

## COMMENTARY

### **Barbados / Trinidad and Tobago Maritime Delimitation**

Yoshifumi Tanaka

#### 1. BACKGROUND

During the period between July 2000 and November 2003, Barbados and Trinidad and Tobago engaged in several rounds of bilateral negotiations which included maritime boundary and fishery negotiations. Nonetheless, the Parties differed as to whether the maritime boundary and fisheries negotiations were part of a single negotiating process or separate negotiations. By a Notice of Arbitration dated 16 February 2004, Barbados therefore initiated arbitration proceedings concerning its maritime boundary with the Republic of Trinidad and Tobago pursuant to Article 286 as well as in accordance with Annex VII to the UN Convention on the Law of the Sea. The Arbitral Tribunal was composed of five members: Stephen M. Schwebel (President), Judges Vaughan Lowe, Ian Brownlie, Francisco Orrego Vicuña, and Sir Arthur Watts. The Permanent Court of Arbitration served as Registry for the proceedings and the arbitration took place in The Hague.

#### 2. MARITIME DELIMITATION EFFECTED BY THE ARBITRAL TRIBUNAL

After confirming its jurisdiction, the Arbitral Tribunal established a maritime delimitation line by dividing overlapping marine space into three areas.

First, in the Western area, it was common ground between the Parties that the delimitation line was to be found in a provisional equidistance line between their opposite coasts. Nonetheless, claims of the Parties were divided as to whether the provisional equidistance line should be shifted taking relevant circumstances into account. While Trinidad and Tobago maintained that the equidistance line should be the delimitation line in the west, Barbados claimed that the provisional line should be adjusted owing to its traditional fishing activities. In this respect, the Tribunal found that the equidistance line in the west shall be the delimitation line between Barbados and Trinidad and Tobago (para. 271).

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\* Dr. Yoshifumi Tanaka is a Senior Lecturer in Law, University of Westminster School of Law, United Kingdom.

Secondly, the central segment extends from Point D of Barbados' claim to Point A of Trinidad and Tobago's claim. In this short segment of approximately 16 nautical miles (nm), the Parties did not argue in favour of any adjustment of the provisional equidistance line. Consequently, the Tribunal concluded that the equidistance line was agreed to in this segment (para. 294).

Thirdly, in the Eastern area, the Parties did not agree to request delimitation by means of a single maritime boundary. Although Barbados has requested the Tribunal to determine a single maritime boundary for the Exclusive Economic Zones (EEZs) and continental shelves of the Parties, Trinidad and Tobago contended that the continental shelf and the EEZ are separate and distinct institutions, and that there may therefore be different lines of delimitation for each. On this point, the Tribunal stated that it would firstly determine a single boundary line for the delimitation of both the continental shelf and the EEZ to the extent of the overlapping claims, without prejudice to the question of the separate legal existence of the EEZ and the continental shelf (para. 298). In this area, the Tribunal determined the location of the maritime delimitation line by adjusting a provisional equidistance line taking relevant circumstances into account. Those circumstances include: (i) the relevant coasts and their projection, (ii) proportionality, and (iii) regional considerations. The geodetic lines of the maritime boundary were specified in the Award (para. 382), and it was shown in Map V annexed to the Award. Finally, the Tribunal applied the proportionality test, and concluded that the bending of the equidistance line reflected a reasonable influence of the coastal frontages on the overall area of delimitation, with a view to avoiding reciprocal encroachments which would otherwise result in some form of inequity (para. 379).

### 3. SOME REMARKS ON THE ARBITRAL AWARD

It would seem that, overall, the Arbitral Tribunal attempted to maintain consistency with judicial precedents in the field of maritime delimitation. In paragraph 243 of the Award, the Arbitral Tribunal explicitly stated that it was necessary that the delimitation be consistent with legal principle as established in decided cases, in order that States in other disputes be assisted in the negotiations in search of an equitable solution that was required by Articles 74 or 83 of the Convention. In relation to this, three comments can be made.

First, as Barbados and Trinidad and Tobago are Parties to the UN Convention on the Law of the Sea, Articles 74 (1) and 83 (1) of the Convention are law applicable to the maritime delimitation in the present case. Nonetheless, these articles omit any reference to a method of delimitation because of the need for a compromise in the Third UN Conference on the Law of the Sea. In this respect, the Arbitral Tribunal ruled in paragraph 242 that:

The determination of the line of delimitation thus normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a convenient starting point, equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities

of each specific case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result.

Furthermore, in paragraph 306, the Arbitral Tribunal stated that:

[W]hile no method of delimitation can be considered of and by itself compulsory, and no court or tribunal has so held, the need to avoid subjective determinations requires that the method used start with a measure of certainty that equidistance positively ensures, subject to its subsequent correction if justified.”

Thus the Arbitral Tribunal adopted the two-step approach or the corrective-equity approach, although it did not accept the compulsory character of the equidistance method. The corrective-equity approach has been adopted in recent decisions relating to maritime delimitations, including: the Greenland / Jan Mayen (1993),<sup>1</sup> Eritrea/Yemen (1999),<sup>2</sup> Qatar/Bahrain (2001)<sup>3</sup> and Cameroon/Nigeria cases (2002).<sup>4</sup> It may be said that the validity of the corrective-equity approach was confirmed in this arbitration.<sup>5</sup> In particular, it is noteworthy that, as with the Cameroon/Nigeria case, the Arbitral Tribunal applied that corrective-equity approach under Articles 74 and 83 of the UN Convention on the Law of the Sea.

Secondly, concerning relevant circumstances, the Arbitral Tribunal pronounced, in paragraph 228, that the quest for neutral criteria of a geographical character prevailed in the end over area-specific criteria such as geomorphological aspects or resource-specific criteria such as the distribution of fish stocks, with a few exceptions. In fact, the Arbitral Tribunal did not admit traditional fishing activities by Barbados as relevant circumstances in the delimitation of the Western Area. In so doing, it would appear that the Arbitral Tribunal accepted the predominance of geographical factors over non-geographical factors. It would seem that this view echoed the recent trend of the case law in the field of maritime delimitation. In fact, judicial practice has shown that maritime delimitation has been effected by international courts and tribunals on the basis, in essence, of geographical considerations; and that non-geographical factors, such as economic factors, practice of the Parties, historic rights, national security etc, have played merely

<sup>1</sup> International Court of Justice: Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway).

<sup>2</sup> Permanent Court of Arbitration: Eritrea / Yemen Arbitration.

<sup>3</sup> International Court of Justice: Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain).

<sup>4</sup> International Court of Justice: Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening).

<sup>5</sup> With respect to the analysis on approaches of international courts and tribunals in some detail, see in particular, Y. Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Oxford, Hart Publishing, 2006), pp. 51-126; Y. Tanaka, “Quelques observations sur deux approches jurisprudentielles en droit de la délimitation maritime : l’affrontement entre prévisibilité et flexibilité”, (2004) *Revue Belge de Droit International*, pp. 419-455. Concerning an overview of this award with Maps by the same writer, see ‘Current Legal Developments’, (2006) 21 *International Journal of Marine and Coastal Law* (forthcoming).

a modest role in maritime delimitations. In that sense, it may be arguable that so far as the existing case law is concerned, maritime delimitation is, in essence, of a spatial rather than an economic nature.

Finally, it is to be noted that the Barbados/Trinidad and Tobago dispute gave rise to an interesting issue relating to the delimitation of the continental shelf beyond 200 nautical miles. Barbados and Trinidad and Tobago intensively discussed this subject in written as well as oral pleadings. Whilst the Arbitral Tribunal, for its part, avoided examining this issue in any detail, it appears that arguments by the Parties will provide an important insight into this issue.