

BARBADOS V. TRINIDAD AND TOBAGO

A Case Summary for the
Maritime Dispute Resolution Project
Round II



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Maritime Dispute Resolution Project

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
(*Barbados v. Trinidad & Tobago*)

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A research project of the
U.S.-Asia Law Institute

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The views expressed herein are those of the author, and do not necessarily reflect the views of the United States Navy or any agency of the United States Government.

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Project Overview

This case summary was prepared as part of the U.S.-Asia Law Institute's Maritime Dispute Resolution Project. The institute began the project in 2018 in order to better understand the circumstances in which interstate maritime disputes are successfully resolved and distill lessons for governments.

The two main questions the project seeks to answer are:

- When are international institutional dispute resolution mechanisms effective in resolving maritime disputes?
- What insights can be applied to the maritime disputes in East Asia?

To address these questions, leading international lawyers and legal scholars held workshops to analyze selected disputes from around the world. This and other case studies were prepared for the workshops and are based on the official records.

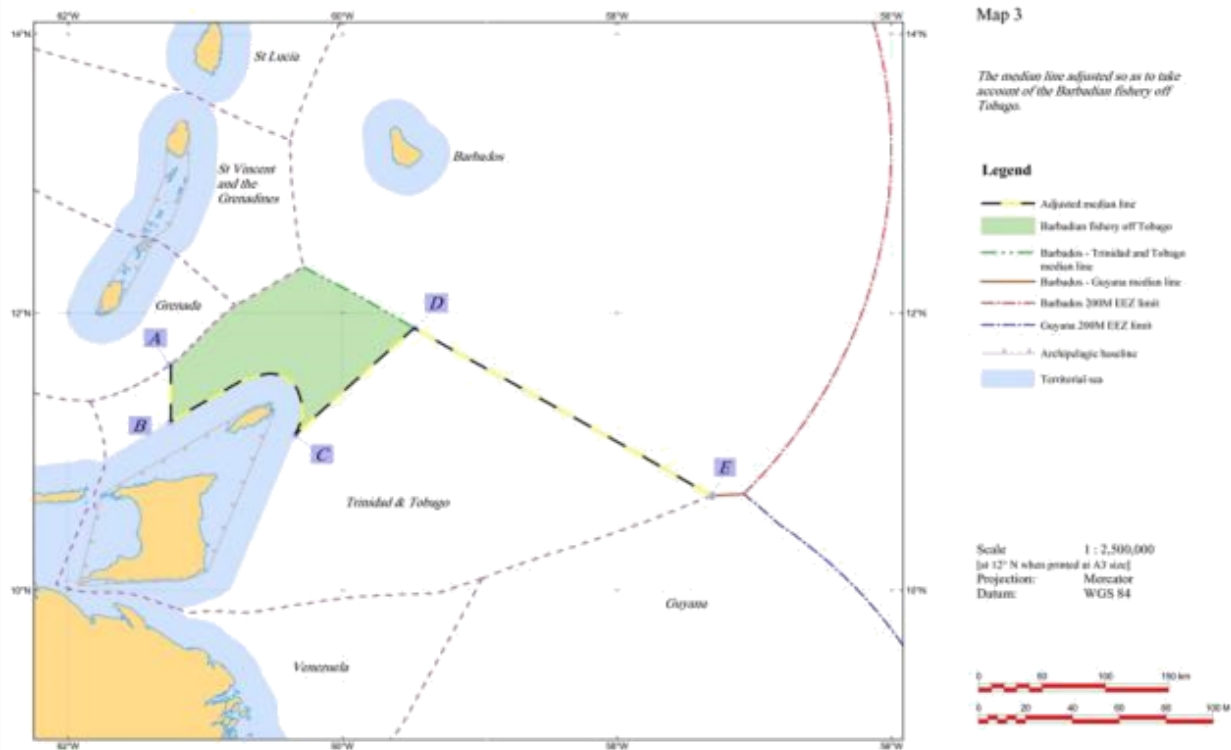
Citation:

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, (Barb. v. Trin. & Tobago) 27 R.I.A.A. 147-251 (2006)

Section I – Summary of the Case

Background. Barbados and Trinidad and Tobago (hereafter Trinidad) lie about 156 miles apart across the Caribbean Sea east of the Lesser Antilles. The two states attempted to negotiate a maritime boundary for 30 years. In 1979, early in the negotiating process, they entered into a MOU to cooperate on hydrocarbon exploration and fishing, but the agreement expired after one year without further progress. In 1986 Trinidad declared itself an archipelagic state and established its Exclusive Economic Zone (EEZ). Thereafter, on several occasions between 1988 and 2004, Trinidad arrested Barbadians fishing off the northern island of Tobago. In 1990 the two entered into a one-year Fishing Agreement to allow Barbadians to fish in Trinidad’s EEZ and sell fish in Trinidad’s markets, but further negotiations proved unsuccessful.

Barbados initiated arbitration pursuant to the United Nations Convention on the Law of the Sea (UNCLOS) article 286, regarding compulsory proceedings entailing binding decisions. Both states are party to the UNCLOS. Neither submitted exceptions to dispute resolution under article 289, and neither made a venue selection under article 287. Barbados requested the tribunal determine a single maritime boundary between the EEZs and continental shelves of the two countries. Barbados’s claim to a single unified boundary suggested the tribunal start with a provisional median line, but as a special circumstance to award it a substantial portion of what would otherwise be Trinidad’s EEZ (indicated in green on the map below) in which Barbadians claimed to have rights to “traditional artisanal fishing activities.”



Map 1: Barbados’s suggested delimitation. Source: *Arbitral award*

Trinidad’s response argued that the expanse of water between the two island countries should be divided based on two different sectors: an opposite portion in the Caribbean and an adjacent portion facing the open Atlantic Ocean. Trinidad agreed the delimitation should begin with a median line but found no basis to deviate from it in the “Caribbean sector” to accommodate Barbados’ claimed traditional fishing rights. In the “Atlantic sector” Trinidad claimed a right to “a full maritime zone, including continental shelf,” and a right of access to the full extent of the continental margin. Accordingly, to ensure its access would not be cut off, Trinidad requested a northward modification of the strict equidistance line in this area to ensure its access to an extended continental shelf and thereby avoid an inequitable result.

did not occur before Barbados filed under UNCLOS Part XV. Finally, it argued that Barbados was estopped from claiming any of the waters of Trinidad's EEZ because Barbados had previously accepted the area as belonging to Trinidad and their 1990 Fishing Agreement allowed Barbadian fishers to fish there.

Barbados argued the existence of a dispute was clear from the numerous differences that arose between the parties over five years and nine rounds of unsuccessful negotiations. It said Trinidad's position that agreement of both parties is needed before moving from negotiations to dispute resolution procedures would end the right to invoke arbitration as long as one state wanted further talks. Further, it argued the 1990 agreement was for one year and was not renewed, and therefore Barbadian fishers lacked a right of access to waters they had traditionally fished.

Tribunal decision: The tribunal found that parties engaged in relevant discussions beginning in the 1970s and entered into nine rounds of negotiations between July 2000 and November 2003. "In the tribunal's view, the parties ... negotiated for a reasonable period of time" and "no agreement having been reached ... [they had] an obligation to resort to the procedures provided for in Part XV of the UNCLOS." Further, the tribunal held that there are "clear disputes" about the applicable legal rules and the interpretation of UNCLOS articles and the relevant international law. The "exchange of views" requirement of article 283(1) does not apply where the negotiations required by articles 74 and 83 have already been undertaken and have failed to produce agreement. Thus, "upon the failure of the parties to settle their dispute by recourse to section 1 [of Part XV], i.e., to settle it by negotiations, article 287 entitles one of the parties unilaterally to refer the dispute to arbitration," in this case justifying Barbados' recourse to arbitration.

Barbados' Statement of Claim relates the dispute to the delimitation of the EEZ and continental shelf. The relief sought is a single maritime boundary. Trinidad's questions related to the extent of the continental shelf are therefore within the scope of the tribunal's jurisdiction. However, "the dispute submitted to arbitration does not give [the tribunal] the jurisdiction to render a substantive decision as to an appropriate fisheries regime to apply in waters which may be determined to form part of Trinidad's EEZ." Such questions belong to article 297(3), which provides a limited right to conciliation over a coastal state's exercise of its sovereign rights in the EEZ, including its discretionary powers related to allocation of the total allowable catch to other states.

2. The Appropriate Method of Delimitation.

Trinidad agreed the starting point for delimitation is the equidistance or median line and accepted "possible adjustment ... to achieve an equitable result," but argued "due regard must be paid ... to other delimitations in the region." Further, it argued the western or Caribbean sector reflects opposing coastlines and the eastern or Atlantic sector reflects adjacency. In Trinidad's view, "where states are opposite one another ... the equidistance line is the preferred method of delimitation, but where states are adjacent, the equidistance line has been found to lead to inequitable results."

Barbados argued for what it called the "equidistance/special circumstances rule" as being the most appropriate method to determine a single maritime boundary. It argued against considering "regional implications" as an important factor, since that would hold the decision hostage to other states not bound to accept it. Further, it claimed "two distant island states ... that face each other across a significant expanse of sea, with extensive sea on either side of them," can never "be in a situation of adjacency in contrast to coastal opposition."

Tribunal Decision: The EEZ regime did not absorb the continental shelf and both zones coexist with significant elements in common, since “within 200 nautical miles of a state’s baselines distance is the basis for the entitlement for each of them.” While “the continental shelf and the EEZ coexist as separate institutions ... it is evident that state practice ... overwhelmingly resorted to the establishment of single maritime boundary lines.”

In providing delimitation, two objective criteria emerged, identification of the relevant coasts and the principle of equidistance. Further development of other relevant circumstances became “increasingly attached to geographical considerations, with particular emphasis on the length and configuration of the respective coastlines and their characterization as opposite, adjacent, or in some other relationship.” The coast is the basis of maritime entitlements. Thus, the coast is a relevant circumstance and disparities can be taken into account, but the lengths of relevant coastlines do not provide a mathematical basis for determining delimitation. Ensuring proportionality of delimited areas is rather a final check since disproportionality would be inequitable. Resource-related criteria are generally only a relevant circumstance in circumstances in which “catastrophic results might follow.” Accordingly, a two-step approach to delimitation has emerged first involving drawing a provisional line of equidistance and second examining the provisional line in light of relevant circumstances. “This approach is usually referred to as the ‘equidistance/relevant circumstances’ principle,’ which combines certainty with the need for an equitable result.”

3. Delimitation in the West

The tribunal next considered whether historic rights existed in favor of Barbadian fishers in Trinidad’s EEZ.

Barbados based its claim on three assertions:

- 1) Barbadians practiced artisanal fishing in the waters northeast of the island of Tobago since the late 18th century. They engaged in artisanal fishing for flyingfish and since at least the 1970s they transported the fish on ice, whereas previously they used other preservation methods.
- 2) Barbadian fishers are dependent on this area. Six hundred Barbadian nationals are involved in flyingfish fishing off Tobago island and loss of their fishing rights would cause “severe economic disruption, and in some cases a complete loss of livelihood.”
- 3) Trinidad’s fishers do not fish there. Fishing is not a major revenue source in Trinidad and the people of the island of Tobago, closest to this fishery, fish close to shore and do not rely on flyingfish.

Trinidad denied the factual basis of the Barbadian claim, arguing as follows:

- 1) Barbadian fishers have no centuries-old artisanal fishing tradition in the waters off Tobago island and only began fishing there in the 1970s. Further the fishing is not artisanal but “highly commercial.”
- 2) Barbados exaggerates claims of the economic importance of its flyfishing and in any event the problem is of its own making since Trinidad continues to be willing to negotiate a new fishing agreement.
- 3) Barbados unduly dismisses the importance of flyfishing to the people of Tobago, which accounts for 70-90% of the total pelagic landings at beaches on the leeward side of the island.

The tribunal next considered whether Barbadian fishing practices in this sector would constitute a relevant or special circumstance requiring deviation from the median line.

Barbados asserted that the factual circumstances demonstrate it acquired “non-exclusive fishing rights.” It argued this should constitute a special circumstance requiring adjustment to the median line, based on four points of law. Barbados made the following claims:

- 1) “The exercise of traditional fishing for an extended period has been recognized as generating a vested interest or acquired right ... especially ... when the right was exercised in areas heretofore *res communis*.” For this proposition, Barbados relied on a 1953 article from the British Yearbook of International Law² and the 1893 Behring Sea Arbitration Award.³ It further asserted that state practice in the form of treaties “recognized the existence and need for the preservation of traditional fishing rights when new boundaries that might interfere with those rights are established.”
- 2) “Such traditional fishing rights vest not only in the state of the individuals that traditionally exercised them, but also in individuals themselves and cannot be taken away or waived by their state. In support of this position, Barbados argued the state need not establish *effectivités à titre du souverain*, and need only establish “that its

² Gerald Fitzmaurice, “The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law”, 30 Brit. Y.B. Int’l L. 1, 51 (1953).

³ Award Between the United States and the United Kingdom Relating to the Rights of Jurisdiction of United States in the Bering’s sea and the Preservation of Fur Seals (U.S. v. U.K.), 28 R.I.A.A. 263, (Aug. 15, 1893), https://legal.un.org/riaa/cases/vol_XXVIII/263-276.pdf.

nationals for a sufficient period of time have been exercising their non-exclusive rights in those waters.”

3) “Such rights are not extinguished by UNCLOS or by general international law.” In support of this, Barbados argued that the UNCLOS protects traditional fishing rights in archipelagic waters and “it would be contrary to established methods of interpretation of treaties to read into a treaty an intention to extinguish pre-existing rights in the absence of express words to that effect.” Specifically, Barbados cited article 47(6), which requires: “If a part of the archipelagic waters of an archipelagic state lies between two parts of an immediately adjacent neighboring state, existing rights and all other legitimate interests which the latter state has traditionally exercised in such waters and all rights stipulated by agreement between those states shall continue and be respected,” and similar language in article 51(1).

Concerning article 62 on the EEZ, which promotes the “optimum utilization of living resources” and requires it to give other states access to the surplus of the total allowable catch, Barbados argued it has no application where a dispute is over the acquisition of traditional fishing rights as a special circumstance in adjusting a maritime boundary, rather than sharing the surplus total allowable catch. Further, Barbados argued “as a general principle of international law, acquired rights survive unless specifically terminated and nothing in the UNCLOS or its travaux suggests states intended to surrender rights not specified in the text.” Finally, Barbados argued “customary international law, particularly as evidenced in Eritrea-Yemen ... provides for the survival of traditional artisanal fishing rights where, as here, former areas of the high seas fished by one state’s nationals are enclosed by the waters of another state.

4) “Such rights have been held to constitute a special circumstance requiring an appropriate adjustment to a provisional median line.” Barbados argued the *Gulf of Maine*⁴ and the *Eritrea-Yemen*⁵ case (among others) affirm that access to fisheries can constitute a special circumstance. Further, Barbados argues a special circumstance requiring deviation from the median line exists “because Trinidad ... refuses to accommodate this non-exclusive right by recognizing a regime of access” for the Barbadian fishers.

Trinidad argued that waters that were formerly high seas were *res communis* and distant water fishing confers no territorial or sovereign rights to the state of the nationality of the vessels concerned. “Conduct of private parties does not normally give rise to sovereign rights and [in any case] fishing by private parties in the high seas could not affect the sovereign rights of the coastal state in the seabed.” Significantly, “fisheries are not the only resource in the area ... the existence of hydrocarbons [under the seabed] is very likely ... [and] fisheries cannot be decisive” in delimitation especially where continental shelf rights stand as prior rights. Further, “non-exclusive rights to fish in the EEZ of another state are not sovereign rights and it is only sovereign rights which are in issue.” It is UNCLOS article 62 that addresses the preservation of existing fishing interests through its “regime of access” rather than adjustment of the equidistance line.

Next the tribunal considered whether Barbados would possess continuing fishing rights, if the area was held to be Trinidad’s EEZ.

⁴ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v U.S.), 1984 I.C.J. 246, (Oct. 12).

⁵ Eritrea v. Yemen, 22 R.I.A.A. 211 (Perm. Ct. Arb. 1998).

Barbados argued the tribunal was competent to award it less than it claimed if it decided not to adjust the equidistance line and could therefore award rights of access to Barbadian fishers as was done in the Eritrea-Yemen case.

Trinidad argued the tribunal has no jurisdiction to make such an award to Barbadian fishers⁶ and in any case the parties had come close to making an access agreement prior to Barbados' initiation of the case.

Tribunal Decision: Barbados bases its claim on three core factual submissions: (1) there is a centuries-old history of Barbadian artisanal fishing in the waters off Tobago; (2) Barbadian fishers are critically dependent on the maintenance of access to that fishery; and (3) the fishers of Trinidad and Tobago do not fish in those waters for flyingfish. Barbados further contends as both a matter of fact and law that Trinidad's "refusal ... to conclude an agreement according renewed and continuing access for Barbadian fisherfolk off Tobago justifies adjusting the maritime boundary."

However, the tribunal found that Barbados failed to prove any of the three factual elements, and "even if Barbados had succeeded in establishing one or all of its core factual contentions, it does not follow that, as a matter of law, its case for adjustment would be conclusive. Determining an international maritime boundary between two states on the basis of traditional fishing on the high seas by nationals of one of those states is altogether exceptional." Indeed, on multiple occasions Barbados recognized the waters as Trinidad's EEZ.

⁶ Note: Presumably Trinidad based this argument on the tribunal's charge to determine a single maritime boundary. The case does not elaborate.

The tribunal stated that there is a distinction between “relevant circumstances” in delimitation and states’ rights and duties, but in this case the respective rights and duties of the parties falls beyond the jurisdiction of the tribunal. “Article 297(3)(a) stipulates a coastal state is not obliged to submit to an Annex VII tribunal ‘any dispute relating to [the coastal state’s] sovereign rights with respect to the living resources in the exclusive economic zone,’ and Trinidad and Tobago has made plain that it does not consent to the decision of such a dispute by this tribunal.”

“The tribunal accordingly considers that it does not have jurisdiction to make an award establishing a right of access for Barbadian fishermen to flyingfish within the EEZ of Trinidad and Tobago.” However the tribunal drew certain matters to the attention of the parties: (1) article 63(1) requires states to coordinate to conserve and develop stocks that occur within the EEZs of two or more states; (2) both parties “emphasized before the tribunal their willingness to find a reasonable solution”; (3) Trinidad emphasized before the tribunal its readiness to negotiate an access agreement with Barbados; (4) commitments made by agents of the state before international tribunals bind the state; and therefore (5) Trinidad has assumed an obligation to negotiate in good faith an agreement with Barbados that would give Barbados access to fisheries within the EEZ of Trinidad.

4. Delimitation to the East:

The tribunal considered whether it should adjust the equidistance line to the north in the eastern (Atlantic) sector as requested by Trinidad to ensure its access to an extended continental shelf.

Trinidad argued that a pure equidistance method would prevent Trinidad from reaching the limit of its EEZ entitlement and would allow Barbados to claim 100% of the outer continental shelf. Citing

various case examples, it argued the tribunal should draw delimitation lines to “avoid cutting off” any state due to the convergence of maritime zones of other states.

An additional issue, it argued, is relevant: the proportionality of the relevant coastlines is relevant to delimitation as a test of equitableness. The “relevant coasts” are not simply those that generate an equidistance line but those that front the delimitation area, a determination that must be carried out as an initial matter. The coastal frontage of Trinidad is much greater than that of Barbados, which would not be reflected in an equidistance line. Further, an equidistance line ignores the regional implications for other states. The tribunal should not ignore other delimitations already made or yet to be made. And the application of a rigid equidistance line would give Barbados a “massively disproportionate continental shelf.” Further, the tribunal should take into account the Trinidad-Venezuela boundary delimitation and adjust the equidistance line between Trinidad and Barbados to ensure Trinidad is not left with “zone-lock or shelf-lock.”

Barbados argued that the only relevant coasts are “those that generate competing overlapping entitlements.” Further, the concept of “cut-off” is not a rule of absolute entitlement and has been applied to ensure access to an EEZ or continental shelf. Trinidad would have an EEZ and continental shelf extending more than 190 nautical miles from the relevant baselines in any event by the application of the equidistance line. The cut-off concept has never been applied to ensure access to an extended continental shelf, to which a state is not *ex ante* entitled.

As to proportionality, it is a final factor, not a source of entitlement to maritime zones, and an archipelagic baseline is not a relevant coastline for the purposes of any argument of disproportionality. Finally, international law does not recognize “regional

implications” as a relevant circumstance to delimitation. To do so would remove delimitation from its concrete foundation in geography. Accordingly, the Trinidad-Venezuela delimitation agreement has no bearing on the case and only applies to the parties of the agreement itself.

The tribunal then considered whether Trinidad should enjoy entitlement to an extended continental shelf.

Trinidad argued that coastal states are entitled to a continental shelf out to the continental margin, and that “under general international law [and the UNCLOS], claims to continental shelf are prior to claims to EEZ.” That is, the older continental shelf regime cannot be subordinated to the later regime of the EEZ. The UNCLOS created two distinct zones and the EEZ was made to be “an optional elected zone.” Furthermore, “there was no expression of any intention in UNCLOS to repeal or eliminate existing rights to the continental shelf.” Moreover, the tribunal is free to award Barbados EEZ rights and Trinidad continental shelf rights in the area beyond Trinidad’s EEZ but within 200 nautical miles of Barbados.

Barbados argued first that Trinidad cannot claim an extended continental shelf until it is first determined to be the “relevant coastal state with an entitlement in accordance with article 76.” As for possessing prior continental shelf rights, it is the UNCLOS itself that granted the extended continental shelf rights Trinidad claims. Further, Barbados argued that it enjoys sovereign rights to the seabed and subsoil within a 200 nautical mile arc that would be lost. In the UNCLOS, “the legal concepts of the EEZ and CS exist side by side, with neither taking precedence over the other.” A scheme of overlap should not be awarded without the consent of the states involved, and in this case the tribunal is precluded from drawing anything but a single maritime boundary.

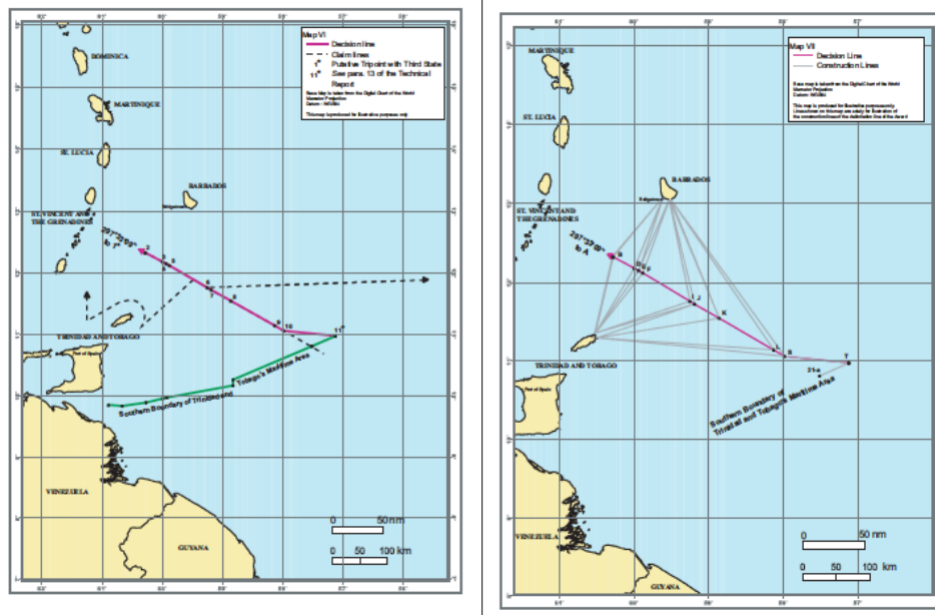
Tribunal Decision: Although Trinidad objects to delimitation of a single maritime boundary, arguing the EEZ and continental shelf regimes are distinct institutions, Trinidad “in fact accepts there is no reason for the tribunal to draw different boundary lines for the EEZ and continental shelf within 200 nautical miles of its own baseline.” Therefore, “the need for a separate boundary line appears [only] to be associated with its claim” to an extended continental shelf. “The tribunal will accordingly draw a single boundary line for the delimitation of both the continental shelf and EEZ to the extent of the overlapping claims.” Furthermore, the tribunal did not find the distinction between a Caribbean and an Atlantic sector persuasive when delimiting “vast ocean areas” between two small island states. In any event, it held, the applicable law and delimitation criteria are the same for either opposite or adjacent coasts. However, the tribunal stated the equidistance line is subject to adjustment based on the relevant circumstances, which in this case included “the relevant coasts to be considered and the base points to be used in delimitation.”

As to the question of whether Trinidad could employ its archipelagic baselines as base points for delimitation of the eastern portion of the equidistance line, the tribunal held that “coastal frontages are a circumstance relevant to delimitation and that their relevant lengths may require adjustment of the provisional equidistance line.” However, “coastal frontages are not strictly a function of the location of base points.” In this case, “the island of Trinidad has a not insignificant coastal frontage which clearly abuts upon the disputed area” that is a relevant circumstance in delimitation. Accordingly, “the orientation of coastlines is determined by the coasts, not by baselines ... [and the] broad coastal frontages of the island of Trinidad as well as the resulting disparity in coastal lengths between the parties, are relevant circumstances to be taken into account in effecting the delimitation.” This assisted the tribunal in making a determination

about the proportionality of the areas provisionally delimited, since “proportionality is a relevant circumstance to be taken into account in reviewing the equity of a tentative delimitation.”

To give effect to these relevant circumstances, the tribunal determined it would be appropriate to assign a point of deflection to the provisional equidistance line in favor of Trinidad. The extended deflection meets the boundary line already established between Trinidad and Venezuela at a distance less than 200 nautical miles from Trinidad’s baselines, obviating the need for any consideration of an extended continental shelf or overlapping entitlements.

The tribunal’s delimitation is depicted in the maps below and reflects the geography-based decision of the tribunal to terminate Trinidad’s EEZ and continental shelf at the point of intersection between the tribunal’s adjusted equidistance line to the north and, to the south, the delimitation line previously negotiated between Trinidad and Venezuela. The terminus point is less than 200 nautical miles from Trinidad’s base lines. The tribunal’s award therefore precludes Trinidad’s entitlement to an extended continental shelf.



Map 3 (left): Decision line compared to claim lines; Map 4 (right): Method of determining the decision line. Source: *Arbitral award*.

Section III – Implementation of the Tribunal’s Decision

According to the Maritime Claims Reference Manual, Trinidad has not amended its legislation to incorporate the specific maritime delimitation coordinates awarded by the tribunal. Trinidad’s Archipelagic Waters and Exclusive Economic Zone Act of 11 November 1986 remains in effect without amendment.⁷ Furthermore, on the United Nations “Legislation and Treaties” web page, there is a map of Trinidad’s archipelagic baselines and a

⁷ U.S. DEPT. OF DEFENSE REP. FOR OCEAN POLICY AFFAIRS, *Trinidad & Tobago*, MARITIME CLAIMS REFERENCE MANUAL (2020), <https://www.jag.navy.mil/organization/documents/mcrm/Trinidad&Tobago2020.pdf>

list of the geographical coordinates of the base points, but no similar chart is on file depicting the coordinates and boundary of the EEZ and continental shelf. Trinidad's page does list and provide links to its EEZ delimitation treaty with Venezuela, which includes the agreed delimitation coordinates. However, Trinidad only notes the tribunal's award under "other relevant documents" without further comment.

In May 2009, Trinidad made a submission to the Commission on the Limits of the Continental Shelf (CLCS) in which it stated on page 14, paragraph 11, Settled Maritime Boundaries: "The maritime boundary between Trinidad and Tobago and Barbados up to 200 M was settled by the Award of an Annex VII Tribunal in April 2006."⁸ While this statement apparently accepts the tribunal's award, Trinidad also appeared to try to reopen a portion of the decision. Specifically, Trinidad's submission took note that the tribunal's award pertained to both the EEZ and the continental shelf. It noted the tribunal had no recommendation before it from the CLCS as to the existence and extent of the extended continental shelf appertaining to Trinidad and Barbados when it issued its award, and it cited the Nicaragua-Colombia case before the ICJ for the proposition that the CLCS is the only competent body to determine whether a coastal state can extend its continental shelf jurisdiction beyond 200 miles. Accordingly, it appears Trinidad was

⁸ U.N. DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF, *Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines, Submissions to the Commission: Submission by the Republic of Trinidad and Tobago*, Ref. No. CLCS.49.2009.LOS (Aug. 20, 2009), https://www.un.org/Depts/los/clcs_new/submissions_files/submission_tto_49_2009.htm

not immediately prepared to accept the tribunal's decision as final in at least some aspects.

Barbados

Similarly, according to the Maritime Claims Reference Manual, Barbados has neither updated its Marine Boundaries and Jurisdiction Act of 1978 in light of the tribunal's award nor deposited a chart with EEZ coordinates with the United Nations Legislation and Treaty section. Like Trinidad, Barbados also lists the arbitration award under "other relevant documents" without further comment.

Barbados submitted a claim for an extended continental shelf to the CLCS in May 2008. Paragraph 1.4 on "Absence of Disputes" states that "the award of an UNCLOS Annex VII Tribunal in April 2006 determined the area of maritime entitlement as between Barbados and the Republic of Trinidad and Tobago." Trinidad issued a letter to the secretary general on August 11, 2008, objecting to this language. It stated that Trinidad intended to submit its own claim for an extended continental shelf, and "there will be areas of potential overlapping entitlements in respect of the continental shelf beyond 200 M with certain neighboring states, including Barbados." On April 15, 2010, the CLCS issued Recommendations to Barbados, which stated: "[T]he recommendations of the Commission relating to Barbados only deal with the outer limits of the continental shelf of Barbados and shall not prejudice any bilateral delimitation issues between states." Barbados made a further submission to the CLCS on January 31, 2012, to which Trinidad has not responded.

According to the *Jamaica Observer*, as of July 2014, there had been no fisheries access agreement between Barbados and Trinidad and Tobago to allow Barbadian fishers access to Trinidad's EEZ to

catch flyingfish. Trinidad was apparently holding up the fisheries agreement as leverage to complete a Memorandum of Understanding for joint energy cooperation with Barbados. An August 25, 2019 report in the *Trinidad and Tobago Guardian* said an MOU had been signed days earlier and negotiations on a fishing agreement could move forward in the interest of both countries. The MOU reportedly estops Trinidad from continuing to make any eastward maritime claims beyond the maritime delimitation boundary as provided in the 2006 arbitral award.

Accordingly, although there remains work to be done, the two states have reached an agreement on hydrocarbon development, appear to be negotiating a fisheries access agreement, and as per the Joint Energy Cooperation MOU, the boundaries as drawn by the arbitral tribunal are accepted as final. The award therefore served as the basis for further negotiation between the parties of the specific interests of the two states in the interest of finality.

Section IV – Conclusions

The case did not foreclose the possibility that historic fishing rights might exist in waters that were formerly high seas, but are now enclosed in the exclusive economic zone of another state, and that such rights may have survived the development of the UNCLOS.

As discussed above, Barbados claimed a centuries-old tradition of fishing in the waters that were once high seas but which were newly enclosed in Trinidad's EEZ by the workings of the UNCLOS. The tribunal found that Barbados failed to prove the existence of historical, artisanal fishing in these waters. It further noted that even if Barbados had proven a long-standing tradition of fishing in the relevant waters, "determining an international maritime boundary between two states on the basis of traditional fishing on the high seas by nationals of one of those states is altogether

exceptional.” That the tribunal found it difficult to conceive of a circumstance in which a maritime boundary might be moved across a vast amount of water space to accommodate traditional artisanal fishing is not the same, however, as suggesting a state’s continuing interest in historical fishing patterns cannot give rise to rights that fall within the UNCLOS EEZ regime. The tribunal might have suggested that, as a matter of law, former high seas fishing rights were extinguished by the UNCLOS and disposed of the issue as a matter of law. It chose not to do so.

Indeed, there is a sense in the opinion that the tribunal may have been somewhat sympathetic to the existence of such an interest. It acknowledged it lacked jurisdiction to determine the appropriate fishing regime in Trinidad’s EEZ, but it found Trinidad had a duty to negotiate an access agreement with Barbados in good faith based on the provisions of article 63. The tribunal also repeated its determination at least twice more, including in its otherwise rather brief *dispositif*. The tribunal’s approach may have left a door open to allow some countries to cite this opinion as support for the continuing existence of traditional fishing rights in the EEZ of another country.

The case addressed the status in international law of the “equidistance/relevant circumstances method” and appeared to raise the use of this method to at least a legal presumption where coastal states cannot otherwise agree on a different approach.

Articles 74(1) and 83(1) respectively state that the delimitation of the exclusive economic zone or 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.” These articles make clear that states have a duty to negotiate agreement as to delimitation of maritime zones and are

free to apply any method of delimitation, consistent with international law. However, once negotiations fail, there appears to be disagreement about the status of the “equidistance/relevant circumstances method”.

In this case, the parties were in disagreement about whether the tribunal was bound to follow a particular delimitation approach. Although both Barbados and Trinidad agreed the tribunal should apply the “equidistance/relevant circumstances method” to their case, Barbados insisted it “is the proper method prescribed by international law, occasionally describing it as a rule,” whereas Trinidad “emphasized ... [it] is not a compulsory method of delimitation.” For its part, the tribunal emphasized two points. First, it emphasized that up to 200 nautical miles from the base lines, distance is the objective criteria and the basis of the coastal state’s entitlement to each of the zones. Second, the tribunal noted it is “*necessary that the delimitation be consistent with legal principle as established in decided cases* (emphasis added), in order that states in other disputes be assisted in the negotiations in search of an equitable solution ... [as] required by articles 74 or 83 of the Convention.” It acknowledged “*the equidistance/relevant circumstances method is the method normally applied* (emphasis added) by international courts and tribunals in the determination of a maritime boundary.” It was also careful to say: “[N]o method of delimitation can be considered of and by itself compulsory.” But it added: “[T]he need to avoid subjective determinations *requires that the method used start with a measure of certainty that equidistance positively assures* (emphasis added), subject to its subsequent correction if justified.”

The tribunal then cited with favor the statement of a domestic Canadian tribunal applying international law to draw a maritime

boundary between Nova Scotia and Newfoundland.⁹ That tribunal stated: “[I]t has become normal to begin by considering the equidistance line and possible adjustments, and to adopt some other method of delimitation only if the circumstances justify it.” This suggests the arbitral tribunal believes there is at least a presumption under international law that, where parties cannot agree on another approach, the “equidistance/relevant circumstances method” is the required method of delimitation and any deviation must be justified by the circumstances.

⁹ *Arb. between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of their Offshore Areas, Award of the Tribunal in the Second Phase, 26 March 2002*, https://jsumundi.com/en/document/decision/en-arbitration-between-newfoundland-and-labrador-and-nova-scotia-concerning-portions-of-the-limits-of-their-offshore-areas-award-of-the-tribunal-in-the-second-phase-tuesday-26th-march-2002#decision_5421.



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