LAND AND MARITIME TRIPOINTS IN INTERNATIONAL JURISPRUDENCE

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Writing on "Intervention in the Proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea" Rüdiger Wolfrum noted that "due to the growing legal interdependence of States, every dispute has to be considered from the point of view of multilateralism".[1] The evolution of the international case law concerning the determination of tripoints on the occasion of disputes concerning land or maritime delimitation confirms this view.

According to Coalter G. Lathrop, "[a]proximately one half of all maritime boundary delimitations worldwide involve a tripoint issue";[2] the proportion is probably even higher concerning land delimitation. Such a situation is a matter of embarrassment for the States concerned when they delimit their boundaries bilaterally and for the international courts and tribunals when they are called upon to decide on a bilateral frontier dispute involving the rights of one or two (rarely more) third States. However, the issue has been abusively complicated by the ICJ, which, in some Judgments, stated that it arises differently in matters of maritime delimitation on the one hand and land delimitation on the other hand.

In its Judgment of 10 October 2002 in the *Cameroon v. Nigeria* case, the ICJ did not "accept [...] that the reasoning [...] in regard to land boundaries is necessarily transposable to those concerning maritime boundaries. These are two distinct areas of the law, to which

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[1] R. Wolfrum, Intervention in the Proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea, in *Liber Amicorum* Günther Jaenicke, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht,, 427, at 442 (135th ed. 1998) (also published in P. Chandrasekhara Rao, Rahmatullah Khan (eds.), The International Tribunal for the Law of the Sea: Law and Practice, 161, at 172 (2001).

[2] C. G. Lathrop, Tripoint Issues in Maritime Boundary Delimitation, in: D. A. Colson / R. W. Smith (eds.), International Maritime Boundaries, at 3305 (Vol. V, 2005), citing the Handbook on the Delimitation of Maritime Boundaries, UN Sales No. E.01.V.2, at 45 (2000).

different factors and considerations apply."[3] While understanding the underlying reasons for caution, the present writer respectfully does not agree. In particular, he is of the opinion that there is no reason for distinguishing between the rules applicable to the determination (or non-determination) of land tripoints on the one hand and maritime tripoints (whatever maritime area is concerned) on the other hand.

In both situations:

- the Court or international tribunal seised of the case must fix a complete and final boundary between the Parties;
- the purpose being the same, contrary to widely shared misconceptions, the process followed in both cases is quite similar;
- while at the same time the rights of third States must be preserved; and
- as a result of these apparently conflicting duties, the Court or the international tribunal in question cannot decide on the precise location of tripoints, but can (and must) indicate the general direction of the boundary line between the Parties up to the (undetermined) point where it reaches the jurisdiction of a third State.

A. On Land or at Sea: Similar Purposes

As the firmly established case law of the World Court shows, "[i]n general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality".[4] In particular, "[i]t is, [...] natural that any article [of a treaty] designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier."[5]

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[3] *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening), ICJ Reports 2002, 421, para. 238. The Court expressly cited its reasoning in the *Frontier Dispute* (Burkina Faso / Republic of Mali), ICJ Reports 1986, 554 and the *Territorial Dispute* (Libyan Arab Jamahiriya / Chad), ICJ Reports 1994, 6. While I was Counsel for Cameroon in that case, I wish to stress that I do not criticize the outcome of this Judgment with respect to the tripoint; what I do criticize is the declaration that different factors and considerations apply or, at least, prevail.

[4] *Temple of Preah Vihear* (Cambodia v. Thailand), ICJ Reports 1962, 34. See more generally: K. H. Kaikobad, Some Observations on the Doctrine of Continuity and Finality of Boundaries, 54 British Yearbook of International Law, at 119–141 (1983).

[5] Advisory Opinion, Interpretation of Article 3, Para. 2, of the Treaty of Lausanne, 24 July 1923, PCIJ 1925, Series B, No. 12, at 20.

This holds true in respect of the land and the territorial seas boundaries as well as the limits between maritime areas in which States enjoy sovereign rights and jurisdiction, namely the continental shelf or the exclusive economic zones.[6] As recalled by the Arbitral Tribunal in the *Beagle Channel* case, "a limit, a boundary, across which the jurisdictions of the respective bordering States may not pass, implies definitiveness and permanence".[7] The ICJ admittedly noted in *Romania v. Ukraine* that a maritime boundary delimiting the continental shelf and exclusive economic zones is not to be assimilated to a State boundary separating territories of States. The former defines the limits of maritime zones where under international law coastal States have certain sovereign rights for defined purposes. The latter defines the territorial limits of State sovereignty."[8] But this difference does not entail any consequence as to the need for certainty and completeness of the respective boundaries.

The very purpose of any boundary delimitation between States–whether terrestrial or maritime–is to determine the extent (and limit) of their respective jurisdictions. States must know as precisely as possible where the limits of their territorial sovereignty or sovereign rights lie–not only for the exercise of their own jurisdiction but also because this is of tremendous practical importance: interested people (people working across the border, nomadic or semi-nomadic tribes, farmers whose plots of land lie on both sides of the boundary, tourists, but also fishing boats or cargo ships, the navy, aircraft) must be aware of the territorial jurisdiction to which they are subject. Quoting from the 1978 ICJ Judgment in the *Aegean Sea Continental Shelf*, Daniel Bardonnet noted, "'Établir les limites entre États voisins', c'est 'tracer la ligne exacte [...] de rencontre des espaces où s'exercent respectivement les pouvoirs et droits souverains'[9] des États en question. La délimitation est indispensable à la vie juridique car elle est l'assiette de multiples prérogatives

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[6] There is no reason why this finding should not apply to the limits between any other kind of maritime zones such as fishery zones or non-exclusive economic zones.

[7] *Dispute between Argentina and Chile concerning the Beagle Channel*, 21 Reports of International Arbitral Awards (RIAA), at 88–89 (1977).

[8] *Maritime Delimitation in the Black Sea* (Romania v Ukraine), ICJ Reports 2009, 130, para. 217. See also Id., at 88, para. 71.

[9] Fn 42 (p. 140) in the text: "CIJ Recueil 1978, at 35, para. 85. Cf. les remarques de la Commission du droit international dans son rapport sur les travaux de sa trente-deuxième session, ACDI, 1980, Vol. II, deuxième partie, p. 80, par. 5."–"See the remarks by the International Law Commission on the works of its 32nd session, ILC Yearbook, 1980, Part II, p. [82 of the English version], para. 5" (author's translation).

étatiques qui ne peuvent s'exercer et s'harmoniser que dans la mesure où leur champ d'applicabilité est précisé."[10]

B. On Land or at Sea, Similar Processes

Comparing maritime and land delimitation, Prosper Weil, asks, "dans quelle mesure la délimitation maritime ressemble-t-elle à la délimitation terrestre? dans quelle mesure accuse-t-elle des traits spécifiques? À ce problème la réponse apparaît nuancée; si l'opération de délimitation est, par sa nature même, fondamentalement différente sur mer et sur terre, la frontière qui en résulte tend à revêtir des caractères similaires."[11] While I agree with the second part of the answer, I have difficulties in accepting that the processes are that much different.

It may be true that "[l]a différence entre les éléments matériels appelle très naturellement une différence de régimes juridiques";[12] but, this relates to the *area* concerned, and not to the *process* for determining the boundary, nor to the *boundary* itself which performs the same functions as the land boundary–functions which are not affected by

[10] D. Bardonnet, Les frontières terrestres et la relativité de leur tracé, 153 Recueil des Cours de l'Académie de Droit international 1, at 21 (1976)–"'[T]o establish the boundary or boundaries between neighbouring States' means 'to draw the exact line or lines where the extension in space of the sovereign powers and rights'(*Aegean Sea Continental Shelf* (Greece v. Turkey), ICJ Reports 1978, 35–36, para. 85) of the respective States meet. Delimitation is indispensable to the legal sphere for it is the foundation of multiple State prerogatives which can be exercised and go together only if their respective fields of application are specified" (author's translation).

[11] P. Weil, Délimitation maritime et délimitation terrestre, Écrits de droit international, at 247 (2000), originally published in Essays in Honour of Shabtai Rosenne, International Law at a Time of Perplexity, at 1021–1026 (1989)–italics in the text ("to what extent does maritime delimitation looks like land delimitation? to what extent does it present special traits? A nuanced answer must be given to these questions; while the delimitation *process*, by its very nature, fundamentally differs on the land and in the sea, the resulting *boundary* seems to offer similar characters" (author's translation).

[12] Arbitral Award, *Delimitation of maritime boundary between Guinea-Bissau and Senegal*, Dissenting Opinion of Mohammed Bedjaoui, 20 RIAA, at 168, para. 36 (1989)–"the difference between the material elements quite naturally calls for difference in the legal régimes" (English translation as reproduced in ICJ, 23 August 1989, *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Annex to the Application instituting proceedings of the Government of the Republic of Guinea-Bissau (Arbitral Award of 31 July 1989), at 106–107, para. 36). See also, at 168, para. 35: "[...] il ne me paraît pas douteux que les limites maritimes sont des frontières, mais d'une nature ou d'une catégorie différente."–"[...] there can, it seems to me, be no doubt that maritime limits constitute frontiers, but frontiers of different nature or category" (Id., at 105, para. 35).

the difference in the material elements. As found by the majority in the case concerning *Delimitation of maritime boundary between Guinea-Bissau and Senegal*:

> "Une frontière internationale est la ligne formée par la succession des points extrêmes du domaine de validité spatial des normes de l'ordre juridique d'un État. La délimitation du domaine de validité spatial de l'État peut concerner la surface terrestre, les eaux fluviales ou lacustres, la mer, le sous-sol ou l'atmosphère. Dans tous les cas, le but des traités est le même : déterminer d'une manière stable et permanente le domaine de validité spatial des normes juridiques de l'État. D'un point de vue juridique, il n'existe aucune raison d'établir des régimes différents selon l'élément matériel où la limite est fixée."[13]

It is commonplace to uphold that "the maritime territory [...] presents numerous peculiarities which distinguish it from the land territory and from the bodies of water more or less completely surrounded by these territories."[14] Physically, this is indisputable[15]; water and earth are two different elements, and while the latter can be trapped, water, like air, is fluid and evasive. Therefore you may demarcate and mark a land boundary on the ground[16]; this is not feasible in the case of maritime boundaries which can only be marked up on maritime charts since

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[13] *Delimitation of maritime boundary between Guinea-Bissau and Senegal*, 20 RIAA, at 144, para. 63 (1989)–"An international frontier is a line formed by the successive extremities of the area of validity in space of the norms of the legal order of a particular State. The delimitation of the area of spatial validity of the State may relate to the land area, the waters of rivers and lakes, the sea, the subsoil or the atmosphere. In all cases, the purpose of the relevant treaties is the same: to determine in a stable and permanent manner the area of validity in space of the legal norms of the State. From a legal point of view, there is no reason to establish different régimes dependent on which material element is being delimited." (English translation as reproduced in ICJ, 23 August 1989, *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Annex to the Application instituting proceedings of the Government of the Republic of Guinea-Bissau (Arbitral Award of 31 July 1989), at 51, para. 63.

[14] Permanent Court of Arbitration, *The Grisbådarna Case, English translation available on the PCA Website, www.pca-cpa.org; French original, 11 UNRIAA, at 159 (1909).*

[15] *See* e.g. E. Jouannet, *L'impossible protection des droits du tiers par la Cour* internationale de Justice dans les affaires de délimitation maritime in: V. Coussirat-Coustère / Y. Daudet / P.-M. Dupuy / P. M. Eisemann / M. Voelckel (eds.), La mer et son droit–Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec, 315, at 317 (2003).

[16] With special difficulties where a river or a lake is concerned. According to the definition given by the ICJ in *Cameroon v. Nigeria*, "[...] the delimitation of a boundary consists in its '*definition*', whereas the demarcation of a boundary, which presupposes its prior delimitation, consists of operations marking it out on the ground." (*Land and Maritime Boundary between Cameroon and Nigeria;* supra note 3, at 359, para. 84).

"there are no signposts or frontiers in the sea as such".[17] Similarly, the difference between the consistency of the land on the one hand and the sea on the other hand has important consequences in relation to evidence of title: while, failing a formal agreement or other kind of written title, the *effectivités* can play a role in establishing both the appurtenance of a given land territory and its limits,[18] they can have no evidentiary value as far as sea delimitation is concerned.[19] But these differences have no impact in matters of delimitation properly called between States with opposite or adjacent coasts: in both situations, a line must be drawn which will represent the limit of the respective jurisdiction of each State and which, therefore, must be as precise, complete and permanent as possible.

More fundamentally, it is a widespread view that "[c]ontrairement à la délimitation terrestre, la délimitation maritime ne consiste pas à rechercher le titre le meilleur, donc le seul décisif en droit; elle consiste à résoudre les difficultés nées de la coexistence de deux titres de même qualité juridique".[20] This position may find some support in the international jurisprudence; thus, according to the Arbitral Court in the *Beagle Channel* dispute between Argentina and Chile, "[t]o draw a boundary between the maritime jurisdiction of States, involves first *attributing to them, or recognizing as being theirs*, the title over the territories that generate such jurisdiction".[21]

Contrary to what this wording seems to imply, the expressions in italics are not equivalent: if it were true that delimiting a maritime

[17] *Beagle Channel* Award, supra note 7, at 80, para. 6.

[18] *Frontier Dispute* (Burkina Faso / Republic of Mali), ICJ Reports 1986, 586–587, para. 63; see also *Land and Maritime Boundary between Cameroon and Nigeria*, supra note 3, 351–355, paras. 64–70 and 415–416, para. 223 and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia / Singapore), ICJ Reports 2008, 50–51, paras. 120–122. On this point, see M. Kohen, La relation titres/effectivités dans le contentieux territorial à la lumière de la jurisprudence de la C.I.J., Revue Générale de Droit International Public at 561–596 (2004).

[19] 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, 27 RIAA, at 242, para. 366 (2006); *North Sea Continental Shelf* (Federal Republic of Germany / Denmark; Federal Republic of Germany / Netherlands), ICJ Reports 1969, 22, para. 19 and 51, para. 96; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), ICJ Reports 1974, 191, para. 41; *Continental Shelf* (Tunisia / Libyan Arab Jamahiriya), ICJ Reports 1982, 66–67, para. 87.

[20] P. Weil (note 11), at 251–"Contrary to land delimitation, maritime delimitation does not consist in looking for the better title, that is the only one decisive in law; it consists in solving the difficulties stemming from the coexistence of two titles having the same legal value" (author's translation). See also supra note 15.

[21] *Beagle Channel* Award (note 7), at 80, para. 6–italics added.

boundary presupposes "attributing" the maritime jurisdiction belonging to each of the States concerned, *then* this would be an operation very different from the delimitation of land boundaries. But this is not so.

It is certainly true that, as the ICJ recalled in its leading 2009 Judgment in *Romania v. Ukraine*, "the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned".[22] But this does not mean that the international courts or tribunal which are called upon to perform such a task have to "allocate" or "attribute" or "share" the areas in question between the States concerned. In particular, it cannot be accepted that sea delimitation is "the same thing as awarding a just and equitable share of a previously undelimited area [...]".[23] Contrary to Prosper Weil's contention, according to which "la délimitation maritime est condamnée à amputer le titre de chacun",[24] such an operation aims at describing the precise territorial scope of each State's title. On this precise point, the Court was right in its (for other reasons unfortunate) 1969 Judgment: "[d]elimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal state and not the determination *de novo* of such an area".[25]

According to the well-known *dictum* of the ICJ in those same cases, "the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources".[26] As a consequence, "the process of delimitation

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[22] See supra note 8, at 89, para. 77.

[23] See supra note 19, at 22, para. 22; see also *Case Concerning the Delimitation of the Continental Shelf Between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, 28 RIAA, at 49, para. 78 (1977).

[24] P. Weil, "Délimitation maritime et délimitation terrestre" (note 11), at 252–"maritime delimitation is doomed to amputate each State's title" (author's translation).

[25] See supra note 19, at 22, para. 22. For an interesting discussion of the origin of the pre-existing title of the coastal State to its continental shelf see B. Kunoy, The Rise of the Sun: Legal Arguments in Outer Continental Margin Delimitations, Nordic Journal of International Law, at 255–262 (2006).

[26] Id., at 22, para. 19. In the same vein, the Court appreciated, in the *Aegean Sea Continental Shelf* case, that "continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State." (supra note 10, at 36, para. 86). See also the Geneva Convention on the Continental Shelf, 29 April 1958, Article 2, and the UN Convention on the Law of the Sea, 10 December 1982, Article 77(3).

is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected".[27]

Indeed, this is usually said to be specific to "the basic concept of continental shelf entitlement", in contrast to the concept of an EEZ, which is "claim dependant" in that a State can avail itself of such a zone only when it has formally proclaimed it.[28] This may be so,[29] but it does not change the problematic in matters of delimitation: if and when two States with opposite or adjacent coasts have proclaimed the existence of such areas, the delimitation process will be guided by the same principles as those applicable to the delimitation of the continental shelf:

- the first rule is that the delimitation should "be effected by agreement on the basis of international law, [...] in order to achieve an equitable solution";[30]
- if such an agreement cannot be concluded and an international court or tribunal is seised of the dispute, it will base itself on the respective titles invoked by the Parties;[31]
- including pre-existing agreements between them;[32] and
- failing such determinative title, it will look for the "best title".[33]

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[27] Id., para. 20.

[28] See supra note 19, at 22, para. 20. The same idea is reflected in: *Land, Island and Maritime Frontier Dispute* (El Salvador / Honduras: Nicaragua intervening), ICJ Reports 1992, 608, para. 419: "the modern law of the sea has added territorial sea extending from the baseline [...]; has recognized continental shelf as extending beyond the territorial sea and belonging *ipso jure* to the coastal State; and confers a right on the coastal State to claim an exclusive economic zone extending up to 200 miles from the baseline of the territorial sea". See also P. Weil, Perspectives du droit de la délimitation maritime, at 142 (1988) and R. R. Churchill / A. V. Lowe (eds.), The Law of the Sea, 156–158 (1988).

[29] Although the present writer finds this to be a very artificial distinction since the "existence" of the area is of right and immediate when the proclamation is made.

[30] See Arts 74(1) and 83(1) of the UN Convention on the Law of the Sea, 10 December 1982.

[31] See Arts 74(2) and 83(2) of the UN Convention on the Law of the Sea, 10 December 1982.

[32] *"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" (Arts. 74(4) and 83(4) of the UN Convention on the Law of the Sea, 10 December 1982).*

[33] *Such a methodology is apparent in the Maritime Delimitation in the Black Sea case, when the Court stated: "The title of a State to the continental shelf and to the* exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts. As the Court stated in the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases, 'the land is the legal source of the power which a State

These general guidelines are, in all respects, similar to those applicable in matters of land delimitation: most land boundaries are fixed by agreement; when they are not, a peaceful means of settlement will have to be resorted to; if an international court or tribunal is called upon to decide, it will first apply any pre-existing treaty title (or other kind of pre-existing title),[34] and, absent such title, it will determine the boundary in accordance with general principles varying according to the circumstances.

Indeed the *content* of these principles is in part different on the land and at sea. In order to draw a land boundary, recourse will be had to principles such as *uti possidetis*, effective occupation, prescription, etc., which can hardly apply (or not without adjustment) in the case of sea delimitation.[35] On the contrary, the search for an "equitable solution", the criterion of the distance from the coast or, more precisely, the "equidistance/relevant circumstances" principle, which prevails for sea delimitation, cannot be applied as such to fix a land boundary. But the *process*, like the purpose, is essentially similar in both cases.

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may exercise over territorial extensions to seaward' (*Judgment, I.C.J. Reports 1969*, p. 51, para. 96). In the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, the Court observed that "the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it" (*Judgment, I.C.J.Reports 1982*, p. 61, para. 73). It is therefore important to determine the coasts of Romania and of Ukraine which generate the rights of these countries to the continental shelf and the exclusive economic zone, namely, those coasts the projections of which overlap, because the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned." (note 8), at 89, para. 77.

[34] For an illustration see the ICJ 1994 Judgment in Chad / Libya: since it found that "[t]he 1955 Treaty completely determined the boundary between Libya and Chad" (note 3, at 40, para. 76), it was "unnecessary to consider the history of the 'Borderlands' claimed by Libya on the basis of title inherited from the indigenous people, the Senoussi Order, the Ottoman Empire and Italy [...] [or other] matters which have been discussed at length before it such as the principle of *uti possidetis* and the applicability of the Declaration adopted by the Organization of African Unity at Cairo in 1964 [or] the effectiveness of occupation of the relevant areas in the past, and the question whether it was constant, peaceful and acknowledged [...]" (id., at 38, paras. 75 and 76).

[35] In its Judgment of 8 October 2007, in the *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean sea* (Nicaragua v. Honduras), the ICJ seems to accept that arguments based on the *uti possidetis* principle or the practice of the concerned States could be invoked in matters of maritime delimitation, but it dismisses them (see ICJ Reports 2007, 727–737, paras. 229–258). To be noted in particular is the Court's warning: "[t]he establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed" (id., at 735, para. 253).

Therefore, contrary to the position taken by the Chamber of the ICJ in *Burkina / Mali*,[36] there should be no question that, as noted by the Court in the *Aegean Sea Continental Shelf case*, "[w]hether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence [...]".[37]

C. On Land or at Sea, a Similar Dilemma

Except in very particular cases,[38] the complete and definitive delimitation of a disputed boundary, whether terrestrial or maritime, will usually imply the rights of one or two third States since the endpoint(s) of the boundary to be fixed will be the starting point of the boundaries between the Parties and a third State–this is the very definition of the tripoint. This is a source of difficulty when a boundary is delimited by negotiation as well as through judicial or arbitral proceedings. In both cases, "the primary concern of the negotiators, judges or arbitrators is to locate the boundary between the two parties to the negotiation or proceeding. However [...] a subsidiary question must also be answered: How should the endpoint(s) of the bilateral boundary be defined in light of possible third-state interests?"[39]

As a matter of fact, when two States seise an international court or tribunal of a delimitation dispute (whether of their land or of their maritime boundary), it is because there are uncertainties as to the precise location of the boundary in question–quite often including that of

[36] "[T]he process by which a court determines the line of a land boundary between two States can be clearly distinguished from the process by which it identifies the principles and rules applicable to the delimitation of the continental shelf" (*Frontier Dispute* (Burkina Faso / Republic of Mali), ICJ Reports 1986, 578, para. 47). As rightly noted by E. Jouannet, "en l'occurrence, il s'agissait simplement de fixer un tripoint et l'on ne voit pas en quoi la différence de délimitation peut paraître ici essentielle puisque c'est justement la question des tripoints qui les rend similaires" (supra note 20, at 329–"in the circumstances, the only issue was to determine a tripoint and one has some difficulties in perceiving how the difference in the delimitation processes may be that essential since precisely the tripoints issue makes them similar" (author's translation).

[37] See supra note 10, at 35–36, para. 85.

[38] Especially when the dispute bears upon a part of the common boundary without any contact with a third State. See for instance *Sovereignty over Certain Frontier Land* (Belgium v. Netherlands), ICJ Reports 1959, 209.

[39] C. G. Lathrop (note 2), at 3305–3306. Mr. Lathrop's remarks are limited to maritime delimitations; as seen above, there is no convincing reason not to extend them to the definition of land boundaries, even if, in practice, the uncertainties are fewer.

the tripoint(s). However, this uncertainty can have no bearing on the rights of third States.[40]

In effect, the Parties and the third States are in fundamentally different situations *vis-à-vis* the court or tribunal's jurisdiction. The main points are as follows:

- the court or tribunal's jurisdiction is based on consent;
- as a matter of definition, the Parties have accepted the court or tribunal's jurisdiction for the dispute in question;
- the third States are in a different position in that the court or tribunal could have jurisdiction in order to settle a possible dispute concerning the border at stake between them and the Parties or one of them; but
- there is no possibility of "forced intervention" in international law and, consequently, it is open to the third State to keep out of the proceedings even though it may have an interest in their outcome.

While in the framework of bilateral negotiations, the negotiators can (or can not) take the risk of fixing the tripoint(s),[41] the international courts and tribunals are constrained by the consensual principle which forbids them from taking a position on the interests of States which have not accepted their jurisdiction. The rights of the third States concerned must at the same time be preserved and set aside, since the courts and tribunals cannot decide upon such rights without these States' consent. In other words, the judges and arbitrators must exercise the jurisdiction conferred upon them by the Parties to its full extent, but they must not exceed that jurisdiction.[42] As the ICJ explained in *Cameroon v. Nigeria*, "The jurisdiction of the Court is founded on the consent of the parties. The Court cannot therefore decide upon legal rights of third States not parties to the proceedings."[43] It would indeed do so if it were to determine a tripoint without the express consent of the third State concerned.

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[40] D. Bardonnet, Frontières terrestres et frontières maritimes, 35 Annuaire Français de Droit International (AFDI) 1, at 54 (1989).

[41] On the various techniques resorted to by States in maritime delimitations see C. G. Lathrop (note 2), at 3313–3321.

[42] The ICJ put the formula the other way: "[t]he Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent." (*Continental Shelf* (Libyan Arab Jamahiriya / Malta), ICJ Reports 1985, 23, para. 19).

[43] *Land and Maritime Boundary between Cameroon and Nigeria* (note 3), at 421, para. 238.

In that case, the rights of two other States, namely Equatorial Guinea and Sao Tome and Principe, could have been affected by the maritime delimitation to be decided by the Court between Cameroon and Nigeria. Since neither of them had become a party to the proceedings,[44] the Court ensured that its Judgment would not affect the rights of those two States and "[i]n view of the foregoing", it concluded:

> "that it cannot rule on Cameroon's claims in so far as they might affect rights of Equatorial Guinea and Sao Tome and Principe. Nonetheless, the mere presence of those two States, whose rights may be affected by the decision of the Court, does not in itself preclude the Court from having jurisdiction over a maritime delimitation between the Parties to the case before it, namely Cameroon and Nigeria, although it must remain mindful, as always in situations of this kind, of the limitations on its jurisdiction that such presence imposes".[45]

Similarly, in its Award of 2006, the Arbitral Tribunal in *Barbados v. Trinidad and Tobago*, emphasized "that its jurisdiction is limited to the dispute concerning the delimitation of maritime zones as between Barbados and Trinidad and Tobago. The Tribunal has no jurisdiction in respect of maritime boundaries between either of the Parties and any third State, and the Tribunal's award does not prejudice the position of any State in respect of any such boundary."[46]

At the same time–and precisely so as not to prejudice the position of the third State concerned, the international court or tribunal seised of the dispute must take into account the rights and interests of that third State. And, again, this is true concerning land boundaries as well as maritime ones.

It is highly significant in this respect that in its 1984 Judgment on the *Application by Italy for permission to intervene* in *Libya / Malta*, the ICJ quoted from the 1933 PCIJ Judgment in the case of the *Legal Status of Eastern Greenland*:

> "Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power":[47]

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[44] Equatorial Guinea had intervened as a non-party.

[45] *Land and Maritime Boundary between Cameroon and Nigeria* (note 3), at 421, para. 238.

[46] 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 (note 19), at 210, para. 218.

[47] PCIJ 1933, Series A/B, No. 53, 46.

and the Court commented: "[...] this observation, which is itself unrelated to the possibility of intervention, is no less true when what is in question is the extent of the respective areas of continental shelf over which different States enjoy 'sovereign rights'".[48]

Consequently in its 1985 Judgment in the case concerning the delimitation of the *Continental shelf* between Libya and Malta, the Court refused to decide on the portions of the boundary in the areas which could be subject to claims by Italy and Tunisia:

> "the Parties have in effect invited the Court, notwithstanding the terms of their Special Agreement, not to limit its judgment to the area in which theirs are the sole competing claims; but the Court does not regard itself as free to do so, in view of the interest of Italy in the proceedings. When rejecting the application of Italy to intervene in the proceedings, the Court noted that both Malta and Libya opposed that application [...]"[49]

The means to ensure the protection of third States may seem diverse. In the first place, the international court or tribunal may take shelter under Article 59 of the Statute of the ICJ and, more generally the principle of *res judicata*. This was the position of the Chamber of the ICJ in *Burkina v. Mali*, which explained:

> "that its jurisdiction is not restricted simply because the end-point of the frontier lies on the frontier of a third State not a party to the proceedings. The rights of the neighbouring State, Niger, are in any event safeguarded by the operation of Article 59 of the Statute of the Court, which provides that 'The decision of the Court has no binding force except between the parties and in respect of that particular case'. The Parties could at any time have concluded an agreement for the delimitation of their frontier, according to whatever perception they might have had of it, and an agreement of this kind, although legally binding upon them by virtue of the principle *pacta sunt servanda*, would not be opposable to Niger. A judicial decision, which 'is simply an alternative to the direct and friendly settlement' of the dispute between the Parties (PCIJ, Series A, No. 22, 13), merely substitutes for the solution stemming directly from their shared intention, the solution arrived at by a court under the mandate which they have given it. In both instances, the solution only has legal and binding effect as between the States which have accepted it, either directly or as a consequence of having accepted the Court's jurisdiction to decide the case. Accordingly, on the supposition that the Chamber's judgment specifies a point which it finds to be the easternmost point of the frontier,

[48] *Continental Shelf* (Libyan Arab Jamahiriya v. Malta), Application by Italy for Permission to Intervene, ICJ Reports 1984, 26, para. 43.

[49] *Continental Shelf* (Libyan Arab Jamahiriya / Malta), supra note 42, at 26, para. 21.

> there would be nothing to prevent Niger from claiming rights, vis-à-vis either of the Parties, to territories lying west of the point identified by the Chamber."[50]

However, the Court in *Cameroon v. Nigeria* considered that in cases "where the maritime areas of several States are involved, the protection afforded by Article 59 of the Statute may not always be sufficient".[51] If this were true–and the present writer is not fully convinced that it is–it would also be true with respect to land delimitation; in both cases, as explained by the Chamber of the ICJ in *Burkina / Mali*, the full delimitation decided by the international court or tribunal would imply, "as a logical corollary, both that the territory [or the sovereign rights] of a third State lies beyond the end-point, and that the Parties have exclusive sovereign rights up to that point".[52] However, it is rather formal to hold that this "twofold presumption" "does not thereby create a ground of opposability outside that context and against the third State. Indeed, this is the whole point of the above-quoted Article 59 of the Statute."[53] As a matter of fact, the interests, if not the rights, of the third State are clearly affected; as has been noted, "Le jugement de la Cour va [...] s'imposer au tiers de façon quasi inéluctable".[54]

This should be an incentive to intervene for the third State the rights or interests of which are at stake, since, as an intervener, it can either limit itself to informing the court or tribunal of its position or become a Party to the dispute–which implies that it would be bound by the judgment or the award, after participating in the proceedings on an equal footing with the Parties.[55] And, indeed, both States–which tend to request to intervene more frequently than in the past[56]–and the ICJ–which seems more inclined to accept interventions–seem

[50] *Frontier Dispute* (Burkina Faso / Republic of Mali), supra note 18, at 577–578, para. 46.

[51] *Land and Maritime Boundary between Cameroon and Nigeria* (note 3), at 421, para. 238.

[52] *Frontier Dispute* (Burkina Faso / Republic of Mali), supra note 18, at 579, para. 49.

[53] Id.

[54] E. Jouannet (note 15), at 330–"the Court's judgment will nearly unavoidably impose itself to the third State" (author's translation).

[55] In contrast to Article 62 of the Statute of the ICJ (and with the Court's practice), Article 31(3) of the Statute of the ITLOS only envisages intervention as a Party. See R. Wolfrum (note 1), at 440.

[56] While the present paper was being prepared, two requests for permission to intervene were pending before the ICJ: 25 February 2010, *Application for Permission to Intervene by the government of Costa Rica* and 10 June 2010, *Application for*

convinced that intervention is an efficient and "economical" means of protecting the rights and interests of the third States.[57]

But this remains subject to non-negligible hazards:

- third States are always free to intervene or not;
- if they intervene as non-Parties, the international court or tribunal is certainly in a position to decide in full knowledge of the facts, but the intervener(s) will not be bound by the decision and a new dispute could occur in the future as to the determination of the tripoint between it (or them); and one of the Parties or both:
- if the statute of an arbitral tribunal does not provide for the possibility to intervene, it is not self-evident that an intervention before such a body would be permitted.

Consequently, the protection offered by the *res judicata* principle being said to be insufficient and intervention remaining an uncertain solution, it is for the court or tribunal having jurisdiction in a boundary dispute to conciliate its duty to settle the dispute by defining a complete boundary and that of preserving the rights of third States.

D. On Land or at Sea: a General Direction; not Tripoints

The international courts' and tribunals' dilemma can be expressed as follows:[58]

- they must answer the submissions and needs of the Parties and, to that end, define the boundary (whether on land or at sea) as completely as possible;
- they cannot decide on third States' rights without their consent (that is without them intervening as parties and, hitherto, such a condition has never been met);

Permission to Intervene by the government of Honduras in the *Territorial and Maritime Dispute* (Nicaragua v. Colombia) case. The Judgments rejecting both requests have been given on 11 May 2011.

[57] For this same view regarding intervention in general see R. Wolfrum, (note 1), at 448–449. The two Judgments of 11 May 2011 (see note 56) seem to dement this view.

[58] See the remarkable (but rather critical) discussion of this dilemma by E. Jouannet (note 20), at 316–341, *passim*, in which she underlines "l'impasse inéluctable à laquelle aboutit tout traitement de la position du tiers en droit international"–"the inescapable deadlock which marks the third party position in international law" (author's translation).

- but they must take third States' rights into account when they settle the dispute between the Parties.[59]

Squaring the circle is a less formidable task than it looks, and even though the international case law is not yet completely consistent, it points to an elegant, simple and globally satisfactory solution consisting in the international courts and tribunals abstaining from precisely defining tripoints while indicating a direction for the boundary–that is a line on which the tripoint can be fixed either by agreement between the three interested States or on the occasion of a new international proceedings.[60]

In effect, in their recent decisions, international courts and tribunals have avoided fixing any point as the terminus of the line they decide, but have simply indicated a direction to which the terminal part of the line points, until the jurisdiction of a third State is reached.[61]

Whether on land or at sea this has not always been the case. Thus, concerning land boundaries, the ICJ Judgments of 1986 in *Burkina / Mali* on the one hand and of 2005 in *Benin / Niger* on the other hand can be contrasted. In the first case, the Chamber of the Court took a rather enigmatic position in deciding that it "it has a duty to decide the whole of the *petitum* entrusted to it; that is, to indicate the line of the frontier between the Parties over the entire length of the disputed area. In so doing, it will define the location of the end-point of the frontier in

[59] "While the ICJ and tribunals are careful to protect non-party interests, they are also committed to fully discharging their duties vis-à-vis the parties before them by delimiting their entire maritime boundary or as much of the maritime boundary as has been requested. These two considerations create an obvious tension for the dispute settlement body, which must carefully balance the interests of the parties with the interests of non-party third states." (C. Lathrop (note 2), at 3221).

[60] The pending case of the *Frontier Dispute* between Burkina Faso and the Republic of Niger is an example of such a situation where the boundary between one of the Parties (Burkina) and a third State (Mali) has already been delimited in a previous Judgment (*Frontier Dispute* (Burkina Faso / Republic of Mali), ICJ Reports 1986, 554). It would be interesting to see whether the ICJ will consider that, since it has already decided on the rights of the third State, it can fix a tripoint (the issue is complicated by the fact that, in their Special Agreement, the Parties ask the Court to "donner acte aux Parties de leur entente" ("acknowledge their agreement"- author's translation; 21 July 2010, Special Agreement).

[61] See, e.g., *Continental Shelf* (Libyan Arab Jamahiriya / Malta), supra note 42, at 26, para. 22; *Land and Maritime Boundary between Cameroon and Nigeria*, supra note 3, at 421, para. 238; 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 (note 19), at 244–245, paras. 381–382; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (note 35), at 755–759, paras. 312–318; and *Maritime Delimitation in the Black Sea*, supra note 8, at 130, para. 218.

the east, the point where this frontier ceases to divide the territories of Burkina Faso and Mali; but, as explained above,[62] this will not amount to a decision by the Chamber that this is a tripoint which affects Niger. In accordance with Article 59 of the Statute, this Judgment will also not be opposable to Niger as regards the course of that country's frontiers."[63] This exclusive reliance upon the safeguard constituted by Article 59 of the Statute was abandoned in the 2005 Judgment, where the Chamber of the Court found that:

> "[...] that the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector takes the following course:[...] the line of deepest soundings of the main navigable channel of the river *as far as the boundary of the Parties with Nigeria*" and
>
> "[...] Finds that the boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows the median line of that river, from the intersection of the said line with the line of deepest soundings of the main navigable channel of the River Niger *as far as the boundary of the Parties with Burkina Faso*",[64]

thus leaving the precise location of both tripoints undetermined.

The same hesitations can be noted regarding maritime delimitation. In some cases, the Parties have themselves defined the extremities of the area to be delimited. This was the case in the 1977 Award in the *Anglo-French continental shelf case* where the Court of Arbitration endorsed the definition of the disputed area given by the Parties in the *Compromis*, but with two important caveats: first that it was not "open to the Court [...] to pronounce in these proceedings on the position of the tripoint"[65] and, second, that its decision "will neither be binding upon nor create any rights or obligations for any third State, and in particular for the Republic of Ireland, for which this Decision will be *res inter alios acta*".[66] In *Jan Mayen*, the ICJ expressly integrally preserved the maximum claim of Iceland[67] as it did in fact do–although

[62] See the quotation above, supra note 50.

[63] *Frontier Dispute* (note 18), at 579–580, para. 50. In Libya / Chad the Court seems to follow the same path and indicates the coordinates of the extremities of the boundary between the Parties but without defining them as "tripoints" (see supra note 3, in particular at 33, para. 63).

[64] *Frontier Dispute* (Benin / Niger), ICJ Reports 2005, 150–151, para. 146.1 and 4 of the *dispositif*–italics added.

[65] *Delimitation of the Continental Shelf between the United Kingdom and the French Republic* (note 23), at 27, para. 27.

[66] Id., at 27, para. 28.

[67] *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway), ICJ Reports 1993, 82, para. 94(2).

with less clarity–in *Libya / Malta* in order to preserve the rights claimed by Italy.[68]

However, in most recent maritime delimitation cases, the ICJ and the arbitral tribunals refrained from fixing the endpoint of the boundary line they adopted after fixing the penultimate point of the border, from which they indicated a direction (usually represented by an azimuth) until it meets a maritime area belonging to a third State. As the Court very clearly explained in one of its most recent decisions in that field:

> "... it is usual in a judicial delimitation for the precise endpoint to be left undefined in order to refrain from prejudicing the rights of third States. (See for example *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 91, para. 130; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 27, and *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 26–28, paras. 21–23; and *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon* v. *Nigeria : Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, paras. 238, 245 and 307.)".[69]

Similarly, in *Qatar v. Bahrain*, the ICJ decided:

> "that the single maritime boundary in this sector shall be formed in the first place by a line which, from a point situated to the north-west of Fasht ad Dibal, shall meet the equidistance line as adjusted to take account of the absence of effect given to Fasht al Jarim. The boundary shall then follow this adjusted equidistance line until it meets the delimitation line between the respective maritime zones of Iran on the one hand and of Bahrain and Qatar on the other",[70]

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[68] *Continental Shelf* (Libyan Arab Jamahiriya v. Malta), supra note 42, at 26, para. 21: "The present decision must [...] be limited in geographical scope so as to leave the claims of Italy unaffected, that is to say that the decision of the Court must be confined to the area in which, as the Court has been informed by Italy, that State has no claims to continental shelf rights. The Court, having been informed of Italy's claims, and having refused to permit that State to protect its interests through the procedure of intervention, thus ensures Italy the protection it sought." See also 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 (note 19), at 273, para. 374.

[69] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (note 35), at 757, para. 312.

[70] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), ICJ Reports 2001, 115, para. 249.

and in *Romania v. Ukraine*, it considered "that the delimitation line follows the equidistance line in a southerly direction until the point beyond which the interests of third States may be affected".[71]

E. Conclusion

As colourfully explained by Mr Lathrop, "Tripoints are like glue–while they can provide the adhesive to cement three separate bilateral agreements together, they can also make things very sticky".[72] However, it can be noted that, adroitly, international courts and tribunals have kept their hands out of that glue; although Professor Jouannet does not perceive a "*réponse claire et continue au problème posé*",[73] after a floating period they have rightly come to the conclusion that they had to bypass the difficulty in order to preserve the sacrosanct principle of consent to jurisdiction. This now apparently well-established jurisprudence consisting in indicating a direction instead of an endpoint making the tripoint in frontier disputes must certainly be approved.

Moreover, "[l]a prise en compte des intérêts des États tiers dans les deux catégories de différends terrestres et maritimes [...] reflète [...] un certain rapprochement, là encore, du régime juridique des deux types de frontières".[74] This convergence is equally most welcome and should lead to mitigation of the "particularisms" unduly attributed to the delimitation of land and maritime boundaries respectively. In both cases, the international courts and tribunals have been well advised to consider the disputed delimitations and the question of the tripoints "from the point of view of multilateralism", to quote again the words of Rüdiger Wolfrum.[75]

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[71] *Maritime Delimitation in the Black Sea* (note 8), at 128–129, paras. 207–209.

[72] C. G. Lathrop (note 2), at 3341.

[73] See supra note 20, at 323–"a clear and continuous answer to the issue in question" (author's translation).

[74] D. Bardonnet (note 40), at 59–"the taking into consideration of third States' rights both in land and maritime disputes [...] reflects, here again, a certain convergence of the legal régimes of the two types of boundaries" (author's translation).

[75] See supra note 1.