", an area encompassing all of Western Sahara and Mauritania, western Mali and northwest Algeria.⁸ This led the next year to Spain classifying Western Sahara (Spanish Sahara) as one of its provinces, with Morocco a short time later affirming its claim to the territory. Although phosphate exploration was well advanced in Western Sahara after the 1940s, notably at the inland Bu Craa area, it was not until 1960 that the Spanish government issued permits for petroleum exploration within the territory.⁹ Later that year, the United Nations adopted its decolonization resolution, the "Declaration on the

⁷ See Thomas M. Franck, "The Stealing of the Sahara," 70 *AJIL* (1976) 694.

⁸ *Western Sahara: The Roots of a Desert War*, *supra* note 5. In October 1957 Morocco formally claimed to the territory at the United Nations.

⁹ *Ibid.* at 124: "Eventually, in 1960-61, forty-three onshore blocks, covering just over 100,000 square kilometers, 37 per cent of the territory's total land area, were awarded to twenty companies grouped into eleven consortia By [1964] most of the companies had decided to pull out ... world oil prices were too low to warrant development perhaps, and the territory's meager infrastructure, in particular the shortage of water, might have influenced the oil companies." See also G. D'Origny, "Western Sahara's Natural Resources" (unpublished) (dated 2002), on file with the author.

granting of independence to colonial countries and peoples”¹⁰, leading to creation of the U.N. “Special Committee on Decolonization” in 1961¹¹.

The question of the Spanish Sahara has been exhaustively discussed in the Special Committee . . . since September 1963, and in General Assembly plenary sessions since December of that year. The first of a stream of resolutions calling on Spain to implement the Sahara’s right to self-determination was passed in Committee on October 16, 1964; the General Assembly followed suit one year later. Madrid’s position, during this period, was that its African territories as provinces of metropolitan Spain, were not subject to self-determination.¹² [Footnotes omitted.]

Much as the case of East Timor, both before and after 1975, the United Nations paid considerable attention to the decolonization of Western Sahara. The General Assembly continued without interruption to consider it a non self-governing territory.¹³ Self-

¹⁰ General Assembly (GA) Resolution 1514 (XV), 15 GAOR Supp. 16 at 66, U.N. Doc. A/4684 (1966). See Article 2: “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” The resolution (accessed 12 January 2010) is available at: www.unhchr.ch/html/menu3/b/c_coloni.htm

¹¹ GA Resolution 1654, 16 GAOR Supp. 17 at 65, U.N. Doc. A/5100 (1961). The Committee, known presently as the “U.N. Special Political and Decolonization Committee” was formally styled the “Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples”. On the Committee’s work in a Saharan context, see “The Stealing of the Sahara”, *supra* note 7 at 697 *et seq.* See generally G. Flack *et al.*, “The International Legal Right of Self-Determination: Four Legal Approaches and Their Textual Foundations,” *Dalhousie Journal of Legal Studies* 1 (1992): 189.

¹² “The Stealing of the Sahara”, *supra* note 7 at 701. General Assembly Resolution 2983 (XXVII) of December 14, 1972 is typical of those between 1965 and 1975: “The General Assembly repeats its invitation to the Administering Power to determine, in consultation with the Governments of Mauritania and Morocco and any other interested party, the procedures for the holding of a referendum under United Nations auspices to enable the indigenous population of the Sato exercise freely its right to self-determination and independence ...” The resolutions concerned both Spanish West Africa and Sidi Ifni, until the latter territory was ceded to Morocco in June 1969. Documents about the Special Committee (accessed 12 January 2010) are available at: www.un.org/Depts/dpi/decolonization/main.htm

¹³ See the General Assembly and Security Council Resolutions issued after 1975 for which there is a useful compendium under “Dossier Referendum” (accessed 12 January 2010) available at: www.arso.org/06-0.htm and at www.un.org/documents/resga.htm

determination, that is, the exercise of its people's right to it, remains a core objective of international and multilateral efforts to deal with the territory.¹⁴ The momentum of decolonization in Africa, coupled with the emerging natural resource potential of Western Sahara might have combined toward a different result in the late 1960s and early years of the 1970s.¹⁵

However, Spanish efforts to create a limited autonomy for the territory and the faltering multilateral commitment to self-determination were ineffective. While Western Sahara's neighbours ostensibly respected the principle of self-determination, the claims of Morocco in particular were becoming more voluble.¹⁶ Perhaps spurred by Portugal's wholesale change in colonial policy after the "Carnation Revolution" of April 1974, Morocco's King Hassan II rejected all notion of a determination referendum in the territory. On August 21, 1974 Spain responded by announcing the referendum would be held in the first six months of 1975.¹⁷ In response to this, Morocco proposed in October 1974 to refer the issue of Western Sahara to the International Court of Justice for an

¹⁴ This mandate is at the fore of the United Nations Mission for the Referendum in Western Sahara, established April 29, 1991 under Security Council Resolution 601/91 (accessed 12 January 2010); available at www.un.org/Depts/dpko/missions/minurso/index.html

¹⁵ Spain first issued permits for seabed oil exploration along the Saharan coast in 1966. Export of phosphate mineral rock from the territory began in 1972. *Western Sahara: The Roots of a Desert War*, *supra* note 5 at 127.

¹⁶ "The Stealing of the Sahara", *supra* note 7 at 702-703. "Instead, what occurred during the next six critical years [1967-73] was the acceleration of efforts by all parties to arrange their preferred outcome behind a façade of support for self determination."

¹⁷ *Historical Dictionary of Western Sahara*, *supra* note 4 at xxix.

advisory opinion. On December 13, 1974, the General Assembly adopted such a resolution, which included direction for a United Nations mission to visit the territory and assess the desire of its people for self-determination. The resolution also postponed the pending Spanish referendum.¹⁸ The questions referred to the Court, in which Morocco was confident its claim of historic title predating colonial contact would be upheld, were:

Question I, "Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?"; and

Question II, "What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?"¹⁹

The Court answered the first question in the negative, finding that the territory was not *terra nullius* at the outset of Spain's colonial occupation. Despite the calculated aims of Morocco, and to a lesser, extent, Mauritania, this result alone would affirm the norms of self determination, generally under General Assembly Resolution 1514 and more specifically those of the United Nations for Western Sahara over the previous decade. In answering the second question, the Court went further:

The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara.

¹⁸ GA Resolution 3292 (XXIX), 29 GAOR 31 at 103, UN Doc. A/9631 (1974). See also the Report of the Visiting Mission, *supra* note 2 at 11: "[T]he population, or at least almost all those persons encountered by the Mission, was categorically for independence and against the territorial claims of Morocco and Mauritania."

¹⁹ *Western Sahara Advisory Opinion* (16 October 1975), ICJ Reports 1975, 12. A summary of the judgment can be read at the Court's website (accessed 12 January 2010); available at: www.icj-cij.org/icjwww/idecisions/isummaries/isasummary751016.htm

They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of General Assembly resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.²⁰

Following the Court's decision on October 16, 1975 two events took place that changed Western Sahara's legal and political future. General Franco of Spain entered his final illness, to die after only having gradually to transfer of power to Prince Juan Carlos, on November 20. In Morocco, King Hassan announced that the advisory opinion was a vindication of his government's claims to Western Sahara, declaring that 350,000 civilian Moroccans would begin the "Green March" to occupy the territory.

Although the Green March initially faltered under a United Nations led effort to forestall it, on November 6, it crossed the boundary south of Tarfaya, after units of the Moroccan Armed Forces.²¹ At the same time, Mauritanian troops began to enter the territory from the south, although it was not until early January 1975 that they occupied the port town of Dakhla, shortly after the last Spanish military personnel had been

²⁰ *Ibid.* at paragraphs 162-163. On the decision, see "The Stealing of the Sahara", *supra* note 7 at 709. "[T]he results were a sharp and essentially unanimous rejection both of Morocco's historic claims." *Idem.* at 711. See also Malcolm Shaw, "The Western Sahara Case," *British Yearbook of International Law* 49 (1978): 119. On the advisory jurisdiction of the Court see J. Collier and V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford: Oxford University Press, 1999) at 182.

²¹ See Security Council Resolutions 377 (22 October 1975), 379 (2 November 1975) and 380 (6 November 1975) U.N. Doc. S/11880, Annex III.

evacuated. By November 9, King Hassan was able to recall the marchers having reached agreement with Spain and Mauritania to divide the territory, contrary to Resolution 1514 norms, the designs of the United Nations and the Saharawi people. The tri-partite agreement, known as the *Madrid Accord*, eliminated any pretext of an orderly decolonization for Western Sahara by the principal States concerned.

Although the terms [of the *Madrid Accord*] understandably remain secret, their substance has become largely surmisable. Spain agreed to a decolonization formula that allowed the Sahara to be partitioned in the way previously agreed between Morocco and Mauritania. The referendum would be quietly buried. Spain, in return, would retain a 35 percent in Fosbucraa, the 700-million dollar Saharan phosphate industry. In addition, there were concessions by Morocco concerning fishing rights off the Saharan and Moroccan coasts . . .²² [Footnotes omitted.]

Proclamation of the SADR

The Saharawi Arab Democratic Republic (the “SADR”) was proclaimed by the Provisional Saharawi National Council on February 27, 1976 in order “to avoid a juridical *fait accompli* being created by the Spanish withdrawal and Moroccan-Mauritanian occupation of the towns” of the territory.²³ Over the following days the SADR’s machinery of government was created, a constitution adopted, and civil leadership positions

²² “The Stealing of the Sahara”, *supra* note 7 at 715. Spain was required cede administration of the territory on February 28, 1976. The text of the *Accord* (“Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania”) (known also as the Tripartite Accords) is at *Declaration of Principles (Tripartite (Madrid) Accords (Mauritania/Spain/Morocco)* (14 November 1975), 14 ILM 1512; *Revue Générale de Droit International Public* 80 (1976); 380. The UN response is at GA Resolutions 3458(A) and 3458(B), U.N. Doc. GA/5438 at 254-256.

²³ *Western Sahara: The Roots of a Desert War*, *supra* note 5 at 238. Arguably, there were a sufficient number of displaced Sahrawi present to have rendered the proclamation legitimate. A report of there being 25,000 Sahrawis under arms in 1983 supports a finding of popular consent to creation of the SADR. *Idem* at 291. The text of the proclamation, including a call for recognition of the SADR (accessed 5 January 2010) is available at: <http://www.arso.org/03-1.htm>

announced.²⁴

Foreign government recognition of the SADR began immediately. Madagascar's recognition, together with those of Burundi and Algeria, was given in the first week of the putative new republic. The formalities, at least, were in place even if not arrived at by an internationally (or traditionally) accepted act of self-determination. In later years, the SADR has convened democratically chosen and operating congresses of its people for the purpose of popular elections and governmental review, including constitutional amendments. The Saharawi state is not without frailties. The extent of a "national economy" is quite limited in the context of a displaced population. While the government of the SADR may provide services for education, healthcare, and justice, to name a few, there are constraints to them in the context of the Tindouf camps. What is remarkable about the Saharawi state is the cohesion and continuity of its internal governance, together with its popular support, and the lasting, widespread acceptance of its political arm, the Polisario Front, in other capitals.

If not in 1976, the SADR has now arguably has acquired sufficient incidents of Statehood to qualify as an independent country. The *Montevideo Convention* criteria of permanent population, defined territory, government and the capacity to enter into relations with other States had been more or less fulfilled by February 1976, even if the Sahrawi people had recently been displaced with a putative government lacking control

²⁴ A current version in French, adopted at a Sahrawi national congress in 1999, can be viewed online (accessed 2 October 2009); available from: <http://www.arso.org/03-const.99.htm>

over all of its territory.²⁵ The SADR's subsequent internal legal development also suggests conformity with self-governance norms sufficient to support Statehood.²⁶ However, it is the combination of the territory's globally accepted status as a former colonial territory undergoing self-determination that has prevailed, notwithstanding the sustained widespread recognition by other States of the SADR.²⁷ Certainly recognition by western, developed States would be a strong factor in obtaining membership in the United Nations, together with a fuller standing in the organized international community and access to the multilateral organizations most States enjoy. Such recognition is perhaps understandably withheld given the nature of the conflict and the fact of most of the territory being occupied by Morocco.

In April 1976, with the evident impossibility of the United Nations in the short term to hold a self-determination referendum in the territory, Morocco and Mauritania agreed to its partition.²⁸ The frontier established by the two States did not modify the existing colonial boundaries around Western Sahara. Rather, it resulted in separate Moroccan

²⁵ *Montevideo Convention on the Rights and Duties of States* (1933), 165 LNTS 19 at Article 1.

²⁶ Consider the constitutional development of the SADR, *supra* notes 3 and 24.

²⁷ I address the issue of recognition below. On September 15, 2004 South Africa became the most recent State to recognize the SADR. See "South Africa recognises the Saharawi Arab Democratic Republic" (accessed 12 January 2010); available at: www.arso.org/SA.RASD2004.htm. Among Arab states, only Algeria, Libya and Mauritania recognize the SADR. The African Union, of course, also recognizes the Saharawi state.

²⁸ *Convention concerning the State frontier line established between the Islamic Republic of Mauritania and the Kingdom of Morocco* (14 April 1976), [1977] UNTS 118. Article 1: "[T]he boundary ... is defined by a straight line, commencing on the Atlantic coast at its point of intersection with the 24th North parallel of latitude and then proceeding [inland] to a point of intersection with the 23rd North parallel of latitude and the 13th West meridian of longitude [i.e. the existing Western Sahara-Mauritania interior boundary ...]" [Translation.] See *Historical Dictionary of Western Sahara*, *supra* note 4 at 247.

and Mauritanian areas wholly within the territory, demarcated by a boundary drawn seaward along a northwest path to a point on the Sahara coast north of Dakhla.²⁹ The southern third of the territory was thus defined as the Mauritanian province of Oued ed-Dahab (Tiris el-Gharbia). The boundary convention between the two States also provided for delimitation of the continental shelf, although to the obvious disadvantage of Mauritania: “Insofar as concerns the continental shelf, the delimitation is constituted [follows] the 24th North parallel of latitude”.³⁰ The boundary constrained Mauritania’s seaward reach along the coast of Dakhla, given the more northeasterly general direction of the Saharan coastline.

Events from 1976 through 1979 belied any sense of normalcy in the occupation of Western Sahara. A guerilla war waged by the Polisario Front eventually succeeded in making Mauritania’s occupation untenable. There had even been a ceasefire between the two parties along with a suggestion that Polisario could occupy the Tiris el-Gharbia province, prompting concern from Morocco.³¹

By 1978, Mauritania’s weak government had been driven to bankruptcy by the

²⁹ Boualem Malek considers the April 1976 agreement to be illegal on three grounds: (i) the incapacity of Morocco and Mauritania to conclude such an agreement; (ii) the denial or contribution to a denial of the Saharawi people’s right of self-determination; and (iii) the denial of the Saharawi people’s right of sovereignty over natural resources. *La question de Sahara occidentale et le droit international* (Algiers: Office des Publications Universitaires, 1983) at 198.

³⁰ *Ibid.* at Article II. In an acknowledgement of customary treaty practice, Article VI provided for the *Convention* to be registered with the United Nations.

³¹ *Historical Dictionary of Western Sahara*, *supra* note 4 at xxxv.

conflict. The battle for liberation waged by Polisario forces had been impressive in its élan and the losses (and loss of prestige) inflicted upon the Mauritanian army had been growing. A coup occurred in the capital, Nouakchott, in July 1978. During the months that followed, Polisario's supporter, Algeria, was able to foster an agreement for Mauritania's withdrawal. On August 5, 1979 the Polisario Front and Mauritania agreed that the latter would renounce its claims to Western Sahara and withdraw from the territory in the new year.³² It should be underscored that the agreement was a bilateral one, done directly between the Polisario Front and the authorities in Nouakchott. Mauritania committed to "withdraw definitively from the unjust Western Sahara war ..."³³ Had the United Nations been engaged in the matter, an orderly attempt to hand over the ceded Río de Oro to the Polisario might have been pursued. However, Morocco would fill the resulting vacuum.

The Moroccan armed forces, with fighting strength superior to both the Polisario Front and Mauritanian forces, consolidated in large numbers on the Saharan coast, moved easily to occupy all of Western Sahara.³⁴ Morocco's complete control over the coast and central areas of the territory allowed it in later years to build a defensive sand

³² *Ibid.* at xxxvi. See *Western Sahara: The Roots of a Desert War*, *supra* note 7 at 353: "The Madrid Accords [sic] were not annulled even after Mauritania's withdrawal from Western Sahara and the Moroccan annexation of Tiris el-Gharbia . . . At the UN, Spain prudently abstained on all the General Assembly resolutions on Western Sahara."

³³ *Mauritano-Sahraoui agreement*, signed at Algiers (10 August 1979), annex to "Letter from the Permanent Representative of Mauritania to the United Nations addressed to the Secretary-General" (18 August 1979), U.N. Doc. A/34/427.

³⁴ *Western Sahara: The Roots of a Desert War*, *supra* note 7 at 276.

wall or “berm” that physically partitioned Western Sahara along a 2,000 km line.³⁵ Where Polisario had been effective in its military campaign during the end of the 1970s by hit-and-run attacks inside the territory, it now found itself confined to the unsettled, hostile desert along Western Sahara’s frontiers with Algeria and Mauritania.

Despite Morocco’s occupation and enormous military presence in Western Sahara, the diplomatic dénouement it acquired for itself would continue over the next 35 years. Morocco remained isolated over the question of Western Sahara during the 1980s even as it enjoyed the tacit support of the United States during the years of the Reagan administration.³⁶ Within days of the Polisario’s declaration of an independent Saharawi Republic, recognition by other States began. By 1980, the Organization of African Unity was actively considering the conflict and had begun efforts to broker a resolution. Morocco rebuffed these attempts. King Hassan refused to engage the Polisario directly in discussions over a 1981 OAU peace plan, an obduracy that would prove costly.³⁷ In 1982, at the apparent instigation of Algeria, the OAU considered the possibility of admitting the

³⁵ The berm was built from 1981 to 1986 and was intended to protect the so-called “Useful Triangle” of Smara, El-Ayoun (Laayoune) and Bou Craa. 10 feet high, it is mined and fitted with observation posts. “To man the defences, Morocco doubled its military presence in the territory again, to 160,000 men.” *Endgame in the Western Sahara*, *supra* note 5 at 192. There has been little international comment, including by the UN, about the berm, even after the ICJ’s 2004 *Palestine Wall advisory* opinion, discussed *infra*.

³⁶ “[It was Morocco’s] King Hassan who looked the most poorly placed to survive a long war of attrition, as economic difficulties, exacerbated by the war, and popular discontent mounted in Morocco. US military aid therefore served to prolong the war without much chance of altering its final outcome.” *Western Sahara: The Roots of a Desert War*, *supra* note 5 at 365. See also “The Stealing of the Sahara”, *supra* note 7.

³⁷ See OAU AHG Res. 104 (XIX) June 1983 (accessed 24 September 2009); available from: <http://www.africa-union.org/root/au/Documents/Decisions/hog/sHoGAssembly1983.pdf>

SADR into its membership. The affair derailed planned (and rescheduled) Organization summits in 1982 and 1983.³⁸ Finally, at its November 1984 summit the OAU admitted the SADR as a member State. Morocco immediately quit the Organization and remains the only African country not a member of the OAU's successor, the African Union.³⁹

Toward Self-Determination?

As with East Timor, the United Nations was unable to resolve the question of Western Sahara during the 1980s. Although the General Assembly's Fourth Committee on Decolonization annually considered the conflict there were few meaningful efforts to overcome the impasse.⁴⁰ The General Assembly resolutions of the era reflect the frustration of member States:

The General Assembly [...] reaffirms the inalienable right of the people of Western Sahara to self-determination and independence in accordance with the Charter of the United Nations, the charter of the Organization for African Unity, and the objectives of General Assembly resolution 1514 (XV) ... deeply deplores the aggravation of the situation resulting from the continued occupation of Western

³⁸ Erik Jensen, *Western Sahara: Anatomy of a Stalemate* (Boulder, Colorado: Lynne Rienner Publishers, 2005) at 32. Jensen was the senior UN official responsible for voter registration in the territory in the late 1990s.

³⁹ The AU's current position is to support UN resolution of the conflict. "[The AU hopes the] two parties will seize the opportunity of the planned fifth round of talks to make progress towards a solution consistent with international legality, in particular the principles enshrined in the Charter of the United Nations, as well as in the Constitutive Act of the African Union." "Report of the Commission on Conflict and Post-Conflict Situations in Africa" (Peace and Security Council) (29 June 2008), AU Doc. PSC/HSG/2 (CXXXVIII) at para. 124 (accessed 2 October 2009); available from: [www.africa-union.org/root/AU/AUC/Departments/PSC/ps/PSC_2008_2009/PSC%202008%20\(105-\)/138/Report/2008_138_RE.pdf](http://www.africa-union.org/root/AU/AUC/Departments/PSC/ps/PSC_2008_2009/PSC%202008%20(105-)/138/Report/2008_138_RE.pdf) The AU also maintains a liaison-administrative office co-located with MINURSO in El-Ayoum.

⁴⁰ UN Secretary-General Perez de Cuellar did arrange for indirect talks between Polisario and Morocco in April-May 1986. Saudi efforts at mediation were also pursued. See *Western Sahara: Anatomy of a Stalemate*, *supra* note 38 at 34. Although Morocco and Algeria resumed diplomatic relations in 1988 the decade closed without substantial progress.

Sahara by Morocco [and] urges Morocco to join in the peace process and to terminate the occupation of the Territory of Western Sahara.”⁴¹

Similar to the case of South West Africa, the United Nations recognized the Polisario Front as the representative of the people of Western Sahara, declaring the Front “should participate fully in any search for a just, lasting and definitive political situation of the question of Western Sahara ...”⁴² The UN would continue in that position while the SADR itself came to be increasingly recognized by States, 75 by the end of the decade.⁴³

1990 brought the prospect of change on the United Nations diplomatic front, setting in motion the complex steps to resolve the question of Western Sahara over the next two decades, steps that have failed. The peace-making efforts of the United Nations, including its ability to conduct direct negotiations between Morocco and Polisario, has been more successful. This owes much to then Secretary-General Perez de Cuellar who arranged matters for the Security Council to ratify a peace plan first presented in 1990.⁴⁴

⁴¹ “Question of Western Sahara”, *supra* note 13. See also GA Res. 39/40 (5 December 1984). But cf. General Assembly resolutions on East Timor, *e.g.* “Question of East Timor” GA Res. 3730 (23 November 1982) requesting the Secretary-General to consult with directly concerned parties “with a view to exploring avenues to achieve a comprehensive resolution of the problem ...” Cf. also “The Question of Palestine” GA Res. 39/49 (11 December 1984). The General Assembly resolutions on Western Sahara’s decolonization were among a handful of others declaring a right of self-determination and independence. See *e.g.* GA Res. 63/165 (18 December 2008) on Palestine (noting a right to self-determination and independence).

⁴² *Ibid.*

⁴³ See “Country Recognitions of the SADR” at the website of the Saharawi Arab Democratic Republic (accessed 12 January 2010); available from: <http://www.arso.org/03-2.htm> The number of state recognitions declined somewhat after 2000.

⁴⁴ See Report of the Secretary-General (18 June 1990), UN Doc. S/23160 and Report of the Secretary-General (19 April 1991), UN Doc. S/22464. “The essential aim of the proposals ... is to enable the people of the Territory of Western Sahara to exercise their right of self-determination ...” UN Doc. S/23160 at para. 4.

1991 brought the creation and deployment into the territory of the UN Mission for the Referendum in Western Sahara, MINURSO, with a mandate to monitor the parties' cease-fire agreement and conduct a self-determination referendum.⁴⁵ The presence of MINURSO should have proven a real advance in a resolution of the Western Sahara conflict underscoring as it did the UN's determination to ensure an orderly exercise of self-determination.⁴⁶ With any progress toward a self-determination referendum stalled and Polisario's diminishing capacity to resume an armed campaign for liberation of the territory (or least render Morocco's current position on the territory untenable) MINURSO now mainly serves humanitarian roles of peace monitoring, "confidence building measures" to establish rapport between the parties, provision of limited medical care, and a presence that perhaps, if minimally, moderates human rights violations.⁴⁷

The impasse in the Sahara has resulted from that which the 1990 peace plan, the later Baker plan and framework agreements, and negotiations after 2004 were unable to resolve: the conduct of a credible referendum to decide for the Sahrawi people the

⁴⁵ See generally the MINURSO website (accessed 28 January 2010); available from: <http://www.un.org/en/peacekeeping/missions/minurso/>

⁴⁶ An advantage not enjoyed in the case of East Timor or most of non-self governing post-colonial territories, except the UNRWA in Palestine.

⁴⁷ See Report of the Secretary-General on the situation concerning Western Sahara (13 April 2009), UN Doc. S/2009/200 (accessed 10 January 2010); available from: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/290/58/IMG/N0929058.pdf?OpenElement>
See also *Western Sahara: Anatomy of a Stalemate*, *supra* note 38 at 118: "... by halting hostilities, [the 1990 peace plan] let Western Sahara slip beneath the horizon of international awareness and made a solution seem less imperative."

question of self-determination.⁴⁸ It is two issues in the referendum process that have been most in dispute between the Polisario Front and Morocco. The first is the identification of Sahrawis entitled to vote. The second is whether they would be permitted to have before them the choice of independence among options for self-determination. The position of the parties in respect of them has been intractable. Morocco's position seems clear: it will consent to a referendum so long as independence is not on offer. The Polisario Front will agree to move forward only if a referendum includes such an option for the Sahrawi people. The circumstances were described in 2008 by Mr. Peter van Walsum, the UN's outgoing representative for Western Sahara:

[T]he two main ingredients of the impasse were Morocco's decision of April 2004 not to accept any referendum with independence as an option, and the Security Council's unwavering view that there must be a consensual solution to the question of Western Sahara ...

This led to my conclusion that there were only two options: indefinite prolongation of the current impasse, or direct negotiations between the parties. Such negotiations would need to be embarked upon without preconditions, and I admitted it was only realistic to predict that, with Morocco in the possession of most of the territory and the Security Council unwilling to put pressure on it, the outcome would fall short of an independent Western Sahara.⁴⁹

Christopher Ross, the Secretary-General's current envoy to the Western Sahara, holds the same opinion, stating recently that "the positions of the parties [have] not changed ... and [remain] far apart on ways to achieve a just, lasting and mutually acceptable political

⁴⁸ On the work of the Secretary-General's personal envoy, James A. Baker III, from 1997 to 2004, see *Western Sahara: Anatomy of a Stalemate*, *supra* note 38 and *Endgame in the Western Sahara*, *supra* note 5.

⁴⁹ Peter van Walsum, "Sahara's long and troubled conflict," *El País*, 28 August 2008. van Walsum was the personal envoy of the Secretary-General for Western Sahara from 2005 until August 2008. "[T]here is a growing awareness that Polisario's insistence on full independence for Western Sahara has the unintended effect of deepening the impasse and perpetuating the status quo." *Ibid.*

solution that will provide for the self-determination of the people of Western Sahara ...”⁵⁰

After more than three decades, the right to self-determination for the Sahrawi people remains denied as much as that of East Timor in the years after 1975 and as irresolvable as the “question” of Palestine. The recent case of Kosovo’s bid for self-determination including a 2008 unilateral declaration of independence suggests the right of self-determination in post-colonial, non self-governing cases is extinct.⁵¹ It seems a right now all but impossible to realize, save only in cases of government collapse in the (re-)colonizing State (as with East Timor) or the resolve of the UN Security Council to force a result. Neither is an immediate prospect for the people of Western Sahara.

Oil in the New Millennium

While there are some aspects of the Western Sahara issue which enjoyed modest political advances in recent years, notably human rights protections and a universal acceptance of United Nations involvement, the specific issues of territory, geographic jurisdiction and sovereign rights to natural resources pending self-determination had, until the last decade, been quiet. However, in 2002 the natural resources of Western Sahara again became controversial. In late 2001 the government of Morocco concluded two contracts allowing the exploration or “reconnaissance” of oil in seabed areas off Western Sahara. Each contract had a one year term – both later extended – for seabed exploration over defined

⁵⁰ “Report of the Secretary-General on the situation concerning Western Sahara”, *supra* note 47 at para. 12.

⁵¹ See Marc Weller, *Contested Statehood: Kosovo’s Struggle for Independence* (New York: Oxford University Press, 2009) and Henry H. Perritt, *The Road to Independence for Kosovo: A Chronicle of the Ahtisaari Plan* (Cambridge, UK: Cambridge University Press, 2009).

areas within 200 nautical miles of the Saharan coast in areas south of the Canary Islands. One contract was between Morocco's state oil company, Office National de Recherches et d'Exploitations Pétrolières (ONAREP), and Kerr-McGee du Maroc Ltd. The other was between ONAREP and TotalFinaElf E&P Maroc. No exploration results from either foreign company were made public. The contracts made provision for seabed oil development after the expiry of their initial one-year terms.⁵²

This development, resulting in the most extensive Saharan seabed exploration activity since Spain's 1976 withdrawal led to the request of the United Nations Security Council to the Under-Secretary General for Legal Affairs to express an opinion on "the legality in the context of international law, including relevant resolutions of the Security Council and the General Assembly of the United Nations . . . of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara".⁵³ The opinion, delivered in a January 29, 2002 letter to the Security Council, concluded that the legality of the oil reconnaissance contracts depended not so much "whether mineral resource activities in a Non-Self-Governing Territory by an administering Power is illegal" but if the

⁵² The Kerr-McGee reconnaissance contract was first set to expire or later convert to permit exploitation of seabed oil and gas on October 29, 2002. It allowed exploration in the northern part of the Saharan offshore over an area of 110,400 square kilometres of seabed. The TotalFinaElf contract allowed for exploration of the seabed over an area of 114,556 square kilometers south of Dakhla.

⁵³ In 1978 ONAREP awarded seabed oil exploration contracts over limited areas in the Saharan offshore to British Petroleum, Phillips Oil Company and in 1982 north of Tarfaya, to Mobil Oil. See *Western Sahara: The Roots of a Desert War*, *supra* note 5 at 122 *et seq.*

activity was done “in disregard of the needs and interests of the people of that territory.”

The Under-Secretary, Mr. Hans Corell, noted that:

The principle that the interests of the peoples of Non-Self-Governing Territories are paramount, and their well-being and development is the "sacred trust" of their respective administering Powers, was established in the Charter of the United Nations and further developed in General Assembly by resolutions on the question of decolonization and economic activities in Non-Self-Governing Territories. In recognizing the inalienable rights of the peoples of Non-Self-Governing Territories to the natural resources in their territories, the General Assembly has consistently condemned the exploitation and plundering of natural resources and any economic activities which are detrimental to the interests of the peoples of these territories and deprive them of their legitimate rights over their natural resource. It recognized, however, the value of economic activities that are undertaken in accordance with the wishes of the peoples of those territories, and their contribution to the development of such territories [...]

The foregoing legal principles established in the practice of States and the United Nations pertain to economic activities in Non-Self-Governing Territories, in general, and mineral resource exploitation, in particular. It must be recognized, however, that in the present case, the contracts for oil reconnaissance and evaluation do not entail exploitation or the physical removal of the mineral resources, and no benefits have as of yet accrued. The conclusion is, therefore, that, while the specific contracts which are the subject of the Security Council's request are not in themselves illegal, if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the international law principles applicable to mineral resource activities in Non-Self-Governing Territories.⁵⁴

It is emphasized that Mr. Corell's opinion confined itself to the issue of oil exploration in the Saharan seabed. Arguably his reasoning would apply equally to the Saharan fishery. A crisis in the European Union's southern fishery resulting from too many commercial vessels in some national fleets brought this fishery into focus during

⁵⁴ The opinion, “Report of the UN Office of Legal Affairs on the legality of the Oil-contracts signed by Morocco over the natural resources of the Western Sahara” (letter dated 29 January 2002) (accessed 12 January 2010), is available at: www.derechos.org/human-rights/mena/moro/SahOil.html

2001-2002.⁵⁵ Moreover, on October 15, 2002 Morocco and the Russian Federation announced agreement upon a “fisheries cooperation accord.”⁵⁶ The agreement, with a term of three years, was not then made public. It provided for commercial access to a pelagic mackerel fishery with payment to be made annually by Russia on a recovered volume basis. A “mixed Russia-Morocco fishing commission” was established under the accord ostensibly to foster cooperation and resolve disputes.⁵⁷

From this review of Western Sahara’s political and legal development we consider the setting to determine its maritime jurisdiction.

The Saharan Geographic Setting

The northwest coast of Africa from Senegal to the Strait of Gibraltar is free of complicating geographic features, save perhaps for three island groups; the Cape Verde, the Canaries and the Madeira archipelago. The coast begins a northward turn at Dakar and after following the Bay of Lévrier (formerly known as the “Bay of the West”) turns completely north at Cape Blanc. Only some distance further north, proceeding to the

⁵⁵ An earlier European Union-Morocco fisheries agreement expired November 30, 1999. A fisheries agreement between Morocco and the Russian Federation was not then renewed. Fisheries arrangements with the EC-EU in Saharan waters after 1975 are discussed below.

⁵⁶ *Agreement between the government of the Russian Federation and the government of the Kingdom of Morocco in the cooperation of sea fishery*, 15 October 2002 (unpublished; not provided to the United Nations – on file with the author).

⁵⁷ See “Russia, Morocco sign fisheries cooperation accord,” *Pravda* (October 15, 2002) (accessed 25 January 2010); available at: <http://english/pravda.ru/economics/2002/10/15/38194.html>. For commercial reports of Russian fishing activities in Moroccan and Mauritanian waters, see *Russian Fish Report* at: www.fishnet.ru

town of Dakhla, does it turn more pronouncedly northeast. On first impression, this regional coastal profile is free from any features that would qualify as embayments across which baselines might be drawn. It is a coast that is readily discernable.

From Cape Blanc in the south to the northern frontier at 27° 40' north latitude, the Saharan coast spans a distance about 510 nautical miles or a straight line between the two points of 464 NM. The coast is remarkably free of offshore features such as islets, rocks and tidal elevations.⁵⁸ With an appearance that “is arid, sandy, and has no vegetation except for some sparse scrub, [the] coastline presents no undulations other than flattened sand dunes, the upper parts which can scarcely be seen at distances of over 3 miles.”⁵⁹ In the Atlantic Ocean proper, the Saharan seabed projecting from such coast, including the continental margin, rise and shelf, are all well defined. The coastline itself shows indications of geophysical instability, revealed as accretion or littoral drift in areas around Dakhla and Cape Blanc. The natural harbor at Dakhla and the southward extending Cape Blanc peninsula are its only obvious features.⁶⁰

⁵⁸ Spain described the coast thus in its materials for the *Western Sahara Advisory* case: “The Saharan coast is very little articulated. From north to south, we find Cape Bojador, l’Angra de los Ruivos, and the Villa Cisneros [Dakhla] Peninsula enclosing a good port with abundant groundwater. Finally, in the south is found Cape Blanc with its peninsula, the interior part of which forms the Bay of Levrier.” [Translation.] Advisory Opinion Documents, *supra* note 5, Volume 1 at 226.

⁵⁹ U.S. Government Printing Office, *Sailing Directions (En Route): West Coast of Europe and Northwest Africa*, 8th ed., (Bethesda: National Imagery and Mapping Agency, 2003) at 215.

⁶⁰ A jetty structure in the north at Port Laayoune (El-Ayoun Playa) was built in the 1970s for the export of phosphate ore from the Bu Craa mines, *ibid.* at 215. These “permanent harbour works” extending 1.5 nm seaward are discussed below. Earth imagery photos (accessed 15 January 2010) are available at: <http://earth.jsc.nasa.gov/sseop/EFS/lores.pl?PHOTO=STS031-151-16>

The general direction of the Saharan coast, from Cape Barbas in the south (north of Cape Blanc, facing seaward into the Atlantic Ocean) to Cape Bojador, follows an azimuth of 209°. ⁶¹ Cape Blanc itself extends, much like the face of the African continent in the northern Mauritanian area, almost on a north-south line while the northernmost part of Western Sahara's coast, adjacent to Port Laayoune, is oriented markedly along a northeast axis. ⁶² The Canary Islands are the only complicating offshore feature, lying as they do within 200 nautical miles of the Saharan coast. If a closing line is drawn across the south extremities of those three islands most directly facing the Saharan coast; Fuerteventura, Gran Canaria and Hierro, such line at its closest point is 55 miles from the Saharan coast at the northern Saharan land frontier (27° 40'N) and, further seaward, 210 miles northwest of Cape Bojador. Of course, the geographic presence of the Canaries, a somewhat complicated archipelago, merits fuller consideration given their effect upon Western Sahara's presumptive exclusive economic zone boundary.

The Saharan Fishery

The general profile of the Saharan coast, together with the Canary Islands, and the bathymetry of the region contribute to an important fishery resource. More than phosphate and oil, Western Sahara's most important and perhaps contentious ocean

⁶¹ See United Kingdom Hydrographic Office International Chart Series *North Atlantic Ocean: Lisboa (Lisbon) to Freetown* (Chart 4104) and *Plans on the North-West Coast of Africa* (Chart 1690).

⁶² "It is reported (1980) that navigation and fishing are prohibited within an area extending up to 13 miles from the coast between Punta Guera [Cape Blanc] (20° 49'N., 17° 06'W.) and Agadir (30° 24'N., 9° 38'W.). Vessels must receive permission from local authorities to enter and navigate within this zone." *Sailing Directions*, *supra* note 59 at 219. Indonesia enacted a similar security exclusion zone on the south coast of East Timor after its annexation of the territory in 1975.

resource continues to be the fishery. “Western Sahara’s territorial waters and continental shelf contain among the world’s most diverse and abundant fishing resources: in the north blue pelagic, particularly sardines, and further south, cephalopods in the cold currents of Dakhla and La Guera.”⁶³

The Canary Current Large Marine Ecosystem is bounded by the Atlantic Ocean and is characterized by its temperate climate. This LME, situated off the coast of Northwest Africa, shows major upwelling and other seasonal nutrient enrichments. Climate is the primary force driving the LME, with intensive fishing as the secondary driving force... The Canary Current is strongest near the coast, becoming progressively weaker offshore. It accelerates as it passes between the Canary Islands and the coast. The islands produce shade zones, with warmer water south of the islands and an accumulation, there, of marine resource biomass

The Canary Current LME is classified as a Class I, highly productive (>300 gC/m²-yr), ecosystem based on global primary productivity estimates ...

Commercial species in this LME include sardines, pilchards, horse mackerel, chub mackerel and hake ... There have been dramatic fluctuations in fish and fisheries. The FAO 10-year trend (1990-1999) shows a decline in the catch from 2.3 million tons in 1990 to 1.8 million tons in 1999 [with] sharp declines in 1992, 1993, and 1994. More than 60% of the catch is composed of small pelagic clupeoids (herring, sardines, anchovies) ... Canary Current fisheries are increasingly under pressure from highly subsidized foreign fishing fleets originating from the European Union countries. These countries want more fishing access. Mauritania, Guinea-Bissau and Senegal need to assess the sustainability of their fisheries resources. These countries’ lack of resources has been an obstacle to the establishment of an effective monitoring system for the LME.⁶⁴ [Citations omitted.]

⁶³ “Western Sahara’s Natural Resources”, *supra* note 9 at 3. See also *Western Sahara: The Roots of a Desert War*, *supra* note 5 at 122.

⁶⁴ United States Government, *Marine Ecosystem Studies, Large Marine Ecosystems: LME #27 – Canary Current* (Narragansett: National Oceanic and Atmospheric Administration, 2003) (accessed 22 January 2010); available at: <http://na.nefsc.noaa.gov/lme/text/lme27.htm>
For a summary of catches in the Canary Current LME (accessed 22 January 2010) see: <http://saup.fisheries.ubc.ca/lme/SummaryInfo.aspx?LME=27#> and see also www.seararoundus.org/eez/summaryInfo.aspx?EEZ=732#

While Morocco has not formally claimed any fisheries or exclusive economic rights in Saharan waters, a matter considered in detail below, it has maintained *de facto* control over them since early 1976, including those waters ostensibly under Mauritanian control until 1979.⁶⁵ Foreign fishing in Saharan waters has seen three phases. The first were bilateral agreements with Spain and Portugal from 1977 until the late 1980s, when the European Economic Community Union, as it then was, assumed responsibility for administration of member State foreign fisheries. During this time, Morocco began to develop a commercial fleet capable of fishing in Saharan waters. By early 1988 an agreement was in place between Morocco and the European Union, permitting Spanish and Portuguese fleets to operate in the area.

For four years, European, mainly Spanish ships would fish in ‘Morocco’s Fishing Zone’ an unrestricted amount of species for eleven months in the year, and stop during one month for biological rest. ‘Morocco’s fishing zone’ included all waters over which Morocco has sovereignty or jurisdiction. 800 fishing licenses for 4 years cost the EU [70 Million ECU].⁶⁶ [Footnotes omitted.]

The agreement was renewed in 1992 and again in 1995.⁶⁷ Throughout the Polisario Front asserted that Morocco was seeking recognition of its sovereignty over Saharan waters, a matter which, while contentious in European Community political circles, was

⁶⁵ See the April 1976 *Convention concerning the State frontier line established between the Islamic Republic of Mauritania and the Kingdom of Morocco*, *supra* note 28.

⁶⁶ “Western Sahara’s Natural Resources”, *supra* note 9 at 6.

⁶⁷ On the 1995 agreement in particular and the history of EU-Moroccan fishery agreements, see Gregory White, “Too Many Boats, Not Enough Fish: The Political Economy of Morocco’s 1995 Fishing Accord with the European Union,” *The Journal of Developing Areas* 31 (1997): 313.

of little practical concern to the parties.⁶⁸ However, by 1999 the EC-Morocco agreements had faltered. Notwithstanding their substantial monetary value, and particular importance to Spain's Canaries-based fishing fleet, the agreements were not renewed. "[The Moroccan Prime Minister's fisheries advisor] explained that Morocco intended to observe a four year biological rest period to renew the fish population and devote that time to modernizing Morocco's ports – particularly Dakhla, which it intends to make into Africa's largest fishing port ..."⁶⁹ Such a "rest period", if only for rich cephalopod fishery, was obviously much needed by late 2003, with the Moroccan government imposing restrictions on the taking of octopus, squid and cuttlefish from September 1, 2003 until April 30, 2004.⁷⁰ The closure of the fishery to foreign vessels was not long in being maintained, however, as Morocco moved to agree with the Russian Federation in October 2002 on a three-year fishery in waters south of 28 degrees latitude, with some restrictions on the catch of particular species in coastal waters.⁷¹

⁶⁸ "Western Sahara's Natural Resources", *supra* note 9 at 6. D'Origny notes that "In November 1987, a month before the [1983 Spanish-Moroccan fishing] agreement expired, the POLISARIO offered to sign a similar fishing deal with the EEC. None of the 12 EEC member states in talks with Morocco accepted this offer, partly because the berms, which then stretched diagonally across almost all the territory, effectively preventing the POLISARIO from controlling the shores." On Polisario Front attacks against Moroccan and foreign flag fishing vessels, see *Western Sahara: The Roots of a Desert War*, *supra* note 5 at 352.

⁶⁹ "Western Sahara's Natural Resources," *ibid.* at 10.

⁷⁰ *Le Matin du Sahara et du Maghreb*, February 11, 2004. A 77% drop in the caught volume of the Moroccan cephalopod fishery, located primarily south of the Canary Islands, was reported for the period 2001-2004, *ibid.* November 20, 2003. See also Phillippe Riché, "L'exploitation Des Ressources Du Sahara Occidental Par Le Maroc : Epuisement Des Cephalopodes", April 2, 2004 (accessed 22 January 2010); available at: <http://arso.org.site.voila.fr/ressnat2.html>

⁷¹ The 2002 agreement allowed fishing of the following species: sardines, mackerel, jack mackerel, anchovies, cutlass fish. Russia was allocated a 120,000 tonne catch in the first year of the agreement, with a valuation formula ranging between 220 and 405 US dollars per tonne, for a resulting annual payment of \$25M-\$48M (US). Sardines were to be 25% of the catch, with a 5% bycatch permitted.

In 2005-2006 the European Union and Morocco began negotiating a new fisheries arrangement, resulting in a four-year *Fisheries Partnership Agreement* that came into force on March 7, 2007.⁷² This agreement continues the tradition of unclear or imprecise geographical limits to fishing areas, simply within the "Moroccan fishing zone" defined as "the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco."⁷³

The 2007 FPA provided for a catch of six categories of pelagic, demersal (*i.e.* longline, trawler and gillnet based fisheries) and inshore species to be carried out by a variety of vessel types, including ones from EU member states partly crewed by Moroccan nationals. The EU's annual payment was to be larger than earlier agreements, including under the 2002 treaty with Russia, such "annual EU financial contribution" to be €36,100,000, with €13,500,000 for the development of Moroccan national fisheries.⁷⁴ An annual catch limit of 60,000 tonnes for the "industrial" pelagic fishery was prescribed.⁷⁵ The FPA is an

See "Russia, Morocco sign fisheries cooperation accord", *Pravda* (October 15, 2002) (accessed 22 January 2010); available at: <http://english/pravda.ru/economics/2002/10/15/38194.html>

See also J.J. Smith, "The maritime jurisdiction of the Western Sahara and the duty of states to preserve Saharan fisheries resources pending self-determination" (unpublished - on file with the author).

⁷² *Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco* (entered into force 7 March 2007) (the "2007 FPA") (accessed 9 January 2010); available from: http://ec.europa.eu/fisheries/cfp/external_relations/bilateral_agreements/morocco_en.htm

⁷³ *Idem* at Article 2. A detailed catch and vessel location-reporting scheme was provided for in the FPA.

⁷⁴ *Idem* at the FPA's "Protocol Setting Out The Fishing Opportunities and Financial Contribution". €4.75M of the annual payment is to be paid for modernization of the Moroccan fishing fleet, and €1.25M to support Morocco's program to abolish driftnet fishing.

⁷⁵ Preliminary catch figures for 2009 became available in late March 2010. See European Union, *Parliamentary Question to the European Commission E-0717/2010* (March 26, 2010) (unpublished - on file with the author). Vessels of seven States (Spain, Portugal, Latvia, Lithuania, United Kingdom, Netherlands and Poland) caught a recorded 41,265 tonnes in the year. Sardines, anchovies and

agreement more conservation and development oriented than previous ones. It is also a richer one for Morocco.

In February 2010, the European Union admitted to having fished under the 2007 FPA in Saharan waters contrary to international law, and that the Agreement itself insofar as it applied to or permitted member State vessels to fish in such waters was illegal. This remarkable admission was contained in a memorandum of the European Parliament legal service dated July 13, 2009, addressed to a committee of the Parliament that had sought advice on whether the FPA was affected by the SADR's declaration of an exclusive economic zone in January of that year.⁷⁶ The memorandum concluded that:

[I]t is not demonstrated that the EC financial contribution is used for the benefit of the people of Western Sahara. Yet, compliance with international law requires that economic activities related to the natural resources of a Non-Self-Governing Territory are carried out for the benefits of the people of such Territory, and in accordance with their wishes.

The actions mentioned in the matrix essentially aim at improving the infrastructure of the ports of Western Sahara. This is not necessarily equal to benefiting the people of Western Sahara insofar as they are not mentioned in the programming document and it is not known whether and to what extent they are able to take advantage of such improvements.

The July 2009 memorandum concluded with a recommendation for an “amicable

mackerel comprised the majority of the catch. Some of the catch was north of Saharan waters (to the north of 27° 40' N latitude) however, at least half was in clearly Saharan waters, noted as being south of 26° 07' N latitude, *i.e.* south of Cape Boujdour.

⁷⁶ “Note - Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco - Declaration by the Saharawi Arab Democratic Republic (SADR) of 21 January 2009 of jurisdiction over an Exclusive Economic Zone of 200 nautical miles off the Western Sahara - Catches taken by EU-flagged vessels fishing in the waters off the Western Sahara” (European Union/Commission Legal Service Opinion), 13 July 2009 (unpublished - on file with the author).

settlement” of the issues in the letter, or suspension of the 2007 *Fisheries Partnership Agreement*, or an established means of ensuring EU member State vessels operate outside Saharan waters.

It was the enactment of ocean jurisdiction legislation by the Saharawi Arab Democratic Republic which precipitated the EU’s admissions.⁷⁷ Such a claim to maritime territory by a representative movement (or government-in-exile) of a non-self governing people was unprecedented. That is not surprising, however, in light of the long-running controversy over Morocco’s development of natural resources in Western Sahara and when one recalls that most colonial liberation movements of the 1960s and 1970s did not have the benefit of advances in the law of the sea and its codification in the 1982 United Nations *Convention on the Law of the Sea*.⁷⁸

The petroleum exploration of the Saharan continental shelf has been scarcely less controversial, even if most ventures over 40 years have been limited to small scale test drilling. “In March 1978 ... the Moroccan government awarded seven offshore exploration blocks between El-Ayoun and Boujdour to British Petroleum and Phillips Oil

⁷⁷ *Law No. 03/2009 of 21 January 2009 Establishing the Maritime Zones of the Saharawi Arab Democratic Republic* (accessed 15 January 2010); available from: <http://www.arso.org/03-0.htm> I was the principal drafter of the legislation, which details a claim to five maritime areas on the Saharan coast: internal waters, the territorial sea, a contiguous zone, the continental shelf and an exclusive economic zone (EEZ). A copy of the *Law* is attached to this paper as **Schedule 1**.

⁷⁸ United Nations *Convention on the Law of the Sea*, done at Montego Bay, Jamaica, 10 December 1982 (entered into force 16 November 1994) (“UNCLOS”), 21 *International Legal Materials* 1261.

Company ... no drilling took place and in 1980 the concession was abandoned”⁷⁹ As noted above, October 2001 Morocco renewed such exploration in 2001 by granting exploration (“reconnaissance”) contracts to foreign companies for petroleum exploration in Saharan waters.⁸⁰ These exploratory concessions extended roughly to 200 nautical miles seaward of the Saharan coast encompassing areas of 110,400 and 114,556 km² respectively. The terms of the contracts have not been made public, although some indication of them can be had from the January 2002 legal opinion of Under Secretary Corell, above. It was announced in 2002 and 2003 that the contracts would be extended for additional one-year periods. In November 2004, Total E&P Maroc relinquished its reconnaissance contract, ostensibly because there were no commercially viable deposits in the “Dakhla offshore”.⁸¹

Petroleum exploration on the Saharan continental shelf has been pursued since 2004 by a single American company, Kosmos Energy LLC of Texas.⁸² In an area of 43,998 km² extending from the 24th parallel of latitude north to the 27th parallel, known as the Boujdour Block, Kosmos owns a 75% share of licensing rights, with Morocco’s government through its Office National des Hydrocarbures et Mines having the remaining

⁷⁹ *Western Sahara: The Roots of a Desert War*, *supra* note 5 at 125 [Footnote omitted].

⁸⁰ See the website of the Office National des Hydrocarbures et Mines (“ONHYM”) (formerly the Office National de Recherches et d’Exploitations Pétrolières (“ONAREP”), a “public organization” under the administrative supervision of the Morocco’s Ministry of Energy and Mines (accessed 24 January 2010); available at: www.onhym.com

⁸¹ “No oil off Sahara’ says withdrawing Total”, *afrol News*, November 29, 2004.

⁸² Kosmos is an exploration development company, and not a petroleum producer. See its website at: <http://www.kosmosenergy.com/> (accessed 22 February 2010).

25%. Two spatial aspects of the Kosmos exploration area are noteworthy. First, its southern limit follows the 24th parallel of north latitude, the continental shelf boundary provided for under the now defunct 1976 Mauritania-Morocco frontier treaty.⁸³ Second, the closing line about its outer, northwest area generally follows a simplified equidistance line between the Saharan coast and the Canary Islands, although to the further south it traces over the 3,000 metre isobath.⁸⁴ Significant seismic exploration in the block was not undertaken until January 2009. The government of the SADR later protested the exploration, recalling Under Secretary Corell's 2002 opinion, and noting that any exploration or exploitation of the natural resources within its recently enacted EEZ would be regarded as illegal.⁸⁵ For its part, Kosmos Energy has reported the area to have petroleum bearing potential with seismic data showing "significant prospectivity".⁸⁶

For its part, the Saharawi Arab Democratic Republic has sought to counter Morocco's petroleum exploration by issuing development permits of its own. A second round of permits was opened on February 5, 2008 for six offshore and three onshore blocks totaling 192,569 km² in area under a production sharing contract regime. Although it is

⁸³ *Convention concerning the State frontier line established between the Islamic Republic of Mauritania and the Kingdom of Morocco*, *supra* note 28. Article II: "[The continental shelf boundary] is constituted by the 24th parallel of north latitude."

⁸⁴ See the map of the Boujdour Block at the ONHYM website (accessed 22 February 2010); available at: http://62.251.215.138/Hydrocarbon_Map/default.aspx

⁸⁵ Letter dated 8 April 2009 from the representative of the Frente Polisario addressed to the President of the Security Council, UN Doc. A/63/871; S/2009/198.

⁸⁶ Kosmos Energy LLC website (accessed 22 February 2010); available at: <http://www.kosmosenergy.com/morocco.html>

impossible for physical exploration of the Saharan continental shelf to take place under such a countervailing scheme, the SADR had in mind the expression of an *effectivité* to its territory: “The licensing initiative has been launched in preparation for the full recovery of all of our territory, as the UN mediation process progresses towards a lasting solution to the conflict between the SADR and Morocco.”⁸⁷

No discussion of the issue of Western Sahara’s ocean resources would be complete without a brief acknowledgment of the substantially richer source of phosphate mineral rock in the territory. The generally stated annual production figure for the mineral, an essential constituent of agricultural fertilizer that is strip mined at Bou Craa, has been three million tonnes.⁸⁸ Until 2007-08, phosphate rock traded at a steady \$50(US)/tonne before peaking over the following year to more than \$200(US)/tonne. Through 2010, the trading price has generally been \$100-125(US)/tonne.⁸⁹ The mineral rock is loaded into bulk freighters at a deepwater loading port constructed off Laayoune’s waterfront. The industry, much as that in Morocco, is the territory’s most substantial natural resource activity, however defined.

⁸⁷ “SADR sets date for second petroleum licencing round” (accessed 22 February 2010); available at: www.sadroilandgas.com

⁸⁸ Letter dated 8 April 2009 from the representative of the Frente Polisario addressed to the President of the Security Council, *supra* note 85.

⁸⁹ These figures are derived from an average of 55 recent posted offerings at a commodities trading website (accessed 22 February 2010); available at: www.ec21.com/offers/rock_phosphate_price.html See also Andy Jung, *Phosphate Industry Outlook* (London: British Sulphur Consultants, November 2008) (accessed 20 February 2010); available from: www.firt.org/Presentation_Archive/2008/JOINT/Jung_Phosphate_Outlook_presentation.pdf

The Drawing of Colonial Frontiers

If there is an enduring axiom of the law of ocean jurisdiction it is that “the land dominates the sea”.⁹⁰ In almost all situations, it is the presence of a coastline with its geographic reach that will be the basis for delimitation.⁹¹ The seaward projection of such a coastline, complex or simple, will be limited by either encroaching geographic features, customary and codified rules governing the maximum reach of exclusive economic zone and continental shelf entitlements and the presence of adjacent States along the same coast. An independent Western Sahara faces all three of these constraints. From the perspective of defining the State’s coastal profile, the setting could not be simpler. Bounded by colonial frontiers in the north and south that have remained undisturbed and which were demarcated on a geographic basis, the territory possesses an uncomplicated coastline from which to generate maritime zones.⁹² There is no difficulty in suggesting that both land boundaries will continue seaward and so initially define Saharan territorial sea boundaries.⁹³

⁹⁰ Prosper Weil, *The law of maritime delimitation – reflections* (Cambridge, UK: Grotius Publications, 1989) at 51, quoting from the *North Sea Continental Shelf cases* at paragraph 96.

⁹¹ There are exceptions, notably in coastal waters held in common or condominium between states, as in the case of France and Spain at the Atlantic Ocean, and between El Salvador, Honduras and Nicaragua, in the Gulf of Fonseca. See *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua Intervening)*, ICJ Reports 1992, 351.

⁹² Neither Morocco nor the SADR has made any extra-territorial claims in respect of the territory. A few islets immediately off the Saharan coast would fall within the State’s territorial sea. Cf. Spain’s continuing possession of islands along the north coast of Morocco, and South Africa’s possession of the Walvis Bay enclave and offshore islands on Namibia’s coast until 1994.

⁹³ “[Western Sahara], within internationally recognized frontiers, is a democratic republic ...” *SADR Constitution*, Article 1, *supra* notes 3 and 24.

The origins of the territory's land boundaries must be first considered. They can be traced to the advance of European colonization, from Spain's occupation of the harbour at Dakhla and the establishment of a protectorate for Cape Blanc, Río de Oro and Angra de Cintra in 1884. In the era, this was an expected and formal expansion of Spanish interests and trading from the Canary Islands, typified by the presence of a commercial enclave at Santa Cruz de Mar Pequeña from 1476 to 1485, and 1496 to 1524.⁹⁴ Spain moved this trading entrepôt in 1765, concluding a treaty with Sultan Sidi Mohamed Ben Abdallah of present day Morocco in 1767, which held at its Article 18 that the Sultan denied sovereignty over the lands south of Oued Noun, near present-day Sidi Ifni at 28-30° north latitude on the Moroccan coast.

His Imperial Majesty warns the inhabitants of the Canaries against any fishing expedition to the coasts of Oued Noun and beyond [to the south]. He disclaims any responsibility for the way they may be treated by the Arabs of the country, to whom it is difficult to apply decisions, since they have no fixed residence, travel as they wish and pitch their tents where they choose. The inhabitants of the Canaries are certain to be maltreated by those Arabs ...

His Imperial majesty refrains from expressing an opinion with regard to the trading post which His Catholic Majesty wishes to establish to the south of the River Noun, since he can not take responsibility for accidents and misfortunes, because *sus dominios* does not extend so far.⁹⁵

The later 1799 *Treaty of Meknes* afforded hardly any greater protection to Spanish seafarers who might find themselves stranded on the Sahara coast. The Sultan of

⁹⁴ *Historical Dictionary of Western Sahara*, *supra* note 4 at xvii and *Western Sahara: The Roots of a Desert War*, *supra* note 5 at 40.

⁹⁵ *Marrakesh Treaty of 1767*, *supra* note 5 at 228. [Translation from Arabic.] Morocco disputed such interpretation. In its documentary materials submitted to the ICJ, Spain acknowledged that “[a] number of treaties primarily for trading purposes with little or no attempt to define boundaries were signed by the sultans of Morocco and European countries prior to 1885 ...”, Advisory Opinion Documents, *idem* at 228. See also at 286.

Morocco, Sidi Moulay Souleiman, undertook in the treaty to “to avail himself of the most opportune and effective measures to extract and free the seamen and other individuals who have the misfortune to fall into the hands of the natives there.”⁹⁶ Whether such provision was ever relied upon by Spanish seafarers is not known.

Spain’s modern presence on the Saharan coast finds its provenance in the 1840s. Spain was then participating in the rise of European mercantilism and nascent colonial expansion.⁹⁷ It was perhaps inevitable that a seemingly unoccupied coast close to the Canary Islands would be of interest, if only to stage fishing in more distant waters. Spain had maintained, if occasionally neglected, interest in its Sidi Ifni enclave on the African coast directly east of the Canaries, establishing “fishing stations” there in 1860.⁹⁸

Meanwhile, Spanish colonization was taking hold further south:

The Spanish colony on the Rio de Oro was founded during the premiership of Antonio Cánovas del Castillo, a conservative royalist who had assumed the reins of government after the restoration of the Spanish monarchy in 1874 and remained in office until 1885 except for a brief period in 1881-83. Personally skeptical about the practical benefits of a colony on the Saharan coast, he authorized its founding under strong pressure from a well-connected and influential “Africanist” lobby backed by powerful business groups...

⁹⁶ Article 22, *Treaty of Meknes*, 1799, *idem*.

⁹⁷ See T.G. Figueras, *Santa Cruz de Mar Pequeña, Ifni, Sahara: La acción de España en la costa occidental de Africa* (Madrid: Ediciones Fe, 1941). “At the same time, the Spanish government was encouraged to stake a claim by fishing interests in the Canaries, which valued the fishing resources off the Saharan coast, and by trading enterprises who, in the manner of the North-West Africa Company, hoped to tap the Saharan caravan traffic.” *Western Sahara: The Roots of a Desert War*, *supra* note 5 at 40.

⁹⁸ *Treaty of Peace and Amity between Spain and Morocco*, 26 April 1860, (1860-61) *British and Foreign State Papers* 51: 928.

[B]y 1884, there was a formidable interlocking nexus of business interests and Africanist propagandists who, with the ear of the royal family and several prominent politicians and the backing of influential sections of the press, could bring considerable pressure to bear on the Spanish government. Meanwhile, the Congress of Berlin was laying down the ground rules for the division of Africa. Unless Spain laid claim to the Sahara coast soon, another European power was certain to do so ...

It was to thwart such rivals that the Sociedad de Africanistas y Colonistas decided to send Emilio Bonelli to the Saharan coast in November 1884.⁹⁹

In December 1884 Spain made formal its presence in the Río de Oro, extending from Cape Bojador (or Boujdour) south to Cape Blanc at the entrance to the Western Bay (the Bay of Lévrier). This was done through the signing of “Acts of Adhesion” by tribal chieftains of the Oulad Bou Sbaa in the presence of Señor Bonelli.¹⁰⁰ The French interests further south along the Mauritanian coast and into Senegal were engaged by this, requiring explicit division between respective colonial territories.

On this basis Spain and France agreed on October 26, 1886 to demarcate a north-south division of the Cape Blanc Peninsula along its centre.¹⁰¹ The geography of the peninsula left open the issue of an inland boundary to the immediate north. Spain noted that, “during the course of negotiations in 1891 ... the [southern] limit of its [Río de Oro

⁹⁹ *Western Sahara: The Roots of a Desert War*, *supra* note 5 at 40 and 42.

¹⁰⁰ See the “Spanish Notification” of January 9, 1885 reproduced in English in Ian Brownlie’s *African Boundaries: A Legal and Diplomatic Encyclopaedia* (London: C. Hurst & Co., 1979) at 438. See also Advisory Opinion Documents, Volume II, *supra* note 5 at 230. Controlled directly from Spain in 1885, the territory was transferred by decree to the administration of the Governor-General of the Canary Islands in April 1887. The same instrument extended Spanish control some 150 miles inland from the Río de Oro coast.

¹⁰¹ *Western Sahara: The Roots of a Desert War*, *supra* note 5 at 45.

territory to the north of the peninsula] was the parallel 21° 20' North [latitude].”¹⁰² Such a boundary was acceptable to France, which required land access to a port on its eastern side of the Cape Blanc Peninsula while also leaving for it fishing rights in the Bay of Lévrier-Bay of Arguin area and the salt pans further inland at Idjil. The arrangements were concluded in a boundary treaty of June 27, 1900, the *Convention pour la délimitation des possessions françaises et espagnoles dans l’Afrique occidentale, sur la côte du Sahara et sur la côte du Golfe du Guinée*.¹⁰³ “It was during this period Spain accepted that Cape Blanc had to be divided in two, leaving all of the Bay of Lévrier to France, a matter made clear by the treaty ...”¹⁰⁴ As such, the southern border of Spanish Río de Oro was defined:

On the coast of Sahara, the limit between French and Spanish possessions follows a line which, from a point [at Cape Blanc] follows the middle of the said peninsula, dividing it equally as the terrain permits [and] continuing to the north until it meets parallel 21° 20' North. The frontier will continue to the east along [such parallel] until intersecting the median of longitude 15° 20' west of Paris (13° west of Greenwich).¹⁰⁵ [Translation from French.]

The 1900 southern frontier was the subject of a 1956 agreement between Spain and France which provided for a more accurate delineation of its inland course, notably in its

¹⁰² Advisory Opinion Documents, Volume III, *supra* note 5 at 21 [Translation from French.]. The parties failed to agree upon an extreme eastern inland boundary during 13 meetings from 1886 to 1900. See Volume I at 290 *et seq.*

¹⁰³ 92 B.F.S.P. 1014 (also known as the *Convention between France and Spain for the Delimitation of their Possessions in West Africa* (the “1900 Boundary Convention”). See *African Boundaries*, *supra* note 100 at 439. See also Advisory Opinion Documents, Volume II, *supra* note 5 at 157.

¹⁰⁴ [Translation from French.] Advisory Opinion Documents, Volume III, *supra* note 5 at 20.

¹⁰⁵ Article 1, the 1900 Convention, *supra* note 103. Article 2 of the Treaty provided that Spanish fishing activities, including landing for processing and vessel repair, could continue “as before” in a narrow channel 3.5 nm south of Cape Blanc. The *Sailing Directions*, *supra* note 59 at 221 note that “[t]here is an abundance of fish in the [north part of the Bay of Levrier]. The quantity of sardines being so great that schools of these fish have sometimes been mistaken for dangers.”

semi-circular path west of Mauritania's salt pans at Idjil and iron ore deposits at Zouerate.¹⁰⁶

The northern frontier of Western Sahara developed in a less orderly and decidedly more political fashion. There had already been established the coastal enclave – little more than an extended fishing encampment – at Sidi Ifni. By the late 1800s, competing European interests in Morocco had resulted in Spain and France agreeing secretly to divide their areas of influence.¹⁰⁷ However, Spain withheld ratification of an agreement reached in a 1902, concerned with a possible English reaction. During the next two years, France consolidated its presence in Morocco following the settlement of colonial interests with England under the 1895 *Anglo-Moroccan Agreement* and the *Entente Cordiale* of 1904.¹⁰⁸ In the event, the secret agreement of 1902 was realized as the *Convention between France and Spain respecting Morocco*, signed October 3, 1904. It defined the extent of Spain's possession of the northern Saharan coast. The "demarcation" was expressed as beginning inland, continuing east along the 26th meridian, then turn north and follow the thalweg of the Draa to its watersheds, and turn then to the coast south of Agadir.

¹⁰⁶ *Franco-Spanish Agreement delimiting the Mauritania-Spanish Sahara boundary*, 19 December 1956, I.B.S. No. 149 at 2. See also *African Boundaries*, *supra* note 100 at 443: "The Convention of 1900 resulted in fairly adequate demarcation of the south and north-east of Spanish Sahara. However, prior to the Agreement of 1956, the concave sector in the south-east remained undemarcated and even indefinite in principle to some degree ... The 1956 Agreement appears to be the formal outcome of a delimitation agreed upon in diplomatic exchanges in 1945." Mauritania became a member of the French Community in 1958 and achieved independence in 1960.

¹⁰⁷ *Western Sahara: The Roots of a Desert War*, *supra* note 5 at 47.

¹⁰⁸ See generally Michael Brett, "Great Britain and southern Morocco in the nineteenth century," *The Journal of North African Studies* 2 (1997): 1.

In order to complete the delimitation set out in Article I of the Convention of 27 June 1900, it is understood that the demarcation between the French and Spanish spheres of influence shall start from the intersection of the meridian 14° 20' west of Paris [12° W. of Greenwich] with 26° north latitude, then follow [a line] east to the meridian 11° west of Paris [8° 40' W. of Greenwich]. The demarcation shall then proceed north along such meridian until it reaches the [basin of the] Oued Draa, the thalweg of which it will follow until the meridian 10° west of Paris [7° 40' W. of Greenwich], finally the meridian 10° west of Paris until it reaches a line drawn between the basins [or watersheds] of the Oued Draa and the Oued Sous, and following it, in a westerly direction, [the same] line drawn between the basins of the Oued Draa and the Oued Sous, and then between the lines of the coastal basins of the Oued Mesa and the Oued Draa until the nearest point of the source of the Oued Tazeroualt.¹⁰⁹ [Translation from French.]

Importantly, the 1904 Boundary Convention accorded Spain unrestricted dominion over the coastal strip between 26° and 27° 40' north, as far west to the above-described demarcation 11° west of the Paris meridian, all of which was said to be “outside Moroccan territory”.¹¹⁰ The territory of all Spain’s possessions was thus established, from the Río de Oro region to Sequiet el Hamra (Saguia el-Hamra) region and, further north the “Spanish Southern Zone” in Morocco, known also as the Tekna Zone, together with Sidi Ifni. However, a distinction would be created between Spain’s protectorate areas in southern Morocco and those of its colonial possessions south of 27° 40' north latitude.

¹⁰⁹ Article V, *Convention between France and Spain respecting Morocco*, 3 October 1904, 102 B.F.S.P. 432 (the “1904 Boundary Convention”). See *African Boundaries*, *supra* note 100 at 151. Cf. the English translation at Advisory Opinion Documents, Volume II, *supra* note 5 at 231.

¹¹⁰ *Idem* at Article VI. The 1904 Boundary Convention provided that Spain was to cede its northern Moroccan enclaves of Fez and Taza, and that Tangiers would become an international zone. In Article IV Sidi Ifni was recognized as existing from 1860 as a Spanish enclave.

Over the next decade France achieved its ascendancy in Morocco, arranging a protectorate with Sultan Moulay Hafid under the *Treaty of Fez*.¹¹¹ The treaty ensured that France would grant to Spain a protectorate status over parts of Moroccan territory, but very little additional area was transferred under the resulting *Franco-Spanish Convention* of 27 November 1912.¹¹² The Agadir Crisis of 1911 had ensured French hegemony in north Africa.

So the Spanish protectorate zone in northern Morocco was reduced to a small strip of coastline and a portion of the Rif Mountains, while in the south Spain had to give up its previous hopes of acquiring some of the Anti-Atlas range and accept a small protectorate zone sandwiched between the Draa and parallel 27° 40'. Known later as Spanish Southern Morocco, this was divided by French-ruled territory from Spanish Ifni, a tiny enclave of about 580 square miles. **To the south of parallel 27° 40', the 1912 convention ratified Article Six of the 1904 convention, thus confirming that Saguia el-Hamra was “outside Moroccan territory” and could become an outright Spanish colony rather than part of Spain’s protectorate zone in Morocco.**¹¹³ [Footnote omitted. Emphasis added.]

The inconsistency of a straight line “demarcation” along the 27° 40' parallel of latitude proceeding inland from the Atlantic coast, as defined in Article VI of the 1904 Boundary Convention, with the less certain watershed-thalweg boundary in the north and north-east merits consideration. Why would the parties apply purely cartographic and physical criteria to establish a single boundary? One answer lies in the accepted historic

¹¹¹ *Protectorate Treaty between France and Morocco* (March 30, 1912), *American Journal of International Law* 6 (1912): 207. See generally Ross E. Dunn, *Resistance in the Desert: Moroccan Responses to French Imperialism, 1881-1912* (Madison, Wisconsin: University of Wisconsin Press, 1977).

¹¹² *Treaty between France and Spain regarding Morocco*, 27 November 1912, *American Journal of International Law* 7 (1913) (Supplement): 81.

¹¹³ *Western Sahara: The Roots of a Desert War*, *supra* note 5 at 48. *Treaty between France and Spain regarding Morocco*, *ibid.*, for which see the French language text at Advisory Opinion Documents, Volume II, *supra* note 5 at 208.

limits of the Moroccan realm, which extended as far south as south the Oued Draa. At its southern extreme the Draa was more or less directly east of Cape Juby, on the Atlantic coast at 27° 57' north, 12° 55' west. The better answer, however, is found in the events that resulted in the 1895 Anglo-French Accord.

In 1874 the English entrepreneur Donald Mackenzie formed the North-West Africa Trading Company. Intending to establish trade connections along caravan routes in north-west Africa, he had been able to negotiate a trading post at Tarfaya (or Port Victoria) at Cape Juby as part of his plans to establish trading points along caravan routes in north-west Africa. In 1879, Mackenzie concluded an agreement with Sheikh Mohammed Beyrouk for the purpose.¹¹⁴ Over the following years, MacKenzie successfully explored the Saharan coastline south to Dakhla and east into the Saguia el-Hamra. It was these travels which purported to threaten or compete with Spain's small presence in the Río de Oro, leading to Bonelli's 1884 expedition.¹¹⁵ In the face of this, Spain reluctantly accepted that Mackenzie could carry on in the Saguia el-Hamra. It may have been further persuaded in the matter by continuing attacks by the local population against the tiny Spanish settlement at Dakhla.¹¹⁶ The Saharawi people were willing to engage in trade, less so efforts to be colonized in one way or another.¹¹⁷

¹¹⁴ *Historical Dictionary of Western Sahara*, *supra* note 4 at xix.

¹¹⁵ Advisory Opinion Documents, Vol. 1, *supra* note 5 at 288.

¹¹⁶ Attacks occurred in 1885, 1887, 1892 and 1894. *Historical Dictionary of Western Sahara*, *supra* note 4 at xx *et seq.* Spain had no other substantial garrison in the Sahara until 1916.

¹¹⁷ "I have the honour to report as follows regarding the state of affairs at Cape Juby ... when the tribes living near heard that the place was going to be handed over to the Sultan [of Morocco], they

All was not peaceful in southern Morocco during the 1880s, with Sultan Hassan I seeking to establish control among its tribes. Two expeditions in 1882 and 1886 were carried out by Moroccan forces in an effort to unify the Sultan's rule in the Oued Noun area, halfway between Sidi Ifni in the north, and Cape Juby (Tarfaya). In 1888, the Sultan's troops raided the Mackenzie settlement at Tarfaya, killing its resident manager. The 1895 Anglo-Moroccan Agreement was the result, by which the United Kingdom gave up Mackenzie's trading post at Tarfaya to Morocco in return for payment of £50,000.¹¹⁸

The 1895 Agreement stipulated that "no one will have any claim to the lands that are between Oued Draa and Cape Boujdour, and which are called Tarfaya, and all the lands behind it, because this belongs to the territory of Morocco." That the Agreement reflected the Sultan's desire to establish control over southern Morocco was reflected in the additional provision that "[the Moroccan] government ... will not give any part of the above-mentioned lands to anyone whatsoever without the concurrence of the English Government." The 1895 Agreement meant the Franco-Spanish spheres of influence on the Saharan coast between Río de Oro and Sidi Ifni would be uncertain for a time under the 1900 and 1904 Boundary Conventions. By 1912, however, with three treaties

would resent that being done, and would attack and try to destroy the place, as they did not acknowledge the Sultan except as spiritual ruler and had a great fear of a Stronghold such as this being in their country being in his hands, from which he could tax them ..." "Report on Cape Juby," Captain C.E. Gissing, RN, H.M.S. *Retribution* at Las Palmas, 6 May 1895 (Public Record Office, F.O. 99/391-X/J 6758).

¹¹⁸ *Anglo-Moroccan Agreement*, 13 March 1895 (*Agreement with Morocco [respecting] Property of North-West Africa Company (Cape Juby)*), British and Foreign State Papers, Vol. 87 at 972. See also F.E. Trout, *Morocco's Saharan Frontiers* (Geneva: Droz, 1969) at 165 *et seq.*

defining the extent of Spain's colony of Río de Oro and Sequiet el Hamra, and an agreed-upon colonial arrangement in place for all of the north-west African coast, any remaining commitment under 1895 agreement could be disregarded.

It was thus in 1912 that the two provinces of Río de Oro and Sequiet el Hamra, joined administratively in 1958 as Spanish Sahara, acquired their present land frontiers. Although their inland segments would not be demarcated until the 1950s, Spanish colonial sovereignty within them had been established.¹¹⁹ In the early years that presence was small, and concerned only in commercial matters with attending to the fishery carried out by vessels from the Canary Islands. Spain, it seems, had no plan to explore, much less develop in the modern accepted sense, its lightly populated desert colony.¹²⁰

By the mid-1950s, it was evident that Spain had to reconsider its protectorate zones in southern Morocco. A presence in the area was less and less tenable given the mechanization of Canarian fishing fleets and Morocco's independence from France. Spain gave up its zone in southern Morocco was given up in 1956.¹²¹ However, Spain

¹¹⁹ Hodges notes "no attempt was made to occupy points in the interior until 1934, 50 years after the initial announcement of a 'protectorate'." *Historical Dictionary of Western Sahara*, *supra* note 4 at 6. On the course of the inland boundary and the use of geographic features for its demarcation, see e.g. *Mapa del Africa Occidental Española: Tiris* (Madrid: Talleres del Servicio Geográfico del Ejército, 1958).

¹²⁰ T.G. Figueras, *Santa Cruz de Mar Pequeña, Ifni, Sahara: La acción de España en la costa occidental de Africa* (Madrid: Ediciones Fe, 1941).

¹²¹ See the *Spanish-Moroccan declaration* of 7 April 1956 at Advisory Opinion Documents, Vol. 1, *supra* note 5 at 310 and see also the *Cintra Agreement* of 1 April 1958. Western Sahara was declared a "province" of Spain in January 1958 in a manner similar to French colonial practice and that of Portugal a few years later.

considered Sidi Ifni a different matter, concluding for a time the enclave had been acquired in perpetuity. And there was considerably more interest in Spanish Sahara, which had begun to be prospected for phosphate mineral in the late 1940s.

In 1969, Sidi Ifni, listed with Spanish Sahara for decolonization by the UN General Assembly, was returned to Morocco. Although a newly independent Morocco had suggested in February 1958 that Spanish Sahara was part of a “Greater Morocco”, no manifest effort was made to assert sovereignty over the territory until 1974.¹²² Morocco remained silent in 1963 when Spanish Sahara was listed by UN General Assembly as a non self-governing territory. Indeed, the principle of self-determination and respect for existing colonial boundaries among African States was endorsed by the Organization of African Unity, of which Morocco was a member State, in 1964.¹²³

Thus Spanish Sahara acquired its colonially-determined boundaries, settled by the 1912 Convention and, by all accounts, recognized by neighboring States until October 1975. Simpler land boundaries, if only those dividing the territory from Mauritania and Morocco at the Atlantic coast, would have been impossible. Cape Blanc had been divided in two with Mauritania by a line running from south to north. And the boundary at

¹²² “While the Morocco-Spanish Sahara boundary as such is not in dispute, representatives of the Government of Morocco have made territorial and sovereignty claims southward as far as the Senegal River. These claims include all of the Spanish Sahara, all or most of Mauritania, part of Mali, and part of western Algeria.” *International Boundary Study*, No. 914 September 1961 (United States Department of State) as cited in Advisory Opinion Documents, Vol. II, *supra* note 5 at 229. See also *Western Sahara: The Roots of a Desert War*, *supra* note 5 at 87.

¹²³ OAU Assembly, AHG/Res. 17(I), Cairo Ordinary Session, 17-21 July 1964.

Cape Juby was an east-west line along the parallel 27° 40' north latitude, through “arid wasteland for most of its 275-mile length.”¹²⁴ The two established boundaries form the basis to define the maritime jurisdiction off the Sahara coast in the Atlantic Ocean.¹²⁵

The ICJ Advisory Opinion and Response

The events of late 1975 in Western Sahara had a strong resemblance to those taking place at the same time in East Timor. Both territories were to be forcibly occupied by neighboring States were abandoned, within days of each other, by their colonial countries. Portugal’s “Carnation Revolution” of April 1974 would set in a rapid abandonment of that country’s colonies.¹²⁶ Spain had taken up the future of its Saharan colony its reluctance of the 1960s, promising a self-determination referendum for the Sahrawi people and then, in late 1974, conducting a census in the territory for that purpose. Spain also made submissions to the International Court of Justice during the *Western Sahara Advisory Opinion* case which had at the fore the interests of the people of the territory.¹²⁷

¹²⁴ United States of America. *International Boundary Study: Morocco-Western Sahara (Spanish Sahara) Boundary* (September 14, 1961) (Washington, DC: Office of the Geographer, Bureau of Intelligence and Research, Department of State) at 3. The study concluded that, “while the Morocco-Spanish Sahara boundary as such is not in dispute, representatives of the government of Morocco have made territorial and sovereignty claims southward as far as the Senegal River.” *Idem* at 4.

¹²⁵ Spain did not assert a maritime jurisdiction in respect of its colony, although arguably its maritime jurisdiction legislation of the time would have applied as much to Spanish Sahara as it did the Canary Islands. There is no record of any maritime boundary delimitation or fishing zones agreements having been pursued with either Mauritania or Morocco over the period 1884-1975.

¹²⁶ “The crisis in the [Western Sahara] area can truly be dated from 1973, for in that year Spain appeared to change course and prepare for the self-determination of the Saharan territory within the near future.” “The Western Sahara Case,” *supra* note 20 at 123.

¹²⁷ See “The Stealing of the Sahara”, *supra* note 7 at 701-709.

That the ICJ did not need to consider extent of the Western Sahara's territory was not surprising given the two questions put to the Court. The questions did not concern themselves so much with the manifestations or *effectivités* of colonial control as they did with historic ties of the Sahrawi people with Morocco and Mauritania. The definition of the Western Sahara territory as a discrete entity was implicit throughout the case, even if Morocco and Mauritania might have argued against the legitimacy of a colonially imposed territory. Whatever the arguments were to be made about the physical extent of the territory, the Court's conclusion left no doubt that the territory within its colonial boundaries existed as a distinct entity for self-determination and decolonization purposes:

[T]he Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the court has not found legal ties of such a nature as might affect the application of resolution 1514(XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory.¹²⁸

More attention was paid by the States involved to the territory's boundaries following the ICJ's advisory opinion on October 16, 1975. The attention took two forms: the *Madrid Accord* of November 1975 and the division of the former Spanish Sahara by Mauritania and Morocco in April 1976, described above.¹²⁹ Of course, Spain's

¹²⁸ *Western Sahara Advisory Opinion*, *supra*, note 19 at paragraph 162. See also

¹²⁹ The *Madrid Accord*, *supra* note 22. "The Spanish presence in the territory will definitively end prior to February 28, 1976." On December 17, 1980, Spain affirmed the right of the Saharawi people to self-determination, implicitly acknowledging the failure to achieve that under the *Madrid Accord*.

withdrawal and occupation by Mauritania and Morocco, including the latter's occupying Green March, put the integrity of the colony's territory itself in dispute. It must be recalled that the *Madrid Accord* did not purport to divide the Spanish Sahara but rather to create a joint administration for the ostensible act of self-determination by the Saharawi people. From a territorial standpoint, the *Accord* served as the basis for Spain's abandonment of the territory, made formal in February 1976.

History has revealed that the two governments of Spain and Morocco at least discussed, if not concluded, further arrangements for the post-colonial future of Spanish Sahara. These are most obvious in Spain's continued ownership share in the phosphate mine at Bou Craa. And, in the early years after 1975, the *modus vivendi* between the two States for shared fisheries, including access to Saharan waters by the Canarian fleet, was evident.¹³⁰

Although the terms understandably remain secret, their substance has become largely surmisable. Spain agreed to a decolonization formula that allowed the Sahara to be portioned in the way previously agreed between Morocco and Mauritania ... Spain would retain a 35 percent interest in Fosbucraa, the 700-million dollar Saharan phosphate industry. In addition there were concessions by Morocco concerning fishing rights off the Saharan and Moroccan coasts, concessions of particular importance to the fishing industry of Spain's nearby Canary Islands ...¹³¹

¹³⁰ The Spanish-Moroccan fishing agreement of February 17, 1977 is an example. See *Western Sahara: The Roots of a Desert War*, *supra* note 5 at 352.

¹³¹ See also "The Stealing of the Sahara", *supra* note 7 at 714. The *Madrid Accord* itself was published in 1976, but none of the *travaux préparatoires* or alleged parallel agreements are publicly available.

The division of the territory's natural resources between Morocco and Spain in November 1975 was later acknowledged by the Morocco's Driss Dahak, one-time advisor to the Moroccan government for law of the sea matters and negotiation of UNCLOS. Details are given in his 1986 book, *Les Etats Arabes et le Droit de la Mer*.¹³² Dahak notes specific provisions (“une chapitre”) for Spanish-Moroccan fisheries cooperation to be part of the *Accord* and that Morocco was obliged to accept what Spain sought, given the “particular political circumstances”, including authorization for 1,600 vessels to fish in Moroccan waters.¹³³

Subsequent fisheries agreements between the two States were short term, made in June 1979, December 1979, April 1981, December 1982 and August 1983. The last of these provided for reciprocal undertakings, with Spain allowed its usual access, and Morocco receiving “assistance in the technical domain and the financing of projects.”¹³⁴ The bilateral agreement-making came to an end when Spain joined the European Community in 1986. Thereafter, fisheries arrangements would be the province of Brussels. The first of these, done in 1988 and with a four-year term, had a cost of 282 million European Currency Units (“ECU”). Subsequent agreements were done in 1992

¹³² Driss Dahak, *Les Etats Arabes et le Droit de la Mer*, Tomes I et II (Rabat: Les Editions Maghrébines, 1986).

¹³³ *Idem* at 409. Dahak also notes the 1977 agreement, above, was not ratified by Morocco, in response to “Spain declaring after 1976 that it had only ceded administration of the territory, and not is sovereignty.” [Translation.] *Idem* at 410.

¹³⁴ *Idem* at 411 [Footnote omitted.] The 1983 agreement prescribed a first annual catch limit of 136,602 tonnes, to be reduced for conservation reasons in successive years by 5 %, 10 % and 14 %.

(310 million ECU) and 1995 (500 million ECU) ending in 1999 when no renewal could be agreed upon.¹³⁵

Morocco and Spain agreed also within the 1975 *Madrid Accord* discussions to a *de facto* division of the continental shelf between the Sahara coast and the Canary Islands. It is important to note there had not previously been an agreement between the two States for such a division between the coast of Morocco proper and the islands. This owes as much to the developing law of the sea (and continental shelf boundary principles within it) as it did to the limited petroleum exploration being pursued off north-west Africa in the 1970s. Dahak notes that:

It is true the negotiations for the Madrid Accord of 14 November 1975 provided that ‘The experts of the two countries will meet prior to 31 December 1975 for the purpose of mapping the median line between the coasts of the two countries’ and that the government of Spain had expressed reservations about petroleum exploration permits issued by the government of Morocco in 1971 in areas between Morocco and the Canary Islands, considered by Spain as having exceeded an equidistance line between the coasts of the two countries.”¹³⁶
[Translation. Footnotes omitted.]

The carving-up of an occupied Western Sahara continued into 1976. As we have seen, Mauritania and Morocco agreed to formally divide the territory that April. The division created a boundary for the purpose of demarcating the two States’ areas of

¹³⁵ *Endgame in the Western Sahara*, *supra* note 5 at 74. The failure to negotiate an agreement after 1999 led to the 2002 agreement with Russia and, later, the 2007 *Fisheries Partnership Agreement*, discussed above.

¹³⁶ *Idem* at 239. Dahak notes that Morocco would apply equitable principles in the adjustment of such a median line boundary, “in keeping with the goal of a complete delimitation of the continental shelf and the jurisprudence of the ICJ.” [Translation.] *Idem* at 240.

occupation. The preamble of the agreement, the *Convention concerning the State frontier line established between the Islamic Republic of Mauritania and the Kingdom of Morocco*, offers the following interpretation of the ICJ's *Western Sahara Advisory Opinion*:

Referring to the advisory opinion of 16 October 1975 of the International Court of Justice recognizing the existence of legal connections of allegiance between the King of Morocco and certain tribes living on Saharan territory and the existence of rights, among them certain rights relative to land, which constituted legal connections with the Mauritanian entity[.]¹³⁷ [Translation.]

It is important to recall the Court had concluded such historical connections did not give rise to a territorial claim or title in the accepted sense of international law. In other words, the ICJ determined that sovereignty did not sufficiently exist to abrogate a right to self-determination, much less so to divide Western Sahara by the April 1976 agreement. Why Mauritania and Morocco chose the boundary they did is not clear. Although the 1976 agreement was filed with the United Nations, its *travaux préparatoires* do not exist or are not publicly available. The timing of the agreement needs less guesswork. The question of Western Sahara had declined as a matter of importance for the UN and, by April 1976, the territory was thought by its occupiers to be securely held. The boundary created by the agreement would benefit both parties. Mauritania would continue with the secure possession of iron ore deposits within its boundaries, at Zouerate, and take receive Río de Oro's port at Dakhla. Morocco would acquire the coveted north, including Bou Craa and some two-thirds of the Saharan coast. Article I of the agreement established a land boundary from the Saharan-Mauritanian inland boundary near Zouerate, at its intersection with the 23rd parallel north latitude, proceeding northwest to the Atlantic

¹³⁷ *Supra* note 28.

coast at 24° north latitude. Article II provided for a continental shelf boundary seaward of the land boundary:

For the continental shelf, the delimitation is constituted [*i.e.* demarcated] by the 24th parallel of north latitude.¹³⁸

The evidence is not clear as to whether the continental shelf boundary was later respected by the two parties. Moroccan fishery activity, as well as that of Spain, appears to have taken place took place in coastal waters north of the 24th parallel. Bilateral agreements between the two States are not clear about location. Such lack of specificity has been a feature of all fisheries agreements done by Morocco, including the most recent 2007 *Fisheries Partnership Agreement* with the European Union.

The 1976 Convention and the boundary it established were not destined to have a long life. By 1978 Mauritania's hold on Western Sahara was weakening. The next year, it abandoned the territory entirely under the *Mauritano-Sahraoui agreement* of August 1979.¹³⁹ The agreement did not provide for territorial cession (*i.e.* return) to the Saharawi government. Within days, Morocco occupied the southern part of Western Sahara,

¹³⁸ No maximum extent of the boundary was prescribed, consistent with the then prevailing acceptance of title to the continental shelf being determined geophysically as a natural prolongation of the coastal State's land.

¹³⁹ *Supra* note 33. The 1976 agreement was never denounced by either party, and continues to be presented as a current maritime boundary treaty by the UN's Division for Ocean Affairs and the Law of the Sea (accessed 24 February 2010); available at: www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/MAR.htm However, Mauritania's 1988 maritime jurisdiction legislation and its 2009 preliminary claim to an extended continental shelf obviously contrast with and supersede the 1976 agreement. The baselines for Mauritania's maritime jurisdiction now have a northernmost point at Cape Blanc.

effectively forestalling even an implied requirement for Mauritania to return the Río de Oro area to Polisario Front control.

The Impetus to Boundary Making

As such, Western Sahara's boundaries returned to their pre-existing, colonially determined extent in August 1979. Although Mauritania, Morocco and Spain would amend or enact their respective maritime jurisdiction legislation in later years, no boundary making has occurred in the offshore. However, Morocco and Spain have respected their informal equidistance line between the Saharan coast and the Canary Islands in the granting of petroleum exploration licenses, as demonstrated by the current example of Kosmos Energy's Boujdour Block. Two recent developments suggest a gradual impetus to maritime boundary-making on the Saharan coast. The first of these is Morocco's 2007 accession to UNCLOS, in which a 10-year period has begun for the country to submit its claim for an extended continental shelf. The making of such a submission, while it would not have the result of establishing continental shelf boundary (but, rather, the outer limits of Morocco's extended shelf), will necessarily engage the already-submitted claims of Spain and Mauritania, provided in May 2009 to the UN's Commission on the Limits of the Continental Shelf.¹⁴⁰ Morocco responded to both. In the case of Mauritania's submission (which was in the form of a "preliminary

¹⁴⁰ See, respectively, Spain's *Información Preliminar y Descripción del Estado de Preparación, de conformidad con la decisión SPLOS/183, de la Presentación parcial relativa a los límites exteriores de la Plataforma Continental de España en el área al Oeste de las Islas Canarias*, 11 May 2009 (accessed 3 February 2010) and *Informations Indicatives des Limites Extérieures du Plateau Continental de la République Islamique de Mauritanie*, 7 May 2009 (deposited with the Commission for the Limits of the Continental Shelf at New York, 11 May 2009). These "informations" are discussed *infra*.

information”), noted it would study the claim and that it rejected any unilateral act of delimitation. Morocco called for application of the “rules of international law” in the matter.¹⁴¹

A second impetus to boundary-making in the Saharan offshore could yet result from the recent controversy over the 2007 EU-Morocco *Fisheries Partnership Agreement*. It may be a requirement for a continuing EU fishery that Saharan waters be identified as such, whether fishing in the area is to be permitted (presumably on the basis of the consent of the Saharawi people and for their economic benefit), or not.¹⁴² Of course, identification of a maritime area for a fishery and its delimitation are different matters. The area of Saharan waters for fishing is obvious as a result of the certainty of established colonial boundaries: That area lies south of the seaward extension of the land boundary extending seaward along the parallel 27° 40’ north.

¹⁴¹ “Letter of the Permanent Mission of the Kingdom of Morocco to the United Nations to the Secretary-General of the United Nations,” 26 May 2009. (Letter in response to Mauritania’s filing of a preliminary information on the limits of the continental shelf, 11 May 2009).

¹⁴² “Note: Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco [...]” (13 July 2009), *supra* note 76. “[T]he Community should envisage either the suspension of the agreement in conformity with its Article 15 and Article 9 of the Protocol, or to apply the agreement in such a way that EU flagged vessels are excluded from the exploitation of the waters of Western Sahara.

II – CURRENT MARITIME CLAIMS IN THE SAHARAN ATLANTIC

*In the maritime context, there is no question both of the political nature of an assertion of national jurisdiction over an offshore area, including the delineation of the outer limit of such an area and that such an assertion is of a unilateral nature.*¹⁴³

THERE ARE THREE STATES with immediate interests in the possible maritime jurisdiction of an independent Saharawi Arab Democratic Republic. That is because their national claims may overlap those extending into the Atlantic Ocean from the coast of Western Sahara. The issue of competing jurisdictional claims has arguably been engaged as a result of the SADR's enactment of ocean jurisdiction legislation in January 2009.¹⁴⁴ The three States are, of course, Spain in the Canary Islands, Morocco and Mauritania. The more distant maritime jurisdictions of the Cape Verde Islands and of Portugal in the Madeira Islands are not engaged, lying well outside the reach of EEZ and extended continental shelf claims from the Saharan coast.¹⁴⁵

Apart from the now defunct 1976 Mauritania-Morocco agreement, which provided in part for a boundary division of the continental shelf, there are no maritime boundaries in

¹⁴³ Ted L. McDorman, "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World," *The International Journal of Coastal and Maritime Law* 17 (2002): 301 at 308.

¹⁴⁴ *Law No. 03/2009 of 21 January 2009 Establishing the Maritime Zones of the Saharawi Arab Democratic Republic*, *supra* note 77.

¹⁴⁵ Cape Verde Islands and Mauritania concluded an EEZ (and continental shelf) boundary agreement in 2003 (in force 23 April 2004). The course of the boundary encompasses the two States overlapping 200 nm projections, and is located well south of any potential Saharan-Mauritanian delimitation area. See generally D.A. Coulson and R.W. Smith, "Cape Verde-Mauritania" in D.A. Coulson and R.W. Smith, eds., *International Maritime Boundaries*, Volume V (Boston: Martinus Nijhoff Publishers, 1993) at 3696. "The boundary itself is a northward extension of the boundary line agreed between Cape Verde and Senegal ten years previously." *Idem* at 3697.

the area of the Saharan coast. However, the SADR's three neighboring States have enacted comprehensive jurisdictional legislation and all have acceded to UNCLOS.¹⁴⁶ Morocco and Spain made reservations or declarations in their UNCLOS accessions. Two by Spain are notable:

1. The Kingdom of Spain recalls that, as a member of the European Union, it has transferred competence over certain matters governed by the Convention to the European Community. A detailed declaration will be made in due course as to the nature and extent of the competence transferred to the European Community, in accordance with the provisions of Annex IX of the Convention.
2. In ratifying the Convention, Spain wishes to make it known that this act cannot be construed as recognition of any rights or status regarding the maritime space of Gibraltar that are not included in article 10 of the Treaty of Utrecht of 13 July 1713 concluded between the Crowns of Spain and Great Britain. Furthermore, Spain does not consider that Resolution III of the Third United Nations Conference on the Law of the Sea is applicable to the colony of Gibraltar, which is subject to a process of decolonization in which only relevant resolutions adopted by the United Nations General Assembly are applicable.¹⁴⁷

It appears Spain never did make a detailed declaration concerning the competencies transferred to the European Union. Moreover, the various fisheries agreements done between the EC/EU and Morocco after 1986 confirm that Spain has relinquished jurisdiction (*i.e.* treaty-making competency) for fisheries to the EU.¹⁴⁸ The reference in the second paragraph to Resolution III of the Conference for UNCLOS Conference is

¹⁴⁶ Spain acceded to UNCLOS on 15 January 1997, Mauritania on 17 July 1996 and Morocco on 31 May 2007. See **Table 1**, *infra*.

¹⁴⁷ See "Current Status of the Convention" (accessed 28 February 2010) at the UN's Division for Ocean Affairs and Law of the Sea website:
http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm

¹⁴⁸ The EEC (as it then was) acceded to UNCLOS under Article 305 on 7 December 1984, having previously signed the Final Act of the Third UN Conference on the Law of the Sea at Montego Bay on 10 December 1982.

unique.¹⁴⁹ In relying on the Resolution Spain attempted to limit the preservation of ocean resources adjacent to Gibraltar including, presumably, the expansion of its maritime jurisdiction in the event the United Kingdom colony was to exercise self-determination and become an independent State. In other words, Spain intended to restrict implementation of UNCLOS for the “well-being and development” of Gibraltarians. The declaration contrasts with Spain’s silence on the application of Resolution III to Western Sahara. Given Spain’s position on Western Sahara’s status, which by 1986 had evolved to acknowledging the right of the Saharawi people to self-determination, it arguably intended Resolution III to apply in that case. However, the application of such a positive (if general) obligation would have engaged Spain’s lapsed status as the colonial administering power. Successive Spanish governments have sought to avoid that.

Accordingly, there are four national jurisdictional claims to maritime areas seaward of or adjacent to the Saharan coast. The newest is that of the Saharawi Arab Democratic Republic. As with the others, it has been enacted through domestic legislation but not

¹⁴⁹ Resolution III is addressed in detail *infra* at part V. Five resolutions of the parties to the 1982 United Nations Third Conference on the Law of the Sea provided for certain matters to give effect to UNCLOS, including the establishment of a preparatory commission for the International Seabed Authority and the International Tribunal for the Law of the Sea. Resolution III provided for colonial, non-self governing territories, declaring that “provisions concerning rights and interests under [UNCLOS] shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development.” Resolution IV permitted “national liberation movements” to sign the final act of the 1982 Convention “in their capacity as observers.” On the drafting history of Resolution III see Myron H. Nordquist, ed., *United Nations Convention on the Law of the Sea 1982: A Commentary* (Boston: Martinus Nijhoff, 1989) at 478. See also Kenneth R. Simmonds, *New Directions in the Law of the Sea* (New York: Ocean Publications, 1995) at U.3.

illustrated on charts of the area, demarcated or otherwise perfected.¹⁵⁰ In other words, the SADR has yet to express the details of a distinct spatial claim. The Law No. 03/2009 of 21 January 2009 *Establishing the Maritime Zones of the Saharawi Arab Democratic Republic* is uncomplicated, prescribing jurisdictional claims to five maritime areas: internal waters as defined by territorial sea baselines, a 12 nautical mile (NM) territorial sea, a 24 NM contiguous zone, a 200 NM EEZ and a continental shelf.¹⁵¹ Prudently, no mention is made of a possible extended continental shelf claim, save for a general reservation of rights “as regards maritime zones.”¹⁵² The 2009 Law makes explicit reference to UNCLOS and purports to be derived from the *SADR Constitution*.¹⁵³ A relatively lengthy (in the context of legislation concerned with maritime claims) passage of the innocent passage of vessels in Saharan waters is also part of the 2009 Law including the “carrying out of any fishing activities” in the territorial sea.¹⁵⁴ The 2009 Law finally provides for the delimitation of maritime boundaries in a general fashion:

Where the maritime entitlements of the Saharawi Arab Democratic Republic overlap with the maritime entitlements of neighboring states, the Saharawi Arab Democratic Republic may negotiate and conclude agreements with neighboring states regarding the delimitation of its maritime boundaries.¹⁵⁵

¹⁵⁰ See variously the requirements to depict the “outer limit lines” of territorial sea baselines, exclusive economic zones and continental shelves at Articles 16, 75 and 84 UNCLOS.

¹⁵¹ *Supra* note 77.

¹⁵² *Idem* at Article 10: “Additional Rights Under International Law.”

¹⁵³ *Supra* note 78.

¹⁵⁴ *Supra* note 77 at Article 5(3)(g).

¹⁵⁵ *Idem* at Article 11. No specific dispute resolution provisions for maritime jurisdictional or boundaries claims under UNCLOS are prescribed by the 2009 Law. Within the SADR’s constitutional scheme the Law implicitly allows for subordinate legislation – decrees – to accomplish its intent, for

The SADR's 2009 Law has been acknowledged as enacted by the United Nations without, understandably, an expression of its acceptance.¹⁵⁶ The governments of neighboring States have similarly been silent in response to legislation, Spain and Mauritania having made no mention of even a prospective Saharawi entitlement in their May 2009 extended continental shelf submissions.¹⁵⁷ The SADR's next steps in asserting maritime jurisdiction would be evident from a perspective of state practice, including publishing the spatial and resource aspects of such claims, developing subordinate enabling legislation, and perhaps acceding – the extent possible – to dispute resolution mechanisms available through UNCLOS. The latter implies accession to UNCLOS under Article 305(e).¹⁵⁸ The preamble to the 2009 Law notes the SADR's "commitment to adhere to the Convention at the earliest possible date."¹⁵⁹

example, in the drawing of territorial sea baselines and the control of resource exploration and development activities in the offshore.

¹⁵⁶ See "Report of the Secretary-General on the situation concerning Western Sahara", *supra* note 56. The Report notes that: "Upon signing the declaration, the Secretary-General of the Frente Polisario, Mohamed Abdelaziz, said in a public statement that the declaration was based on the right of the people of Western Sahara to self-determination and to permanent sovereignty over their natural resources, and he called on the European Union to suspend its 2005 [*sic*] fisheries agreement with Morocco."

¹⁵⁷ *Supra* note 140.

¹⁵⁸ "This Convention shall be open for signature by ... all territories which enjoy full internal self-government, recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters." Importantly, only the Cook Islands, the EEC and the UN Council for Namibia as "entities other than States" have acceded to UNCLOS.

¹⁵⁹ *Supra* note 77. The Polisario Front was considering UNCLOS accession at the time of writing. (Personal communication J.J.P. Smith/Mohamed Sidati, 1 March 2010).

The 2009 *Law Establishing the Maritime Zones of the Saharawi Arab Democratic Republic* has again placed the spotlight on foreign fishing in Saharan waters. This was intended, given that the SADR had earlier demanded suspension of the 2007 EU-Morocco *Fisheries Partnership Agreement*.¹⁶⁰ However, the result was achieved indirectly, with the EU concluding, on request of a committee of its Parliament for legal direction in the matter, that the 2007 Agreement as it had applied to fishing in Saharan waters was contrary to international law. It is important to recall that the EU legal opinion did not reach such conclusion on the basis of the SADR's 2009 Law but, rather, rejected the capacity of the Saharawi State to make such a jurisdictional claim:

The declaration of jurisdiction over an EEZ off Western Sahara by SADR does not produce legal consequences on the FPA with Morocco. Such declaration cannot produce legal effects for three different reasons:

- SADR does not enjoy the characteristics of statehood;
- it is not [and] cannot be a signatory party of UNCLOS;
- the territory which it claims not only is barely to a limited extent subject to its control, but is considered as a whole to be a Non Self-Governing Territory within the meaning of Article 73 of the United Nations Charter.¹⁶¹

The SADR offered a reply in the matter in a letter from Mohamed Sidati, its representative and minister-counselor to the EU, on 1 March 2010. While the SADR did not express a position on the issue of statehood (other than to reiterate its existence and status as a member of the African Union) and did not engage the substantive question of a maritime claim under the 2009 Law, it noted the following:

¹⁶⁰ *Supra* note 72.

¹⁶¹ *Supra* note 76.

In my capacity as the Frente POLISARIO's Minister Delegate for Europe, I wrote to your predecessor, Mr Borg [the then EU Commissioner for Minister for Fisheries and Maritime Affairs], on 18 May 2005 to urge the Commission to ensure that any fisheries agreement between the EU and Morocco expressly exclude the waters of Western Sahara. This was a clear and unambiguous statement by the Frente POLISARIO to the European Commission that EU fishing in the waters adjacent to Western Sahara pursuant to an agreement with Morocco would be contrary to the interests and wishes of the people of Western Sahara. **This point was reinforced by the SADR's declaration of an Exclusive Economic Zone on 21 January 2009, which was an expression and exercise by the Saharawi people of their permanent sovereignty over the natural resources of Western Sahara, including their *exclusive* sovereign rights with respect to the resources offshore.** Exploitation by EU vessels of Western Sahara's fisheries resources, without prior consultation and consent of the representatives of the Saharawi people, is in direct conflict with the non-derogable right of the Saharawi people to exercise sovereignty over their natural resources.¹⁶² [Footnotes omitted. Emphasis added in bold.]

There is no doubt the SADR's maritime jurisdiction legislation and claim in respect of sovereignty over resources is all but impossible to realize, at least in the short term, whether by legal proceedings or other steps. But its utility in generally highlighting the "question" of Western Sahara as a non-self-governing territory with a people entitled to exercise the right of self-determination and, more narrowly, issues of natural resource exploitation, is undeniable. If nothing else, the advances in the law of the sea and ocean jurisdiction over 35 years as applied to Western Sahara have now come into focus.

The 2009 Law *Establishing the Maritime Zones of the Saharawi Arab Democratic Republic* arguably eliminates any vestiges of a Spanish colonial maritime jurisdiction on the Saharan coast that would have, in November 1975 (and, formally, in February 1976)

¹⁶² Letter of Mohamed Sidati, SADR/Polisario Front Minister-Counsellor to the EU, to Ms. Maria Damanaki, European Commissioner for Fisheries and Maritime Affairs, 1 March 2010 (unpublished - copy on file with the author).

competed with those of neighboring Mauritania and Morocco. Such jurisdiction, never delimited by agreed-upon boundaries, would have been only in respect of general Spanish claims to a territorial sea and fishing zones, for no claim to a continental shelf seaward of the Saharan coast nor any to an EEZ had been declared by the critical period of Spanish Sahara's abandonment.¹⁶³ As such, a continuing territorial sea and fisheries jurisdiction, whether theoretically to be adopted by or binding upon Morocco as the occupying power, the SADR as a jurisdictional asserting power, or upon Spain is its foregone role of the administering power, is exceedingly remote. The law of the sea and the claims of all interested parties have advanced beyond such a point.¹⁶⁴

Before embarking on a review of the current maritime claims of States neighboring Western Sahara, the possibility of historic fisheries rights to be claimed by Spain must be addressed. Until the threatened *dénouement* of the 2007 EU-Morocco *Fisheries Partnership Agreement*, Spain had enjoyed five centuries of generally unrestricted fishing in Saharan waters.¹⁶⁵ It was, and is, a fishery of substantial social and economic value to the people of the Canary Islands. The importance of the industry can be seen in Spain's 1977

¹⁶³ See generally Spain's Decree Law 20/67 of 8 April 1967.

¹⁶⁴ The comparative case of Portuguese Timor (now Timor-Leste) is recalled. No consideration was made for the continuation of colonial maritime jurisdiction during or following the territory's occupation from 1975 until 1999 in subsequent maritime jurisdiction arrangements, including the 2003 *Timor Sea Treaty* negotiations in which I participated. Similar cases, such as that of Namibia, suggest a general principle of new post-colonial states being entitled to maritime areas as prescribed by current law, unless maritime boundaries have been previously delimited. An example of the latter can be found in the Singapore-Malaysia Johor Strait colonial boundary.

¹⁶⁵ See, for example, the fisheries notations depicted on the coast of the Sahara on a 1968 Spanish chart: *Costa Occidental de África (Hoja III), Comprende desde Cabo Bojador Hasta Portendik* (Madrid: Dirección de Hidrografía, 1868 (Corrigeda en 1945)).

agreement to re-enter those waters after abandoning its colony, and in its several bilateral agreements with Morocco until joining the EEC in 1986.¹⁶⁶ With the exception of Morocco's 2002 fisheries agreement with Russia, the EU's succeeding agreements have uniformly favored the Canarian fishing industry to the considerable exclusion of other EU member State fleets. That is understandable, given the number of vessels involved and the continuing economic importance of the industry to the Canary Islands.¹⁶⁷

The extent of Spain's entitlement to historic fishing rights in Saharan waters during the critical period of November 1975-February 1976 is uncertain. No serious or continuing assertion of such rights was made before such period. Such a claim was not necessary during Spain's colonial occupation of the Sahara after 1885. That occupation would appear to have abrogated any earlier, accrued rights to fish in the area. Moreover, the technological and socio-cultural basis to conduct anything resembling an offshore or other-than-artisanal fishery was exclusively Spain's until the second half of the twentieth century. In other words, only Spain was in a position to fish on a significant and sustained scale along the Saharan littoral and it did so through the Canarian fleet as colonizing State, and not a third party granted some continuing access.

¹⁶⁶ "Too Many Boats, Not Enough Fish: The Political Economy of Morocco's 1995 Fishing Accord with the European Union," *supra* note 67 at 324. White notes 800 EU vessels operated in Moroccan (and Saharan) waters at the time of the 1995 agreement, of which 700 were Spanish.

¹⁶⁷ See "European Union > Fisheries > Facts and Figures on the EU Fishing Fleet > Spain" (accessed 1 March 2010); available at: <http://ec.europa.eu/fisheries/fleetstatistics/index.cfm?ctyCode=ESP>

In any event, any such historic fishing right of Spain to be theoretically restored upon resolution of the question of Western Sahara has been abrogated by events and the development of the law. Spain implicitly relinquished such rights under its maritime areas division agreement in parallel with the *Madrid Accord* and its 1977 fishing treaty with Morocco.¹⁶⁸ Those treaty arrangements would have nullified any continuing claim of access to Saharan waters, regardless of whether the then nascent law for the protection of natural resources in non-self-governing territories to undergo self-determination would have also been a bar to maintenance of such a claim. Further, Spain ceded its competence in respect of negotiating fisheries access and thereby the ability to assert continuity of any historic rights upon joining the EEC in 1986 and by acceding to the Union's Common Fisheries Policy in 1996.¹⁶⁹ The European Union, in its several fisheries agreements since with Morocco has neither raised the matter or brought it to the attention of the other party with a presumptive interest in the matter, the Polisario Front/SADR. Further, Spain's modern ocean jurisdiction legislation, and notably its 1978 EEZ enabling law, adopts current UNCLOS entitlements, without an expression of claim to historic fishing rights.¹⁷⁰

¹⁶⁸ *Supra* note 22, and note 66 with accompanying text.

¹⁶⁹ "Under the Common Fisheries Policy, the EU enjoys exclusive jurisdiction, which means that Member State legislative power has been abolished both in practice and in principle. EU law has pre-emptive force. Since there is no residual Member State competence within the substantial area of law covered by the CFP, EU exclusive prescriptive competence implies that Member States are precluded from any law-making." Peter Ørebeck, "The Fisheries Issues of the Second 2004 European Union Accession Treaty: A Comparison with the First 1994 Accession Treaty," *The International Journal of Marine and Coastal Law* 19 (2004): 93 at 100.

¹⁷⁰ See Act No. 15/1978 on the Economic Zone of 20 February 1978 (Spain) (accessed 12 January 2010); available at: www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP_1978_Act.pdf

Even without the positive acts abrogating historic fishing rights on the Saharan coast, is it doubtful any such claim is tenable as a matter of law. The claim to access a resource in an ocean area claimed by or presumptively under the jurisdiction of another State must be distinguished from the more common, if controversial, claim of historic territorial rights in such an area closely adjacent to the States involved. Historic title and historic right in the exploitation of an ocean resource are therefore to be distinguished. The basis or doctrinal foundation for title to maritime spaces is slender. Judge Shigeru Oda of the International Court of Justice concluded in *El Salvador/Honduras* that the concept of territorial right to “historic waters’ *as such* did not and [does] not exist as an independent institution in the law of the sea.”¹⁷¹ The relatively limited number of instances where the doctrine has been raised bear this out, as does the uniform conferral (and almost universal adoption) of more expansive maritime areas under UNCLOS.¹⁷²

It is not title to territory in the case of Western Sahara that would be at issue. It is the matter of a possible claim historically founded. The expression of the claim could take

¹⁷¹ Dissenting Opinion, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, supra note 91 at para. 44. [Emphasis in original.] “In fact, it is not so much a concept as a description expressive of the historic title on the basis of which a claim to a particular status for certain waters has been made.” *Ibid.*

¹⁷² “It may also be said, as seen, that the whole concept of ‘vital’ bays and waters which have lain behind many past historic claims is now an anachronism anyway; and that the list of ‘historic waters’ is now long closed” Clive R. Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Boston: Martinus Nijhoff, 2008) at 284. Note the UNCLOS regime does provide for historic title to be asserted in the case of bays, at Article 7, and for third parties within archipelagos to be bounded by a State “delimiting internal waters.” See Articles 46-51 UNCLOS, supra note 78. Mauritania’s 1967 declaration of an 89 NM straight baseline from Cape Timiris to Cape Blanc enclosed the Banc (Bay) d’Arguin is premised on a historic claim. The issue is addressed *infra*.

two forms, although maritime boundary decisions in the UNCLOS era suggest such a claim would not be for access or a share of the Saharan fishery resource *per se*, but would be asserted as a factor in delimiting the maritime boundary between the two States. Within that, evidence of historic use is applied as an *effectivité* in asserting possession of small physical features which have an effect on where delimitation will be done, or in the adjustment of a provisional boundary to more equitably allow the claimant State access to a maritime resource. An example of the latter can be found in the ICJ's 1993 continental shelf-fishery zones boundary decision in *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark/Norway)*.¹⁷³ The Court considered it necessary to shift an initially drawn equidistant boundary between the two opposing coastlines of Greenland and Jan Mayen toward Jan Mayen in order to accord greater maritime space to Greenland:

It appears to the Court that the seasonal migration of the capelin presents a pattern which ... may be said to centre on the southern part of the area of overlapping claims, approximately between that line and the parallel of 72° North latitude, and that the delimitation of the fishery zone should reflect this fact. It is clear that no delimitation in the area could guarantee to each Party the presence in every year of fishable quantities of capelin in the zone allotted to it by the line. It appears however to the Court that the median line is too far to the west for Denmark to be assured of an equitable access to the capelin stock, since it would attribute to Norway the whole of the area of overlapping claims. For this reason also the median line thus requires to be adjusted or shifted eastwards.¹⁷⁴

A similar result occurred in the *Eritrea/Yemen* territory and maritime boundary

¹⁷³ ICJ Rep. 1993, 8.

¹⁷⁴ *Idem* at para. 76. The Court adopted the reasoning in the 1984 *Canada/USA Gulf of Maine* decision adjusting a provisional boundary to account for access to fisheries, "ensuring that the delimitation [would] not entail 'catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned'." *Idem* at para. 75.

arbitration award.¹⁷⁵ The panel, in assessing the sovereignty of island groups in the contested part of the southern Red Sea concluded that traditional fishing in the area required Yemen to ensure “free access and enjoyment for the fishermen of both Eritrea and Yemen ... be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men.”¹⁷⁶ The nature of the fishery (being artisanal and of primary economic importance to the peoples concerned), the limited geographic area of its exercise and closely spaced island areas combined to make the result desirable.¹⁷⁷ It was also one *infra petita*, the arbitration panel noting that Eritrea and Yemen had sought the resolution of territorial issues on the basis of “the re-establishment and the development of a trustful and lasting cooperation between the two countries.”¹⁷⁸

However, the Court has been careful in various decisions to confine historic uses of the seas in the adjustment of a provisionally drawn boundary line. An example can be

¹⁷⁵ *Eritrea v. Yemen (Phase One: Territorial Sovereignty and Scope of Dispute)* (9 October 1998), 119 ILR 417 (accessed 15 January 2010); available from: <http://pca-cpa.org/PDF/EY%20Phase%20II.PDF>

¹⁷⁶ *Idem* at para. 526. And see para. 126: “[T]he conditions that prevailed during many centuries with regard to the traditional openness of southern Red Sea marine resources for fishing, its role as means for unrestricted traffic from one side to the other, together with the common use of the islands by the populations of both coasts, are all important elements capable of creating certain “historic rights” which accrued in favour of both parties through a process of historical consolidation as a sort of “*servitude internationale*” falling short of territorial sovereignty. Such historic rights provide a sufficient legal basis for maintaining certain aspects of a *res communis* that has existed for centuries for the benefit of the populations on both sides of the Red Sea.” [Footnote omitted.] And at para. 526: “This existing regime has operated, as the evidence presented to the Tribunal amply testifies, around the Hanish and Zuqar islands and the islands of Jebel al-Tayr and the Zubayr group.”

¹⁷⁷ And see *idem* at para. 130: “The socio-economic and cultural patterns described above were perfectly in harmony with classical Islamic law concepts, which practically ignored the principle of “territorial sovereignty” as it developed among the European powers and became a basic feature of 19th Century western international law.” [Footnote omitted.]

¹⁷⁸ *Idem* at para. 525.

seen in the *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (Qatar/Bahrain)* where the Court was dismissive of Bahrain's claims to historic pearl fishing in certain locales of the maritime area in contention.¹⁷⁹ The Court concluded the right of such use had been broadly shared among peoples in the region, and that such use had ended decades earlier.¹⁸⁰ The Arbitral Tribunal in *Barbados/Republic of Trinidad and Tobago Maritime Boundary Arbitration* came to a similar conclusion in rejecting both the importance and the continuing historical nature of a Barbadian flying fish fishery in waters close to Trinidad and Tobago and, in particular that the distant water mechanized nature of such a fishery had only existed for some 30 years.¹⁸¹ The Tribunal was skeptical of any application of an historical claim to resources having weight in the adjustment, as here, of a provisionally drawn EEZ boundary:

Determining an international maritime boundary between two States on the basis of traditional fishing on the high seas by nationals of one of those States is altogether exceptional. Support for such a principle in customary and conventional international law is largely lacking. Support is most notably found in speculations of the late eminent jurist, Sir Gerald Fitzmaurice, and in the singular circumstances of the judgment of the International Court of Justice in the *Jan*

¹⁷⁹ *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (Qatar v. Bahrain)* (16 March 2001), ICJ Rep. 2001, 40.

¹⁸⁰ *Idem* at paras. 235 *et seq.*

¹⁸¹ *Barbados/Republic of Trinidad and Tobago Maritime Boundary Arbitration (Award)*, (April 11, 2006) (accessed 12 January 2010); available at: www.pca-cpa.org/upload/files/Final%20Award.pdf See Barbara Kwiatkowska "The 2006 Barbados/Trinidad and Tobago Award: A Landmark in Compulsory Jurisdiction and Equitable Maritime Boundary Delimitation," *The International Journal of Marine and Coastal Law* 22 (2007): 7. "Immediately, the Award became - on a par with the 2001 *Qatar v. Bahrain Maritime Delimitation and Territorial Questions (Merits)* Judgment - the best of all judicial and arbitral decisions concerning maritime boundary delimitation." [Footnote omitted.] *Idem* at 19.

Mayen case. That is insufficient to establish a rule of international law.¹⁸²
[Citation omitted.]

A Spanish claim to historic fishing rights within a Saharawi EEZ - in contrast, as will be addressed below, to the adjustment of a boundary line to accommodate for such uses - would face insuperable challenges that have resulted from its own acquiescence since 1975. For Spain not only ceded that November all of its territorial area generating the Saharan fishery, it thereafter obtained fishery rights *de novo* through bilateral treaties making no mention of nor applying on any basis of historic right. And, making any national claim more remote with the passage of time, Spain's putative rights joined with those of the EEC upon joining the Community in 1986.¹⁸³ Here, it should be recalled that it has been the EU that has assessed the legality of its 2007 *Fisheries Partnership Agreement* with Morocco in response to the SADR's enactment of ocean jurisdiction legislation. While not a tacit or implicit recognition of the effect of that legislation, the SADR's move might further erode any possible claim of Spain to fish in Saharan waters.

It can be reliably concluded as a matter of international law that historic rights to an ocean resource - invariably some form of a fishery - sought to be exercised in a transboundary manner no longer has any subsisting doctrinal basis. What is left in the modern, expansive law of the sea regime are claims to territory *simpliciter*, as in the case of

¹⁸² *Idem* at para. 269. However, the Tribunal did note the agreement of the two States to negotiate a fisheries access agreement for Barbados, in part because of the migratory nature of flying fish. *Idem* at paras. 272-293.

¹⁸³ The irony of Spain obtaining access to a Saharan fishery exclusively through the agency of the EU, in contrast to what would be a wholly national pursuit of a bilateral EEZ boundary with Morocco (or an independent SADR) to delimit the use of the same ocean resource is evident.

Qatar/Bahrain, or the adjustment of a boundary line, as in the *Norway/Denmark* and *Canada/USA* cases, at a later stage of the delimitation process. We return to the latter scenario below in an assessment of the SADR's likely EEZ boundary with Spain south of the Canary Islands.

Given the certainty (and global recognition) of Western Sahara's land frontiers, coupled with there being no competing claims to territorial landmasses by any of the States with maritime interests in the region, a brief survey of the maritime jurisdictional claims of the four States involved is useful. Not surprisingly as a result of uniform State practice and the prescriptive nature of UNCLOS, such claims are more or less identical, even at the level of specific enabling provisions in national legislation.¹⁸⁴ Only in the instance of the final frontier of the extended continental shelf might they prove different in form.¹⁸⁵

Mauritania's Maritime Claims

Mauritania first enacted ocean jurisdiction legislation, claiming a fisheries zone, in 1962, after its independence from France on 28 November 1960. In 1967, the government in Nouakchott promulgated straight baseline legislation, establishing a 70 NM closing line

¹⁸⁴ See Nuno Antunes, *Towards the Conceptualization of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (Boston: Martinus Nijhoff, 2003). See also the maritime boundary agreements available through the UN Division for Ocean Affairs and Law of the Sea (accessed 4 January 2010); available at: www.un.org/Depts/los/LEGISLATIONANDTREATIES/index.htm

¹⁸⁵ No pattern of extended continental shelf ("ECS") claims is discernable in the 2009 preliminary submissions of Mauritania and Spain, apart from the expected maximal seabed areas of such claims and a prudent reservation of rights for all manner of geologic supporting evidence in eventual substantive submissions to the CLCS. The SADR's possible ECS claim is considered below.

across the Bay of Arguin (Baie d'Arguin), in the north from Cape Blanc to Cape Timiris in the south.¹⁸⁶ The broad profile of the embayment does not lend itself to being enclosed in the manner of a “juridical bay” by such a baseline and the United States government has protested the drawing of the baseline.¹⁸⁷ The baseline was restated in Mauritania’s current ocean jurisdiction legislation enacted in 1988.¹⁸⁸ That legislation provides for a regime of internal waters, a 12 NM territorial sea, a 24 NM contiguous zone, a 200 NM EEZ and an extended continental shelf claim. No boundary-making provisions appear in the 1988 enactment, and there are no references to other legislation, including fisheries, navigation and shipping ordinances. The government of Mauritania does not appear to have published charts of its claimed ocean areas, apart from the map featured in the 2003 Cape Verde-Mauritania EEZ-continental shelf boundary agreement.¹⁸⁹ The use of Cape Blanc as the northernmost point for Mauritanian

¹⁸⁶ Law No. 62.038 of 20 January 1962 and Law No. 67.023 of 21 January 1967, respectively.

¹⁸⁷ See *International Boundary Study - Series A - Limits in the Seas - Straight Baselines - Mauritania* (Washington, DC: Department of State/Bureau of Intelligence and Research, 1970). The study concludes that: “The straight baseline measures approximately 89 nautical miles in length and it includes within Mauritanian internal waters approximately 60 per cent of the very shallow Banc d’Arguin ... The enclosed waters, while forming a major indentation of the Mauritanian coast, do not satisfy the semicircular requirements of a bay ... The straight baseline extends over approximately 30 per cent of the Mauritanian coast. The low water line forms the baseline for the remaining portions of the coast.” And see J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims*, 2nd ed. (Boston: Martinus Nijhoff Publishers, 1996) at 142 on the text of the US note of protest delivered in 1990.

¹⁸⁸ *Ordinance 88-120 of 31 August 1988 establishing the limits and the legal régime of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of the Islamic Republic of Mauritania*. The baseline is also referred to in Mauritania’s 2009 extended continental shelf submission, *supra* note 140, where it is the only drawn (non-low water line) baseline claimed.

¹⁸⁹ *Supra* note 145.

territorial waters will be returned to below in the analysis of the SADR's presumptive maritime jurisdiction.

Morocco's Maritime Claims

Morocco followed a similar course in developing legislation of maritime jurisdiction.¹⁹⁰ In 1958, it promulgated legislation for the development of the continental shelf, including a provision that any boundary between the State and the opposite coastline be drawn as a median line.¹⁹¹ Territorial sea legislation followed in 1962, together with an exclusive fishery zone claim in 1973.¹⁹² A full EEZ jurisdictional claim was then enacted in 1981.¹⁹³ That legislation expressly incorporated Morocco's 1958 continental shelf exploration law and the 1973 12 NM territorial sea enabling decree. The 1981 EEZ legislation did not refer to Morocco's 1975 straight baselines decree, perhaps because the stipulated baselines were not then extended south to the Saharan coast or simply because the 1973 territorial

¹⁹⁰ Dahak addresses the colonial fisheries jurisdiction of Morocco from 1919 until independence in 1958 in *Les Etats Arabes et le Droit de la Mer*, *supra* note 132 at 101.

¹⁹¹ Dahir no. 227-58-1 de 2 juillet 1958. Article 3: "... the delimitation of the continental shelf is fixed by a median line along the equidistant points closest to the baselines from which is measured the territorial sea of Morocco and each of the States [with a coast facing Morocco]." See also *Les Etats Arabes et le Droit de la Mer*, *supra* note 132 at 143. Morocco took the step of expressly declaring a continental shelf jurisdiction as a result of the 1958 *Law of the Sea Convention*, UNCLOS I.

¹⁹² Dahir du 30 juin 1962 and Dahir du 2 mars 1973, respectively. See *Les Etats Arabes et le Droit de la Mer*, *idem* at 102. And see the baselines legislation at Dahir no. 2.75.311 (21 July 1975) *Defining the Closing Lines of Bays on the Coasts of Morocco and the Geographical Co-ordinates of the Limit of Territorial Waters and the Exclusive Fishing Zone*.

¹⁹³ Act No. 1-81 of 18 December 1980, promulgated by Dahir No. 1-81-179 of 8 April 1981, *Establishing a 200-nautical-mile Exclusive Economic Zone off the Moroccan coasts*. The 1981 legislation also provided for a 24 NM contiguous zone.

sea declaratory legislation sufficed to ground an EEZ claim. In any event, Morocco has not formally asserted maritime jurisdiction on the Saharan coast.¹⁹⁴

Following a continuing tendency affirmed as part of the Third [United Nations] Conference on the Law of the Sea Morocco decided to institute an exclusive economic zone which, in effect, absorbed the continental shelf in situations where Morocco's would not exceed 200 miles. This position conformed with that which Morocco had defended [earlier], together with propositions made by the Arab Group as adopted by the African Group, and those of geographically disadvantaged States and enclaved States [participating in the Third UN Conference]. [Translation.]¹⁹⁵

Morocco's 1981 legislation, superseding the country's 1958 continental shelf decree, provided for delimitation of the EEZ as follows:

[D]elimitation must be effected in accordance with the equitable principles laid down by international law [and] through bilateral agreements between States, the outer limit of the exclusive economic zone shall not extend beyond a median line every point of which shall be equidistant from the nearest points on the baselines of the Moroccan coasts and the coasts of foreign countries opposite to Moroccan coasts or which border them. [Translation.]¹⁹⁶

The 1981 legislation, insofar as it would apply to the Saharan coast south of an extension of the Western Sahara-Morocco land boundary at 27° 40' north latitude, has not been engaged in an actual delimitation. It need not be, given the *modus vivendi*

¹⁹⁴ Apart from the informal maritime delimitation agreement with Spain done in parallel with the *Madrid Accord*, Morocco's only other expression of maritime jurisdiction on the Saharan coast is that implicit from the 2007 EU-Morocco *Fisheries Partnership Agreement*, whereby the fisheries limits and geographic coordinates detailed at Appendix 4 to the Agreement permit three fisheries "to the south of" either 30° 40' or 29° 00' north latitude.

¹⁹⁵ *Les Etats Arabes et le Droit de la Mer*, *supra* note 132 at 145.

¹⁹⁶ Article 11 of Act No. 1-81 of 18 December 1980, *supra* note 193. Dahak comments such drafting, for a delimitation of the EEZ through bilateral agreement and by the drawing of a "corrected median line" were the two preferred means of delimiting maritime space under international law. *Supra* note 132 at 145.

established between Morocco and Spain under the 1975 *Madrid Accord* together with Morocco's ostensible reluctance as occupying power of Western Sahara to engage Mauritania in boundary issues, notwithstanding the defunct April 1976 partition and continental shelf boundary agreement.¹⁹⁷ Morocco's 1981 EEZ legislation also contains the curious provision that it "not be an obstacle to the principles of international cooperation to which Morocco subscribes and to which effect is given through agreements with other States, without prejudice to its rights of sovereignty and with respect for its national interests."¹⁹⁸ Such phrasing suggests a cautious approach taken to the assertion of maritime jurisdiction in the era immediately prior to the 1982 Third UN Conference on the Law of the Sea.

Despite its emphatic, irreducible claim to Western Sahara, Morocco has thus far not expressly legislated a maritime jurisdiction off the coast of the territory. Neither its 1973 baselines ordinance, nor Spanish/EU fisheries agreement make mention or provide for geographic coordinates in the water south of the colonial boundary. At first glance, this appears a careful engagement of the issue of territoriality. But two factors must be recalled.

The first is that Morocco has been unrestricted in its control and use of the Saharan offshore since the *Madrid Accord*. The second is that it has been arguably constrained in

¹⁹⁷ *Supra* note 28. The 1976 partition/boundary agreement was not made the subject of enabling legislation in either Mauritania or Morocco.

¹⁹⁸ Article 13 of Act No. 1-81 of 18 December 1980, *supra* note 193.

the assertion of any new or more expansive territorial claim since the 1990/91 UN-sponsored peace initiatives. With seabed petroleum exploration not far advanced, and a continuing rental of the fishery, an express jurisdictional claim on the Saharan littoral has not been necessary. Only the SADR's 2009 proclamation of maritime jurisdiction and the emergence of Mauritanian and Spanish extended continental shelf claims now threatens to occupy the legislative *lacunae*.¹⁹⁹

Spain's Maritime Claims

Spain's maritime jurisdictional claims in the region are similarly unremarkable. Such claims have not required perfection through the making of maritime boundaries south of the Canary Islands because there has been little practical impetus to do so, given the subsisting practical bilateral arrangement with Morocco under the *Madrid Accord*, the general workability of fisheries agreements, and the absence of competing petroleum development. Spain's modern maritime legislation traces its origins to 1967, with a then proclamation of territorial sea jurisdiction.²⁰⁰ A 1977 decree establishing baselines added to this, importantly as will be considered below in the drawing of closing lines around the Canary Islands.²⁰¹ The 1978 EEZ legislation is perhaps the simplest of the four States in the Saharan region, although like Morocco's it prescribes delimitation of boundaries by

¹⁹⁹ The SADR's ocean jurisdiction legislation was enacted in part to first fill such a legislative gap.

²⁰⁰ Act number 20/1967 (8 April 1967).

²⁰¹ Royal decree 2510/1977 (5 August 1977).

application of equidistance.²⁰² The same phrasing is, interestingly, used in both enactments as the basis to establish an EEZ boundary: “... the outer limit of the exclusive economic zone shall ... be equidistant from the nearest points on the baselines ...” In legislation of general application for both States, it is difficult to conclude collusion between the two over the narrow issue of apportioning the maritime area off the Saharan coast. In any event, such a division was done by agreement parallel to the *Madrid Accord*.²⁰³ It may simply be that a drafting of the Moroccan EEZ legislation, enacted later in time, borrowed from the Spanish precedent.

Spain’s legislation also expressly provides for an EEZ to emanate from straight baselines enclosing each of its Atlantic Islands, including the Canaries. This is appropriate, and supportable as a matter of State practice and within UNCLOS requirements. None of the baselines prescribed by the 1977 royal decree that enclose the Canary Islands are excessively drawn or otherwise expansionistic.²⁰⁴ The individual island baselines in the Canaries are consistent with UNCLOS Article 7, serving as a “profile-smoothing” feature for each of the insular islands of the Canaries group: Gran Canaria, Tenerife, Gomera, Hierro and La Palma, together with a uniform baseline about the singular feature of the easternmost Alegranza-Graciosa-Lanzarote-Fuerteventura group.²⁰⁵

²⁰² Act No. 15/1978 on the Economic Zone (20 February 1978). Article 2: “... the outer limit of the economic zone shall be the median or equidistant line.”

²⁰³ *Supra* note 22 and accompanying text.

²⁰⁴ *Supra* note 201.

²⁰⁵ See especially Admiralty Chart 3133, *Africa - West Coast: Casablanca to Islas Canarias (including Arquipélago da Madeira)* (Taunton: UK Hydrographic Office, 1997).

Importantly, Spain makes no claim under its 1977-78 legislation for an archipelagic baseline enclosing the periphery of the entire Canary Islands. Such a claim would be contrary to the rules at Article 47 UNCLOS available to truly archipelagic States.^{206 207}

The SADR's Maritime Claims

The ocean jurisdiction legislation of the Saharawi Arab Democratic Republic is perhaps the simplest of the four States in the Saharan region.²⁰⁸ The expected regime of internal waters, a territorial sea, a contiguous zone and EEZ and a continental shelf claim is established. Mention is also made of such zones projecting seaward from the coast, for which the low water line is stated to generally be the defining baseline. The 2009 *Law Establishing the Maritime Zones of the Saharawi Arab Democratic Republic* is silent on a specific formula for boundary delimitation, with a simple term enabling the conclusion of a boundary agreement. It also does not prescribe any mechanism for enforcement of jurisdiction given the fact of the SADR not being in possession of the Saharan coastline. Finally, the 2009 law declares in its preamble that the SADR will “adhere” to UNCLOS at

²⁰⁶ The leading example being Indonesia, which has enacted legislation for a system of baselines encompassing its entire island territory. See Act No. 6 of 8 August 1996 regarding Indonesian Waters. And consider the ICJ's reasoning in *Qatar/Bahrain*, *supra* note 179 at para. 214: “In such a situation, the method of straight baselines is applicable only if the State has declared itself to be an archipelagic State under Part IV of the 1982 Convention on the Law of the Sea, which is not true of Bahrain in this case.”

²⁰⁷ The drawing of a closing line across the southern extent of the Canary Islands for purposes of a prospective maritime boundary with the SADR is considered *infra*.

²⁰⁸ 2009 *Law Establishing the Maritime Zones of the Saharawi Arab Democratic Republic*, *supra* note 77.

an early opportunity.²⁰⁹ As is the case with its three neighbours States, the SADR has not legislated in respect of an extended continental shelf claim, and does not have to either as a principle of the SADR's domestic legal regime or generally under *UNCLOS*.²¹⁰

State	Baseline legislation	Territorial Sea claim	Contiguous Zone claim	EEZ claim	Continental Shelf claim	Extended Continental Shelf claim	UNCLOS accession
Mauritania	Yes (1988)	12 NM (1988)	24 NM (1988)	200 NM (1988)	Yes (1988)	Preliminary submission (2009)	Yes (17 July 1996)
Morocco	Yes (1975)	12 NM (1980)	24 NM (1980)	200 NM (1980)	Yes (1980)	Not yet prepared	Yes (31 May 2007)
Saharawi Arab D.R.	Yes (2009)	12 NM (2009)	24 NM (2009)	200 NM (2009)	Yes (2009)	Not yet prepared	Pending
Spain	Yes (1977)	12 NM (1978)	24 NM (1978)	200 NM (1978)	Yes (1978)	Preliminary submission (2009)	Yes (15 January 1997)

Table 1 – Summary of national maritime claims in the Saharan Atlantic region

It is the national claims of the four States with maritime jurisdictions to potentially overlap in the Saharan offshore that will form the basis of eventually settled spaces in the region. That is an issue of maritime boundary-making. Before embarking on the exercise for a presumptively independent Saharawi Arab Democratic Republic, the law of maritime delimitation must be first considered.

²⁰⁹ The use of the term “adhere” was probably a drafting error. “Accede” was likely meant.

²¹⁰ National enabling legislation to provide for ratification of a treaty settling extended continental shelf boundaries following determination by the Commission on the Limits of the Continental Shelf is theoretically mandated in dualist systems.

III – TO THE SEA

*It is indeed a boundary separating States which is produced by the division of overlapping areas, the very essence of maritime delimitation. Sooner or later, the theory of maritime delimitation will complete the theory of the State in international law.*²¹¹

State jurisdiction and maritime areas

THE IDEA OF A LEGAL DOMINION over the seas is relatively new in human history, dating back five centuries to the scholar-theorist Grotius (Hugh de Groot). The basis of reasoning the difference between competing norms of a public or open use of the seas, and national sovereignty is one that continues as a defining feature of the modern law of the sea. The debate has taken many forms over the years, from the establishment and expansion of natural jurisdictions, to uses of the resources of the seas and, more recently, to protection of the marine environment and the assurance of security for marine shipping and coastal states.

The modern conception of coastal state jurisdiction over the offshore dates back some 150 years. The industrialization of European, proto-colonial societies, with a concomitant rise in maritime trade and technological advances in shipping were factors in the conceiving of a legalized maritime dominion. The “cannon shot rule” of a defined coastal margin of sea reserved for exclusive national purposes and control was the inevitable result in the second half of the nineteenth century.²¹² The development and

²¹¹ *The law of maritime delimitation – reflections, supra* note 90 at 95.

²¹² The Scandinavian view through the eighteenth and nineteenth centuries C.E. was that the coast could be controlled to a distance of four nautical miles offshore, the British view three miles (one marine league). The assertion of national jurisdiction over a coastal sea in English law can be traced to

sophistication in the uses of offshore zones as a matter of national entitlement gained speed after World War II, spurred by the proclamation of United States President Harry S. Truman:

[I]t is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and seabed of the continental shelf by the contiguous nation is reasonable and just ... since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it²¹³

The advances were driven by politics and science, notably marine technology, and had at their core the aspiration for greater national access to ocean resources, notably fisheries and seabed petroleum. In retrospect, the cooperation and sophistication of the organized international community in addressing the uses and apportionment of the ocean was remarkable. By 1958, four multilateral conventions had established a framework for ocean jurisdiction, with important and lasting implications for assertions of national sovereignty to greater distances offshore, especially for the increasingly industrialized fisheries of developed States.^{214 215}

the 1876 criminal case *R. v. Keyn* (the *Franconia* case), 2 Ex. D. 63 and the resulting enactment of the 1878 United Kingdom *Territorial Waters Jurisdiction Act*. For a useful survey of the development of the United States' maritime territorial doctrine see John A. Duff, "Assemblage-Oriented Ocean Resource Management: How the Marine Environment Washes Over Traditional Territorial Lines," *Michigan Journal of International Law* 30 (2009): 645.

²¹³ *Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, US Presidential Proclamation No. 2667 (28 September 1945) (the "Truman Proclamation"), 10 FR 12303; 13 DSB 485. "The Truman Proclamation unleashed a quarter-century of territorial and quasi-territorial claims to the high seas so vast that, at the dawn of the Third United Nations Conference on the Law of the Sea, the leader of the Canadian delegation, Ambassador J. Alan Beesley, could quip that he comes to bury Grotius, not to praise him." Bernard H. Oxman, "The Territorial Temptation: A Siren Song at Sea," *AJIL* 100 (2006): 830 at 832.

²¹⁴ The four so-called "Geneva Conventions" resulting from the 1958 First United Nations Conference on the Law of the Sea are: *Convention on the Territorial Sea and Contiguous Zone 1958*, 516 UNTS 205; *Convention on the High Seas 1958*, 450 UNTS 11; *Convention on Fishing and Conservation of*

It is helpful to recall that, for most coastal states, there are now four offshore “zones” that can be claimed as “maritime territory”.²¹⁶ These areas are defined by the 1982 United Nations *Convention on the Law of the Sea* and, to a lesser extent, by customary international law, together with the practice of coastal states.²¹⁷ There are now few differences between States in the nature and extent of their claimed maritime areas.²¹⁸ They are:

(1) the **territorial sea**. “The sovereignty of a coastal state extends, beyond its land territory and internal waters . . . to an adjacent belt of sea described as the territorial sea.

This sovereignty extends to the air space over the territorial sea as well as to its seabed and

Living Resources of the High Seas 1958, 559 UNTS 285; and *Convention on the Continental Shelf* 1958, 499 UNTS 311. For all practical purposes, the four Conventions have been subsumed in the 1982 UN *Convention on the Law of the Sea*. See UNCLOS Article 311.

²¹⁵ Exploration and recovery of petroleum from the seabed remained in its infancy through the 1950s. No longer. In 2010, Shell’s “Perdido” spar drilling platform in the Gulf of Texas will begin operating in almost 3,000 metres of water. Seabed drilling to depths of five kilometres within the continental shelf is now commonplace. “Plumbing the depths: A recent wave of advances is enabling oil companies to detect and recover offshore oil in ever more difficult places,” *The Economist* (March 4, 2010).

²¹⁶ Consider the geographic setting of Singapore, which did not allow that state to claim an EEZ, at least under the island territorial award of the ICJ in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (23 May 2008) (accessed 12 January 2010); available at: www.icj-cij.org/docket/index.php?p1=3&p2=3&k=2b&case=130&code=masi&p3=4

Most states have adopted international definitions in national legislation establishing their maritime zones. See e.g. Canada’s *Oceans Act*, S.C. 1996, c. 31 (accessed 12 January 2010); available at: <http://laws.justice.gc.ca/en/o-2.4/text.html>

²¹⁷ UN *Convention on the Law of the Sea*, *supra* note 78. “Internal waters”, for example harbors and bays landward of the baselines for a State’s territorial sea and other maritime zones, are effectively a fifth area. See UNCLOS Article 8.

²¹⁸ See “Table of claims to maritime jurisdiction (current to May 28, 2008),” United Nations Division for Ocean Affairs and the Law of the Sea (accessed 8 January 2010); available at: www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf

subsoil.”²¹⁹ Customary international law does not generally allow the territorial sea to extend seaward greater than 12 nautical miles as measured from a State’s coast or accepted baselines. The right of the coastal State in this zone are not absolute. Among other things, the innocent passage of vessels and the laying of seabed cables must generally be permitted.²²⁰ In establishing the baselines for the territorial sea (which may and frequently consists of the natural coastline of the State concerned) a high degree of accuracy is required, given the implications for the orientation and spatial reach of jurisdiction to 12 nautical miles and the establishment of a 200 NM EEZ.

(2) the **contiguous zone**. This zone may be established to a distance of 24 nautical miles from the baselines of a State within which there may be exercised limited sovereign rights to enforce national customs, immigration and environmental regulations.²²¹

(3) the **continental shelf**. “The continental shelf of a coastal state comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend

²¹⁹ UNCLOS, *supra* note 78, Article 2.

²²⁰ *Idem* at Articles 17-32.

²²¹ *Idem* at Article 33. In a twenty-first century world concerned with security at sea, the contiguous zone has undergone little development. National legislation claims it almost as a matter of ritual. The contiguous zone has not featured as a claimed area in any maritime delimitation proceeding. Arguably, the progressive legislation of coastal States to regulate activities in the EEZ is resulting in a *de facto* extension of the zone to 200 NM.

up to that distance.”²²² The first part of this provision establishes the extended continental shelf which, following the coming into force of UNCLOS in 1994, is receiving considerable attention. The great innovation of the 1982 Conference on the Law of the Sea was to prescribe a 200 NM distance based limit to those continental shelf claims that cannot reach into the further offshore on the basis of the geologic-geomorphologic criteria for an extended continental shelf claim.

(4) the **exclusive economic zone (EEZ)**. “The exclusive economic zone is an area beyond and adjacent to the territorial sea [in which] the coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the water superjacent to the sea-bed and of the sea-bed and its subsoil ... The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.” It should be noted that the sovereign rights to seabed development are identical to those available under the continental shelf regime.²²³ In other words, the right of a State to develop the seabed is the same under UNCLOS Articles 77 (continental shelf) and 56 (EEZ). The EEZ, being the newest artefact of international maritime law stands distinct as an oceans

²²² *Idem* at Article 76(1).

²²³ *Idem* at Articles 55-57. “Archipelagic waters” can be considered a distinct maritime zone under Article 49 of the Convention. It is recalled that an “archipelagic state” is one constituted wholly by one or more archipelagos: UNCLOS Article 46. Indonesia qualifies as an archipelagic State. Spain and Canada, for example, with offshore island groups, do not. So, too, should the “High Seas” and the “Area” of the international seabed outside national maritime jurisdiction. See Parts VII and XI UNCLOS.

zoning regime, something reflected in the willingness of States and the courts to delineate all-purpose maritime boundaries that are, effectively, delimitations of the EEZ.

While the seaward reach of these zones should be ideally prescribed in national legislation and depicted on suitable scale charts, the right of a state to the continental shelf along its coast is inherent.²²⁴ International law holds the shelf as an extension of a country's landmass: "The rights of the coastal state over the continental shelf do not depend on occupation, effective or notional or on any express proclamation."²²⁵ This applies in equal measure to claims for a continental shelf within 200 NM of a State's coastline as well as any further extended continental shelf, the definition on the shelf, in contrast to the other maritime zones, being a geophysical construct.

The global trend in defining functional maritime zones and the making of claims to the offshore has also manifested itself in national jurisdictions. Federated States in particular saw competing local and central government claims over such areas, notably in the 1980s and 1990s, the result of seabed petroleum development. In general, the disputes over ocean jurisdiction in such States have been resolved in favour of national governments, including Australia, Canada and the USA. For example, three decisions of

²²⁴ See Articles 16, 47, 75 and 84 UNCLOS, respectively on the requirement to show the baselines or outer limits of the territorial sea, archipelagic waters, the EEZ and the continental shelf.

²²⁵ *Idem* at Article 77(3).

the Supreme Court of Canada determined the country's offshore to fall within central government jurisdiction.²²⁶

Boundaries in the Sea

The process of claiming and defining a state's offshore jurisdiction begins with the coastline it possesses. As the land dominates the sea, so the question of the extent and reach of a maritime zone is matter of the coastal geography the State possesses. "The land is the legal source of the power which a State may exercise over territorial extensions to seaward."²²⁷ From such a starting point, the various boundary delimitation criteria as developed in international law can be applied, with the paramount requirement being "an equitable result" where there are overlapping claims to maritime areas between the States concerned. Consider Article 74 UNCLOS:

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.²²⁸

International law is clear that, in instances where two states have overlapping maritime claims, they must negotiate a boundary between their zones or settle the dispute by

²²⁶ The Canadian decisions offer helpful analysis about the nature of offshore resource rights and jurisdiction in federated states. See *Reference Re Ownership of Off-Shore Mineral Rights* (1968), 65 DLR (2d) 353; *Reference Re The Seabed and Subsoil of the Continental Shelf Offshore Newfoundland* (1984), 5 DLR (4th) 385; *Reference Re Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 4 WWR 289. See also J.J. Smith, "Notre Mer? An Independent Québec's Maritime Claims in the Gulf of St. Lawrence and Beyond," *Canadian Yearbook International Law* (1997): 113.

²²⁷ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases, *ICJ Reports* 1969, 51, para. 96.

²²⁸ UNCLOS *supra* note 78.

peaceful means in order to achieve an “equitable solution”. Article 83 of the Convention imposes this requirement in cases of competing continental shelf claims, with Article 15 imposing a simplistic requirement for an equidistant median line to result, save in the case of historic title “or other special circumstances.”²²⁹ If negotiating and conciliatory measures fail delimitation can be achieved by judicial determination including before the International Court of Justice, the International Tribunal for the Law of the Sea (“ITLOS”) and by arbitration.

The role of equity in maritime boundary-making has been debated contentiously since the ICJ’s initial work on the subject, the 1969 *North Sea Continental Shelf* cases. That is unfortunate, for role of equity at stages in the process to define jurisdiction by arriving at maritime boundaries has been unnecessarily obscured. It is the result which the law demands be equitable, and not methods or the application of an equity wholly devoid of normative rules in apportioning competing maritime jurisdictions. The source of confusion seems as traceable to the early and tentative approaches in both State practice and judicial awards to ascertaining maritime boundaries, as it does to the understandable lack of technical prescriptions to draw an actual boundary in the 1958 Geneva

²²⁹ The ICJ has recently stated that, for territorial sea boundary delimitation “equidistance remains the general rule.” *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (8 October 2007) at para. 281 (accessed 12 January 2010); available at: <http://www.icj-cij.org/docket/files/120/14075.pdf> However, equidistance was rejected in the 1982 *Tunisia/Libya* case, and in the 1986 *Guinea/Guinea Bissau* case, *infra*, to avoid cutting-off one party’s projection into the Atlantic Ocean.

(“UNCLOS I”) conventions and UNCLOS 1982 (UNCLOS III”).²³⁰ It is “the course of the final line [that] should result in an equitable solution.”²³¹

[T]he idea of delimitation in accordance with equitable principles is best understood as a process, rather than as a call for the identification of any particular means, methods, concepts or factors which, when framed as principles, are to be considered equitable. That process calls for the identification of an appropriate method of delimitation in light of the appropriate relevant circumstances and its application in the light of them. Circumstances relevant to the identification of the appropriate practical method of delimitation need not be the same as the circumstances relevant to its practical application. The result of this process is the equitable solution, called for by the process. Ex post facto tests of equitability are - as a matter of judicial reasoning - brought into play in order to demonstrate that the result thus produced is product of the application of ‘equitable principles.’²³²

As there exist overlapping exclusive economic zone and continental shelf claims between almost all coastal states, the detailed criteria of ocean boundary delimitation must be taken up at an early stage. How should a coastal state’s maritime boundaries, particularly those establishing the EEZ and outer limits of the continental shelf, be defined? With an established legal structure now in place, the task is one shared by lawyers, hydrographers and cartographers.

²³⁰ “Equitable considerations *per se* are an imprecise concept in the light of the need for stability and certainty in the outcome of the legal process. Some early attempts by international courts and tribunals to define the role of equity resulted in distancing the outcome from the role of law and thus led to a state of confusion in the matter (*Tunisia/Libya*). The search for predictable, objectively-determined criteria for delimitation, as opposed to subjective findings lacking precise legal or methodological bases, emphasized that the role of equity lies within and not beyond the law (*Libya/Malta*.) [Citations omitted.] *Barbados/Republic of Trinidad and Tobago Maritime Boundary Arbitration (Award)*, *supra* note 181 at para. 230. “Certainty, equity and predictability are thus integral parts of the delimitation process.” *Idem* at para. 244.

²³¹ *Case concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (3 February 2009) (accessed 12 January 2010); available at: www.icj-cij.org/docket/files/132/14987.pdf

²³² Malcolm D. Evans, “Maritime Boundary Delimitation: Where Do We go From Here?” in David Freestone, Richard Barnes Richard and David M. Ong, eds., *The Law of the Sea: Progress and Prospects* (New York, NY: Oxford University Press, 2006) 137 at 145.

In an effort to achieve equitable outcomes and develop broad criteria applicable to most situations, international law has achieved considerable certainty in its analytical approach to maritime boundary making. The evolution of the law in this area has been remarkable given the types of maritime zones to be delimited over an infinitely varied range of geographic settings. It should be recalled that codified international law, including the Convention, offers no technical “rules” for the delimitation process. What is now all but a settled approach owes much to the decisions of courts and tribunals and, importantly (if secondarily), the practice of coastal states.

It is two continuing trends that have led to normative certainty in maritime delimitation law. The process-framework for the allocation of maritime space has come to be settled and therefore predictable as a result. In almost no other area of public international law has such certainty been achieved, so rapidly. If territorial integrity is the lodestar of the modern international legal order, the willingness of States to resolve maritime jurisdiction issues and to readily turn to the courts in the difficult cases has been the hallmark of that success. The first of the trends contributing to this has been, with the coming into force and near global acceptance of the 1982 *Convention on the Law of the Sea*, a uniform consensus over State entitlement together with that for the approach to maritime delimitation. The second trend has emerged from the work of courts and tribunals, culminating most recently in the ICJ’s 2009 *Romania/Ukraine Black Sea* boundary decision.²³³ The work of the courts has been impressive and in no other single

²³³ *Supra* note 231.

area of international law have so many decisions been arrived at by the ICJ since its founding. There are 18 decisions of the courts and arbitration panels to guide the delimitation process.²³⁴ Those decisions of the past 10 years in particular have resolved the difficult issues and made the law certain, especially those of *Barbados/Trinidad and*

²³⁴ 10 of the 18 boundary awards since 1969 have been ICJ decisions. The ITLOS, established under UNCLOS in 1996 with complementary jurisdiction to that of the ICJ, will decide its first maritime boundary case in *Bangladesh/Myanmar*, commenced in December 2009. Decisions of the ICJ are intended to have limited precedential application. Article 59 of the *Statute of the International Court of Justice* states that: “The decision of the Court has no binding force except between the parties and in respect of that particular case.”

The leading decisions in the development of the law are: *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. Netherlands)*, ICJ Rep. 1969, 3; *Delimitation of the Continental Shelf (UK v. France)*, [1979] 18 ILM 379; *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, ICJ Rep. 1982, 18; *Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States)*, ICJ Rep. 1984, 246; *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, ICJ Rep. 1985, 13; *Case Concerning the Delimitation of the Maritime Areas Between Canada and France* (1992), 31 ILM 1149; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, ICJ Rep. 1993, 8; *Eritrea v. Yemen (Phase One: Territorial Sovereignty and Scope of Dispute)* (9 October 1998) and *(Phase Two: Maritime Delimitation)* (17 December 1999), 119 ILR 417; *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (Qatar v. Bahrain)* (16 March 2001), ICJ Rep. 2001, 40; *Barbados/Republic of Trinidad and Tobago Maritime Boundary Arbitration (Award)*, (April 11, 2006) (accessed 12 January 2010); available at: <http://www.pca-cpa.org/upload/files/Final%20Award.pdf>; *Guyana/Suriname Maritime Boundary Arbitration (Award)*, (17 September 2007) (accessed 12 January 2010); available at: (<http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (8 October 2007) (accessed 12 January 2010); available at: <http://www.icj-cij.org/docket/files/120/14075.pdf>; and *Case concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (3 February 2009) (accessed 12 January 2010); available at: <http://www.icj-cij.org/docket/files/132/14987.pdf>

Secondary or less influential decisions in the corpus of 18 include: the *Beagle Channel Arbitration (Argentina/Chile)* (1978), 17 ILM 632; *Dubai/Sharjah Border Arbitration (Arbitral Award of 19 October 1981)*, 91 ILR 543; *Guinea v. Guinea Bissau Maritime Boundary Arbitration*, [1986] 25 ILM 251; *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, ICJ Rep. 1992, 351; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, ICJ Rep. 2002, 303.

The early *Grisbadarna* case is also recalled: (*Norway/Sweden*) (1909), 11 *Reports of International Arbitration Awards* 147; *American Journal of International Law* 4 (1910): 226 (English translation).

The reputation of tribunals to effectively resolve maritime boundary questions was not arrived at in isolation. A substantial, corollary development of the law has been achieved in land territory and boundary disputes ranging from *Cambodia/Thailand*, ICJ Rep. 1962, 6 to *Botswana/Namibia*, ICJ Rep. 1999, 1045 and, recently, *Malaysia/Singapore* (23 May 2008), *supra* note 216.

*Tobago, Guyana/Suriname, Nicaragua/Honduras and Romania/Ukraine.*²³⁵ The ICJ signaled as much in the making of a statement on the occasion of the twentieth anniversary of UNCLOS:

The maritime delimitation of States with opposite and adjacent coasts is now governed by a unified system of application law. For the Court, any delimitation must lead to an equitable result. It first determines provisionally the equidistance line and then asks itself whether there are any special circumstances or relevant factors requiring this initial line to be adjusted with a view to achieving equitable results.²³⁶

Such remarks, followed by decisions after the quality of analysis and uniform approaches in *Eritrea/Yemen* and *Qatar/Bahrain* prove that the law of maritime delimitation has arrived at a point of certainty at least about how the analysis of boundary making should proceed. A stable doctrinal approach has been advocated for some time, with Professor Prosper Weil writing in 1989 that:

The structure of the delimitation process is the area of greatest certainty. It is true that the judgments remain a little hesitant and that the courts have not defined the process with rigor or uniformity. Even *Libya/Malta*, which, of all the judgments, approached most closely a precise description of the process, preferred a pragmatic approach, free of any normative definition - and thus of any general validity. However, by tying delimitation to legal title and basing title to all maritime areas on distance, the courts have blazed the trail for developments which should lead logically to the "normalization" of the two-pronged process which the courts have applied many times, but without so far according it the obligatory character which alone can turn it into a rule of law.²³⁷

²³⁵ The geographic nature and varied locations of the maritime boundaries in the four cases has contributed to the credibility of such dispute resolution.

²³⁶ ICJ Press Notice 2002/38, "Participation of the International Court of Justice in the celebration of the twentieth anniversary of the opening for signature of the United Nations Convention on the Law of the Sea of 1982" (accessed 14 January 2010); available at: www.icj-cij.org/presscom/index.php?pr=609&pt=1&p1=6&p2=1

²³⁷ *The law of maritime delimitation – reflections*, *supra* note 90 at 244. See also Jonathan Charney, "Progress in international maritime boundary delimitation law", (1994) *AJIL* 227 at 255. "[Recent ICJ decisions] mark important advances and refinements in the law, which, in turn, will promote the

Given the necessary flexibility required of delimitation criteria to ensure equitable outcomes it seems unlikely that a rigid approach can ever be applied in all situations. Geography and history are too varied to achieve complete uniformity. However, the most recent four decisions, above, strike the right balance. The regime of maritime jurisdiction is based on distance from a prevailing coastal geography. A structure or framework for the drawing of a maritime boundary can be determined in each case. The now extensive catalogue of special circumstances and relevant factors can be applied from case to case.²³⁸

An Equidistant Starting Point

The framework to establish a maritime boundary is simply to draw an equidistant line through the area of overlapping claims, to identify the special and relevant factors that suggest moving (adjusting) such a provisional line and applying them, and then, finally, testing the resulting boundary to ensure it is equitable.²³⁹ About this third step, the ICJ wrote in *Romania/Ukraine* that:

Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by

settlement of maritime boundary disputes. For the most part, they have focused attention on coastal geography and have analyzed that information by use of increasingly structured and uniform procedures and techniques."

²³⁸ State practice is an increasingly important part of this, if only from the large number of maritime boundary agreements done since UNCLOS was opened for signature in 1982. States borrow from and reinforce a consistent approach, both in the criteria selected to delineate boundaries and in the creation of single maritime boundaries for EEZs and continental shelves.

²³⁹ "At this initial [first] stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data." *Romania/Ukraine*, *supra* note 231 at para. 118.

reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line ... A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.

This is not to suggest that these respective areas should be proportionate to coastal lengths - as the Court has said “the sharing out of the area is therefore the consequence of the delimitation, not vice versa’ (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*).”²⁴⁰ [Citation omitted.]

It is in the middle step, that of identifying, accepting and applying factors to adjust a provisional equidistance line, which the process is most flexible. The catalogue of what might be called influencing criteria is unlimited. But the cases offer guidance. The non-geographic receive only infrequent consideration and the era of asserting them as a basis to adjust the allocation of maritime spaces seems to be over. These criteria include so-called “security considerations”, the relative economic importance of fisheries and informal arrangements purportedly pre-dating delimitation proceedings. For example, the ICJ rejected Romania’s suggestion of adjusting the boundary line with the Ukraine in the Black Sea on the basis of the provisional boundary considered too close to the Romanian coast, noting that:

The Court confines itself to two observations. First, the legitimate security considerations of the parties may play a role in determining the final delimitation line (see *Continental Shelf (Libyan Arab Jamahiriya/Malta)* ... Second, in the present case however, the provisional equidistance line it has drawn substantially differs from the lines drawn either by Romania or Ukraine. The provisional equidistance line determined by the Court fully respects the legitimate security interests of either Party. Therefore, there is no need to adjust the line on the basis of this consideration.²⁴¹

²⁴⁰ *Idem* at para. 122.

²⁴¹ *Idem* at para. 204. Romania adduced weak evidence of its security claim. Arguably, such assertion would be stronger in the case of a territorial sea boundary close inshore than that of the EEZ.

There has been a similar retrenchment from economic issues as a special or relevant circumstance in adjusting a continental shelf boundary. The most notorious application of such a factor was done by the ICJ in *Greenland/Jan Mayen (Denmark/Norway)* when the Court shifted the provisional boundary eastward, toward Jan Mayen Island in an effort to ensure Denmark's "equitable access to the capelin stock", thereby avoiding "catastrophic repercussions" to the economic livelihood of the residents of Eastern Greenland.²⁴² The statement of the arbitration panel in the *Barbados/Trinidad and Tobago* EEZ boundary case, that "injury does not equate with catastrophe" seems in direct rejoinder to the earlier allowance of such a criteria.²⁴³ The irony in the disavowal of an economic interest in a scheme for the allocation of maritime space to States expressly for the development of ocean resources is apparent. The question of what is an ocean resource and the strength of a State's claim to it can be infinitely pursued. Although the law may be close to eliminating all but the strongest of such non-geographic claims, their era has not yet passed.²⁴⁴ Pending cases will tell.²⁴⁵

²⁴² *Denmark/Norway*, *supra* note 173 at para. 76. The ICJ considered the result of a boundary on regional fisheries in the 1984 *Gulf of Maine* case (*Canada/USA*), *supra* note 234 and, as we have seen, an arbitration panel required transboundary fishing to continue in *Eritrea/Yemen*, *supra* note 175.

²⁴³ *Supra* note 181 at para. 267. The panel added: "Nor is injury in the course of international economic relations treated as sufficient legal ground for border adjustment." State practice has proven more responsive to preservation of fisheries interests. See David Anderson, *Modern Law of the Sea: Selected Essays* (Boston: Martinus Nijhoff, 2008) at 413.

²⁴⁴ Cf. Malcolm D. Evans: "In truth there need only be one thing to be taken into account, and that is the coastal geography. Just about everything else that is advanced is, or could be 'explained away', unless it is sufficient to indicate that a delimitation is to be conducted on a wholly different basis for exceptional reasons. "Maritime Boundary Delimitation," *supra* note 232 at 157.

²⁴⁵ Including the long-running (2001) *Nicaragua/Columbia* and 2008 *Peru/Chile* cases in the ICJ. It should be expected that the increasing number of multilateral agreements concerning environmental

A criterion firmly, and usefully, rejected in current caselaw is that of the physical features or geomorphology, of the seabed. The issue traces its provenance to the reasoning of the ICJ in the 1969 *North Sea Continental Shelf* cases where the notion of the “natural prolongation” of the continental shelf was considered.^{246 247} The quality and extent of a coastal State’s seabed has not arisen in any of the recent decisions. However, in respect of the extended continental shelf jurisdiction submissions to be decided by the Commission on the Limits of the Continental Shelf, it is seabed topography and geology which predominates.²⁴⁸

protection and habitat conservation will give rise to new criteria in the delimitation process. Consider the reasoning of Judge Weeramantry in the ICJ’s 1999 *Botswana/Namibia* decision: “I will now address a resultant question which will confront international law with increasing intensity in the future - the tension between principles of territorial sovereignty and principles of ecological protection which will involve a fiduciary responsibility towards the ecosystems of the states concerned.” *Supra* note 234, Dissenting opinion at paragraphs 80-92. In this regard, consider Article 74(4) UNCLOS on EEZ delimitation: “Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.”

²⁴⁶ *Supra* note 227 at paras. 22 *et seq.*

²⁴⁷ The reach of the continental shelf played a political (if indirect) role following Indonesia’s 1975 invasion and annexation of then Portuguese Timor. Australia and Indonesia had earlier concluded a continental shelf boundary in the Timor Sea, drawn across the north-reaching extension of Australia’s underwater landmass. Portugal, the colonial administering power of Timor, refused to complete such a boundary across its portion of the Timor Sea on the basis of the developing concept of the EEZ with its 200 NM reach in the years prior to the 1982 Conference on the Law of the Sea. After Indonesia’s annexation of Timor, Australia became the only State to recognize it *de jure* and in 1989 concluded a joint seabed development treaty with Indonesia in the area previously left undelimited by Portugal, the *Timor Gap Treaty*. In 1991 Portugal commenced proceedings in the ICJ to abrogate the treaty, resulting in the Court’s 1995 *Portugal/Australia* decision, considered below.

²⁴⁸ The requirements to claim an extended continental shelf are at Article 76 UNCLOS and are considered below in the context of a possible claim by the SADR. The Commission is a scientific and technical body. Its terms of reference – to “consider the data” of submitted extended shelf claims and “to provide scientific and technical advice, if requested” – are defined at Annex II to UNCLOS. The Commission has no legal standing to definitively award a State’s extended shelf claim or delimit

It is thus that coastal geography has come to predominate. Professor Jonathan Charney accurately foretold such a result in 1994:

Maritime zones and boundary delimitations established on the basis of coastal geography, distances measures from the coastline, and proximity more closely reflect states' interests in spatial-based authority and control and their preference for the maximization of the physical separation between states, as viewed from the two-dimensional perspective of the earth's surface.²⁴⁹

A reading of the table of contents for recent judgments confirms this, and the various special and relevant circumstances advanced in support of shifting a provisional boundary line one way or the other. Such criteria include the presence and acceptability of national territorial sea baselines, the effect of islands (notably island groups) near the proposed boundary, the desire to avoid the encroachment of a provisional boundary into areas of possible third party claims, unusual or highly varied featured in the coastal geography of one or both States, the regional coastal geographic context, the terminal points of land

competing claims to the shelf. Rather, it makes recommendations to be responded to by the submitting State. The settlement of competing claims to the extended continental shelf is, as with boundary delimitation generally, a matter for tribunal selection by States and election of the procedures under Part XV UNCLOS, "Settlement of Disputes." The Commission's *Rules of Procedure* also expressly reject jurisdiction over boundary disputes. See generally Constance Johnson and Alex G. Oude Elferink, "Submissions to the Commissions on the Limits of the Continental Shelf in Cases of Unresolved Land and Maritime Disputes: The Significance of Article 76(10) of the Convention on the Law of the Sea," in David Freestone, Richard Barnes and David M. Ong, eds., *The Law of the Sea: Progress and Prospects*. (New York, NY: Oxford University Press, 2006) at 161.

²⁴⁹ "Progress in International Maritime Boundary Delimitation Law," *supra* note 237 at 239.

boundaries at a coast, and the comparative maritime areas resulting from the lengths of the parties' "generating coastlines" assessed under the principle of "proportionality".²⁵⁰

The Role of Islands

Islands occupy an important role in defining the geographic aspects of maritime boundary delimitation. UNCLOS provides that islands can generate a 12 NM territorial sea and a 200 NM EEZ.²⁵¹ The expansive effect thus resulting is evident.²⁵² The case law has been consistent in accounting for them, and the distorting effect their generation of EEZs can have on a boundary. In contrast, State practice in the treatment of islands has proven quite varied. Three factors appear to have resulted in this. The first is that sovereignty over inshore and distant islands is frequently laden with geopolitical considerations. The second is that the effect of islands upon a maritime boundary (and in generating EEZs of their) own was not truly understood until the preparatory work for UNCLOS and the resulting caselaw of the 1980s and 1990s began to be understood. Third, State practice

²⁵⁰ This list is by no means exhaustive. The best recent catalogue of geographic and related factors in maritime boundary delimitation is found in *Towards the Conceptualization of Maritime Delimitation: Legal and Technical Aspects of a Political Process*, *supra* note 184.

²⁵¹ Article 121 UNCLOS provides that rocks which cannot sustain human habitation or an economic life "of their own" cannot generate an EEZ or territorial sea. However, rocks and low-tide elevations do play an important (and distorting) role in establishing the baselines from which such maritime zones are generated, an approach illustrated by Bahrain's claims in *Qatar/Bahrain*, *supra* note 179. Japan's claim to a full, 163,00 square mile EEZ from its southernmost islet of Okinotorishima, a rock three feet above the high water mark southeast of Taiwan, is perhaps the most notorious current claim.

²⁵² As the case of the Spratly Islands claimed by several States in the South China Sea illustrates. See generally Min Gyo Koo, *Island Disputes and Maritime Regime Building in East Asia: Between a Rock and a Hard Place* (New York, NY: Springer, 2009). And see Ted L. McDorman, "The South China Sea after 2009: Clarity of Claims and Enhanced Prospects for Regional Cooperation?" (unpublished 2009 paper – on file with the author).

has seen an uneven application of baselines to enclose islands or to link them with mainland points for delimitation purposes.

The case law offers more certainty. The early decisions, notably *United Kingdom France, Tunisia/Libya* and *Libya/Malta* gave reduced or “half” effect” to islands lying to one side of a provisional boundary in the adjustment of such a line.²⁵³ In general, islands can be given full weight (or effect), there can be an exchange of maritime areas to account for islands (“*quid pro quo*”), islands can be partially or “half” weighted, discounted entirely or have a limited territorial sea (or EEZ) drawn around them (“enclavement”).²⁵⁴ The latter technique has been demonstrated most dramatically in the case of *Canada/France*, for which the court established a narrow, south-reaching EEZ “corridor” 10.5 NM wide for France’s St. Pierre and Miquelon Islands.²⁵⁵

Matters of Geography

If geographic factors occupy center stage in the second, review-of-provisional line, phase of substantive maritime boundary-making, it is clear the evidence of such factors will be paramount. Because the process routinely involves not only the assessment of discrete

²⁵³ *Supra* note 234.

²⁵⁴ Yoshifumi Tanaka usefully surveys the treatment of islands in the decisions from the 1977 *Anglo-French* case through *Cameroon/Nigeria* in 2002 with the categories “full effect”, “no effect” and “partial effect” being applied in more or less equal measure, and only the treatment of the Channel Islands in the former case as one of “enclavement”. *Predictability and Flexibility in the Law of Maritime Delimitation* (Oxford and Portland, Oregon: Hart Publishing, 2006) at 208.

²⁵⁵ *Supra* note 234. The ICJ continued the technique of enclaving an island group near a boundary line in *Nicaragua/Honduras*. See “Delimitation around the islands” *idem* at para. 299 *et seq.*

criteria, but also an overall claimed boundary line by each party, the construction of a case in favour of a desired – and frequently maximalist – outcome takes on a life of its own.²⁵⁶ Several cases illustrate this. Trinidad and Tobago contended that the reach or “outlet” of its EEZ into the western Atlantic Ocean should not be constrained by an unadjusted equidistant EEZ boundary with Tobago.²⁵⁷ Romania argued in its case that the geography of the western coast of the Black Sea favored an EEZ boundary considerably toward the Ukraine.²⁵⁸ The selection of features to ground a claim is crucial, and within that credible data including choice of geodetic datum, chart projection and chart scale, bathymetry, surveys, historical records, documents of the parties’ uses and agreements in respect of the area to be delimited, as well as the techniques used to generate two-dimensional representations of such features together with boundary claim lines, vital.²⁵⁹

²⁵⁶ See *e.g.* the considerably different EEZ claim lines in *Canada/France, idem*.

²⁵⁷ *Supra* note 181 at paras. 319 *et seq.* The argument, rejected by the arbitration panel, skillfully invoked the principle of non-encroachment in maritime boundary-making.

²⁵⁸ *Supra* note 231 at page 9, “Sketch-map No. 1: The maritime boundary lines claimed by Romania and Ukraine”.

²⁵⁹ The need for geographic accuracy transcends the process. “[T]he following information is necessary for the accurate recovery of the boundary ... (1) the geographic coordinates of turning pints (preferably to the nearest .1”), (2) the nature of the line segments connecting these points (preferably geodesics as they are closest to equidistance and easiest to compute), and (3) the geodetic datum to which the boundary is referenced (preferably WGS84 or another global datum in order to avoid transformations to or from local datums).” Coalter Lathrop, “The Technical Aspects of Maritime Boundary Delimitation, Depiction, and Recovery,” *Ocean Development & International Law* 28 (1997): 167 at 179. See also “Geodetic Methodologies” in Division for Ocean Affairs and the Law of the Sea (United Nations Office of Legal Affairs), *Training Manual for delineation of the outer limits of the continental shelf beyond 200 nautical miles and for preparation of submissions to the Commission on the Limits of the Continental Shelf* (United Nations: New York, 2006).

The boundary-making process is logically and usefully informed by steps prior to the actual substantive exercise of setting a provisional boundary line, adjusting it “in the circumstances”, and finally making an equitable check of it. First, the type of boundary to be delimited - territorial sea, continental shelf, EEZ and, in the older cases, a fishery zone boundary - must be clear. There is now a well-established trend to the “single maritime boundary” of a combined continental shelf-EEZ delineation, at least for continental shelf claims within the EEZ, that is, within 200 NM of the claimant State. The imperative toward such a boundary was explained by the Court in *Qatar/Bahrain*, referring to the *Gulf of Maine (Canada/USA)* case, “to avoid the disadvantages inherent in a plurality of separate delimitations; according to the Chamber, ‘preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation’.”²⁶⁰ [Citation omitted.]

How the boundaries of extended continental shelf claims greater than 200 NM seaward (to their maximum permissible extent of 350 NM under UNCLOS Article 76) will be treated remains to be seen.²⁶¹ For a single EEZ-continental shelf boundary, “[t]here will rarely, if ever, be a single line that is uniquely equitable.”²⁶² The development of the

²⁶⁰ *Qatar/Bahrain*, *supra* note 179 at para. 225.

²⁶¹ The curious case of St. Pierre and Miquelon illustrates some of the complexities expected in extended continental shelf claims. The 1992 EEZ boundary awarded to France lies entirely within the larger Canadian EEZ. *Canada/France*, *supra* note 234. In recent years, it has been suggested the islands generate or are entitled to a discontinuous extended shelf claim outside (*i.e.* “leapfrogging” beyond) the Canadian EEZ. See Marc Plantegenest *et al*, *The French Islands of Saint-Pierre et Miquelon: A Case for the Construction of a Discontinuous Juridical Continental Shelf?* (undated, unpublished - paper on file with the author).

²⁶² *Trinidad and Tobago/Barbados*, *supra* note 181 at para. 244.

approach to a single boundary began with the ICJ's 1982 decision in *Tunisia/Libya*, tracing its course through the later *Gulf of Maine* and *Greenland/Jan Mayen* (*Denmark/Norway*) cases and specifically addressed by the Court a decade later in *Qatar/Bahrain*:

The Court observes that the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and that it finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various - partially coincident - zones of maritime jurisdiction appertaining to them.²⁶³

The utility of a single ("all purpose") boundary should be clear, with States free to modify their arrangements in respect of specific ocean resources near such a boundary, for example straddling fish stocks and common seabed petroleum reservoirs. The problems of different boundaries for different regimes within a 200 NM offshore ocean space revealed themselves in a 1997 EEZ "water column only" boundary treaty between Australia and Indonesia in the Timor Sea.²⁶⁴ The boundary was meant to respect the parties' 1973 seabed boundary and the 1989 *Timor Gap Treaty* by establishing a simplified equidistant line south of the existing continental shelf boundary. The 1997 treaty was never ratified because of the events in East Timor in 1999 and given the fact that it purported to effect a boundary south of then Indonesian occupied Timor. The 1997 treaty would have had the inconsistent result of regulating ocean uses above the seabed up

²⁶³ *Qatar/Bahrain*, *supra* note 179 at para. 173. Judge Oda, in his separate opinion, correctly noted that "[t]he term 'single' boundary has come to mean an identical boundary, being a single line for the two different régimes of the continental shelf and the exclusive economic zone." *Idem* at page 127.

²⁶⁴ *Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries* (14 March 1997) (accessed 12 January 2010); available at: www.austlii.edu.au/au/other/dfat/treaties/notinforce/1997/4.html

to its equidistant line, but not in those areas further north, to the 1973 continental shelf boundary.²⁶⁵

A second preliminary step in the boundary exercise is the determination of the geographic setting in dispute. The geographic context – the outer spatial limits of the region in dispute – must be understood from the outset.²⁶⁶ This step has several functions, including limiting the number of geographic features to be contended with (and, implicitly, in assigning relative merit or probative weight to them), and defining the coastal fronts that generate competing/overlapping maritime areas and thereby a later comparison of their relative proportions. The presence or future possibility of third State agreements and jurisdictional claims is an important aspect of establishing the delimitation setting.²⁶⁷ The case of *Guinea/Guinea Bissau*, in which the tribunal

²⁶⁵ See Stuart B. Kaye, “The Use of Multiple Boundaries in Maritime Boundary Delimitation: Law and Practice,” *Australian Yearbook of International Law* 19 (1998): 49.

²⁶⁶ A useful reference to define the regional setting of a maritime boundary problem is the International Hydrographic Organization’s *Limits of Oceans and Seas* (Monaco: International Hydrographic Bureau, 2001).

²⁶⁷ The ICJ reasoned in *Nicaragua/Honduras*, *supra* note 229 at para. 312 that: “As for the endpoint, neither Nicaragua nor Honduras in each of their submissions specifies a precise seaward end to the boundary between them. The Court will not rule on an issue when in order to do so the rights of a third party that is not before it, have first to be determined. Accordingly, it is usual in a judicial delimitation for the precise endpoint to be left undefined in order to refrain from prejudicing the rights of third States.” [Citation omitted.] In contrast, the Court held in *Romania/Ukraine* that “where areas are included solely for the purpose of approximate identification of overlapping entitlements of the Parties to the case, which may be deemed to constitute the relevant area (and which in due course will play a part in the final stage testing for disproportionality), third party entitlements cannot be affected.” *Supra* note 231 at para. 114.

considered the overall west African coastal geography in drawing a boundary to ensure the claims of neighboring States would not suffer encroachment, is a further example.²⁶⁸

A part of this step necessarily involves the determination of the coastlines of the States involved, including the terminus of land boundaries at the coast or the uncertainties of riparian boundaries and whether the initial part of a boundary can extend directly from such points or whether it must be fixed in a location a short distance offshore. The latter approach was adopted for the territorial sea-EEZ-shelf boundary awards in *Nicaragua/Honduras* and *Guyana/Suriname*.²⁶⁹

Within this second step of preliminaries, there must also be an assessment of the overlapping seaward projections of the coastlines at issue. In situations where there are existing land boundaries and relatively uniform coastal profiles, this is straightforward. As a general rule, where the overlapping claims are between opposite coasts (for example, in *Barbados/Trinidad and Tobago*) the allowance of the length of each State's coast will be simple to determine. Where claims are between adjacent States (for example in *Guyana/Suriname* and *Nicaragua/Honduras*) the assessment is more difficult. The comparative coastal lengths in mixed adjacent-opposite situations take on greater significance, as the cases of *Canada/USA (Gulf of Maine)* and *Romania/Ukraine*

²⁶⁸ *Supra* note 234. The tribunal set a "coastal front" between the two adjacent States appropriate to the convex profile of the African coast by drawing a line from Almadies Point in Senegal to Cape Shilling in Sierra Leone.

²⁶⁹ *Supra* notes 229 and 234, respectively.

demonstrate. Determining the relevant maritime space-generating coastlines present is the challenge here.

Non-Geographic Preliminaries

There are a few other obvious preliminaries to maritime-boundary making. They are most formally identified in the caselaw, but they feature in State practice of bilateral agreements. The existence and application of existing agreements, be they for a boundary, maritime resource use or otherwise evidencing the conduct of the parties in the area under question, is one. Existing agreements have been expressly considered in the recent cases, including *Romania/Ukraine* (a 2003 treaty between the two States, and Romania-USSR treaties dating from 1961 and 1949) and in *Cameroon/Nigeria* (including the Anglo-German agreement of 11 March 1913).²⁷⁰ The implicit agreement of historic fishing uses, as a further example, was considered by the arbitration panel in *Eritrea/Yemen*.²⁷¹ Further, the existence of third party agreements, notably maritime boundary agreements, near or touching on the area of competing claims to be delimited will be an initial consideration.

A further preliminary issue is the jurisdiction of the court in which proceedings are brought. Given that the resolution of State disputes in international legal order is operates on a consensual basis jurisdiction *simpliciter* is not ordinarily in issue. There may also be a question of whether a third State should be joined to proceedings, as

²⁷⁰ *Supra* note 231 at paras. 43-76 and *supra* note 234 at paras 193 *et seq.*, respectively.

²⁷¹ *Supra* note 175 at paras. 126 and 526.

demonstrated by *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)* and a present application of Costa Rica to intervene in the *Nicaragua/Columbia* case.²⁷² The cases demonstrate that discrete issues may be also be pursued, although with some risk a tribunal will reject them as *ultra vires* its competency. An unusual example can be seen in the *Guyana/Suriname* case, where Guyana sought \$33M damages for Suriname's actions in 2000 in enforcing its purported EEZ jurisdiction against a commercial drilling rig and against two concession holders.²⁷³ The claim was not one within the ordinary law of the sea applicable to maritime jurisdiction and boundary-making.

The choice of law applicable to a maritime boundary dispute is further preliminary matter. Tribunals have dealt ably with the issue and, in general, the differences between customary international law (which, for example, embodies almost all of the specific rules of maritime boundary-making under discussion here) and UNCLOS have been more or less consolidated into a uniform jurisprudence. The requirements of other treaties between the parties and the application of the *Statute of the International Court of Justice*, in particular the sources of law and application under Article 38, are a part of this. Parties are more than theoretically free to agree to limit the application of specific doctrine or to direct a court to an award beyond firmly established rules (*i.e.* to decide a case *ex aequo et*

²⁷² *Supra* note 234.

²⁷³ *Supra* note 234 at paras. 401-406. The tribunal took a broad approach to jurisdiction, accepting the claim on the basis that Article 293 UNCLOS imported customary international law into the dispute, including that relating to "the threat or issue of force." The tribunal went on to conclude that no damages resulted from the impugned incidents.

bono) but all have been content to select universal application of the law. Where limits are specified in litigation, they have been on the nature of boundaries, their spatial reach or a desired specific application of UNCLOS provisions.²⁷⁴

A final initial matter is that of a claim or questions of jurisdiction over coastal territory (and islands) involved in a maritime boundary dispute. The resolution of such claims must invariably be done as a substantive matter before any delimitation is undertaken. An example can be seen in the case of *Nicaragua/Honduras* in which competing claims to cays in the Caribbean Sea were necessarily first resolved, after which a 12 NM radial EEZ boundary was drawn around four (of five) of them in favour of Honduras.²⁷⁵ In general, claims to territory in maritime boundary disputes are more common in post-colonial situations where title may be unclear and in those instances where States are in close proximity to each other with varied coastlines having small island features, rocks, low tide elevations and generally uncertain baselines, whether natural (*i.e.* coastlines) or drawn.

A Proportional Result

The final step in maritime boundary-making, referred to above as the third in the substantive process of equidistance setting/adjusting/checking is done to ensure an equitable result. It is called the check of proportionality. The step has been carried out in

²⁷⁴ Nicaragua, for example, had not acceded to UNCLOS when the *Nicaragua/Honduras* case, *supra* note 229, was initiated. However, it accepted the application of UNCLOS early in the proceedings. *Idem* at para. 261.

²⁷⁵ *Supra* note 229 at paras. 104-227. And consider the extensive claim to small islets and low tide elevations affecting the course of the maritime boundary in *Qatar/Bahrain*, *supra* note 179.

the recent cases by comparing the ratios of the lengths of the coastlines involved generating the respective maritime areas delimited by the awarded boundary, to the ratios of such areas. After some years of debate among law of the sea scholars, the ICJ clarified the approach and importance of this final stage in the delimitation process itself in

Romania/Ukraine:

The purpose of delimitation is not to apportion equal shares of the area, nor indeed proportional shares. The test of disproportionality is not in itself a method of delimitation. It is rather a means of checking whether the delimitation line arrived at by other means needs adjustment because of a significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts.

The Court cannot but observe that various tribunals, and the Court itself, have drawn different conclusions over the years as to what disparity in coastal lengths would constitute a significant disproportionality which suggested the delimitation line was inequitable, and still required adjustment. This remains in each case a matter for the Court's appreciation, which it will exercise by reference to the overall geography of the area.²⁷⁶

With the law and process of maritime delimitation thus reviewed, the analysis can now turn to their application in the case of Western Sahara.

²⁷⁶ *Supra* note 231 at paras. 11 and 213. The Court was satisfied with a ratio of coastal lengths (Romania:Ukraine) of 1:2.8 to a ratio of maritime areas (EEZ, continental shelf) of (Romania:Ukraine) 1:2.1.

IV – THE MARITIME JURISDICTION OF AN INDEPENDENT WESTERN SAHARA

*Who hath measured the waters in the hollow of his hand ... ?*²⁷⁷

THE MARITIME JURISDICTION of Western Sahara, more accurately the presumptive ocean jurisdiction of the Saharawi Arab Democratic Republic, can be determined with precision. The law of the sea, in its conventional, state practice, caselaw and customary foundations, has advanced to both a rationale structure, as well as a defined process and body of rules to permit the delimitation of maritime boundaries encompassing zones of ocean jurisdiction. In the case of Western Sahara, with defined territorial boundaries, and uncomplicated geography of coastline and resolvable overlapping claims with neighboring States, the goal to delimit and thus define the spatial extent of maritime areas is within reach.²⁷⁸

With consideration of the historical, treaty issues, and current maritime claims of the four States in the Saharan area - that is, States with the potential to generate overlapping territorial sea and EEZ claims - the analysis can begin with the geographic setting together with the baselines from which competing will project.²⁷⁹ Application of the law will then

²⁷⁷ Isaiah 40:12, *The Holy Bible* (New York, NY: Collins' Clear-Type Press, 1936) at 594.

²⁷⁸ What Prosper Weil wrote in 1989 has come to pass: "It is to be hoped that the elements of the law of maritime delimitation will regroup and rules of law, and that these will regain, within the framework of customary international law, the richness and precision which the treaty norms had until the courts altered their meaning." *The law of maritime delimitation – reflections, supra* note 90 at 101.

²⁷⁹ The types of maritime boundary to be considered are discussed *infra*. They do not include a boundary for the 24 NM contiguous zone on the basis that it can be readily determined after a territorial sea and EEZ are arrived at. Similarly, the approach will be one of a single maritime boundary (*i.e.* a common boundary) for the Saharawi EEZ and continental shelf within 200 NM of the coast.

turn to the substantive, engaging the three steps described above to determine a median or equidistant boundary line, to possibly adjust such a line “on the basis of international law” as required by Articles 15, 74 and 83 of UNCLOS and, finally, to check for an equitable result.²⁸⁰ The exercise may appear abstract at points, however it is submitted the prevailing uncertainty is found equally as much in law of the sea as it is in the status of Western Sahara (in other words, the Saharawi State) and its people.²⁸¹ The present exercise is meant to shed some light on such questions, if only by the definition of territorial possibilities and, thereby, the illumination of ocean resource issues.

The Setting for Delimitation

To turn to the geographic setting, before addressing the particular coastal features of the States in contention. What might be termed the overall regional setting with relevance to the Western Sahara situation extends, to begin with, across the maximum jurisdictional reach or coastal projection into the Atlantic Ocean of the four States concerned, as well as

²⁸⁰ Articles 74 (delimitation of the EEZ) and 83 (delimitation of the shelf) prescribe an equitable delimitation result. Article 15 (delimitation of the territorial sea) does not do so expressly, but arguably its additional provision to vary or adjust a median line boundary in the case of “special circumstances” imports an equitable outcome where necessary, or desired. On the trend generally to the reasoning of equity in the decisions, see notably Tanaka’s analysis in *Predictability and Flexibility in the Law of Maritime Delimitation*, *supra* note 254 at 119 *et seq.*

²⁸¹ The absence of a more prescriptive and rules-based approach to maritime boundary delimitation was referred to by the tribunal in *Eritrea/Yemen*, *supra* note 175 at para. 116: “In any event there has to be room for differences of opinion about the interpretation of articles [74 and 83] which, in a last minute endeavour at the Third United Nations Conference on the Law of the Sea to get agreement on a very controversial matter, were consciously designed to decide as little as possible. It is clear, however, that both Articles envisage an equitable result.”

the general orientation of the African coast. Such maximum jurisdictional reach is, for present purposes, that of each State's 200 NM EEZ.²⁸²

As such, the Saharan regional setting for purposes of maritime boundary delimitation extends on the African coast from 15° N latitude (the maximum southerly reach of Mauritania's EEZ extending from the boundary with Senegal at St.-Louis) north to the terminus of Morocco's Atlantic coastline (and its EEZ) at 36° N latitude at the Strait of Gibraltar. Apart from the Cape Verde and Canary Islands, the African coast has an uninterrupted projection westward into the Atlantic across this 1,800 NM coastline. The orientation of it is generally north-south on the west facing coast of Mauritania, before following an increasing north-east direction north of Cape Blanc.

Three observations can be made at this general stage of setting the regional context. The first is that the influence or possible third party engagement of Cape Verde's EEZ can be eliminated from the present analysis. The Cape Verde Islands lie outside the defining geography of this particular delimitation exercise. Second, Morocco's coast north of 31° North latitude is also outside the area under consideration. Third, the situation of overlapping EEZ claims on the adjacent coasts of Mauritania and Western Sahara will not engage or extend to any third State, thus allowing for simpler resolution of the delimitation. The same will not be true in the tri-State adjacent-opposite coastal setting

²⁸² The issue of extended continental shelf claims under UNCLOS Article 76 by Mauritania, Morocco, the SADR and Spain, noted above, is considered in detail below.

near the Canary Islands.²⁸³ As such, the nature of the regional area is such that the context is smaller, one set closer to the theoretical maximum 200 NM of a Saharawi EEZ.

The length of the Saharan coast, which for purposes of setting the context is measured on a simplified straight line drawn on the major axis of the coast extending from Cape Blanc to the land boundary south of Cape Tarfaya, a distance of 464 NM, ensures that the claims of Mauritanian and the SADR in the south will generally not overlap those of Morocco, Spain and the SADR in the north.²⁸⁴

In the south, therefore, this allows the regional area to be set closer to the Mauritanian-SADR land boundary at Cape Blanc. Instead of the southern extent of such area commencing at 15° North latitude, the setting can be more closely focused and brought north to that point of the Mauritania coast which would be reached by the maximum extent of the SADR's 200 NM EEZ claim, a point on the coast at 18° North latitude; the location of Mauritania's capital, Nouakchott. The setting, therefore, in the south is one of adjacent projecting coastlines each with a maximum reach of 200 NM for the determination of an EEZ boundary. It is also, much as the coastline to the north, free of distorting or spatially limiting offshore features.

²⁸³ There is a fifth State in this wider region: Portugal in the Madeira Archipelago, with an EEZ overlapping that extending north from Spain's Canary and Selvagen Island groups.

²⁸⁴ See notably the depiction of 200 NM EEZs of all four States concerned, at **Map 2**.

Mauritania's claim to a lengthy baseline across the Bay of Arguin and the particular geography of the Cape Blanc peninsula must obviously be addressed in the delimitation exercise. Accordingly, this area, extending from 18° North latitude through a central point between the two States at Cape Blanc to Dakhla a further 200 NM to the north, is the relevant one for the purposes of establishing a provisional median line boundary as a first step in the actual delimitation.²⁸⁵ It should be noted that, within this area and the small area off the Cape Blanc peninsula, a territorial sea would be delimited. The orientation of that 12 NM boundary is discussed below.

A further refinement to the northern extent of the delimitation area can be done at this stage. It is evident a Saharawi EEZ would extend no much more north than the Morocco-Western Sahara land boundary at 27° 40' North latitude. Given the competing claims in the immediate area of Morocco, adjacent to the north together with that of Spain opposite in the Fuerteventura Islands group of the Canaries, a Saharawi EEZ could not be expected to extend through a radius of more than 60 NM and considerably less when a provisional median line is drawn. The result is that the relevant coastline – that land front capable (or required) to generate a median line provisional boundary – extends from Dakhla in the south at 24° North latitude to Sidi Ifni on the Moroccan coast at 29°

²⁸⁵ See *Suriname/Guyana* (a case of broadly similar adjacency in generally smooth profile coastal fronts), citing from *Greenland/Jan Mayen* at paras. 343-352, supra note 234: “[I]t seems logical and appropriate to treat as relevant the coasts of the Parties which generate “the complete course” of the provisional equidistance line. ‘The equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured.’” The selection of such an area for the Saharan delimitation also respects the reasoning of the court in *Guinea/Guinea Bissau* that the overall regional profile of the African coast be accounted for, that a delimitation not encroach upon possible maritime claims of third States.

30' North latitude. Such area is also fronted by all of the coastline of the Canary Islands that faces the African coast; the eastern profile of the Fuerteventura group, together with the southern profile of the five island Gran Canaria-Tenerife-Gomera-La Palma-Hierro group. Not overly complicated in comparison to the varied features in *Qatar/Bahrain*, for example, this northern part of the relevant area can be characterized as one of mixed opposite-adjacent coasts.²⁸⁶

This definition of the area relevant to the delimitation the SADR's EEZ, that is, the identification of the coast generating an entitlement to maritime territory, here in two distinct parts, is consistent with the caselaw. Most recently, the ICJ considered a situation of combined oppositeness-adjacency in *Romania/Ukraine*. Although not pre-disposing itself to selecting a median/equidistant line as the presumptive start of delimitation, the Court chose between completing claims over the extent of coastlines those which would encompass the base points to draw such a line in the disputed area, and no more extensive coasts:

The Court observes that the legal concept of the "relevant area" has to be taken into account as part of the methodology of maritime delimitation. In the first place, depending on the configuration of the relevant coasts in the general geographical context and the methods for the construction of their seaward projections, the relevant area may include certain maritime spaces and exclude others which are not germane to the case in hand.²⁸⁷

²⁸⁶ *Supra* note 179 at paras. 178-216.

²⁸⁷ *Supra* footnote 231 at para. 110. The Court chose the area relevant for delimitation mindful of its later *a posteriori* exercise to assess the proportionality of the States' delimited EEZs to the coastal lengths generating such respective areas.

The presence of existing baselines in this relevant area from 18° North to 29° 30' North latitude must next be considered. As we have seen, Spain claims baselines in circumference of each of its Canary Islands and Mauritania to enclose the Bay of Arguin. Baselines can serve as the basis for a State's territorial sea. The rules prescribed at Article 7 UNCLOS are clear in this regard.²⁸⁸ However, in the process of delimiting the EEZ and continental shelf, it is the points of coastal geography that govern. The ICJ has been definitive on the issue, most recently in *Romania/Ukraine*:

The Court observes that the issue of determining the baseline for the purpose of measuring the breadth of the continental shelf and the exclusive economic zone and the issue of identifying base points for drawing an equidistance/median line for the purpose of delimiting the continental shelf and the exclusive economic zone between adjacent/opposite States are two different issues.

In the first case, the coastal State, in conformity with the provisions of UNCLOS (Articles 7, 9, 10, 12 and 15), may determine the relevant base points. It is nevertheless an exercise which has always an international aspect. In the second case, the delimitation of the maritime areas involving two or more States, the Court should not base itself solely on the choice of base points made by one of those parties. The Court must, when delimiting the continental shelf and exclusive economic zones, select base points by reference to the physical geography of the relevant coasts.²⁸⁹ [Citation omitted.]

The Canarian baselines are unobjectionable in the context of a territorial sea delimitation in the narrow strait between Cape Juby and Fuerteventura's Point Lantilla, a

²⁸⁸ "Straight baselines" *supra* note 78. In general, baselines to found the territorial sea can only be used to enclose bays with openings of less than 24 NM, deeply indented coasts, coasts fringed by islands. Baselines are prescribed from departing to any considerable degree from the general direction of the coast. See United States Department of State, *Limits in the Seas – Developing Guidelines for Evaluating Straight Baselines* (No. 106) (Washington, DC: Bureau of Oceans and International Environmental and Scientific Affairs, 1987). Where such rules do not permit the drawing of straight baselines, it is the low water line of the coast that constitutes the baseline of the territorial sea, the so-called Article 5 "normal baseline" on a "coast as marked on large-scale charts officially recognized by the coastal State."

²⁸⁹ *Supra* note 231 at para. 130.

distance spanning 55 NM, as they are in the projection of an EEZ (and continental shelf) claim into such area and the wider expanse of ocean to the south. That is because the baselines closely conform to the periphery of each island and do not enclose the islands (with the exception of the continuous chain of the Fuerteventura group) as an archipelago. That the Canaries are thus a discontinuous island group will be an important factor in assessing the reduced or discontinuous coastal profile generated by them in contrast to the continuous Saharan coast, opposite, an issue to be considered shortly.

Mauritania's baseline enclosing the Bay of Arguin is evidently impermissible for the founding of a territorial sea and, *a fortiori*, the coastline to generate an EEZ/continental shelf.²⁹⁰ The Bay, together with the Bay of Lévrier in its northern part, while having a unique bathymetric structure, is an open coastal feature that does not satisfy any of the Article 7 criteria for enclosure. Moreover, the baseline arguably "departs from the general direction of the coast" at least as such coastline is locally oriented. It should be accepted that the UNCLOS rules govern the situation, as the caselaw and state practice are not dispositive. If there is a rule of general application to deny any relevance of Mauritania's baseline, it is that broadly open (or shall profile) coastal embayments more than 24 NM wide are not be enclosable by the drawing of a baseline.²⁹¹

²⁹⁰ *Supra* notes 186 and 288.

²⁹¹ "Where such baselines or base points might produce distorting effects, however, it is conceivable that international courts and tribunals may select other points or lines for the purposes of maritime delimitation. In fact, the ICJ in the Libya/Malta case did not use Malta's straight baselines when

Baselines to be Claimed by the SADR

A review of the coastlines generating maritime entitlements in the Saharan offshore would not be complete without mention of two territorial sea baselines to be acceptably claimed by the SADR. These are a short baseline across the Bay of Río de Oro at Dakhla and baselines enclosing the phosphate loading jetty at Port Laayoune.²⁹² Article 2 of the 2009 *Law Establishing the Maritime Zones of the SADR* provides the necessary enabling provisions for legislation to draw such baselines.²⁹³ At Dakhla, a closing baseline drawn directly north-south from the southeastern tip, Point Galarna, of the Dakhla Peninsula, to the Saharan mainland, is therefore indicated.²⁹⁴ The short span of such a baseline, its orientation and its location on the mid-Saharan coast will mean that it would have no discernable effect on a delimitation in the region. The waters enclosed by such a line would practically be the SADR's only internal waters, so defined.

drawing a provisional equidistance line on the basis of the consideration of equity." [Citation omitted.] *Predictability and Flexibility in the Law of Maritime Delimitation*, *supra* note 254 at 230.

²⁹² The embayment is also known as the Oued al-Dahab estuary. The bay measures about 6.5 NM across its opening into the Atlantic and about 10 NM in its interior major axis, lying to the northeast. The Dakhla Peninsula is a geographic structure formed by the littoral current along the Saharan coast. The Gulf of Cintra embayment is further. It does not qualify as a juridical bay capable of being enclosed by a baseline because of its shallow profile.

²⁹³ *Supra* note 77. Article 2: "(2) If it deems it appropriate, the Saharawi Arab Democratic Republic may define straight baselines for measuring the breadth of the territorial sea in accordance with the applicable principles of international law. (3) Baselines across the mouths of rivers and bays may be defined in accordance with the applicable principles of international law." Legislation for the drawing of such baselines has not yet been promulgated.

²⁹⁴ See Article 10 UNCLOS, *supra* note 78: "[A] bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the same line drawn across the mouth of that indentation."

The basis to claim as closing baseline about the harbour works at Port Laayoune are different in law.²⁹⁵ Articles 10 and 11 of UNCLOS govern the situation, here of a single 3,000 metre long jetty-pier structure built perpendicular to the coast for the loading of bulk phosphate mineral rock extracted from the inland Bou Craa mine.²⁹⁶

Article 11 - Ports

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works.

Article 12 - Roadsteads

Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea.²⁹⁷

The requirements of Articles 11 and 12 are clear and established as a matter of State practice.²⁹⁸ Further, the reasoning of the ICJ in *Romania/Ukraine* over a similar structure claimed by Romania to extend the basepoint of its EEZ into the Black Sea is apposite.

²⁹⁵ The phosphate loading pier-jetty is depicted on large-scale charts of the Saharan coast. See e.g. Admiralty Chart 3133, *Africa - West Coast: Casablanca to Islas Canarias (including Arquipélago da Madeira)* (Taunton: UK Hydrographic Office, 1997).

²⁹⁶ To the north on the coast adjacent to the Laayoune townsite there is also a harbour enclosed by dykes on three sides extending 600 metres offshore. This harbour, and that at Dakhla, are the only two protected roadsteads on the Saharan coast.

²⁹⁷ *Idem.*

²⁹⁸ Consider, for example, the territorial sea boundary between Singapore and Malaysia in the Strait of Johor, and in the English Channel between the UK and Belgium in respect of the harbour works at Zeebrugge and Oostende. Article 12 was derived from Article 9 of the 1958 *Convention on the Territorial Sea and Contiguous Zone*, *supra* note 214.

That structure was the Sulina Dyke, reaching 7.5 KM out to sea. The Court rejected the dyke as being a harbour work, suggesting its purpose was limited to the navigational protection of shipping in the immediate area. The Court's consideration of Article 11 UNCLOS is helpful to defining the Port Laayoune pier-jetty as an "[installation allowing] ships to be harboured, maintained or repaired and which permit or facilitate the embarkation and disembarkation of passengers and the loading or unloading of goods."²⁹⁹ In any case, lying some 38 NM south of the land boundary terminal point with Morocco, a short closing drawn about the structure would have almost no influence on a territorial sea boundary. Further, the slight concavity of the Saharan coast in the area, between Cape Boujdour to the south and Cape Tarfaya, reduces any effect of such a basepoint on an EEZ to be delimited with the Canary Islands opposite.³⁰⁰

²⁹⁹ *Supra* note 231 at para. 133. The matter of a territorial sea drawn about the structure at Port Laayoune may not be entirely free of controversy. The Court went on to note the comments of the International Law Commission in the drafting of the 1958 Convention: "In the light of the above, the ILC did not, at the time, intend to define precisely the limit beyond which a dyke, jetty or works would no longer form "an integral part of the harbour system". The Court concludes from this that there are grounds for proceeding on a case-by-case basis, and that the text of Article 11 of UNCLOS and the *travaux préparatoires* do not preclude the possibility of interpreting restrictively the concept of harbour works so as to avoid or mitigate the problem of excessive length identified by the ILC. This may be particularly true where, as here, the question is one of delimitation of areas seaward of the territorial sea." *Idem* at para. 134. The phosphate loading pier is an insular structure and does not lie within a discernable natural harbour.

³⁰⁰ The only other discrete features of note on the entire Saharan coastline are a small rock islet, Lahjayra Lakbira, measuring about 350 metres in its north-south length and lying one NM offshore Point Gorda south of Cape Barbas at 22° 9' N, 16° 52' W and Agal Rock (Lahjayra Çghira) three NM to the north. Both are depicted on United States National Geospatial-Intelligence Agency Chart 51022, *Africa – West Coast: Morocco/Western Sahara/Mauritania Cap Juby to Baie Lévrier including the Islas Canarias* (Bethesda, MD: Defense Mapping Agency, 1996).

An Archipelagic Solution for the Canaries

Given the simplicity of the Sahara coastline, what remains in the definition of coastlines generating competing claims in the assessment of the maritime projection of Spain's Canary Islands. The islands do not present a continuous coastline upon which to found an EEZ to their south and east. While a provisional equidistant line can be acceptably derived from a line enclosing the south and east extent of the islands, the later adjustment of such a line given the discontinuity of the islands in generating a coastal front is necessary, and supportable as a matter of State practice and the caselaw. The temporary or drafting-construction line thus to be drawn extends in the north of the Canaries from Point Delgada on Alegranza Island around the eastern coastline of the Fuerteventura group to Point de la Orchilla on the westernmost Hierro Island. Point Lantailla on Fuerteventura, directly opposite the mainland's Cape Tarfaya, is a useful location to calculate the distances of the relative Spanish coastal front generating an EEZ to overlap with that of the SADR.³⁰¹

The "drafting-construction" closing line extending across the south face of the Canaries to define the Spanish EEZ projecting into Saharan waters is therefore drawn as a line originating in the east at Point Lantailla on Fuerteventura Island to Point de Morro Jable on the same island, then Pont de Maspalomas on Gran Canaria Island, and finally to Points Restinga and Orchilla on Hierro Island. The resulting line is 259 NM in

³⁰¹ The Fuerteventura-Lanzarote coastline to the further north, given its spatial orientation and the restricting profile of the Moroccan coast north of Cape Tarfaya, can be effectively discounted from the calculation of the distance across the span of the Canary Islands in opposition to the Saharan coastline for purposes of drawing and checking an EEZ equidistant line.

length.³⁰² As has been noted above, the actual coastal front projecting from the islands to south through the closing line is discontinuous. The aggregate of the distance across the Canary Islands that generates an EEZ entitlement is 143 NM. In other words, 116 NM is to be discounted (*i.e.* disregarded) from such an overall coastal front for purposes of assessing the generating lengths of the coastlines from which overlapping EEZs are to be drawn.

Some observations are useful at this stage before the substantive delimitation exercise begins. First, the coastlines and coastal features of the four States involved over a determination of Saharawi ocean jurisdiction are relatively free of complications. Second, the length of the Saharawi coast suggests a territorial sea and EEZ delimitation can be done with very little overlap or shared coastal features influencing the boundary in the north, and that in the south. Some overlap or connection between the two extents of the coast may be inevitable depending on the selection of the length of the Saharan coast to stand opposite to the Canaries, an issue discussed below. Third, the unobstructed reach of the African coast south of the Canaries, coupled with most of the coast serving as a natural baseline, renders boundary-making simpler yet. With this in mind, the first step – drawing a provisional equidistance line for a territorial sea and EEZ boundary in the north and in the south – can be done.

³⁰² The distances stated here, derived from various nautical charts, are expressed as figures rounded to the nearest nautical mile. The available charts of the region, together with electronic maps including CARIS LOTS, allow for accuracy in the range of 0.25-0.5 NM.

The SADR's Southern Maritime Boundaries

The drawing of the territorial sea boundary between the SADR and Mauritania is uncomplicated. The discrete feature of the Cape Blanc peninsula, while presenting a very limited coastal front or profile to found an equidistant line as required by Article 15 UNCLOS stands in singular isolation from any other distorting geographic feature. Only two features potentially to a median line boundary: Mauritania's claim to the Bay of Arguin baseline, described above, together with navigational to the port on the east side of the peninsula, Nouadhibou.³⁰³ Neither is a tenable factor for the adjustment of an equidistant EEZ boundary even with an expansive application of Article 15's allowance for "historic title or other special circumstances".³⁰⁴ Moreover, given the conventional and customary right of innocent passage in territorial waters, Mauritania could make no claim to adjusting such a boundary for access to Nouadhibou.³⁰⁵

The *Nicaragua/Honduras* decision illustrates the difficulties in the drawing of such an equidistant line.³⁰⁶ The absence of well-defined features from which to construct a line can be challenging. Geography and history can assist. The orientation of the Cape Blanc peninsula through its 20 NM length, is generally north to south, although its most

³⁰³ Nouadhibou is a port of some economic importance to Mauritania, supporting the region's fishery and serving as deepwater loading facility for iron ore brought by train from inland mines at Zouerate.

³⁰⁴ *Supra* note 78.

³⁰⁵ *Idem* at Articles 17-26. The SADR has legislated in respect of innocent passage in its 2009 maritime zones law, *supra* note 77 at Article 5.

³⁰⁶ *Supra* note 229 at paras. 283-298.

southerly part is oriented somewhat east of south.³⁰⁷ Second, France and Spain intended an equal north-south division of the peninsula under their 1900 Boundary Convention.³⁰⁸ Third, the colonial boundary so resulting terminates at the coast in the middle of the Cape Blanc peninsula.

An acceptable solution, founded on the immediate local geography, is therefore the drawing of a territorial sea boundary extending directly south from the terminal point of the two States' 1900 Convention boundary at the coast.³⁰⁹ Such location is at the low-water mark 170 metres south of the first reference point for the land boundary, the reconstructed Monument of the Castaways.³¹⁰ The boundary would therefore follow a course 12 NM south.³¹¹ There appears to be no tenable *a posteriori* criteria to suggest such an equidistant boundary be adjusted.³¹²

³⁰⁷ The deposit of sediments inside the southeast corner of the peninsula, the result of littoral currents, would make low-tide elevations difficult to locate with precision.

³⁰⁸ *Supra* note 103.

³⁰⁹ A strict bisector construction of the territorial sea boundary 12 NM out to sea from the relevant (or, given the limited size of the Cape Blanc Peninsula, the available) geographic points would see the boundary oriented some to the east, on an azimuth of about 165° relative to North.

³¹⁰ "The boundary begins from the coast of the Cabo Blanco Peninsula, at a point located to the south of the monument known as the Cross of the Breton Castaways ..." Article 1, *Franco-Spanish Agreement delimiting the Mauritania-Spanish Sahara boundary of December 19, 1956*, *supra* note 106.

³¹¹ The geographic points defining the territorial sea and EEZ/continental shelf boundaries in this paper are provided in a dispositive at Appendix 1.

³¹² It should be noted that an ordinal (as here, a longitudinal) extension of a land boundary to form a territorial sea boundary has been accepted on a few occasions as a matter of State practice. See "Position of Land Boundary" in *Predictability and Flexibility in the Law of Maritime Delimitation*, *supra* note 254 at 257-262. An extension of the land boundary without regard to equidistance would in most instances result in an inequitable outcome.

From the terminal point of the Mauritanian-SADR territorial sea south of Cape Blanc can be drawn the EEZ boundary between the two States. Here the exercise is almost as simple. The two coasts are adjacent to each other and their overall general profile is one of a north-south orientation. If the EEZ generating coastline of the SADR is oriented somewhat north of west, then in balance to this, Mauritania's relevant coastline, concave though much of its extent, is oriented to the same extent south. The Cape Blanc peninsula is an obvious transition point in the overall northwest African coast, marking the turn or change of its trend from a north-south line across the coastal front of Senegal and Mauritania to one increasingly east of north over the long distance to the Strait of Gibraltar.

An equidistant line drawn 200 NM seaward from the end of the territorial sea boundary would, properly constructed, follow a path somewhat south of west, that is a line with line along an azimuth of 265° relative to North (and not directly west on an azimuth of 270°).³¹³ That is because of the recessed coastal generating points within the Lévrier-Arguin embayment area.

Three factors tentatively suggest adjustment of this EEZ boundary. First, when Mauritania's somewhat restricted coastal projection to the further south is considered -

³¹³ It must be recalled that it is the "baseline" of the coast proper from which the EEZ is determined and not the at-sea terminal point of territorial sea boundary.

due to the presence of the Cape Verde Islands - then the principle that its EEZ not be unduly encroached begins to apply.³¹⁴ Second, rich inshore fishery in the Arguin Bank area may be an influence although as the caselaw has demonstrated, the presence of such a resource (and reliance upon it) could play a role. Third, the geographic “advantage” to the SADR of the Cape Blanc peninsula extending 20 NM south of mainland Africa, together with a further 12 NM south extension of the territorial sea might be compensated for by adjusting the equidistant EEZ boundary. None of these factors is persuasive. We are left with the geography of the two coasts and the resulting equidistance line.

The third step in delimitation follows. This is a check for proportionality or, more accurately, disproportionality in the relative lengths of coastlines to the ocean space within respective EEZs generated by them.³¹⁵ In the “adjacent EEZs” case of *Suriname/Guyana*, the arbitration panel approached this test for an equitable result as follows:

The Tribunal has checked the relevant coastal lengths for proportionality and comes up with nearly the same ratio of relevant areas (Guyana 51% : Suriname 49%) as it does for coastal frontages (Guyana 54% : Suriname 46%); likewise there are no distortions caused by coastal geography. As the Parties have not chosen to argue the relative distribution of living and non-living natural resources throughout these zones, the Tribunal did not take these matters into account.³¹⁶

³¹⁴ See again *Guinea/Guinea Bissau*, *supra* note 234.

³¹⁵ This checking can only be approximate. Diverse techniques have in the past been used for assessing coastal lengths, with no clear requirements of international law having been shown as to whether the real coastline should be followed, or baselines used, or whether or not coasts relating to internal waters should be excluded. *Romania/Ukraine*, *supra* note 231 at para. 212.

³¹⁶ *Supra* note 234 at para. 392.

The same result is found in the Mauritania-SADR EEZ situation which, again, has as its relevant area the maritime space described above, between 18° North and 24° North. A ratio of coastal fronts (SADR : Mauritania) of 1:1.15 is to be contrasted with that of resulting EEZs (SADR : Mauritania) 1.1:1. The discrepancy in the ratios has its source in the extending effect of the Cape Blanc Peninsula and the orientation of the completing coastlines.³¹⁷ Therefore, no adjustment of the equidistance boundary is warranted.³¹⁸

The SADR's Northern Maritime Boundaries

The presence of the Canary Islands, and of three States, together with the pronounced change in the general direction of the African coast a short distance north of the Morocco-SADR land boundary makes for a more challenging delimitation. A territorial sea is to be considered first with its boundary extending seaward from the terminus of the land boundary at the coast, at 27° 40' N latitude.

The law of the sea requires an equidistant territorial sea boundary between Morocco and the SADR. No historical or geographic circumstance seems apparent to justify

³¹⁷ Cf. the ratios in *Eritrea/Yemen (Phase Two: Maritime Delimitation)*, *supra* note 175 at para. 168: The ratio of coastal lengths (Yemen : Eritrea) was calculated as 1:1.31 and the ratio of maritime areas resulting from the delimitation, 1:1.09. "The Tribunal believes that the line of delimitation it has decided upon results in no disproportion."

³¹⁸ The course of the EEZ boundary is detailed in a *dispositif* at **Schedule 2**. The EEZ boundary would extend to the area of the 3,500 metre isobath in the Atlantic Ocean.

derogating from such a rule.³¹⁹ Given that the adjacent coasts of the two States involved have a smooth façade and that there are virtually no offshore features including rocks and low-tide elevations to complicate the coastal profile, the exercise is straightforward.

The area relevant to this delimitation extends for about 20 NM to either side of the terminus of the land boundary at the coast. To the further north, the African coast turns at Cape Juby (Cape Tarfaya). The average direction of the coast across such a distance along an azimuth 30° relative to North. A simplified equidistance construct yields a line averaging along a perpendicular to such general direction, that is, with an azimuth 300° relative to North. It should be noted that such a line is almost contiguous with the shortest distance from the land boundary on the mainland to the nearest point on the Canary Islands, Point Lantailla on Fuerteventura.³²⁰ In its initial path the Morocco-SADR territorial sea boundary will trend for about five nautical miles somewhat to the south of a 300° azimuth, given the more west facing profile of the coast generating the initial median line. However, in the further offshore, from about mile five to mile 12, the territorial sea boundary will trend north of such azimuth, given the change in orientation of generating points north of Point Stafford. The average trend, if it can permissibly be called such, is the 300° azimuth.³²¹

³¹⁹ Cf. the determination of the arbitration panel in *Guyana/Suriname*, *supra* note 234 at para. 295-329, where the circumstances of historic navigation in the nearshore were sufficient to constitute a special circumstance derogating from equidistance under Article 15 UNCLOS.

³²⁰ The line between the two points is 125-305° relative to North.

³²¹ Coordinates for this boundary are detailed in the *dispositif* at **Schedule 2**.

The relevant area for delimitation of the Saharawi EEZ is found over a larger area. Described above, the area extends on the African coast from the most southerly point on the Saharan coast capable of generating a 200 NM EEZ which would meet that extending south from the Canary Islands, to a point 200 NM northwest of the northern land boundary at Point Stafford, such location on the Moroccan coast being the northernmost theoretical extent of the EEZ. The first of these is considerably south on the Saharan coast, only 15 NM north of Cape Blanc, at 21° N latitude.

It is evident the Saharan coast not being in direct opposite to the south-facing “plane” of the Canarian coast, would have little generative influence for an EEZ and therefore the drawing an equidistant line. The more acceptable point on the Saharan coast for purposes of generating an EEZ in opposition to that projecting south from the Canaries is, therefore, on the outer coast of Point Durnford on the Dakhla Peninsula, at 23° 40' N latitude. The most distant relevant Canarian opposing point is Point Restinga on Hierro Island, 265 NM to the northwest. Finally, the uncomplicated Saharan coastline between Point Durnford (Dakhla) and Point Stafford in the north can be simplified with a construction line drawn across its face. Such a line measures 285 NM in length, and serves as the basis to establish a provisional equidistance line in the overlapping EEZ areas south of the Canaries.³²²

³²² Construction-closing lines for the northern territorial sea and EEZ boundaries are depicted on Map 3.

With the geographic context established, a northerly Saharawi EEZ boundary can be approached in two steps. The first is to consider a common boundary between the three States involved in the comparatively narrow area between Fuerteventura Island and the African mainland. The second is to consider the boundary to the further west as it delimits the EEZs generated by the southern façade of the Canaries and the Saharan coast.

To begin with the EEZ in the area south and east of Fuerteventura Island. In the general area of a single point where there would be an equidistant boundary between all three States, on or immediately near the halfway point of a shortest distance azimuth line of 125-305° relative to North which spans the 55 NM distance from the land boundary a short distance south of Point Stafford, to Point Lantaila. This construction then allows for an equidistant line through the strait to be drawn extending south-west about 60 NM from such a point.³²³

A radius of 60 NM on either side of a common equidistant point will acceptably eliminate the influence of the Moroccan EEZ to the southwest, in the area south of Fuerteventura's westernmost tip, Point Jandia. Conversely, an equidistant line from the common point drawn to the northwest 60 NM will eliminate the influence or effect of the mainland coast south of 27° 40' N that generates a Saharan EEZ. It should be noted that there is a slight gap in the façade of the Fuerteventura-Lanzarote coast in this northern

³²³ The tri-point described is on an azimuth of 305° 27.6 NM northwest of Point Stafford at 27° 56' 44" N, 13° 33' 26" W.

area. There is a 10 NM wide strait, La Bocayna, between the two islands. This suggests a possible adjustment of a median line toward the African coast. But given the wider geography, and that such a median line would be for the EEZ boundary between Spain and Morocco, no further consideration is needed here.

We turn now the second part of the Saharan EEZ boundary in the north, what would be the bilateral boundary delimiting the EEZs generated by the southern façade of the Canaries and the Saharan coast (as simplified by the construction line drawn from Point Durnford to Point Stafford). Such a boundary, at least drawn initially, between the competing coastal fronts of the two States has the following basis:

[B]etween coasts that are opposite to each other the median or equidistance line normally provides an equitable boundary in accordance with the requirements of the Convention, and in particular those of its Articles 74 and 83 which respectively provide for the equitable delimitation of the EEZ and of the continental shelf between States with opposite or adjacent coasts.³²⁴

An equidistant boundary proceeding southwest from the above common equidistant point between Point Lantailla and Point Stafford will progress about 250 NM before reaching the outermost relevant areas construction line above, that from Point Durnford/Dakhla to Point Restinga on Hierro. The overall area thus encompassed is a form of triangle, approximately equilateral, measuring approximately 230 NM on its north

³²⁴ *Eritrea/Yemen (Phase II: Maritime Delimitation)*, *supra* note 175 at para. 131. And see *Denmark/Norway*, *supra* note 173 at para. 64: “Prima facie, a median line delimitation between opposite coasts results in general in an equitable solution, particularly if the coasts in question are nearly parallel. When, as in the present case, delimitation is required between opposite coasts which are insufficiently far apart for both to enjoy the full 200-mile extension of continental shelf and other rights over maritime spaces recognized by international law, the median line will be equidistant also from the two 200-mile limits, and may prima facie be regarded as effecting an equitable division of the overlapping area.”

side, 260 NM on its Atlantic side, and 285 NM on its African side. The equidistant line proceeds further into the Atlantic, seaward of the Durnford-Restinga construction line, to the final point of EEZs between the two States, at a point 200 NM southwest of Point Restinga and 200 NM northwest of Point Durnford. The simplified coordinates of such location are 24° 34' 19" N 19° 24' 04" W³²⁵. The provisional median line boundary (*i.e.* equidistant line) so drawn between the Canarian coastal façade and that of the Sahara extends along a distance of 430NM.

The most obvious criteria or circumstance in law for the adjustment of such a provisional boundary is the discontinuous coastal profile of the Canaries. No other geographic circumstance suggest itself. There are no issues of encroachment, into the presumptive EEZs of either Spain or the SADR at this stage. Neither are non-geographic factors present with any weight or credibility for possible application. These include issues of navigation, security, and the presence of third States. What has been addressed – and disposed of above – namely a possible claim by Spain to historic fishing rights in the Saharan nearshore. At best, Spain might seek the corollary of adjusting the equidistant line, or perhaps limiting its shift toward the Canaries, on the basis of a demonstrated economic need to access the Saharan fishery. That issue, if not disposed of above on the showing of Spain's arrangements made after 1975 up to the 2007 EU-Morocco *Fisheries*

³²⁵ Such location is point N24 detailed in the dispositif at **Schedule 2**.

Partnership Agreement, is certainly eliminated by the reasoning to exclude all but a catastrophic impact as demonstrated by the *Barbados/Trinidad and Tobago* decision.³²⁶

A possible relevant factor to delimitation of the overall northern area of the Saharawi EEZ is the SADR's issue in recent years of petroleum exploration licenses. It is important to note that two such rounds of licensing has not been responded to or protested by either Morocco or Spain. The licenses, first issued in 2005 and again in January 2008, presently encompass an area of 192,569 square kilometres in large size land and offshore blocks. The Saharawi Arab Democratic Republic Petroleum Authority, responsible for the licenses, claims "sovereign authority for the territory referred to as Western Sahara" and the "licensing initiative [as launched] in preparation for the full recovery of our territory."³²⁷ In the offshore, the three most northern blocks, measuring 21,000, 17,000 and 15,000 square kilometres have as their most northerly limit a simplified equidistance line extending seaward and to the south of the Canary Islands from the common tri-point noted above.³²⁸

³²⁶ *Supra* note 181. Relative economic need arguably could favour the Saharawi State, notably in light of financial needs following restoration to it of the occupied part of Western Sahara.

³²⁷ Press release from Saharawi Arab Democratic Republic Petroleum Authority, "SADR sets date for second petroleum licencing round" (22 January 2008) (accessed 12 January 2010); available at: www.wsrw.org The Authority's website, www.sadroilandgas.com, currently notes that six of 12 offshore blocks are available for license applications (accessed 15 January 2010).

³²⁸ "2008 SADR Licence Offering" (accessed 12 January 2010); available at www.sadroilandgas.com/licensinground.htm The licenses on offer are of the Production Sharing Contract type together a 10-year "Assurance Agreement" given the fact of the SADR not being in control of the coastal territory of Western Sahara.

The caselaw is clear that the SADR's action in issuing seabed petroleum licenses for exploration within areas limited to a median line with Spain and Morocco does not constitute a form of estoppel or *modus vivendi* to later bar an more expansive claim and EEZ delimitation. Indeed, it should be recalled that the 2009 *Law Establishing the Maritime Zones of the SADR* claims a 200 NM EEZ. What would have to result for the SADR to be limited to its present petroleum exploration line is a consistent pattern of conduct by all States in respect of such line. An early, and incomplete effort to confer exploration rights, by a party not in possession or control of its maritime territory, would not lead to such a result.³²⁹

What remains as the sole defining factor in completing the delimitation the EEZ between the SADR and Spain is the presence of the Canary Islands. The task of establishing a single (or common) maritime boundary for the EEZ and continental shelf under Articles 74 and 83 UNCLOS is the same, whether two mainland coastlines are generating overlapping zones or, as here, there are islands generating an entitlement in opposition to that of a continuous mainland coast. That is because islands project the full

³²⁹ “First, the influence of the conduct of the parties is very limited in State practice ... Second, in the case law, the conduct of the parties usually plays but a modest role for the purpose of maritime delimitation. The only exception is the *Tunisia/Libya* judgment, which clearly took such conduct into account. This case appears to show that, only when the conduct of the Parties can prove the existence of a *modus vivendi* or *de facto* line ... may such facts be taken into account by the courts.” [Citation omitted.] *Predictability and Flexibility in the Law of Maritime Delimitation*, *supra* note 254 at 298. The trend continues. “The Court does not see, in the circumstances of the present case, any particular role for the State activities invoked above in this maritime delimitation. As the Arbitral Tribunal in the case between Barbados and Trinidad and Tobago observed, “[r]esource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance ...” [Citation omitted.] *Romania/Ukraine*, *supra* note 231 at para. 198.

range of maritime zones under UNCLOS (and customary international law) as a matter of right:

It is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State. In accordance with Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, which reflects customary international law, islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory.³³⁰

If the caselaw is to be a useful guide to the unique geographic circumstances presented by the Canary Islands, the distinction between those decisions in which islands were accounted for in “mainland-to-mainland” situations (or, at least, continuously opposing coasts) must be distinguished from those in which it was an island or islands proper generating the entirety of one party’s claim.³³¹ The former cases, including most recently *Romania/Ukraine*, *Nicaragua/Honduras*, *Eritrea/Yemen*, dealt with islands in proximity to a provisional equidistance boundary between the primary coastlines of the States involved. The islands were appropriately treated as discrete or insular features with little overall effect. It is the latter type of cases that have greater application to the present analysis. The island-to-mainland cases include *Canada/France (St. Pierre and Miquelon)*, *Libya/Malta*, *Denmark/Norway (Greenland/Norway)* and *Qatar/Bahrain*.³³²

³³⁰ *Qatar/Bahrain*, *supra* note 179 at para. 185.

³³¹ Yoshifumi Tanaka categorises such islands as “detached Islands, which are located far from the mother state and constitute the sole unit of entitlement.” *Predictability and Flexibility in the Law of Maritime Delimitation*, *supra* note 254 at 185. The classic examples are Jan Mayen, and St. Pierre and Miquelon.

³³² Arguably the decision in *Barbados/Trinidad and Tobago* is part of this corpus, if only for the treatment of the varying or disparate coastal fronts between a small island and two larger ones. *Supra* note 181 at para. 372. Greenland is an island, of course, just as much as Jan Mayen.

What can be derived from these cases are straightforward principles to apply in the case of a boundary between the Canaries and the Saharan coast. The first such principle is that the disparity between a singular offshore island or compact group of islands can be accounted for in an approximate adjustment as the second substantive step of the delimitation exercise, that is, after the setting of a provisional equidistance line. A more nuanced and mathematical check using proportionality can then be undertaken at the third “equitable result” assessment stage of the exercise. This is, admittedly, not much of a departure from the process applied in all of the more recent decisions of courts and tribunals. Where the analogous use of the four island-to-mainland delimitation cases weakens is from their particular geographic circumstances as situations of relatively small islands in proximity to lengthier mainland coasts. Only *Qatar/Bahrain* is something of an exception due to the relative equality of coastal lengths between the two States involved.³³³ The treatment of what were singular disparate coastal lengths in the first three of the four island-to-mainland cases wherein the island or islands concerned were viewed as a single geographic entity is well known.

In *Canada/France (St. Pierre and Miquelon)*, France’s islands possessions immediately to the south of the Canada’s Newfoundland province were accorded only a 12 NM territorial sea to their immediate east, a 24 NM EEZ based on the application of the spatial distance

³³³ Tanaka considers the *St. Pierre and Miquelon* boundary award to have “little value as a precedent for delimitation in relation to detached islands” given the inconsistency of methods used to create a 24 NM inshore EEZ to the west of the islands and a 200 NM south oriented EEZ corridor 10.5 NM wide. *Predictability and Flexibility in the Law of Maritime Delimitation*, *supra* note 254 at 199.

(but not substantive application of) the contiguous zone, and a much-criticized 200 NM EEZ projecting directly sought, having only the width of the coastal façade on the islands in such direction, 10.5 NM.³³⁴ The constraints of available sea space to the north and east led to the result, one checked with approximately equal proportionality.

The *Libya/Malta* continental shelf decision of the ICJ is notable for the Court implying that, had not Malta constituted an independent State in the context of a semi-enclosed sea (the Mediterranean), its continental shelf entitlement may have been less for purposes of a modest adjustment of the provisional boundary line. In that situation, the Court “transposed” the provisional shelf boundary 18 NM (18’ latitude) closer to Malta to ensure an equitable result.³³⁵ *Libya/Malta* was a decision in what may be considered the development phase of maritime boundary rule-making. The Court was not concerned that the northward shift in the continental shelf boundary went unchecked by any application of the principle or rule of proportionality, as least mathematically applied, then in its infancy:

The Court does not consider that an arithmetical ratio in the relationship between the relevant coasts and the continental shelf areas generated by them would be in harmony with the principles governing the delimitation operation. The relationship between the lengths of the relevant coasts of the Parties has of course already been taken into account in the determination of the delimitation line; if the Court turns its attention to the extent of the areas of shelf lying on each side

³³⁴ *Supra* note 234. See notably Ted L. McDorman, “The Canada-France Maritime Boundary Case: Drawing a Line Around St. Pierre and Miquelon,” *American Journal of International Law* 84 (1990): 157.

³³⁵ *Supra* note 234 at para. 73. By “transposing” is meant the operation whereby to every point on the median line there will correspond a point on the line of delimitation, lying on the same meridian of longitude but 18’ further to the north.”

of the line, it is possible for it to make a broad assessment of the equitableness of the result, without seeking to define the equities in arithmetical terms. The conclusion to which the Court comes in this respect is that there is certainly no evident disproportion in the areas of shelf attributed to each of the Parties respectively such that it could be said that the requirements of the test of proportionality as an aspect of equity were not satisfied.³³⁶

The ICJ's decision in *Denmark/Norway (Greenland/Norway)* is useful for two propositions relevant to the present case. The first is that, no matter how extensive or all-encompassing the "mainland" State's coastal projection of a maritime area may be, it will never (or only rarely) extend to its full entitlement at the expense of the off-lying island.³³⁷ The second is that a test of proportionality can result in a general range or threshold ratio of coastal lengths to generated maritime areas beyond which the result will be inequitable. In *Denmark/Norway*, the Court cited with approval the finding of a ratio of 1:1.38 in the *Gulf of Maine (Canada/USA)* case as "sufficient to justify the 'correction' of a median line delimitation."³³⁸ Unfortunately – if predictably – the Court did not engage in its own computation of mathematical excess in the adjustment or any later equitable check of the single maritime boundary between Greenland and Jan Mayen. It is evident such a step would reveal a considerable disparity in coastal lengths and the areas to be delimited, and so the Court prudently refrained from the exercise.

³³⁶ *Idem* at para. 76.

³³⁷ *Supra* note 173 at para. 71. The coast of Jan Mayen, no less than that of eastern Greenland, generates potential title to the maritime areas recognized by customary law, *i.e.*, in principle up to a limit of 200 miles from its baselines. To attribute to Norway merely the residual area left after giving full effect to the eastern coast of Greenland would run wholly counter to the rights of Jan Mayen and also to the demands of equity."

³³⁸ *Idem* at para. 68. [Citation omitted.] The Court was delimiting through a single or coincident boundary the continental shelves and fisheries areas of the parties, and not an EEZ. "Similarly, as regards the fishery zones, the Court is of the opinion, in view of the great disparity of the lengths of the coasts, that the application of the median line leads to manifestly inequitable results."

State practice of limited assistance in the treatment of a group or chain of islands opposite a continuous or mainland coast. Several boundary agreements have seen a reduced effect given to islands, including the Norway-Iceland agreement in respect of Norway's Jan Mayen Island, Venezuela-Netherlands in respect of the Netherlands Antilles, and France-Dominican Republic (Guadeloupe and Martinique).³³⁹ But no clear pattern emerges, with Yoshifuma Tanaka noting that “[i]n light of the high diversity of [State] Practice, it appears difficult and dangerous to extrapolate a general rule regarding the effect of islands.”³⁴⁰

The treatment of the Canary Islands must therefore proceed on its own, with only broad analogy from the cases and State practice. A two-step process should avoid inequity, namely a simplistic second-stage adjustment of a provisional median line followed by an equitable check for any disproportionality at the conclusion of the exercise. It is submitted that the provisional EEZ boundary remain unadjusted in that part of its initial path from the tri-state common point, above, between Points Stafford and Lantailla as it proceeds southwest over a distance of 70 NM until it lies directly south of the

³³⁹ See David A. Colson and Robert W. Smith, *International Maritime Boundaries*, Volumes I-V (Boston: Martinus Nijhoff, 1993) and also Jonathan I. Charney and L.M. Alexander, eds., *International Maritime Boundaries* Volumes I-IV (Boston: Martinus Nijhoff, 2002). The 1997 EEZ (or “water column”) boundary treaty between *Indonesia and Australia*, *supra* note 264 is recalled. Although Indonesia's Lesser Sunda Islands group are discontinuous, the boundary drawn, a simplified equidistance line, did not discount or reduce the effect of the islands on the basis of gaps between them. This EEZ boundary followed, that is, adopted, the course of a 1981 fisheries jurisdiction line between the two States.

³⁴⁰ *Predictability and Flexibility in the Law of Maritime Delimitation*, *supra* note 254 at 218.

easternmost tip of Fuerteventura Island, Point Jandia. This equidistant line would trace itself through multiple geodesic points, depending on the features on the two opposing coasts selected for its construction. In general, the equidistant line would follow a course averaging an azimuth 220° relative to North.

Seaward of the Point Jandia southward projection/first segment provisional boundary, the opposing coastlines begin to diverge. That of the Canaries trends to a south facing front, and the Saharan coast turns further south. The closing line drawn across the south façade of the Canaries reveals gaps in that front. Moreover, two of the islands in this western segment - Tenerife and Gomera - and are displaced somewhat to the north of the construction-closing line. These relevant circumstances suggest the islands be given a reduced weight, that is a partial or demi effect, with the western segment of the provisional equidistant boundary adjusted to the north. A shift of such line to a course halfway between the south façade construction-closing line and the initial equidistant line would be excessive. Rather, what appears supportable in the circumstances is the movement of the provisional line north through one-third of such distance, effectively resulting in $4/6$ (*i.e.* two-thirds) of the overall distance and therefore area resulting to the SADR and $2/6$ (*i.e.* one-third), north of the adjusted westerly segment, resulting to Spain. Given that a uniform construction-closing (or façade) line was used to develop the Canary Islands basepoints for the second segment provisional equidistant line, the resulting adjusted boundary has fewer turning points. The EEZ boundary for both the first

segment south of Fuerteventura and the second, western segment is described in Schedule 2.

The third stage of the delimitation process for the SADR's northern EEZ boundary can now be embarked upon. The caselaw suggests a check for proportionality of the entire area so delimited, and not that resulting from each of the two EEZ boundary segments described above. The coastal lengths generating the areas are recalled. For the Canary Islands, from Point Lantailla on Fuerteventura to Point de la Orchilla on Hierro, the planar (or fronting) coastal distance is 228 NM. 91 NM of this figure, over the second segment/south façade span of 204 NM is the aggregate distance of gaps between the five western-most Canary Islands. The effective or actual projecting coastal front is therefore 137NM. As has been discussed above, the Saharan coast generating an opposing EEZ area extends from Point Durnford at Dakhla in the south to the land boundary with Morocco in the north. The distance across the general profile of the coast between such points, noted above, is 285 NM. The ratio of the coastlines generating the EEZ boundary is therefore (SADR : Spain) 285:137, or 2.1:1.

The resulting EEZ, defined by the triangle described above being that area in which there were overlapping EEZ claims of the SADR and Spain, to that point beyond which the coastline of Western Sahara no longer has a 200 NM reach, is therefore delimited by an adjusted boundary that is measures 430 NM in distance along its length. To the north, the boundary results in Spain having an EEZ measuring 16,076 NM². (This EEZ, is

should be noted, is the entire area generated by the Canary Islands in “opposition” to the Saharan coast, that is, the south façade of those islands including the ocean area north of the construction-closing line described above up to the south coast of each island involved, as depicted on Map 3.) In the south, the resulting Saharawi EEZ measures 30,009 NM². The resulting ratio of areas is therefore (SADR : Spain) 30,009 NM² to 16,076 NM², a ratio of 1.9:1.

The proportionality check can therefore be completed by considering whether there is any substantial or marked disparity between the ratios of the two States’ coastal lengths (SADR : Spain), 2.1:1 and that of the EEZs for each in the relevant area so resulting from their delimitation; 1.9:1. There is not. Such figures are well within those accepted in the caselaw, including most recently *Guyana/Suriname* and *Romania/Ukraine*.³⁴¹ An EEZ boundary as described, with its western segment adjusted to a line two-thirds the distance between the Saharan coast and that of the south-facing Canary Islands, is equitable.

The Saharan Extended Continental Shelf

It would be premature to suggest that the SADR should now pursue a claim to the extended continental shelf seaward more than 200 NM into the Atlantic Ocean from the Saharan coast. That is because the necessary technical and geological surveys have not been done to establish such a claim under UNCLOS Article 76. Moreover, neighboring States, with their obligations to present claims under a deadline to the UN Commission

³⁴¹ *Supra* notes 234 and 231, respectively.

on the Limits of the Continental Shelf (“CLCS”) have only just done so in a preliminary manner.³⁴² In any event, there is no rush to present such a claim to the CLCS, for States have 10 years from accession to UNCLOS to do so, and even then, as several claims filed in 2009 illustrate, may acceptably provide only the most basic information in support of a submission.³⁴³

Article 76 prescribes that a State’s continental shelf extends to the “outer edge of the continental margin” or “to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.” In contrast the EEZ, no claim is required to establish the right of a coastal State to the continental shelf.³⁴⁴ The continental shelf is, after all, the extension of a State’s landmass into the sea.³⁴⁵ However, it is the extent of

³⁴² See Spain’s *Información Preliminar y Descripción del Estado de Preparación, de conformidad con la decisión SPLOS/183* and Mauritania’s *Informations Indicatives des Limites Extérieures du Plateau Continental*, *supra* note 140.

³⁴³ The 10-year submission deadline is prescribed by the *Rules of Procedure on the Commission on the Limits of the Continental Shelf* (17 April 2008) (the *Rules*), with a common baseline date of May 13, 1999 for all States acceding to UNCLOS prior to such date. Article 45 of the Rules accordingly required Spain and Mauritania to make preliminary submissions in May 2009. Morocco’s extended continental shelf claim will not have to be presented until 2017. *Rules* (accessed 22 January 2010); available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/309/23/PDF/N0830923.pdf?OpenElement>

³⁴⁴ The SADR’s maritime jurisdiction legislation expressly claims an extended continental shelf should it be available through identical phrasing to that in Article 76(1) UNCLOS. “The continental shelf of the Saharawi Arab Democratic Republic comprises the seabed and subsoil of the submarine areas adjacent to and beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles” Article 9(1) 2009 *Law Establishing the Maritime Zones of the SADR*, *supra* note 77.

³⁴⁵ *North Sea Continental Shelf* cases, *supra* note 227 at page 23. “In short there is here an inherent right.”

the shelf, and therefore the coastal State's jurisdiction in respect of it, that is usefully pursued early in time.

The issue of an extended continental shelf jurisdiction, important to all coastal States, is one that will concern the Saharawi State as technical advances for deepwater petroleum exploration and recovery progress. At present, the SADR's 200 NM EEZ would trace its outer limits in waters too deep for seabed petroleum drilling, in depths averaging 3,800-4,000 metres in the south to about 3,000 metres in the northern part of the EEZ. However, in the further offshore, 20-60 NM seaward of the outer limit of the EEZ, there are three relatively shallow seabed features which may have petroleum bearing potential. These are, from north to south, The Paps Seamount (1562 metres), Endeavour Bank (152 metres) and Tropic Seamount (1055 metres).³⁴⁶ A Saharawi extended continental shelf claim would project into the deep waters of Cape Verde Abyssal plain off the African coast south of the Canary Islands. The plain lies in waters with depths of 4,200 to 5,000 metres.

Article 76 prescribes a complex formula to determine the outer limit of a continental shelf, that is, a State's continental margin, defined legally as "the submerged prolongation of the land mass of the coastal State [consisting] of the seabed and subsoil of the shelf, the

³⁴⁶ Various hydrographic surveys have been done off the Saharan coast but information on the geology of the seabed (by sonar, seismic and drilling samples) is not complete. See e.g. D.L. Divins, NGDC *Total Sediment Thickness of the World's Oceans & Marginal Seas* (accessed 2 March 2010); available at: www.ngdc.noaa.gov/mgg/sedthick/sedthick.html And see the general sediment information at Figure 12 of Spain's 2009 preliminary extended continental shelf information, *supra* note 140.

slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.”³⁴⁷ As we have seen, where the outer edge of the margin is within 200 NM of a coast, then such outer limit will extend only to the maximum reach of the EEZ. Provided there can be established a basis for a further-reaching shelf under Article 76(4), then the shelf can extend to a maximum distance of either 350 NM from the baselines of the coastal State or 100 NM seaward of the 2,500 metre isobath. The basis for the extension turns on demonstrating that: (i) the location of the “outermost fixed points at which the thickness of the sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental shelf” or (ii) a line can be drawn “not more than 60 nautical miles from the foot of the continental shelf.” The 1999 *Scientific and Technical Guidelines* of the CLCS note laconically that “Article 76 contains a complex combination of four rules, two formulae, and two constraints, based on concepts of geodesy, geology, geophysics and hydrography.”³⁴⁸

The location of the apparent foot of the continental slope along the Saharan coast, together with the 2,500 metre isobath in the region suggests that a Saharawi claim to an extended continental shelf would be successful. What is uncertain given the lack of information about the quality of bottom sediments is whether the “60 NM from the foot of the slope” rule or that of an outer line drawn on the basis of the “1% sedimentary rock

³⁴⁷ Article 76(3).

³⁴⁸ *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf* (CLCS/11) (13 May 1999), Article 2.3.1 (accessed 22 January 2010); available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/171/08/IMG/N9917108.pdf?OpenElement>

thickness” rule, above, would prevail.³⁴⁹ It may also be argued that the three seamount features in the area, above, are not isolated features with the deep ocean area (abyssal plain) but rather are features of some kind marking the foot of the continental slope.³⁵⁰

The information provided by Spain and Mauritania in their 2009 extended continental shelf preliminary information documents, although very general in nature, supports the possibility of an extended shelf off the Saharan coast.³⁵¹ Mauritania’s was the simpler of the two in that, while noting suitable sediment thickness may be present in some places, it contained quite limited hydrographic survey data. The various maps in the information depict sounding lines well to the north of Cape Blanc, although the submission contains no declaration of claim, much less any assertion to an extended shelf area. A single point of bathymetric data is presented in Mauritania’s preliminary information; “FOS-1”, located at 21° 16’ N, 20° 01’ W, about 162 NM from the nearest point of the Saharan coast and 50 NM north of the Saharawi EEZ boundary described above (and at Schedule 2). This “foot of slope” point would fall within the SADR’s EEZ however delimited.³⁵² Mauritania’s document states that the point is located at the base of

³⁴⁹ See e.g. Admiralty Chart 4104, *North Atlantic Ocean: Lisboa (Lisbon) to Freetown* (Taunton: UK Hydrographic Office, 1992) and United States National Geospatial-Intelligence Agency Chart 51022. *Africa – West Coast: Morocco/Western Sahara/Mauritania Cap Juby to Baie Lévrier including the Islas Canarias*. Bethesda, MD: Defense Mapping Agency, 1996.

³⁵⁰ The seamounts (which are also known as the Saharan Seamounts) may be of a type similar to or continuation of those forming the Madeira, Salvagen and Canary Islands to the north.

³⁵¹ *Supra* note 140.

³⁵² See notably Figure 5 of the Mauritanian preliminary information, *idem*.

Mauritania's continental slope.³⁵³ Mauritania's substantive submission may be some years in research and preparation. The 2009 preliminary information noted Mauritania was a developing State and that it will apply to the Commission for assistance under a trust fund established for the purpose of facilitating extended shelf submissions.³⁵⁴

Spain noted in its 2009 preliminary information for an extended continental shelf in the Canary Islands area that it would present a final claim submission within five years. The area of claim is large, notwithstanding the assertion it is limited to the area west of the Canaries. The conclusions presented in the information are tentative, Spain noting that the data presented has the potential to ground an extended shelf claim under the criteria at UNCLOS Article 76(4).³⁵⁵ To present a possible claim on the basis of the 1% sediment thickness rule, the preliminary information details three seismic survey lines, including one, "Profile A", extending to the southwest from Hierro Island in or near a presumptive Saharawi EEZ.³⁵⁶ A very general conclusion is stated about the Profile and whether it would satisfy Article 76(4):

In accordance with the presented/displayed seismic data [at Figure 13 of the Preliminary Information], there is a demonstrably sufficient sediment thickness to

³⁵³ *Idem* at page 9.

³⁵⁴ Mauritania's preliminary information also noted that it was without prejudice to maritime boundary claims.

³⁵⁵ *Supra* note 140 at page 47. The maps in Spain's preliminary information name the Western Sahara as such, including a depiction of a Sahara EEZ construction line.

³⁵⁶ *Idem* at page 41. An incorrect survey path is shown for the Profile on a following seismic profile sketch, Figure 13. Small typeface indicate the correct direction of the survey line.

permit application of the 1% sediment formula ... at least [through the course of] profile A ... It will be necessary to obtain further data through geophysical techniques ... for a complete understanding of the area of a possible [continental shelf] extension.³⁵⁷ [Translation.]

An extended continental shelf claim would present significant technical complexities for the Saharawi State. The task would be daunting and it is fortunate that the SADR would not have to present at least a preliminary information to the Commission until 10 years after acceding to UNCLOS. With that result in mind, the early imperative to claim and delimit continental shelf boundaries as part of an EEZ claim within 200 NM of the Saharan coast becomes clear.³⁵⁸

V – SOVEREIGNTY OVER OCEAN RESOURCES

*The central principle around which this case revolves is the principle of self-determination, and its ancillary, the principle of permanent sovereignty over natural resources.*³⁵⁹

THE CASE OF WESTERN SAHARA – the last significant exercise in European decolonization, unique in this respect for a quarter-century on the African continent – offers a window through which to assess the law of sovereignty over natural resources. The development of that law has followed a well-trod path if, in this course through issues of the natural resources of the seas, less well charted. The history of the Western Sahara

³⁵⁷ *Idem* at page 46.

³⁵⁸ The position of the SADR given its status as an only partly recognized State, and not a member of the United Nations (but of the African Union) in light of pending extended shelf submissions by Spain and Mauritania (and, presumably, Morocco) should be considered. Resolution III of the Final Act of the 1982 UN Convention on the Law of the Sea, discussed *supra*, would implicitly require a protest by the SADR in respect of a claim to be heard by the Commission. See also “The Role of the Commission on the Limits of the Continental Shelf,” *supra* note 143.

³⁵⁹ Judge Christopher G. Weeramantry, Dissenting Opinion, *Portugal/Australia*, ICJ Rep. 1995 at 193.

conflict since 1975 has been imbued with natural resources issues. Such issues seemingly rank equally with human rights concerns for the displaced Saharawi people and those residing in occupied Western Sahara, second only to the overarching issues of territorial annexation and the right of self-determination. The question of the exploitation of the territory's resources, phosphate mineral rock and fish, cannot be divorced from such primary issues. For the taking of natural resources from a people to undergo self-determination without benefit to them or their decision in the matter can extend, if not exacerbate, the difficulties in achieving that self-determination.

The Taking of Ocean Resources

The taking of resources from a colonized territory (or one occupied by force) has three effects. It is a source of justification for territorial annexation providing an economic basis for its continuation. A taking of resources to be traded with other States, as here with the 2007 EU-Morocco *Fisheries Partnership Agreement*, fulfills a second norm: legitimizing the underlying annexation and the taking of resources.³⁶⁰ A third, longer-term result from the taking of a resource is the loss of it to a people undergoing or who have successfully completed the self-determination process and are now building a nation-state for themselves. Consider the non-renewable resource that is phosphate mineral rock mined at Bou Craa in Western Sahara. A conservative estimate would put the foregone

³⁶⁰ The comparable case is that of East Timor, through the 1989 *Timor Gap Treaty* entered into by Australia and Indonesia for development of seabed petroleum south of the island of Timor. A decade earlier, Australia became the only State to recognize *de jure* Indonesia's 1975 annexation of East Timor, largely in preparation to secure a petroleum development treaty. South Africa's diamond and uranium mining in Namibia in the 1960s and 1970s is an earlier example.

value of the resource over the 34 years of Moroccan annexation at a present value of \$2.5B.³⁶¹

The issue of natural resources generally and ocean resources in particular in the case of Western Sahara has, while being an animating issue in the conflict since its beginnings, manifested itself in stages. There has been throughout an understanding of the implications of sovereignty over resources by all the parties concerned.³⁶² Only the United Nations General Assembly and Security Council, properly concerned with the question of self-determination for the Saharawi people and the maintenance of peace and security in the region, have not definitively addressed the issue.³⁶³ Successive fisheries agreements between Spain, followed by the EEC and the EU, with Morocco met with protests from

³⁶¹ Calculated at 3 million tonnes/year production and adjusted for inflation. See generally the US Geological Survey “Phosphate Rock Statistics and Information” page (accessed 12 February 2010); available at: http://minerals.er.usgs.gov/minerals/pubs/commodity/phosphate_rock/ See also *Endgame in the Western Sahara: What Future for Africa’s Last Colony*, *supra* note 5 at 69. The now exhausted Laminaria-Corallina oilfield within or very near to East Timor’s waters, in production by Australia during the existence of the disputed Australian-Indonesian *Timor Gap Treaty* with a gross revenue that had exceeded \$1B by 2004, is a comparable example.

³⁶² Consider the SADR’s statement upon enacting its maritime jurisdiction legislation in 2009, as reported by the UN Secretary-General to the Security Council: “Upon signing the declaration, the Secretary-General of the Frente Polisario, Mohamed Abdelaziz, said in a public statement that the declaration was based on the right of the people of Western Sahara to self-determination and to permanent sovereignty over their natural resources, and he called on the European Union to suspend its 2005 fisheries agreement with Morocco.” *Supra* note 47 at para. 4.

³⁶³ However the UN General Assembly has consistently reviewed and urged the preservation of economic viability and natural resources generally in non-self-governing territories. See *e.g.* Report of the Special Political and Decolonization Committee (Fourth Committee), “Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories” (28 October 2009), UN Doc. A/64/410.

the Polisario Front.³⁶⁴ However, it has been three events in the past decade that have brought the issue of ocean resources to the fore.

The first of these events was the failure or, perhaps more accurately, the refusal of the European Union to renew a fisheries agreement in 1999.³⁶⁵ Even with the entry of the Russian Federation under a 2002 agreement, that event may have been unremarkable had there been progress in the Baker peace initiatives then taking place.³⁶⁶ The second event – Morocco’s grant of petroleum exploration permits to two companies in late 2001 – was the catalyst for the third; the 2002 legal opinion of Hans Corell, discussed above.³⁶⁷ The subsequent events of the 2007 *Fisheries Partnership Agreement* being under question by the EU itself, and the SADR’s formal maritime jurisdiction claim in 2009 were perhaps inevitable. The SADR has been consistent in its statements on the issue of ocean resources:

[In] effect, the illegal occupation of the Western Sahara has been accompanied by the deprivation of the Saharawi people of their wealth – the deprivation of the mineral and fisheries riches of their country.³⁶⁸ [Translation.]

³⁶⁴ Mohamed Sidati, “Les réserves halieutiques, la question du droit du pêche, accord UE-Maroc,” in *Colloque des juristes sur le Sahara Occidental* (Paris: L’Harmattan, 2001) at 159.

³⁶⁵ See *supra* note 65 and accompanying text.

³⁶⁶ See *supra* note 56 and accompanying text.

³⁶⁷ On request of the Security Council. See also *supra* note 54 and accompanying text.

³⁶⁸ “Les réserves halieutiques, la question du droit du pêche, accord UE-Maroc,” *supra* note 364 at 160.

The people of Western Sahara have a permanent right of sovereignty over the natural resources of the territory. Taking into account UN relevant resolutions and principles of international law regarding Non-self-governing territories, any activity of exploitation, commercialization and trade affecting the **natural resources** engaged by Morocco are illegal and UN Member States and foreign interest [sic] should avoid entering into agreement with the occupying power since Morocco is not the legitimate and legal authority in the territory.³⁶⁹ [Emphasis in original.]

In a rare step, Hans Corell offered insights during a 2008 conference into the reasoning of his 2002 opinion letter (which, it should be recalled, confined itself to the legality of Morocco's 2001 petroleum exploration licenses), acknowledging that the exclusive right of a coastal state under UNCLOS Article 77 to explore and exploit the resources of the continental shelf could usefully have been stated in the letter.³⁷⁰ Corell had by this time retired from United Nations service. He noted that the opinion had been drafted to be clear on the conclusion of law that Morocco would have no "authority to engage in exploration and exploitation of mineral resources in Western Sahara if this was done in disregard of the interests *and* wishes of the people in Western Sahara."³⁷¹ He went on to address the application of the law to the phosphate extraction and fisheries resource issues:

A distinction can of course be made between renewable resources and non-renewable resources. A prominent renewable resource in Western Sahara is

³⁶⁹ Statement by Mr. Ahmed Boukhari, "Memorandum by the Frente Polisario on Western Sahara Peace Process" (Caribbean regional seminar on the implementation of the Second International Decade for the Eradication of Colonialism) (May 2009), UN Doc. CRS/2009/CRP.15 at page 7.

³⁷⁰ Hans Corell, "The legality of exploring and exploiting natural resources in Western Sahara," Conference on Multilateralism and International Law with Western Sahara as a Case Study", Pretoria, 5 December 2008 (accessed 22 January 2010); available from: www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf

³⁷¹ *Idem.* [Emphasis in original.]

fishing. But I believe that it is fair to say that the law applicable to Non-Self-Governing Territories does not make a distinction between different resources. They must all be used in the interests of the peoples in such Territories. An important question is therefore how the revenues from the fishing in the waters off Western Sahara benefit the people of the territory.

As is well known, the European Commission concluded a Fisheries Partnership Agreement with Morocco in May 2006

I confess that I was quite taken aback when I learned about this Agreement Any jurisdiction over [the waters of the Western Sahara] is subject to the limitation on the rules that follow from self-determination

I would have thought it was obvious that an agreement of this kind that does not make a distinction between the waters adjacent to Western Sahara and the waters to the territory of Morocco would violate international law.³⁷²

The SADR recently confirmed that the people of the Western Sahara remain opposed to the taking of natural resources from the territory: “Exploitation ... of Western Sahara’s fisheries resources, without prior consultation and consent of the representatives of the Saharawi people, is in direct conflict with the non-derogable right of the Saharawi people to exercise sovereignty over their natural resources.”³⁷³ A broader call for restraint in the exploitation of the territory’s resources had been made a year earlier in a letter from the SADR to the UN Security Council:

[W]e call on Member States, consistent with General Assembly resolution 63/102, to take ‘legislative, administrative or other measures in respect of their nationals and the bodies corporate under their jurisdiction that own and operate enterprises in the Non-Self-Governing Territories that are detrimental to the interests of the inhabitants of those Territories, to put an end to such enterprises.’

We believe that it is the responsibility of the Member States of the United Nations, and in particular the Security Council, to restore respect for international

³⁷² *Idem.*

³⁷³ Letter of Mohamed Sidati, March 1, 2010, *supra* note 162 and accompanying text.

law, and to call a halt to the illegal plunder of the natural resources belonging to the people of Western Sahara. This deplorable situation seriously undermines any solution that provides for the self-determination of the people of Western Sahara.³⁷⁴

Permanent Sovereignty over the Resources of the Sea

After a half-century of development, the law of permanent sovereignty over natural resources as applied to the few remaining non-self-governing territories should be clear. Many UN General Assembly resolutions address the issue, together with several decisions of the ICJ, as well as the practice of the United Nations in the case of Namibia. The case of Western Sahara appears to be no different, except that the application of the law of sovereignty over natural resources has not in a previous situation been developed with regard to the law of the sea. That should not be surprising in light of the work of decolonization having been substantially completed before the concept of the EEZ as an extended ocean zone was codified in UNCLOS in 1982.

The question of ocean resources in various declarations concerning non-self-governing territories did not apparently require mention.³⁷⁵ Namibia is an example. The United Nations took unique steps to govern the territory in response to South Africa's continuing refusal to end its former League of Nations mandate and prepare the territory for self-determination. In 1966, the United Nations declared that henceforth it had exclusive governmental competency in respect of the then South West Africa, creating the UN

³⁷⁴ Saharawi Arab Democratic Republic. Letter dated 8 April 2009 from the representative of the Frente Polisario addressed to the President of the Security Council, UN Doc. A/63/871; S/2009/198.

³⁷⁵ However, the right of permanent sovereignty to natural resources of the continental shelf was specifically addressed by UN General Assembly in UN GA Resolution 316 (XXVII) of 1972.

Council for Namibia (as it had renamed the territory in consultation with the representatives of its people) in 1968.³⁷⁶ In 1974, the UN Council for Namibia issued its Decree No. 1 for the Protection of the Natural Resources of Namibia. The decree was silent on ocean resources, although its regulation (and prohibition against the unauthorized taking) of “any natural resources ... within the territorial limits of Namibia” was clear.³⁷⁷

The case of Namibia represents a high water mark in the UN’s coordinated protection of sovereignty over natural resources in non-self-governing territories. The unique circumstances of a heavy decolonization agenda in the 1960s, coupled with the territory’s status as a former League of Nations Mandate under supervision of the General Assembly and the growing condemnation of South Africa’s apartheid regime allowed for a sustained effort. That would continue through the 1980s as the UN Council for Namibia attempted to restrain the development of the territory’s resources, going so far as to bring

³⁷⁶ UN General Assembly Resolution 2145 (XXI) (27 October 1966) and UN GA Res. 2248 (XXII) (19 May 1967), respectively. The issue of a Security Council resolution declaring all actions in respect of Namibia by South Africa since the 1967 termination of its Mandate to be illegal and invalid was referred to the ICJ for an advisory opinion “on the legal consequences for States of the continued presence of South Africa in Namibia.” (UN Security Council Resolution 248/1970). The Court advised “that States Members of the United Nations are under obligation to recognize the illegality of South Africa’s presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration.” *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep. 1971, 16 at para. 133.

³⁷⁷ *Decree No. 1 for the Protection of the Natural Resources of Namibia* (27 September 1974), reprinted in Nico Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (New York, NY: Cambridge University Press, 1997) at 162.

civil proceedings in The Netherlands against a Dutch company importing uranium for enrichment that had been mined in the territory.³⁷⁸

The same did not result for the similar post-colonial cases of Palestine and East Timor, although the issue of natural resources has featured (if not been resolved) in ICJ cases concerning the two territories. By 1983, the General Assembly had ceased making resolutions on the issue of natural resources in Palestine.³⁷⁹ The 1994 Oslo Accord between the State of Israel and the Palestine National Authority (as it now is) (as well as the United States and Russia) was silent about the issue of sovereignty over natural resources.³⁸⁰ However, the 2004 decision of the ICJ in its Palestine Wall advisory opinion addressed the issue, if tangentially.³⁸¹ In concluding that the construction of a security fence partly through the Palestinian territories was in violation of various international human rights conventions and the 1970 Friendly Relations Declaration of the UN General Assembly, the Court noted the impact of the wall's construction on agricultural lands, calling for their restoral to the "persons in question", *i.e.* those residing in or

³⁷⁸ The proceedings were withdrawn in 1990 upon Namibia achieving its independence. The council did not make a claim in damages but rather sought a declaration of illegality. See *Sovereignty Over Natural Resources: Balancing Rights and Duties*, supra note 367 at 149.

³⁷⁹ But see UN GA Res. 32/161 (19 December 1977) emphasizing "effective permanent sovereignty and control over their natural and other resources ..." And see the Report of the UN Secretary-General on the question of resources in Palestine, UN Doc. A/38/265 (21 June 1983).

³⁸⁰ "Declaration of Principles on Interim Self-Government Arrangements" (1994), 33 ILM 622. Arguably the accord's provisions for economic and regional cooperation engage the issue of sovereign rights to natural resources.

³⁸¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, 136.

affected by the construction of the security fence.³⁸² The Court cited the *Chorzow Factory* case as authority for such restitution:³⁸³

Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.³⁸⁴

The Court also noted that all States were under a universal duty to refrain from making “aid or assistance” to maintain the continued presence of the security fence and “to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.”³⁸⁵ It is important to recall that the Court made its reasoning on the basis of international humanitarian law and in answer to a specific question in its role of providing an advisory opinion. An excessive or unduly broad application of the Court’s analysis to situations of disputed sovereignty over natural resources should be avoided.

³⁸² UN GA Res. 2625 (XXV) “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”. The Fourth Geneva Convention for the protection of civilian persons under occupation and the *International Covenant for the Protection of Civil and Political Rights* were also applied by the Court. See paras. 90-111 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 381.

³⁸³ *Factory at Chorzów, Merits, Judgments*, No. 13, 1928, PCIJ, Series A, No. 17, 47.

³⁸⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 381 at para. 143.

³⁸⁵ *Idem* at para. 159.

In summary, the motives for formulating the principle of permanent sovereignty and the objectives to be pursued by it are obvious. The principle was developed during the 1950s, as part of an effort to both secure the benefits arising from exploiting natural resources for peoples living under colonial rule and to provide newly independent States with a shield against infringements upon their sovereignty by foreign States or companies.³⁸⁶

Two other decisions of the ICJ concerning rights in respect of natural resources in the context of non-self-governing territories and self-determination illustrated the limits of the law or at least the difficulties in restraining the taking of resources. The first proceeding, the *Case concerning Certain Phosphate Lands in Nauru (Nauru/Australia)* was brought in an effort to recover compensation for land reclamation resulting from the mining of phosphates in Nauru during the territory's League of Nations trust Mandate and subsequent UN trust territory period prior to independence on 31 January 1968.³⁸⁷ A judgment on the merits was not required, the two parties having settled the proceeding on 9 September 1993. Notwithstanding the age of Nauru's claim, uncertainties in the Mandate-trust obligations incumbent upon Australia, and the non-joinder of the other two Mandate states, the United Kingdom and New Zealand, to name a few of the grounds in Australia's objections to the proceeding, it was permitted to continue.³⁸⁸

³⁸⁶ *Sovereignty Over Natural Resources: Balancing Rights and Duties*, *supra* note 367 at 24. The development of the right to permanent sovereignty to natural resources is shifting more to the concerns of the global environmental commons after the 1992 Rio "Earth" summit, a result forecast by Judge Christopher Weeramantry in his dissenting opinion to the ICJ's 1999 *Botswana/Namibia* decision, *supra* note 234 at para. 119: "I would like to observe in conclusion that the pressures bearing down on the environment are so universal that the international disputes of the future will increasingly involve considerations of an environmental nature."

³⁸⁷ *Case concerning Certain Phosphate Lands in Nauru (Nauru/Australia) (Preliminary Objections)*, ICJ Rep. 1992, 240.

³⁸⁸ See generally Iain Scobie, "Case concerning Certain Phosphate Lands in Nauru (*Nauru/Australia*), Preliminary Objections Judgment," *International & Comparative Law Quarterly* 42 (1993): 710.

The same could not be said of Portugal's action concerning the *Timor Gap Treaty*.³⁸⁹ In its 1995 decision, the Court determined it could not proceed to consider the merits of the legality of the 1989 treaty in the absence of Indonesia as a party to the treaty.³⁹⁰ The Court did, however, accept "Portugal's [further] assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character [and so] is irreproachable."³⁹¹ With an obvious application to the procedure available for enforcement of sovereign rights to natural resources in the case of Western Sahara, the Court went on to distinguish between the right of self-determination *erga omnes* and the compellability of an opposing party in an international legal proceeding:

However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.³⁹²

There is also the procedural question of which State or States, or other entities, can pursue the enforcement of a right of non-interference with natural resources in the non-

³⁸⁹ *Portugal/Australia*, *supra* note 359.

³⁹⁰ Citing the principle decided in the case *Monetary Gold Removed from Rome in 1943*, ICJ Rep. 1954, 32, "that the Court can only exercise jurisdiction over a State with its consent."

³⁹¹ *Supra* note 359 at para. 29. The court concluded "East Timor remains a non-self-governing territory and its people have the right to self-determination." *Idem.* at para. 37.

³⁹² *Idem* at para. 29. Australia was mindful of the question of consent to jurisdiction when it withdrew in March 2002 from compulsory jurisdiction in respect of maritime boundary disputes under UNCLOS prior to East Timor's independence in May of that year.

self-governing setting. For its part, the UN General Assembly lacks the necessary *jus standi* before the ICJ to obtain anything other than the Court's advice. The limits of that are apparent from the 1975 *Western Sahara* case and more recently in the *Palestine Wall* case.³⁹³

Ibi Ius, Ibi Remedium

Advisories of courts to be effective in the United Nations system must be acted upon, and in the hard cases made the subject of Security Council direction to the parties concerned.³⁹⁴ The colonial or former colonial Administering Power, as with Portugal in *Portugal/Australia* would appear to have the requisite standing. From a pragmatic (or *realpolitik*) perspective, the possibility of Spain acting to vindicate the right of the people of Western Sahara to preserve their natural resources pending resolution of the self-determination issue seems remote. Spain, after all, has had a continuing and profitable role in the taking of those resources. Two candidates to pursue curial remedies remain. One is an engaged State from the international community, which standing to act would

³⁹³ *Supra* notes 19 and 381, respectively.

³⁹⁴ There is a theoretical prospect of a "UN Council for Western Sahara" akin to that for Namibia. But its effectiveness would be doubtful, and the ability to constitute it remote in light of the Security Council's central supervening role in the question of Western Sahara.

"In seemingly intractable cases, where the great powers are not prepared to take military action or other effective sanctions to change an illegal situation, symbolism such as a judgment becomes especially significant. Consider, for example, the many visits to the Court and the creation of the (toothless) Council for Namibia as strategies to underline the illegitimacy of the South African presence in Namibia." Roger S. Clark, "Obligations of Third States in the Face of Illegality - Ruminations Inspired by the Weeramantry Dissent in the Case Concerning East Timor," in Antony Anghie and Garry Sturgess, eds., *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Boston: Kluwer Law International, 1998) 631 at 638.

be doubtful and which prospect in any event is fanciful.³⁹⁵ The other is the SADR itself, after it would have first met the requirement of international legal personality, in other words, having achieved recognition that it has a sufficient standing to initiate proceedings.

The substantive state of the law concerning sovereignty to natural resources is a far more certain affair. Although the remaining self-determination cases are few in number, the various declaratory and treaty requirements constitute a whole that is binding. This is underscored by the right of recovery (or, procedurally at least to invoke such a right) demonstrated by *Nauru/Australia*.³⁹⁶ That a substantive remedy can result in also demonstrated by the restitution requirement expressed by the Court in its Palestine Wall decision.³⁹⁷ Judge Weeramantry, although he was dissenting from the Court in *Portugal/Australia* on the admissibility of the case, captured the development of the law to that time in noting that he would have admitted to the case to proceed, in part on the basis that “[t]he right to self-determination constitutes a fundamental norm of contemporary international law, binding on all States.”³⁹⁸ He added as regards Australia’s

³⁹⁵ Algeria might have so qualified as an intervening State during its fractious relationship with Morocco after 1975.

³⁹⁶ *Supra* note 387.

³⁹⁷ *Supra* note 381. *Quaere* if standing and substance of a proceeding in respect of the natural resources of Western Sahara would have a different treatment in courts other than the ICJ, for example the ITLOS or the European Court of Human Rights. The SADR has standing a member State of the African Union in the Court of Justice of the African Union, which is in the process of becoming the Court of Justice and Human Rights of the African Union. Morocco, it should be recalled, is not a member of the African Union.

³⁹⁸ *Portugal/Australia*, dissenting opinion, *supra* note 359 at 221. Judge Weeramantry also concluded: “The rights to self-determination and permanent sovereignty over natural resources are recognized as rights *erga omnes*, under well-established principles of international law, and are recognized as such by

conduct in concluding the 1989 *Timor Gap Treaty* in the face of such a norm that:

[T]he act of being a party to the Timor Gap Treaty would appear to be incompatible for recognition of and respect for the principle of East Timor's rights to self-determination and permanent sovereignty over natural resources inasmuch as, *inter alia*, the Treaty:

- (1) expressly recognizes East Timor as a province of Indonesia without its people exercising their right;
- (2) deals with non-renewable natural resources that may well belong to that territory;
- (3) makes no mention of the rights of the people of East Timor, but only of the mutual benefit of the peoples of Australia and Indonesia in the development of the resources of the area ...
- (4) makes no provision for the event of the East Timorese people deciding to repudiate the Treaty upon exercise of their right self-determination.³⁹⁹

An Unconventional Application of the Convention

It is UNCLOS that holds the potential to secure the ocean resources of Western Sahara pending resolution of the territory's status, whether by exercise of the right of the Saharawi people to self-determination or the full emergence of the SADR as a nation-state. That is because UNCLOS can be applied complementary to the law of natural resource sovereignty and contains more specific and enforceable rights to ocean resources,

the Respondent; An *erga omnes* right generates a corresponding duty in all States, which duty, in case of non-compliance or breach, can be the subject of a claim for redress against the State so acting; The duty thus generated in all States includes the duty to recognize and respect those rights. Implicit in such recognition and respect is the duty not to act in any manner that will in effect deny those rights or impair their exercise; [and] The duty to recognize and respect those rights is an over-arching general duty, binding upon all States, and is not restricted to particular or specific directions or prohibitions issued by the United Nations.”

³⁹⁹ *Idem* at 212.

arguably even in the non-self-governing (or annexed/occupied) circumstances of Western Sahara. The application of UNCLOS can be approached, if in an unconventional manner, by first considering the ability of the SADR (whether so constituted, or as a territory whose people are to undergo self-determination).

The development of UNCLOS through the 1970s reflected the tenor of the times, when both issues of sovereignty to natural resources in the so-called developing world and decolonization were prominent.⁴⁰⁰ For the *Convention* provided in an unprecedented manner that colonial territories could, in certain circumstances, accede to it. It also stipulated a heightened norm of restraint for the development of ocean resources in the maritime areas of non-self-governing territories. Not surprisingly, given the limited number of post-colonial cases after 1982 (and even fewer in as maritime setting) these measures, or provisions, have gone largely unnoticed and therefore missed in potential application.

The first of such measures is that of accession to UNCLOS. Article 305 permits a wide range of entities to sign the *Convention*, including States, the then UN Council for Namibia; “self-governing associated States”, international organizations pursuant to Annex IX of the *Convention* and also:

⁴⁰⁰ On the preparatory work and negotiations leading to UNCLOS see generally Myron H. Nordquist, ed., *United Nations Convention on the Law of the Sea 1982: A Commentary* (Boston: Martinus Nijhoff, 1989).

[A]ll territories which enjoy full internal self-government, recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters[.]⁴⁰¹

Article 306 UNCLOS stipulates the accession process for States and entities defined at Article 305, noting the *Convention* is subject to the ratification of States and the listed entities. Article 307 takes the process a step further, requiring the *Convention* to “remain open for accession by States and the other entities referred to in Article 305.”⁴⁰² Two definitions at Article 1 of the *Convention* are also usefully recalled at this point:

‘States parties’ means States which have consented to be bound by this Convention and for which this Convention is in force[.]

This Convention applies *mutatis mutandis* to the entities referred to in article 305, paragraph 1(b), (c), (d), (e) and (f), which become Parties to this Convention in accordance with the conditions relevant to each, and to that extent ‘States Parties’ refers to those entities.⁴⁰³

⁴⁰¹ UNCLOS Article 305(e), *supra* note 78. In the event, the UN Council for Namibia did accede to the *Convention* on 18 April 1983 under Article 305(b). That accession was ratified at independence in 1990 under Articles 143 and 144 of the Namibian Constitution. Accession by the EU in 1998 under Article 305(f) was done pursuant to Annex IX of UNCLOS. Accession by the Cook Islands was done in 1995 under Article 305(c) as a self-governing and self-determined State in association with another (New Zealand). The total number of accessions/States party to the *Convention*, following that of Chad in August 2009, is 160. East Timor (the Democratic Republic of Timor-Leste) and the Palestinian National Authority have not yet acceded to UNCLOS. Among other States, nor have Syria, Israel and Turkey.

⁴⁰² UNCLOS *supra* note 78. “The instruments of accession shall be deposited with the Secretary-General of the United Nations.” Article 315(2) provides that States and the entities at Articles 305 may initiate amendments to the provisions of the *Convention*.

⁴⁰³ Among other things, this deeming provision extends the Article 317 right to denounce UNCLOS to the non-State Article 305 entities and the requirement of the UN Secretary-General to report to States Parties “issues of a general nature” arising under the *Convention*.

In retrospect, it appears unusual that non-state entities would be provided for in the drafting of a multilateral convention, less so accession to it. The initiative traces its origins to the establishment of the Conferences on the Law of the Sea in the 1970s, and the recommendations made at early sessions of the negotiating-working groups. Four resolutions of the UN General Assembly set the stage: Resolution 2340 (XXII) (18 December 1967); Resolution 2467 (21 December 1968); Resolution 2574 (15 December 1969); and the “Declaration of Principles governing the Sea-Bed and Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction”, 2749 (XXV) (17 December 1970). The General Assembly was thus in a position to convene a Conference on the Law of the Sea, doing so through its Resolution 2750 C (XXV) of 17 December 1970, to be held in 1973.⁴⁰⁴

In 1973 the General Assembly’s Resolution 3067 (XXVIII) broadened the mandate of the Conference, requiring all law of the sea matters to be addressed.⁴⁰⁵ It was in the second session of the Conference, held in Caracas, that the invitation was extended to “national liberation movements, recognized by the Organization of African Unity and the

⁴⁰⁴ “[A] conference on the law of the sea which would deal with the establishment of an equitable international régime – including an international machinery – for the area and the resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction ... and a broad range of related issues ...”

⁴⁰⁵ UN GA Res. 3067 (XXVIII) (16 November 1973): “[T]he mandate of the conference shall be to adopt a convention dealing with all matters of the law of the sea ...” The first session of the conference was then scheduled to convene 3-14 December 1973 to deal with organizational matters, among them the selection of rules of procedure. The Resolution requested the Council for Namibia be a participant in the Conference. *Idem* at para. 10.

League of Arab States in their respective regions to participate in its proceedings as observers.”⁴⁰⁶ The second session made formal the invitation in its rules of procedure:

National liberation movements in their respective regions recognized by the Organization of African Unity or by the League of Arab States may designate representatives to participate as observers, without the right to vote, in the deliberations of the Conference, the Main Committees and, as appropriate, the subsidiary organs.⁴⁰⁷

By the Conference’s fifth session, held 2 August through 17 September 1976, drafting of the Convention had progressed to a preamble and final clauses, including provisions for signature, ratification, accession, and entry into force. It was noted in the report of the session that “final clauses of United Nations multilateral treaties have not infrequently been the subject of debate among delegations.”⁴⁰⁸ At this early stage, the drafting of UNCLOS had included a “transitional provision” for dependent territories on the premise that “[v]arious United Nations agreements provide a possibility for separate participation by dependent territories.”⁴⁰⁹ The participation of non-State groups (including territories to prospectively emerge into independence) continued, and at the

⁴⁰⁶ *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 1, *supra* note 400 at 409.

⁴⁰⁷ Rule 63(1). See “Rules of Procedure” in Robin Churchill, Myron H. Nordquist, and S. Houston Lay, eds. *New Directions in the Law of the Sea*, Vol. VI (Dobbs Ferry, NY: Oceana Publications, Inc., 1977) at 565. Rule 62 extended the same invitation to the UN Council for Namibia.

⁴⁰⁸ “Draft Alternative Texts of the Preamble and Final Clauses,” *idem*, 716 at 718.

⁴⁰⁹ *Idem* at 719. The role of the UN Secretary-General, in the function of depositary of treaty ratifications and accessions, in seeking the opinion of the General Assembly, whenever advisable “before receiving a signature or an instrument of ratification, acceptance, approval or accession” was noted.

eight session of the Conference held 19 March - 27 April 1979 the “transitional provision” read as follows:

The rights recognized or established by this Convention to the resources of a territory whose people have not attained either full independence or some other self-governing status recognized by the United Nations, or a territory under foreign occupation of colonial domination, or a United Nations trust territory, or a territory administered by the United Nations, shall be vested in the inhabitants of that territory, to be exercised by them for their own benefit and in accordance with their needs and requirements.

A metropolitan or foreign power administering, occupying or purporting to administer or occupy a territory may not in any case exercise, profit, or benefit from or in any way infringe the rights referred to [above].⁴¹⁰

The Conference concluded its work in an eleventh session held 8 March to 30 April 1982 that had to be resumed 22 to 24 September 1982. The issue of participation in the Conference itself and accession to a convention by national liberation movements remained fractious until the end. The G77 group of nations resolved to allow such participation. On March 26, a report of the Conference’s President offered a way out of the impasse.⁴¹¹ A compromise proposal for signature and accession at Article 305 was presented, drawing on the recent experience of national liberation movements participating the drafting of the 1977 Geneva Convention Protocols. Article 305 was to contain “the enabling provisions for non-States entities [sic] to participate in the

⁴¹⁰ “Explanatory Memorandum by the President of the Conference” (28 April 1979), *idem* at 134 at 235. Cited are paragraphs 1 and 3 of the proposed transitional provision of the Convention. Paragraph 2 required that in cases of territorial dispute the rights conferred under paragraph 1 were not to be exercised until settlement of the dispute in accordance with the UN Charter.

⁴¹¹ “Report of the President on the question of participation in the Convention,” Third UN Conference on the Law of the Sea Doc. A/CONF./62/L.86 (26 March 1982) at Renate Platzöder, ed., Third United Nations Conference on the Law of the Sea: Documents, Vol. XV (Dobbs Ferry, NY: Ocean Publications, 1988) at 526.

convention as parties.”⁴¹² It was explained that the “[t]his will enable [national liberation movements] to present the views of the peoples they represent and request the adoption of appropriate measures for the protection of the interests of those peoples until they obtain their autonomy or independence.”⁴¹³ The compromise was endorsed by numerous States, and the remarks of Morocco made at the 1982 session are typical:

[Mr. El Gharbi – Morocco] As far as participation of national liberation movements was concerned, his delegation remained fully in support of the fullest possible participation for those recognized movements which had been invited to send representatives to the conference. Their legitimate international status should be reflected in the texts ultimately adopted.⁴¹⁴

The *Convention*’s text for participation of non-State entities was accordingly divided, resulting in the signature and accession provisions at Article 305 and 306 of the *Convention*, above, and two resolutions for the Final Act of the Conference, pertaining to non-self-governing territories and to national liberation movements.⁴¹⁵ It is the first of these, Resolution III, which has particular relevance to the issue of maritime resources in Western Sahara:

⁴¹² *Idem* at 530.

⁴¹³ *Idem* at 530.

⁴¹⁴ *Idem* at Vol. XVII (“Conference proceedings”) 429 at 430.

⁴¹⁵ Resolutions III and IV, respectively. The resolutions were adopted into the *Convention* as part of “an integrated whole.” *United Nations Convention on the Law of the Sea 1982: A Commentary*, *supra* note 400 at 421. The text of Resolution IV reflected Rules 62 and 63 of the Conference’s procedure, allowing “national liberation movements” to sign the final act of the 1982 *Convention* “in their capacity as observers.” (Resolution I established the Preparatory Commission for the International Sea-Bed authority and for the International Tribunal for the Law of the Sea. Resolution II created the regime for “Preparatory Investment in Pioneer Activities relating to Polymetallic Nodules.”)

Resolution III

The Third United Nations Conference on the Law of the Sea,

Having regard to the Convention on the Law of the Sea,

Bearing in mind the Charter of the United Nations, in particular Article 73

1. Declares that:

(a) In the case of a territory whose people have not attained full impendence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development.

(b) Where a dispute exists between States over the sovereignty of a territory to which this resolution applies, in respect of which the United Nations has recommended specific means of settlement, there shall be consultations to the parties to that dispute regarding the exercise of the rights referred to in subparagraph (a). In such consultations the interests of the peoples of the territory concerned shall be a fundamental consideration. Any exercise of those rights shall taken into account the relevant resolutions of the United Nations and shall be without prejudice to any party to the dispute. The States concerned shall make every effort to enter into provisional arrangements of a practical nature and shall not jeopardize or hamper the reaching of a final settlement of a dispute.

2. Requests the Secretary-General of the United Nations to bring this resolution to the attention of all members of the United Nations and the other participants in the Conference, as well as the principal organs of the United Nations, and to request their compliance with it.⁴¹⁶

States that have signed or acceded to UNCLOS have accepted the entirety of the Final Act of the Conference on the Law of the Sea, as an integral whole of the Convention.

⁴¹⁶ *Idem* at 432. Myron Nordquist suggests a suitable title for the resolution is “Rights of Peoples of Non-Self-Governing or Disputed Territories.” He describes the negotiations leading to the resolution thus: “It had become impossible, however, to continue ignoring the political connection between the entities to which article 305, subparagraph 1(c), (d) and (e) applied, the demand for participation by certain national liberation movements, and the transitional provision, especially as the Group of 77 tried to reinstate the transitional provision among the numbered articles of the Convention ... In the absence of experience, it is impossible to attempt to foretell how this resolution, limited in its operative paragraph to relations between States, will be applied in practice.” *Idem*, Vol. V at 481.

Three States have made statements on the applicability of Resolution III upon signing or ratifying UNCLOS: Portugal, Spain and Argentina. Portugal expressly accepted the Resolution, noting it applied to East Timor.⁴¹⁷ Spain, as we have seen above, rejected its application to Gibraltar.⁴¹⁸ Argentina made the most denunciatory of rejections doing so at both upon signing and ratification of UNCLOS. The rejection of Resolution III must be considered in light of Argentina's long-standing claim to territorial sovereignty over the Falkland Islands (Islas Malvinas), reading *in extenso*:

The ratification of the Convention by the Argentine Government does not imply acceptance of the Final Act of the Third United Nations Conference on the Law of the Sea. In that regard, the Argentine Republic, as in its written statement of 8 December 1982 ... places on record its reservation to the effect that resolution III, in annex I to the Final Act, in no way affects the 'Question of the Falkland Islands (Malvinas)' ...

In this connection, and bearing in mind that the Malvinas and the South Sandwich and South Georgia Islands form an integral part of Argentine territory, the Argentine Government declares that it neither recognizes nor will recognize the title of any other State, community or entity or the exercise by it of any right of maritime jurisdiction which is claimed to be protected under any interpretation of resolution III that violates the rights of Argentina over the Malvinas and the South Sandwich and South Georgia islands and their respective maritime zones. Consequently, it likewise neither recognizes nor will recognize and will consider null and void any activity or measure that may be carried out or adopted without its consent with regard to this question, which the Argentine Government

⁴¹⁷ Portugal ratified UNCLOS on 3 November 1997. "Portugal expresses its understanding that the Resolution III of the United Nations Third Conference on the Law of the Sea shall fully apply to the non-self-governing Territory of East Timor, of which it remains the administering Power, under the United Nations Charter and the relevant Resolutions of the General Assembly and of the Security Council. Accordingly, the application of the Convention, in particular a delimitation, if any, of the maritime areas of the territory of East Timor, shall take into consideration the rights of its people under the Charter and the Resolutions and, furthermore, the responsibilities incumbent upon Portugal as administering Power of the Territory of East Timor." "Declarations or Statements upon UNCLOS ratification" (accessed 12 February 2010); available at: www.un.org/Depts/los/convention_agreements/convention_declarations.htm

⁴¹⁸ *Supra* note 147 and accompanying text.

considers to be of major importance. [...]

Furthermore, it is the understanding of the Argentine Republic that the Final Act, in referring in paragraph 42 to the Convention together with resolutions I to IV as forming an integral whole, is merely describing the procedure that was followed at the Conference to avoid a series of separate votes on the Convention and the resolutions. The Convention itself clearly establishes in article 318 that only the Annexes form an integral part of the Convention; thus, any other instrument or document, even one adopted by the Conference, does not form an integral part of the United Nations Convention on the Law of the Sea.⁴¹⁹

This is a restrictive and singular response to the text of UNCLOS. Article 318 is merely intended to ensure clarity on the status of annexes to UNCLOS, and not a broad exclusion of its agreed-upon constitutive text. If there is a distinction between the resolutions and the nine annexes to UNCLOS, it is that the former are enabling provisions, the latter operative or conferring institutional mechanisms, such as the CLCS and the ITLOS.⁴²⁰

What is perhaps surprising, after 160 accessions to UNCLOS, is that more States have not expressed a position in respect of Resolution III. Two things explain this. The first is that Article 309 prohibits the making of reservations or exceptions to the Convention subject to those instances where a State does so under Article 310 for the purpose of “harmonization of its laws and regulations with this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of [the] Convention in their application to the State.” Derogations from the

⁴¹⁹ Declaration upon ratification, 1 December 1995, *supra* note 417 “Declarations or Statements upon UNCLOS ratification.”

⁴²⁰ See Annexes II and VI, respectively.

integral entirety of UNCLOS, in other words, are forbidden. The second factor at play is the complexities of that for which there is an election to be made under UNCLOS, the choice of dispute resolution under Part XV.⁴²¹ States have concerned themselves with the tribunals to resolve disputes and which of a very short list of matters to exempt from binding decisions.

On the basis that Spain (as administering power) is incapable or refuses to act against Morocco to restrain the further exploitation of Western Sahara's ocean resources, that third States are in the same position, and that the UN Security Council would avoid so acting with partiality, what remains is for the SADR as a putative State to act in its own interest. The availability of accession to and ratification of UNCLOS under Articles 305-306 is the first part of the consideration. The second is the substantive. How would Resolution III and related Articles of the Convention be applied to preserve a Saharawi right to permanent sovereignty over such resources?

A Place at the Table – The SADR's Accession to UNCLOS

The SADR can accede to UNCLOS either as a State pursuant to Article 305(1)(a) or as a territory “enjoying full self-government, recognized as such by the United Nations”

⁴²¹ See Article 287 on the choice of procedure (fora) and Article 298 for those subjects of UNCLOS which may be excluded from the compulsory procedures entailing binding decisions: “sea boundary delimitations”, disputes concerning military activities, and “disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.” Should a State not make an express election of fora for the resolution of a dispute, such as the ICJ or the ITLOS, then Article 287(3) deems arbitration under Annex VII as the default.

through Article 305(1)(e).⁴²² Two requirements of the latter category of accession present an evident challenge: the enjoyment of full internal self-government and that of “competence over matters governed” by UNCLOS “including the competence to enter into treaties in respect of those matters.” If a finding of competency turns on territoriality, that is, possession and control of the area with self-government, then article 305(1)(e) would not appear to be available as a basis for accession. A reliance on territorial control would remove the intended benefit of the accession provision in most of the past cases, and future ones, too. It would suffice for an occupying or annexing power to assert the displacement or exclusion of some form of governing authority to obviate the provision. East Timor serves to illustrate. So does the former case of Namibia, with an accepted representative entity, the South West Africa Peoples Organization, which together with the UN Council for Namibia was demonstrably less competent in respect of territory than is the SADR at present.

However, it is the fact of self-government together with status as a non-self-governing territory under UN General Assembly Resolution 1514 (XV) that are the broader criteria. Moreover, that the SADR has the necessary competency to enter into UNCLOS related treaties is beyond doubt. It began concluding treaties when it settled a peace agreement with Mauritania in 1979.⁴²³ More recently, it has legislated comprehensively in respect of its claimed maritime jurisdiction, at level as sophisticated as neighboring States. What

⁴²² The wide recognition of the SADR among States and its member status in the African Union are two *indicia* of statehood, discussed *supra* at note 27 and accompanying text.

⁴²³ *Supra* note 32 and accompanying text.

competency as a question of accession to UNCLOS is, is the aggregate of legitimacy as the representative of a people undergoing self-determination together with the capacity to conduct affairs in respect of law of the sea matters. When it is recalled that the participation of national liberation movements in the Third UN Conference on the Law of the Sea was arrived at in part to ensure the protection of permanent sovereignty to natural resources in territories undergoing decolonization, the availability of Article 305(1)(e) in the case of Western Sahara is evident.

The substantive application of UNCLOS to the present circumstances of the Saharawi people and their sovereignty over natural resources suggests two grounds for proceedings against Morocco or third states participating in the exploitation of the territory's maritime resources, namely, an action to restrain such exploitation (or development) and an action to delimit maritime boundaries.⁴²⁴ The latter seems a remote prospect. Delimitation of the Saharan ocean area would be only symbolic in circumstances where the continued exploitation of ocean resources is continuing and absent the SADR's effective access and control of the resources in such an area. Although Morocco has not declared itself outside the UNCLOS binding dispute resolution scheme in matters of maritime boundaries, it could readily do so, as Australia did in March 2002 when faced with East Timor's possibly superior claim just before that country's independence.⁴²⁵

⁴²⁴ The basis for a claim of restitution or compensation under the first cause of action here is also possible. See *Case concerning Certain Phosphate Lands in Nauru*, *supra* note 387.

⁴²⁵ Article 298, *supra* note 78. In the event a State withdraws from compulsory jurisdiction in maritime boundary disputes, UNCLOS allows for the permissive mechanism of conciliation under Article 284. A State withdrawing from one of the categories of subjects for binding dispute resolution

What remains to assure the preservation or protection of maritime resources in the sea off Western Sahara are proceedings to restrain their exploitation. It is to be recalled that the law generally in respect of permanent sovereignty over natural resources in both States and non-self-governing territories is applicable to the present circumstances. No particular recourse to the law of the sea is necessary. However, the issue of standing before a court of competent jurisdiction for the only apparently capable or willing to seek a remedy – the SADR – necessarily engages the *Convention*. That the nature of and rights to the natural resources that are the subject of UNCLOS are the clearer is a useful advantage.

UNCLOS contemplates such a situation. As a matter of procedure, a State party may enjoin the use or exploitation of resources claimed to be its own by seeking provisional measures under Article 290.⁴²⁶ A dispute characterized as such would not be removable from binding resolution under UNCLOS because it would not fall within the categories of permitted exemption provided by Article 298, unless defined as one in which the “Security Council is exercising the functions assigned to it by the Charter of the United

at Article 298 (boundaries, military activities, disputes in which the UN Security Council is acting) may not, pursuant to Article 298(7), pursue the same category of dispute against a third State without its consent.

⁴²⁶ See e.g. *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, *Provisional Measures*, Order of 8 October 2003, where the ITLOS, applying Article 290, directed “Singapore not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts.” The parties later settled the proceeding, which included a maritime boundary claim. See: http://www.itlos.org/start2_en.html (accessed 24 February 2010).

Nations” and Morocco or any third State to be enjoined so withdrew from compulsory jurisdiction in respect of such a dispute.⁴²⁷ The substantive basis under UNCLOS to enjoin the exploitation of ocean resources are those conferring sovereign rights to such resources: Articles 193, 56 and 77. Articles 56 and 77 confer, respectively, the same species of rights for both the exploration and exploitation of the EEZ and the continental shelf. As such, a proceeding to secure the preservation of natural resources can include a prohibition against the exploration of the continental shelf, for example, by the use of seismic seabed surveys or core drill sampling.

In the exclusive economic zone, the coastal State has ... sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil ...⁴²⁸

Other provisions of UNCLOS lending weight to an application for provisional measures in the preservation of resource sovereignty include Articles 300 and 301:

Article 300 Good faith and abuse of rights

States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

Article 301 Peaceful uses of the seas

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial

⁴²⁷ Article 298(1)(c).

⁴²⁸ Article 56(1). Article 77(1) provides that: “The coastal State exercises over the continental shelf sovereign rights for the purposes of exploring it and exploiting its natural resources.” Article 77(2) provides that, in the absence of the exploration or exploitation of the resources of the continental shelf appertaining to the coastal State, “no one may undertake these activities without the express consent” of that State.

integrity or political independence of any State, or in any manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

The cases of conflicts over non-self-governing territories in the post-colonial setting defined by UN General Assembly Resolution 1514 (XV) are fortunately now few. The “question” of Western Sahara and that of Palestine are here the most serious and lasting among them. They are cases with considerable importance to the people involved, for the achievement of peace and security in the regions they are found, and ones exacerbated if not prolonged by the unprotected use and exploitation of natural resources. The emergence of a settled pattern of strong norms for the preservation of the right to permanent sovereignty over natural resources is all the more reinforced by the procedure and substantive grounds to secure such rights in a maritime setting under UNCLOS.

It is so in the case of Western Sahara. The scheme envisioned for UNCLOS to apply in matters of the ocean resources of a non-self-governing territory under recognized and competent representation was one arrived at by design, and intended to be a significant advance in the law. The clarity of reciprocal rights and obligations for the people of Western Sahara is manifest, imposing an inescapable duty on States involved with the territory’s maritime resources: “provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development.”⁴²⁹

⁴²⁹ UNCLOS Resolution III, *supra* note 416 and accompanying text.

ORDER IN THE SEAS

THE CENTRAL FOUNDATION of peace and security for the organized community of States and thereby humanity is territorial integrity. For it is the obligation to respect sovereignty to territory as a matter of law that limits the actions of one State upon another. In the absence of restraint upon the encroachment or taking of territory the resulting precedent leads to instability. This is particularly so in the cases of clear territorial right and preservation, namely, the few remaining cases of peoples entitled to exercise a right of self-determination and to realize with that the advantages of a defined or at least resolvable spatial jurisdiction together with sovereignty over the natural resources found therein. Thomas M. Franck signaled the dangers inherent in the failure to uphold territorial integrity when he wrote the following:

The easy success of Morocco and Mauritania in the Sahara (and, concurrently, of Indonesia in Timor) against wholly ineffectual UN opposition, cannot but change the odds and encourage more vigorous pursuit of other territorial claims. Nor is there any reason to believe that this renewed tendency to assert claims of historic title can be limited to issues of decolonization.⁴³⁰

The law of the sea cannot, of course, serve as a universal bulwark against the erosion of the “territorial norm.” But, as we have seen, it can apply usefully to underscore the desirability of the norm in cases of competing maritime jurisdictions, together with the division (and common use) of ocean resources. For almost the entirety of coastal States in acceding to UNCLOS have bound themselves, while taking the benefit of greater rights to greatly increased maritime areas on their shores, second only to the UN Charter to uphold the integrity of territorial sovereignty.

⁴³⁰ “The Stealing of the Sahara,” *supra* note 7 at 720.

The Saharawi people, suffering the disadvantages of uncertainty in the law allowing for their right of self-determination or, more accurately, the failure or inability to apply such law with result to their circumstances, have now the benefit of certainty in an important question of territoriality and of the sovereignty to the resources of the sea. The scope for the matter to influence the larger “question” of Western Sahara will always be limited. The impasse over Western Sahara is least of all about a claim to maritime jurisdiction, nor is it a conflict primarily concerned with natural resources. It is ultimately a dispute to territory. To the extent that the certain application of the law of the sea, now capable of delimiting the maritime space of the SADR with precision, together with the certain definition and enforceability of the Saharawi right to sovereignty over ocean resources, dismantles the territorial imperative at the heart of the Saharan conflict, the exercise will have been justified.

* * *

Map 1

Northwest Africa from Senegal to the Strait of Gibraltar

Projection: Africa Equidistant Conic
Datum: WGS 84
Scale: 1:10,400,000



Map 2

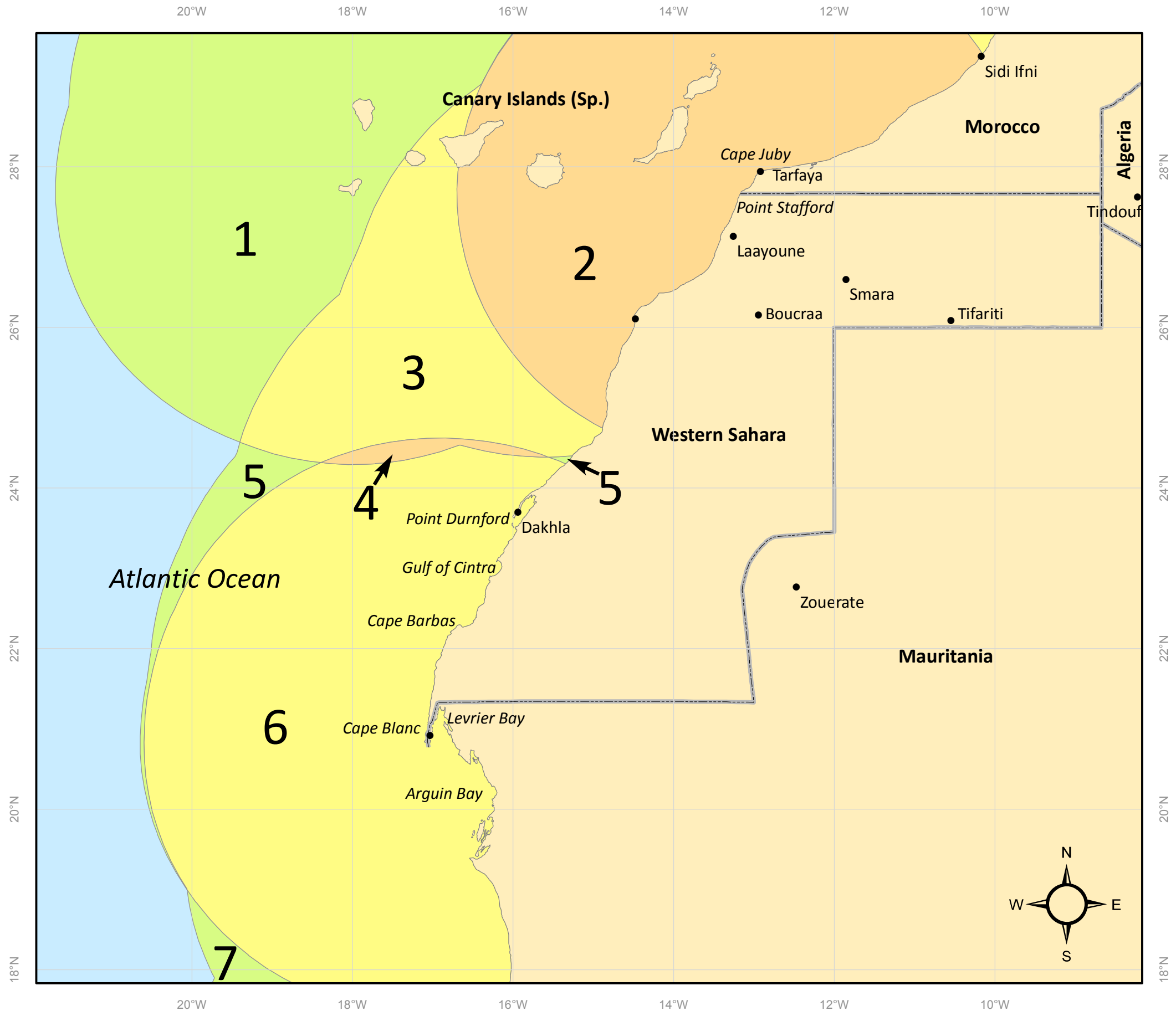
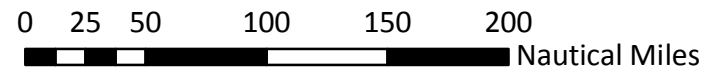
EEZ Claims in the Western Sahara Region

Legend

- Single EEZ claim
- Two overlapping EEZ claims
- Three overlapping EEZ claims

1. Spain EEZ as generated by Canary Islands
2. Overlapping EEZs of Spain, Morocco and Western Sahara
3. Overlapping EEZs of Spain and Western Sahara
4. Overlapping EEZs of Spain, Western Sahara and Mauritania
5. Western Sahara EEZ (two locations)
6. Overlapping EEZs of Mauritania and Western Sahara
7. Mauritania EEZ

Projection: Africa Equidistant Conic
 Datum: WGS 84
 Scale: 1:5,800,000



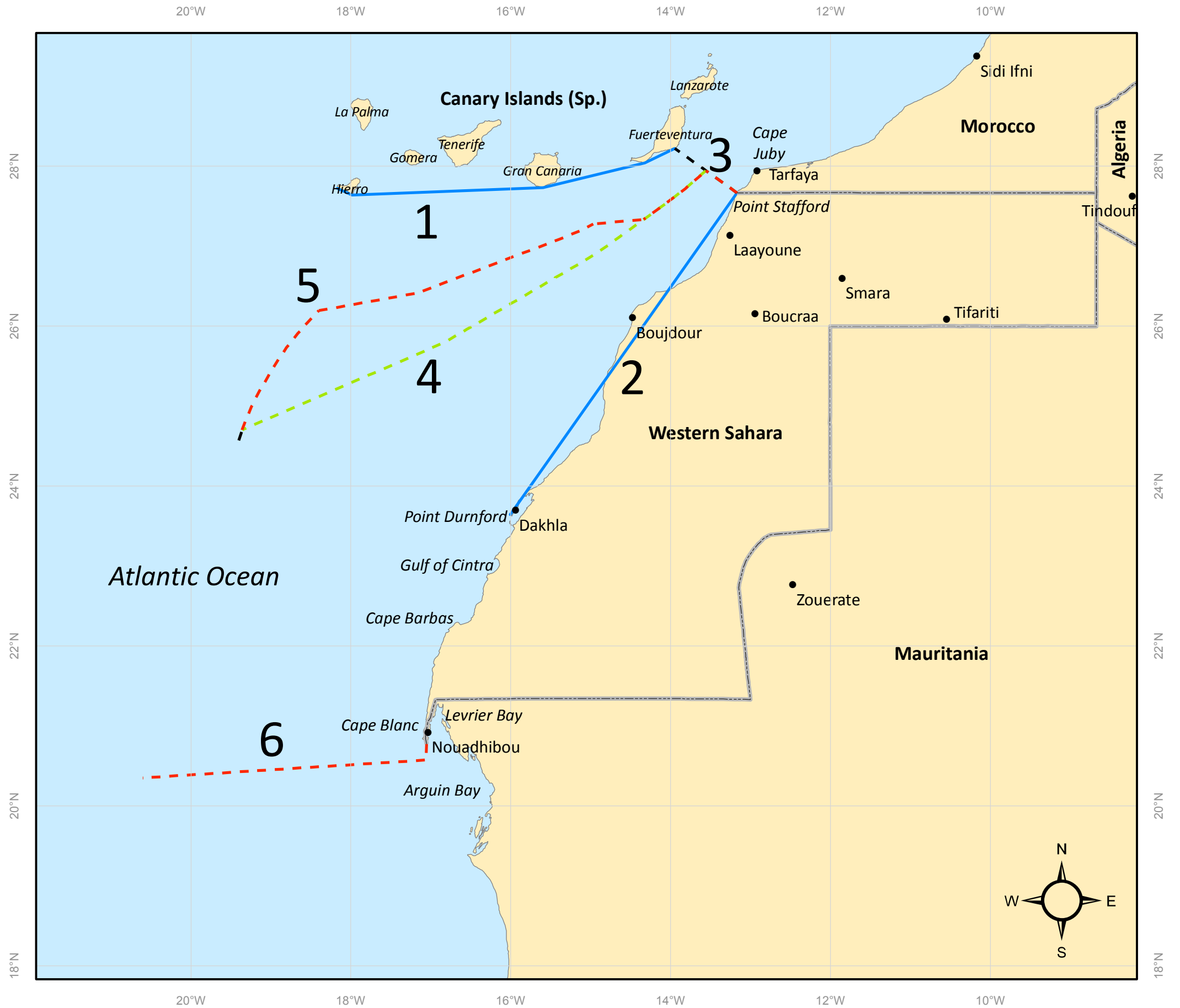
Map 3

Construction Lines for the SADR's Northern Boundaries (Territorial Sea and EEZ)

(Also depicting southern territorial sea and EEZ boundary)

- 1. Construction-closing line across south facade Canary Islands
- 2. Construction line across Saharan coast
- 3. Point Stafford-Fuerteventura Island construction line (territorial sea and EEZ boundary depicted on south segment)
- 4. Provisional equidistant (median line) EEZ boundary
- 5. Adjusted (final) EEZ boundary
- 6. Southern EEZ boundary

Projection: Africa Equidistant Conic
 Datum: WGS 84
 Scale: 1:5,800,000



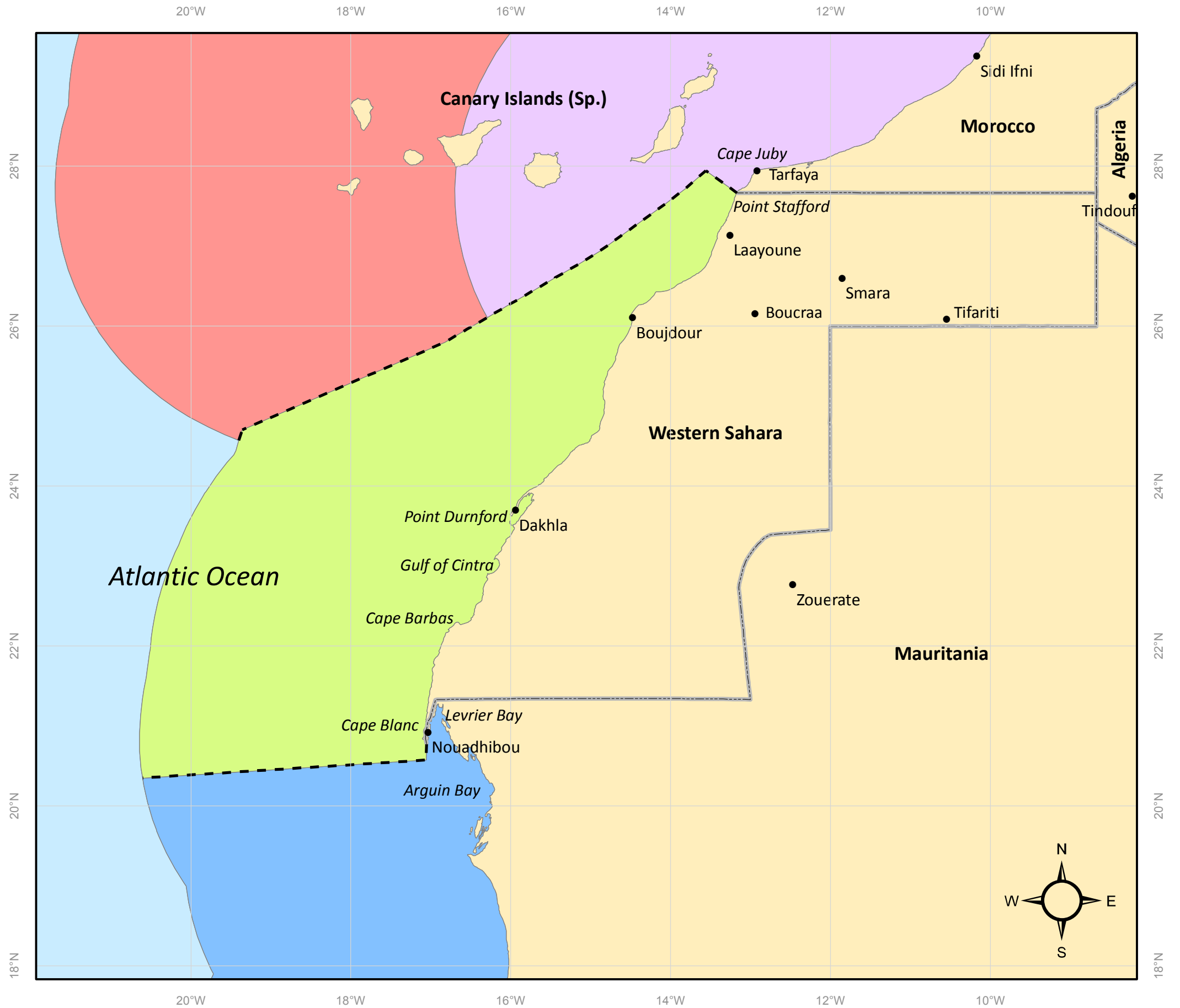
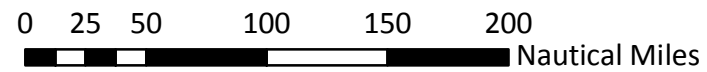
Map 4

Provisional Maritime Boundaries of the SADR (Territorial Sea and EEZ)

Legend

- - - Provisional boundaries
- Western Sahara
- Spain
- Mauritania
- Area of overlapping EEZs (Morocco-Spain)

Projection: Africa Equidistant Conic
Datum: WGS 84
Scale: 1:5,800,000



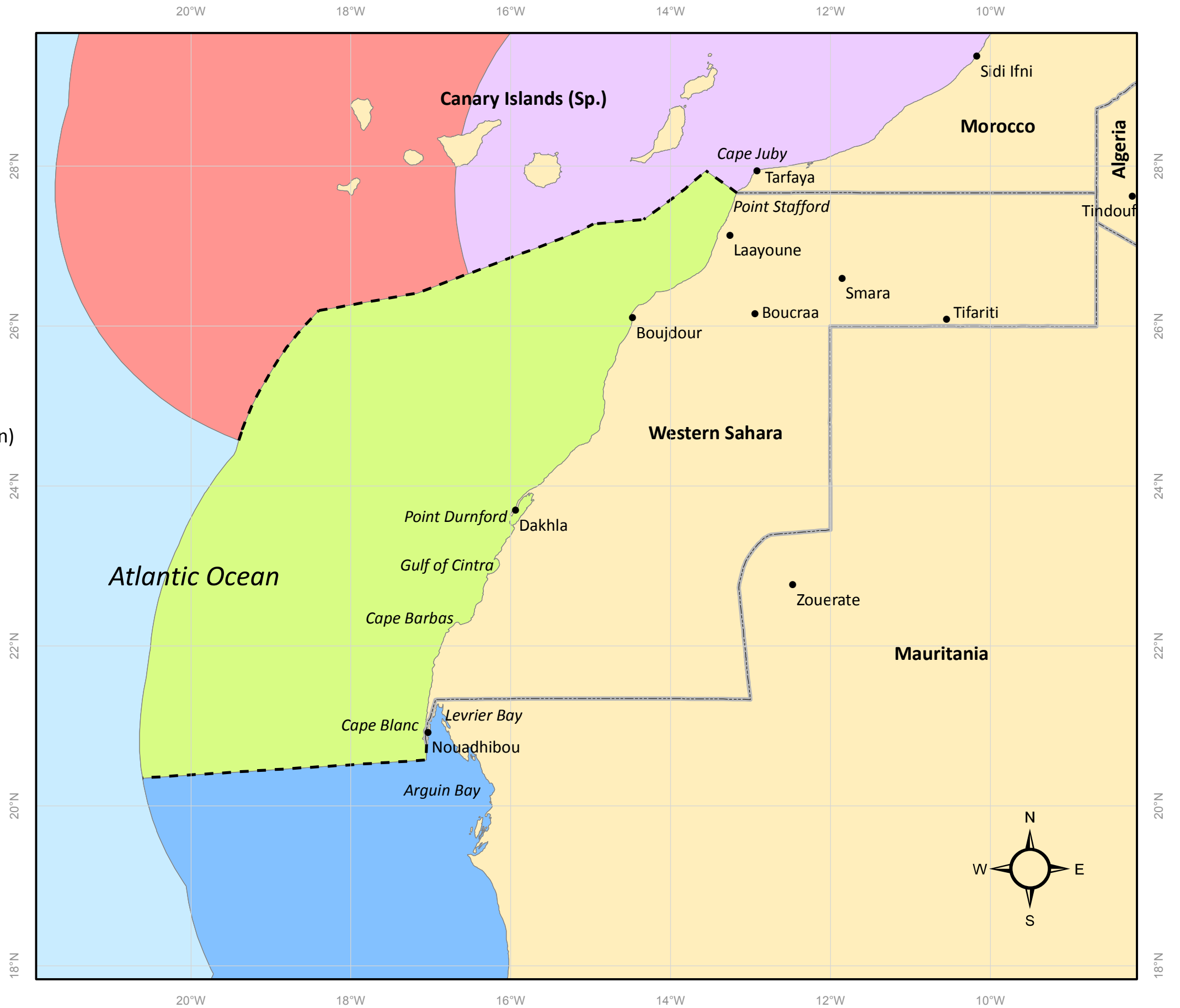
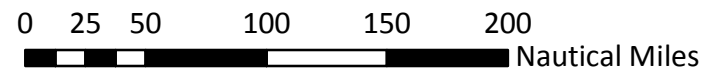
Map 5

Maritime Boundaries of the SADR (Territorial Sea and EEZ)

Legend

- - - Adjusted (final) boundaries
- Western Sahara EEZ
- Spain EEZ
- Mauritania EEZ
- Undelimited overlapping EEZs (Morocco-Spain)

Projection: Africa Equidistant Conic
Datum: WGS 84
Scale: 1:5,800,000



Schedule 1

LAW NO. 03/2009 OF 21 JANUARY 2009 ESTABLISHING THE MARITIME ZONES OF THE SAHARAWI ARAB DEMOCRATIC REPUBLIC

Whereas the Constitution of the Saharawi Arab Democratic Republic provides that the State shall exercise full sovereignty over its territory, including its territorial waters;

Whereas the Saharawi Arab Democratic Republic wishes to update its domestic law regarding sovereign rights, jurisdiction and duties in the State's exclusive economic zone and continental shelf;

Whereas the ocean and its natural living and non-living resources offer significant opportunities for economic diversification, sustainable development and the generation of wealth for the benefit of all the citizens of the Saharawi Arab Democratic Republic, and in particular for coastal communities;

Considering the need to safeguard the rights and fundamental interests of the nation with regard to the living and non-living resources in the waters off the coast of the Saharawi Arab Democratic Republic;

Considering the Saharawi Arab Democratic Republic is entitled to exercise the rights and fulfil the duties of a coastal state in accordance with international law, as set forth in the United Nations Convention on the Law of the Sea, 1982 (hereinafter "the Convention");

Considering the Saharawi Arab Democratic Republic's commitment to adhere to the Convention at the earliest possible date;

For these reasons, the Saharawi Arab Democratic Republic establishes and defines its maritime zones as follows:

SECTION I INTERNAL WATERS AND TERRITORIAL SEA

Article 1

Territorial Sea

The territorial sea of the Saharawi Arab Democratic Republic comprises those areas of the sea having as their inner limit the baselines described in Article 2 of this Law and as their outer limit a line established seaward from those baselines every point of which is at a distance of twelve miles from the nearest point of the baseline.

Article 2

Baselines

1. The normal baseline is the low-water line along the coast of the Saharawi Arab Democratic Republic.
2. If it deems it appropriate, the Saharawi Arab Democratic Republic may define straight baselines for measuring the breadth of the territorial sea in accordance with the applicable principles of international law.
3. Baselines across the mouths of rivers and bays may be defined in accordance with the applicable principles of international law.

Article 3

Internal Waters

1. The internal waters of the Saharawi Arab Democratic Republic include those areas of the sea on the landward side of the baselines from which the breadth of the territorial sea is measured.
2. No foreign vessel shall enter the internal waters except with prior authorization from the Government of the Saharawi Arab Democratic Republic in accordance with its laws and regulations.

Article 4

Sovereignty

The Saharawi Arab Democratic Republic exercises sovereignty in its internal waters and territorial sea, which is understood to include:

- a) the mass of water;
- b) the superjacent airspace;
- c) the corresponding seabed, soil and subsoil; and
- d) the living and non-living resources.

Article 5

Innocent Passage

1. The vessels of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea of the Saharawi Arab Democratic Republic, in accordance with international law and with such laws and regulations as the Saharawi Arab Democratic Republic may adopt.
2. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the Saharawi Arab Democratic Republic.
3. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the Saharawi Arab Democratic Republic if while in the territorial sea it engages in any of the following activities:
 - a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the Saharawi Arab Democratic Republic, or in any other manner in violation of the principles of international law;
 - b) Any exercise or practice with weapons of any kind;

- c) Any act of propaganda or any act aimed at collecting information to the prejudice of the defence or security of the Saharawi Arab Democratic Republic;
 - d) The launching, landing or taking on board of any aircraft or military device;
 - e) The loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the Saharawi Arab Democratic Republic;
 - f) Any act of serious international pollution contrary to international law;
 - g) The carrying out of any fishing activities, research activities or hydrographic surveys without the corresponding authorization or license;
 - h) Any act aimed at interfering with any systems of communication or any other facilities or installations of the Saharawi Arab Democratic Republic; or
 - i) Any other activity not having a direct bearing on passage.
4. Foreign nuclear-powered ships and ships carrying nuclear substances or radioactive products or other inherently dangerous or noxious substances shall notify in advance the competent authorities in the Saharawi Arab Democratic Republic of their entry and passage through the territorial sea.
5. In the territorial sea, submarines and other foreign underwater vehicles are required to navigate on the surface and to show their flag.
6. The Government of the Saharawi Arab Democratic Republic may, by order published in the official Gazette, suspend temporarily the right of innocent passage in such areas of the territorial sea as are specified in the Order if such suspension is essential for the protection of the security of the Saharawi Arab Democratic Republic.

SECTION II

CONTIGUOUS ZONE

Article 6

Contiguous Zone

1. The contiguous zone is comprised of those areas of the sea beyond and adjacent to the territorial sea and having as their seaward limit a line every point of which is twentyfour nautical miles from the nearest point of the baseline used to measure the breadth of the territorial sea.
2. In the contiguous zone, the Saharawi Arab Democratic Republic shall exercise the control necessary to:
 - a) Prevent infringement of its security, customs, fiscal, immigration, or sanitary laws and regulations within its land territory, internal waters or territorial sea; and
 - b) Punish infringement of the above laws and regulations committed within the land territory of the State, its internal waters or territorial sea.

SECTION III EXCLUSIVE ECONOMIC ZONE

Article 7

Exclusive Economic Zone

An exclusive economic zone is hereby established beyond and adjacent to the territorial sea, out to a distance of 200 nautical miles from the baselines used to measure the breadth of the territorial sea.

Article 8

Rights and Obligations

1. In the exclusive economic zone, the Saharawi Arab Democratic Republic has sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and subsoil and the superjacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from water, currents and winds.
2. In the exclusive economic zone, the Saharawi Arab Democratic Republic has exclusive jurisdiction with regard to:
 - a) Marine scientific research;
 - b) The establishment and use of artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, drugs, safety and immigration laws;
 - c) The protection and preservation of the environment;
 - d) Punishing infringements of national laws and regulations pertaining to the above matters, chiefly with regard to fishing and extraction of any other natural resource, marine scientific research and pollution prevention and control; and
 - e) Any other matters which the Government of the Saharawi Arab Democratic Republic may establish, in accordance with international law.
3. There shall be no exploration or economic exploitation of the natural resources of the exclusive economic zone by persons or vessels other than nationals of the Saharawi Arab Democratic Republic, and no scientific research may be conducted within the zone and no artificial island, installation or structure may be constructed, operated or used within the zone, for any of the foregoing purposes, unless such activity has been authorized by the Government of the Saharawi Arab Democratic Republic.

SECTION IV CONTINENTAL SHELF

Article 9

Continental Shelf

1. The continental shelf of the Saharawi Arab Democratic Republic comprises the seabed and subsoil of the submarine areas adjacent to and beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the

continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

2. The Saharawi Arab Democratic Republic shall exercise over its continental shelf sovereign rights for the purposes of exploring and exploiting its natural resources. These rights shall be exclusive to the Saharawi Arab Democratic Republic in the sense that no one shall exercise them without its express consent. These rights do not depend on occupation, effective or notional, or on any express proclamation.

3. The natural resources referred to in the preceding paragraph consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, meaning the organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

4. There shall be no establishment or use of artificial islands, installations or other structures for the purpose of exploring and exploiting the natural resources of the continental shelf, or for any other purpose, unless such activity has been authorized by the Government of the Saharawi Arab Democratic Republic. The Saharawi Arab Democratic Republic exercises jurisdiction over such artificial islands, installations and structures, including jurisdiction with respect to customs, tax, health and immigration laws and safety laws and regulations.

SECTION V GENERAL PROVISIONS

Article 10

Additional Rights under International Law

In addition to matters provided in this Law, the Saharawi Arab Democratic Republic shall enjoy all other rights and jurisdiction States enjoy under the international law as regards maritime zones.

Article 11

Delimitation

Where the maritime entitlements of the Saharawi Arab Democratic Republic overlap with the maritime entitlements of neighbouring states, the Saharawi Arab Democratic Republic may negotiate and conclude agreements with neighbouring states regarding the delimitation of its maritime boundaries.

Article 12

Final Provisions

1. All legislation conflicting with this Law is hereby revoked.
2. This Law shall enter into force on the date of its publication in the official Gazette.

Schedule 2

Dispositif

Boundary Coordinates of the Presumptive Territorial Sea and Exclusive Economic Zone of the Saharawi Arab Democratic Republic

This dispositif details the geographic points of the SADR's territorial sea and EEZ boundaries. Because international law requires maritime boundaries - in the absence of an acceptable baseline, agreement of the States concerned or special circumstances - to begin at the low water line the location of which can change, the two points given below for commencement of the SADR's territorial sea, where the northern land boundary (27° 40' N) intersects the low water line at the seaward extension of such boundary and where the southern land boundary dividing the Cape Blanc peninsula intersects the low water line, the resulting geographic coordinates given at the commencement points of such boundaries, N1 and S1, respectively, are *approximate*.

The coordinates below are referenced to the World Geodetic System 1984 (WGS-84). They have been checked by plotting on an Africa Equidistant Conic projection in ArcGIS version 9.0 software at scales of less than 1:25,000, cross-referenced to published nautical charts of the Saharan Atlantic region. The International Nautical Mile of 1852 metres has been used.

Southern Maritime Boundaries

Territorial Sea: Commencing at a point named S1, being at the low water line of the Cape Blanc peninsula directly south (180° azimuth relative to North) of the land boundary dividing Mauritania and the SADR, being a locating approximately 170 metres south of the centre of the present "Monument of the Castaways", and then directly further south a distance of 12 NM to point S2:

S1: 20° 46' 27" N, 17° 03' 07" W S2: 20° 34' 23" N, 17° 03' 07" W

(being the SADR's territorial sea boundary in the south)

EEZ: Beginning at point S2 and proceeding west along a line with an azimuth of 265° relative to North seaward to a distance of 200NM, sequentially between the following turning points:

S2: 20° 34' 23" N, 17° 03' 07" W S3: 20° 32' 30" N, 17° 34' 26" W

S4: 20° 31' 48" N, 17° 47' 07" W S5: 20° 30' 24" N, 18° 08' 57" W

S6: 20° 28' 26" N, 18° 40' 25" W	S7: 20° 28' 43" N, 18° 36' 06" W
S8: 20° 26' 43" N, 19° 03' 04" W	S9: 20° 25' 13" N, 19° 27' 53" W
S10: 20° 23' 23" N, 19° 55' 41" W	S11: 20° 22' 13" N, 20° 17' 39" W
S12: 20° 20' 59" N, 20° 36' 14" W	

(being the SADR's EEZ boundary in the south)

Northern Maritime Boundaries

Territorial sea: Commencing at a point named N1, being the intersection of the northern land boundary at 27° 40' N and the low water line of the coast, and then sequentially to point N3, a distance 12 NM northwest of the coast:

N1: 27° 40' 00" N, 13° 10' 05" W	N2: 27° 44' 19" N, 13° 16' 07" W
N3: 27° 47' 30" N, 13° 20' 39" W	

(being the SADR's territorial sea boundary in the north)

EEZ: Beginning at point N3 and proceeding initially in the same northwest direction as the territorial sea boundary, to a distance of 55.3 NM from the coast through point N4 to point N5 and then, at point N5 turning into the Atlantic Ocean in a generally south-west direction, sequentially between the following turning points:

N3: 27° 47' 30" N, 13° 39' 20" W	N4: 27° 52' 01" N, 13° 26' 55"
N5: 27° 56' 44" N, 13° 33' 26" W	N6: 27° 56' 44" N, 13° 33' 26" W
N7: 27° 44' 49" N, 13° 47' 08" W	N8: 27° 29' 08" N, 14° 07' 34" W
N9: 27° 20' 00" N, 14° 20' 11" W	N10: 27° 18' 22" N, 14° 39' 19" W
N11: 27° 16' 43" N, 14° 58' 10" W	N12: 27° 12' 18" N, 15° 06' 22" W
N13: 27° 02' 41" N, 15° 29' 44" W	N14: 26° 52' 49" N, 15° 55' 54" W
N15: 26° 38' 25" N, 16° 33' 57" W	N16: 26° 24' 44" N, 17° 10' 11" W
N17: 26° 17' 59" N, 17° 48' 16" W	N18: 26° 11' 40" N, 18° 23' 57" W
N19: 25° 58' 45" N, 18° 36' 06" W	N20: 25° 45' 23" N, 18° 47' 03" W
N21: 25° 21' 16" N, 19° 02' 45" W	N22: 25° 06' 02" N, 19° 11' 16" W
N23: 24° 50' 13" N, 19° 18' 26" W	N24: 24° 34' 19" N, 19° 24' 04" W

(being the SADR's EEZ boundary in the north)

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