Maritime Law, vol. XXXIV
ISSN 0860-7338
DOI 10.24425/pm.2018.125829

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ECONOMIC ARGUMENTS IN THE SETTLEMENT OF INTERNATIONAL MARITIME DISPUTES

Abstract

The aim of the study is to examine the importance of economic argumentation in international maritime disputes. The paper first explains what the international maritime disputes, their sources and types are, what principles they are subjected to. It also established what should be understood by economic arguments, emphasizing their relative nature, as well as showing the potential of the Convention on the Law of the Sea of 1982 as a basis for formulating economic argumentation. The importance of economic argumentation was considered in relation to international disputes regarding the legal status of maritime territories, delimitation of maritime zones, power over the sea and use of the sea.

Research, carried out, leads to the following conclusions: 1) economic arguments are present in the reasoning of the parties as well as dispute settlement bodies. However, their probative value is limited; 2) in disputes related to the status of maritime features economic reasoning appears in the context of necessity to demonstrate that they can be a basis for delimitation; 3) in delimitation disputes, addressing economic arguments is more complex and contradictory. Economic arguments may be useful in the second phase of delimitation when relevant circumstances are considered. However, the existing practice shows that the range of economic arguments is limited (they cannot serve as a reason for correction of natural inequalities). International jurisprudence denies taking into account arguments based on level of economic development or economic or financial difficulties of a state (except for the catastrophic repercussions for the livelihood and economic well-being of the population), the needs of economic development or performance of economic activities (mining, fishing, shipping). An argument associated with assurance of deposit unity is of some importance (when resources are known or readily ascertainable); 4) in disputes concerning the power over the sea some weight is held by an argument associated with the establishment of economic authority, in particular, of a regulatory and control nature; 5) in disputes related to the use of the sea, the importance of economic reasoning

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is varied. In disputes concerning the prompt release, the role of the economic argument is limited. On the contrary, it is relevant in disputes related to the violation of rights and economic interests of States and people, if they are protected by international law.

Keywords: international disputes, settlement of international maritime disputes, maritime delimitation, territorial sovereignty, prompt release, economic arguments in the law of the sea, UNCLOS, international economic law.

INTRODUCTION

Relations between the economy and the sea have been noted and described for centuries[1]. The sea was originally perceived as space which could be used for merchant sailing (albeit not always as an end in itself) or for fishing (constituting an end in itself). Subsequently, scientific and technological progress contributed to enhanced exploration and exploitation capacities as well as expansion into previously inaccessible living and non-living resources of the seas and oceans. Intense exploitation of the seas also posed serious risks to the maritime environment (e.g. overfishing, oil pollution). It also created a need to ensure the adequate legal protection of biodiversity. Besides, climate changes trigger changes in the maritime environment, undoubtedly affecting, on the one hand, possibilities for states to act and the condition of the maritime environment and its economic significance on the other.[2]

The economic benefits from the sea have for a long time also been among the major driving forces behind actions of states with regard to securing their power over the sea (efforts to achieve a monopoly in sailing, fishing). At present, states with considerable exploration and exploitation capacities tend to be proponents of the limitation of the power of coastal states, whilst states with lesser or poor capacities are inclined to expand their power. Economic interests are undoubtedly the root cause underlying those differences .[3]

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[1] See, however, E. A. Posner, A. O. Sykes, *Economic Foundations of the Law of the Sea,* American Journal of International Law 2010, vol. 104, Issue 4, pp. 569 and ff.. According to the authors, they are "the first commentators to analyze the law of the sea from an economic perspective" (p. 569).

[2] See J. Gilas, *Status obszarów morskich*, [in:] J. Łopuski (ed.), *Prawo morskie*, vol. I, Bydgoszcz 1996, pp. 301-302. The author emphasizes that the doctrine of international law of the sea has always understood the economic significance of the law of the sea. At the same time, he adds that today's relationships of the law of the sea with international economic law have intensified.

[3] In this context, there is the problem of justice in the law of the sea. See J. Gilas, *Sprawiedliwość międzynarodowa gospodarcza*, Toruń 1991, pp. 128 and ff.

The law of the sea was for many centuries regulated, above all, by common law and, to a lesser extent, bilateral treaties. The codification efforts undertaken in the 20th century ended in the adoption of multilateral treaties, in particular as part of the first and third UN Conferences on the Law of the Sea. Within the former, economic issues appeared above all in the three Geneva conventions of 29 April 1958, i.e. in the Convention on the High Seas,[4] Convention on Fishing and Conservation of the Living Resources of the High Seas[5] and Convention on the Continental Shelf,[6] although they are also present in the Convention on the Territorial Sea and the Contiguous Zone.[7]

The economic interests of states were raised in a broader scope during the third Conference on the Law of the Sea. The debates were significantly influenced especially by the idea of the New International Economic Order (NIEO), which had been brought up since the 1970s and which the developing countries managed to push through in the form of a resolution of the UN General Assembly.[8] As a result, the international agreements negotiated during the third Conference, i.e. the United Nations Convention on the Law of the Sea (UNCLOS) and the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (Montego Bay, 10 December 1982),[9] referred to the new international economic order[10] and included a series of links to the economy. The Convention explicitly included the economic aspect directly in the names and contents of legal institutions such as the exclusive economic

[4] UNTS vol. 450, p. 1. It entered into force on 30 September 1962; 63 states parties.

[5] UNTS vol. 559, p. 285. It entered into force on 20 March 1966; 39 states parties.

[6] UNTS vol. 449, p. 311. It entered into force on 10 June 1964; 58 states parties.

[7] UNTS vol. 516, p. 205. It entered into force on 10 September 1964; 54 states parties.

[8] Declaration on the Establishment of a New International Economic Order (1 May 1974, res. 3201; together with Programme of Action), Charter of Economic Rights and Duties of States (12 December 1974, res. 3362). The idea of NIEO has not been abandoned. It is still the subject of work and resolutions of the UN General Assembly. See e.g. Towards a New International Economic Order, A/RES/71/236 of 21 December 2016. Also currently, it is controversial. The resolution of 2016 was adopted by the following votes: 131 for, 49 against and 4 abstentions.

[9] UNTS vol. 1836, p. 3. It has been applied temporarily since 16 November 1994, and finally entered into force on 28 August 1996; 150 parties.

[10] We read in the Preamble of the Convention: "Bearing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked." See the commentary to this fragment of the preamble: R. Lagoni, Preamble, in: A. Proelss (ed.), *United Nations Convention on the Law of the Sea. A Commentary*, München 2017, pp. 12-13. The author considers in this context that it is "the most political preamble paragraph," according to which "the special interests and needs of developing countries" should, inter alia, be taken into account. He believes that as a result, the Convention adopted "the principle of preferential treatment of developing countries."

zone, as well as in the contents of the existing or new legal institutions: the continental shelf, contiguous zone, Area.[11]

The concept of the new international economic order proved, however, to be heavily ideologized and became a source of disputes. Therefore, it was not fully included in the UNCLOS. Nevertheless, the Convention constitutes an attempt to institute a new morality, new power sharing that considers both the states other than coastal ones (not only developing countries, but also them) and the interests of the international community. Equity, compensating the action of formal equality, became an important means of the new justice.[12] Thus, the UNCLOS linked the economy and the sea in a specific manner. The Convention did not become an instrument with which to equalize possibilities but only opportunities (geographic and economic factors determine the use of the rights to the sea).[13] Contrary to the NIEO ideas, it also did not lead to an equalization of what geography had made unequal. Nevertheless, to a certain extent it put an end to the economic liberalism by expanding the power of developing states onto significant zones (nationalization of natural resources) and by internationalizing the ocean floor (common heritage of mankind).[14]

The use of the sea is also one of major causes of international disputes and thereto related polemics in the international law doctrine. It is beyond doubt that at least some of those disputes and polemics concern the relations between the economy and the sea. This study will focus on explaining the understanding, scope and role of economic arguments in international maritime disputes. With the above purpose in mind, the notion of international disputes will first be discussed. Then, the characteristics of international maritime disputes will be presented. Finally, in the last part of the paper, the understanding and scope of the use of economic arguments in international maritime disputes will be considered.

[11] According to D. Anderson, *Modern Law of the Sea. Selected Essays,* Leiden-Boston 2008, p. 306, especially "Part XI of the Convention was fashioned as part of the New International Economic Order, designed to benefit developing countries from proceeds of mining. However, the reality has turned out to be different."

[12] See J. Gilas, *Sprawiedliwość*…, pp. 130–131.

[13] *Ibidem*, pp. 133–134.

[14] *Ibidem*, pp. 136–137.

1. INTERNATIONAL DISPUTES

1.1. WHAT IS THE DISPUTE?

The dispute in international law is a legal term, distinguished from such terms as a contentious situation or conflict.[15] However, written international law does not include its definition. The understanding of the dispute was left to the international jurisprudence and international law doctrine. In the context of defining the dispute it is worth distinguishing the dispute in a broad sense (essentially doctrinal) and in a narrow sense (essentially judicial). The dispute in its broad sense may be characterized as any disagreement between at least two subjects of international law concerning a specific object of dispute, regardless of its intensity.[16] In the narrow sense (above all in the court and arbitration discourse) the dispute means "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[17]

The definition formula of the dispute adopted in the *Mavrommatis* case has remained valid until present and is explicitly referred to by international courts, including the International Court of Justice, and international arbitration, regardless of the matter on which a judgment is issued.[18] It was also accepted in the case-law of the sea[19]. The ICJ supplemented this formula with additional arrangements.

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[15] See, for instance, commentaries on the notion of the dispute contained in Article 2 (3) of the UN Charter. See Ch. Tomuschat, Article 2(3), [in:] B. Simma, D.-E. Khan, G. Nolte, A. Paulus (eds.), *The United Nations Charter. A Commentary*, vol. I, Oxford 2012, p. 192; J. Charpentier, B. Sierpinski, Article 2, paragraph 3, in: J.-P. Cot, A. Pellet, M. Forteau (coord.), *La Charte des Nations Unies. Commentaire article par article*, vol. I, Paris 2005, pp. 430–431.

[16] See e.g. J. Merills, *The Means of Dispute Settlement*, [in:] M. Evans (ed.), *International Law*, Oxford 2006, pp. 533–534.

[17] The definition was determined by the Permanent Court of International Justice, *The Mavrommatis Palestine Concessions*, judgment of 30 August 1924, P.C.I.J. Publ. 1924, Series A, No. 2, p. 5 (at 11).

[18] See e.g. judgment of the ICJ in the Case of the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, I.C.J. Rep. 2011, p. 70 (at 84), para. 30, with the cited case-law. See also Y. Tanaka, *The Peaceful Settlement of International Disputes*, Cambridge 2018, pp. 8–9; C. Santulli, *Droit du contentieux international*, Issy-les-Moulineaux 2015, pp. 18–19.

[19] See judgment of the ICJ in the Case of Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007, I.C.J. Rep. 2007, p. 659. ICJ stated: "With regard to the dispute concerning the maritime delimitation, the Court finds that the exchange of letters of 1977 did not mark the point at which the dispute crystallized, according to the well-established definition of a dispute set down by the Permanent Court of International Justice, namely that "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, Judgment*

Thus, according to the International Court of Justice, the dispute means that "the claim of one party is positively opposed by the other." The dispute must be of a real and not hypothetical nature (it does not suffice just to allege that a dispute exists), and its object must be possible to determine.[20] Therefore, the claims and contestation must be sufficiently precise and specific[21] as well as existing on the critical date (the date upon which the dispute crystallized).[22] The ICJ stressed that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for." In this context: "While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter."[23] The existence of the dispute may be the object of the dispute and is subject to assessment by international dispute settlement bodies.[24]

The international dispute is distinct, in particular, from a conflict. It is noted that the conflict is necessarily of specific nature. The international bodies which settle a dispute arising from a conflict may only assess its legal aspects.[25] The international dispute may turn into an international conflict, including an armed conflict. The dispute may not only precede the conflict, but also continue after the conflict has ended. The ended conflict may also be the source of new disputes.

No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11). No claims or counter-claims were articulated by the two Parties at the time and the suggested process of negotiations came to nought" (para. 130, at 700). See also judgment of the International Tribunal of the Law of the Sea, M/V Norstar Case (Panama v. Italy), Preliminary objections, Judgment of 4 November 2016, Case No. 25, at 23, para. 85, where the Tribunal referred to the Southern Bluefin Cases, in which it shortly stated: "[A] dispute is a 'disagreement on a point of law or fact, a conflict of legal views or of interests' (Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11)."

[20] As C. Santulli, *op. cit.*, pp. 235–232, emphasizes the dispute should be *"né, réel et actuel"*. Meeting these criteria determines the admissibility of the complaint.

[21] However, the claim may be explicit or implicit, while the contest may be express or silent. *Ibid.*, p. 19.

[22] See Sovereignty over Pedra Branca/Pulau Batu Puteh Middle Rocks and South Ledge, Malesia v. Singapore, 23 May 2008, ICJ Rep. 2008, p. 12 (at 27–28), para. 32.

[23] See the judgments of the ICJ in the Case of Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, I.C.J. Rep. 2011, p. 70 (at 84), para. 30, along with the cited case law, and the Fisheries Jurisdiction Case (Spain v. Canada), Jurisdiction of the Court, Judgment of 4 December 1998, I.C.J. Rep. 1998, p. 432 (at 447-449), paras. 29-31. See also on criteria of the existence of a dispute: Y. Tanaka, *op. cit.*, pp. 9–12.

[24] Interpretation of Peace Treaties, Advisory Opinion of 30 March 1950, I.C. J. Rep. 1950, p. 65 (at 74). The ICJ stated here: "Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence."

[25] Y. Tanaka, *op. cit.*, p. 9.

1.2. WHAT IS THE INTERNATIONAL DISPUTE?

This study considers international disputes. Therefore, the question arises what makes the dispute international.[26] It is a complex issue. From the substantive point of view, any issue regulated by international law may be the object of an international dispute.[27] Consequently, international disputes may include not only disputes regarding relations between states (e.g. disputes over the state borderlines and sovereignty over a territory, disputes over natural resources in borderlands, disputes over the failure to fulfil treaty obligations, disputes related to claims resulting from international or internationalized armed conflicts), but also purely internal ones (e.g. the infringement of citizen/human rights by the state of which the individual concerned is a citizen, disputes between parties fighting in a non-international armed conflict) or cross-border disputes (e.g. expropriation by the state of a foreign investor's property).

From the perspective of the subjects involved, in classic international law, only states could be parties to the dispute. Following transformations of this law (its humanization, emergence of integration processes, globalization of relations in the world), also international organizations – intergovernmental and integrative ones (acting as both applicants and respondents) as well as individuals (natural persons, legal persons, their associations), who may, however, act as applicants only, may be parties to the dispute.

2. INTERNATIONAL MARITIME DISPUTES AND THEIR SETTLEMENT

2.1. WHAT DOES THE MARITIME DISPUTE MEAN?

2.1.1. MARITIME DISPUTES AND MARITIME CLAIMS

The history of the international community is inextricably linked to the seas and oceans. Coastal states repeatedly laid claims to the rule over fragments of or

[26] See Ch. Tomuschat, *op. cit.*, pp. 193–195; J. Charpentier, B. Sierpinski, *op. cit.*, pp. 432–433.

[27] See C. Santulli, *op. cit.*, pp. 19–22, who distinguishes substantially and formally international disputes. He notes: "Un litige est *matériellement international* lorsqu'il comporte un «élément d'extranéité », celui-ci pouvant résulter de critères spatiaux ou personnels." In this way, the author excludes disputes between states and individuals (primarily citizens of that state) from this approach in the sphere of international protection of human rights. On the other hand, in the case of formally international disputes, he distinguishes two elements of the dispute: variable (c'est qui est demandé - la prétention et sa contestation) and invariable (caractère juridique; ce qui est demandé ou refusé est ce que le droit prévoit). He concludes finally: "Le différend est international si l'élément invariable est l'état du droit international."

even entire seas (the idea of *mare clausum*) or, opposing those claims, demanded the openness of the seas. Land-locked states, in turn, sometimes applied for gaining access to the sea.[28] At present, maritime claims pertain to above all the delimitation of territorial maritime sovereignty as well as access to non-living and living maritime resources in zones not subject to sovereign state control. In asserting those claims the states quote arguments of sovereignty, security and environment protection.[29]

The fact that international claims in general, including maritime claims, are put forward does not yet mean that there is a dispute. The claim must be positively opposed, questioned for a dispute to arise. Nevertheless, making claims to the same (e.g. the same zone of the sea, the same resources), and even just partial overlapping of the claims may generate international disputes (e.g. claims for resources of the Arctic – Canada and the United States dispute how to divide the Beaufort Sea and the status of the Northwest Passage, or Antarctica – claims made by Argentina, Australia, Chile, France, New Zealand, Norway, and the UK (some overlapping) for three-fourths of the continent, France and Vanuatu claim Matthew and Hunter Islands, east of New Caledonia).[30]

Moreover, no maritime dispute will exist when a protest or objection is formulated, but it is of general nature. Such a situation may occur when the interested subject protests in general, e.g. against the violation of the maritime regime, against the intentional pollution of the sea or against the postulates to unfreeze frozen claims to maritime territories (the case of Antarctica). The same applies to a general objection against an emerging practice which might become common law as is the case e.g. with the objection presented by the United States during the third Conference on the Law of the Sea against the expansion of territorial seas onto the straits used for international navigation.[31]

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[28] See e.g. J. Kraska, *Maritime Power and the Law of the Sea. Expeditionary Operations in World Politics,* Oxford 2011, pp. 33 and ff.; T. Treves, *Historical Development of the Law of the Sea*, [in:] D. R. Rothwell, A. G. Oude Elferink, K. N. Scott, and T. Stephens (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford 2017, pp. 3 and ff.

[29] See J. Kraska, *op. cit.*, especially chapters 6 and 7.

[30] Data on international disputes, including maritime disputes, provided [in:] World Factbook CIA: https://www.cia.gov/library/publications/the-world-factbook/fields/2070.html (access: 16 May 2018). See also L. Łukaszuk, *Współpraca i spory międzynarodowe na morzach. Wybrane zagadnienia prawa, polityki morskiej i ochrony środowiska*, Warszawa 2009.

[31] Against the backdrop of disputes over the passage through the Strait of Hormuz: Transit Passage Rights in the Strait of Hormuz and Iran's Threats to Block the Passage of Oil Tankers, "Insights" 2016, vol. 16, issue 16.

2.1.2. MARITIME DISPUTES AND VIOLATIONS OF OBLIGATIONS STEMMING FROM THE INTERNATIONAL LAW OF THE SEA

The international law of the sea generates treaty and customary international obligations. The parties do not always fulfil them. Occasionally, obligations are violated. However, it should be emphasized that not every breach of an international obligation, including an obligation under the law of the sea, means that a dispute exists. Fulfilment of international obligations may indeed be subject to scrutiny by international bodies. The scrutiny does not have to be related to the competence to consider complaints. General means may be employed, such as review and evaluation of state reports, assessment of the conduct of the parties on the basis of the information obtained from various sources. The reaction of other parties to the obligation is crucial for the occurrence of a dispute originating from a breach of an international obligation. Nonetheless, the breach may meet various responses of the parties. The reaction may be passive, ambiguous or active – both in the positive and in the negative meaning. Only in the latter case may the breach of an obligation lead to a dispute.

2.1.3. NATURE OF MARITIME DISPUTES

The title of this study mentions maritime disputes. The question arises what elements make the dispute maritime. The basic, most natural association brings together the maritime nature of the dispute with its object: the seas and oceans. Therefore, it could be said that maritime disputes are any disputes pertaining to the seas and oceans. However, a doubt arises whether the notion of maritime disputes should not be limited to those maritime issues which are regulated by international law. It seems that such an approach may be dangerous if we consider that international law does not regulate all maritime problems. That would raise the question what is meant by disputes pertaining to maritime matters non-regulated by international law. Nevertheless, it is worth noting that not every claim laid in the dispute concerning the seas and oceans will obtain the same protection under international law, or no court or arbitration protection anyway. In the case of international courts and international arbitration tribunals, their competence comprises only disputes concerning the interpretation and application of international law (legal dispute). Therefore, it is important that the object of a legal dispute be regulated by international law. Otherwise, it may be subject at most to non-judicial methods of dispute settlement, especially direct negotiations.

It can also be considered what it means that the object of dispute must pertain to the seas and oceans, or, in other words, whether maritime disputes are solely those concerning sea and oceanic waters. If we look at the UN Convention on the Law of the Sea, we will notice that it also regulates other problems, e.g. those

pertaining to lands (islands, ice-covered areas), air zones (freedom of flight over the High Seas), maritime technologies. Should the disputes concerning only these matters be treated as maritime disputes? The answer should be in the affirmative since these matters are inextricably linked to the sea and they do not have autonomous relevance under the regulations of international law (e.g. the freedom of flight over the High Seas is governed by the law of the sea since it concerns the air space over the sea). Nevertheless, there might be doubts regarding borderline (shared) issues such as the use of maritime military bases.

From the perspective of the qualification of a dispute as a maritime dispute, it is an open issue whether the criterion of the subject, or who is party to the dispute, matters here. The international law of the sea generates obligations between states regardless of their location with respect to the sea. What is more, the states concerned do not necessarily have to be coastal or archipelagic states, although in practice they are typically parties to maritime disputes. To a certain extent, the law of the sea is also open to international organizations as parties bound by the obligations under this law. In particular, in accordance with the UNCLOS (Annex IX), parties to obligations and disputes may be organizations to which their respective state parties to the Convention transferred the competence on matters regulated by the Convention. However, recognizing that states and some international organizations may be parties to maritime disputes is not of distinguishing significance, since the same subjects may be parties to disputes in other areas of international law. Individuals (e.g. a pirate or captain of a ship) may not be parties to obligations and disputes.

Finally, it could be analyzed whether from the perspective of recognizing a dispute as a maritime one it is relevant who considers the dispute. Theoretically, this has no key relevance. Maritime disputes may, after all, be settled without the involvement of a third party. Moreover, courts of general jurisdiction, such as the International Court of Justice, are bodies considering disputes pertaining to the seas and oceans. Nevertheless, it is worth distinguishing maritime disputes in a strict and broad meaning. The former will be disputes considered by bodies clearly associated with the international law of the sea (identified as competent to settle disputes), even if their jurisdiction is general (e.g. the ICJ).

Maritime disputes, in the broad sense, will be disputes on which judgments may be passed by bodies which do not belong to the institutional structure of the law of the sea but may settle disputes concerning the use of the sea. These will be e.g. disputes settled by WTO bodies, which adjudicate on international trade disputes (e.g. disputes concerning trade in shrimp, sardines, seals or turtles), investment arbitration tribunals (disputes concerning investments in maritime installations or artificial islands) or e.g. courts of regional integration organizations provided that the integration comprises maritime matters (e.g. maritime

transport, fishing, maritime environment protection). Disputes of this kind remain, however, beyond the scope of this study.

2.1.4. INTERNATIONALITY OF MARITIME DISPUTES

Maritime disputes are described using the adjective "international". As in the case of general considerations, it can be assumed that this refers to any dispute subject to international regulation. The international nature of the object of regulation is, in principle, of secondary importance. What is important is whether the international law-makers decided to "internationalize" the regulated issues. This means that, at least theoretically, a national issue (domestic legal relations) may become the subject matter regulated by international law. The international law of the sea sometimes regulates matters located inside states, e.g. the legal status of inland waters and territorial sea, historic bays, passage through internal archipelagic waters, environment pollution from land sources. However, each time a foreign element comes into play here, at least in the context of delimitation of power between states, awarding contentious maritime territories to a determined state, infringement of other parties' rights or interests. In consequence, the international maritime dispute always pertains to an international situation.

The internationality of maritime disputes gains particular intensity when their object involves territories considered as international, i.e. not subjected to the state rule but constituting things of public use (*res usus publicum*; the High Seas), common things (*res communis*; the Area). Also, the qualification of maritime disputes as international is undoubtedly influenced by the aspect related to the parties involved. Two or more states are parties to those disputes. International organizations can also be parties thereto. That makes the dispute intrinsically international.

2.1.5. INTENSITY OF INTERNATIONAL MARITIME DISPUTES

International disputes may vary in their intensity. In international law, apart from ordinary disputes, there are also those which are eligible by posing a risk for or constituting a violation of the international peace and security. The latter are of particular interest to the collective security structures, including the UN Security Council. They can transform into maritime conflicts and even into conflicts going beyond maritime territories. Such disputes include the Argentinian-British dispute over the Falkland Islands (1982; in 1995 the parties signed an agreement to never again settle this dispute with the use of force), and to some extent also the on-going dispute over Gibraltar, which occasionally intensifies (Morocco, Spain v. United Kingdom).

It is worth noting, at this point, that the parties involved in the dispute are obliged to settle it peacefully, which means refraining from the use of force, and in the case where the use of force is to some extent permitted (law enforcement operations), the appropriate international standards must be complied with.[32]

2.2. SOURCES OF INTERNATIONAL MARITIME DISPUTES

Diverse causes underlie international disputes. They can be called sources of disputes. The sources may be classified as direct and indirect. The former constitute the direct cause of the dispute. For instance, sinking of a foreign ship at sea may be considered as a direct source of an international dispute. Direct sources may be the only causes of disputes. However, it is not infrequent that the sources of disputes are deeper, more systemic or general, capable of generating one or more disputes. These will be indirect sources of disputes or dispute-generating matters. While their existence or even development does not always lead to disputes, as a rule it has serious potential.

In the case of international maritime disputes this potential can be assumed to be related to the very existence of the seas and oceans. Maritime waters as a whole constitute a geophysical unity, where it is much harder, than on land, to delimitate borders and guard them. States vary in terms of their location with respect to the seas and oceans. Not each state has (equal) access and equal possibilities of benefiting from the seas and oceans. Therefore, claims are put forward to gain or expand access to the sea. Naturally, there is also the overlap between the zones controlled by states with adjacent and, even if to a lesser extent, those with opposite coasts.[33] Geographical inequalities also cause each state to have different opportunities of using maritime waters for navigation (the problem of freedom of navigation or monopoly on determined waters), living and non-living resources,

[32] See ITLOS, M/V Saiga Case, Saint Vincent and Grenadines v. Guinea, Judgment of 1.7.1999, paras. 155 and 156. The Convention "requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law." In law enforcement operations at sea first give an "auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered […]."

[33] According to World Factbook, *Disputes – International*, "overlapping limits due to adjacent or opposite coasts create the potential for 430 bilateral maritime boundaries of which 209 have agreements that include contiguous and non-contiguous segments (195 independent states, 71 dependencies, areas of special sovereignty, and other miscellaneous entities)."

building of ports and their surroundings, maritime installations or laying of cables and pipelines. All that engenders rivalry and tensions, which may lead to disputes.

The dispute-generating nature of the seas and oceans manifests itself as well in connection with the environmental changes that affect them. That causes maritime waters to show dynamics which has implications for the states. At present, the developments in the natural environment are above all a consequence of climate changes. The changes contribute to serious transformations affecting islands and land coastlines (e.g. in Oceania, South Asia), composition of maritime waters, course of sea currents, shifting of the habitat of marine species (e.g. individual states' resources of marine species become depleted). New routes open up for navigation, fishing and maritime mining (e.g. in the Arctic). That, in turn, prompts the states to redefine their interests and policies, and put forward maritime claims, generating new fields for disputes and conflicts[34].

Humanity also develops its technical capacities of exploration and exploitation. That applies to the seas and oceans too. Scientific and technological progress enabled, among other things, deep-sea shipping, mass-scale and partially at-sea catch processing, exploration and exploitation of deep-sea living resources and non-living seabed resources, laying of cables and pipelines at large distances, building of artificial islands, platforms and installations, building of undersea cities, using the seas for energy or military security purposes, satellite control over the seas. However, scientific and technological progress also creates risks. Not all states have equal possibilities of benefiting from the seas. The risks including e.g. overfishing and destruction of living species, uncontrolled exploitation of non-living resources, sea pollution, and use of the seas for purposes that breach security interests (not only military security) of other states. The new opportunities and threats open up potential fields of disputes.

International maritime disputes frequently have serious historical entanglements. They are the consequence of the past, especially the colonial past (mainly in Africa and Latin America)[35]. The colonial powers did not always precisely demarcate their power on land and even less so at sea. Established boundaries were repeatedly artificial and after decolonisation they are being challenged. Moreover, in many places decolonization occurred spontaneously rather than rationally. As a result, new independent states were shaken by internal upheavals for a number of years. Sometimes they tried to unite, other times they fell apart or experienced

[34] See i.a. B. Kunoy, *Assertions of Entitlement to the Outer Continental Shelf in the Central Arctic Region,* International and Comparative Law Quarterly 2017, vol. 66, Part 2, pp. 367 and ff.

[35] See esp. Th. Okonkwo, *Maritime Boundaries Delimitation and Dispute Resolution in Africa,* Beijing Law Review 2017, No. 8, pp. 55 and seq. The author mentions that of the 100 maritime boundaries identified in Africa, only 32 were resolved and 68 unresolved or contested (the end of 2017 – p. 62).

secession (e.g. Eritrea, South Sudan, Caribbean and Central American countries). Transformations of states as entities at least partially translated into their control over the seas and the ensuing disputes (e.g. Australia and Timor-Leste signed a permanent maritime border treaty, scrapping a 2007 development zone and revenue sharing arrangement between the countries).

On some occasions, the root cause of maritime disputes also lies in not fully ended armed conflicts. Such conflicts may come to an end in terms of the cessation of hostilities, yet a peace treaty is not always concluded with a resolution of all border-related problems (e.g. Paracel Islands are occupied by China, but claimed by Taiwan and Vietnam; Iraq's lack of a maritime boundary with Iran prompts jurisdiction disputes beyond the mouth of the Shatt al Arab in the Persian Gulf as one of the reasons of war between them, the sovereignty dispute over the islands of Etorofu, Kunashiri, Shikotan, and the Habomai group, known in Japan as the "Northern Territories" and in Russia as the "Southern Kurils," occupied by the Soviet Union in 1945, now administered by Russia, and claimed by Japan; Japan and South Korea claim Liancourt Rocks (Take-shima/Tok-do) occupied by South Korea since 1954).

Finally, vague provisions of international treaties may be a source of maritime disputes. They will lead to divergent interpretations and varying perceptions of proper fulfilment of obligations or application of treaties (e.g. lack of clarity as to Article 234 UNCLOS: Ice-covered areas, which generate disputes over what coastal states may do[36]). In this context, the framework nature of the basic sea conventions may contribute to maritime disputes, since the conventions leave various matters to be regulated in particular regulations (both treaty-based and, especially, unilateral, e.g. with regard to the Arctic – Article 234 UNCLOS). Furthermore, international agreements sometimes set forth general obligations whose understanding and scope may also generate disputes (e.g. the problem of the rights of landlocked states to use the sea).

2.3. TYPES OF INTERNATIONAL MARITIME DISPUTES

Like international disputes in general, international maritime disputes may be classified in various ways. The parties to those disputes are above all states, in some cases also regional integration organizations (provided that they have the appropriate competence). However, it is the object of dispute and not the nature of its parties that is essential for the classification of maritime disputes. In this context, it is advisable to distinguish jurisdictional disputes, concerning the legal

[36] Certain arrangements in this regard were made by the United States, the USSR and Canada, but not necessarily by other parties to the Montego Bay Convention. See J. Symonides, *op. cit.*, pp. 173, 157.

status, delimitation disputes and those related to the use of the sea. International jurisprudence differentiates, in particular, the first three of the aforementioned dispute categories.[37] An organization of regional integration, as not having its own territory, may not be a party to disputes of the first, second and third types. However, it may expect contentious matters to be regulated by the state applying for accession[38] or it may support state parties in their disputes with third countries. The integration organization may be a party to disputes of the third type if it obtained or took over competence over maritime matters from state parties and the third country accepts the organization in its capacity of party to the obligation and dispute.

Jurisdictional disputes concern power over the sea (*dominio maris*) and are typically complex in nature[39]. They usually pertain to the status of waters (e.g. the United States v. Canada dispute over the passage by the north-western route; according to Canada, these are internal waters, according to the United States these are international straits[40]) and sovereignty over waters, islands, rocks and reefs (e.g. managed dispute between Canada and Denmark over Hans Island in the Kennedy Channel between Canada's Ellesmere Island and Greenland, Madagascar claims the French territories of Bassas da India, Europa Island, Glorioso Islands, and Juan de Nova Island, Haiti claims US-administered Navassa Island, Iceland, the UK, and Ireland dispute Denmark's claim that the Faroe Islands' continental shelf extends beyond 200 nm, Iran and UAE dispute Tunb Islands and Abu Musa Island, which Iran occupies, the 1992 ICJ ruling advised a tripartite resolution to a maritime boundary in the Gulf of Fonseca advocating Honduran

[37] The issue of distinguishing the nature of a dispute is sometimes the object of a dispute. See: The South China Arbitration, Republic of Philippines v. China, Award of 12 July 2016, PCA Case No. 2013-19, paras. 170, 204. See also D. R. Bugajski, *Chińsko-japońskie spory morskie*, Prawo Morskie 2013, vol. XXIX, pp. 197-198, who distinguishes territorial (border) disputes and jurisdictional disputes (over law), without questioning sovereignty, dividing them into disputes regarding delimitation and other jurisdictional disputes.

[38] See the EU attitude towards reservations of Slovenia concerning the accession of Croatia. See the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009, Croatia v. Slovenia, Partial Award of 30 June 2016, paras. 12 and seq., 115, 220, 226.

[39] We can also talk about mixed jurisdictional disputes, which concern both sea and land issues. They raise doubts as to the jurisdiction of the dispute resolution bodies set out in UNCLOS. See I. Buga, *Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals,* The International Journal of Marine and Coastal Law 2012, vol. 27, No. 1, pp. 59 and ff.

[40] J. Symonides, *Problemy i kontrowersje dotyczące implementacji i interpretacji konwencji o prawie morza w kwestiach wolności żeglugi w Arktyce*, Prawo Morskie 2013, vol. XXIX, pp. 169–172.

access to the Pacific; El Salvador continues to claim tiny Conejo Island, not identified in the ICJ decision, off Honduras in the Gulf of Fonseca).

Disputes concerning the determination of the status of a specified element, usually islands, rocks and other maritime features are a particular (in some sense an atypical) category. This concerns the divergences in the assessment of the legal nature of the features, and in particular whether they can be considered the basis for the determination of an exclusive economic zone and continental shelf, and therefore, areas with a major economic impact for many countries. They are not too numerous but they are significant and often incite great emotions. An example of such a dispute is the dispute between China and the Philippines on the Spratly Islands.

Delimitation disputes concern the demarcation of the power over the sea. They are often historically entangled (with their factual status in some cases dating back to the times of geographic discoveries), complex, long-standing, abating at times, then reviving again (various causes may trigger the revival of disputes: changes in the state policy, unsettled or partially settled old dispute, lack of acceptance of a judgment issued, especially of an arbitration award; e.g. Chile and Peru rebuff Bolivia's reactivated claim to restore the Atacama corridor, ceded to Chile in 1884, but Chile offers instead unrestricted but not sovereign maritime access through Chile for Bolivian products; Chile has offered instead unrestricted but not sovereign maritime access through Chile to Bolivian natural gas; Chile rejects Peru's unilateral legislation to change its latitudinal maritime boundary with Chile to an equidistance line with a southwestern axis favouring Peru; Azerbaijan, Kazakhstan, and Russia ratified Caspian seabed delimitation treaties based on equidistance, while Iran continues to insist on a one-fifth slice of the sea).

Finally, the third type of disputes are those related to the use of the sea. They typically regard current interests of states. At their source specific and current behaviours of States lie, such as disputes over fishing or exploitation of non-living resources (e.g. in 2014, Costa Rica brought Nicaragua to the ICJ over offshore oil concessions in the disputed region), sea pollution.

Maritime disputes can also have a complex character.[41] Determining the nature of the dispute has implications for decisions on jurisdiction and the merits. For example, in a whaling dispute the ICJ delivered a judgement on 31.3.2014[42] that it did not concern delimitation to which the parties agree. In this context, it held:

[41] As, for example, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), judgment of 8.10.2007, ICJ Rep. 2007, p. 659, which concerned both independence and delimitation.

[42] Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014, p. 226 (at), paras. 39 and 40. See also the South China Sea Arbitration, Philipines v. China, award of 12.7.2016, PCA Case No. 2013-19, paras. 204, 283, 691.

> The question remains whether JARPA II involves the exploitation of an area which is the subject of a dispute relating to delimitation or of an area adjacent to it. Part of the whaling activities envisaged in JARPA II take place in the maritime zone claimed by Australia as relating to the asserted Australian Antarctic Territory or in an adjacent area. Moreover, the taking of whales, especially in considerable numbers, could be viewed as a form of exploitation of a maritime area even if this occurs according to a programme for scientific research. However, while Japan has contested Australia's maritime claims generated by the asserted Australian Antarctic Territory, it does not claim to have any sovereign rights in those areas. The fact that Japan questions those maritime entitlements does not render the delimitation of these maritime areas under dispute as between the Parties. As the Court stated in the *Territorial and Maritime Dispute* case "[t]he task of delimitation consists in resolving the overlapping claims by drawing a line of separation between the maritime areas concerned" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, pp. 674-675, para. 141). There are no overlap ping claims of the Parties to the present proceedings which may render reservation (b) applicable.

It also stated as follows:

> Moreover, it is significant that Australia alleges that Japan has breached certain obligations under the ICRW and does not contend that JARPA II is unlawful because the whaling activities envisaged in the programme take place in the maritime zones over which Australia asserts sovereign rights or in adjacent areas. The nature and extent of the claimed maritime zones are therefore immaterial to the present dispute, which is about whether or not Japan's activities are compatible with its obligations under the ICRW.

In turn, the arbitration tribunal said the award of merits of 12.7.2016 and the earlier Award on Jurisdiction and Admissibility, award of 29.10.2015[43] where it held that:

> these Submissions reflect a dispute concerning the status of maritime features in the South China Sea and not a dispute concerning sovereignty over such features. The Tribunal also held that this is not a dispute concerning sea boundary delimitation, insofar as "the status of a feature as a 'low-tide elevation', 'island', or a 'rock' relates to the entitlement to maritime zones generated by that feature, not to the delimitation of such entitlements in the event that they overlap." The Tribunal noted, however, that the possible existence of overlapping entitlements to an exclusive economic zone or continental shelf could have "practical considerations for the selection of the vertical datum and tidal model against which the status of the features is to be assessed".

[43] PCA Case No. 2013-19, para. 283.

2.4. SETTLEMENT OF INTERNATIONAL MARITIME DISPUTES

2.4.1. PRINCIPLES OF SETTLEMENT OF INTERNATIONAL MARITIME DISPUTES

The settlement of international maritime disputes is governed by the same substantive and procedural rules as other international disputes. Therefore, it is sufficient to reiterate and emphasize that the principle of peaceful settlement of disputes, in this case maritime ones, is of primary importance (Article 2 (3) of the UN Charter). Its content is, to a large extent, explained in the Manila Declaration on the Peaceful Settlement of International Disputes of 15 November 1982.[44]

In accordance with this Declaration: (i) States shall act in good faith, in conformity with the purposes and principles enshrined in the UN Charter with a view to avoiding disputes among themselves; (ii) States shall settle their disputes exclusively by peaceful means in such a manner that international peace and security, and justice, are not endangered; (iii) disputes shall be settled on the basis of the sovereign equality of States, in accordance with the principle of free choice of means in conformity with the UN Charter and the principles of justice and international law; (iv) States shall seek, in good faith, and in a spirit of co-operation an early and equitable settlement of their disputes. In seeking such a settlement, they shall agree on such peaceful means as may be appropriate to the circumstances and the nature of their dispute; (v) State parties to a dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security and make more difficult or impede the peaceful settlement of the dispute, and shall act in accordance with the purposes and principles of the United Nations.

As in the case of disputes not concerning maritime matters, international maritime disputes are also governed by the same procedural rules. This applies, above all, to the settlement of maritime disputes in court or arbitration. Without discussing the matter in detail, it is worth mentioning here that in maritime disputes the international court itself decides *ex officio* on its jurisdiction[45] as well as assesses whether any dispute exists and of what nature it is.[46] Moreover, the rules accepted in maritime disputes include the following: (i) once initiated, the dispute may not be brought to an end due to the withdrawal of one party in the course of

[44] A/RES/37/10.

[45] The Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009, Croatia v. Slovenia, Partial Award of 30 June 2016, paras. 148-150.

[46] Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment of 24 September 2015, I.C.J. Rep. 2015, p. 592 (at 602–603), para. 26.

the settlement proceedings;[47] (ii) it is prohibited to change the scope of the dispute brought to court during the proceedings;[48] (iii) it is prohibited to exacerbate and extend the dispute while it is being considered;[49] (iv) the parties to the dispute are bound by the dispute settlement methodology adopted in an international agreement and by jurisprudence developed in accordance with this methodology on the (formally) *inter partes* basis.[50]

2.4.2. MEANS OF SETTLEMENT OF INTERNATIONAL MARITIME DISPUTES

Under the principle of peaceful settlement of international disputes the parties assuming international obligations, in particular contractual obligations, are capable of determining a dispute settlement methodology. Unless they make specific arrangements in the case, they agree that various methods will be admissible, in accordance with their common choice. However, in many instances parties to international agreements specify the methods that might be applied, the order of using them, the governing law for the settlement of disputes, complaint legitimacy, dispute settlement procedure, manner of putting the dispute to an end, including the issuance of a judgment or award and its effectiveness. The methodology of dispute settlement undoubtedly has an impact on the possibility and manner of using arguments by the parties.

In the case of the international law of the sea there is a considerable diversity of treaty-based solutions. Considering the highly representative nature of the UNCLOS, it will suffice to briefly outline the methodology of settling disputes related to the interpretation and application of the Convention set forth therein.[51]

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[47] The Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009, Croatia v. Slovenia, Partial Award of 30 June 2016, para. 142.

[48] Fisheries Jurisdiction Case (Spain v. Canada), Jurisdiction of the Court, Judgment of 4 December 1998, I.C.J. Rep. 1998, p. 432 (at 447), para. 29; Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Rep. 2007, p. 659 (at 659 and ff.), paras. 108 and seq., esp. paras. 109-110.

[49] The South China Arbitration Case, Republic of Philippines v. China, Award of 12 July 2016, PCA Case No. 2013-19, paras. 1169–1173.

[50] The Arctic Sunrise Case, Netherlands v. Russia, Award on the merits of 14 August 2015, PCA Case No. 2014-02, paras. 366–369.

[51] See e.g. B. H. Oxman, Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals, [in:] D. R. Rothwell, A. G. Oude Elferink, K. N. Scott, and T. Stephens (eds.), *op. cit.*, pp. 394 and ff.; D. R. Rothwell, T. Stephens, *The International Law of the Sea,* Oxford-Portland 2010, pp. 439 and ff.; D. Anderson, *op. cit.*, pp. 503 and ff.; R. Churchill, *Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade*; T. Treves,

The Montego Bay Convention contains an entire part on dispute settlement (Part XV, Article 279-299).[52] It adopts the principle of peaceful settlement of disputes, in accordance with Article 2 (3) of the UN Charter and under the means referred to in Article 33 of the UN Charter (Article 279). Thus, it is possible to use negotiations, other non-judicial methods, judicial methods, and dispute settlement by the competent body of the international/regional integration organization. The Convention-based system of dispute settlement is not exclusive since the parties to the Convention may at any time agree on the use of other methods (Article 280). The solutions adopted in the UNCLOS only apply if the parties make no such choice (Article 281 (1)).

The general methods of dispute settlement defined in the Convention comprise the exchange of views (Article 283), conciliation (Article 284), three compulsory methods to choose from by the parties to the Convention, applicable should the previous methods fail: the International Tribunal for the Law of the Sea, the International Court of Justice and international arbitration (Article 287). Some matters, however, are subject to specific methods. Thus, disputes concerning the Area are settled in accordance with Article 186 and seq. by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (Article 285). Furthermore, the Convention introduces limitations of court and arbitration jurisdiction in some cases (Article 297), and allows the parties to introduce individually applicable differences on determined issues (Article 298). Finally, it provides for specific solutions in the event if a party to the dispute is an international organization as per Annex IX (Article 7).

International maritime disputes, like most international disputes in other areas of international law, are settled above all with the use of non-judicial methods, in particular negotiations. Indeed, these methods are less restrictive for the parties (more flexible), confidential, less expensive, better suited to the parties' interests. They can also be less long-lasting (rapidity). In this context, it is interesting that sometimes non-judicial methods can also be used after the application of court methods, as in the *Beagle Channel Case* (arbitration, 18 February 1977[53]), when a recourse to papal mediation was finally used (1980[54]).

Maritime disputes characterized by a high degree of tension as well as particularly serious, complex disputes are most frequently settled in court or arbitration proceedings. However, the use of these methods has its formal constraints,

A System for Law of the Sea Dispute Settlement, [in:] *The Law of the Sea. Progress and Prospects,* eds. D. Freestone, R. Barens, D. M. Ong, Oxford 2006, pp. 388 and ff., 417 and ff.

[52] See A. Serdy, T. Treves, P. Ferrara, commentaries on Articles 279 and ff., [in:] A. Proelss, *op. cit.*, pp. 1813 and ff.

[53] R.I.A.A. vol. XXI, p. 53 and ff.

[54] See P. Ferrara, commentary on Article 293, in: A. Proelss, *op. cit.*, pp. 1894–1895.

e.g. those related to the exhaustion of local remedies (Article 295 UNCLOS). Thus, the requirements concerning the competence of the international body and admissibility of the complaint must be met.

2.4.3. INTERNATIONAL LAW AS AN APPLICABLE LAW IN INTERNATIONAL MARITIME DISPUTES

International law applies to the settlement of international maritime disputes. Although the UNCLOS is to a certain extent a special regime, it is not exclusive, closed. As a result, even in the scope of disputes settlement regarding the interpretation and application of the Convention through court or arbitration, other rules of international law should be used. However, according to Article 293 (1):

> A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

The Convention thus establishes the criterion of referring to other rules of international law in the form of non-incompatibility with the Convention.[55] In particular, rules that are technical in nature and allow for the operation of international law are not considered as such. This is also the arbitral tribunal in the award on *The Arctic Sunrise* case of 14 August 2015[56] which stressed that:

> In order properly to interpret and apply particular provisions of the Convention, it may be necessary for a tribunal to resort to foundational or secondary rules of general international law such as the law of treaties or the rules of State responsibility.

Looking from another perspective the Special Chamber of the ITLOS in *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire),* judgment of 23 September 2017,[57] recognized that customary rules of international law can be perceived as a potential source of "other rules of international law."

What is more, in *The Arctic Sunrise*, the tribunal decided that it is also possible to invoke rules from other substantive areas of international law, albeit only additionally:[58]

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[55] Compare Article 31 (3) of the 1969 Vienna Convention on the Law of Treaties.

[56] The Arctic Sunrise, Netherlands v. Russia, Award on the merits, 14 August 2015, PCA Case No. 2014-02, para. 190. Similarly, the arbitration tribunal in the case Duzgit Integrity, Malta v. Sao Tomé and Principe, 5.9.2016, PCA Case No. 2014-07, para. 208.

[57] Case No. 23, para. 559, in this case, however, rules relating to the rules of international responsibility. See also earlier ITLOS in the Case of Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012, Case No. 16, ITLOS Rep. 2012, p. 4, paras. 182–184.

[58] The Arctic Sunrise Case, para. 198.

In determining the claims by the Netherlands in relation to the interpretation and application of the Convention, the Tribunal may, therefore, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions that authorise the arrest or detention of a vessel and persons. This Tribunal does not consider that it has jurisdiction to apply directly provisions such as Articles 9 and 12(2) of the ICCPR or to determine breaches of such provisions.

In addition, recourse to other rules of international law may mean not only an extension of protection or the possibility of parties' behaviour, but also a restriction on the exercise of the rights set out in the Convention. In this way, the International Tribunal of the Law of the Sea recognized in the judgment in the *M/V "Saiga"* case of 1 July 1999[59] that:

> 53. Saint Vincent and the Grenadines claims that Guinea used excessive and unreasonable force in stopping and arresting the *Saiga*. It notes that the *Saiga* was an unarmed tanker almost fully laden with gas oil, with a maximum speed of 10 knots. It also notes that the authorities of Guinea fired at the ship with live ammunition, using solid shots from large-calibre automatic guns. […]
> 155. In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of Article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

The significant openness of the Convention's system to other norms of international law allows us to assume that thanks to them also the arguments of the parties and the dispute resolution body can be deeper, more comprehensive. Formally, they can encompass also arguments taken from the international economic law.

[59] M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Rep. 1999, p. 10 (at 61-62).

3. NOTION OF ECONOMIC ARGUMENTS IN THE SETTLEMENT OF INTERNATIONAL MARITIME DISPUTES

3.1. HOW TO UNDERSTAND THE ARGUMENT?

The term 'argument' appears in the title of this study. Its dictionary meaning is "a set of reasons that show that something is true or untrue, right or wrong etc.",[60] "a reason given for or against a matter under discussion: a statement made or a fact presented in support of or in opposition to a proposal or opinion", "a coherent series of reasons, statements, or facts intended to support or establish a point of view."[61] The argument is naturally associated with the dispute. It is usually associated with taking of evidence and reasons put forward by the parties in order to support their theses. In this capacity, it undoubtedly appears in maritime disputes many times.[62]

In this study, however, the argument will be understood somewhat specifically. This would mean not only the arguments presented by the parties but the arguments that on the one hand can potentially be formulated in a maritime dispute due to the fact that they are based on international law and arguments in the reasoning of the dispute resolution body, therefore, the arguments considered valid by the dispute settlement body.

3.2. ECONOMIC NATURE OF ARGUMENTS IN INTERNATIONAL MARITIME DISPUTES

During the resolution of disputes, the parties submit arguments of various kinds. In international maritime disputes, these are geological, geographic, military (security considerations), historical, environmental and even civil protection or respect for human rights arguments. Economic arguments are also often made.

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[60] *Longman Dictionary of Contemporary English for Advanced Learners*, New (Sixth) Edition, Essex 2012, p. 75.

[61] Ph. Babcock Gove (ed.), *Webster's Third New International Dictionary of the English Language Unabridged*, Cologne 1993, p. 117.

[62] In this context, see the interesting distinction made in the judgment: Fisheries Jurisdiction Case (Spain v. Canada), Jurisdiction of the Court, Judgment of 4 December 1998, I.C.J. Rep. 1998, p. 432 (at 451), para. 32: In so doing, the Court will distinguish between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute: "The Court has . . . repeatedly exercised the power to exclude, when necessary, certain contentions or arguments which were advanced by a party as part of the submissions, but which were regarded by the Court, not as indications of what the party was asking the Court to decide, but as reasons advanced why the Court should decide in the sense contended for by that party […]."

Contrary to appearances, it is not easy to determine which of the arguments is of an economic nature. At first glance, the adjective "economic" is associated with economics, or business activities. Such activities are understood as aimed at achieving profit. As the Longman Dictionary explains, "economic is as much as trade, industry, and the management of money, as well as an economic process, etc."[63]

However, States as parties to maritime disputes do not raise an economic argument in order to ensure that the State itself achieves a profit. Rather, it is about defending or recognizing economic interests, socio-economic needs and economic rights. The economic argument understood in this way can be combined with the exercise of economic power, in particular sovereignty in the economic sphere. The state also operates on international markets through state-owned or state-controlled economic entities. In this sense, it also runs a business. In addition, the state itself is a way of organizing a community of citizens, promoting and protecting their needs and interests and those of private business entities. Consequently, it may raise arguments that concern entities possessing the nationality of that state, engaged in economic activities related to the use of the sea (and, therefore, activities aimed, in principle, to make a profit) in areas such as maritime investments, fishing, production (e.g. fish processing), but also production for maritime activities, e.g. shipbuilding), trade in products and services related to the sea, maritime transport, cable laying, and especially pipelines, maritime tourism, maritime construction, marine energy.

In maritime disputes, not only the interests or economic needs of individual states may come into play, but also a large group of them (e.g. developing countries) or even the international community as a whole. Economic arguments will therefore express these interests, needs or rights. At the same time, the mere fact that they are associated with a large group of countries or the international community does not automatically mean that they will be considered legitimate and deserving of protection in international law.

It is also worth noting that economic argumentation should not be too simplified to be associated with the economic object of the dispute. In international practice, we deal with numerous disputes whose object is to a greater or lesser extent economic in nature. Such disputes include the delimitation dispute over the seabed and oil reserves on Caspian (Azerbaijan v. Turkmenistan); the dispute regarding the ability to sustain habitation on rocks – the exclusive economic zone, continental shelf (Barbados v. Venezuela); the jurisdictional dispute over sovereignty over Mbane and other islands occupied by Gabon in Corisco Bay, rich in hydrocarbons (Equatorial Guinea v. Gabon); the dispute related to the lack

[63] *Longman Dictionary of Contemporary English for Advanced Learners*…, p. 537.

of ratification of the 1998 delimitation agreement under which oil exploration is based (Lithuania v. Latvia); the dispute about delimitation of Ambalat oil block on M. Celebes (Malaysia v. Indonesia). In such disputes, the subject matter of a maritime dispute may be economic, but the arguments raised by the parties and recognized in the final solution may not necessarily be economical. For the parties may refer, for example, to geological, security, historical or environmental arguments.

Theoretically speaking, economic argumentation in international maritime disputes may have a primary or secondary importance. In the first case, the economic argument may decide on the matter itself or be one of the basic arguments (necessary but not the only). In the second case, it will be additional, supporting (an insufficient argument). Finally, it may be that the economic argument put forward by the party will be rejected by the dispute settlement body.

3.3. RELATIVITY OF QUALIFYING ARGUMENTS AS ECONOMIC

Prima facie economic and non-economic arguments (e.g. related to geology or geography) are semantically separate. Indeed, on many occasions that separation is the case. Nevertheless, sometimes the distinction between the two types of arguments is not simple, while it may be relevant for the final settlement. The understanding of historic arguments is an example of such a situation.

The UNCLOS mentions the issue of historic title (e.g. delimitation of the territorial sea – Article 15) or the use of traditional rights (e.g. exercising of rights on archipelagic waters – Article 47 (6), Article 51). Notwithstanding the above, historic arguments are also invoked before international bodies of dispute settlement in other cases[64]. The question arises whether such arguments can be deemed to be economic. It seems that the historic argument may not be considered as economic in proving sovereign power, even if the elements of such evidence include historically held rights of economic nature. However, it could be different if the case concerned the recognition of the right to use maritime resources based on proving the historic rights in this regard. Subtle considerations of this type seem to be present in *The South China Sea Arbitration*, also known as Philippines v. China, award of 12 July 2016.[65] The Tribunal indicated here the need to differentiate the historic title which concerns sovereignty from historic fishing rights.

[64] See i.a. L. Bernard, *The Effect of Historic Fishing Rights In Maritime Boundaries Delimitation*, LOSI Conference Papers, 2012 "Securing the Ocean for the Next Generation", Seoul, May 2012, https://www.law.berkeley.edu/files/Bernard-final.pdf

[65] PCA Case No. 2013-19, para. 225. Moreover, the tribunal distinguished historic rights to the land and to the sea (para. 272).

The Tribunal stated:

> The purpose of this extended recitation is to emphasise that there exists, within the context of the law of the sea, a cognizable usage among the various terms for rights deriving from historical processes. The term 'historic rights' is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty. 'Historic title', in contrast, is used specifically to refer to historic sovereignty to land or maritime areas. 'Historic waters' is simply a term for historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea, although "general international law . . . does not provide for a single 'régime' for 'historic waters' or 'historic bays', but only for a particular régime for each of the concrete, recognised cases of 'historic waters' or 'historic bays'." Finally, a 'historic bay' is simply a bay in which a State claims historic waters.

Also in other cases doubts may arise as to the economic or non-economic nature of the argument put forward. For example, arguments related to maritime navigation are economic only insofar as they are linked to merchant sailing and not e.g. the sailing of state-owned ships, including warships. Arguments related to maritime exploration are economic only insofar as the exploration is conducted for the purpose of subsequent economic activity. Arguments related to environment protection tend not to have an economic nature, although pollution is typically linked to economic activity. Environmental considerations are more likely to be invoked in order to counterbalance economic arguments (as e.g. in the Indonesia v. Australia dispute resulting from the closing by Australia of access to Ashmore and Cartier Reserve and prohibition of fishing there). In some situations, however, the economy and environment are interrelated, as in the case of preservation measures and management of living resources in the exclusive economic zone to ensure protection against overfishing (Article 61(2) of the Convention of 1982). In any case, doubts related to the meaning and qualification of specific arguments should not, as a rule, undermine the validity of distinguishing of economic arguments.

3.4. ARGUMENTATIVE POTENTIAL OF LAW THE CASE OF THE CONVENTION OF MONTEGO BAY

Economic issues, which could be used as the substantive basis of economic arguments, appear in the provisions of various treaties of the law of the sea. Here, it will suffice to note the solutions adopted in the UN Convention of 1982. They have considerable argumentative potential, although using this in order to

formulate economic arguments does not have to be obvious or automatic. Also, the rank of economic arguments and their place among other arguments is not always certain. Nevertheless, the economic factor may be of co-defining or scope-related relevance. In this role it appears e.g. in Article 46, where for the purposes of the provisions concerning archipelagic states, the archipelago is defined. Economic relations are here among the criteria that prove the existence of the archipelago as interconnected islands, waters and other natural features.[66] In turn, in Article 121(3) the Convention provides that rocks which "cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

In some of the UNCLOS provisions the economic factor serves to determine the existence and content of the rights of the States (e.g. the right of the coastal State to exercise control in the contiguous zone on customs, fiscal, immigration and sanitary matters – Article 33, sovereign rights of coastal States to the exclusive economic zone and continental shelf, which include exploration and exploitation of living and non-living resources in those zones or the establishment and use of artificial islands, installations and structures in the exclusive zone – Article 56(1); less unambiguously in Article 77(1)). Other times the Convention refers to the rules by which the state manages and uses maritime resources (Article 61(2), Article 62 and seq. – living resources of the exclusive economic zone, Article 77, 81 – exploration and exploitation of shelf resources, drilling operations on the continental shelf, use of the living resources of the high seas – Article 116 and seq., management of the resources in the Area and conducting business activity there – Article 144, Article 150 and seq., the Economic Planning Commission for the Area – Article 164).

Some UNCLOS provisions in turn require economic circumstances to be taken into account in fulfilling the obligations under the Convention. These circumstances, even if not just by themselves, should be considered in securing the right of land-locked states and geographically disadvantaged States to participate in the exploitation of the surplus of the living resources of the zone (Article 69(1), Article 70(1); apart from geographical circumstances), and in determining the

[66] T. Markus, commentary on Article 46, [in:] A. Proelss, *op. cit.*, p. 351, writes in this context: "there needs to be an economic relationship between islands as well as between islands and the interconnecting waters to justify the linking of archipelagic waters to the land domain." He adds however: "the economic criterion would be relative in its application and assumes a subjective character." He states as well: "extent of use of interconnecting waters for various purposes, the dependency of the islanders on the waters, and the use of the resources, as well as the exercise of those interests for some time, provide indications of the interrelation required for the economic entity test under Article 46 (b)."

measures aimed at maintaining or restoring populations of harvested species (Article 119(1)a; apart from environmental circumstances).

Other known legal solutions on the one hand involve the economic use of the sea, and on the other require that economic circumstances be taken into account. That is the case e.g. in Article 70, which concerns geographically disadvantaged states. Article 70(5) provides that:

> Developed geographically disadvantaged States shall, under the provisions of this Article, be entitled to participate in the exploitation of living resources only in the exclusive economic zones of developed coastal States of the same subregion or region having regard to the extent to which the coastal State, in giving access to other States to the living resources of its exclusive economic zone, has taken into account the need to minimize detrimental effects on fishing communities and economic dislocation in States whose nationals have habitually fished in the zone.

Economic considerations also appear in the context of the protection of the maritime environment. In the context of determining the admissible level of pollution from land-based sources, Article 207(4) UNCLOS requires that "the economic capacity of developing States and their need for economic development"[67] be taken into account. Economic reasons are also of major significance with regard to the development and transfer of maritime technology (Article 266-269).[68]

4. SCOPE OF USING ECONOMIC ARGUMENTATION IN THE REASONING OF BODIES THAT SOLVE INTERNATIONAL MARITIME DISPUTES

4.1. IMPORTANCE OF ECONOMIC ARGUMENTATION IN THE SETTLEMENT OF JURISDICTIONAL DISPUTES

One of the three categories of maritime disputes are those pertaining to the jurisdiction over the sea, including its islands and rocks. Contemporary

[67] F. Wacht, commentary on Article 207 (4), [in:] A. Proelss, *op. cit.*, p. 1390, notes that UNCLOS introduced here the obligation of due diligence which "concedes wide discretion to developing States with regard to their obligation to combat this pollution source at the international level."

[68] K. Bartenstein in commentary on Article 266, in A. Proelss, *op. cit.*, p. 1765, wrote that Part XIV of the Convention, which the commented Article opens, "establishes the Convention's normative framework for marine capacity building. Its operational provisions aim to ensure an equitable and efficient utilization of ocean resources and, more generally, a just and equitable international economic order as well as economic and social advancement of all peoples of the world, goals that are expressed in the Preamble."

jurisdictional disputes no longer concern so much the power over the seas or oceans as rather the use of islands or even rocks to expand sovereignty or sovereign rights. It is in these terms that the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), settled by the ICJ in its judgment of 8 October 2007, can be considered.[69]

The Court reminded (with reference to the *Eastern Greenland* case) in that judgment that proving power over the islands requires proving the existence of *animus* and *corpus* (intention and will to act as sovereign and manifestations of actual sovereign acts).[70] However, in such cases the Court is forced to determine which circumstances are relevant for proving the power and which may not be taken into account.

In the analyzed case, the Court asks, amongst others whether, in order to establish the state authority over the islands, the activity of private individuals, and also the regulation activities in the field of fisheries, may be of importance. In this regard, it acknowledged that with regard to activities by private persons, these:

> cannot be seen as effectivités if they do not take place on the basis of official regulations or under governmental authority" (Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002, p. 683, para. 140).

It subsequently held that:

> these activities took place under Honduran authorization in the waters around the islands, but not that such fishing took place from the islands themselves. Instead, Honduras provides evidence that it has licensed activities on the islands which are related to fishing activities, such as the construction of buildings, or the storage of fishing boats. When looked at as a whole, the Court believes that the fishing licences, although undesignated as to areas, were known by the Honduran authorities to have been used for fishing taking place around the islands; Honduras authorized the construction of housing on the islands for purposes related to fishing activities. The Court is thus of the view that the Honduran authorities issued fishing permits with the belief that they had a legal entitlement to the maritime areas around the islands, derived from Honduran title over those islands. The evidence of Honduran-regulated fishing boats and construction on the islands is also legally relevant for the Court under the category of administrative and legislative control […].
>
> The Court considers that the permits issued by the Honduran Government allowing the construction of houses in Savanna Cay and the permit for the storage of fishing equipment in the same cay provided by the municipality of Puerto Lempira may also

[69] I.C.J. Rep. 2007, p. 659 (at 720, 721-722), paras. 202-204, 208.

[70] See also ICJ, Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23.5.2008, I.C.J. Rep. 2008, p. 12 (at 35-37), paras. 60-69.

> be regarded as a display, albeit modest, of the exercise of authority, and as evidence of effectivités with respect to the disputed islands.

Thus, the ICJ stated that the state regulative activities in the sphere of issuing licenses for fishing and permits for activities associated with fishing may be considered as significant for determining the exercise of power over the islands.

Moreover, the Court examined the granting of a concession for oil extraction, although that was mainly in connection with public orders for the construction of an exploration rig (antenna), fishing and related activity, and the significance of the parties' participation in the economic integration (SICA) and the SICA free trade agreement with the Dominican Republic. In this context the Court concluded:

The Court is of the view that the antenna was erected in the context of authorized oil exploration activities. Furthermore, the payment of taxes in respect of such activities in general can be considered additional evidence that the placement of the antenna (which, as noted, was part of those general activities) was done with governmental authorization. The Court thus considers that the public works referred to by Honduras constitute *effectivités* which support Honduran sovereignty over the islands in dispute. Then the Court stated:

> Having considered the arguments and evidence put forward by the Parties, the Court finds that the *effectivités* invoked by Honduras evidenced an "intention and will to act as sovereign" and constitute a modest but real display of authority over the four islands (*Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 46; see also *Minquiers and Ecrehos (France/United Kingdom), Judgment, I.C.J. Reports 1953*, p. 71). Although it has not been established that the four islands are of economic or strategic importance and in spite of the scarcity of acts of State authority, Honduras has shown a sufficient overall pattern of conduct to demonstrate its intention to act as sovereign in respect of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay. The Court further notes that those Honduran activities qualifying as *effectivités* which can be assumed to have come to the knowledge of Nicaragua did not elicit any protest on the part of the latter.

Therefore, it can be concluded that in this case economic arguments connected with the exercise of economic state power did not play the key role, yet they mattered as auxiliary arguments that contributed to the judgment favourable to the applicant.

Jurisdictional disputes also nowadays, on many occasions, concern different minor maritime features, including rocks, which are perceived by parties to the dispute as a physical basis for the sovereignty. In the *Territorial and Maritime Dispute between Nicaragua and Columbia* judgment of 19 November 2012,[71] the ICJ

[71] ICJ Rep. 2012, p. 624 (at 655, 657), paras. 80, 84.

reminded that in proving the existence of a sovereign title to the territory various acts performed *à titre de souverain* may be invoked. These include:

> in particular, but not limited to, legislative acts or acts of administrative control, acts relating to the application and enforcement of criminal or civil law, acts regulating immigration, acts regulating fishing and other economic activities, naval patrols as well as search and rescue operations (see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, pp. 713–722, paras. 176-208).

With regard to sovereignty over minor maritime features, the Court pointed out that it could be demonstrated:

> on the basis of a relatively modest display of State powers in terms of quality and quantity" (*ibid.*, p. 712, para. 174). Finally, a significant element to be taken into account is the extent to which any acts *à titre de souverain* in relation to disputed islands have been carried out by another State with a competing claim to sovereignty. […]

In the course of the proceedings Colombia argued that it had engaged in regulation of economic activity, organized public orders pertaining to the features, took law-enforcement measures with respect to actions on the features. With reference to the above acts, the Court judged that:

> It has thus been established that for many decades Colombia continuously and consistently acted *à titre de souverain* in respect of the maritime features in dispute. This exercise of sovereign authority was public and there is no evidence that it met with any protest from Nicaragua prior to the critical date. Moreover, the evidence of Colombia's acts of administration with respect to the islands is in contrast to the absence of any evidence of acts à titre *de souverain* on the part of Nicaragua.

Thus, the ICJ understands that in the case of minor maritime features even limited acts of economic sovereignty may be essential, especially if the other party to the dispute did not engage in similar acts.

4.2. THE IMPORTANCE OF ECONOMIC ARGUMENTATION IN CASES RELATING TO THE STATUS OF MARITIME FEATURES

As regards the use of high and low maritime features in order to establish the exclusive economic zone or continental shelf, the Convention on the Law of the Sea of 1982 in its Article 121 (3) provides that:

> Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

In this provision the economic argument is of key importance. The determination of the status of features and establishment of maritime zones requires, therefore, proof that the rocks are able to "sustain human habitation or economic life".

An analysis of the arbitration award in the *South China Sea Case*, Philippines v. China, of 12 July 2016[72] attests to the practical importance of this solution. The court first interpreted the term "rock" in Article 121 (3) UNCLOS, finding out that:

> 540. First, […], the use of the word "rock" does not limit the provision to features composed of solid rock. The geological and geomorphological characteristics of a high-tide feature are not relevant to its classification pursuant to Article 121(3).
> 541. Second, the status of a feature is to be determined on the basis of its natural capacity, without external additions or modifications intended to increase its capacity to sustain human habitation or an economic life of its own.

With regard to "economic life" the court noted[73] that – contrary to the wording of Article 121 (3) – it is "in most instances" linked to "human habitation."

> Article 121(3) does not refer to a feature having economic value, but to sustaining "economic life". The Tribunal considers that the "economic life" in question will ordinarily be the life and livelihoods of the human population inhabiting and making its home on a maritime feature or group of features. Additionally, Article 121(3) makes clear that the economic life in question must pertain to the feature as "of its own." Economic life, therefore, must be oriented around the feature itself and not focused solely on the waters or seabed of the surrounding territorial sea. Economic activity that is entirely dependent on external resources or devoted to using a feature as an object for extractive activities without the involvement of a local population would also fall inherently short with respect to this necessary link to the feature itself. Extractive economic activity to harvest the natural resources of a feature for the benefit of a population elsewhere certainly constitutes the exploitation of resources for economic gain, but it cannot reasonably be considered to constitute the economic life of an island as its own.

The Tribunal also added that:

> as a practical matter, […] a maritime feature will ordinarily only possess an economic life of its own if it is also inhabited by a stable human community. One exception to that view should be noted for the case of populations sustaining themselves through a network of related maritime features. The Tribunal does not believe that maritime features can or should be considered in an atomized fashion. A population that is able to inhabit an area only by making use of multiple maritime features does not fail to inhabit the feature on the grounds that its habitation is not sustained by a single feature

[72] PCA Case No. 2013-19, paras. 539 and ff.

[73] Paragraphs 543 and 544.

individually. Likewise, a population whose livelihood and economic life extends across a constellation of maritime features is not disabled from recognising that such features possess an economic life of their own merely because not all of the features are directly inhabited.

Considering rocks, as the basis for determining the economic zone or continental shelf, requires proving that they have the capacity to sustain economic life, among others. Therefore, the Tribunal explained that:[74]

1) what is relevant here is the capacity itself and not whether the rocks were or are inhabited or a place of economic activity; indeed it is this capacity that constitutes the objective criterion whose determining does not depend on any previous decision on sovereignty; the tribunal may evaluate the status of rocks;
2) this capacity must be evaluated on a case-by-case basis, and not in the abstract;[75] the capacity should be evaluated taking into account the principal factors which occur with varying intensity in various cases and which include "the presence of water, food, and shelter in sufficient quantities to enable a group of persons to live on the feature for an indeterminate period of time. Such factors would also include considerations that would bear on the conditions for inhabiting and developing an economic life on a feature, including the prevailing climate, the proximity of the feature to other inhabited areas and populations, and the potential for livelihoods on and around the feature"; the capacity should be evaluated "with due regard to the potential for a group of small island features to collectively sustain human habitation and economic life;"
3) the capacity to "sustain human habitation or economic life clearly excludes a dependence on external supply." In particular, such capacity is incompatible with any dependence on "the continued delivery of supplies from outside." With regard to economic life it means that the feature may not be entirely dependent on external resources or be used solely for extraction purposes without the participation of the local population (it must have its own economic life); however, when the islands are distant from one another, sometimes inhabitants must use many islands for their livelihood, hence no individual feature should be evaluated separately. Then, "the local use of nearby resources as part of the livelihood of the community," should not be equated with the use of the features only for the extraction purposes;
4) although the natural physical conditions of the features enable their preliminary classification, in a situation when they are devoid of vegetation and potable water, as well as of food necessary for survival, then such features do not have the capacity

[74] Paragraphs 545-551 of the arbitral award.

[75] The Tribunal emphasized that: "This is particularly the case in light of the Tribunal's conclusion that human habitation entails more than the mere survival of humans on a feature and that economic life entails more than the presence of resources. The absence of an abstract test, however, has particular consequences (that will be discussed below) for the Tribunal's approach to evidence of conditions on, and the capacity of, the features in question" (para. 546).

> to sustain human habitation or economic life. *A contrario*, when a major feature has physical conditions which cause it to be inhabited, it will have such capacity;[76]
> 5) as far as historical evidence is concerned, when it can be seen that a stable human community has never developed on the feature, a reasonable conclusion will be that the feature does not have the relevant capacity. A war, pollution or environmental damage may contribute to depopulation. If the feature was or is inhabited, then its dependence on external support needs to be examined. Trade and relations with the outside world do not necessarily confirm the existence of such support of the "feature to the extent that they go to improving the quality of life of its inhabitants." If the support is a *sine qua non* condition of the habitation, the feature does not have this capacity.[77] Arguments historically confirming human habitation on the feature may be more important than contemporary evidence of the activity related to the feature;
> 6) the same type of analysis may apply to the evaluation of the capacity to sustain economic life. This means that historical evidence proving or disproving the existence of economic life on the feature should be examined first of all.

Furthermore, the arbitration tribunal referred to the possibility of applying Article 121 UNCLOS to high tide elevations/features.[78] In this respect the Tribunal analysed the presence of potable water, vegetation and biology, soil and agricultural potential, the presence of fishermen, and commercial activity. In consequence, it stated that high tide elevations within the Spratly Islands were capable of ensuring survival only for small groups of humans. The tribunal confirmed that:[79]

> There is historical evidence of potable water, although of varying quality, that could be combined with rainwater collection and storage. There is also naturally occurring vegetation capable of providing shelter and the possibility of at least limited agriculture to supplement the food resources of the surrounding waters. The record indicates that small numbers of fishermen, mainly from Hainan, have historically been present on Itu Aba and the other more significant features and appear to have survived principally on the basis of the resources at hand (notwithstanding the references to annual deliveries of rice and other sundries).

[76] The Tribunal added: "The Tribunal considers, however, that evidence of physical conditions is insufficient for features that fall close to the line. It will be difficult, if not impossible, to determine from the physical characteristics of a feature alone where the capacity merely to keep people alive ends and the capacity to sustain settled habitation by a human community begins. This will particularly be the case as the relevant threshold may differ from one feature to another." (para. 548).

[77] The Tribunal added that "a purely official or military population, serviced from the outside, does not constitute evidence that a feature is capable of sustaining human habitation." (para. 550).

[78] *Ibidem*, paras. 577 and ff.

[79] Paragraphs 615 and 616.

At the same time it added that:

> the features are not obviously habitable, and their capacity even to enable human survival appears to be distinctly limited. In these circumstances, and with features that fall close to the line in terms of their capacity to sustain human habitation, the Tribunal considers that the physical characteristics of the features do not definitively indicate the capacity of the features.

In this situation the Tribunal also undertook an analysis of the historical capacity to sustain human habitation or economic life. With reference to economic life, the Tribunal noted that it followed from historical evidence that the high tide features were:[80]

> essentially extractive in nature (i.e., mining for guano, collecting shells, and fishing), aimed to a greater or lesser degree at utilising the resources of the Spratlys for the benefit of the populations of Hainan, Formosa, Japan, the Philippines, Viet Nam, or elsewhere.

Meanwhile, the Tribunal had previously noted that:

> to constitute the economic life of the feature, economic activity must be oriented around the feature itself and not be focused solely on the surrounding territorial sea or entirely dependent on external resources. The Tribunal also considers that extractive economic activity, without the presence of a stable local community, necessarily falls short of constituting the economic life of the feature.

Consequently, a history of extractive activity does not constitute evidence of economic life. Nevertheless, the arbitration tribunal stated that:

> In reaching this conclusion, however, the Tribunal takes pains to emphasise that the effect of Article 121(3) is not to deny States the benefit of the economic resources of small rocks and maritime features. Such features remain susceptible to a claim of territorial sovereignty and will generate a 12-nautical-mile territorial sea, provided they remain above water at high tide. Rather, the effect of Article 121(3) is to prevent such features—whose economic benefit, if any, to the State which controls them is for resources alone—from generating a further entitlement to a 200-nautical-mile exclusive economic zone and continental shelf that would infringe on the entitlements generated by inhabited territory or on the area reserved for the common heritage of mankind.

Finally, the arbitration tribunal concluded that in the analyzed case the rocks did not secure the possibility to sustain human habitation and economic life so an exclusive economic zone or continent shelf could not be established around

[80] Paragraphs 623–625.

them.[81] Nevertheless, the court's reasoning implies that economic arguments are important to demonstrate that maritime features can serve as a basis for the establishment of an exclusive economic zone and continental shelf.

4.3. IMPORTANCE OF ECONOMIC ARGUMENTATION IN THE SETTLEMENT OF DELIMITATION DISPUTES

4.3.1. GENERAL REMARKS

Numerous contemporary maritime disputes concern delimitation of individual zones of the sea. The UNCLOS provisions pertaining to this issue indicate that maritime zones differ in nature and relevance for effective formulation of economic arguments. The territorial sea is seen as part of the state territory whose delimitation matters for the prestige and security of the coastal state. It is less obvious in the case of the contiguous zone, where the right of the coastal state to exercise control in specific areas is of key importance. In turn, in the case of the exclusive economic zone and continental shelf their economic importance predominates. These zones are also subject to different delimitation rules.[82] In this situation the question arises whether and to what extent the different nature of individual maritime zones is relevant in the context of the effective use of economic arguments in disputes over the delimitation of such zones. Until now the practice of settling delimitation disputes by international courts and tribunals has concerned territorial waters, the exclusive economic zone and continental shelf.

4.3.2. DELIMITATION OF TERRITORIAL WATERS

Territorial waters comprise inland waters and the territorial sea. The boundaries of the territorial sea are between states with neighbouring or opposite coasts. Delimitation of the territorial sea is regulated in Article 15 of the Montego Bay Convention:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median 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

[81] *Ibidem*, para. 626.

[82] However, if parties to a dispute do not raise arguments based on territorial rather than functional nature of the territorial waters and even conclude an agreement, an international court may apply the same methodology and determine a single boundary for those waters, the exclusive economic zone and continental shelf. See ITLOS, Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), judgment of 23 September 2017, Case No. 23, paras. 260–263.

States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

Thus, delimitation is subject to the freedom of contract. Unless the states use this freedom or agree otherwise, the median (equidistance) line is of primary importance, except when historic title or other relevant circumstances need to be taken into account. The latter, however, are not specified in the Convention. Therefore, it is not clear whether they may include economic considerations.

The problem of relevant circumstances appeared in the case of *the delimitation of the maritime boundary between Guyana and Suriname* in the arbitration award of 17 September 2007.[83] The Tribunal indicated that Article 15 gave priority to the rule of the median line. The rule of relevant circumstances may only be used when such circumstances occur. The tribunal pointed out that neither historic title nor geographical features were relevant in the analyzed case. It noted that the parties were in dispute as to what kind of special circumstances could be relevant and, specifically, whether navigational considerations could be such circumstances. Quoting the International Law Commission, the tribunal indicated that the Commission had deemed navigational considerations to be a relevant circumstance.

The Arbitration Tribunal also reiterated that international courts and tribunals had not drawn up any closed list of relevant circumstances. However, hitherto judgments and awards (especially in the arbitration award in the *Beagle Channel* case) confirm that the existence of a navigable passage might have that role. Finally, the tribunal took into account the existence of a special circumstance and refrained from determining the boundary rigorously along the median line[84].

Navigational interests or the existence of a navigable channel may be considered as an economic argument. Yet, it certainly does not exhaust various possibilities of quoting economic reasons. Article 15 UNCLOS seems open. It does not mean, however, that in practice such arguments would be easily taken into

[83] R.I.A.A. vol. XXX, p. 1 (at 82 and ff), paras. 295 and seq.

[84] Later, the international courts and tribunals (ICJ, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea, Nicaragua v. Honduras, judgment of 8 October 2007, I.C.J. Rep. 2007, p. 659; ITLOS, the dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012, Case No. 16, ITLOS Rep. 2012, p. 4; Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award of 7 July 2014 has changed their position. The importance of special circumstances vis-à-vis the equidistance principle has been enhanced, accepting its use even before the equidistance line is determined. This change is critisized as inconsistent with Article 15 of the UNCLOS. See M. Lando, *Judicial Uncertainties Concerning Territorial Sea Delimitation Under Article 15 of the United Nations Convention on the Law of the Sea,* International and Comparative Law Quarterly 2017, vol. 66, Part 3, pp. 589 and ff.

consideration. This is undoubtedly linked to the relative nature of many of them. Nevertheless, especially a certain location of natural resources may be of some argumentative importance.

Other economic arguments treated as special circumstances in the delimitation of the territorial sea can also have some weight. Note the arbitral award in maritime delimitation between Eritrea and Yemen of 17 December 1999.[85] The Tribunal started its considerations with the determination of the importance of fishing in general. It analyzed the economic dependency on fishing, location of fishing areas, consumption of fish by the population. It concluded, however, negatively:[86]

> Based on the foregoing, the Tribunal finds no significant reason on any other grounds concerning fishing — whether related to the historical practice of fishing in general, to matters of asserted economic dependency on fishing, to the location of fishing grounds, or to the patterns of fish consumption by the populations — for accepting, or rejecting, the arguments of either Party on the line of delimitation proposed by itself or by the other Party. Neither Party has succeeded in demonstrating that the line of delimitation proposed by the other would produce a catastrophic or inequitable effect on the fishing activity of its nationals or detrimental effects on fishing communities and economic dislocation of its nationals.
>
> For these reasons, it is not possible for the Tribunal to accept or reject the line of delimitation proposed by either Party on fisheries grounds. Nor can the Tribunal find any relevant effect on the legal reason supporting its own selection of a delimitation line arising from its consideration of the general past fishing practices of either Party or the potential deprivation of fishing areas or access to fishing resources, or arising from nutritional or other grounds.

Secondly, the Tribunal considered the pertinence and probative force of petroleum agreements. It recalled the ICJ judgment in the *North Sea Continental Shelf* cases and stated that in a situation of overlapping areas the agreement should be concluded or, failing that, resolved by an equal division of the areas or by agreements for joint exploitation. It finally observed that:[87]

> having regard to the maritime boundary established by this Award, the Parties are bound to inform one another and to consult one another on any oil and gas and other mineral resources that may be discovered that straddle the single maritime boundary between them or that lie its immediate vicinity. Moreover, the historical connection between the peoples concerned, and the friendly relations of the Parties that have been

[85] The second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), R.I.A.A. vol. XXII, p. 335 (at 350 and ff.), paras. 61 and ff.

[86] Paragraphs 72 and 73 (at 352).

[87] Paragraph 86 (at 356).

> restored since the Tribunal's rendering of its Award on Sovereignty, together with the body of State practice in the exploitation of resources that straddle maritime boundaries, import that Eritrea and Yemen should give every consideration to the shared or joint or unitised exploitation of any such resources.

At the end, the Tribunal took on the role of traditional fishing rights in the delimitation of the territorial sea and beyond[88]. It recognized that:[89]

> The Tribunal's Award on Sovereignty was not based on any assessment of volume, absolute or relative, of Yemeni or Eritrean fishing in the region of the islands. What was relevant was that fishermen from both of these nations had, from time immemorial, used these islands for fishing and activities related thereto. Further, the finding on the traditional fishing regime was made in the context of the Award on Sovereignty precisely because classical western territorial sovereignty would have been understood as allowing the power in the sovereign state to exclude fishermen of a different nationality from its waters. Title over Jabal al-Tayr and the Zubayr group and over the Zuqar-Hanish group was found by the Tribunal to be indeterminate until recently. Moreover, these islands lay at some distance from the mainland coasts of the Parties. Their location meant that they were put to a special use by the fishermen as way stations and as places of shelter, and not just, or perhaps even mainly, as fishing grounds. These special factors constituted a local tradition entitled to the respect and protection of the law.

As a consequence, the traditional fishing rights have some value in delimitation of territorial waters.

4.3.3. DELIMITATION OF EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF

At present, the most bitter disputes concern delimitation of two maritime zones where the rights of coastal states cross those of other states. The point here is the delimitation of the exclusive economic zone and continental shelf. Undoubtedly, both zones are economically important both for coastal states and other states entitled to use those waters and seabed. Their legal essence is also of an economic nature because in both cases it is linked in particular to the sovereign (exclusive) right of the coastal state to the exploration and exploitation of living and non-living resources of those zones (Article 56(1), Article 77(1)). It is not surprising that states try to delimitate the maximum boundaries of those zones admissible by international law, seek ways to expand their sovereignty and enter into delimitation disputes over those areas. However, the question arises whether economic

[88] See also earlier ICJ decision in Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993, p. 38.

[89] Paragraph 95 (at 358).

arguments are voiced in the delimitation of those zones. It turns out that it is not so evident at all.

The Convention regulated the issue of delimitation of the exclusive economic zone and continental shelf between states with adjacent and opposite coasts in the same, although formally separate, way. In practice, a single maritime boundary is often delimitated for both zones.

In accordance with Article 74 and 83 UNCLOS:

> 1. The delimitation of the exclusive economic zone/continental shelf 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.
> 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
> 3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
> 4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone/continental shelf shall be determined in accordance with the provisions of that agreement.

Thus, the Convention unambiguously gave priority to the agreement, even if it did so with the reservation that the agreement should be based on international law and, something particularly important, should aim to achieve an equitable solution. However, the Convention does not require the parties to take into account any specific circumstances.

More maritime disputes related to the delimitation of the continental shelf, although a number of cases concerned, both the shelf and the economic zone. It is worth mentioning here that since the ICJ judgment of 1969 in the case of the *continental shelf in the North Sea* international jurisprudence, including arbitration awards, have undergone a certain evolution. Two lines of adjudication have developed. According to the first, there are no mandatorily applicable delimitation methods (the concept of flexibility; the line initiated by the ICJ judgment of 1969). According to the second one, the first method to be used is that of equidistance,[90] where the resulting line can be subsequently adjusted by taking into account special relevant circumstances (the concept of predictability; dating back to the arbitration award in the case of *delimitation of the continental shelf between the United*

[90] The rule of equidistance as the line delimitating the boundaries on the shelf was, in particular, referred to in Article 6 of the Geneva Convention on the Continental Shelf of 28 April 1958.

Kingdom and France of 1977). In 2009 the ICJ issued a judgment on the *delimitation of the shelf on the Black Sea* (Romania v. Ukraine), where it finally concluded that such delimitation should take place in three stages: (i) provisional delimitation of the boundary along the equidistance line; (ii) taking into account relevant circumstances; (iii) adjustment of the arrangements in accordance with the proportionality principle. This settlement influenced the judgments of the ICJ itself, as well as those of ITLOS and international arbitration awards.[91] This evolution undoubtedly has an effect on the position of economic arguments, which may be taken into consideration, especially on the relevant circumstance basis.

In this context, it can be noted that in international disputes the need to take into account various economic circumstances was often quoted. Some of them are related to the condition of the parties to the dispute or the dependence of the population on the resources of the zones, others relate to the economic use of the zones or location of their resources. Those arguments have not always met the recognition of the adjudicating bodies.

An argument connected to the situation of the parties to the dispute is the economic poverty of the state or its condition of a developing country. This was the reason put forward in the ICJ judgment in the case of the *continental shelf* in the Libya v. Tunisia dispute of 24 February 1982.[92] The Court considered that the principle of natural extension of the land territory of the coastal shelf was of primary importance in the delimitation of the shelf. Moreover, the relevance of various factors was considered, including geological, geomorphological, geographical factors, historic rights and economic factors. In this last case Tunisia put forward the argument of its economic poverty, alleging that it should have an effect on Tunisia being adjudicated a greater part of the shelf. This was questioned by Libya, which claimed that the argument was irrelevant. The Court summed up the argumentation:

> In their pleadings, as well as in their oral arguments, both Parties appear to have set so much store by economic factors in the delimitation process that the Court considers it necessary here to comment on the subject. Tunisia seems to have invoked economic considerations in two ways: firstly, by drawing attention to its relative poverty vis-à-vis Libya in terms of absence of natural resources like agriculture and minerals, compared with the relative abundance in Libya, especially of oil and gas wealth as well as agricultural resources; secondly, by pointing out that fishing resources derived from its claimed "historic rights" and "historic waters" areas must necessarily be taken into

[91] See ITLOS in the case of dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012, Case No. 16, ITLOS Rep. 2012, p. 4, paras. 225-240. See also commentary of Y. Tanaka, Article 83, [in:] A. Proelss, *op. cit.*, pp. 658–662.

[92] ICJ Rep. 1982, p. 18 (at 77-78), paras. 106–107.

account as supplementing its national economy in eking out its survival as a country. For its part, Libya strenuously argues that, in view of its invocation of geology as an indispensable attribute of its view of "natural prolongation", the presence or absence of oil or gas in the oil wells in the continental shelf areas appertaining to either Party should play an important part in the delimitation process. Otherwise, Libya dismisses as irrelevant Tunisia's argument in favour of economic poverty as a factor of delimitation on any other grounds.

Then the Court referred to the argumentation of the parties, reasoning as follows:

The Court is, however, of the view that these economic considerations cannot be taken into account for the delimitation of the continental shelf areas appertaining to each Party. They are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource. As to the presence of oil wells in an area to be delimited, it may, depending on the facts, be an element to be taken into account in the process of weighing all relevant factors to achieve an equitable result.

Therefore, the Court questioned the relevance of the economic poverty factor in the delimitation of the continental shelf, pointing the variability and instability of this factor. The Court emphasized that this factor must not equalise what nature had made unequal. Nevertheless, the presence of oil wells might be of a certain relevance. Still, whether this argument will be taken into account and its rank will depend on all circumstances in their entirety.

Two years later, the ICJ seems to have departed, even if unwillingly, from this quite rigorous position. The Chamber of the International Court of Justice in the case of *delimitation of maritime boundary in the Gulf of Maine*, Canada v. USA, judgment of 12 October 1984[93] stated that equitability criteria should be taken into account in the analyzed case. With regard to the criteria of economic nature, the Chamber concluded:

It is, therefore, in the Chamber's view, evident that the respective scale of activities connected with fishing - or navigation, defence or, for that matter, petroleum exploration and exploitation - cannot be taken into account as a relevant circumstance or, if the term is preferred, as an equitable criterion to be applied in determining the delimitation line. What the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to

[93] ICJ Rep. 1984, p. 246, paras. 56, 157, 158, 237.

entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned.

Thus, while the ICJ was not inclined to take into account economic reasons in a broader scope, it considered that when the delimitation that disregarded them were to have catastrophic effects for the survival and well-being of the population in the states concerned, the economic reasons must not be underestimated, since that would lead to an unequitable result.

The arbitration Tribunal in the dispute over the *continental shelf*, Guinea v. Guinea Bissau, in its award of 14 February 1985[94], seems to have gone even further. In this case the Tribunal took into account the fact that the states engaged in the dispute were developing countries facing very serious economic and financial difficulties. The Tribunal noted that each of them aspired to the riches of the shelf *à juste titre*. The Arbitration Tribunal shared the view of the ICJ that the economic factor as one of variable nature and based on uncertain data should not be decisive in the delimitation of the shelf. At the same time the arbitration Tribunal indicated that the boundaries determined by humans should not aggravate the difficulties faced by states or complicate their economic lives. The Tribunal must not offset economic inequalities by modifying their delimitation. Also, the fact of taking economic circumstances into account in the delimitation must not favour one party at the expense of another. However, one must not lose sight of the legitimisation of claims because of which economic circumstances are invoked, nor challenge the right of the peoples concerned to pursue socio-economic development which enables them to enjoy full dignity. Consequently, the Tribunal concluded that the economic circumstances, so legitimately quoted by the parties, should naturally encourage them to mutually beneficial cooperation that would bring them closer to their objective, which is their development.[95]

[94] R.I.A.A. vol. XIX, p. 149, paras. 112–123.

[95] The Tribunal stated: "il ne serait ni juste ni équitable de fonder une délimitation sur l'évaluation de données qui changent en fonction de facteurs dont certains sont aléatoires". It added also: "Les frontières fixées par l'homme ne devraient pas avoir pour objet d'augmenter les difficultés des Etats ou de compliquer leur vie économique. Il est vrai que le Tribunal n'a pas le pouvoir de compenser les inégalités économiques des Etats intéressés en modifiant une délimitation qui lui semble s'imposer par le jeu de considérations objectives et certaines. Il ne saurait non plus accepter que les circonstances économiques aient pour conséquence de favoriser l'une des Parties au détriment de l'autre en ce qui concerne cette délimitation. Il ne peut toutefois complètement perdre de vue la légitimité des prétentions en vertu desquelles les circonstances économiques sont invoquées, ni contester le droit des peuples intéressés à un développement économique et social qui leur assure la jouissance de leur pleine dignité."

A considerably less favourable stance on taking into account the economic situation of the state was adopted by the ICJ in the dispute on the *delimitation of the continental shelf*, Libya v. Malta, judgment of 3 June 1985.[96] The ICJ stated then:

> It was argued by Malta […] that the considerations that may be taken account of include economic factors and security. Malta has contended that the relevant equitable considerations, employed not to dictate a delimitation but to contribute to assessment of the equitableness of a delimitation otherwise arrived at, include the absence of energy resources on the island of Malta, its requirements as an island developing country, and the range of its established fishing activity. The Court does not however consider that a delimitation should be influenced by the relative economic position of the two States in question, in such a way that the area of continental shelf regarded as appertaining to the less rich of the two States would be somewhat increased in order to compensate for its inferiority in economic resources. Such considerations are totally unrelated to the underlying intention of the applicable rules of international law. It is clear that neither the rules determining the validity of legal entitlement to the continental shelf, nor those concerning delimitation between neighbouring countries, leave room for any considerations of economic development of the States in question. While the concept of the exclusive economic zone has, from the outset, included certain special provisions for the benefit of developing States, those provisions have not related to the extent of such areas nor to their delimitation between neighbouring States, but merely to the exploitation of their resources. The natural resources of the continental shelf under delimitation „so far as known or readily ascertainable" might well constitute relevant circumstances which it would be reasonable to take into account in a delimitation, as the Court stated in the North Sea Continental Shelf cases (I.C.J. Reports 1969, p. 54, para. 101 (D) (2)). Those resources are the essential objective envisaged by States when they put forward claims to sea-bed areas containing them. In the present case, however, the Court has not been furnished by the Parties with any indications on this point.

Thus, the ICJ rejected the idea that the level of economic development of the states engaged in the dispute might be a factor affecting the delimitation of the continental shelf or even of the maritime economic zone. Nevertheless, the known or readily ascertainable natural resources of the shelf are a circumstance which should generally (but not in this case) be taken into account.

An argument of economic nature is also the activity of the state with regard to economic sovereignty as well as sailing or fishing. In the case on *the delimitation of the maritime boundary between Guyana and Suriname*, award of 17 September 2007,[97] the arbitration Tribunal noted that in the *Beagle Channel* case of 1977 it had been recognized that navigational interests constituted a special

[96] ICJ Rep. 1985, p. 13 (at 41), para. 50.

[97] R.I.A.A. vol. XXX, p. 1 (at 82 and ff.), paras. 295-306, 354–357, 378, 380 and ff.

circumstance. But special circumstances could also be geological and geophysical (albeit not in this case), as well as geographical. The conduct of the parties, including, in the economic sphere, is not irrelevant, either. Nigeria questioned delimitation relevance of the issuing of concession to extract oil. In this regard the Tribunal indicated that:[98]

> The ICJ for its part having made an analysis of the case law relating to the role of oil practice in maritime delimitation declared that "although the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are generally not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account. In the present case there is no agreement between the Parties regarding oil concessions."
> Arbitral Tribunals have supported this approach. The *St-Pierre et Miquelon* arbitration paid little regard to the oil practice of the parties. In this case, permits for exploration had been issued by both parties in areas of overlapping claims but "after reciprocal protests no drilling was undertaken." The Tribunal held that in the circumstances it had no reason "to consider the potential mineral resources as having a bearing on the delimitation." […]
>
> The dictum that oil wells are not in themselves to be considered as relevant circumstances unless based on express or tacit agreement between the parties was expressly applied in the award in the Barbados/Trinidad and Tobago arbitration. The award also made clear that the Tribunal did "not consider the activities of either Party, or the responses of each Party to the activities of the other, themselves constitute a factor that must be taken into account in the drawing of an equitable delimitation line."
> The cases reveal a marked reluctance of international courts and tribunals to accord significance to the oil practice of the parties in the determination of the delimitation line. In the words of the Court in the Cameroon/Nigeria case, "oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account." The Tribunal is guided by this jurisprudence. Having carefully examined the practice of the Parties with regard to oil concessions and oil wells, the Tribunal has found no evidence of any agreement between the Parties regarding such practice. The Tribunal takes the view that the oil practice of the Parties cannot be taken into account in the delimitation of the maritime boundary in this case.

The Tribunal noted a marked reluctance of international courts and tribunals in this regard. Only when the parties reach an express or tacit agreement, can it be

[98] Paras 386–390.

different. The Tribunal also quoted another arbitration award, from which it followed that also the potential existence of mineral resources in the territorial sea zone did not constitute a special circumstance.

The issue of the relevance of economic practices for the delimitation of maritime zones was also addressed by the Special Chamber of the ITLOS. In the case on the *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire),* judgment of 23 September 2017,[99] the Chamber stated, among others:

> The Special Chamber considers that the oil practice, no matter how consistent it may be, cannot in itself establish the existence of a tacit agreement on a maritime boundary. Mutual, consistent and long-standing oil practice and the adjoining oil concession limits might reflect the existence of a maritime boundary, or might be explained by other reasons. As the ICJ stated in Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras):
>
> A de facto line might in certain circumstances correspond to the existence of an agreed legal boundary or might be more in the nature of a provisional line or of a line for a specific, limited purpose, such as sharing a scarce resource. Even if there had been a provisional line found convenient for a period of time, this is to be distinguished from an international boundary. (Judgment, I.C.J. Reports 2007 (II), p. 659, at p. 735, para. 253)
> As the ICJ also stated with respect to oil concession limits in Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia): "[t]hese limits may have been simply the manifestation of the caution exercised by the Parties in granting their concessions" (Judgment, I.C.J. Reports 2002, p. 625, at p. 664, para. 79). Thus the proof of the existence of a maritime boundary requires more than the demonstration of longstanding oil practice or adjoining oil concession limits.

And further:

> The boundary the Special Chamber has to delimit is a single maritime boundary delimiting the territorial sea, exclusive economic zone and the continental shelf. In the Special Chamber's view, evidence relating solely to the specific purpose of oil activities in the seabed and subsoil is of limited value in proving the existence of an all-purpose boundary which delimits not only the seabed and subsoil but also superjacent water columns. As the ICJ stated in Maritime Dispute (Peru v. Chile), "the all-purpose nature of the maritime boundary … means that evidence concerning fisheries activity, in itself, cannot be determinative of the extent of that boundary" (Judgment, I.C.J. Reports 2014, p. 3, at p. 45, para. 111).

[99] Case No. 23, paras. 215, 226.

With regard to taking relevant circumstances into account, the Special Chamber first stressed in general[100] that:

> the Special Chamber emphasizes – while being aware that any delimitation may result in some refashioning of nature – that delimitation must not completely refashion geography or compensate for the inequalities of nature.

Then, with reference to the location of the resources in the zones, it considered[101] that:

> According to international jurisprudence, delimitation of maritime areas is to be decided objectively on the basis of the geographic configuration of the relevant coasts. Maritime delimitation is not a means for distributing justice.

In this context the Special Chamber concluded that:

> In assessing the international jurisprudence, the Special Chamber wishes to emphasize that such jurisprudence, at least in principle, favours maritime delimitation which is based on geographical considerations. Only in extreme situations – in the words of the Chamber of the ICJ in the Gulf of Maine case – if the envisaged delimitation was "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned" (see above at para. 452), may considerations other than geographical ones become relevant. In the view of the Special

[100] Paragraph 409.

[101] In para. 452 the Tribunal reminded that "In general, the trend – as expressed in the case concerning Continental Shelf (Libyan Arab Jamahiriya/Malta) and reiterated in Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway) (Judgment, I.C.J. Reports 1993, p. 38, at pp. 73–74, paras. 79–80) – was that a maritime delimitation should not be "influenced by the relative economic position of the two States in question, in such a way that the area of continental shelf regarded as appertaining to the less rich of the two States would be somewhat increased in order to compensate for its inferiority in economic resources." An exception to this is the Grisbadarna case (Norway/Sweden) (decision of 23 October 1909, R.I.A.A., vol. XI, p. 147), where account was taken of the lobster-fishing activities of Swedish fishermen. A more restrictive position was taken in Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), where it was stated that resource-related considerations may be taken into account in delimitation only if such delimitation was "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned" (Judgment, I.C.J. Reports 1984, p. 246, at p. 342, para. 237). That view was confirmed by the Judgment in Territorial and Maritime Dispute (Nicaragua v. Columbia) (Judgment, I.C.J. Reports 2012, p. 624, at p. 706, para. 223), which referred to the arbitral award in Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them (Decision of 11 April 2006, R.I.A.A., vol. XXVII, p. 147, at p. 214, para. 241), to which the ICJ referred again in Maritime Delimitation in the Black Sea (Romania v. Ukraine) (Judgment, I.C.J. Reports 2009, p. 61, at pp. 125–126, para. 198). Paragraphs 452–455.

> Chamber, Côte d'Ivoire has not advanced any arguments which might lead the Special Chamber to deviate from such jurisprudence.

In the presented judgment the ITLOS also commented on the delimitation of the continental shelf beyond the line of 200 nautical miles.[102] On this point the ITLOS reminded that the shelf constituted a whole. Therefore, theoretically the ITLOS should use the three-stage delimitation methodology. Meanwhile, the Tribunal used only the third criterion by examining proportionality. It analyzed equidistance from the perspective of proportionality, i.e. whether the application of the rule did not cause a significant disproportion compared to the coast length. But it did not elaborate on the arguments concerning relevant circumstances.[103] Thus, it became practically impossible to take economic arguments into account.

Consequently, the principle of proportionality does not affect the initial delimitation of the interim equidistance line. Indeed, relevant circumstances should be taken into consideration if the disparity is great, but the relations between the length of the coastline and the size of zones held do not apply here directly and mathematically. With reference to the delimitation of the exclusive economic zone and continental shelf around the Serpents' Island, the Court assessed, among other things, the behaviour of the parties concerning the issuing of oil concessions, fishing activity and operating maritime patrols. In this regard, the ICJ stated:

> 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, resource-related criteria have been treated more cautiously by the decisions of international courts and

[102] See also earlier ITLOS in the Case of Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14.3.2012, Case No. 16, ITLOS Rep. 2012, p. 4, paras. 341 and seq.

[103] Paragraphs 520 and seq., 528 and seq. In para. 533 it stated: "The third stage in applying the equidistance/relevant circumstances methodology requires verification that the delimitation line constructed by application of the first two stages of this methodology does not lead to an inequitable result owing to a marked disproportion between the ratio of the respective coastal lengths and the ratio of the relevant maritime area allocated to each Party. In this respect, the Special Chamber follows the approach of the ICJ in Maritime Delimitation in the Black Sea (Romania v. Ukraine) (Judgment, I.C.J. Reports 2009, p. 61, at p. 103, para. 122), which was also adopted in the Judgment of the Tribunal in the dispute concerning Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar) (Judgment, ITLOS Reports 2012, p. 4, at p. 123, para. 477). The Special Chamber notes that in conducting the disproportionality test, the relevant area encompasses the entire area under dispute identified in paragraphs 381 to 386 above (see Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, p. 4, at p. 125, para. 493; Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award of 7 July 2014, para. 490)."

> tribunals, which have not generally applied this factor as a relevant circumstance" (*Award of 11 April 2006, RIAA*, Vol. XXVII, p. 214, para. 241).
>
> With respect to fisheries, the Court adds that no evidence has been submitted to it by Ukraine that any delimitation line other than that claimed by it would be "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population" (Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984, p. 342, para. 237).
>
> Since the Court does not consider that the above-mentioned State activities constitute a relevant circumstance in the present case, the issue of critical date discussed by the Parties does not require a response from the Court.

Thus, the ICJ was reluctant about the argumentation concerning economic state power. Fishing in turn may be taken into account only in a special case involving disastrous consequences for the population.

An economic argument put forward in maritime disputes is the location (situation) and unity of the resources of economic maritime zones. This issue was addressed by the ICJ in the judgment concerning disputes over the *continental shelf*, Germany v. Denmark and Germany v. Netherlands, of 20 February 1969.[104] The Court considered that in the process of delimitation various circumstances should be taken into account and their equilibrium should be sought. They include geological and geographical circumstances, unity of deposits, as well as proportionality. With respect to the unity of deposits, the Court observed:

> The natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal régime established subsequent to the Truman Proclamation. Yet it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned. To look no farther than the North Sea, the practice of States shows how this problem has been dealt with, and all that is needed is to refer to the undertakings entered into by the coastal States of that sea with a view to ensuring the most efficient exploitation or the apportionment of the products extracted […]. The Court does not consider that unity of deposit constitutes anything more than a factual element which it is reasonable to take into consideration in the course of the negotiations for a delimitation. The Parties are fully aware of the existence of the problem as also of the possible ways of solving it.

Thus, the Court concluded that the unity of deposits was only a factual circumstance which should be considered while negotiating a delimitation agreement. Yet it does not have to be the essential or decisive circumstance.

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[104] ICJ Rep. 1969, p. 3 (at 41-43), paras. 72–74, 94–98.

The relevance of the distribution of the resources of the exclusive economic zone for its delimitation was addressed by the arbitration tribunal in the Barbados v. Trinidad Tobago dispute, award of 11 April 2006.[105] The Tribunal first characterised the course of the delimitation process, and then noted that international courts did not prefer the elements strictly linked to the shelf in the delimitation of the exclusive economic zone and *vice versa*. Quoting the ICJ judgment on the *Jan Mayen* case, the Tribunal indicated that, with minor exceptions, neutral criteria of geographical nature prevailed over those specifically linked to a determined zone such as distribution of fish resources. The Tribunal stressed that equitable considerations should be taken into account in delimitation, but above all those of geographical nature.

With regard to economic considerations, the Tribunal observed:

> Resource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance. As noted above, the *Jan Mayen* decision is most exceptional in having determined the line of delimitation in connection with the fisheries conducted by the parties in dispute. However, as the question of fisheries might underlie a number of delimitation disputes, courts and tribunals have not altogether excluded the role of this factor but, as in the *Gulf of Maine*, have restricted its application to circumstances in which catastrophic results might follow from the adoption of a particular delimitation line.

Therefore, the Arbitration Tribunal decided that the criteria related to natural resources of maritime zones usually do not constitute a significant delimitation circumstance.

4.4. IMPORTANCE OF ECONOMIC ARGUMENTATION IN THE SETTLEMENT OF DISPUTES RELATED TO THE USE OF THE SEA

4.4.1. GENERAL REMARKS

Jurisdictional and delimitation disputes have dominated in the hitherto practice of international courts and tribunals. Disputes concerning the use of the seas and oceans have played a minor role. Yet it seems that their significance will grow, given that maritime zones have mostly been delimitated. As the majority of identified and, most importantly, accessible living and non-living resources of the seas are situated in an exclusive economic zone and on the continental shelf, it can be expected that more disputes will concern the use of these areas. Moreover, disputes will also concern the area and use of the High Seas. Among them, disputes

[105] R.I.A.A. vol. XXVII, p. 147, paras. 224–228, 230–232, 241.

of a purely economic nature will most likely have a significant share. They may be related e.g. to access to the sea, access to and use of sailing routes, access to and use of fisheries, maritime border violations for economic purposes. Yet again, the question arises whether economic arguments may be of any relevance in these disputes and, if so, of what relevance. We do not have complete knowledge of this matter. The number of cases which were examined by the international courts and tribunals still remains limited in this area. Let us look at some of these cases.

4.4.2. PROMPT RELEASE CASES

A considerable group of cases related to the use of the sea is created in reaction to the acts of vessels, captains and crews related to breaching of the regulations of the coastal state. The release of vessels and crews may depend on the submission of "a reasonable bond or other financial security" (Article 292 UNCLOS). They were the subject of settlement in the ITLOS and, to a lesser extent, also in international arbitration. In those cases there are recurring arguments pertaining to the nature of the sovereignty of the coastal state over the maritime zone and the manner in which this sovereignty is used, as well as the nature of the acts of vessels against which restrictive measures were taken. However, such arguments should be differentiated from the issue of determining what regulations of a coastal state have been violated, which may also involve economic regulations. This issue is indeed a prerequisite for the legality of a state's actions and not an argument which might be relevant in the settlement of the dispute.

Numerous prompt release cases concern measures involving security on property that the coastal state reacting to the infringement of regulations may take towards the vessel and its crew. Acts of this kind take place in various maritime zones but above all in the exclusive economic zone (Article 73 UNCLOS). Such cases include the *Monte Confurco* case, Seychelles v. France, of 18 December 2000.[106] The Tribunal noted in this context that the coastal state had an obligation to release the arrested vessel on the posting of reasonable bond or other security. However, this provision does not specify the circumstances which determine reasonableness.

In the *Camouco* case, the Tribunal specified the factors relevant in an assessment of the reasonableness of bonds or other financial security, as follows:

> The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the

[106] ITLOS Rep. 2000, p. 86 (at 109, 111–112), Case No. 6, paras. 76, 86.

> bond imposed by the detaining State and its form. (Judgment of 7 February 2000, paragraph 67).
>
> This is by no means a complete list of factors. Nor does the Tribunal intend to lay down rigid rules as to the exact weight to be attached to each of them. These factors complement the criterion of reasonableness specified by the Tribunal in the *M/V "SAIGA" Case* as follows:
>
> In the view of the Tribunal, the criterion of reasonableness encompasses the amount, the nature and the form of the bond or financial security. The overall balance of the amount, form and nature of the bond or financial security must be reasonable. (Judgment of 4 December 1997, paragraph 82).

In the further part of the reasoning, the Court held that:

> the value of the fish and of the fishing gear seized is also to be taken into account as a factor relevant in the assessment of the reasonableness of the bond. The seizures of the fish, the fishing gear and the vessel were effected with reference to the same offences. For the purposes of Article 292 of the Convention, the Tribunal considers them as part and parcel of the same proceedings.

The Tribunal of the Law of the Sea therefore accepted that the economic argument in the form of seizure of cargo (here: caught and seized fish) may be of importance in assessing the reasonableness of the requirement and the amount of the bond or other security referred to in Article 73 UNCLOS.

A much later arbitration dispute in the *Duzgit Integrity Case*, Malta v. São Tomé and Principe, award of 5 September 2016[107] may be examined in the context of prompt release cases. It concerned pollution of the sea. In this case a tanker on archipelagic waters transferred fuel without permission to two other vessels owned by the same company (Stena Oil). The captain was arrested and his deprivation of liberty was extended. The entire cargo was also seized and customs duties and other pecuniary penalties were imposed. The Arbitration Tribunal rejected the argument based on the admissibility of the use of customs duties. It noted that no economic transaction had occurred but only a transshipment operation. Consequently, the customs duties and the seizure of cargo as commensurate with the act or the interest of respect for the sovereignty of São Tomé.

In the context of prompt release cases it is worth noting the ITLOS judgment in the Case of *M/V Saiga Case*, Saint Vincent and Grenadines v. Guinea, of 1 July 1999.[108] One of the issues in this case was the admissibility of the state of necessity being invoked to justify the application of the customs law of the coastal state in

[107] PCA Case No. 2014-07, paras. 257, 260.

[108] Case No. 2, paras. 127, 133–136.

the exclusive economic zone. The Tribunal in Hamburg concluded in this respect as follows:

> The Tribunal notes that, under the Convention, a coastal State is entitled to apply customs laws and regulations in its territorial sea (Articles 2 and 21). In the contiguous zone, a coastal State may exercise the control necessary to:
> (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
> (b) punish infringement of the above laws and regulations committed within its territory or territorial sea (Article 33, paragraph 1).
> In the exclusive economic zone, the coastal State has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures (Article 60, paragraph 2). In the view of the Tribunal, the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone not mentioned above.

However, a doubt arose whether the application of customs law could be justified with the state of necessity. In this respect the Tribunal concluded as follows:

> 133. In the *Case Concerning the Gabčíkovo-Nagymaros Project (Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *Judgment, I.C.J. Reports 1997*, pp. 40 and 41, paragraphs 51 and 52), the International Court of Justice noted with approval two conditions for the defence based on "state of necessity" which in general international law justifies an otherwise wrongful act. These conditions, as set out in Article 33, paragraph 1, of the International Law Commission's Draft Articles on State Responsibility, are:
> (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
> (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.
> 134. In endorsing these conditions, the Court stated that they "must be cumulatively satisfied" and that they "reflect customary international law".
> 135. No evidence has been produced by Guinea to show that its essential interests were in grave and imminent peril. But, however essential Guinea's interest in maximizing its tax revenue from the sale of gas oil to fishing vessels, it cannot be suggested that the only means of safeguarding that interest was to extend its customs laws to parts of the exclusive economic zone.
> 136. The Tribunal, therefore, finds that, by applying its customs laws to a customs radius which includes parts of the exclusive economic zone, Guinea acted in a manner contrary to the Convention. Accordingly, the arrest and detention of the *Saiga*, the prosecution and conviction of its Master, the confiscation of the cargo and the seizure of the ship were contrary to the Convention.

As a result, the International Tribunal for the Law of the Sea decided that an economic instrument in the form of ensuring the extended application of customs

law might not be taken into account. It is not the only measure of protecting the economic interest of the state, that is of securing revenues to the state budget. However, the Tribunal did not challenge the legitimacy of invoking the budgetary interest of the coastal state.

4.4.3. PERFORMING ECONOMIC ACTIVITIES IN THE COURSE OF SETTLEMENT OF INTERNATIONAL MARITIME DISPUTES

Some maritime disputes concern activities undertaken during a dispute, especially a delimitation one, before the dispute has been settled. It is in this context that the case before the Special Chamber of the ITLOS on the *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire),* judgment of 23 September 2017[109] should be viewed. In this case Côte d'Ivoire claimed that by engaging during delimitation in unilateral activities concerning hydrocarbon deposits, Ghana breached the rule of refraining from the use of unilateral activities in the contentious zone during its delimitation. The applicant claimed in particular that exclusive (sovereign) rights to the exploration and exploitation of the continental shelf had been infringed, alleging that the delimitation judgment did not create such rights (they were inherent), and only determined their geographical scope with the force of *res iudicata*.

The Special Chamber admitted that indeed the rights of the coastal state to the shelf are inherently exclusive and the states have those rights without the need to make any declarations. However, it decided that in the event of overlapping rights, a court judgment is constitutive. Consequently:

> maritime activities undertaken by a State in an area of the continental shelf which has been attributed to another State by an international judgment cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States.

Finally, the Chamber refused to recognise the argument that the hydrocarbon-related activity conducted by Ghana constituted an infringement of the sovereign rights of Côte d'Ivoire, even if it transpired that the activity was undertaken in the zone attributed to Côte d'Ivoire by the judgment.

Côte d'Ivoire also claimed that the activity of Ghana in the contentious zones constituted a breach of the obligation (applicable during the interim period) not to jeopardize or hamper the talks intended to reach an agreement ensuring an equitable result (Article 83 (3) UNCLOS). The Chamber noted that the obligation to act in good faith resulted from the Convention. The Chamber did not find Ghana

[109] Case No. 23, paras. 562–565, 590–595, 606 and seq.

in breach of the obligation, since the state suspended its activities following the Order of the Special Chamber, and had conducted the activities only in the zone attributed to it.

CONCLUSIONS

Reflections on the importance of economic reasoning in international maritime disputes lead to the following conclusions:

1) economic arguments in maritime disputes are used by parties to the dispute to prove their reasoning, and is the argumentation taken into account, although unevenly through international settlement bodies. Rarely it is the argument of primary importance. Typically, the economic arguments arise in parallel to arguments of another nature, especially within the framework of the relevant/special circumstances. It means that the economic argument can be taken into account in the settlement of maritime disputes only if and to the extent in which such circumstances have legal base in the law of the sea and jurisprudence practice;
2) in disputes of jurisdiction, what is the most important is, which is understandable, an argument enabling the effective establishment of economic authority, in particular, of a regulatory and control nature. The economic activities of private individuals have no probative value;
3) in disputes related to the determination of the status of maritime features economic reasoning plays an important role. It has the legal basis in the Convention. It is necessary to particularly demonstrate the autonomy of real economic life on the feature. It is also interesting that the body deciding the dispute be ready to attach greater importance to the historical economic activities than contemporary ones.
4) in delimitation disputes, addressing economic arguments is more complex and contradictory than in previous cases. In adopting and disseminating fundamental three-phases methods for determining the boundaries of the zones of the sea, economic arguments may appear in the second phase of delimitation when relevant circumstances should be considered. However, existing practice shows that the range of economic arguments recognized by courts and international tribunals is limited. This is due to the general dislike of correcting natural inequalities and the preference for equidistance, which in essence refers to geographical or geophysical criteria. International jurisprudence, in particular, denies taking into account arguments based on level of economic development or economic or financial difficulties of a state. There is also scep-

ticism in judicial practice for arguments relating to the needs of economic development or performance of maritime economic activities (mining, fishing, shipping). Courts and tribunals are willing to waive this rule only in cases where specified delimitation would bring catastrophic repercussions for the livelihood and economic well-being of the population. However, to some extent the argument associated with unity of deposit assurance has value. It is important as far as resources are known or readily ascertainable.

5) in disputes related to the use of the sea, the importance of economic reasoning varied. In disputes concerning the prompt release, the role of the economic argument is limited. This is linked to the assessment of reasonableness of the bond or other financial security. However, in these disputes, a weak position is the adoption of acts establishing economic authority (e.g., application of customs legislation). They cannot be justified even by a greater necessity. Acts establishing economic authority should not be taken also in disputed maritime zones during the resolution of a dispute. Finally, economic arguments are relevant in disputes related to the violation of rights and economic interests of States and people, if they are protected by international law.

ARGUMENTACJA EKONOMICZNA W MIĘDZYNARODOWYCH SPORACH MORSKICH

Słowa kluczowe: spory międzynarodowe, rozstrzyganie międzynarodowych sporów morskich, delimitacja obszarów morskich, suwerenność terytorialna, niezwłoczne zwolnienie statku, argumenty ekonomiczne w prawie morza, UNCLOS, międzynarodowe prawo gospodarcze

Abstrakt

Celem opracowania jest zbadanie znaczenia argumentacji ekonomicznej w międzynarodowych sporach morskich. W artykule wyjaśniono najpierw, czym jest międzynarodowy spór morski, jakie są jego źródła i rodzaje, jakim zasadom podlega ich rozwiązywanie. Ustalono także, co należy rozumieć przez argumenty ekonomiczne, podkreślając ich relatywną naturę, a także pokazując potencjał, jakim dysponuje Konwencja o prawie morza z 1982 r. jako podstawa formułowania argumentacji ekonomicznej. Znaczenie argumentacji ekonomicznej rozważono w odniesieniu do międzynarodowych sporów dotyczących statusu prawnego terytoriów morskich, delimitacji stref morskich, władzy nad morzem i korzystania z morza.

Przeprowadzone badania prowadzą do następujących wniosków: 1) argumenty ekonomiczne występują tak w uzasadnieniu stanowisk stron, jak i w rozumowaniu organów rozstrzygających spory. Jednak ich wartość dowodowa jest ograniczona; 2) w sporach dotyczących statusu obiektów morskich (*maritime features*) rozumowanie ekonomiczne pojawia się w kontekście konieczności wykazania, że mogą one stanowić podstawę do delimitacji; 3) w sporach dotyczących jurysdykcji argumenty ekonomiczne są bardziej złożone i niejednorodne. Argumenty ekonomiczne są użyteczne w drugim etapie delimitacji, gdy uwzględnia się istotne okoliczności. Istniejąca praktyka pokazuje jednak, że zakres akceptacji argumentów ekonomicznych jest ograniczony (nie mogą one służyć jako podstawa korygowania naturalnych nierówności). Orzecznictwo nie aprobuje argumentów opartych na poziomie rozwoju gospodarczego czy też na gospodarczych lub finansowych trudnościach państwa (z wyjątkiem katastrofalnych skutków dla egzystencji i dobrobytu ekonomicznego (ludności), potrzebach rozwoju gospodarczego lub wykonywaniu morskiej działalności gospodarczej (wydobycie, rybołówstwo, żegluga). Pewne znaczenie ma argument związany z zapewnieniem jedności zasobów (gdy zasoby są znane lub łatwo je ustalić); 4) w sporach dotyczących władzy nad morzem pewną wagę ma argument związany z ustanowieniem władzy gospodarczej, w szczególności o charakterze regulacyjnym i kontrolnym; 5) w sporach związanych z korzystaniem z morza znaczenie rozumowania ekonomicznego jest zróżnicowane. W sporach dotyczących niezwłocznego zwolnienia statku rola argumentacji ekonomicznej jest ograniczona. Natomiast jest ona ważna w sporach związanych z naruszeniem praw i interesów ekonomicznych państw i osób, jeżeli są one chronione prawem międzynarodowym.