

THE MEXICO-UNITED STATES CONTINENTAL SHELF. THE CASE OF THE WESTERN POLYGON IN THE GULF OF MEXICO

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CONTENTS

Introduction	5
Resumen	7
Treaty on Delimitation of the Continental Shelf between Mexico and the United States of America of June 9, 2000	9
ALONSO GÓMEZ-ROBLEDO VERDUZCO	
The Evolution of the Delimitation of the Continental Shelf in International Law and the Case of the Delimitation of the Western Polygon between Mexico and the United States of America	27
SUSANA HERNÁNDEZ PACHECO	
Western Polygon Project	39
MARIO LIMÓN GONZÁLEZ	
The International Legal Status of the Detained Prisoners by the United States of America in Guantanamo, Cuba, after the Conflict in Afghanistan	53
LUIS BENAVIDES	
The Growth of Particularly Sensitive Sea Areas. Are We Heading Towards a New “Bookish Battle” in the XXI Century?	73
DAVID ENRIQUEZ	

INTRODUCTION

The Mexican Yearbook of International Law (MYIL) is a publication of the Institute of Legal Research which is pending that its authors and their works have wide dissemination. In this sense, we take into account that currently, the language of science is the English language, as was Latin in the past.

With Selected Papers from the Mexican Yearbook of International Law, we want to make available to readers who do not read Spanish, some works of Mexican jurists that in another moment already were published in the same MYIL.

The works published here refer to two issues of great importance such as the law of the sea and international humanitarian law, with authors who are an authority in their specialty (Alonso Gómez-Robledo Verduzco, Susana Hernández Pacheco, Mario Limón González, Luis Benavides and David Enríquez) and they were selected because they have shown great interest to the readers, in their version in Spanish, and we now want to expand their dissemination among readers (lawyers or experts in international relations) who want to have an English version.

We hope that this new MYIL publication will be the starting point of other issues of the Selected Papers from the Mexican Yearbook of International Law. We want to thank the technical assistant of the MYIL, Mónica Nuño, in the selection and care of the translation and the National Council of Science and Technology (CONACYT) who provided the funds for the same translation.

Manuel Becerra-Ramírez
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RESUMEN

Los trabajos aquí presentados son el resultado de la Mesa Redonda organizada por la Coordinación del Programa de Posgrado en Derecho y el Instituto de Investigaciones Jurídicas, la cual se llevó a cabo el 12 de agosto de 2001. El objetivo fue ofrecer una visión completa de la problemática relativa a la delimitación de la plataforma continental en el derecho internacional y sus implicaciones en la región del Golfo de México, con el propósito de esclarecer un tema que desde la publicación del "Tratado sobre delimitación de plataforma continental en la región occidental del Golfo de México más allá de las 200 millas náuticas" causó gran interés entre la comunidad científica del país. El tema fue tratado tanto desde el punto de vista técnico, como del jurídico; ambas visiones se presentan a continuación.

ABSTRACT

The works here presented are the result of the Round Table held by the Law Postgraduate Program and the Legal Research Institute, on August 12 2001. The objective was to picture a complete perspective of the problems related to continental shelf delimitation in international law, and its implications in the Gulf of Mexico. The aim was to establish the situation evolved since the ratification of the "Treaty of Continental Shelf Delimitation in the western section of the Gulf of Mexico beyond 200 nautical miles", which generates remarkable interest in the among the members of the scientific community. The subject was dealt with from both the technical and legal perspectives.

RÉSUMÉ

Les travaux présentés sont le résultat d'une Table Ronde qui s'est tenue le 12 août 2001 et a été organisée par la Coordination du Programme de Troisième Cycle en Droit et l'Institut de Recherches Juridiques. Le but était d'offrir une vision complète de la problématique relative à la délimitation de la plate-forme continentale en droit international et ses implications dans la région du Golfe du Mexique, à fin d'éclaircir un sujet, qui depuis la publication du "Traité sur la délimitation de la Plate-forme Continentale dans la région du Golfe du Mexique, au-delà de 200 milles nautiques", a soulevé un grand intérêt dans la communauté scientifique du pays. Tout au long de l'article, le sujet a été abordé aussi bien d'un point de vue technique que juridique.

TREATY ON DELIMITATION OF THE CONTINENTAL SHELF BETWEEN MEXICO AND THE UNITED STATES OF AMERICA OF JUNE 9, 2000

ALONSO GÓMEZ-ROBLEDO VERDUZCO*

C O N T E N T S

- I. Introduction
- II. Common Denominator to the Maritime Delimitation
- III. Definition of the Continental Shelf
- IV. The Delimitation in International Jurisprudence and State Practice
- V. Delimitation of the Continental Shelf between Mexico and the United States of America
- VI. Conclusion

I. INTRODUCTION

It can be said about the problems regarding the delimitation of maritime zones, from a purely technical point of view, that they were problems really simple to solve in most cases.

The width of the territorial waters were only a few miles; the baselines that served as their measurement generally followed the configuration of the coasts.

Delimitations today imply great distances, whose aim is no longer solely being a border of 3 or 12 nautical miles, but great extensions covered by the exclusive economic zones and by continental or island shelves.

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TREATY ON DELIMITATION OF THE CONTINENTAL SHELF BETWEEN MEXICO AND THE UNITED STATES OF AMERICA OF JUNE 9, 2000

All and any of the negotiations, whether bilateral or multilateral, present a unique set of problems, among the following: the multiple differences in the configuration of the line of the coast, the presence of islands, rocks or elevations that emerge at sea, the morphology of the seabed, the distribution of living and non-living resources, etc.

The general rules on delimitation between two or more States are still originating through a gradual process of formation, due mainly to the work of international jurisprudence. Although there are more and more cases submitted to arbitration and the international judiciary; however, as Tullio Scovazzi has said, it does not seem that a corpus has been formed so consistently as to consent to the individualization of sufficiently precise and consolidated general rules in international practice.

On the other hand, it is indisputable that the right of delimitation of the Continental Shelf has been considered as the prototype of the right of any maritime delimitation, although it is not obvious at first sight that the delimitation of the territorial sea, the platform and the exclusive economic zone must follow the same principles and rules of law, since because of their same subject matter they are applied to jurisdictions of diverse juridical nature.

Since 1969, the court has considered that the non-applicability of the conventional provisions of 1958 was not equivalent to an absence of legal rules, and since then both judicial decisions and arbitral decisions have not ceased to insist on the obligation imposed on the international judge to settle disputes on the basis of law, not conferring him/her the power to decide, in any manner whatsoever, an *ex aequo et bono* litigation.

Little by little, and through the succession of cases submitted to international jurisprudence, it can be argued that the judge can no longer fulfill his/her mission, simply stating that a delimitation path is the right one because he/she simply considers it equitable. It is also necessary that the international judge be able to justify the delimitation line in light of equitable principles of normative content.

As a result, one of the serious problems presented by the law of maritime delimitation is to find that necessary balance between a certain degree of generality that should be covered by any legal rule, but in close conjunction with the criterion of equity, taking into account not to bring equity to illogical positions of an extreme individualization of the rule of law itself, which obviously, if this were the case, it would lose all connotation of normative rule.

II. COMMON DENOMINATOR TO THE MARITIME DELIMITATION



The common denominator applicable to any maritime delimitation —and on which there seems to be no greater discussion in international jurisprudence— is that according to it the delimitation must be made by using practical methods and by applying “equitable principles” that are suitable for ensuring an equitable

result, taking into account the geographical configuration of the region and other “relevant circumstances” to the specific case.¹

Thus, in the Case of the Delimitation of the Maritime Border in the Gulf of Maine Region, the International Court of Justice stated that no maritime delimitation between States whose coasts are adjacent or face-to-face could not be affected unilaterally by one or the other the States. This delimitation must be made through an agreement, the result of a negotiation carried out in good faith and with the genuine intention of being able to reach a positive result.

In the event that an agreement cannot be reached, la delimitation must be made by resorting to a third instance endowed with the necessary competence for this purpose: “Dans le premier cas, comme dans le second, la délimitation doit être réalisée pour l’application des critères équitables et par l’utilisation de méthodes pratiques aptes à assurer, compte tenu de la configuration géographique de la région et des autres circonstances pertinentes de l’espèce, un résultat équitable”.²

We must state very clearly that the “equitable principles”, also sometimes called equitable criteria or factors (Arbitration, Guinea vs. Guinea Bissau 1982) are not mere rhetoric, but true legal maxims, which together with the so-called “relevant circumstances”, integrate an inseparable duality.

It is evident that the “equitable principles” —as the jurisprudence has shown— which can be taken into consideration for an international maritime delimitation, cannot be systematically and theoretically defined, due to their highly variable adaptability to very different and specific situations.

In the Case of the Delimitation of the Maritime Border in the Gulf of Maine Region, between Canada and the United States of America, the International Court of Justice stated that they could be remembered as “equitable criteria”, expressed in the classic formula that the land dominates the sea; the principle of no overlap between areas of the Continental Shelf; the one concerning avoiding, as much as possible, an effect of amputation of the maritime projection of the coast of one of the States in question.³

¹ See Gómez-Robledo, Alonso, “Métodos de delimitación en derecho internacional del mar y problema de las islas”, en varios autores, *Los espacios marítimos y su delimitación*, México, Secretaría de Energía, 1999, pp. 135-218.

² See ICJ, “Arrêt du 12 octobre 1984 rendu pour la Chambre constituée par Ordonnance de la Cour du 20 Janvier 1982”, *Recueil des Arrêts, Avis Consultatifs et Ordonnances*, p. 299 and 300, paragraph 112. The cases of the Continental Shelf in the North Sea continue to be of exceptional value for the understanding of the legal nature of the Continental Shelf and its delimitation. In its judgment of February 20, 1969, the court stated that the delimitation should be operated via an agreement, in accordance with equitable principles and taking into account all relevant circumstances, to attribute, to the maximum extent possible, to each party all the areas of the Continental Shelf that constitute the natural prolongation of its territory under the sea, and in such a way that there will not be an overlap over the natural prolongation of the territory of a third party; see “Affaires du Plateau Continental de la Mer du Nord” (RFA/Denmark; RFA/Pays-Bas), ICJ, *Recueil des Arrêts, Avis Consultatifs et Ordonnances*, 1969, p. 53, paragraph 101. See the illustrative analysis on the delimitation method based on the “equidistance” of the Mexican judge Padilla Nervo, Luis, “Separate Opinion of Judge Padilla Nervo”, *op. cit.*, p. 86-99.

³ See ICJ, *Recueil des Arrêts, Avis Consultatifs et Ordonnances*, 1984, p. 312 and 313, paragraph 157.



TREATY ON DELIMITATION OF THE CONTINENTAL SHELF BETWEEN MEXICO AND THE UNITED STATES OF AMERICA OF JUNE 9, 2000

In an effort of greater clarification, the International Court of Justice, in the case of the Continental Shelf between Libya and Malta of 1985, will specify that the normative nature of the “equitable principles” applied in the framework of general international law are important, by virtue of the fact that these principles govern not only the delimitation by judicial means or by arbitration, but also and primarily, because they impose the obligation on the parties to seek, first of all, a delimitation by means of an agreement, which implies also to look for an equitable result.

The court will then enunciate, as an example, several principles, considered as “equitable principles” in the jurisprudence and susceptible in addition to a general application:

- a) The principle according to which, at no time would it be a question of completely remaking geography or rectifying the inequalities of nature.
- b) The neighbor principle of non-overlap of one part over the natural prolongation of the other; and that is nothing but the negative expression of the positive rule, according to which the coastal State enjoys sovereign rights over the shelf bordering its coasts to the full extent authorized by international law, in accordance with the relevant circumstances.
- c) The respect due to all and any of said pertinent or relevant circumstances.
- d) The principle according to which, even though all States are equal to each other according to law and can claim equal treatment, equity does not necessarily imply equality,⁴ nor does it point to turn into equal, what nature has made unequal.
- e) The principle according to which at no time it would be a kind of distributive justice.⁵

Theoretically, “equitable principles” and “relevant circumstances” are placed on different planes, as Professor Prosper Weil has pointed out. The concept of relevant circumstances refers to gross facts, such as the concavity of a coast, the presence of an island, the difference between the extension of the coastal facades.

On the other hand, the concept of equitable principles implies a judgment on said elements of fact, and a certain vision regarding the objective pursued in a delimitation.

However, in reality, as the most serious doctrine states, relevant circumstances and equitable principles integrate, as we said before, an inseparable duality.



⁴ ICJ, *Reports*, 1969, p. 49, paragraph 91.

⁵ See ICJ, “Affaire du Plateau Continental, Jamahiriya Árabe Lybienne/Malte”, Arrêt du 3 juin 1985, *Recueil des Arrêts, Avis Consultatifs et Ordonnances*, pp. 39 and 40, paragraph 46.

Without the help of equitable principles, it would be impossible for the relevant circumstances to generate an appreciation of equality.

In fact, then, the equitable principles, as P. Weil points out, are shaped by reference to the relevant circumstances of the case, and the relevant circumstances of the concrete case, do not become operational except with the help and in the context of the equitable principles.⁶

III. DEFINITION OF THE CONTINENTAL SHELF

The United Nations Convention on the Law of the Sea, signed in Montego Bay, Jamaica, on December 10, 1982, and in force from November 16, 1994, that is, 12 months after depositing the sixtieth instrument of ratification (Guyana), sets out in its Article 76 the following:

The Continental Shelf of a coastal State includes the bed and subsoil of the underwater areas that extend beyond its territorial sea and throughout the natural extension of its territory and until the outer edge of the continental margin, or up to a distance of 200 nautical miles from the baselines from which the width of the territorial sea is measured, in cases where the outer edge of the continental margin does not reach that distance (Article 76, paragraph 1).

In almost all the regions of the world, the bottom of the sea descends gradually from the coast, into a great extension, even before it is interrupted by a very sharp descent, through a steep slope that leads to the oceanic chasms, or abyssal funds (see drawing on the next page).

This area of the seabed that is a type of cornice that borders more or less in an accentuated manner the islands and continents, has been called Continental or coastal shelf, and insular plain.

The extension of the Continental Shelf is very variable, since in some regions it has a relatively insignificant extension (South America Western Coast), while in other regions it reaches an extension of 800 or more miles (Bering Sea).

The rights of the coastal State over its Continental Shelf are sovereign, exclusive and unconditional, in the following sense: If the State does not occupy or exploit its platform, no other State may undertake such exploitation, without its express consent.

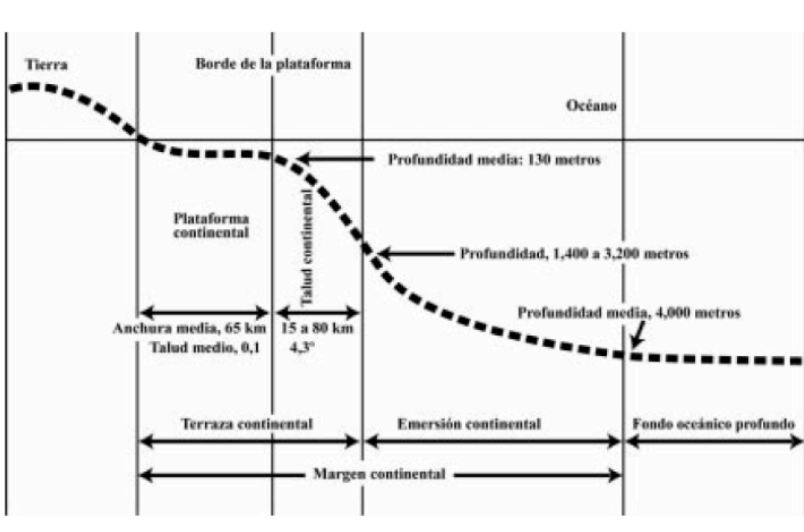
⁶ See(1) Weil, Prosper, "A propos du droit coutumier en matière de delimitation maritime", in different authors, *Études en l'Honneur de Roberto Ago: Le Droit International à l'heure de sa codification*, Milán, Giuffrè, 1987, vol. II, pp. 535-552. (2) Id., "L'équité dans la jurisprudence de la Cour Internationale de Justice", in different authors, *Essays in Honour of Sir Robert Jennings: Fifty years of the Internationale Court of Justice*, Cambridge University Press, 1996, pp. 121-144. The principle of "no overlapping", for example, do not have a more accurate meaning but in relation to concrete geographical circumstances that lead to the equidistance line, to approach, in greater or lesser extent to the coast of each of the parties. See Jimenez de Aréchaga, Eduardo, "The conception of equity on maritime delimitation", in several authors, *Études en l'Honneur de Roberto Ago...*, cit., in this same quote, vol. II, pp. 228-239.



TREATY ON DELIMITATION OF THE CONTINENTAL SHELF BETWEEN MEXICO AND THE UNITED STATES OF AMERICA OF JUNE 9, 2000

The International Court of Justice, in its famous judgment of 1969 in the cases of the North Sea, will speak of rights of the coastal State, generated ipso facto and ab initio.⁷

One of the biggest problems in the state practice is precisely that where the coastal State has a Continental Shelf that exceeds 200 nautical miles, since the Montego Bay Convention (MBC) sets out, in these cases, complex provisions and of a great technicality.



SOURCE: *Continental Shelf definition*, Division of Ocean Affairs and the Law of the Sea, New York, United Nations, 1994.

In accordance with the Convention of 1982, wherever the margin extends beyond 200 nautical miles, the coastal State will establish the outer edge of the continental margin by a line drawn in relation to the most distant fixed points in each of which the thickness of sedimentary rocks be at least 1% of the shortest distance between this point and the bottom of the continental slope. Or a line drawn, in relation to fixed points located no more than 60 nautical miles from the bottom of the continental slope.

The fixed points that constitute the outer boundary line of the Continental Shelf on the seabed "should be located at a distance not exceeding 350 nautical miles from the baselines from which the width of the territorial sea is measured, or 100 nautical miles from the 2,500-meter isobath, which is a line that connects depths of 2,500 meters" (Article 76, paragraph 4, subsection a); paragraph 5 and paragraph 7 of the MBC).

⁷ See Gómez-Robledo V., Alonso, *El nuevo derecho del mar: guía introductiva a la Convención de Montego Bay*, México, Miguel Ángel Porrúa, 1986, pp. 71-78.

It is true then that the provisions of the Convention of 1982 adopt a hybrid and complex formula, which may well be perceived as a true amalgam of all the main types of criteria that had been proposed. But this is just the consequence of the harsh negotiations to which the negotiation technique gave rise in a “package” and the need to achieve at all costs a consensus, running the risk of endangering the Convention in its entirety.⁸

IV. DELIMITATION IN STATE PRACTICE AND INTERNATIONAL JURISPRUDENCE

1. *In the 1975 Arbitration on the delimitation of the Continental Shelf in the Iroise Sea*

The parties (England and France) asked the court to decide pursuant to international law applicable to the matter, the following question: What should be the layout of the line or lines, delimiting the areas of the Continental Shelf that corresponded respectively to the United Kingdom, as well as the Anglo-Norman Islands and the French Republic, to the west of the length 30 minutes west to the Meridian of Greenwich and up the 1000-meter isobath?

The importance of this arbitration was indisputable, since, as Professor W. Bowett said, it represented the first delimitation operation of continental shelves carried out by an international court. In the cases of the Continental Shelf in the North Sea of 1969, the court had only been asked to determine the principles and rules applicable to the delimitation.

In this Arbitration, the court ruled without hesitation about the application of the rule “equidistance-special circumstances”, as part of customary international law, and this is clearly expressed in the delimitation made in the Canal area, as well as in the one of the Atlantic.⁹

2. *In the Case of the delimitation of the Continental Shelf between Tunisia and Libya (1982)*

The parties requested the International Court of Justice that in the delimitation operation it took into account the equitable principles, the circumstances of the

⁸ See Castañeda, Jorge, “The Conférence des Nations Unies sur le Droit de la Mer et l’Avenir de la Diplomatie Multilatérale”, in several authors, *Etudes en l’Honneur de Roberto Ago*, cit., Note 6, pp. 74-85. The president of the delegation of Mexico to the III Confemar, the jurist Mr. Jorge Castañeda and the Norwegian Ambassador H. Vindennes, gathered a set of representative delegations from all points of view to discuss the difficult problem related to the nature of the EEZ and the settlement of disputes applicable to fisheries and scientific research. This group had a decisive influence on the work of the third commission and the informal plenary, as well as those of the second commission.

⁹ See “Affair of the Délimitation du Plateau Continental entre Royaume-Uni de Grande Bretagne et d’Irlande du Nord’ et République Française”, *Recueil des Sentences Arbitrales*, vol. XVIII, Nations Unies, p. 130, 270. The critical analysis of this arbitration can be consulted in Gómez-Robledo V., Alonso, *Jurisprudencia internacional en materia de delimitación marítima*, México, UNAM-IIJ, 1989, pp. 65-93.



TREATY ON DELIMITATION OF THE CONTINENTAL SHELF BETWEEN MEXICO AND THE UNITED STATES OF AMERICA OF JUNE 9, 2000

region itself that were relevant, and the new trends on the law of the sea, as they emerged from the III Confemar.

The following passage of the case is, undoubtedly, of great importance for the jurisprudence of the court:

The application of equitable principles must achieve an equitable result. This way of expression, even when it is generally used, cannot be completely satisfactory, since the equitable adjective is qualifying both the result that one tends to achieve, and the means by which it is intended to reach that end. However, it is the result what is important: the principles are subordinated to the objective to be achieved... All principles cannot be in themselves equitable; it is the equity of the solution, the one that will confer such characteristic...¹⁰

In the opinion of the court, the radical change of orientation of the Tunisian coast would seem to modify to some extent, but not completely, the relationship between Libya and Tunisia, which, being frontier States at first, tend to become States with coasts located one opposite to the other.

This leads to a situation in which the drawing of a line of equidistance becomes a factor that weighs more than it would normally do, with respect to the global appreciation of equity considerations.

In its ruling of February 24, 1982, adopted by 10 votes in favor and four against, the International Court of Justice will reiterate that the delimitation should be carried out in accordance with equitable principles and relevant circumstances, and that the region that should be taken into consideration for purposes of delimitation consisted in a single Continental Shelf, natural extension of the land territory of the two parties.¹¹

3. Case of the delimitation of the maritime boundary in the Gulf of Maine region

The Canadian government and the USA government agreed upon via a commitment to submit their delimitation dispute on the Continental Shelf and fishing zone, jointly and by drawing a single line, before a court room of the International Court of Justice, intermediate point between the mandatory jurisdiction and the arbitration. This mechanism seems to contribute to greater confidence on the part of the States in submitting their disputes to the international judiciary.

The court room will proceed to divide the area to be limited into three sectors. In the first one, the court room uses a geometric method, based on respect for the



¹⁰ See "Affaire du Plateau Continental-Tunisie/Jamahiriyá Árabe Libyenne", Arrêt du 24 février 1982, *Recueil des Arrêts, Avis Consultatifs et Ordonnances*, p. 59, paragraph 70. The 1985 judgment decided on the claim, submitted by Tunisia, for review and interpretation of the first judgment. IJC, *Recueil des Arrêts...*, 1985, p. 192.

¹¹ See *ibidem*, p. 92, paragraph 133. The following judges voted against the judgment of the court: Andre Gros, Shigeru Oda, Forester and the *ad hoc* judge Jens Evensen. For a critical analysis of the case, see: Gómez-Robledo V, Alonso, *Jurisprudencia internacional...*, *cit.*, note 9, pp. 95-128.

geographical situation of the coasts, and it is, in fact, the use of a line of equidistance in a simplified form, since each point of the bisector is at the same distance from both straight lines from the point of the angle chosen.

With regard to the second segment, the court room would proceed through two stages. Provisionally, it would establish a basic delimitation, and then it would take into consideration the necessary corrective measures in view of the “special circumstances” of the specific case. Here, and even more than in the first segment, and although the court room does not say so, the equidistance method is used, exactly in the sector where the Canadian and North American coasts are one opposite to the other.

Regarding the third sector of the delimitation line, and given the fact that the delimitation line had to be drawn in the middle of the ocean, the court room considered, once again, that the only practical method that could be taken into consideration was a “geometric method”, and that in the specific case, it consisted in the drawing of a perpendicular line in relation to the line of the closure of the Gulf of Maine.¹²

4. Case of the Continental Shelf between the Republic of Malta and the Arab Republic of Libya of 1985

The International Court of Justice, after analyzing the principles and circumstances pertinent to the case, makes a preliminary layout, by means of a center line between the coasts of Malta and Libya, to then correct it according to the circumstances that it has considered as being relevant, especially the length of the coasts, the distance that separates them and the situation of Malta in the context of the Mediterranean.¹³

5. Case of the Maritime Delimitation in the Region between Greenland and Jan Mayen between Denmark and Norway (1993)

The International Court of Justice would conclude that the line of equidistance drawn up on a provisional basis, and used as a starting point for the delimitation

¹² See IJC, “Affaire de la délimitation de la frontière maritime dans le région du Golfe du Maine”, Arrêt du 12 octobre 1984, *Recueil des Arrêts, Avis Consultatifs et Ordonnances*, Canada/Etats-Unis d’Amérique, 1984. In the third segment, the equidistance method is again used and it is sufficient to see carefully the maps attached to the judgment of the court room of 1984, to check how the line drawn in this third segment is the continuation of the established line for the second segment. As has been noted by the doctrine, if the operation of the delimitation begins necessarily by equidistance, this does not imply that it necessarily must end with the same method. At this point, once this line is drawn as a first step for the delimitation, it should be established whether the equidistance method is convenient since it is a means to perform a “fair” and “equitable” delimitation, *Judgment of 1977 on the Iroise Sea*, paragraph 242. For a critical analysis of the Gulf of Maine Case, see: Gómez-Robledo V., Alonso, *Jurisprudencia Internacional...*, cit., note 9, pp. 131-172.

¹³ See IJC, Arrêt du 3 juin 1985, *Recueil des Arrêts...*, cit., note 5, pp. 1-187. See Gómez-Robledo, Alonso, *Jurisprudencia internacional...*, cit., note 8, pp. 175-204.



of the Continental Shelf and the fishing zones, should be corrected or displaced by virtue of the disparity of the length of the littorals of the States in question.¹⁴

6. The practice of States regarding maritime delimitation ratifies a large part of international jurisprudence

Thus, in the Agreement executed in Rome on January 8, 1968, between Italy and Yugoslavia, the equidistance method characterizes a large part of the delimitation line of the Continental Shelf. A reduced effect was attributed to four islands located in the central part of the Adriatic.¹⁵

In the Agreement on the Delimitation of the Continental Shelf between Greece and Italy, executed in Athens, on May 24, 1977, the Equidistance method, although with some adjustments, was chosen. These corrections refer mainly to the Greek islands of Fanos (to which an effect similar to 3/4 was attributed) and Strofades, to which a semi-effect was attributed.¹⁶

In the Agreement on the Delimitation of the Continental Shelf, executed between Italy and Spain on February 10, 1974, in the city of Madrid, and effective as of February 16, 1978, in the same manner as in the previous cases, it was expressly stipulated that the delimitation line would be established applying the Equidistance Method from the respective baselines (Article 1).

Here the delimitation line stops before touching the equidistant points between France-Italy-Spain and Algeria-Italy-Spain.¹⁷

After endless and laborious negotiations within the III Confemar, the formula of the delimitation of the Continental Shelf was finally achieved in its Article 83, with its equivalent for the delimitation in the exclusive economic zone in its Article 74: "The delimitation of the Continental Shelf between States with adjacent coasts or placed one opposite to the other, will be made by agreement between them on the basis of international law, referred to in Article 38 of the Statute of the International Court of Justice, in order to reach an equitable solution" (Article 83, paragraph 1). Although the previous formulation is not very happy from the legal point of view; however, it has an incontrovertible political advantage, since it opened the doors for an agreement between radical positions, and thus it allowed the adoption of the entire text of the Montego Bay Convention of 1982.

¹⁴ See IJC, "Affaire de la délimitation maritime dans la région située entre le Groenland et Jan Mayen", Arrêt du 14 juin, *Recueil des Arrêts, Avis Consultatifs et Ordonnances* (Danemark c. Norvège), 1993. Specifically, see pp. 77-82, paragraphs 87-94.

¹⁵ See text of the Agreement between Italy and Yugoslavia on January 8, 1968, in force since January 21, 1970, in Conforti, Benedeto and Francalanci, Gianapiero, *Atlante dei Confini Sottomarini*, Milan, Dott. A. Giuffrè Editore, 1979, pp. 85-87.

¹⁶ See text of the Agreement between Greece and Italy of May 24, 1977, *ibidem*, pp. 89-91.

¹⁷ See text of the Delimitation Agreement between Spain and Italy, *ibidem*, pp. 75-77.

The emphasis is on the result and in principle any method of delimitation can be applied. Unlike the Conventions of Geneva of 1958 on the Law of the Sea, under the current scheme, there are no specific nor less binding rules for the delimitation between States.

However, the international jurisprudence and the state practice demonstrate—as we already saw—that most delimitation agreements take as a criterion-base, as a starting point, a line drawn according to the method of equidistance, to proceed then to make the necessary adjustments and relevant corrections, depending on relevant, particular or special circumstances; configuration of the coasts, width of the facade, length between them, presence of islands, etc.¹⁸

V. DELIMITATION OF THE CONTINENTAL SHELF BETWEEN MEXICO AND THE UNITED STATES OF AMERICA

The government of the United Mexican States and the government of the United States of America executed on June 9, two thousand a Treaty on the Delimitation of the Continental Shelf in the Western Region of the Gulf of Mexico beyond 200 nautical miles, having been executed in Washington, D.C., on June 9, 2000, and being effective as of the change in the instruments of ratification on January 17, 2001.¹⁹

The maritime boundaries between the parties were determined on the basis of the “Equidistance” method, for a distance between twelve and two hundred nautical miles offshore, from baselines from which the width of the territorial sea in the Gulf of Mexico and the Pacific Ocean, in accordance with the Maritime Boundary Treaty between Mexico and the United States of America, signed on May 4, 1978.

Likewise, the maritime boundaries between the parties were determined based on the “Equidistance” line for a distance of 12 nautical miles offshore, from baselines from which the width of the Territorial Sea is measured, pursuant to the Treaty to Resolve Pending Border Differences and to Maintain the Bravo and Colorado rivers, as the International Border between Mexico and the United States of America, executed on November 23, 1970.

In this treaty of June 9, two thousand, the parties established, according to international law, the limit of the Continental Shelf between Mexico and the Uni-

¹⁸ On several occasions, States use the terminology of the “center line” for delimitations between States whose coasts are placed one opposite to the other, and of the “equidistance line” for States with adjacent coasts. But, in both cases, these are lines drawn according to the method of equidistance, method that produces, as the court says in its judgment of February 20, 1969, a line that attributes to each one of the interested parties, all the portions of the Continental shelf closer to one point of its coast, than of any other point located on the coast of the other party, see Cafilisch, Lucius, “Les zones maritimes sous juridiction nationale, leurs limites et leur délimitation”, in Bardonnnet, D and Virally, M. *Le nouveau droit international de la mer*, Paris, Editions A. Pédone, 1983, pp. 34-116.

¹⁹ See Treaty Enactment Decree. Federal Official Gazette. Thursday March 22, 2001.



TREATY ON DELIMITATION OF THE CONTINENTAL SHELF BETWEEN MEXICO AND THE UNITED STATES OF AMERICA OF JUNE 9, 2000

ted States of America, in the Western region of the Gulf of Mexico, beyond the 200 nautical miles from the baselines from which the width of the Territorial Sea is measured.

This treaty was even more important, if the possibility —not to say the certainty— that there could be substantial deposits of oil or natural gas across the boundary of the Continental Shelf was taken into consideration, and that under such circumstances, the cooperation and periodical consultation with the aim of protecting the respective interests between the parties were necessary.

Mexico and the United States of America are party to the Convention of Geneva of 1958 on Continental Shelf, and such is understood as the seabed and subsoil of the underwater areas adjacent to the coasts, but located outside the territorial sea zone to a depth of 200 meters, or beyond this limit, to where the depth of the overlying waters allows the exploitation of natural resources of the platform.

In the Convention of 1982 on the Law of the Sea, to which Mexico is a party, and with respect to which the United States of America has accepted that in this section the Convention of 1982 reflects the customary international law, the definition established provides for a better scientific definition of the Continental Shelf, as we had the opportunity to examine it previously.

Do not forget that with regard to areas beyond 200 nautical miles, from the baselines, both the Convention of Geneva of 1958 and the Montego Bay Convention of 1982 stipulated a series of precise criteria so that the Continental Shelf can be qualified as such (see above).

During the treaty negotiations, both Mexico and the United States of America agreed upon the fact that both the soil and the subsoil of underwater areas beyond the 200-nautical mile limit of the Exclusive Economy Area in the Western region of the Gulf of Mexico, brought together the requirements demanded by both conventions.

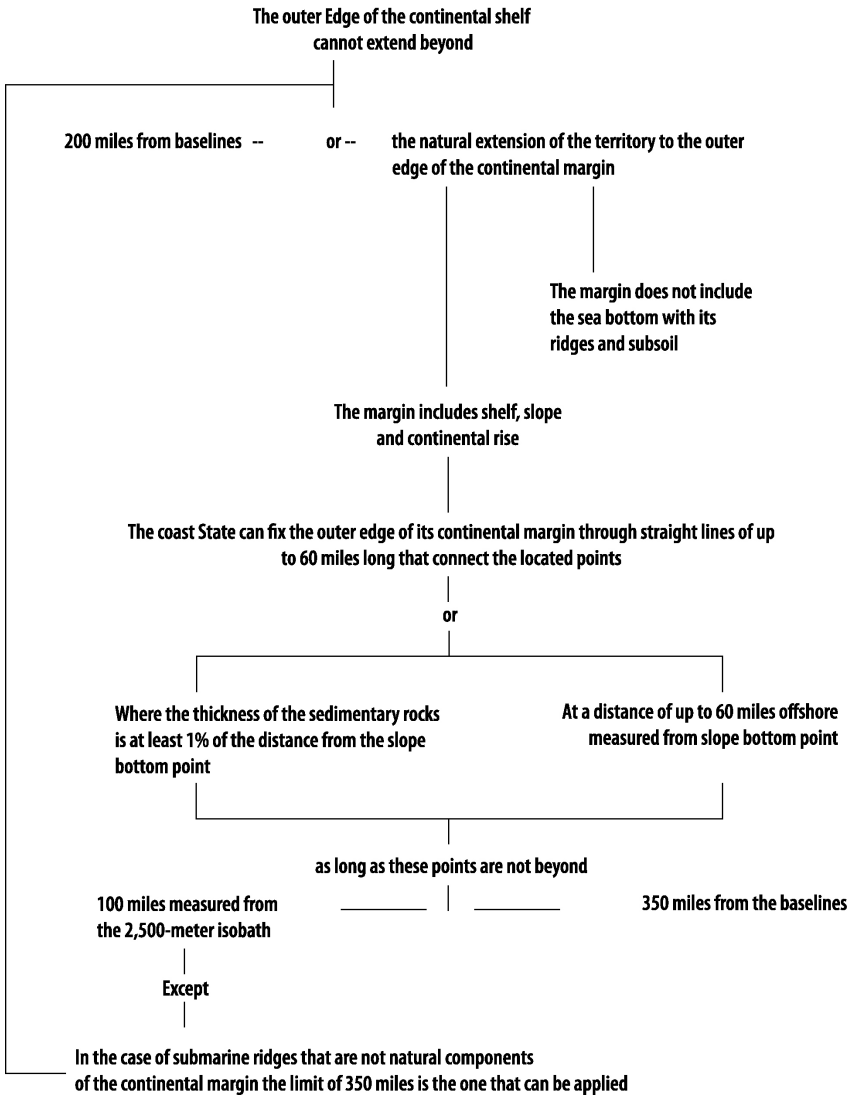
The “limit” of the Continental Shelf is described in Article I of the treaty between Mexico and the United States of America in the Western region of the Gulf of Mexico beyond 200 nautical miles, being determined this boundary by geodesic lines, which connect with a list of 16 coordinates as terminal points (see diagram on the next page).

In accordance with the methodology used in previous delimitation treaties between the two countries, the current line represents an “equidistant line” drawn from the respective baselines of Mexico and the United States of America, including the baselines of the islands.

For the determination of the established limit, the geodesic bases and the computation of the North American Datum of 1983, and the International Terrestrial Reference Frame (“ITRF 92”) of the International Earth Rotation Service were used.



DIAGRAM OF ARTICLE 76



SOURCE: Rebagliati, O. R., *La Plataforma Continental y su Límite Exterior*, Buenos Aires, 1985, pp. 137 and 138.

The above was necessary to ensure that the treaty could be applied uniformly and meticulously by Mexico and the United States of America, respectively.

Article III establishes —by agreement between the parties— that Mexico, to the north of the limit of the Continental Shelf (set out in Article I), and the United



TREATY ON DELIMITATION OF THE CONTINENTAL SHELF BETWEEN MEXICO AND THE UNITED STATES OF AMERICA OF JUNE 9, 2000

States of America, to the south of that limit, will not claim nor will they exercise sovereign rights or jurisdiction for any purpose on the seabed and the subsoil.

In addition to what was previously established, the treaty contains a new set of precepts contained in Articles IV and V, and which refer to the possible existence of oil or natural gas deposits through the limit established for the Continental Shelf.

Among other things, these precepts create a legal framework (we hope not utopian) by which the parties must exchange information to help determine the possible existence of “transboundary deposits”.

The parties have undertaken (Article IV) that during a moratorium of 10 years, they will not authorize or permit drilling or exploration of oil or natural gas on the Continental Shelf within a nautical mile, four tenths (1.4) on each side of the boundary or limit settled down.

Based on these same terms, within this “area” of two nautical miles, eight tenths (2.8), the moratorium does not apply to other activities of the Continental Shelf.

This means that each party has the right to authorize or allow exploration and/or exploitation of oil outside the “area” within the Western Region.

It is also set out that the parties may modify, if so agree, the moratorium of 10 years, through an exchange of diplomatic “notes”. This provision allows the parties to shorten or extend the duration of the moratorium, if they deemed it appropriate.

Another important provision, in relation to the area, is that related to the fact that if a party is aware of the existence or of the possible existence of a transboundary deposit, it must notify so to the other party (Article IV (6)).

As geological and geophysical information that facilitates the knowledge of the parties about the existence of transboundary deposits, including the notifications of the parties about the possible existence of them (including the sixth paragraph of the Article IV) is generated, the parties must meet periodically in order to identify, locate and determine the geological and geophysical characteristics of said deposits.

Any dispute concerning the interpretation or application of the treaty in question, must be resolved by negotiation or by other peaceful means that the parties agree upon.

The Treaty on Maritime Boundaries between the United Mexican States and the United States of America executed on May 4, 1978, and in force since November 13, 1997, had not made the delimitation of the Western and Eastern polygons (Western and Eastern Doughnut Hole), so that the present treaty of June 9, 2000 was necessary for that purpose.

The total area of the “Western polygon” (Western gap) is approximately 17,467 square kilometers. The delimitation path divides the Western polygon of the Continental Shelf, in such a way that United States of America is awarded 6,526 square

kilometers, that is say 38% of the total, while Mexico is awarded an area of 10,905 square kilometers, that is 62% of the total area bounded.

The Maritime Boundaries Treaty between Mexico and the United States of America on May 4, 1978, and approved by the Mexican Senate on December 20 of the same year, slept the sleep of the just until the USA Senate agreed to approve it in October of 1997, and the instruments of ratification were exchanged on November 13 of the same year.

The incredible lapse of almost 20 years that the United States of America let pass to finally approve and ratify the treaty of May 4, 1978, is explained, simply, because the extraordinarily powerful North American oil guild —headed by the geologist Hollis Hedberg— was adamantly opposed to its approval, that it was argued that such a treaty was contrary to the interests of the United States of America, because it left Mexico with an important sector of the Center of the Gulf of Mexico that contained enormous potential for extraction of hydrocarbons and other minerals.²⁰

The United States of America significantly amended the federal laws that govern its payment and patent system relating to the “offshore” production of gas and hydrocarbons, in such a way that they made decrease those economic obstacles that had paralyzed the extraordinary technological advances.

As a result of the adoption of these reforms, and in particular of the: “Outer Continental Shelf Deep Water Royalty Relief Act” (43.U.S.C.1337 (a)), adopted in 1995, the North American oil companies undertook a great exploration program, seeing now production costs substantially reduced.

All this made that it was necessary for the United States of America to want to approve and ratify the Boundary Treaty of 1978 that had been approved and ratified by Mexico a long time ago.

The most powerful oil associations in the United States of America, like the American Petroleum Institute; The International Association of Drilling Contractors; The Domestic Petroleum Council and others, urged and pressed now the North American Congress, for the ratification of the treaty of 1978, and for the execution of a treaty for the Delimitation of the Continental Shelf beyond 200 miles in the Gulf of Mexico.

Now it was imperative to have secure borders, and accurate maritime delimitations, for the instrumentation of the numerous North American projects of

²⁰ See Dillard, Hammett, “Deep water Drilling-Foresight, Risk and Reward”, 22. *Exploration and Economics of the Petroleum Industry*, USA, 1984, pp. 227-231.

exploration and exploitation of hydrocarbon, gas and other mineral deposits in the Gulf of Mexico.²¹

VI. CONCLUSION

It is true that the precision formulated by the Montego Bay Convention of 1982, in the sense that the delimitation agreement must be achieved on the basis of international law referred to in Article 38 of the Statute of the International Court of Justice – International Conventions and Treaties; International Customary Rules; General Principles of Law; and Judicial Decisions and Qualified Doctrine, as auxiliary means does not really seem to make a particularly significant contribution to the topic in question.

Even, it must be said, for a large part of the doctrine, the indication of the equitable solution appears as equally unsatisfactory, “not being clear how an agreement, which is presupposed that was freely agreed upon by the parties, may contain an unfair solution... The theory of the equitable solution represented a happy file, prepared by the international courts” (Professor Tullio Scovazzi).

It is not an exaggeration to affirm that the jurisprudence regarding maritime delimitation has taken the role of conventions and custom, in the sense that jurisprudence in this area appears as a direct and primary source, and not subsidiary or auxiliary.

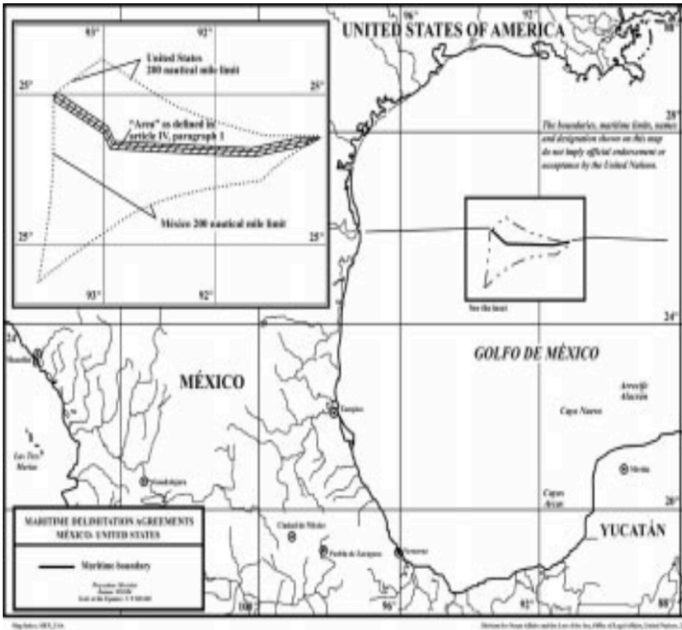
However, we must not forget that a large part of the jurisprudence in these areas has tried to reconcile the respect for territorial sovereignty of States, with certain elementary imperatives of justice, and in this sense the search for normative equity certainly appeared as the best corrective to one or several rules with very much rigid and inflexible components.

And, finally, it is true, as several judges have pointed out (N. Valticos), that States that have executed bilateral delimitation treaties on Continental Shelves probably did not have the feeling of following a mandatory rule of law nor were they clearly inspired for an *opinio iuris*.

Notwithstanding the foregoing, the States have executed such treaties or agreements, in light of all relevant legal rules and information; and thinking always that the method of the center line, or equidistance line, was the most convenient delimitation system because of its inherent qualities, such as the relative ease with which it can be applied, and the mathematical determination that allows, before any negotiation, the unilateral fixation of a provisional line.



²¹ See “Hearings on Maritime Boundaries Treaty with Mexico before the Senate Committee on Foreign Relations”, 105th. Congress, 1s. Session, 1997 (Testimony of Frank Murkowski: Chairman of the Senate Committee on Energy and Natural Resources).



SOURCE: *Law of the Sea*, Bulletin number 44, New York, United Nations, 2001, p. 75.

THE EVOLUTION OF THE DELIMITATION OF THE CONTINENTAL SHELF IN INTERNATIONAL LAW AND THE CASE OF THE DELIMITATION OF THE WESTERN POLYGON BETWEEN MEXICO AND THE UNITED STATES OF AMERICA

SUSANA HERNÁNDEZ PACHECO*

C O N T E N T S

- I. Introduction
- II. Definition
- III. Legal Title
- IV. Extension
- V. Concept of Maritime Delimitation
- VI. The Legal Scheme of the Delimitation of the Continental Shelf
- VII. The Case of Mexico and the United States of America

I. INTRODUCTION

The importance of organizing this round table lies in the strategic and fundamental nature of the topic. It is strategic due to the existence of important natural resources found on the Continental Shelf of the Gulf of Mexico, whose soil is covered with plant and animal resources, while its subsoil protects oil deposits and other important minerals.

Although what motivated both Mexico and the United States of America to execute the Treaty on the Delimitation of the Continental Shelf in the Western Region of the Gulf of Mexico, beyond 200 nautical miles, was the suspicion that there was a great oil potential in the region, the Continental Shelf of the Gulf of Mexico has also other resources (for example, pearls) that increase its economic importance.

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The study of this topic is also fundamental due to its economic and legal implications. In effect, it is not as in the case of the delimitation of land borders, which with instruments clearly acknowledged by international law the area of the territory of a State is determined, but in the case of the Continental Shelf, from its definition to its delimitation, legal problems are posed and their solution is difficult. Thus, suffice it to mention that the concept of Continental Shelf may not coincide at all with its physical existence. On the other hand, the determination of the outer limit of the Continental Shelf involves not only neighboring states but also the international community. In addition, given that the powers of the coastal State over its Continental Shelf are limited to exploration and exploitation, the linear delimitation does not seem to be determinant in cases where there are transboundary mineral or oil deposits that cause adjustments that “dilute”, so to speak, the delimitation line.

II. DEFINITION

The Continental Shelf can be defined from two aspects, one geophysical and one legal. Both concepts take into account the physical appearance of the Continental Shelf, but because they pursue different ends, they do not necessarily coincide.

Scientists define the Continental Shelf as a slope of variable inclination that ends in a sharp fall towards the bottom of the sea. From the geophysical point of view, the Continental Shelf is irregularly distributed in islands and continents. In some places the Continental Shelf will reach great distances, while in others it will be practically non-existent.

In its legal meaning, the notion of Continental Shelf has evolved in response to the need to regulate state claims, with which it is intended on the one hand to legally limit the possibility of exploration and exploitation of the Continental Shelf by States, and on the other hand, to grant to every State a Continental Shelf regardless of its geological or geophysical characteristics.

The origin of the legal notion of Continental Shelf goes back to the proclamation of President Truman, published by the government of the United States of America on September 28, 1945, whose principles served as the basis for the works that would culminate with the Geneva Convention (IV) on Continental Shelf.

In this way, conventional law defined the Continental Shelf taking into consideration first the criteria of depth and exploitability. In terms of the Article 1 of the Convention of 1958:

The Continental Shelf is formed by the bed and the subsoil of the underwater regions adjacent to the coasts, but located outside the territorial sea, to a depth of 200 meters, or beyond this limit to the point where the depth of the overlying waters allows the exploitation of the natural resources of these regions.

This implied that any State with a greater capacity of technological exploitation, would have greater extension of Continental Shelf.

In accordance with the judgment of the International Court of Justice of February 20, 1969, issued with respect to North Sea Affairs¹, the court defined the Continental Shelf as *the natural extension of the territory of the State*, a notion that would be the basis of the title that the international law recognizes as the foundation of the law of the States on its Continental Shelf.

Now, if the notion of 1958 favored countries industrially developed because of the technological development they could achieve, conceptualize the Continental Shelf as the natural extension of the territory of a State posed the difficult problem of determining how far was the natural extension of a State in relation to the natural extension of another State, and what to do if a Continental Shelf is the natural extension of two or more States. In any case, international jurisprudence has not fully recognized the effects of this definition. Thus, although the conceptual basis of the Continental Shelf is still the natural extension of the territory of a State under the sea, international law imposes a limit to said extension.

The development of technologies that made it possible to exploit more important marine resources, caused a change in the concept. It changed from the idea of depth and exploitability to the idea of distance. Without abandoning the whole concept of natural extension, the Convention of the United Nations on the Law of the Sea in its Article 76 establishes the following:

1. The Continental Shelf of a coastal State comprises the bed and the subsoil of the underwater areas that extend beyond its territorial sea and throughout the natural extension of its territory until the outer edge of the continental margin, or up to a distance of 200 nautical miles from the baselines, from which the width of the territorial sea is measured, in cases where the outer edge of the continental margin does not reach that distance... 3. The continental margin includes the submerged extension of the continental mass of the coast State and is formed by the bed and the subsoil of the shelf, the slope and continental emersion. It does not include the deep ocean bottom with its oceanic crests or its subsoil.

III. LEGAL TITLE

As pointed out by the International Court of Justice in its judgment of February 20, 1969, the legal title that international law recognizes to the State on its Continental Shelf does not stem from the proximity of this, but of the notion of *natural extension* of the territory of the State. The court expressed the following under these terms:

¹ Cfr. Matters of the Continental Shelf of the North Sea (Federal Republic of Germany/Denmark and the Federal Republic of Germany/Netherlands), ICJ, *Recueil des Arrêts, Avis Consultatifs et Ordonnances*, judgment of February 20, 1969, p. 32.



The title that international law *ipso jure* attributes to the coastal State on its Continental Shelf comes from the fact that the submarine zones in question can be considered as being truly part of the territory, over which the coastal State already exercises its authority: it can be said that, even when covered with water, these areas are an extension, a continuation, a prolongation of said territory under the sea.²

According to this notion, it does not matter that the Continental Shelf of a State is closer to the border of another State, if it constitutes the natural extension of its territory, it may validly claim it.

However, the evolution of the Continental Shelf concept has led to establish a distance criterion, so it is this and not the idea of natural extension the basis of the legal title, at least until the 200 nautical miles.³

IV. EXTENSION

The Convention of 1958, regulated the extension of the Continental Shelf according to factors of depth and capacity of exploitation by the States. This is, up to a 200- meter depth, or up to the place where the overlying waters allow their exploitation.

The accelerated technological development achieved by certain States, as well as the fact that the 1958 Geneva Convention is only mandatory for States parties to it, led to the preparation of a jurisprudential definition that considered it as the natural prolongation of the territory that allowed claims based on aspects predominantly physical and non-legal. This situation led to the fact that in the Third United Nations Conference on the Law of the Sea this conception was modified and the extension of the Continental Shelf was limited to 200 nautical miles, regardless of its physical structure, with the possibility of extending it to a maximum of 350 marine miles, when the Continental Shelf reaches that distance.

In accordance with the Montego Bay Convention, if the extension of the Continental Shelf reaches up to 350 nautical miles, in order for that delimitation that is made based on this extension to be opposable to others States, the Boundary Commission that their own convention provides should be informed. When the States are adjacent or are one opposite to the other, the delimitation must be made by agreement between the parties, in accordance with international law, in order to reach an equitable solution. In some of these cases the extension of the Continental Shelf might not even reach 200 miles, as in the case of the Continental

² *Idem.*

³ Cfr. Issue of the Continental Shelf (Libyan Arab Jamahiriya/Malta), ICJ, *Recueil des Arrêts, Avis Consultatifs et Ordennances*, judgment of June 3, 1985, p. 35.

Shelf between Libya and Malta,⁴ or extend further beyond that distance, as in the case of the United States of America and Mexico in the Gulf of Mexico.

V. CONCEPT OF MARITIME DELIMITATION

The delimitation, said the court in 1969, consists in determining the limits of a zone already dependent on the coastal State, and not in an operation that intended to define the zone *de novo*.⁵ That is, it is about a distribution of the region in question but strictly a delimitation.

The delimitation of the Continental Shelf may be carried out unilaterally only when the State in question has no neighbors in front of it or adjacent to it, but in order for this delimitation to be opposable to the other States, this should be done in accordance with international law. It is about, as Michel Virally states, a delimitation between a State and the international community.⁶

In the case of adjacent States or that are located one opposite to the other, conventional law has established the obligation that said delimitation is made by agreement between the parties based on the international law, with the aim of reaching an equitable solution.

VI. THE LEGAL SCHEME OF DELIMITATION OF THE CONTINENTAL SHELF

Any maritime delimitation must be done in accordance with international law. However, to know what the rules of law that regulate the delimitation of the Continental Shelf between States are is a problem that has not been solved satisfactorily.

The International Court of Justice and the arbitral courts that have issued judgments in this matter have determined that each case is a *unicum*, and, therefore, there are no general principles; the problem, as the court states in 1984, is that "a type of rules that does not exist is being sought in general international law".⁷

Consequently, each delimitation of the Continental Shelf is a unique case and must be solved according to the circumstances of the case.⁸

⁴ Cfr. *idem*.

⁵ *Ibidem*, p. 23.

⁶ Virally, Michel, "L'Équité dans le droit. A propos des problèmes de delimitation maritime", *Le droit international a l'heure de sa codification. Etudes en l'honneur de Roberto Ago*, vol. II, Milán-Dott. A. Giuffrè editore, 1987, p. 531.

⁷ Case of the Delimitation of the Maritime Border in the Gulf of Maine Region (Canada/United States of America), ICJ, *Recueil des Arrêts, Avis Consultatifs et Ordennances*, judgment of October 12, 1984, p. 290.

⁸ Cfr. *idem*.



Both conventional law and customary law have intended to regulate the delimitation of the Continental Shelf. However, its content does not allow knowing the manner in which said delimitation must be made. There is, in effect, a tendency towards abstraction that avoids the elaboration of substantive rules that guide jurists that, as judges or arbitrators, or as negotiators, should perform that task.

The norms of international law that regulate the delimitation of the Continental Shelf are the Convention of 1958 on Continental Shelf, the United Nations Convention on the Law of the Sea of 1982 and the customary law, which has been acknowledged through International jurisprudence on the matter.

The Geneva Convention of 1958 in its Article 6 established the criterion according to which, in the absence of an agreement between the parties, the method of equidistance⁹ for the states that are one opposite to the other, and the center line for the adjacent States, must be applied, unless special circumstances prevented its application.

However, when in 1969 the first issue to be solved by the International Court of Justice was presented, and in which it was requested to determine what was the applicable law for the delimitation of the Continental Shelf in the North Sea, it became evident that not necessarily it was an appropriate method in all circumstances and, above all, the court, after a reasoning about the formation of the international custom, concluded that it did not have the characteristics of a customary norm, and, therefore, it had no general application; this conclusion was also reached by the Arbitral Court incorporated to settle the issue of the delimitation of the Continental Shelf in the Iroise Sea.¹⁰

To know what the general principles applicable in this matter are, it is necessary to go to the auxiliary sources of international law, among which jurisprudence has had a fundamental significance, to the point of being considered by some doctrinaires, not as an auxiliary source but as a principal source of international law.¹¹

The International Court of Justice, in its judgment of 1969, making an analysis of the formation of customary law and taking as basis the conduct of the States regarding the delimitation of their Continental Shelf, established that:

Such delimitation must operate by agreement in accordance with equitable principles, taking into account all relevant circumstances, so that it is attributed, as far as possible, to each party all of the Continental Shelf areas that are part of the

⁹ The equidistance is obtained through drawing a line, whose points are at an equal distance from the reference points taken from the baseline from which the width of the territorial sea of both States is measured.

¹⁰ Issue on the Delimitation of the Continental Shelf (United Kingdom of Great Britain and Northern Ireland/ French Republic), ICJ, *Recueil des Sentences Arbitrales*, vol. XVIII, United Nations, paragraph 75.

¹¹ Cahier, Philippe, "Les sources du droit relatif à la delimitation du plateau continental", en *Le droit au service de la paix, de la justice et du développement*, Paris, Pedone, 1991, p. 181.

natural extension of its territory under the sea and the sea and not overlapping on the natural extension of the territory of another.¹²

This reasoning based on the free appreciation of the relevant circumstances was confirmed by the arbitral court that decided the dispute over the maritime boundary between Guinea and Guinea Bissau in its judgment of February 14, 1985, which determined that: "In the case of factors, the court must make an inventory and value them... These circumstances will be taken into account by the court, only when the court judge them relevant in the specific case".¹³

That is, the singularity or particularity of a circumstance that can exclude the equidistant delimitation, is passed to the application of equitable principles, having to take the appropriate circumstances, that is, only those that deserve to be taken into account. Thus, a special circumstance may not be considered relevant.¹⁴

In this manner, the contents of the rule that establishes as delimitation method an agreement between the parties or, in the absence thereof, the method of equidistance-special circumstances, are not applicable, when the relevant equitable principle-special circumstances formula is established, above all, considering, as did the court room in 1984 in the matter of the Maritime Delimitation of the Gulf of Maine that such equitable principles "are not in themselves rules of law".¹⁵ These equitable principles would regulate both the delimitation and the choice of the practical method to do it. That is, it is at the discretion of the judge the determination of the applicable method¹⁶ "on the basis of the fundamental rule which prescribes that the delimitation be in accordance with equitable principles".¹⁷ Now, if the choice of the practical method of delimitation should be carried out on the basis of non-binding equitable principles, taking into consideration only the relevant circumstances, the final objective that is the delimitation, must reach an equitable result. Thus, the agreement-equitable principles-relevant circumstances formula, is completed by a last element: the equitable result: "The application of equitable principles must achieve an equitable result... since the equitable adjective is qualifying at the same time the result that tends to be achieved, and the

¹² ICJ, *Recueil des Arrêts...*, *cit.*, note 1, p. 53.

¹³ Arbitral Court for the Delimitation of the Maritime Border (Guinea/Guinea Bissau), *Recueil des Sentences Arbitrales*, judgment of February 14, 1985, paragraph 89.

¹⁴ See, for example, economic factors in the Matter of the Continental Shelf (Arabic Jamahiriya Libya/Malta), ICJ, *Recueil des Arrêts...*, *cit.*, note 3, p. 4.

¹⁵ ICJ, *Recueil des Arrêts...*, *cit.*, note 7, p. 292.

¹⁶ These practical methods can be the line perpendicular to the coast, the line following the general direction of the coast, the equidistance line, and so on.

¹⁷ ICJ, *Recueil des Sentences Arbitrales*, Arbitration on the Delimitation of the Continental Shelf in the Iroise Sea, paragraph 99.



means by which it is intended to reach that end. The equity of a principle must be assessed according to the usefulness it represents to achieve an equitable result".¹⁸

Later it goes from the fundamentality of equitable principles to the discernment of the criteria. Thus, in 1984, the International Court of Justice stated the following terms: "International law only sets out that the delimitation must be done by the application of *equitable criteria* and by the use of practical methods suitable for ensuring, taking into account the geographical configuration of the region and other relevant circumstances in the case, an equitable result".¹⁹

The Path to Abstraction Is therefore Evident

For the court, what international law provided for was only to be inspired in each specific case, by the criterion or the balance of different criteria, that seemed more appropriate to the concrete situation. This reasoning was confirmed in the Malta-Libya Case,²⁰ where the court re-establishes that the delimitation of the Continental Shelf must be carried out in accordance with equitable principles and taking into account all relevant circumstances, in order to achieve an equitable result.

To achieve that equitable solution, equitable principles, that had stopped being mandatory, will be qualified according to its usefulness to reach the expected equitable solution: "The equity of a principle must be assessed according to the usefulness it presents to reach an equitable result. All the principles are not in themselves equitable: it is the equity of their solution that gives them this quality".²¹

It will be necessary to distinguish then, between non-binding equitable principles or criteria and "that cannot be the subject matter of a systematic definition *a priori*";²² from the relevant factors or circumstances that address geographical situations of the region. Although "there are really no legal limits for the considerations that States may examine in order to ensure they are going to apply equitable procedures".²³

There is, therefore, no legal norm that establishes which are the equitable principles based on which the delimitation must be carried out, nor which practi-

¹⁸ Issue of the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), ICJ, *Recueil des Arrêts, Avis Consultatifs et Ordenances*, judgment of February 24, 1982, p. 59.

¹⁹ ICJ, *Recueil des Arrêts...*, *cit.*, note 7, p. 300.

²⁰ Cfr. ICJ, *Recueil des Arrêts...*, *cit.*, note 3.

²¹ ICJ, *Recueil des Arrêts...*, *cit.*, note 18, p. 45.

²² ICJ, *Recueil des Arrêts...*, *cit.*, note 7, p. 33.

²³ ICJ, *Recueil des Arrêts...*, *cit.*, note 1, p. 93.

cal method should be applied for the same purpose, what is important is to reach an equitable solution.

Finally, the United Nations Convention on the Law of Sea of 1982, no longer refers to equitable principles, but rather it emphasizes on the equitable result that must be reached in any delimitation of the Continental Shelf. Indeed, Article 83, section 1 provides: "The delimitation of the Continental Shelf between States with adjacent or opposite coasts will be made by agreement between them on the basis of international law, which is referred to in Article 38 of the Statute of the International Court of Justice, in order to reach an equitable solution."

This rule has been considered as a reflection of customary law on the matter. This was determined by the International Court of Justice in 1993, by stating: "The indication of an 'equitable solution' as the end of any delimitation operation reflects the requirements of customary law with regard to the delimitation of the Continental Shelf".²⁴

Consequently, the only applicable general principle is the one that establishes that the delimitation of the Continental Shelf between States should be made by agreement between the parties, and in the absence thereof through the resolution of a judicial instance, in order to reach an equitable result, which has allowed some authors to express that the norm of the law that obliges us to reach an equitable solution, is actually an empty norm, in the sense that it does not indicate the path to follow to obtain that result.

On the other hand, reference to international law does not help at all in the delimitation operations of the Continental Shelf, either by the negotiating States or by the judges and arbitrators called to carry them out, since, as we have seen, these legal norms do not provide substantive rules. This situation has been highlighted by the International Court of Justice, who stated that conventional texts "give a definition of the rule of international law on delimitation",²⁵ reminding also about the precarious material content of these articles.²⁶

Therefore, it is a legal norm that refers to equity, although the court has clarified that "it is not about applying equity simply as a representation of justice in the abstract, but to apply a rule of law that states to resort to equitable principles according to the ideas that have always inspired the development of the legal scheme of the Continental Shelf".²⁷ The procedure established by the international jurisprudence is as follows: specify the area whose delimitation will be carried out; list the circumstances that should be taken into account to then assess them, and

²⁴ Issue on the Maritime Delimitation in the Region between Greenland and Jan Mayen (Denmark/Norway), ICJ, *Recueil des Arrêts, Avis Consultatifs et Ordennances*, judgment of June 14, 1993, p. 25.

²⁵ ICJ, *Recueil des Arrêts, Avis Consultatifs et Ordennances*, p. 294.

²⁶ ICJ, *Recueil des Arrêts...*, *cit.*, note 18, p. 49 ; ICJ, *Recueil des Arrêts...*, *cit.*, note 7, p. 30.

²⁷ ICJ, *Recueil des Arrêts...*, *cit.*, note 1, p. 47.



define what the weight that should be given to each of them is; then draw a provisional line, whose equitable result is verified at the end of the procedure.

However, knowing which is that equitable result is still an unresolved question.

VII. THE CASE OF MEXICO AND THE UNITED STATES OF AMERICA

The delimitation of the Continental Shelf in the Gulf of Mexico involves three States: Mexico, the United States of America and Cuba. The international law establishes the right of States to a Continental Shelf of 200 miles from the baselines from which the width of the territorial sea is measured, regardless of the geological conformation of said shelf. In the case of the Gulf of Mexico, the Continental Shelf extends to more than 400 miles, therefore the delimitation of said shelf does not compromise the 200 miles of each of the States.

The delimitation of the Continental Platform up to 200 miles between Mexico and the United States of America was made by agreement, through the Treaty on Maritime Boundaries of 1978, pending to delimit the central region of the Gulf of Mexico, beyond the 200 miles of each State.

According to Article 76, sections 4 and 5 of the Montego Bay Convention, in cases where the outer edge of the continental margin extends beyond the 200 nautical miles from the baselines from which the width of the territorial sea is measured, the fixed points that form the line of the outer limit of the Continental Shelf to the seabed should be drawn at a distance not exceeding 350 nautical miles from the baselines from which the width of the territorial sea is measured, or of 100 nautical miles from the 2,500 meter isobath which is a line that joins a depth of 2,500 meters.

The delimitation of the Continental Shelf between Mexico and the United States of America beyond 200 nautical miles was made by the Treaty on the Delimitation of the Continental Shelf in the Western Region of the Gulf of Mexico beyond the 200 nautical miles.²⁸ This treaty demands several reflections. Although the notion of the Continental Shelf as a natural extension of the territory of a State has application beyond 200 nautical miles, States do not consider it as the basis of their negotiations, but these were made based on studies that determined the oil potential of the region.

On the other hand, in accordance with Section 8 of Article 76, of the United Nations Convention on the Law of the Sea:



²⁸ This treaty was signed in Washington on June 9, 2000. The exchange of instruments of ratification provided for in Article IX of the treaty was made in Mexico City on January 17, 2001, and it was published in the *Federal Official Gazette* on March 22, 2001.

The coastal State will present information on the limits of the Continental Shelf beyond the 200 nautical miles from the baselines from which the width of the territorial sea is measured to the Commission on the Limits of the Continental Shelf, established in accordance with Annex II on the basis of equitable geographical representation, the Commission will make recommendations to coastal States on the issues related to the determination of the outer limits of their Continental Shelf. The limits of the shelf determined by a coastal State, based on such recommendations, shall be final and binding.

However, since only Mexico is a party to the Convention of 1982, this obligation could not be imposed on the United States of America, because treaties are only binding on the parties, unless the evolution of the law of the sea allows for considering this norm as part of the general international law.

The purpose of the treaty is to delimit the Continental Shelf in the Western polygon of the Gulf of Mexico, which is established in Article 1. However, in addition to the delimitation, a system of meetings and consultations is established, as well as mutual cooperation in relation to geological and geophysical studies that lead to the location of transboundary deposits in what is called “the area”, that is to say, 1.4 nautical miles from each side of the boundary marked by Article 1. For example, Article IV, due to the possible existence of transboundary deposits of oil or natural gas, the parties agree not to authorize or allow oil or natural gas drilling or exploitation on the Continental Shelf in said “area”, for a period of ten years from the time the treaty is in force. The international law recognizes that the States are sovereign for the purpose of exploration and exploitation of natural resources, such rights are exclusive but in the case that the natural resources of the soil and subsoil do not allow a linear division, the very concept of exclusivity seems inadequate.

This means that the traditional delimitation through a line cannot be fully applied to the Continental Shelf, when there are transboundary deposits in it. Indeed, if these exploration powers have to be shared, even if it is under a conventional authorization obligation, the delimitation line becomes an area of exploration cooperation between the States. It seems that the principles that international law has developed on the Continental Shelf are overwhelmed by a geophysical reality that does not volunteer for a legal regulation.

On the other hand, we still do not know whether the equitable result established by international law was reached. In principle, given that the States reached an agreement without resorting to the peaceful means of dispute resolution, we can conclude that both coincide in an equitable result. The question of how to obtain this equitable result will be of greater importance in the delimitation of the Eastern polygon of the Gulf of Mexico, a delimitation in which the United States of America, Mexico and Cuba will participate.



WESTERN POLYGON PROJECT*

MARIO LIMÓN GONZÁLEZ**

C O N T E N T S

- I. Objective
- II. Background
- III. General Aspects
- IV. Regional Geological Framework
- V. Geological Column
- VI. Interpretation
- VII. Lines in Time
- VIII. Lines in Depth
- IX. In-Depth Configuration Maps of the Challenger Units and Mexican Mountain Ranges
- X. Oil Geology
- XI. Evaluation of potential Oil Resources
- XII. Method of Mass Balance
- XIII. Transboundary Deposits
- XIV. Conclusions

I. OBJECTIVE

Define the geological characteristics of the Western polygon to evaluate its potential oil resources.

II. BACKGROUND

On the occasion of the negotiation and execution of the treaty on maritime limits between Mexico and the United States of America in 1978, the American Association of Petroleum Geologists (AAPG), proposed in 1979 a modification to the mari-

* This work is the result of the research conducted for the negotiation of the Treaty on the Delimitation of the Continental Shelf in the Western Region of the Gulf of Mexico beyond 200 nautical miles.

** Manager of Interregional Projects and New Areas of Pemex, Exploración y Producción [Exploration and Production].

time delimitation agreement between both countries, which suggested a change in the limits for the treaty talks of 1978, due to the oil potential they supposed for this portion of the Gulf of Mexico basin (see Figure 1 on the next page).

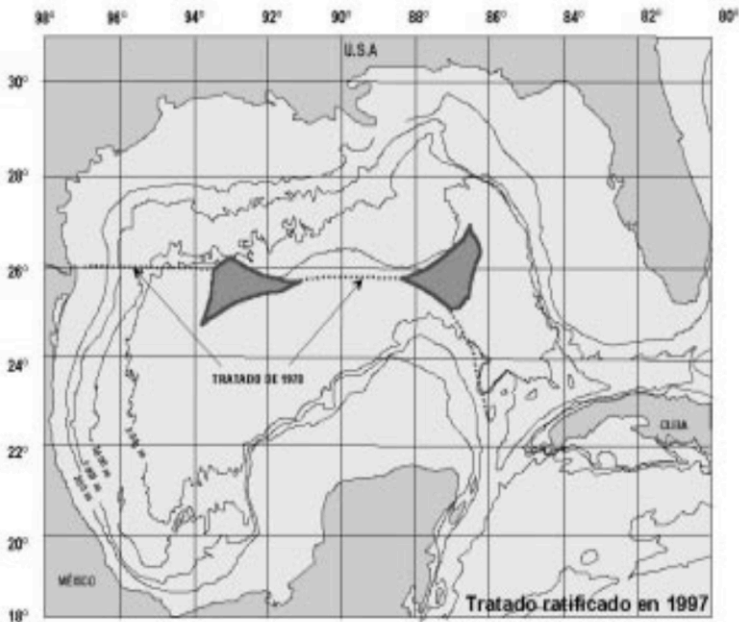


Fig. 1

According to this proposal, a large part of the areas of the Abyssal Plain, bounded by the 3,000-meter isobath, a portion of the Perdido Fold Belt, the Sigsbee Mounds, a part of the Sigsbee Escarpment, and part of the continental shelf would be in international waters, and therefore they would have to negotiate with Mexico.

As a result of this proposal, the USA Senate deferred the execution of the Maritime Boundary Treaty between Mexico and the United States of America and two years later, in 1981, the Department of the Interior of United States of America made through the Geological Service of this same country a regional study to assess the oil potential in the areas proposed by AAPG. This study was called "The Region of the Maritime Border in the Center of the Gulf of Mexico".

The region evaluated in that study was divided into six areas based on its geological characteristics (see Figure 2 on the next page):

1. Abyssal plain
2. Bank of the Rio Grande
3. Perdido Fold Belt

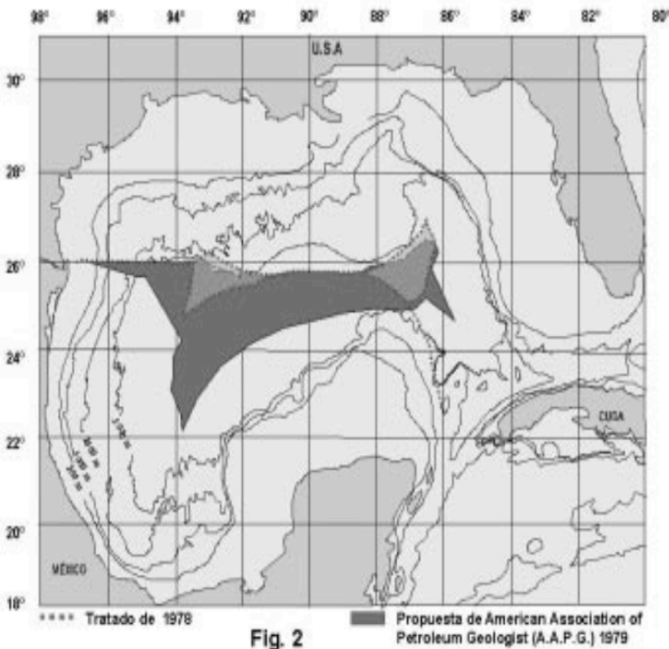
4. Sigsbee escarpment
5. Sigsbee mounds
6. Campeche escarpment

These areas are in water depths that vary from 30 m to 3,750 m, with more than 75% of the total surface under water depths that exceed 3,000 m.

It should be noted that the six areas evaluated in said study, as illustrated in Figure 2, constitute only a portion of the geological provinces to which they are referred.

The results of such a study were published by AAPG in 1983, where it is indicated that the volumes of hydrocarbons in situ are estimated based on a geological analysis and a probabilistic methodology.

The estimated potential as mean values in said study is presented in Figure 2. Regarding these estimates, it is pertinent to note that oil and gas volumes in situ refer to all oil that there may be in the porous spaces of the accumulating rocks, without considering what fraction can or could be produced (reserves) and without considering economic or technological limitations. As a reference of this in situ estimate, the United States Geological Survey quotes that in this country approximately 32% of the oil in situ can be produced, while 80% of the gas in situ can be recovered.



WESTERN POLYGON PROJECT

After that study, the USA Senate kept interrupted the execution of the treaty of 1978, and it was not until November 1997 that the treaty was ratified, so the limits remained as they had originally been agreed upon (see Figure 3 on the next page), the negotiation of the areas that are known as “Western Polygon” and “Eastern Polygon” was still pending.

In 1998, Mexico and the United States of America began talks to establish the boundaries between both countries in the Western Polygon. For this purpose, Petróleos Mexicanos was entrusted with carrying out a study of the oil potential of the area, and in this work the results obtained are shown.

III. GENERAL ASPECTS

The Western Polygon is located in the central part of the Gulf of Mexico between parallels 2630 and 2430N and meridians 9045 and 9400W and it has an area of 16,700 km, corresponding mostly to the Abyssal Plain (87%) and a small portion to the Sigsbee Escarpment (13%) and it is located in water depths that vary from 2,100 m to 3,700 m (see Figure 4 below p. 93).

In order to have a good image of the geological characteristics of the subsoil, it is necessary to have the good quality seismic information of reflection. The procedure used in this case was to use the most advanced technology and the results were of high quality.

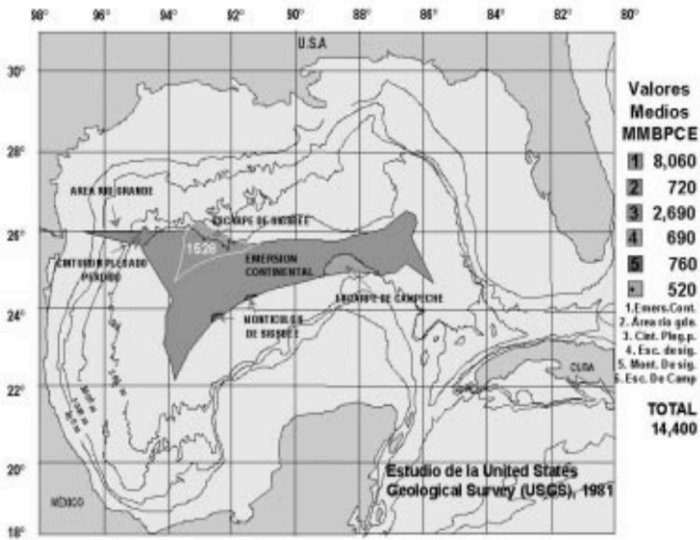
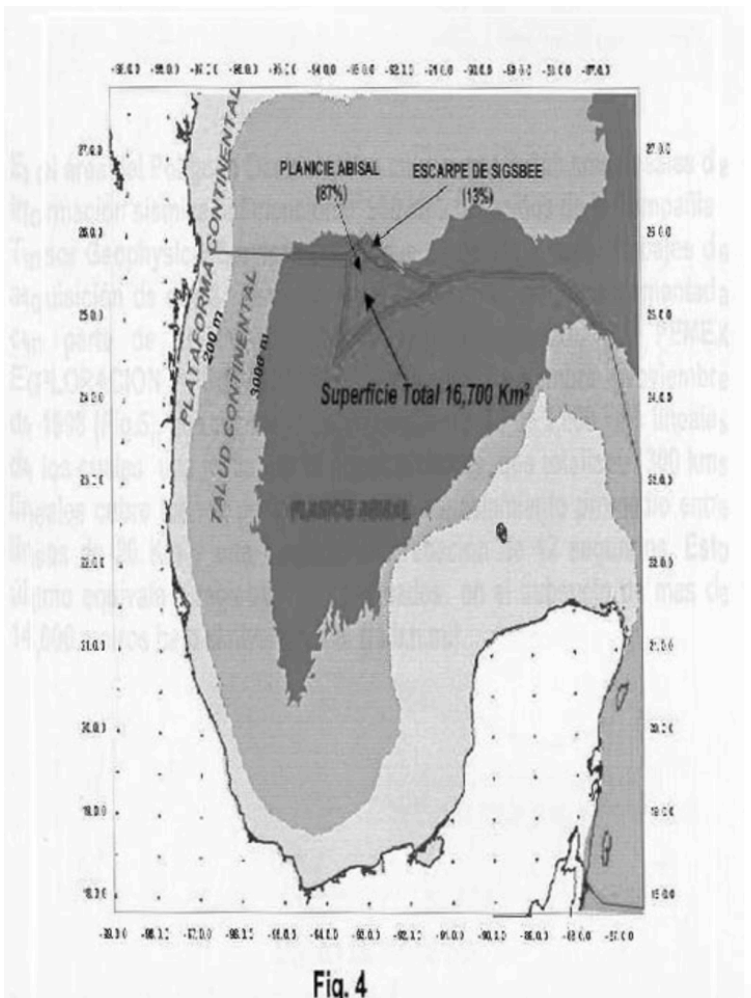


Fig. 3
 "Región de la Frontera Marítima en el centro del Golfo de México"

In the area of the Western Polygon, there are 2,300 linear km of two-dimensional seismic information; 980 km obtained from the Company Tensor Geophysical Services (TGS), which is engaged in doing acquisition of seismic data world-wide; complemented with part of a regional seismic work carried out by Pemex, Exploración y Reproducción, in the September–November quarter of 1998 (see Figure 5 below p. 94), which consisted in the survey of 3,000 linear km, of which a grid of 18 seismic lines, totaling 1,300 linear km covers the entire polygon, with an average spacing between lines of 20 km and a recording length of 12 seconds. The latter is equivalent to recording depths in the subsoil of more than 14,000 meters below sea level (mbsl).



IV. REGIONAL GEOLOGICAL FRAME

The area is characterized by two predominant features (see Figure 6 on the next page):

- The Sigsbee Escarpment that is a prominent physiographic feature that extends west-east in the northern portion of the polygon and the Abyssal Plain that occupies the rest of the area.
- The escarpment was formed by the ascent and subsequent lateral advance during several tens of kilometers towards the south, of a great saline mass of the Jurassic age. In this movement, it intruded to sediments of the Mesozoic, Tertiary and Quaternary ages.
- The Abyssal Plain is found in water depths greater than 3,000 m and is characterized by a sedimentary sequence of more than 10,000 meters thick, essentially flat, without important structural deformations. The 6,000 m at the top correspond to sediments sandy-clayey from the Tertiary age and more than 4,000 m at the bottom to calcareous-clayey sediments from the Mesozoic age.

V. GEOLOGICAL COLUMN

The sedimentary column of the Western Polygon area varies from the Jurassic age to the Recent age and it is made up of five sedimentary sequences that are below an igneous basement (see Figure 7 below p 97).

This column is the result of the geological evolution of the Basin of the Gulf of Mexico and it is characterized by deep-sea sediments.

In accordance with the regional seismic-stratigraphic correlation performed in this study, the sedimentary sequences correspond to the units known as:

- Challenger, from the Middle Jurassic-Middle Cretaceous age, made up of clayey limestone.
- Campeche, from the Late Cretaceous-Paleocene age, which is subdivided in two segments: a lower segment of the Upper Cretaceous age formed by a clay-calcareous sequence, which marks the end of the presence of carbonated sedimentation; and an upper segment from the Paleocene age formed by sandstones and turbidite lutites that determine the beginning of the presence of siliciclastic sedimentation.
- Mixed Mexican ridges from the Pliocene age, formed by lutites and turbiditic sands, which in the northern portion of the polygon are intruded by salt masses from the Middle Jurassic age.



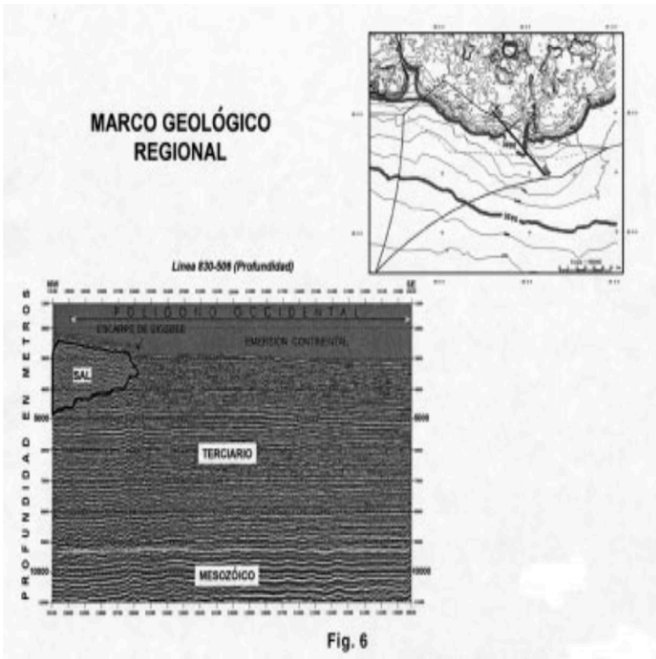


Fig. 6

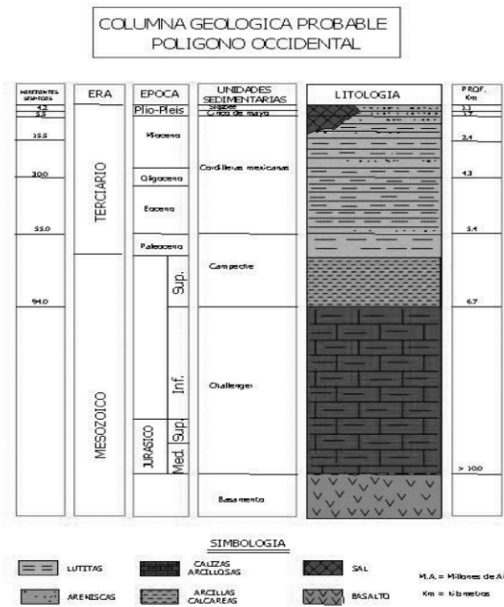


Fig. 7



- Sigsbee from the Pliocene Pleistocene age, formed by sequences of lutites and turbiditic sands, which, like Cinco de Mayo, are intruded by salt masses.

VI. INTERPRETATION

In order to clarify the idea that below the saline mass of the Sigsbee Escarpment there are different geological oil conditions in comparison to the rest of the polygon, which made people think of the idea that in that region there are large structures capable of storing huge quantities of hydrocarbons, seismology was used as the largest of the subsoil conditions.

For the elaboration of this study, all the lines were interpreted and the most representative were selected to be included in this document, that objectively show the geological characteristics of the Western Polygon area (see Figure 8 on the next page). These lines are presented in time and in depth to compare the effect that causes the presence of salt in the reflections below it. Likewise, the maps configured in depth of the Challenger Unit and the High Mexican Mountain Ridge Unit to show the structural geological behavior of a regional nature and its oil implications are included.

VII. LINES IN TIME

In a regional manner, seven seismic horizons that correspond to the limits of sedimentary units were interpreted.

These horizons show two important features, one of them is the presence of relatively horizontal seismic reflectors with good continuity associated with the Abyssal Plain and the other important feature is related to the presence of large salt masses near the sea bottom, under which the image quality of the reflectors and their position are strongly influenced by the relief of the sea bottom and by the saline bodies themselves. This influence is due to the fact that high-speed transmission of seismic waves in salt causes that the reflectors below, give the appearance that there are geological structures. However, the analysis of the characteristics of the seismic reflectors in both sectors allowed identifying and correlating said events.



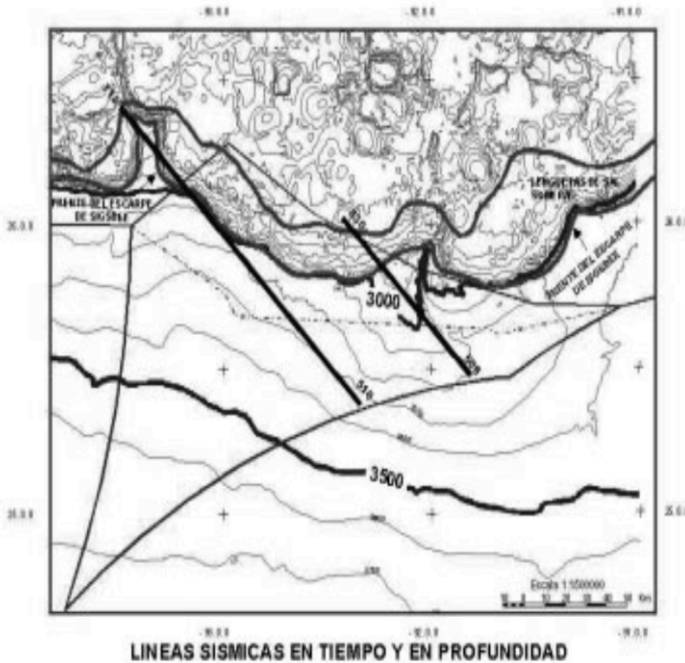


Fig. 8

VIII. IN-DEPTH LINES

With the purpose of obtaining an image of the subsoil in which the seismic effects caused by the presence of salt, and the relief of the marine bottom are eliminated, the seismic information was processed to obtain in-depth lines. The processing consisted of eliminating the effect of the speed of the body of salt that is between 1000 and 2000 m thick, which caused a rise of the reflectors in time. For this, the seismic velocities corresponding to each type of rock were used.

The result is the disappearance of the false subsaline structures and it implies that the structural conditions of the rocks of the Abyssal Plain extend below the Sigsbee Escarpment in the northern part of the Western Polygon. And, therefore, it is concluded that the entire area of the polygon has geological uniformity and has the same characteristics of the Abyssal Plain.

IX. DEPTH CONFIGURATION MAPS OF THE CHALLENGER UNITS AND THE MEXICAN MOUNTAIN RIDGE

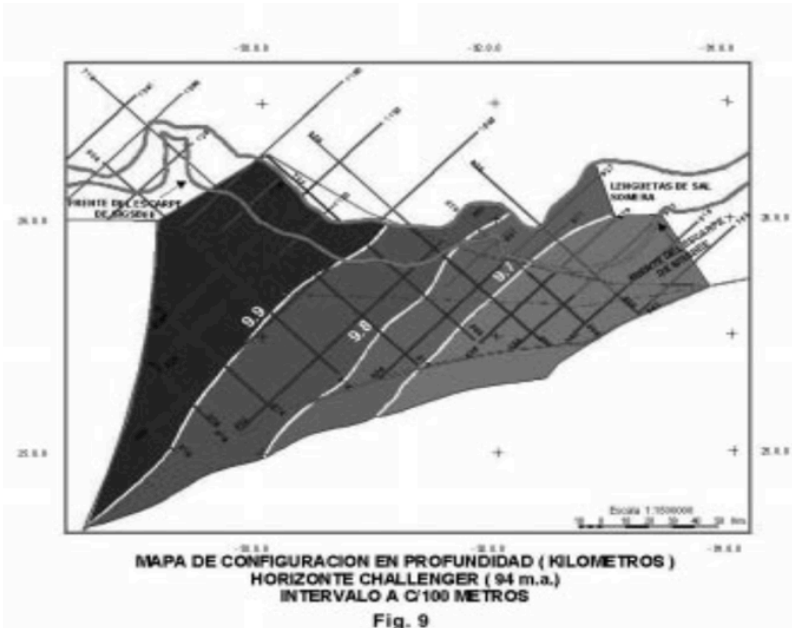
The maps configured in depth were generated from the interpretation of the seismic in-depth lines available.



WESTERN POLYGON PROJECT

1. Challenger Unit Map

On this map (see Figure 9 on the next page), a structural behavior without deformations is observed; this shows a gentle upward trend from the northwest part to the southeastern part of the area, with a variation of depths from 10,000 mbsl to 9,700 mbsl.



Considering these depths, the absence of structures, the water depth of more than 3,000 m and the probable high-degree of compaction of the Mesozoic clay-calcareous rocks, these are of little oil interest.

2. High Mexican Mountain Ridges Unit Map

Here, it is possible to observe that the structural behavior is maintained relatively flat, with a gentle downward trend that goes from the northwest portion to the southeast portion, with a variation in depth from 3,800 to 4,600 m. Such conditions involve absence of large structural traps capable of containing hydrocarbons and that in the case of existing traps, these would be strategic.



X. PETROLEUM GEOLOGY

In the Gulf of Mexico Basin, it has been shown that there are four geological horizons generators of hydrocarbons located in: the Jurassic, the Cretaceous, the Eocene

and the Miocene. These four horizons were identified within the area of the Western Polygon at depths, which vary between 4,000 and 8,000 m under the sea bottom.

At the Tertiary level, the geological evolution of the basin makes it possible to assume that up to five sandy-clayey sedimentary units with characteristics to constitute hydrocarbon storage rocks at depths that vary between 800 and 3500 m under the sea bottom could be found.

These possible storage rocks would form probable stratigraphical traps where the possible seals would be interstratified clay rocks.

Structurally, the Tertiary interval is affected by faults that could give rise to small stratigraphic-structural traps.

XI. EVALUATION OF POTENTIAL OIL RESOURCES

The evaluation of the oil possibilities of an area requires to analyze and define the components of the oil system, which are:

- Presence of hydrocarbon generating rocks.
- Presence of porous and permeable storage rocks.
- Presence of traps and seal rocks.
- Migration and synchronization of all the components.

XII. MASS BALANCE METHOD

For the estimation of potential oil resources in the Western Polygon, the mass balance method was used. This method is based on the reconstruction of the transformation process of organic matter of hydrocarbons; due to the thermal evolution of the basin, supported by the "BasinMod" software for the two-dimensional geological-geochemical modeling process of the generation-migration of hydrocarbons, applied to three regional seismic lines in depth.

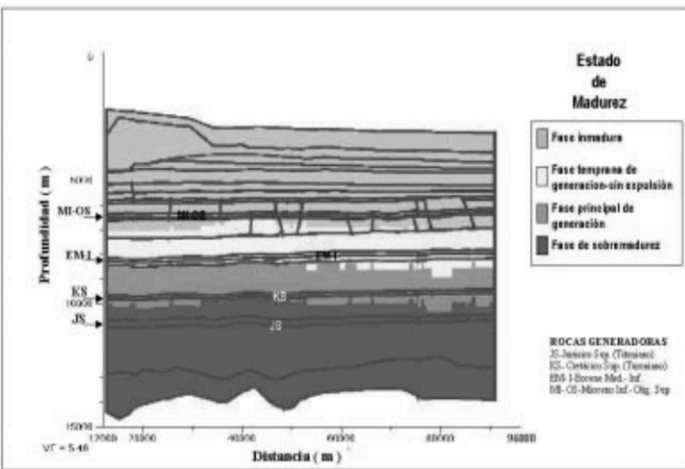
As a result, it could be established that the current thermal state of the Jurassic rocks, potentially generative, is overmature and its hydrocarbon generation potential has been exhausted. Finally, the Eocene rocks are in an initial stage of maturity without expulsion, and those of the Oligocene-Miocene are immature, as observed in the example shown for the case of the 830-506 seismic line (see Figure 10 on the next page). In accordance with the abovementioned, it is stated that it is the rocks of the Upper Cretaceous that have probably generated significant volumes of hydrocarbons in most of the area, which is deduced by looking at the maturity distribution map for this stratigraphic interval (see Figure 11 on the next page).

Using representative parameters of the already known areas of the Basin of the Gulf of Mexico, in terms of the content of organic matter and its transformation



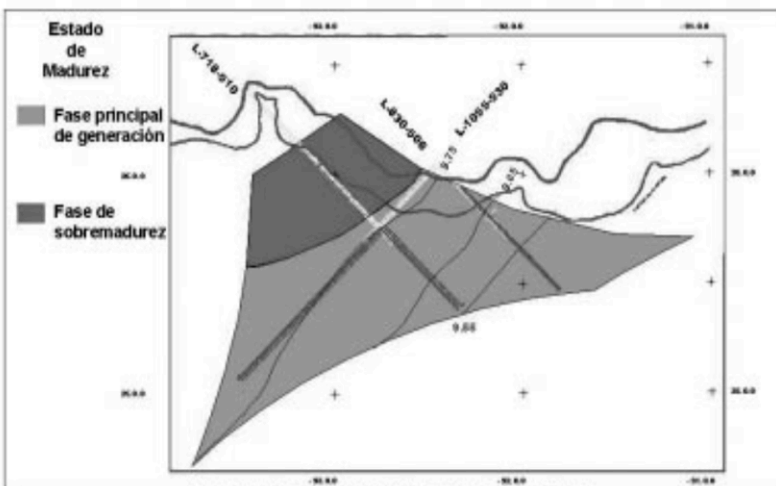
WESTERN POLYGON PROJECT

percentage, it has been calculated that the hypothetical volume of liquid hydrocarbons expelled in the Western Polygon could be 20,226 mmbbls and the hypothetical volume of gas expelled could be 10,067 mmm³. Therefore, the amount of hydrocarbons expelled reaches a total of 20,300 mmbpce. However, the international experience has shown that the maximum migration efficiency, i.e. when the traps are immediately above the active generating rocks, does not exceed 30%. Therefore, in the optimal case, the maximum estimated potential resources would be 6,090 mmbpce.



MODELO HIPOTETICO DE MADUREZ ACTUAL
 LINEA SISMICA 830-606

Fig. 10



MAPA DE DISTRIBUCION HIPOTETICA DE MADUREZ
 ROCA GENERADORA DEL CRETACICO SUPERIOR (TURONIANO)

Fig. 11

On the other hand, in the event that possible accumulating rocks are not close and hydrocarbon migration routes are scarce, a minimum migration efficiency that internationally has a value of 5% would be applied, thus the potential resource would be of 1015 mmbpce. Based on the above, it was estimated that the average volume of the potential resource is 2,500 mmbpce.

XIII. TRANSBOUNDARY DEPOSITS

Due to the geologic uniformity that exists in the area of the polygon, the estimated volume could be distributed in transboundary deposits, as exemplified by the theoretical model of Figure 12 found on the next page.

Transboundary deposits are common in certain parts of the world, as in the North Sea, where Norway shares oil fields with the United Kingdom (see Figure 13 on the page following the next page).

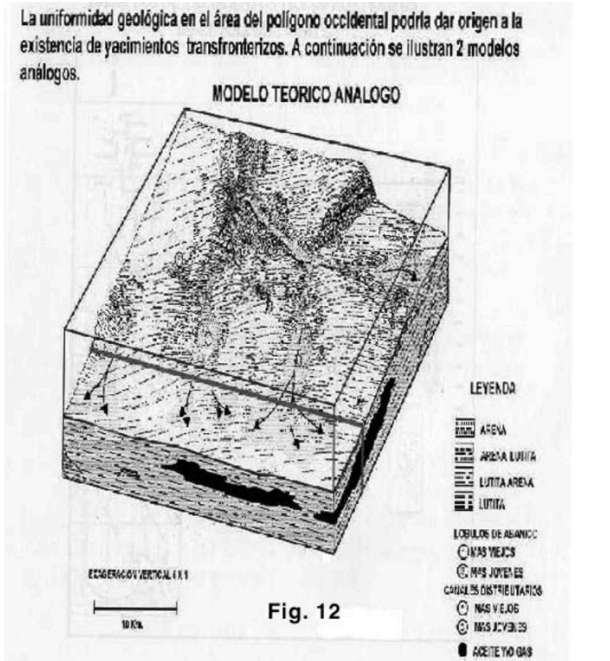
XIV. CONCLUSIONS

As a result of this study, the following conclusions can be postulated:

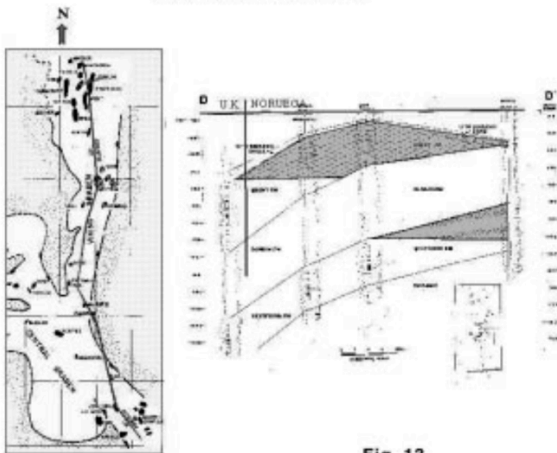
1. The thickness of the sedimentary column that is uniformly distributed in the Western Polygon is greater than 10,000 m. The upper 6,000 are made up of Tertiary clay-sandy rocks and Mesozoic limestone-clayey rocks.
2. Within the sedimentary sequence, the existence of four rock intervals with hydrocarbon generating potential and five intervals with potentially accumulating rocks is stated.
3. Structurally the area of the Western Polygon is characterized by being essentially flat, not deformed, and therefore without important geological structures. This includes the area below the Sigsbee Escarpment, where the lack of structures that could lead to large hydrocarbon deposits is verified.
4. Between 5000 and 7500 mbnm, small traps of small dimensions associated with normal faults that could contain hydrocarbons are observed throughout the area of the polygon.
5. The results of the hydrocarbon estimation or quantity of hydrocarbons available to be accumulated in the area of the Western Polygon based on the mass balance method, indicate a potential average resource of 2,500 mmbpce.
6. If the results of the western polygon's oil potential are compared with those of other border areas of the Gulf of Mexico, the low potential of the Western Polygon is evident.



7. Considering that the geological-oil characteristics are uniform throughout the area of the polygon and that the possible deposits of hydrocarbons would be of a stratigraphic type, associated with the sedimentation patterns of the Tertiary age, it is necessary to consider the very high probability of the existence of transboundary deposits.



EJEMPLOS DE YACIMIENTOS TRANSFRONTERIZOS EN EL MAR DEL NORTE



THE INTERNATIONAL LEGAL STATUS OF THE DETAINED PRISONERS BY THE UNITED STATES OF AMERICA IN GUANTANAMO, CUBA, AFTER THE CONFLICT IN AFGHANISTAN*

LUIS BENAVIDES**

The USA claims to be a progressive force for human rights. Military commissions have not been used for more than half a century in the United States, a period which has seen the reinforcement of a broad framework of fair trial guarantees in international human rights law and standards and in international humanitarian law. Executive military commissions have no place in 21st century criminal justice systems.¹

C O N T E N T S

- I. Introduction
- II. The Legal Status of the Prisoners in Guantanamo
- III. Brief Explanation of the Subsystem of International Humanitarian Law (IHL)
- IV. Relation between Human Rights and IHL
- V. Prisoners of War, General Framework
- VI. Rights of Prisoners of War
- VII. Military Commissions
- VIII. Conclusions

* Lecture presented at the international seminar "International Law and the Events of September 11," Mexico, May 2002.

** PhD at the Institut Universitaire de Hautes Études Internationales; Geneva, Switzerland.

¹ International Amnesty, *United States of America. Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantanamo Bay*. AI Index: AMR 51/053/2002, April, 2002, p. 61 (Amnesty Memorandum).

I. INTRODUCTION

The response to the events on September 11 in the United States of America (USA) was at a military level,² by the USA and a coalition of States,³ the armed attack to Afghanistan. The reasons, alleges USA, lie in the rejection, by the *de facto* government of the Taliban, of handing over who they consider to be the intellectual author of said attacks, Osama bin Laden, as well as the members of the leading group called Al Qaeda.

The USA claims to have sufficient evidence linking Osama bin Laden and Al Qaeda members with previous attacks to the World Trade Center in New York and its embassies in Tanzania and Kenya. In addition, they state that the Al Qaeda group is an international network of terrorists whose objective is not only the USA but, making the argument as short as possible, the Western culture.

Since the beginning of the fighting in Afghanistan in October 2001, thousands of people have been detained by the international coalition led by USA⁴ and by the anti-Taliban forces, which now are the new government of Afghanistan.

Prisoners are incarcerated in various detention centers in Afghanistan⁵ and Pakistan and even on US military ships.⁶ This, of course, makes it more difficult to know the exact number of prisoners and under which conditions they are. In these centers, the prisoners are subjected by the USA forces to a series of interrogations, in order to select those who could provide them with information that leads them to the capture of the leaders of the Al Qaeda organization or the Taliban, or that they have been an important part of said organizations or have had some relation with the events of September 11. Once the prisoners have been selected, they are transferred to the US military base in Guantanamo, Cuba, for a *possible* trial before

² The strategy of the United States of America has been developed in different fields, for example, in the diplomatic field the intention has been to create the greatest support possible, facing the countries the dilemma of being with the United States of America or against the United States of America; in the economic field it is about detecting and stopping any type of financing to terrorist groups.

³ The main military ally of the United States of America is Great Britain, but troops from Canada and Germany, among other countries, have also participated directly. Indirectly, all of Afghanistan's neighboring countries have participated, with its former ally Pakistan standing out.

⁴ Among the people captured, there are nationals from more than 35 countries. The identity of most of them is unknown. See Amnesty Memorandum, *op. cit.*, note 1, p. 23.

⁵ The facility with the largest number of prisoners, several thousand, is located in Shiburghan, west of Mazar-i-Sharif. Another detention camp controlled by the Americans is located outside Kandahar. There are many other prisons throughout the Afghan territory, some of them controlled by anti-Taliban forces.

⁶ For example, the USS *Peleliu*.

the military commissions.⁷ Regarding the fate of the thousands of prisoners who are in Afghanistan, it is even more uncertain.⁸

The number of Guantanamo detainees is around 384. While 174 more are awaiting transfer in Afghanistan.⁹

The USA has qualified *a priori* the people detained in Guantanamo as terrorists and criminals, thus in its opinion they would be illegal combatants. On the other hand, the large majority of the international community believes that such people should clearly have the status of prisoners of war.

The problem arising is to know what the status, according to international law, of the people detained in Guantanamo is. This will determine the rights that are conferred on these people, as well as the obligations that the USA has regarding them.

II. THE LEGAL STATUS OF THE PRISONERS OF GUANTANAMO

In order to determine the legal status of the prisoners held in Guantanamo, it is essential to know the circumstances in which they were apprehended.

Most of the people in Guantanamo were detained in the context of an armed conflict between the USA, together with an international coalition, against the *de facto* government of the Taliban in Afghanistan. Together with the Taliban allegedly fought members of the organization Al Qaeda.

There is, however, a small group of people who were detained in other places. Such is the case of the Algerian detainees in Bosnia and despite the fact that the Supreme Court of that country had declared there were no elements to detain these people, they were transported, illegally, to the Guantanamo base.¹⁰ Also, they have reported cases of people who have been arrested in Afghanistan and then transferred to other countries for interrogation, where it has even been mentioned the participation of USA agents in them.¹¹ These people have a different legal status than those arrested during a military conflict, and therefore we will not study them on this occasion.

⁷ The Secretary of Defense Ronald Rumsfeld has stated that people who are in Guantanamo are the most likely to be prosecuted before military commissions. With regard to the others, it has not been decided yet what they will do with them. The possibility of detaining them indefinitely has even been mentioned.

⁸ It has been said that there might be some trials by the new Afghan government, but very little is known about the exact number of people arrested, under which conditions they are, their location and what they will do with them.

⁹ CNN, "Guantanamo facilities full, building goes on. Gitmo now holds 384 detainees; 174 more in Afghanistan", May 10, 2002, at <http://www.cnn.com/2002/WORLD/americas/05/10/gitmo.detainees/index.html>. Accessed on May 11, 2002.

¹⁰ See comments in Amnesty Memorandum, *op. cit.*, note 1, p. 12.

¹¹ *Ibidem*, pp. 14-16.



THE INTERNATIONAL LEGAL STATUS OF THE DETAINED PRISONERS BY THE UNITED STATES OF AMERICA

Every armed conflict is governed by a subsystem of rules of international law called international humanitarian law (IHL).¹²

III. BRIEF EXPLANATION OF THE INTERNATIONAL HUMANITARIAN LAW (DIH) SUBSYSTEM

IHL is a set of rules of a conventional or customary nature and of principles,¹³ which seeks to limit the effects of armed conflicts for humanitarian reasons. It protects people who do not take part in hostilities, such as civilians and medical and religious personnel. It also protects people who no longer participate in the fighting, that is, those who are *hors de combat*, for example, wounded or sick combatants, shipwrecked people and prisoners of war. It also limits the means and methods of waging war.¹⁴

IHL applies in situations of armed conflict¹⁵ of an international or non-international nature, for which reason it is also called *jus in bello*. But it does not cover situations of internal tensions or internal disturbances, such as isolated acts of violence. It is only applicable when a conflict has been unleashed and applies equally to all parties, regardless of who initiated it. IHL does not determine if a State has

¹² IHL is often called "Law of War" or "law of armed conflicts".

¹³ Some principles are: elementary considerations of humanity, the need to distinguish between civilians and combatants, the principle of proportionality, the prohibition of causing unnecessary suffering, among others.

¹⁴ The International Court of Justice has indicated that "The 'laws and customs of war'... as they were traditionally called... were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This 'Hague Law' and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the 'Geneva Law' (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and people not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law" Legality of the Threat or Use of Nuclear Weapons, *ICJ Reports*, 1996, (Advisory Opinion), paragraph 75. Some of the international instruments that prohibit the use of certain military weapons and tactics or that protect certain categories of persons or goods are: The Hague Convention of 1954 for the protection of cultural property in case of armed conflict and its two protocols; the 1972 Convention on Bacteriological Weapons; the 1980 Convention on Certain Conventional Weapons, and its four protocols; the 1993 Convention on Chemical Weapons; the Ottawa Treaty of 1997 on Antipersonnel Mines; the optional protocol of the Convention on the Rights of the Child on the participation of children in armed conflicts.

¹⁵ The International Court for the Former Yugoslavia has defined the armed conflict as: "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there", *The Prosecutor vs. Dusko Tadic*, Appeals Chamber, Case No. IT-94-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, paragraph 70 (*Tadic Case*).



the right or not, to resort to force, also known as *jus ad bellum*.¹⁶ This issue is regulated by an important —but distinct— part of IHL in the Charter of the United Nations, Article 51. In this sense, both the United States and the United Nations¹⁷ and NATO¹⁸ have reaffirmed the right to self-defense after the September 11 attacks. The current USA exercise of this right has been much debated in the doctrine¹⁹ mainly because the conditions to exercise it as well as the manner it has been done do not correspond to what is established in the general international law.²⁰

IHL is essentially contained in the four Geneva Conventions of 1949²¹ and in its additional protocols of 1977.²² Almost all States, including Afghanistan and the USA, are parties to such agreements. The United States has not ratified the abovementioned protocols, but many of the principles contained in them are already considered part of international customary law and, therefore, mandatory for all countries. As already mentioned, an important part of IHL is contained in customary international law and in the principles of this law. This has been acknowledged in what is known as the Martens clause.²³

IHL distinguishes between international armed conflict and armed conflict without international nature. In international armed conflicts, at least two States con-

¹⁶ For a review of the terms *jus in bello* y *jus ad bellum* see: Kolb, Robert, "Origin of the twin terms *jus ad bellum*/*jus in bello*", *International Review of the Red Cross*, No. 320, 1997.

¹⁷ See, for example, the resolutions of the United Nations Security Council: S/Res/1368 (2001) and S/Res/1373 (2001).

¹⁸ Cfr. Statement by the North Atlantic Council, Press Release (2001)124, September 12, 2001, at <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

¹⁹ Part of that debate has taken place in forums such as *ASIL insights* at <http://www.asil.org/insights/insigh77.htm>. See, for example, the contributions of Cerone, John, *Status of Detainees in International Armed Conflict, and their Protection in the Course of Criminal Proceedings*, and Wedgood, Ruth, *Tribunals and the events of September 11th*.

²⁰ Part of the criticism has also occurred due to a possible "preventive" use of the right to self-defense. This preventive use has already tried to be invoked by other States on different occasions, and has had a great rejection by the international community. Thus, for example, after the Israeli attack in 1981 against an Iraqi nuclear reactor based on an alleged "preventive" right, the United Nations condemned the attack and Mexico declared: "il est inadmissible d'invoquer le droit de légitime défense quand il n'y a pas eu d'agression armée. Le concept de guerre préventive, qui durant de nombreuses années, a été utilisé pour justifier les abus des Etats les plus puissants, car il laissait à leur entière discrétion le soin de définir ce qui constituait pour eux une menace, a été définitivement aboli par la Charte des Nations Unies", S/PV.2288, June 19, 1981, p. 46, reproduced also in *International Legal Materials*, 1981, vol. 20, p. 991, and in Cot, Jean-Pierre and Pellet, Alain, *La Charte des Nations Unies: commentaire article par article*, 2nd. ed., France, Economica, 1991, p. 779. We hope that the Mexican government continues to maintain the same position.

²¹ I Geneva Convention dated August 12, 1949 to alleviate the fate of the wounded and sick of the Armed Forces in the field. 75 UNTS 31 (G-I). II Geneva Convention of August 12, 1949 to alleviate the fate of the wounded, sick and shipwrecked people of the armed forces at sea. 75 UNTS 85 (G-II). III Geneva Convention of August 12, 1949 relating to the treatment of prisoners of war. 75 UNTS 135 (G-III). III Geneva Convention of August 12, 1949 relating to the protection owed to civilians in time of war. 75 UNTS 287 (G-IV).

²² I Additional Protocol to the Geneva Conventions dated August 12, 1949, regarding the protection of victims of international armed conflicts. 1125 UNTS 3 (P-I). II Additional Protocol to the Geneva Conventions of August 12, 1949 regarding the protection of victims of armed conflicts without international character. 1125 UNTS 609 (P-II).

²³ "The Martens clause is part of the law of armed conflicts since it appeared, for the first time, in the Preamble of the (II) Hague Convention of 1899 related to the laws and customs of land warfare: "until a more complete code of the law of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as a result of the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience." Ticehurst, Rupert, "The Martens Clause and the Law of Armed Conflict", *International Review of the Red Cross*, No. 140, 1997, p. 131.



front each other. They should observe, *inter alia*, the standards contained in the Geneva Conventions and Additional Protocol I.

In non-international armed conflicts, the regular armed forces and dissident armed groups, or armed groups, face each other on the territory of the same State. In them a more limited set of rules is applied, in particular the provisions of Article 3. common to the four Geneva Conventions and Additional Protocol II.²⁴

This difference in the application of IHL, depending on the international nature or not of the conflict, seems to be being diluted in order to move closer to a general application of IHL, regardless of the nature of the conflict.²⁵

As a general rule we can say that people protected by IHL have the right to have their lives and their physical and moral integrity respected, and they benefit from judicial guarantees. The people will be, in all circumstances, protected and treated with humanity, without any distinction of an unfavorable nature.

In particular, it is forbidden to kill or injure an opponent who has laid down his arms or who is out of combat. The wounded and the sick will be picked up and assisted by the belligerent party in whose power they are. Staff and medical supplies, hospitals and ambulances will be respected.

People who do not fall into the category of prisoners of war (PW) are protected by the G-IV on the protection of civilians in times of war. All detainees fall into one of the categories established in both conventions. There is no intermediate status, no one in the hands of the enemy is outside the law.

IV. RELATION BETWEEN HUMAN RIGHTS AND IHL²⁶

It is important to make the distinction between international humanitarian law and international human rights law (IHRL). Although some of its rules

²⁴ Thus, said third article indicates: "In the event of an armed conflict that is not of an international nature and that arises in the territory of one of the High Contracting Parties, each of the Parties to the conflict shall have the obligation to apply, as minimum, the following provisions: 1) Persons who do not participate directly in hostilities, including members of the armed forces who have laid down their arms and persons put out of action due to illness, injury, detention or for any other reason, will be, under any circumstances, treated with humanity, without any distinction of an unfavorable nature, based on race, color, religion or belief, sex, birth or fortune, or any other analogous criteria. In this regard, at any time and in any place, as regards the above-mentioned persons, the following are prohibited: a) attacks against life and physical integrity, especially homicide in all its forms, mutilation, cruel treatment; and torture; b) taking hostages; c) attacks against personal dignity, especially humiliating and degrading treatment; d) the sentences issued and the executions without previous trial before a legitimately constituted court, with judicial guarantees recognized as indispensable by the civilized peoples. 2) The wounded and the sick will be picked up and assisted. An impartial humanitarian agency, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. In addition, the Parties to the conflict will endeavor to enforce, through special agreements, all or part of the other provisions of this Agreement. The application of the above provisions will have no effect on the legal status of the Parties to the conflict."

²⁵ *Cfr.* Case of *Tadic*, *cit.*, note 15, paragraphs 78-79, 83, 84, 91, 92 and 96-99. See also the separate opinion of Judge Georges Abi-Saab in the same decision. In the same vein, Boelaert Suominen, Sonja, "Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Custody Law Moving Towards a Uniform Enforcement Mechanism for All Armed Conflicts?", *Journal of Conflict and Security Law*, vol. 5, no. 1, 2000, *passim*.

²⁶ See, for example, Vité, Sylvain y Doswald-Beck, Louise, "International Humanitarian Law and Human Rights Law", *International Review of the Red Cross*, no. 293, 1993, *passim*.



are similar, these two branches of international law have been developed separately and appear in different treaties. In particular, IHRL is, in general terms, that body of international law that protects the civil, political, social, economic and cultural rights of human beings. IHRL establishes “negative” obligations for the States, which translates into a non-violation of said human rights. It also establishes “positive” obligations such as taking all necessary measures to ensure their protection and realization. IHRL is applicable in peacetime and many of its provisions can be suspended during an armed conflict, for example, the right of assembly. However, there is a minimum of basic rights²⁷ that cannot be interrupted under any circumstances, not even during the war, as is the right not to be tortured.²⁸

The relationship between IHRL and IHL, when it comes to their application in situations of war, is like that of a gear system. In this case, everything that is not covered by IHL will be covered, in a subsidiary manner, by IHRL, which grants, in a more detailed manner, greater protection to prisoners. In the present work, we will only deal with IHL.

V. PRISONERS OF WAR, GENERAL FRAMEWORK

IHL establishes specific rules that regulate the conditions of detention of PWs. The general rule is that any combatant captured by the enemy is a prisoner of war. The first question that arises is who can be considered a PW?

In accordance with Article 4 of the III Convention, PWs²⁹ are “the people who, belonging to one of the following categories, fall into the hands of the enemy”.

This first section identifies two conditions that, despite being obvious, deserve to be discussed. The first is that to be considered a PW it is necessary to fall into one of the six possible categories indicated herein. The second condition is to fall into the hands of the enemy. In this sense, enemy is any adversary in an armed conflict, in its broadest sense that, regardless of the circumstances, falls into the hands of one of the belligerent parties.

²⁷ Many of these basic rights are found in the international instruments that constitute what has been called the “International Charter of Human Rights”, integrated by the Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights and its Optional Protocol, as well as the Second Optional Protocol to the same agreement to abolish the death penalty.

²⁸ In the case, for example, of the American Convention, Article 27 indicates that articles are not derogable: 3rd. (right to recognition of legal personality); 4th (right to life); 5th (personal integrity right); 6th (prohibition of slavery and servitude); 9th (principle of legality and retroactivity); 12 (freedom of conscience and religion); 17 (protection of the family); 18 (right to name); 19 (children’s rights); 20 (right to nationality), and 23 (political rights), nor of the judicial guarantees indispensable for the protection of such rights.

²⁹ Article 43-45 of the P-I also defines PWs, taking into consideration the characteristics of the type of armed conflicts that arose in the world after the Second World War. See comments in Cassese, Antonio, *International Law*, Oxford University Press, Great Britain, 2001, p. 329-332. However, the United States of America is not part of this protocol. For this reason, for the purposes of this work, we will limit ourselves to what is indicated by G-III.



1. “Members of the armed forces of a party to the conflict, as well as members of the militias and volunteer bodies that are part of these armed forces.”

The first part refers to the members of the armed forces, that is, to the forces of air, land, sea or any other category that belong to the military corps of one of the parties. It is therefore what is commonly known as the army in its professional aspect and broader concept. Normally the armed forces wear uniforms, have a hierarchical order and know the rules of IHL.

In the second part, which refers to militias or bodies of volunteers, it is important to mention them because in many States most of the armed forces are conformed precisely by this type of bodies. Generally, these bodies are made up of members of the civilian population who receive military training and who in case of armed conflict are called to participate in the armed forces.

In the case of the conflict in Afghanistan in particular, the Taliban may well be considered the armed forces of Afghanistan, and the members of Al Qaeda members of the militias or volunteer corps that are part of those forces.

2. “The members of the other militias and of the other volunteer corps, including those of organized resistance movements, belonging to one of the Parties to the conflict and acting outside or within the territory itself, although this territory be occupied, provided that these militias or these volunteer corps, including these organized resistance movements, meet the following conditions: a) be commanded by a person who responds to his/her subordinates; b) have a fixed distinctive sign, recognizable from a distance; c) carry the weapons in sight; d) direct their operations in accordance with the laws and customs of war.”

This second category has a historical reason already recognized in the Hague Convention of 1907.³⁰ The reason for its inclusion was due to the, so to speak, atomization of the conflicts that had taken place in Europe. In these conflicts countless bodies of militiamen arose, and it was, therefore, necessary to try to recognize and grant those groups of people a legal protection. The same problem arose during the Second World War where, alongside the great armies, numerous groups of “partisans” also fought, who were sometimes granted the protection of a prisoner of war.

³⁰ These same conditions were originally indicated in Article 1 of the Regulation concerning the laws and customs of the land war of the Fourth Hague Convention of October 18, 1907 which states: “Quality of Belligerent. Art. 1. The laws, rights and duties of war refer not only to the army but also to the militias and the bodies of volunteers who meet the following conditions: 1. To have as head a person responsible for their subordinates; 2. To have a signal as a fixed distinctive sign recognizable from a distance; 3. To bear weapons ostensively; 4. To abide in their operations to the laws and customs of war. In countries where the militias or the Volunteer Corps form the army or are part of it, both those and these are included under the name of army”.

To qualify for the status of prisoners of war, these bodies of combatants had to meet certain requirements.

The first requirement refers to the existence of a hierarchical order, where there are those who issue orders and those who obeys them; which makes the determination of responsibilities easier.

The second requirement is a distinctive sign that combatants must wear. This is essential since, in the absence of a uniform, combatants must differentiate themselves from the rest of the civilian population.

Thirdly, to carry weapons in sight is a requirement that, as ICRC points out, should not be understood as detrimental to the surprise factor in any military operation.

Ideally any combatant in an armed conflict should know the rules of IHL, however, this is not the case. The ICRC recognizes that combatants.

In all their operations, they must be guided by the moral criteria which, in the absence of written provisions, must direct the conscience of man; in launches attacks, they must not cause violence and suffering disproportionate to the military result which they may reasonably hope to achieve. They may not attack civilians or disarmed persons and must, in all their operations, respect the principles of honor and loyalty as they expect their enemies to do.³¹

In the conflict in Afghanistan it could be argued that the members of Al Qaeda do not meet the conditions listed above, however, this has to be determined before the corresponding judicial instance, as we will see later.

3. “Members of the regular armed forces who follow the instructions of a government or authority not recognized by the detaining power”.

This provision is of great importance, since none of the belligerent parties, simply because they do not know the authority of their enemy, may not grant PW status to combatants. Thus, for example, during World War II, the forces of General de Gaulle were supposed not to consider PWs because the Axis forces did not recognize de Gaulle’s government in exile. The solution that was given was to associate these forces to one of the belligerent parties in this case, who was fighting for the United Kingdom.

³¹ Cfr. Pictet, Jean (ed.), Commentary on the Convention (III) relative to the Treatment of Prisoners of War. Geneva, August 12, 1949, ICRC, *International Humanitarian Law*, CD-ROM, 1998 (ICRC CD ROM).

THE INTERNATIONAL LEGAL STATUS OF THE DETAINED PRISONERS BY THE UNITED STATES OF AMERICA

In the case of the Afghan conflict, the USA can not argue that because the de facto government of the Taliban was never recognized by them, they can not grant PW status to the people captured during the armed conflict.³²

4. "People who follow the armed forces without actually forming an integral part of them, such as the civilian members of military aircraft crews, war correspondents, suppliers, members of work or service units responsible for the well-being of the military, provided that they have received authorization from the armed forces they accompany, with the latter having the obligation to provide them, for this purpose, with an identity card similar to the model attached".

This article refers to the people who accompany the armed forces without being members of them. While this article refers to the need for the armed forces to provide an identity card to the people who accompany them, this requirement, in the opinion of ICRC, is not absolute. The determining factor, ICRC emphasizes, is the capacity in which the person was serving, with the identity card being an additional guarantee.³³

5. "Members of the crews, including skippers, pilots and cabin crew of the merchant marine, and civil aviation crews of the Parties to the conflict who do not benefit from more favorable treatment under of other provisions of international law."

This fraction establishes protection for crew members of the merchant navy or civil aviation, who by the nature of their activities may be under the power of one of the belligerent parties.

6. "The population of an unoccupied territory that, when the enemy approaches, spontaneously takes up arms to fight against the invading troops, without having had time to become regular armed forces, if it carries the weapons in sight and respects the laws and customs of war."

This is the case of the mass uprisings of a population to face an invading enemy. On this occasion the conditions to be considered PW are reduced to only two and



³² See comments in Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by the US Forces*, January 19, 2002, p. 6.

³³ ICRC indicated: "The Conference considered that the capacity in which the person was serving should be a determining factor; the possession of a card is therefore an indispensable condition of the right to be treated as a prisoner of war, but a supplementary safeguard". See ICRC CD ROM, *op. cit.*, note 31.

not to four of the second paragraph. The conditions are: carry the weapons in sight and respect the laws and customs of war.

Some of the people detained in Afghanistan can also be in this category.

Thus, the assumptions that this article covers go from the most particular to the most general. From the regular armed forces to the spontaneous uprisings of the population. In this sense, a PW group can be formed by people belonging to one of the different categories already mentioned. It is not necessary that everyone is under the same assumption.

In part B of the same Article 4, it is pointed out that PW will also be accorded to military personnel who are in an occupied territory and to military personnel who are in a neutral country.

This same article does not affect the status of health and religious personnel, as set forth in Article 33 of this agreement.³⁴

Article 5 of the G-III states that this agreement will apply to the people mentioned in Article 4 from the moment they fall into the hands of the enemy and until their liberation and final repatriation. It also indicates that in case of doubt regarding belonging to one of the categories listed in Article 4 of the people who have committed an act of belligerency and who have fallen into the hands of the enemy, said people shall benefit from the protection of this agreement, pending the determination of its statute by a competent court.³⁵

There are two fundamental principles in this article. The first is that of the application of the G-III, and by extension, of all the protection of IHL, for those people who fall into the hands of the enemy. The second principle is that even when there is doubt as to the status of the person imprisoned, the person must enjoy the protection of the agreement until a court with jurisdiction determines his/her status. This court is understood to be the same as that normally used by members of the armed forces of the detaining power in case of conflict in the application of IHL.

In the case studied here, we find the situation that the USA government initially ruled out the application of IHL; later, it indicated that only some of the prisoners would enjoy some of the provisions of the Geneva law such as the enjoyment of the statute of PW. All this without having gone to the corresponding judicial instance to settle any type of doubt, but simply by decision of the Executive Branch. This constitutes serious violations of the Geneva Conventions.

³⁴ Article 33 states that the members of health and religious personnel held by the detaining power to assist the PW will not be considered as such. However, they will enjoy, at least, all the advantages and protection of the G-III, as well as they will be given anything they need to provide their services.

³⁵ See also Green, Leslie C., *The Contemporary Law of Armed Conflict*, 2nd. ed., Great Britain, Juris Publishing and Manchester University Press, 2000, p. 198.



THE INTERNATIONAL LEGAL STATUS OF THE DETAINED PRISONERS BY THE UNITED STATES OF AMERICA

It is important to mention that despite the refusal of the USA government to grant PW status to those detained in Guantanamo, international organizations such as the Office of the United Nations High Commissioner for Human Rights³⁶ and the ICRC,³⁷ and International NGOs, such as Amnesty International and Human Rights Watch, have pointed out the clear obligation of the USA to grant PW status, because it is a right the Guantanamo prisoners have, as well as the application of IHL.

It is interesting to note that the European Parliament, in a resolution of February 7, 2002, expressed its solidarity with the USA in the fight against terrorism, but expressed its concern about the conditions of detention of prisoners detained in the US base of Guantanamo. The Parliament considered that these prisoners do not meet the conditions prescribed by the Geneva Conventions and that the standards established in these conventions should be revised in order to deal with new situations generated by the development of international terrorism. The Parliament invited the United Nations and its Security Council to adopt a resolution with a view to establishing a competent court for issues related to Afghanistan and whose objective is to clarify the legal status of prisoners.³⁸

On April 25, 2002, the European Parliament approved another resolution in which it called for the status of the Guantanamo prisoners to be clarified, also indicated that the establishment of military commissions represented a clear violation of the international obligations of the United States, particularly the International Covenant on Civil and Political Rights. In the same vein, the high representative for the Foreign and Security Policy of the European Union, Javier Solana, stated that the detainees in Guantánamo should enjoy the status of prisoners of war.³⁹

It is important to indicate that even if the detained persons were judged by a court with jurisdiction and found not to have PW status, this does not mean that they would be totally defenseless, in particular, they would enjoy the protection of the fourth agreement as well as of those rules that are part of international customary law.⁴⁰

³⁶ See, for example, *Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantanamo Bay, Cuba*, January 16, 2002. OAS, as well as the Inter-American Commission on Human Rights, have expressed their support for the fight against terrorism and for the desire that the detainees' human rights be respected. They have also criticized the creation of military commissions. See Resolution on terrorism and human rights of the IACHR of December 12, 2001.

³⁷ See ICRC press release of February 9, 2002.

³⁸ RSP/2002/2513, European Parliament Resolution on the conditions of detention of the prisoners in Guantánamo, February 7, 2002.

³⁹ See Washington Times, "EU Parliament slams US military tribunals", April 25, 2002, <http://www.washtimes.com/upi-breaking/25042002-083751-5834r.htm>.

⁴⁰ An example of these rules can be found in Article 75 of the P-I that refer to fundamental guarantees and that establish a minimum standard of human treatment and due process of law that must be respected for all people, regardless of their status.

VI. RIGHTS OF PRISONERS OF WAR

In this section we will mention some of the rights conferred by the G-III. As already indicated, in all that is not explicitly indicated in IHL, IHRL must be used, in a subsidiary manner and where applicable.

The general rule, in terms of guarantees of the PWs, is to apply the same conditions, rights and duties to the PWs that had the armed forces of the detaining power.

Our analysis will focus on two broad categories, namely: human treatment and judicial guarantees.

1. Human Treatment

PWs must be treated humanely all the time. This means, among other things, that they should not be tortured, insulted or exposed to public curiosity. Their dignity must be respected without having to suffer any discrimination, being one of the categories the one of nationality.⁴¹ Likewise, the G-III establishes that the rights of the PW are inalienable rights.⁴²

Prisoners must be placed in facilities with similar conditions to those found in facilities where the forces of the detaining power are. In particular, it is pointed out that said facilities for the PWs must be adequately illuminated and ventilated. PWs can only be interned in facilities that are on the ground with all possible hygiene and health measures. PWs should be provided with food and medical attention.⁴³

The evacuation or transfer of the PWs will always be carried out humanely and under conditions that should not be less favorable than those that would be enjoyed by the armed forces of the detaining power.⁴⁴

A first comment regarding these rights is about their inalienable nature. That is, they are not waived in any manner whatsoever.

It is also important to highlight the conditions under which people detained in Guantanamo have been treated. For their transfer from Afghanistan to Cuba, the detainees were sedated, hooded, shaved, chained hand and foot to the seats, and carried a portable urinal. Once in prison, in the so-called X-Ray camp, they were placed in steel cages, which were out in the open and with the lamps on all day. The cells measured 1.80 by 2.40 m, and their toilet was a bucket.⁴⁵

⁴¹ While no PW can be discriminated based on his/her nationality, the G-III itself in its Article 47 condemns the use of mercenaries, who would not enjoy the PW status. So far, the government of the United States of America has not qualified the people detained in Guantanamo as mercenaries. See Green, Leslie C., *op. cit.*, note 35, p 114-117, 199.

⁴² *Cfr.* Articles 7-17.

⁴³ *Cfr.* Articles 13-25.

⁴⁴ *Cfr.* Articles 20 and 46.

⁴⁵ See the description that El Mundo newspaper makes in <http://www.elmundo.es/elmundo/2002/graphics/ene/s3/guantanamo/guantanamo.html>. Also "New Prisoners in Guantanamo", BBC World, May 2, 2002, at http://news.bbc.co.uk/hi/spanish/news/newsid_1963000/1963854.stm accessed on May 8, 2002.



At the end of April, the prisoners were transferred to other facilities within the same Guantanamo base, although these were in better conditions, one of the problems is that they are even smaller than the previous ones.⁴⁶

Undoubtedly, the treatment given to the people detained in Guantanamo has been degrading and may well be described as cruel and inhuman treatment in many cases, which could be considered as torture. The US would never treat its own troops like this.

As we indicated at the beginning, there is not an exact number of all the detainees and it is not known where all of them are. Here it is worth mentioning that although the G-III clearly establishes the obligation that the PWs must be in facilities that are on land, some people have been retained in US military vessels such as the *USS Peleliu*.

The US has also declared that they will only give their citizens all the judicial guarantees for their prosecution. This in itself constitutes discrimination, and this has been done in the case of the American John Walker Lindh, who has received a completely different treatment from the rest of the detained prisoners; despite having been captured in the same conditions as the others. However, even in his case several abuses were committed. Several media outlets reported that American soldiers took photos of the American citizen Walker, alleged Taliban, while he was handcuffed, tied to a stretcher and blindfolded. They even refer that in some photos they made obscene gestures to him. This, of course, constitutes an attack on the dignity of the person, in addition to being considered torture. This last argument has already been used by Mr. Walker's defense attorneys.⁴⁷

2. Judicial Guarantees

PWs can only be tried by a military court or unless the existing laws of the detaining power expressly allow them to be tried by civil courts. Under no circumstances should PWs be judged by any court that does not offer the essential guarantees of independence and impartiality generally recognized, and in particular they cannot be subject to any procedure where they are not granted the necessary rights and means of defense recognized by the G-III.⁴⁸ According to Article 102, PWs can only be validly sentenced if they were sentenced by the same courts and in accordance with the same procedure with which the members of the armed forces of the detaining power had been judged, and provided that the provisions

⁴⁶ The new detention camp is called Campo Delta that cost of several million dollars. In "Transfers in Guantanamo", *BBC Mundo*, April 30, 2002, at http://news.bbc.co.uk/hi/spanish/news/newsid_1958000/1958927.stm accessed on May 8, 2002.

⁴⁷ Masters, Brooke A., "Prosecutors concede limits of their case against Lindh", *Washington Post*, April 2, 2002, p. A11.

⁴⁸ *Cfr.* Article 84.

of this particular convention had been observed, those that were refer to rights and means of defense.⁴⁹

Pursuant to Article 86, PWs may be judged according to the laws of the detaining power for acts committed before being captured. However, even when sentenced, they must enjoy the benefits of this convention.

The Geneva Conventions do not exclude the possibility of judging and punishing prisoners of war for war crimes, crimes against humanity or any of the common order.

PWs have the right to appeal the decision with the possibility that it is annulled or modified.

As for interrogations, PWs are only required to provide their name, rank, date of birth and serial number. Of course, they should not be subject to any kind of torture.⁵⁰ According to some journalistic reports, US troops are carrying out trainings for interrogators now called: *human intelligence collectors* where the line to avoid torture is increasingly difficult to distinguish.⁵¹

The application of these rights by the US government differs greatly from what is prescribed by IHL and even from the US practice itself.⁵² Thus, US agents have stated on several occasions that in case of doubt about the status of a person imprisoned by the US in an armed conflict, this must be treated as a PW until his/her situation is defined by a court with jurisdiction. In accordance with US military law itself, such determination must be made by a military court made up of three members, whose decisions must be subject to trial and must also have a fair trial.

This among many other provisions.⁵³

Despite having clear provisions in US law, itself, the current government has stated that the people detained in Guantanamo are illegal combatants, and that although they could be treated according to the Geneva Conventions, the US would not be obligated to do so. The Secretary of Defense Donald Rumsfeld declared on January 11, 2002 that: "Prisoners are illegal combatants and therefore have no rights under the Geneva Conventions. We have indicated that we plan, for most of them, to treat them in a manner that is reasonably consistent with the Geneva Conventions, to the

⁴⁹ Article 105.

⁵⁰ Article 17.

⁵¹ Thus, Sgt. Giersdorf tells students, 'You can put a source in any position you want. You can chain his legs to the chair, you can handcuff his hands behind him', force him to stand at attention or have military police thrust him to the ground. 'If [a prisoner] says it hurts, is it torture?' he asks. 'Yes' say several students. 'No. It is not' The sergeant corrects'. Cfr. Bravin, Jess, "US Army Recruits Learn How to Grill at Interrogation School", *Wall Street Journal Europe*, April 29, 2002, pp. A-1 y A-9.

⁵² See comments in Paust J., Jordan, "Military Commissions: some perhaps legal, but most unwise", November 14, 2001. On file with the author.

⁵³ See, for example: Lacey, M. y Bill, B. (eds.), *US military Judge Advocate General operational Law Handbook*, US, International Law and Operational Law Department, Judge Advocate Generals School, 2000, *passim*.



extent appropriate.” It is important to point out that the term of illegal combatants does not exist in international law.⁵⁴ In addition, the Secretary of Defense declared that even if the military commissions absolved some of the prisoners who are in Guantanamo, if the government of the USA considers that these people are “dangerous terrorists”, it would continue to keep them prisoners. These statements by the Secretary of Defense have been in contradiction with what has been said by other high military members, who have clearly indicated the conditions in which they have captured the people who are in Guantanamo. Thus, for example, the Pentagon general counsel stated that: “The people that we are detaining, for example in Guantanamo Bay, Cuba, are enemy combatants that we captured on the battlefield seeking to harm US soldiers or allies.”⁵⁵

That is, the United States intends to decide how, when, what and to what extent, if they do, they would apply IHL.⁵⁶ The United States of America not only finds itself in violation of its conventional obligations, but also of all those principles of IHL which are already part of the international customary law. In addition to going against the US practice in the matter.⁵⁷

It is important to indicate that the US has declared that the US Constitution does not apply to its Guantanamo military base because Cuba exercises sovereignty. Therefore, prisoners do not enjoy the rights granted by the Constitution, nor of the possibility of access to civil courts, so they are left with only the path of military commissions.⁵⁸

Unfortunately, the treatment of the PWs by other participating States in the international coalition has not been entirely homogenous either. Thus, while Britain has decided to grant PW status to the people it has captured, Canadian forces have preferred to transfer the people captured by them to US forces so they can make the corresponding determination.⁵⁹

Finally, it is worth mentioning that failure to comply with the abovementioned rights can be considered a war crime.⁶⁰

⁵⁴ See Human Rights Watch, Background Paper on Geneva Conventions and Persons Held by the US Forces, January 19, 2002.

⁵⁵ Department of Defense news briefing, March 21, 2002, reproduced in Amnesty Memorandum, *op. cit.*, note 1, p. 12.

⁵⁶ The US Secretary of Defense declared: “We have indicated that we do plan to, for the most part, treat [the prisoners] in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate, and that is exactly what we have been doing”, Department of Defense news briefing, January 11, 2002, *ibidem*, p. 31.

⁵⁷ Amnesty International has noted that: “The USA’s ‘pick and choose’ approach to the Geneva Conventions is unacceptable, as is its failure to respect fundamental international human rights standards” *idem*. See also Human Rights Watch, Background Paper on Geneva Conventions and Persons Held by the US Forces, January 19, 2002, *passim*.

⁵⁸ See “U.S. praises court decision to throw out detainees’ lawsuit”, February 22, 2002, www.cnn.com/2002/LAW/2002/02/22/inv.justice.detainees.suit/index.html. Accessed on May 7.

⁵⁹ See Graham’s note, Bradley, “British to turn over Prisoners to Afghanistan”, *Washington Post*, April 30, 2002, p. A01.

⁶⁰ See G-III, Article 130, and G-IV, Article 147. Regarding war crimes see, for example: Benavides, Luis, “The obligation of States to suppress war crimes as part of international criminal justice”, *Magazine of Mexican Public Law*, Mexico,

VII. MILITARY COMMISSIONS

On November 13, 2001, the president of the United States of America issued a military order for the detention, treatment, and prosecution of some non-US nationals in the war against terrorism. In said order it was declared that:

1. Terrorist attacks on facilities and against US citizens have been of such a scale that they have created a state of armed conflict.
2. The persons subject to said order would be all those who were not US citizens and who were part of a terrorist organization.
3. If judged, it would be for violations of the laws of war and other laws applicable by military courts.
4. In the case of military commissions, the principles of law and the rules of evidence that are commonly applicable in criminal cases before district courts were not applicable.
5. It indicates that the people to be judged must be treated humanely, without distinction based on race, color, religion, gender, birth, wealth or any other similar criterion (of course, they forgot the nationality one).
6. The death penalty is applicable.
7. It indicates that the defense will have a fair trial.
8. The accused has no right to seek a remedy in a direct or indirect manner or that is made in its representation before any US court or before any court of another country or before an international court.

This military order was widely criticized by various international and American human rights organizations.⁶¹

Part of the incongruity that USA has shown in the treatment of PWs is found precisely in this document. This is, for example, the fact of considering the laws of war applicable and judging prisoners for violations thereof, but not considering them PWs in accordance with the Geneva Conventions. It also constitutes a violation to lower the standard of a fair trial for the specific case of military commissions.

Despite this reaction, the US government issued, on March 21, 2002, another military order in which it establishes the rules of procedure for military commissions.

ITAM, No. 3, 2002, *passim*.

⁶¹ See what is argued by Amnesty International, Human Rights Watch, The Center for Justice & Accountability, Lawyers Committee for Human Rights, etcetera. Amnesty International, for example, pointed out that such an order should be revoked because it threatened international principles of justice, including the separation of powers, non-discrimination, among many others, in "Presidential order on military tribunals threatens fundamental principles of justice", November 15, 2001. AMR 51/165/2001.



THE INTERNATIONAL LEGAL STATUS OF THE DETAINED PRISONERS BY THE UNITED STATES OF AMERICA

Some of the characteristics are:

1. The secretary of defense is the one who establishes the military commissions.
2. These military commissions will be formed by a minimum of three and a maximum of seven members.
3. The members of the commissions must be military officers, but only the president of the commission needs to be a lawyer.
4. The jurisdiction of the commission will be about violations of the laws of war and "other offenses" that may be tried by military commissions (it does not say what those other offenses are).
5. Two thirds of the votes are required to find a person guilty.
6. The death penalty can even be applied. But this can only be applied by a commission of seven members.
7. A decision made by the commission may be appealed before a review panel of three military officers, in which one must have experience as a judge.
8. The review panel can return the case to the commission that knew of it or send it to the secretary of defense. The latter can return the case again to be judged or send it to the president to issue a final decision.
9. The sentence of the commission is final when the president of the USA or the secretary of defense issues a final decision for that purpose.

Among the rights set out by these rules of the commissions are: to make the trials public, to prove beyond a reasonable doubt, the existence of a presumption of innocence, to grant access to defense attorney to the documents of the prosecution to prepare his/her case, questioning witnesses and the right of the accused not to testify against him/her.

These provisions are still far from complying with the minimum international human rights standard, and for this we will take as an example the right to the presumption of innocence. It is impossible to think that the right to the presumption of innocence is fulfilled when the president of the United States has declared, with respect to the people detained in Guantanamo, that: "These killers-these are killers". The secretary of defense has also declared on different occasions, with respect to the same people that they are: "hard-core well trained terrorists" and "among the most dangerous, best trained, vicious killers on the face of the earth".⁶²

These statements are extremely serious when it is precisely the president and the secretary of defense who establish the commissions in which the detainees in Guantanamo will be judged and who make the final decision about their fate.



⁶² Reproduced in Amnesty Memorandum, *op. cit.*, note 1, p. 41.

Also, these commissions are created by the Executive Branch, so it is difficult to speak of independent bodies for the administration of justice.

VIII. CONCLUSIONS

The determination of the legal status of any person detained during an armed conflict is essential to know the rights conferred by IHL. Likewise, the obligations that the States have, with respect to said prisoners, are essential to determine, in the case of a violation thereof, the legal consequences to which the State that detains them is subject to.

In this case, it is clear that the people currently detained in Guantanamo were captured during the conflict in Afghanistan, and therefore they enjoy the protection of IHL. It is presumed, given the USA's own information, that these people participated in combats and that they were captured during the course of them. This fact gives them the status of prisoners of war. IHRL, as well as the customary law in the matter, complement any gap that may exist in terms of the treatment that should be granted to prisoners of war.

The United States has wanted to deny the status of prisoners of war to those detained in Guantanamo, qualifying them *a priori* as terrorists and criminals, so in their opinion they would be illegal combatants. The determination of this status does not depend on the will of the detaining power, but on whether or not it complies with the above-mentioned conditions, which are objectively stated in the Geneva Convention. In case of doubt about whether or not they belong to said category, this must be determined by a court of law.

The disqualification that the USA has tried to make of IHL calling it obsolete and inadequate is unfounded. Instead, it responds to a policy with a dual purpose, on the one hand it seeks to justify its action, and if it cannot do so, it tries to create exceptions to existing rules that legalize its actions.

The treatment that the United States is giving to detainees in Guantanamo is in violation of general international law and of humanitarian law in particular, for this reason the United States is internationally responsible for the treatment of the people detained in Guantanamo.⁶³

In conclusion, with respect to Mexico we can say the following. Not to oppose such actions or at least not to declare them illegal *ab initio* puts us in a very risky position, because:

1. The acquiescence to these rules can give rise to the birth of new rights that can acquire force of international custom in which we could not declare ourselves persistent objectors, with all the consequences that this entails.

⁶³ Pursuant to Article 91 of the P-I, "The Party to the conflict that violates the provisions of the Agreements or of this Protocol shall be obliged to compensate, if applicable. It will be responsible for all acts committed by people who are part of its armed forces." In addition to the applicable rules of international responsibility.

THE INTERNATIONAL LEGAL STATUS OF THE DETAINED PRISONERS BY THE UNITED STATES OF AMERICA

2. Failure to act also entails a responsibility - remember that we are also responsible for omission. Many of the violations committed constitute *erga omnes* obligations, in which all States have a legitimate right to enforce them. There is also, of course, a moral responsibility that is worthy of consideration.
3. The violation of an incipient yes, but an important, *State of international law*, should concern us all.

At a time when the Ministry of Foreign Affairs declared that it would denounce human rights violations anywhere,⁶⁴ the secretary should be reminded that silence in the elaboration of rules of international law has a price, and this can be very expensive.

⁶⁴ "I come to this forum with the mandate of my government and of the Mexican society to manifest our new commitment to respect and contribute with the international community so that human rights are respected throughout the world. The Mexican government has chosen this forum to present a series of actions that testify a fundamental change in our policy towards these transcendental values... It has been argued that the defense and promotion of human rights are internal matters of each country that should not be subject to international scrutiny. Mexico does not share this thesis. It categorically affirms that human rights represent values with absolute and universal validity... As universal values, the situation of human rights in any State is a legitimate concern of the international community as a whole. The work of promoting their validity and respect is a common undertaking of all governments and all peoples, and cannot be subordinated to the exclusive will of a government ... It is important to avoid that ulterior motives undermine an initiative aimed at promoting human rights. Therefore, we favor a balanced treatment, on objective and non-selective bases, of the situation of human rights in the world and we reiterate our unwavering interest in working for human rights in all States. Our voice will be clear and our vote will reflect the actual and objective context in which it is issued." Words of the Secretary of Foreign Affairs, Jorge Castañeda, in the 57th. session of the UN Human Rights Commission, Geneva, Switzerland, March 20, 2001. In http://www.sre.gob.mx/derechoshumanos/doctos_rel57cdh.doc accessed on May 21, 2002.

THE GROWTH OF PARTICULARLY SENSITIVE SEA AREAS. ARE WE HEADING TOWARDS A NEW “BOOKISH BATTLE” IN THE XXI CENTURY?

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C O N T E N T S

- I. Approach
- II. Freedom of Navigation
- III. Specially Sensitive Maritime Zones
- IV. The Case of PSSA of Western Europe
- V. Conclusions. Towards a review of the Guidelines on PSSA

I. APPROACH

As it will be analysed along this article, both Special Marine Zones as well as Particularly Sensitive Sea Areas (PSSA) are areas that due to their characteristics represent limitations to freedom of navigation, which tend to the protection of marine environment.

The two concepts referred —freedom of navigation and marine zones of both categories— have solid grounds in the formal sources of the law of the sea and maritime law, respectively.¹ However, the recent proliferation of PSSA requests before the International Maritime Organization (IMO) submitted by several countries and groups of countries shall not prevent us from stopping in the way, and reflect

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¹ See United Nations Convention on the Law of the Sea, 1982 (UNCLOS), articles 192-194 and 211 (6); International Convention for the Prevention of Pollution from Ships, 1973, amended by the Protocol of 1978 (MARPOL 73/78), attachments I, II and V, Resolution A.927 (22) of the IMO's Assembly.

on both the justification of some requests as well as on the possible need to review the applicable international instruments.²

Therefore, we have two legally protected rights—free international navigation and protection of the marine biodiversity—and an important challenge to achieve: the harmonization of both, in such a way that the designation of PSSA does not represent a step backwards to legitimate freedom of navigation; one of the prime conquests of the law of the sea, gained after centuries of wars, debates and international negotiations.³

In this context, the purpose of this study is to analyse the debate that to this date several States member of IMO hold regarding the legality of several PSSA recently designated or to be designated, and departing from there briefly, describe the revisionist trends on the subject that may exist in the short term.

To offer an orderly presentation of the discussion, its content has been divided into five epigraphs along which we attempt to refer to freedom of navigation in the law of the sea, the applicable international instruments in the designation of PSSA, the confrontation generated in the case of PSSA of Western Europe, as well as the international trends which call for an orderly review of the PSSA Guidelines. In addition to the foregoing, as conclusions, there is the course that in a future may take this matter so particularly sensitive.

II. FREEDOM OF NAVIGATION

1. Background

The principle of freedom on the seas, in which falls into the current normative concept known as freedom of navigation, is one of the pillars of the evolution of international law. Its importance is such, that without its effective application it would be impossible to think in maritime commerce on which an important part of the world economy is based.⁴

² See Document IMO, MEPC 51/WP.9 and MEPC 49/22.

³ For the introduction to the study of the law of the sea; see among others Cervera, Jose, *El derecho del mar*, Madrid, Editorial Naval, 1992, pp. 37 and the pages that follow; Gomez-Robledo, Alonso, *Derecho del mar*, Mexico, UNAM, Instituto de Legal Investigations, pp. 105 and the pages that follow; Szekely, Alberto, *Derecho del mar*, Mexico, UNAM, Instituto de Investigaciones Jurídicas, 1991, pp. 27 and the pages that follow; Scovazzi, Tullio, *Elementos de derecho internacional del mar*, Madrid, Tecnos, 1994, pp. 55 and the pages that follow; Sobarzo, Alejandro, *Regimen jurídico del alta mar*, Mexico, Porrúa, 1985, pp. 55 and the pages that follow; Castañeda, Jorge, *Obras completas. Derecho del mar*, Mexico, IMRED, 1995, pp. 101 and the pages that follow; Enriquez, David, *Historia del derecho marítimo mexicano*, Colima, Government of the State of Colima, 1997, pp. 2 and the pages that follow.

⁴ See the historical debate on the principle of the freedom of seas, perpetuated currently in UNCLOS, article 87, in Grocio, Hugo, *De la libertad de los mares*, trad. of Blanco García y García Arias, Madrid, Civitas, 1979, pp. 53 and ss.; Fulton, Thomas, *The Sovereignty of the Sea*, London, 1911, pp. 17 and ss.; García, Luis, *Historia del principio de la libertad de los mares*, Santiago de Compostela, 1948, pp. 9 and the pages that follow; Enriquez, David, “La libertad de navegación”, *Revista Jurídica Jalisciense*, Guadalajara, January-April, 1997.

While the Western Old Times were characterized by the exclusive imposition of the exercise of navigation among the conqueror peoples, as in were the Phoenicians in their time, the Carthaginian or the Hellenes regarding the Mediterranean, the age of the Roman peace for the first time considered the criterion of jurists, among them Ulpiano and Celso, who gave a connotation of common use to the maritime spaces.⁵

Of course, the interpretation given by the Roman governors to the criteria of their legal consultants may not have another dimension than guaranteeing the free exercise of navigation within the Roman Empire itself, with which, the enforceability of the principle of freedom of the seas among different jurisdictions, is at that time, naturally questionable.

With the fall of the Roman Empire and the consolidation of the prosper City-States during the Middle Age grew the confrontation between maritime powers, such as Venice or Genoa, which aimed at claiming exclusive rights on strategic maritime zones for their commercial interests. Similar conflicts arose not only in the Mediterranean Sea but also in the Baltic sea and the North Sea; where Sweden, Denmark and England attempted to take over the international routes.

It was without a doubt the beginning of colonization, which led to the discussion to the highest point on the predominance in the seas. Therein, the crowns' pretensions increased in proportions unknown until that moment: Spain claimed exclusive rights on the Pacific Ocean and the Gulf of Mexico, and Portugal, on the Indic Ocean and on the South Atlantic.⁶

2. The Bookish Battle

Although the cause for the most famous study for the defense of the freedom of the seas was not necessarily academic or altruistic, there is no doubt that it took the debate from a simple political and military discussion among the maritime powers to a true legal debate among thinkers, which in the end would influence the consolidation of the international law of the sea. We refer to the works of Hugo Grocio, known as *Mare Liberum* dated 1605.⁷

⁵ See D. 8.4.13 and D. 43.8.3.

⁶ The disputes for the control of the seas are, without a doubt, the cradle of international law. Although the hierarchy that this dispute took on the evolution of international law, which is not the purpose of this analysis, we can recommend among others: Basave, Agustin, *Filosofía del derecho internacional*, Mexico, UNAM, IJ, 1992, pp. 238 and the pages that follow; Sorensen, Max, *Manual de derecho internacional publico*, México, FCE, 1968, pp. 344 and the pages that follow; Sepulveda, Cesar, *Derecho internacional*, Mexico, Porrúa, 1991, pp. 463 and the pages that follow.

⁷ This work, which full title is originally *Mare liberum sive de jure quod Batavis competit ad Indicana comercia dissertatio* is really one of the chapters of *De iure praede commentarius*, in which Grocio argued in favor of the Dutch East Indian Company Orientals, which in turn tried to convince its Mennonite shareholders to accept the financial benefits of the Portuguese old galleon "Catalina", captured in the Malaca Peninsula coastline at the Asian Southeast by Heemskerck in 1602. The work was written between 1604 and 1605, when its author was only twenty years old. See Luis Garcia preface in Grocio, Hugo, *op. cit.*, note 4, pp. 10 and the pages that follows. Also see Brown, James, "La



THE GROWTH OF PARTICULARLY SENSITIVE SEA AREAS

Essentially, *Mare Liberum* was an interesting argument written against Portugal, published in opposition to Spain, and used to the detriment of England, by Dutch maritime traders, who far from defending the philosophical postulate of the freedom of the seas —whose authentic foundation was really carved by the intellectual Spaniards Francisco de Vitoria and Fernando Vazquez de Menchaca, half a century before— pretended to have access to better traffic and plentiful fishing zones in the neighbouring seas.

Therefore, by means of the systematization of Vitoria and Vazquez de Menchaca's postulates, the argumentative building of young Grocio relied on three columns, well explained by Luis Garcia with the wording of the original text:⁸

Due to *ius communicationis*, the Spaniards may not ban the Dutch access to East India since: (i) the Lusitanian do not have sovereignty over India, nor may they present in their favor legitimate titles, which cannot be based on *ius inventionis*, the pontifical donation or *ius belli*; (ii) they do not have the ownership over the sea or over navigation, neither by means of discovery nor occupation, pontifical donation, acquisitive prescription or custom; and (iii) they are not entitled to prevent commerce, which is free by the law of nations, not by occupation, nor by pontifical donation, acquisitive prescription or custom, the Dutch shall keep commerce with East India, whether in peace, truce or war, against whoever opposes.

The famous work of Grocio gave rise to one of the more interesting debates generated in international law, the so called "great bookish battle", an intellectual controversy —with political and even bellicose dimensions— among legal experts of various nationalities, who defended in one sense or another freedom or the exclusivity of the seas.

Although within their contexts influential documents were written as the one of William Welwood or Fray Serafin de Freitas, it would be until 1618 that the English John Seldein wrote *De dominio maris regio*, published in 1635 under the controversial title of *Mare clausum*; in this work, opposite to *Mare liberum* of Grocio, he would brilliantly argue from a historical perspective in favour of the English exclusivist policy of the seas.⁹

As accurately explained by Alejandro Sobarzo, the seed planted by Grocio found fertile ground. Despite the swinging of the argumentation and the political pressure among maritime leading nations, the balance would clearly incline

gènese du Traité du Droit de la Guerre et de la Paix", *Revue de Droit International et de Législation Comparée*, Brussels, 1925, t. VI, pp. 489 and the pages that follow.

⁸ See Garcia, Luis, *op. cit.*, note 4, pp. 10 and the pages that follow. The author makes an excellent list of the authors, works and argumentative sense of the famous and controversial bookish battle which took place during a significant part of the XVII century.

⁹ *Idem*. See also Fulton, Thomas, *The Sovereignty of the Sea*, London, Pitman, 1911, pp. 346 and the pages that follow.

towards the principle of freedom of the seas opposite to the pretended exclusivity of diverse leading nations, specially England.

Consequently, another Dutchman, Cornelio Van Bynkershoek, would conclude in 1702 with a century of discussion by the publication of his study, *De dominio maris dissetatio*, in which he would outline the reality of a principle: right to land ends where the force of arms ends. With the foregoing, the division between territorial sea and overseas had one sole effective measure: the force of the battle cannon.¹⁰

3. The United Nations Convention on the Law of the Sea

Finally, already in the first quarter of the XIX century, the balance of maritime leading nations generated by the consolidation of great land armies made the principle of freedom of the seas unquestionable. However, it would be necessary that one and a half century passed so that mentioned principle was embodied into the most important and widely penalized instrument of the history of the law of the seas: The United Nations Convention on the Law of the Sea of Montego Bay, Jamaica, of 1982 (UNCLOS). In this instrument there is established for once and forever that no State may legitimately pretend to subject any part of overseas to its sovereignty.¹¹

In fact, there would be needed three conferences of the United Nations about the Law of the Sea to grant full formal validity to freedom of navigation. With a work initiated in 1949 by the United Nations International Law Commission and developed along more than three decades until the Jamaica Convention, freedom of navigation shall be understood as one of the six rights recognized by UNCLOS to their States member.

So, pursuant to article 87 of said international instrument, freedom of navigation, freedom of over flight, freedom of laying of submarine cables and pipelines, freedom of constructing artificial islands and other facilities permitted by international law, freedom of fishing and freedom of scientific investigation constitute the charter of rights recognized to all States, whether they possess a coast or not.

The freedom in the exercise of the mentioned rights overseas is subjected to the limits both of UNCLOS as well as the limits of other international law regulations; and there must always be considered the interests of other States in their legitimate exercise.

¹⁰ Along the negotiations to unify the aspirations over the exclusive rights overseas, at last, in UNCLOS of 1982, a consensus was reached which consists in that every State has the right to establish the amplitude of their territorial sea up to a limit not exceeding 12 marine miles from the base lines determined in compliance with the convention. UNCLOS, article 3.

¹¹ UNCLOS, article 89.



III. PARTICULARLY SENSITIVE SEA AREAS

1. UNCLOS and other International Regulations

In addition to the general duties imposed to each State party to the UNCLOS as correlated to its rights overseas and over the remainder of marine zones, every party State has the obligation of protecting and preserving the marine environment.

Within the measures to prevent, reduce and control the pollution of marine environment, we must stress that since it is a subject on which PSSA has an interest, the obligation that, among the measures taken pursuant to UNCLOS, are the ones necessary to protect and preserve rare or vulnerable ecosystems, as well as the habitat of species or marine life forms that are decimated, threatened or endangered.¹²

Before going deep in the environmental regulations of UNCLOS, it is convenient to briefly reflect on the net of special international maritime regulations, aiming at directly or indirectly protecting marine environment. As it can be seen from the different compulsory and not binding instruments of IMO, the purpose of them all —and particularly of SOLAS and MARPOL— is regulating the structural integrity of ships, their equipment, their crew and generally, its functioning. The regulations recorded in the mentioned conventions promote the safety in maritime transportation and consequently, they protect marine environments from pollution.

In this sense, the work of IMO for marine environment protection —direct or indirect— may be summarized in four categories of measures: (i) SOLAS Convention, designed for the safety of the shipping sector and its indirect effect in environmental protection; (ii) MARPOL Convention in which there is established a basic level for the protection of the environment both of operating discharges as well as accidental discharges; (iii) the organization measures for maritime traffic, approved to increase navigation safety and which in turn assist in the protection of marine environment; and (iv) the designation of special zones —SMZ— in which the discharge stipulations are stricter in compliance with the stipulations detailed in attachments I, II and V of MARPOL; and PSSA in the cases commented in this document.

In addition to the work of IMO by means of instruments such as MARPOL or SOLAS, there are other sources of international law —plus the UNCLOS itself— to PSSA. In fact, the United Nations Convention on Biological Diversity is one international instrument by means of which, among others, there is established an



¹² UNCLOS, article 194.

appropriate framework to designate zones as particularly protected in sites where there have been found high concentrations of vulnerable biological resources.¹³

In the context of international law sources, UNCLOS recognizes certain categories of marine zones that require greater levels of environmental protection: these are precisely PSSA. Once the importance of PSSA and the need to apply stricter environmental regulations to them than to other marine spaces have been stressed, UNCLOS establishes the standing criterion in a series of regulations and the procedure for the determination of PSSA and their respective environmental protection measures:¹⁴

- a) Pursuant to UNCLOS, when the international regulations and standards to prevent, reduce and control the marine environmental pollution caused by ships are inadequate to face the special circumstances, and the coastal States have reasonable motives to believe that a particular and clearly defined area of their respective exclusive economic zones requires the adoption of special compulsory measures to prevent ship pollution, due to recognized technical reasons related due to their oceanographic and ecological conditions, as well as to the use or to the protection of their resources and the particular nature of its traffic, the coastal States, after holding the appropriate consultations by means of the organization —understood as IMO— with any other interested State, may address a communication to said international organization, by submitting scientific and technical tests to support them.
- b) Within the twelve following months upon receiving said communication —UNCLOS continues— the organization shall determine whether the conditions in that area correspond to the stated requirements. If the organization so determines, the coastal States may issue for said area laws and regulations intended to prevent, reduce and control pollution caused by ships, applying the regulations and standards or international navigation practices that, by means of the organization, have become applicable to special areas. Those laws and regulations shall not entry into force for foreign ships until fifteen months after the communication has been submitted before the organization. The coastal States shall publish the limits of said particular and clearly defined area.
- c) Upon submitting their request, the coastal States shall state whether they have the intention to issue addition laws and regulations on the PSSA to be determined by means of the process. Although said lays and regulations may refer to discharges or navigation practices, they may not bind foreign ships to comply with the accepted design standards.

¹³ See in particular the article 8 of said convention, in which the designation of protected zones is regulated and compare its provisions with the guidelines mentioned in this document.

¹⁴ UNCLOS, article 211.

THE GROWTH OF PARTICULARLY SENSITIVE SEA AREAS

The new laws and regulations of the coastal State may be applied to foreign ships fifteen months after having submitted the request before the organization, with the condition that the organization grants its conformity within twelve months following the presentation.

d) The international regulations and standards to which we have referred before shall comprise, particularly those related to the speedy notification to the coastal States which coast or interrelated interest may result affected by incidents, including maritime accidents causing or may cause discharges.

1. IMO and International Guidelines

A. The Development of Guidelines

In addition to international before described obligations of UNCLOS, as correctly stated by Paul Nelson, PSSA have their technical origins in Resolution 9 of the International Conference on Ship-Vessel Safety and for the Prevention of Pollution dated 1978, in which there were included a series of measures on the design and operation of that type of ships, which were included in turn in the protocols to the international conventions to prevent ship pollution of the same year (MARPOL) and for the safety of human life in the sea (SOLAS).¹⁵

Resolution 9 recognized as PSSA to the marine zones, regarding which there was a special need for protection against marine pollution of ships and discharges, considering the renewable nature of the resources or otherwise the importance thereof for scientific purposes. From the reference of 1978 on PSSA, the Marine Environment Protection Committee (MEPC) of IMO dedicated to developing a series of objective criteria for identifying and determining PSSA. MEPC work continued for a term of several years, until 1991 when there was approved by IMO's Assembly of Resolution A.720(17) which contained the first Guidelines to identify and designate PSSA.

Despite of being ready to be used for the member countries in their PSSA, the Third PSSA Legal Expert International Session, held in the Netherlands in 1994, stated its concern, since from its approval in 1991 only one request—the Australian Great Coral Reef— had been submitted, with which there was decided to review the guidelines. Under these circumstances, in 1997 MEPC organized a group by post which would evaluate the need to review the guidelines. The work of the group resulted in the approval of the guidelines in force approved in compliance with Resolution A.927(22) of the IMO Assembly in November 2001.



¹⁵ Nelson, Paul, "Protecting areas that are vulnerable to damage by maritime activities: the reality of particularly sensitive sea areas", *Maritime Studies*, July-August, 2003, pp. 20 and the pages that follow.

The document, under the heading Guidelines for Designating Special zones due to MARPOL 73/78 and Guidelines to Determine and Designate Particularly Sensitive Sea Areas,¹⁶ is the instrument in force which all the States member should use as a basis for requesting PSSA, on which the competent IMO bodies should be based for their determination. Now then, in March 2003, MEPC approved a circular letter containing a pro-forma document which aims at serving as model for applicants of PSSA.¹⁷

B. Distinguishing Elements between SMZ and PSSA

To better understand the Guidelines content, it is convenient to first establish the difference between SMZ and PSSA. The SMZ are defined in MARPOL as any extension of sea in which, due to recognized technical reasons related to its oceanographic and ecological conditions, and the particular nature of maritime traffic, it is necessary to adopt special compulsory procedures to prevent sea pollution by hydrocarbons, liquid damaging substances or waste, accordingly.¹⁸

On the other hand, PSSA —which main foundation is in UNCLOS— are those zones that should be the object of special protection, in compliance with the measures adopted by IMO, in connection with its importance due to ecological, socio-economical or scientific recognized motives, and that their environment may suffer damages as a consequence of maritime activity.¹⁹

Due to the distinct characteristics and purposes between SMZ and PSSA, CEPC decided to derived Resolution A22/Res.927 of the assembly in two attachments: one for SMZ and another for PSSA. As it can be noticed, a SMZ does not have the stricter environmental connotation as PSSA. That is to say, a PSSA -but not a SMZ- is justified to the extent it is a rare or vulnerable ecosystem, as well as the habitat of species and other forms of marine life decimated, threatened or endangered.²⁰

Now then, pursuant to one of the criterion established by the Guidelines, in many cases there may be determined that a marine zone, within a special zone, is particularly sensitive, and vice versa. It should be said that the criteria to determine particularly sensitive sea areas and the criteria to designate special zones are not mutually excluding.

C. General Considerations in the Designations of PSSA

The Guidelines have three basic purposes. First, they aim at providing orientation to the IMO States member as to the formulation and presentation of requests for

¹⁶ Hereinafter, “the Guidelines”. Pursuant to Resolution A. 927(22) the resolutions A.720(17) and A.885(21) were revoked.

¹⁷ MEPC/Circ.398. Hereinafter “the Model Document”.

¹⁸ MARPOL 73/78, attachments I, II and V.

¹⁹ Guidelines, *op. cit.*, note 16, p. 7.

²⁰ UNCLOS, article 194.



THE GROWTH OF PARTICULARLY SENSITIVE SEA AREAS

designating PSSA. Second, they pretend to guarantee that in that process all the interests, both the coastal State's as the flag State's, are carefully considered, the groups interested in environment and the maritime transportation sector; considering the scientific, technical, economic and environmental pertinent information on the zone exposed to risk due to international maritime activities, as well as the protection measures to reduce said risks to the minimum. Finally, the Guidelines have the intention to foresee the technical elements necessary for IMO to evaluate the requests.

Now then, the determination of PSSA and the adoption of the corresponding protection measures demand to examine three elements: i) the environmental conditions specific to the zone that is to be determined; ii) the vulnerability of said zone to damages caused by the international maritime activities; and iii) the proficiency of IMO to dispose of the corresponding protection measures before the risks of maritime activities.²¹

D. International Maritime Activities and the Marine Environment

To know the way in which maritime activities affect a determined zone, it is necessary to first know the risk categories said zone may suffer. In general, ordinary maritime activities are likely to produce three types of environmental danger: i) discharges resulting from operations; ii) accidental or intentional pollution; and iii) physical damage to marine habitat or organisms.

As explained in the Guidelines, during normal operation and in accidents, ships may discharge a wide variety of pollutant substances, whether directly in the marine environment or indirectly through the atmosphere. Those pollutants may be hydrocarbons and oily mixtures, liquid damaging substances, polluted waters, waste, solid harming substances, antifouling painting, foreign organisms and even noise.

Many of these elements may negatively affect marine environment and the live resources of the sea. Likewise, pollutants may harm environment in case of maritime accident. Moreover, the ships may cause harm to marine organisms and to their habitats due to physical impact. Beached may asphyxiate habitats and there have even been cases of collisions between ships and great cetaceans such as whales.

E. Ecological, Socio-Economic, and Scientific Criteria for Determining a PSSA

So that IMO classifies a zone as PSSA, said zone in question shall, on the one hand, meet at least with one of the ecological, socio-economic or scientific criteria mentioned in this section; and on the other hand, it shall be vulnerable to international maritime activities from the factors indicated in the following section. Thus, first it



²¹ Guidelines, *op. cit.*, note 16, p. 8.

is explained each one of the criterion to be considered, to later refer to the vulnerability factors derived from maritime activities.

a. Ecological Criteria

Singularity or rareness. Ecosystems may be unique or rare. One zone or environment are unique when there is only one in its kind. One example of such zones are the habitats of rare, threatened or endangered species that occur in one only zone. One zone or ecosystem are rare when they are given only in some places or when all the ones of their kind are in a proven regression. Ecosystems may go beyond national frontiers and have great regional or international importance. Farms or determined feeding zones may also be unique or rare.

Critical habitats. A marine zone may be a critical habitat for a fish population or rare or endangered marine species, or otherwise, it may have a decisive importance to maintain great marine ecosystems.

Dependency. The ecological phenomena such as the zones that depend on great measure on the biotic structure of the systems.²² Frequently, those ecosystems with a biotic structure have a great diversity which depends on the organisms that constitute it. The dependency also comprises zones that are fish, reptile, bird and mammal migration routes.

Representative nature. The zones are extremely representative of ecological phenomena, of the types of community or habitat or of other natural characteristics. The representativeness corresponds to the degree in which the zone represents a type of habitat, an ecological phenomenon, a biologic community, a physio-geographical or another natural characteristic.

Diversity. The zones have a wide variety of species or genetic diversity, or include multiple ecosystems, habitats and communities. However, this criterion may not be applicable to certain simpler ecosystems, for example to some pioneer communities or in ecological balance, or zones subjected to destructive forces, such as coasts exposed to the violent action of the waves.

Productivity. The zone has a great natural biological productivity. That production is the result of biological and physic processes which end in a net increase in the biomass of great natural productivity zones, such as oceanic fronts, ascending current zones and some oceanic gyres.

Spawning or reproduction zones. The zone may be a spawning or reproduction site of marine species that pass the rest of their vital cycle in other zones, or a bird or marine mammals migratory routes.

Natural nature. The zone has a highly natural nature for having escaped to the perturbations and degradation caused by the humankind.

²² For example, coral reefs, brown algae, mangrove and sea-grass beds, and marine algae.

THE GROWTH OF PARTICULARLY SENSITIVE SEA AREAS

Integrity. The zone is a biological functional unit, that is to say, a viable autonomous ecological entity. The more ecologically self-sufficient the zone is, the more likely its value may be effectively protected.

Vulnerability. The zone is very susceptible to degradation caused by natural phenomena or human activity. Biotic communities of coastal habitats may present low tolerance to changes in environmental conditions, or exist close its tolerance threshold.²³ Likewise, they may be exposed to natural perturbations, such as storms or prolonged emersion, determining the limits of its development. Other unfavourable conditions²⁴ may determine the total or partial recovery of the zone from the effects of natural perturbations, or its destruction.

Moreover, some oceanographic and meteorological factors may make a zone vulnerable or increase its vulnerability; for example, causing the concentration or retention of harming substances in water or sediments, or causing that the harming substances be exposed. Said factors include particular types of water circulation, such as convergence zones, oceanic fronts and gyres, or prolonged presence time resulting from low dispersion rate, a stratification by permanent or seasonal density which may lead to an impoverishment of oxygen of a layer of bottom, as well as unfavourable conditions of ice or wind. A zone which environment is already subjected to tensions produced by human activity or natural phenomena²⁵ may need special protection against additional tensions. including those tensions derived from international maritime activity.

Bio-geographical importance. The zone has bio-geographical characteristics that are not common or representative of a bio-geographical type or types, or that has unique, or not common, geological characteristics.

b. Socio-Economic and Cultural Criteria

Economic benefits. The zone has special importance for seizing live marine resources.

Recreation. The zone offers an important particular interest for recreation activities and tourism.

Human dependency. The zone is particularly important for sustenance modes and/or traditional cultural needs of the local population.

c. Scientific and Pedagogical Criteria

Investigation. The zone has great scientific interest.



²³ Determined by the temperature, salinity, turbidity, or depth of waters.

²⁴ Such as domestic or industrial pollution, excessive reduction of salinity and increase in turbidity provoked due to a bad management of the basin.

²⁵ For example, infiltration of hydrocarbons.

Referred and surveillance studies. The zone compiles the appropriate conditions referred as to biota or environmental characteristics.

Education. The zone offers the opportunity to demonstrate determined natural phenomena.

F. Vulnerability Factors Derived from Maritime Activities

a. Maritime Traffic Factors

Operational factors. Types of maritime activities in the zone proposed that may increase risk for navigation safety.²⁶

Types of ships. The types of ships that pass by the zone or by an adjacent zone to the one proposed.²⁷

Characteristics of traffic. Traffic volume or concentration, the interaction among ships, the distance to the coast or other dangers for navigation that increase the risk of boarding or beaching.

Damaging substances transported. Type and amount of substances on board, whether freight, combustible or supplies, that would be damaging if discharged in the sea.

b. Natural Factors of the Zone

Hydro-graphical. Depth of the water, marine bed and coastal topography, absence of proximate and safe anchorage, and other factors requiring the adoption of greater precautionary measures in navigation.

Meteorological. Preponderant time, force and direction of the wind, atmospheric visibility and other factors increasing the boarding and beaching risk, as well as the risk for the zone to suffer damage should a leak occur.

Oceanographic. Tide currents, oceanic currents, ice and other factors increasing the risk of boarding and beaching, as well as the risk for the zone to suffer damage should a leak occur.

G. Relevant Protection Measures

As already commented, the determination of a PSSA by itself has no sense if it is not accompanied by a series of protection measure that consider ecological, socio-economic and scientific criteria, in addition to PSSA own vulnerability factors in question. Of course, protection measures are limited to the scope of IMO authority and are described in the following catalogue:

²⁶ For example, small fishing ships, small recreational ships, oil and gas platforms, etcetera.

²⁷ For example, great speed ships, large dimension ship-vessels or bulk-carrier ships of low water depth under the keel.

THE GROWTH OF PARTICULARLY SENSITIVE SEA AREAS

- a) Designating the site in question as special zone due to attachments I, II or V of MARPOL Convention, or a control zone of Sox emissions due to attachment VI of the same Convention; or otherwise applying special restrictions to the discharges of ships operating in said zone.²⁸
- b) Elaborating notification systems for ships and organization systems of maritime traffic, under the SOLAS Convention, and in compliance with the general provisions on organization of maritime traffic and the Guidelines and criteria related to notification systems for ships, in PSSA and their surrounding areas.²⁹
- c) Elaborating and adopting other measures addressed to protect determined marine zones against environmental damages caused by ships, such as compulsory pilotage systems or maritime traffic regulating systems. In fact, this category of protection measures is sufficiently broad to pursuant to the specific case, the requesting State member designs the specific measure necessary for protecting the zone.

In addition to the protection measures authorized by IMO from the request, so as to strengthen the hierarchy of PSSA as such, it is convenient to examine the possibility to include it in the List of World Heritage; to pronounce it Biosphere Reserve; or otherwise to include it in the list of international, regional or national importance zone. Likewise, it is necessary that the requesting party stipulates whether the zone is the international, regional or national preservation measures or agreements.³⁰

If PSSA circumstances in questions deserve so, the proposal may also include a separation zone; this is to say, an adjacent area to a specific site or central zone that is to be protected from maritime traffic. For the foregoing, it is necessary to justify the need of the separation zone and the extent in which it provides effective protection of the central zone.

H. Procedure for Designation of PSSA and its Protection Measures

When requests for designation of PSSA that do not contain proposals for the adoption of protection measures are presented, the requesting State member shall inform the type of measures that are contemplating. It shall be considered that in a

²⁸ It must be highlighted that the procedures and criteria for the designation of control zones of Sox emissions are included in attachment VI of MARPOL.

²⁹ In this protection measure there are in fact three alternatives to be regulated: (i) avoid the zone completely; (ii) establish special organization measures for maritime traffic; or otherwise, (iii) establish measures for notifying ships.

³⁰ In the case of Mexico it shall be necessary to indicate whether the marine zone proposed to IMO is in the National System of Protected Areas, and as the case may be, which is the technical and legal treatment thereof. Although IMO is not bound to reflect the protection measures authorized by the regulations of the requesting country—in this case Mexico—naturally what has been already regulated and practiced by the requesting government shall be considered.

term of no more than two years, from the approval at the beginning of a PSSA by MEPC shall present at least the relevant protection measure proposal.³¹

The request shall contain a summary of the objectives of the proposal, of the situation of the zone, the need to protect it and the relevant protection measures requested. The summary shall explain the arguments for which the relevant protection measures are the preference method to protect the zone which PSSA determination is requested.

Essentially, the designation requests shall contemplate all the considerations and criteria stipulated in the Guidelines and include information demonstrating each of them; and if possible, the treatment and measures that the State member is already applying to protect the marine zone aimed at raising its category as PSSA. Likewise, it is necessary to point out the national regulations on penalization due to infraction that the State member shall establish in its legislation regarding ships not complying with the protection measures to be authorized by IMO.

The request shall be divided in two parts: the first part shall be dedicated to the description, importance and vulnerability of the zone; the second part shall describe in detail the relevant protection measures and stress the competency of IMO to adopt them in compliance with the applicable international conventions. In the evaluation case by case of the requests, IMO is bound to consider several elements of the Guidelines, and particularly if the three following criteria are exhausted:

- a) The group of available protection measures, and it shall be determined whether the relevant protection measures being proposed are appropriate to effectively face the assessed risk that determined international maritime activities produce damage in the proposed zone.
- b) Whether such measures would increase the possibility that the aforementioned international maritime activities have important negative effects in the environment outside the PSSA proposed.
- c) Whether the length of the zone is limited to the necessary extension to meet the identified needs.

Once the request has been presented to MEPC, in compliance with the Guidelines, IMO, pursuant to the evaluation criteria stated above, shall exhaust the following analysis and resolution procedure in six specific stages briefly described herein below:

³¹ There are cases in which IMO, before the PSSA request by the State member, has adopted certain protection measures for all the zone or otherwise for a part of the zone, or even for a group of zones. In those cases, it is necessary that the requesting party indicates how the already adopted measures contribute to the protection of the PSSA in question.

THE GROWTH OF PARTICULARLY SENSITIVE SEA AREAS

- a) MEPC is the first responsible for studying the PSSA determination requests, therefore all the requests shall be presented —as already mentioned— first before said committee.
- b) MEPC shall initially examine the request to establish whether said requests adjust to the provisions stipulated in the Guidelines. Should it be in the affirmative, the committee may approve in principle the determination of the zone proposed as PSSA, and shall send the request, along with its relative protection measures, to the subcommittee or competent committee in charge of the corresponding concrete protection measures proposed for the zone. Said committee in turn may ask for counselling to MEPC regarding matters related to the request. In any case, MEPC is prohibited from making the final decision as to its determination, until the subcommittee or pertinent committee has studied the relevant protection measures;³²
- c) As to the measures that demand the approval of the Maritime Safety Committee (MSC), the sub-committee shall present MSC the recommendation that said measures be approved; or otherwise, should they be rejected, the sub-committee shall inform both MEPC as well as MSC, explaining the reasons for said decision. On the other hand, MSC shall study the recommendations made and, if it decides that the measures are adopted, it shall notify the foregoing to MEPC.
- d) If a request in which the relevant protection measures are not proposed, MEPC may approve in principle the determination of the zone as PSSA, subject to a term of no more than two years from the approval, at least a relevant protection measure proposal is presented and immediately thereafter it is approved at least one of said protection measures.³³
- e) If the request is rejected, MEPC shall inform the proposing State member thereof and shall make a presentation of the facts giving grounds to its decision.
- f) Once the competent committee or sub-committee has approved the relevant protection measures, MEPC may designate the zone -definitively- as PSSA.

In any case, pursuant to the Guidelines, IMO shall work as the forum for the revision and a new evaluation of all the protection measures taken, accordingly, bearing in mind the comments, reports and pertinent observations on the measures.



³² It is a matter of interest that the Guidelines stipulate that the competent committee may be MEPC, therefore, MEPC would remit the case to itself. Nonetheless, nothing prevents from, if doing so, MEPC may form a working group to assess the determination request and the related protection measures.

³³ The foregoing is so, except for the case in which there are no proposed protection measures, because IMO had previously adopted them.

The governments whose ships have operations in PSSA are entitled to inform IMO the questions they have regarding the protection measures, so that the pertinent modifications to the measures may be made.³⁴

Finally, upon evaluating each case, IMO shall consider the technical and financial resources available for the developing States member, or those whose economies are going through a system transition period. This regulation is an acknowledgment to the rising of prices that a change of route may represent for ships that navigate by or nearby said specific PSSA.

I. Implantation of PSSA and Relevant Protection Measures

Since the request for a PSSA determination and their respective protection measures are the greatest priority in environmental policy for any country, after IMO's authorization, once having exhausted the procedure, it is bound to guarantee that the effective implantation date is as soon as possible, in compliance with the applicable regulations.

Once the designation of a PSSA is approved, the relevant protection measures must be indicated in all the nautical charts, using the symbols and methods of the International Hydrographic Organization (IHO). Although the proposing States member may also write in the charts the PSSA designated with the pertinent national symbols, if IHO adopts an international symbol, the State member is bound to signal the PSSA in question, by using said symbol and the methods recommended by IHO.

The States member are bound to adopt all the measures necessary to guarantee that the ships bearing their flag comply with the relevant protection measures adopted to protect the PSSA designated. In this context, the States member receiving information on the alleged infraction of a protection measure by a ship with their flag, shall facilitate the government notifying the infraction the detailed information of all the measures adopted in this regard.

J. The Guidelines and the Law of the Sea

The Guidelines constantly state the respect that must be kept in the designation of a PSSA and its respective protection measures with the international law of the seas, encompassed in UNCLOS. In fact, as noticed at the beginning of this work, the recognition of freedom of navigation has been the subject of a long road, to become what it is today, therefore, all the international instruments that somehow limit such freedom, attempt to highlight the respect to the law of the sea.

PSSA and, above all, the protection measures mean the authentic limitations to freedom of navigation for a higher legal right protected by the law: the protec-

³⁴ Of course, the requesting party of the PSSA determination are also legitimated to inform IMO any additional questions or measure proposals or amendments of said relevant protection measures.



tion of the marine environment. This protection, as it has been also noted, keeps perfect harmony with UNCLOS since navigational freedom may not be understood as an unrestricted right of the States or their nationals, but to the extent that they serve to preserve their higher value for the international community.

Therefore, a PSSA determination and its respective protection measures that do not comply with the criteria established in the Guidelines, or otherwise, that have formally complied with them and attempt to go beyond the Guidelines, would be an authentic abuse of law. The delicate balance reached between the legitimate right of the States to request the PSSA determination and freedom of navigation of the ships of remainder States makes that potential abuses in the requests or in the procedures question the effective enforceability of the law of the sea.³⁵

Thus, IMO and the countries that conform it shall always be oversee that the PSSA requests be valid and reasonable, so that the alluded harmony between the regulation for protecting marine environment and freedom of navigation co-exist without abuses, of the countries or regions that have the economic and technical means necessary to pass as authentic PSSA marine zones that, although relevant, do not gather sufficient characteristics to be validly recognized as such by the international communities. Likewise, it is necessary to watch over so that the lack of economic or technical resources of developing or transitioning countries is not a limiting factor so that marine zones that really deserve being recognized as PSSA have said recognition.

Until this moment we have reviewed the evolution of the law of the sea and the regulation on PSSA and its respective protection measures. It has been noticed the need to keep a balance between the protection of the environment and freedom of navigation. Now, we need to analyse, under the light of current practical cases —particularly regarding Western Europe PSSA— whether there are sufficient reasons or not to fear that the enforceability of the very old principle of freedom of the seas is in franc decay due to the authorization of PSSA of doubtful validity.

IV. THE CASE OF WESTERN EUROPE PSSA

1. The Proposal: General Aspects

In the scope of the 49th assembly of MEPC dated April 2003, several countries members of the European Union —Belgium, Spain, France, Ireland, Portugal and the United Kingdom— presented a proposal to determine a PSSA in Western Eu-



³⁵ See UNCLOS, articles 87 and 89.

rope that would go from the Shetland Isles to the North to San Vicente Cape, to the South, as well as the English Channel and its access routes.³⁶

Among the general justification stressed by the requesting States there are dramatic maritime accidents that have occurred during the last years in European waters,³⁷ and how such accidents have demonstrated the deficiencies in the international regulations, both as to maritime safety as well as to the protection of marine and coastal environment against accidental pollution.

The PSSA proposal of Western Europe shall be understood as a package of orchestrated strategic measures by the European Commission, after the accident of the Prestige in 2003. Said measures mainly comprise: a) the accelerated retreat of single hull tanker ships of European waters; b) the creation of an additional indemnity fund for hydrocarbon leak victims, in the scope of the International Oil Pollution Compensation Funds —IOPCF—; and c) the determination of a Western Europe PSSA with strict protection measures.

Upon justifying the request according to the importance and vulnerability of the marine zone in question, the requesting States remarked that a so diverse region implies a great importance due to the high number of marine mammals and marine birds, migration and hibernation of birds, the fish species (including rare and threatened fish species), the variety of coastal habitats providing reproduction spaces for fish, crustaceans and molluscs, food for birds; as well as the diversity of habitats for plants.

In the opinion of the requesting States, the zone complies with all the ecological criteria to obtain the name of PSSA. Furthermore, there was indicated how the parts of the zone have great economic importance or are meaningful from the touristic or leisure perspective. Likewise, there was explained how there are places within the zone that have a special significance in scientific or educational terms. However, the international maritime transportation activity implies a serious risk for the zone. Factors to consider are the type of loads transported, the conditions of the ships and traffic intensity, combined with the natural, hydrographic, oceanographic and meteorological conditions. The protection measures originally requested —to become effective as of July 2004— comprised the following elements:

- a) Prohibiting the transportation of heavy hydrocarbons through PSSA in ships weighing more than 600 tons death weight, unless they are double

³⁶ Western Europe PSSA include determined parts of the special zone known as “Waters of Northwest Europe”, as defined in Regulation 10 (1) (h) of the attachment of MARPOL Convention; determined parts of the pollution control zone of the United Kingdom; determined parts of the response zone to pollution of Ireland; and determined parts of economic zones exclusive to Belgium, France, Spain and Portugal. The presentation of the document before IMO caused a great publicity in the maritime field. See *Tradewinds*, July 25, 2003 and Lloyd’s List, July 16, 2003, among others.

³⁷ Among these: *Aegean Sea*, *Braer*, *Sea Empress*, *Erika*, *Ievoli Sun* and *Prestige*; as well as other accidents that were about to happen for other ships such as *Mimosa* and *Princess Eva*.



hull tanker ships, which will be obligated to notify themselves at least 48 hours in advance. The foregoing, in the understanding that heavy hydrocarbons are defined as follows:

- b) heavy oils are those which have a density higher than 900 kg/m³ at 15° C (which means one API degree lower than 25.7); ii) heavy fuels are the ones that have a density higher than 900 kg/m³ at 15° C or a kinematic viscosity higher than 180 mm²/s at 50° C; and iii) asphalt, tar and emulsions. For all tanker ships between 600 and 5000 tons death weight, the provision was requested to be applied as of 2008.
- c) Aligned with the Guidelines, the requesting States reserve their right to propose other measures related to the foregoing, during the PSSA determination proceeding in question.³⁸

Before underlining the interesting debate that at its time generated the proposal for Western Europe PSSA, it is convenient to consider the tremendous support from the World Wildlife Fund (WWF) which stated in addition to the adjacent marine zones, such as the Ireland Sea, the Eastern coast of Scotland and England to East Anglia also comply with the criteria to be PSSA, and therefore, they should be included in the proposal. Moreover, WWF pointed out that the only prohibition measure of single hulls was insufficient, and stated its belief that the protection measure should be stricter to what had been requested by the European countries.

2. The Debate on Validity

The interesting debate on validity of PSSA of Western Europe held during the 49th MEPC assembly on April 2003 is susceptible to be analysed in three stages: a) initial positioning; b) the negotiations of the unofficial group; and c) MEPC decision. Essentially, the discussion was polarized between the proposing states on the one hand, and three segments of countries that considered that have suffered a detriment due to distinct reasons for each one.

The first segment of critics to the PSSA request was made out of the States representing the worldwide navigation industry; this is, the principal records open: Panama and Liberia. The second group, headed by Norway, although it did not represent its Nordic neighbours, it did state the environmental concern that the new PSSA would bring forth for their coast. Lastly, the third group —also without express representation— led the commercial regional cause which consisted in the excessive cost for tanker ships to be able to navigate from and towards their ports, should the PSSA be approved.³⁹

³⁸ Guidelines, attachment II, 8.4.

³⁹ The principal reference document to further the debate is MEPC 49/22.

Therefore, considering this first vision as a whole, both the stages of the debate as well as the speakers, hereafter are stated the more relevant topics in the discussion which resulted, to begin with, in the approval of Western Europe PSSA.

- a) Concerns regarding the great dimensions of the zone proposed, and the possibility of creating a precedent to determine other zones of the same dimensions as PSSA.⁴⁰
- b) Uneasiness that the proposal would create a precedent compromising the innocent passage and freedom of navigation, as well as the possible violation of international law upon banning passage of single hull ships through international straits.
- c) The potential negative consequences that the proposed protection measures would have in navigation safety, since single hull tanker ships would be obligated to navigate by waters farther away from the coast and dangerous.⁴¹
- d) Doubt regarding the legal grounds of the proposed protection measures.

In addition to the four main concerns questioning the validity and convenience of the requested PSSA, there were also stated other concerns, such as the lack of clarity on the form in which said protection measures would be implemented; the repercussions that the proposed protection measures may have over the arrival of ships into refuge ports; and lastly, the definition of the term double hull.

From all these observations and criticisms to the proposal, MEPC decided to form an unofficial technical group under the order of investigation whether the proposal complied or not with the criteria dictated by the Guidelines. The work group did not come to a generalized consensus to support the proposal, however, it made change in the position of the requesting States, which consisted of said States withdrawing the portion of the proposal dealing with the prohibition of single hull tankerships.⁴²

Anyway, one of the topics of the agreement was the need to recommend reviewing the Guidelines so as to guarantee the appropriate designation of PSSA in the future.

⁴⁰ In this regard, the answer of the requesting States was to appoint that there are already precedents as the one of the Great Coral Reef.

⁴¹ Norway pointed out that the relevant protection measures that single hull oil tankers transporting heavy hydrocarbons from the Baltic region will navigate closer to Norway's coasts.

⁴² However, for the industry and the great records open such as Panama and Liberia it was a reason to suspect that the withdrawal of the portion in the propose, since without it, the designation of the region as a PSSA should be questioned. These delegations have stated their concern for possible protection measures to be adopted in a future. Therefore, although the withdrawal of said portion of the proposal generated a greater acceptance, skepticism of its critics remains. See LEG 87/16/1.

THE GROWTH OF PARTICULARLY SENSITIVE SEA AREAS

In this manner was like, with a majority of the support, MEPC approved in principle the designation of a PSSA in Western Europe waters, with the exception that the zone would be reduced, so that its East limit at the level of Shetland islands would be located at 0° longitude.⁴³ Nonetheless, before the persistence of the Russian Federation that the Legal Committee analysed the proposal and rendered a report in advance to MEPC assembly of October 2004, in which it would be finally approved the designation of the Western Europe PSSA, there was agreed that the interested delegations would send their legal observations to said committee so that MEPC would be in the sufficient conditions to make a final decision.

When the designation of the Western Europe PSSA was approved in principle in MEPC assembly dated April 2003, and in the understanding that the final designation would not take place until October 2004, the ship industry, the principal countries or free registry and some other affected nations, such as the Russian Federation, decided to hold a battle —until then lost for them— in a different front: before the Legal Committee.⁴⁴ In it, they posed once more their legal considerations. Essentially, the arguments posed were the following:

- a) Although, upon developing regulations regarding the zones in need for special environmental protection, UNCLOS had considered regions such as the Great Coral Reef, there was not being considered zones so broad and diverse as the ones requested by Western Europe, since said zone does not have one single and clearly defined ecosystem. Therefore, the designation of such an extensive and diverse zone would go beyond the PSSA concept itself, eroding the importance of current PSSA and questioning every reason of being a mechanism so important as pollution prevention.
- b) UNCLOS authorizes the coastal States to adopt exceptional measures by means of which they limit the navigation in zones that demand special protection. However, these exceptional measures have to be well founded and have to be carefully examined since they represent a deviation of the general rules of the convention. So, in the opinion of the delegations referred hereto, if such a extensive and diverse zone of the ocean is designated as PSSA, and protection measures consisting in limitations to navigation were to be applied, there is the risk that the exception becomes a rule and erode the fundamental principles of UNCLOS.
- c) It is questioned the objective and effects of the protection measure proposed which consist in the requirement of notifying 48 hours in advance.



⁴³ In compliance with the Guidelines, there was agreed also to send to the NAV Sub-committee the measures to be analysed that would be compulsory notified in 48 hours, so as to have in October 2004 sufficient elements to finally approve the PSSA requested and their respective protection measures.

⁴⁴ Legal arguments were presented by Liberia, Panama, the Russian Federation, BIMCO, ICS, INTERCARGO, INTERTANKO and IPTA before the assembly of the Legal Committee dated April 2004. It is document LEG 87/16/1.

The proposed measure may result in the detention of ships, with which they would be prevented from exercising freedom of navigation and the right to innocent passage.

- d) It is deemed that instead of the designation of Western Europe PSSA, the appropriate strategy would be the adoption of stricter measures on traffic organization; with said measure, concerns on pollution of the region would be addressed effectively. Such measures should focus on areas where, pursuant to the precedents, there is a real risk, and where risk evaluation, which had concluded among other things with a study of traffic intensity, indicates that it is necessary to adopt the measures. Likewise, it should also be determined the convenience of designating smaller areas comprising unique ecosystems deemed exposed to risks as PSSA, along with the adoption of protection measures as the designation of “zones to avoid”.
- e) In conclusion, the group of countries and organizations indicated above requested an opinion from the Legal Committee on: a) whether the designation of a Western Europe PSSA, as the one proposed, is in compliance with UNCLOS ; and b) whether the protection measure consists of a previous 48 hour notification, as well as any other protection measure that may be provided regarding said PSSA is in compliance with UNCLOS provisions, especially with the provisions regarding freedom of navigation, transit through international straits and innocent passage.

To study and issue an opinion, the Legal Committee considered both the request for legal analysis on the validity of PSSA in question as well as the observations in this regard sent by the Division of Ocean Affairs and Law of the Sea of the United Nations (DOALOS) regarding the designation of PSSA and UNCLOS; particularly on article 211 6). It should be considered that although DOALOS observations are not binding, it is true that said body has the relevant authority for the Legal Committee, and generally for IMO and its States member.

In fact, the Legal Committee limit itself to describe several positions regarding the legal positioning and to stress DOALOS observations on the validity of the Western Europe PSSA determination. After an analysis on the coherence between the designation of PSSA and UNCLOS, from DOALOS opinion the following reasoning and conclusions may be pointed out:

- a) Although the Guidelines for PSSA designation are based on the provisions of article 211 6) of UNCLOS , said guidelines are detailed, and therein a more flexible approach has been adopted which is coherent with a more sophisticated scientific and general comprehension of the dangers posed by the ships for the marine environment, as well as an array of protection measures available in the broadest framework of IMO’s competence than the one existing when negotiations were hold with UNCLOS in the seven-

THE GROWTH OF PARTICULARLY SENSITIVE SEA AREAS

- ties. The legality of the Guidelines for designating a PSSA has not been called into question, since it is in the framework of IMO's competence on the regulation of international maritime transportation activities and its possible consequences for marine environment. Additionally, the Guidelines adjust to the provisions stipulated in article 237 of the convention, since they are an agreement subsequently adopted by IMO's Assembly by means of which the established general principles in the convention are developed, particularly the ones contained in part XII.
- b) The proposal for the designation came along with sufficient detailed scientific information on the oceanographic and ecological conditions of the zone. In addition, data proving that maritime traffic in the zone is extremely dense were included, that many ships transport heavy hydrocarbons, and that numerous accidents with serious environmental consequences have occurred, including the ones provoked by the ships Aegean Sea, Erika and Prestige.
 - c) As to the surface of the zone, article 211 6) only stipulates that this should be "a particular and clearly defined area of their respective exclusive economic zones". Although from the text it can be inferred, in principle, that the area should not comprise all the exclusive economic zones, it does not establish a maximum limit as to its extension.
 - d) Although it is true that Western Europe PSSA comprises several ecosystems, in article 211 6) there is no provision specifying that the zone in question should only comprise one ecosystem. So, several ecosystems may be included, provided that all of them are vulnerable to pollution provoked by maritime traffic.
 - e) Regarding the proposed protection measures, it is clarified that article 211 does not ban the adoption of demands as to notification. So, IMO is the one determining the type of protection measures applicable. On the other hand, there is no provision in SOLAS Convention regarding a notification with an anticipatory term of 48 hours. Even though it has been stated the concern that the requirement of 48 hours is applied as a basis to ban the entrance to Western Europe PSSA, in contravention of the principle of freedom of navigation, if the NAV Sub-committee approves such measure, it would be also in compliance with UNCLOS, since this body remits to IMO as to the navigation rules, regulations and standards.
 - f) In conclusion, due to the reason explained, DOALOS deemed that the request presented by six countries members of IMO for the designation of PSSA of a Western Europe marine zone, it does not contravene UNCLOS provisions.⁴⁵



⁴⁵ It its conclusions, DOALOS considered the limitation in the original proposal of PSSA derived from MEPC work group of April 2003, as well as the mild reduction thereof requested by Norway.

V. CONCLUSIONS. TOWARDS A REVIEW OF PSSA GUIDELINES

Even if it is true that we are far from a debate as the one of the XVII century between the positions about *mare liberum* of Grocio and *mare clausum* of Seldein, it is also true that the Western Europe PSSA has generated an unprecedented concern in the navigation industry and in the regulating countries of convenience registration before the proposal of six European countries. So, freedom of navigation, transit through international straits and innocent passage are self-limiting in the light of the effective international protection of marine environment to prevent terrible environment damage, as the damage caused due to tanker ship accidents such as the Aegean Sea, Erika or Prestige in the coast of Europe.

Although at the beginning of this new attempt of “bookish battle” a high legal opinion has been held regarding the Legal Committee of the International Maritime Organization and of the Division of Oceanic Affairs and Law of the Sea of the United Nations, by means of the confirmation that nor geographical dimensions, neither varied ecosystems, or the proposed protection measures for new PSSA represent by themselves violations to UNCLOS, it shall be consider that the struggle for finding a balance between freedom of navigation and marine environment has not yet ended.

In fact, the voices that have risen to request a review of the Guidelines to designate PSSA has taken MEPC under the IMO in April 2004 to generate a new debate on the contents to be amended. Among the aspects subject to review referred to by diverse delegations are: a) the duty by the requesting State to clearly explain why the marine zone in question is deemed not to be duly protected by the existing measures under MARPOL Convention and under the measures of maritime traffic organization; b) the duty to provide evidence that all the measures available have been adopted by the pertinent coast States to reduce pollution originated in the land-based industries, as well as pollution from sea-based industry, whether due to international maritime transportation, in-sea exploration, in-sea energy sources, military exercises, fishing activities or the recreational sector.

With the foregoing, it is evident that although the ideological debate of the XVII century has been left behind, the need to preserve the environment in balance with the commercial interest of the ship industry are contemporary matters and are in deep change. It is everyone’s responsibility that the discussion for this balance considers the various perspectives from which it is necessary to attack the problem, facing a sustainable future of the activities that may be done in our planet’s oceans.



