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Ted L. McDorman*

The Search for Resolution of the
Canada–France Ocean Dispute
Adjacent to St. Pierre and
Miquelon

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1.0 Introduction

They were not to become an “object of jealousy” according to the British and French in 1783.¹ True to this admonition, the French islands of St. Pierre and Miquelon have remained as the uncontested footnotes to France’s colonial presence in North America. However, the ocean area and resources adjacent to the French islands became the object of intense jealousy, being the centre of a thorny, 25 year international dispute between Canada and France.

Canada and France both claimed exclusive jurisdiction over a pie-shaped wedge running south from St. Pierre and Miquelon into the Atlantic Ocean. While commonly referred to as an ocean boundary dispute, the dispute was one of conflicting views over the allocation and sharing of both the ocean space and the resources adjacent to the French islands.

The 242 square kilometers (94 square miles) of St. Pierre and Miquelon, with a population of 6,000, sits nearly ten nautical miles from the mainland coast of the Canadian province of Newfoundland. Adjacent rocks and islets reduce the neighbourly distance to three nautical miles. Proximity did not make the dispute any easier to resolve. Canada and France held conflicting views on the existence and application of international fisheries and boundary delimitation law, contrary assessments of the geographic and economic importance of the islands, and, most fundamentally, differing calculations regarding what would constitute a politically acceptable compromise on ocean area and resource allocation.

The St. Pierre and Miquelon dispute provides an interesting case study of international dispute resolution since the two countries employed several mechanisms in attempting to peacefully resolve the issue. First and foremost, Canada and France engaged in bilateral negotiations, the mechanism of choice in dealing with international disputes. Bilateral negotiation led Canada and France to agreement on some points,² but negotiations ultimately failed to resolve the major issues of resource and ocean area allocation. Following the breakdown of direct negotiations and escalation of the urgency to resolve the dispute for diplomatic, political and resource conservation reasons, the two countries utilized a

1. *Definitive Treaty of Peace and Friendship between France and Great Britain*, 3 September 1783, 48 Cons. T.S. 437 at 469 (Declaration).

2. For example, *Agreement on Their Mutual Fishing Relations*, Mar. 27, 1972, Canada–France, reprinted in United Nations, *National Legislation and Treaties Relating to the Law of the Sea* (New York, 1974) 570 (U.N. Doc. ST/LEG/SER. B/16, Sales No. E/F.74.V.2) [hereinafter *1972 Agreement*] and U.S. Dep’t of State, Office of the Geographer, *Limits in the Seas*, No. 57 (Washington, D.C., 1974). See generally *infra*, section 3.2.

mediator to assist them in finding common ground. With the help of the mediator the two parties reached agreement to resort to third party adjudication, an arbitral tribunal, in order to resolve the fundamental issue of ocean space allocation.³ Canada and France had hoped that the adjudicative resolution of the ocean space dispute would also resolve the ocean resource allocation dispute. It is clear from both the decision of the Tribunal⁴ and the subsequent actions of the two countries⁵ that this aspect of the dispute remains unresolved.

It is argued below that the primary reason negotiations failed and mediation was largely unused to resolve the Canada and France ocean area and resource dispute was *timing*. When one country was ready to consider a compromise, the other country was in an intransigent mode. When one country felt urgency, the other felt complacency. They finally did agree to use an independent Tribunal, but the only way in which the Arbitral Tribunal could have fully resolved the dispute was to unabashedly side with either Canada or France: anything less than total victory for one side or the other would leave the resources question unresolved. Not surprisingly, the Arbitral Tribunal tried to find a middle ground. The approach taken below is to outline the context and complicating factors which were important in the search for a resolution of the Canada–France dispute and then review the international ocean practice regarding negotiation, mediation and adjudication and the use made of these three mechanisms by Canada and France.

2.0 *The Context and Complicating Factors of the Dispute*

Every international dispute has its own unique context and set of complicating factors. The context of the St. Pierre and Miquelon dispute was the evolving international law of the sea which allowed extended offshore jurisdiction by coastal States, thus creating ocean area and resources conflicts throughout the world. The complicating factors which influenced the search for a resolution of the dispute were a 1972 Treaty that guaranteed French fishing in Canadian coastal waters; the resource needs of France coupled with the resource conservation concerns of Canada; internal political pressures in both countries; and the geography of the disagreement.

3. *Agreement Establishing a Court of Arbitration for the Purpose of Carrying Out the Delimitation of Maritime Areas between France and Canada*, 30 March 1989, 29 I.L.M. 1 [hereinafter the *1989 Compromis*].

4. *Case Concerning the Delimitation of the Maritime Areas Between Canada and France*, 10 June 1992, 31 I.L.M. 1148 [hereinafter *Canada–France Case*].

5. See “Cod Protest Arrests” *Fishing News International* (January 1993) 52.

2.1 *The Conflicting Claims*

Developments in the international law of the sea since the Second World War have resulted in coastal States exercising jurisdiction over increasing areas of the offshore. The 1958 Geneva *Convention on the Continental Shelf* recognized that a State had sovereign rights over the resources located in and on its adjacent continental shelf.⁶ In the 1970s, States began claiming and exercising jurisdiction over living resources out to 200 nautical miles⁷ and the 1982 *United Nations Convention on the Law of the Sea* recognizes the existence of national 200-nautical mile, multi-functional, exclusive economic zones.⁸

The 1958 and 1982 multilateral Treaties on the law of the sea accepted that inhabited, self-sustaining islands could be used to generate offshore jurisdictional zones.⁹ As a consequence, in 1966, France exercised its jurisdiction over the continental shelf adjacent around St. Pierre and Miquelon by issuing hydrocarbon exploration permits¹⁰ and in 1977 France declared the existence of a 200 nautical mile fishing zone for St.

6. *Convention on the Continental Shelf*, 29 April 1958, 499 U.N.T.S. 311, art. 1.

7. For example, the United States enacted its 200-nautical mile fishing zone in 1976 through the Magnuson *Fishery Conservation and Management Act*, Pub.L. 94-265, 90 Stat. 331 (1976) (codified as amended at 16 U.S.C. §§ 1801-82 (1988)) [hereinafter *FCMA*].

8. 10 December 1982, U.N. Doc. A/CONF. 62/122 (1982), 21 I.L.M. 1261, United Nations, *Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (New York, 1983) (U.N. Sales No. E.83.v.5), arts. 55-75 [hereinafter *LOS Convention*]. The *LOS Convention* has now received its 60th ratification and will come into force for those States which have ratified in November 1994 ("Sixtieth Ratification of the Law of the Sea Convention Deposited" (1993) 10:7 *Oceans Policy News* 1). Concerning Canada and the *LOS Convention*, see T. McDorman, "Will Canada Ratify the Law of the Sea Convention?" (1988) 25 *San Diego L. Rev.* 535.

9. Article 1 of the 1958 *Convention on the Continental Shelf*, *supra* note 6, specifically indicates that islands are entitled to a continental shelf. Article 121 of the 1982 *LOS Convention*, *ibid.*, directs that islands, which are not mere rocks, are entitled to a 12 nautical mile territorial sea, a 200 nautical mile exclusive economic zone, and a continental shelf. The 1981 Icelandic-Norway Conciliation Commission took the view that Article 121 represents customary international law (Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen, *Report and Recommendations to the Governments of Iceland and Norway*, 20 I.L.M. 797).

10. Concerning the French exploration permits, see D. Day, "Maritime Boundaries, Jurisdictional Disputes, and Offshore Hydrocarbon Exploration in Eastern Canada" (1988) 23 *J. Can. Stud.* 60 at 69-70; Canada, *Canada-France: Case Concerning the Delimitation of Maritime Areas: Memorial Submitted by Canada* (Ottawa: Government of Canada, 1990) at 108-09 [hereinafter *Canadian Memorial*]; and *Canada-France Case*, *supra* note 4 at para. 8.

Pierre and Miquelon.¹¹ In 1966, Canada, exercising its offshore rights, issued hydrocarbon exploration permits in the coastal areas adjacent to Newfoundland and Nova Scotia.¹² The permits issued by Canada and France coincided in the shelf areas adjacent to St. Pierre and Miquelon. Similarly, the fishery jurisdiction of Canada, extended to 200 nautical miles in 1977,¹³ overlapped the fishery area claimed by France adjacent to St. Pierre and Miquelon.

While claiming a 200 nautical mile zone, France accepted that the limit of its claim was a line equidistant from the French and Canadian coasts. France argued that full weight should be given the French islands and that an equidistance (or median) line was the appropriate manner to delimit the ocean space.¹⁴ Precisely where that line was and hence the extent of the French claim was not made public.¹⁵ The Canadian view, unaccepted by France, was that the islands of St. Pierre and Miquelon constituted a “special circumstance” and that a “reasonable” ocean area should exist for the French islands.¹⁶ The reasonable area was determined by Canada in 1978 to be 12 nautical miles.¹⁷ The 12 nautical mile “enclave” for St. Pierre and Miquelon was the public position maintained by Canada throughout the 1980s.¹⁸

11. Loi n° 76–655 du 16 juillet 1976, J.O., 18 juillet 1976, 4299, regarding the Economic Zone off the Coasts of the Territory of the Republic. By Décret n° 77–169 du 25 février 1977, J.O., 27 février 1977, 1102, the 200 nautical mile zone applies off the coasts of St. Pierre and Miquelon. The legislation is reprinted in R. Smith, *Exclusive Economic Zone Claims: An Analysis and Primary Documents* (Dordrecht, The Netherlands: Martinus Nijhoff, 1986) at 147.

12. Concerning the Canadian exploration permits, see Day, *supra* note 10 at 69–70.

13. Regulations under the *Territorial Sea and Fishing Zones Act*, R.S.C. 1985, c. T-18: *Fishing Zones of Canada (Zones 1, 2 and 3) Order*, C.R.C., c. 1547; *Fishing Zones of Canada (Zones 4 and 5) Order*, C.R.C., c. 1548; and *Fishing Zones of Canada (Zone 6) Order*, C.R.C., c. 1549.

14. *Canada–France Case*, *supra* note 4 at para. 5. See also T. McDorman, “The Canada–France Boundary Case: Drawing A Line Around St. Pierre and Miquelon” (1990) 84 *Am. J. Int’l L.* 157 at 170–71.

15. *Canadian Memorial*, *supra* note 10 at 11–12.

16. As described *ibid.* at 108–09.

17. See *ibid.* at 117.

18. See T. Siddon, Minister of Fisheries of Oceans, Remarks in *House of Commons Debates* (27 January 1987) at 2808–09 and C.R. Symmons, “The Canadian 200-Mile Fishery Limit and the Delimitation of Maritime Zones Around St. Pierre and Miquelon” (1980) 12 *Ottawa L. Rev.* 145 at 153. It was also the position taken by Canada before the Canada–France Arbitration Court. See *Canada–France Case*, *supra* note 4 at para. 5.

2.2 *The 1972 Fishing Agreement*

Since 1763, when St. Pierre and Miquelon were ceded by Great Britain to France “to serve as a shelter to the French fishermen,”¹⁹ a right to fish by French fishers in waters adjacent to Canada has been protected by treaty.²⁰ Renegotiation of this 200 year old right took place in 1972 at a time prior to 200 nautical mile zones, when Canada was attempting to remove foreign fishing activity from the Gulf of St. Lawrence. The 1972 *Agreement between Canada and France on Their Mutual Fishing Relations* drew a distinction between fishing vessels from metropolitan France and fishing vessels registered in St. Pierre and Miquelon. The former were to be able to fish in the Gulf of St. Lawrence until May 1986.²¹ Vessels from St. Pierre and Miquelon were to be able to fish in the Gulf of St. Lawrence subject to Canadian quota control.²² If Canada expanded its fisheries jurisdiction, fishers from Metropolitan France and St. Pierre and Miquelon were to have access to resources in the newly expanded waters, again subject to Canadian quota control.²³

Pursuant to the 1972 *Agreement*, fishers from St. Pierre and Miquelon are entitled to a quota within the Gulf of St. Lawrence and French fishers (either from Metropolitan France or the islands) are entitled to a quota in uncontested Canadian waters outside the Gulf of St. Lawrence. The nature and extent of the obligations in the 1972 *Agreement* have been the subject of dispute between the two countries²⁴ and the quota arrange-

19. *Definitive Treaty of Peace between France, Great Britain and Spain*, 10 February 1763, 42 Cons. T.S. 279, art. iv.

20. Discussed in *Filleting within the Gulf of St. Lawrence between Canada and France* (1986), 19 R.I.A.A. 225 [hereinafter *La Bretagne Arbitration*].

21. The 1972 *Agreement*, *supra* note 2, art. 3.

22. *Ibid.*, art. 4.

23. The 1972 *Agreement*, *supra* note 2, art. 2 recognized the possibility of States expanding their fishing zones. Article 2 of the 1972 *Agreement* became an important consideration in the *Canada-France Case*. Article 2 obliges Canada to recognize French fishing rights in Canadian waters and the French government is to reciprocate respecting Canadian fishing rights in French waters. This reciprocity allowed the Court of Arbitration to construct an ocean boundary confident that the countries would respect one another's rights in the newly-delimited ocean areas (*Canada-France Case*, *supra* note 3 at para. 87).

24. *La Bretagne Arbitration*, *supra* note 20, concerned the interpretation of the 1972 *Agreement*. See T. McDorman, “French Fishing Rights in Canadian Waters: The 1986 La Bretagne Arbitration” (1989) 4 Int’l J. Estuarine & Coastal L. 52. Concerning this arbitration, see also W.T. Burke, “A Comment on the ‘La Bretagne’ Award of July 17, 1986: The Arbitration Between Canada and France” (1988) 25 San Diego L. Rev. 495. Concerning other problems regarding the 1972 *Agreement*, see D. Pharand, “The Cod War Between Canada and France” (1987) Rev. Gen. Droit 627. Note also *Canada-France Case*, *supra* note 4 at para. 16.

ments subject to protracted negotiations.²⁵ Despite the *1972 Agreement* involving obligations for Canada and France unrelated to the ocean area and resources dispute, the protracted difficulties regarding the *1972 Agreement* tainted the atmosphere of discussions about the overlapping claims. Of more immediate relevance was the *1972 Agreement*'s displacement by 1986 of Metropolitan France fishers from the Gulf of St. Lawrence. Canada was concerned that the displaced vessels would relocate in the disputed waters around St. Pierre and Miquelon and increase the pressure on the depleting fishery resources in the area.

2.3 Resources

A second complicating factor in the Canada–France dispute was the location, importance and abundance of the living and non-living resources adjacent to St. Pierre and Miquelon. Although the hydrocarbon potential of the disputed area was not fully assessed, the shelf area close to the French islands showed little potential, while areas more distant from the islands did appear to be promising.²⁶ Oil had been found east and southwest of the disputed area.²⁷ The hydrocarbon resources were of particular importance to France which was, and continues to be, overwhelmingly dependent upon imported oil and gas.²⁸ As one author commented: "France has maintained a conspicuous presence on these islands [St. Pierre and Miquelon] partly to assert its claim to potential oil deposits in the surrounding Atlantic waters."²⁹ The location of possible hydrocarbon resources and the scarcity of French-controlled reserves were an important factor in the French calculations regarding an acceptable solution to the St. Pierre and Miquelon dispute.

Respecting living resources, Newfoundland, Canada's poorest province, relied heavily on the harvest of fishery resources for employment and income: "The fishery has sustained the south coast communities [of Newfoundland] for centuries. Without the fishery, the people of the south coast of Newfoundland would not have a viable future."³⁰ The history of

25. See generally Pharand, *ibid.* at 632–35.

26. See Day, *supra* note 10 at 71.

27. Approximately 50 significant discoveries of oil and gas have been in the East Coast Canadian offshore area. The best known is the Hibernia find of 1979 off the coast of Newfoundland. The only oil production, however, is from a small field offshore Nova Scotia.

28. On France's energy position, see generally N. Lucas, *Western European Energy Policies* (New York: Oxford University Press, 1985) at 1–62.

29. M.-C. Aquarone, "French Marine Policy in the 1970s and 1980s" (1988) 19 *Ocean Dev. & Int'l L.* 267 at 276.

30. *Canadian Memorial*, *supra* note 10 at 69–70; see also 70–76.

St. Pierre and Miquelon showed that fishing was the reason for its survival.³¹ As well, France had a small distant water fishing fleet which fished off the Canadian coast.³² The overall reduction in available living resources in western Atlantic waters in the 1980s increased the competition between Canadian and French fishers for the living resources in the disputed waters adjacent to St. Pierre and Miquelon. For Canada the optimum resolution of the dispute was to eliminate or control the French fishing effort respecting vulnerable fish stocks.

2.4 Political Pressures in Canada and France³³

Closely related to the problem of decreasing fish stocks was the complication of internal politics within both Canada and France. The French distant water fishing fleet were a constituency to which the French government had to respond.³⁴ At one point, a port in France was blockaded as part of a protest against the French government's handling of the St. Pierre and Miquelon issue.³⁵ The residents of St. Pierre and Miquelon were upset with the French government's capitulation to Metropolitan France's fishing interests³⁶ and with the deteriorating relationship that existed in the mid-1980s with Canada.³⁷ The government of Newfoundland strongly opposed any perceived weakness or compromise of the

31. The British ceding of the islands to France was for fisheries purposes. See the *1763 Peace Treaty*, *supra* note 19 and the history of the French fishing rights, *La Bretagne Arbitration*, *supra* note 20 at paras.7–9. How economically important the fishing industry is to St. Pierre and Miquelon was a hotly debated issue before the Court of Arbitration. See *Canadian Memorial*, *supra* note 10 at 76. French sources suggested that 40 per cent of the workforce were employed by the fishery and that the fishery generated \$10 million for the local economy (Canadian Press, "Paris Supports Island Fishermen" *The [Toronto] Globe and Mail* (26 January 1989)).

32. Aquarone, *supra* note 29 at 270.

33. It is customary to consider that in an international dispute only the States are participants. As is explained in C. Chinkin & R. Sadurska, "The Anatomy of International Dispute Resolution" (1991) 7 *Ohio St. J. Dispute Res.* 39 at 40–45, focussing narrowly only on the States misses the true complexity of an international dispute and leads to misperceptions about the causes and possible resolutions of international disputes.

34. See Aquarone, *supra* note 29 at 270.

35. Canadian Press, "Angry French plug port in protest" *Victoria Times-Colonist* (28 January 1989) A3.

36. See T. McDorman, "The Canada–France Maritime Boundary Case," *supra* note 14 at 185.

37. The Canadian–French dispute on fisheries escalated to the point of Canada suspending operation of the *1972 Agreement* which had a direct impact on St. Pierre and Miquelon fishing in uncontested Canadian waters. This was not in the interest of the St. Pierre and Miquelon fleet. See McDorman, "The Canada–France Maritime Boundary Case," *ibid.* at 164.

Canadian government position regarding St. Pierre and Miquelon³⁸ and at one stage withdrew in protest from the discussions.³⁹ These key national constituencies made finding an acceptable compromise difficult for the governments of both Canada and France.

2.5 Geography

The final complicating factor was geography. Canada's view of the geography was that the small French islands, far distant from their home country, could not possibly be entitled to a significant amount of ocean space in the middle of the Canadian offshore zone.⁴⁰ Such an argument was a populist one, easily understandable in Canada. Because of this ease of understanding, public support for a strong Canadian posture against the French was easily obtained. However, the high degree of support for the Canadian argument and the vigour with which it was proclaimed by politicians made compromise difficult.

France rejected the Canadian viewpoint. France is the possessor of small islands in the Caribbean, South Pacific, and Indian Ocean and a precedent that restricted the area available to small, dependent islands would be inconsistent with France's interests.⁴¹

An important part of this geographic complication, particularly from the Canadian viewpoint, was the acceptance by the 1977 *Anglo-French Arbitral Tribunal* of France's argument that the British Channel Islands, located near the coast of France, were to be disregarded in the drawing of the main ocean boundary in the English Channel and that each of the

38. In 1987 Canada and France tentatively agreed to enter into negotiations to conclude a special agreement to resolve the ocean boundary dispute by arbitration (Agreed Record of Canada–France of 27 January 1987). Part of the agreement was an allocation to France of cod in waters adjacent to Newfoundland. Concerning the 1987 Agreement, see Pharand, *supra* note 24 at 635–40. The Newfoundland government was outraged by the action of the Canadian government and a highly unusual meeting of provincial premiers took place to discuss the issue (R. Martin and R. Sheppard, "Premiers Meet to Discuss Cod Treaty" *The [Toronto] Globe and Mail* (10 February 1987) A1–A2). Moreover, the Canadian House of Commons had an emergency debate about the 1987 accord. See *House of Commons Debates* (27 January 1987) at 2806–49. Newfoundland and St. Pierre and Miquelon fishermen were able to oppose the tentative pact, another indication of the differing position of St. Pierre and Miquelon from that of France (Canadian Press, "Fishermen Join Forces Against Pact" *Vancouver Sun* (6 February 1987) A6).

39. Canadian Press, "Peckford to Boycott Boundary Talks" *The [Toronto] Globe and Mail* (18 September 1987) A4.

40. See *Canadian Memorial*, *supra* note 10 at 15.

41. See Aquarone, *supra* note 29 at 276.

British Channel Islands was entitled only to a small ocean area.⁴² Canada felt strongly that France's desire for a large ocean area to be given St. Pierre and Miquelon and France's argument that the Channel Islands should be given only a limited ocean area was "a remarkable inconsistency."⁴³

2.6 Conclusion

The Canada–France dispute arose from overlapping claims to an ocean area south of St. Pierre and Miquelon, a logical consequence of the developments in the law of the sea since the Second World War. Dealing with the dispute was complicated by a 1972 bilateral treaty which guaranteed a right for French fishers to access uncontested Canadian waters, the conflicting perspectives of each country regarding the resources of the disputed area, the political pressures which existed in each country, and the colouring of the reasonableness of any compromise by the geography of the dispute. Against this background, it is appropriate

42. *Delimitation of the Continental Shelf between Great Britain and France*, 30 June 1977 and 14 March 1978, 18 R.I.A.A. 3, 18 I.L.M. 397 at paras. 150, 161, 166, 198, 202 [hereinafter *Anglo-French Award*]. See *Canadian Memorial*, *supra* note 10 at 194–98.

43. *Canadian Memorial*, *supra* note 10 at 196. The Court of Arbitration dismissed out-of-hand the relevance of the Channel Island precedent to the St. Pierre and Miquelon situation (*Canada–France Case*, *supra* note 4 at para. 42).

The reference to the *Anglo-French Award* suggests that an additional complicating factor was the international law of maritime boundary delimitation and the perceived legal strength of each country's claim to the area and resources around St. Pierre and Miquelon. While the Arbitration Tribunal heard and read the legal arguments of each country and sought to evaluate their relative merits in reaching its decision, when engaged in negotiation the role of international law would have been less important.

In the process of negotiating resolution of international disputes, countries utilize international law to justify their claims and counterclaims. They may base their willingness to compromise on the perceived legal strength of their argument, and a successful resolution may be formulated in an internationally binding treaty. Seldom, if ever, will the negotiated solution be dictated by principles of international law. Respecting international law and negotiation, see M. Lachs, "International Law, Mediation, and Negotiation" in A.S. Lall, ed., *Multilateral Negotiation and Mediation* (New York: Pergamon Press, 1985) 183. See also R.B. Bilder, "An Overview of International Dispute Settlement" (1986) 1 *Emory J. Int'l Dispute Res.* 1 at 5–6.

For maritime boundary disputes the above pattern is clear. States in conflict formulate positions by reference to law and precedent, they may evaluate alternative solutions based on the perceived strength of their legal argument, and, if an agreement is reached, put that agreement in the form of a treaty. This process in maritime boundary delimitation disputes and resolution is succinctly described in D.M. Johnston, *The Theory and History of Ocean Boundary-Making* (Kingston, Ont.: McGill-Queen's University Press, 1988) at 234. However, a negotiated solution to a boundary problem inevitably is a series of compromises unrelated to the principles of international law that exist for maritime boundary delimitation. This is dictated by the political nature of any boundary, including a maritime boundary.

to look at the dispute resolution mechanisms employed by Canada and France.

3.0 *Negotiation*

3.1 *Negotiation and Ocean Boundary Disputes*

Regarding ocean area and resource allocation disputes, there is a rich experience of negotiated arrangements which have been employed to resolve or manage disputes. Negotiated resolution of overlapping ocean claims has been accomplished through boundaries permanently dividing areas in dispute, by boundaries permanently allocating resources in disputed areas where the boundary for one resource regime (fisheries) is not coincidental with the boundary for another resource regime (hydrocarbons),⁴⁴ and by the parties agreeing to permanently, or for an extended period of time, jointly manage and share the resources of an area in dispute.⁴⁵ Negotiations have also resulted in parties agreeing to manage disputes⁴⁶ pending the satisfactory resolution of the dispute through standstill agreements, controlled access agreements, or agreements not to challenge the other state's exercise of jurisdiction.⁴⁷ As one authority has commented, "diplomacy seems to introduce the best prospect for ingenuity in ocean boundary-making"⁴⁸ and this has been borne out by the

44. This type of ocean boundary is unusual with the best example being the boundary lines created by the *Treaty between Papua New Guinea and Australia Concerning Sovereignty and Maritime Boundaries*, 18 December 1978, 18 I.L.M. 291. About this treaty, see H. Burmeister, "The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement" (1982) 76 Am. J. Int'l L. 321, and Johnston, *supra* note 43 at 219–20, who describes the Torres Strait Treaty at 219 "as a functionally sophisticated approach to ocean boundary-making."

45. Regarding joint development arrangements see H. Fox, ed., *Joint Development of Offshore Oil and Gas: Conference Papers* (London: British Institute of International and Comparative Law, 1990) and H. Fox et al., *Joint Development of Offshore Oil and Gas: A Model Agreement for States for Joint Development with Explanatory Commentary* (London: British Institute of International and Comparative Law, 1990).

46. It is sometimes impossible, particularly when sovereignty is in question, for countries to proceed easily or quickly to dispute resolution. Hence, *management* of a dispute to prevent escalation and to regularize contact is often important.

47. These management techniques for ocean boundary disputes are discussed by Johnston, *supra* note 43 at 260–62.

48. Johnston, *supra* note 43 at 233; see also 258–59.

practice of states.⁴⁹ However, special constraints exist on negotiations involving national jurisdiction or sovereignty.

[B]ilateral boundary negotiations tend to be heavily laden with emotional freight. Even when kept secret or private they are likely to become disputatious. Because of their symbolic significance they usually attract the attention of politicians and the public at large more than most other kinds of diplomacy. Not infrequently, therefore, the negotiators of a boundary dispute find they are not the only actors, and that they are required to negotiate with relatively little flexibility in accordance with high-level political directives, which in turn may be perceived as a direct expression of public opinion (or at least coloured by an awareness of public sentiment).⁵⁰

3.2 *Negotiation and the St. Pierre and Miquelon Dispute*

At various times during the negotiation process, Canada and France agreed to refrain from measures and activities likely to inflame the dispute. For example, in 1966 following each country's assertion of jurisdiction over the continental shelf adjacent to St. Pierre and Miquelon, there was an agreement that no exploration activity would take place in the disputed area.⁵¹ When each country extended its fishing jurisdiction to 200 nautical miles, the two countries agreed to permit unchallenged access to the disputed zone by fishers from both countries.⁵² Further, in 1984 the two countries agreed that neither would challenge the presence of the other in the disputed zone and, in particular, that national fisheries laws would not be enforced against one another in the disputed area.⁵³ These agreements were attempts to manage the dispute and prevent direct, physical confrontations that could escalate it.⁵⁴

The moratorium on hydrocarbon exploration activity was successful in keeping either country from obtaining significant advantage regarding the resources or its legal position. Regarding living resources, however, the two countries had a "non-confrontation" arrangement, but not a

49. A cursory review of the state practice on maritime boundary delimitation is provided in Johnston, *supra* note 43 at 213–22. For a review of state practice in the Pacific region, see D.M. Johnston & M.J. Valencia, *Pacific Ocean Boundary Problems: Status and Solutions* (Dordrecht, The Netherlands: Martinus Nijhoff, 1991) at 62–77. For a review of state practice in a number of regions, see D.M. Johnston & P.M. Saunders, eds., *Ocean Boundary Making: Regional Issues and Developments* (New York: Croom Helm, 1987).

50. Johnston, *supra* note 43 at 27.

51. *Canadian Memorial*, *supra* note 10 at 109 and Day, *supra* note 10 at 70–71.

52. D. Jamieson, Secretary of State for External Affairs, Remarks, *House of Commons Debates* (5 November 1976) at 793.

53. The 1984 agreement was referred to by Siddon, *supra* note 18 at 2809–10.

54. The attempts to prevent escalation of the dispute were not always successful. See McDorman, "The Canada–France Boundary Case," *supra* note 14 at 164.

“no-exploitation” arrangement. The Canadian view was that it was “a settled practice” that French fishers were entitled to 15.6 percent of the total allowable catch [TAC] in the disputed area and that the TAC was to be set by Canada.⁵⁵ By the mid-1980s, France had clearly rejected Canada’s assumptions as French fishing activity in the disputed zone far exceeded the “Canadian-allotted quota.”⁵⁶ Canada viewed the extent of French fishing activity in the disputed zone as outrageous and it was this outrage which ultimately led to an impasse in negotiations and to arbitration.

During the lengthy negotiations Canada and France did not feel constrained by traditional thinking on ocean boundary delimitation.⁵⁷ They explored numerous creative means to resolve the dispute. In the earliest negotiations in the 1960s, the two countries focused upon the French proposal to create a joint hydrocarbon resources arrangement in the disputed area as a means of dealing with the dispute.⁵⁸

As part of the 1972 fisheries agreement, Canada and France established an ocean boundary in the waters directly between the French islands and the coast of Newfoundland. The boundary, a modified equidistance line,⁵⁹ was the product of compromises by both Canada and France.⁶⁰ Following from this successful negotiation, in what has been described as “the only real *rapprochement* between the Parties in nearly 20 years of negotiations,”⁶¹ came the 1972 *Relevé de Conclusions*⁶² which provided that St. Pierre and Miquelon was to receive an exclusive zone of 12 nautical miles around the islands and, in a defined zone beyond this area, France was to have certain rights to explore and exploit hydrocarbon

55. Canada, *Canada–France: Case Concerning the Delimitation of Maritime Areas: Counter-Memorial Submitted by Canada* (Ottawa: Government of Canada, 1991) at 65 [hereinafter *Canadian Counter-Memorial*] and Siddon, *supra* note 18 at 2810.

56. See McDorman, “The Canada–France Boundary Case,” *supra* note 14 at 161–62 and *Canadian Counter-Memorial*, *supra* note 55 at 60.

57. Traditional thinking would have involved seeking a single line to cover all ocean activities and approaching the problem purely as a line-drawing exercise for the purpose of dividing ocean space, as opposed to dealing with the resources, administrative necessity, and other factors that are an important part of the boundary process.

58. See *Canadian Memorial*, *supra* note 10 at 110–11.

59. So described in the analysis of the 1972 Canada–France boundary by the U.S. Dept. of State, *supra* note 2; see also *Canadian Memorial*, *supra* note 10 at 112–13.

60. Described in *Canadian Memorial*, *supra* note 10 at 112–13.

61. *Canadian Counter-Memorial*, *supra* note 55 at 80.

62. Reproduced in Canada, *Canada–France Case Concerning the Delimitation of Maritime Areas: Annexes to the Memorial Submitted by Canada*, vol. 1 (Ottawa: Government of Canada, 1990) B–2, 85.

resources.⁶³ Despite the arrival of 200 nautical mile fishing zones in the mid-1970s, France continued to press Canada to accept the 1972 compromise⁶⁴ indicating that the apparent trade-off of fish for Canada and hydrocarbons for France was acceptable. Canada ultimately rejected the proposed trade-off in the 1972 *Relevé de Conclusions*.⁶⁵ However, the idea of a fish for oil trade-off was subsequently discussed in 1984 when it was reported that Canada had proposed a comprehensive package involving joint fisheries management and hydrocarbon resource sharing in the disputed zone.⁶⁶ The full extent of these discussions have not been made public. It is reasonable to assume, given the sophistication in ocean policy matters of both Canada and France, that the negotiators explored a wide range of cooperative arrangements, joint development and administrative zones, and other trade-offs, none of which were successful as a basis for a negotiated solution.

As French fishing activity in the disputed area increased and negotiations to resolve the dispute stalled, Canada, which had previously rebuffed French overtures to adjudicate,⁶⁷ concluded that adjudication was appropriate. The goal of negotiations, therefore, changed from dispute resolution to the reaching of an agreement for third party assistance in resolving the dispute. In January 1987, the two countries formally agreed to negotiate to conclude a special agreement to utilize international arbitration to resolve the overlapping claims dispute.⁶⁸ In order to induce French acceptance of this agreement, Canada provided significant fish quotas to French fishers under the 1972 bilateral fishing agreement.⁶⁹ Moreover, Canada agreed that an interim fishing agreement for the disputed area was a prerequisite to submission of the dispute to adjudication.⁷⁰ Canadian negotiators found themselves in the position of

63. The Court of Arbitration dismissed the relevance of the 1972 *Relevé des Conclusions* primarily because it dealt only with shelf issues. Also, it was not approved by the two States and consequently had "no standing as an agreement between them" (*Canada-France Case*, *supra* note 4 at paras. 90-91).

64. See *Canadian Memorial*, *supra* note 10 at 115-16.

65. See M. MacGuigan, Secretary of State for External Affairs, *Minutes of Proceeding and Evidence of the Standing Committee on External Affairs and National Defense* (No. 69) (Ottawa: Queen's Printer, 4 May 1982) at 12-13 and *Canadian Memorial*, *supra* note 10 at 116.

66. J. Meek, "Canada Makes New Offer in Boundary Dispute" *The [Halifax] Chronicle-Herald* (10 May 1984) 3.

67. See A.J. MacEachern, Secretary of State for External Affairs, Remarks, *House of Commons Debates* (28 March 1983) at 24212.

68. Agreed Record of Canada-France of 27 January 1987 (unofficial translation). See generally Pharand, *supra* note 24 at 635-38.

69. See Pharand, *supra* note 24 at 635-38 and the material cited in *supra* note 38.

70. *Canadian Counter-Memorial*, *supra* note 55 at 68.

complaining about excessive French fishing activity being detrimental to Canadian interests, but having to provide quotas to the French in order to induce an agreement to arbitrate.

The January 1987 accord, which was intended as an agreement to assist in dispute resolution, had the unfortunate effect of escalating the dispute. Negotiations on an interim fisheries arrangement for the disputed zone broke down; Canada declined to allocate a quota for French fishing vessels in undisputed Canadian waters as required under both the 1972 and 1987 *Agreements*; fishing vessels from both countries were seized in the disputed zone; France recalled its Ambassador from Ottawa; and Canadian citizens were arbitrarily delayed at Parisian airports.⁷¹ Relations only improved when a new prime minister was installed following the Spring 1988 French elections.

Following the intervention of a mediator, in March 1989 Canada and France agreed to submit the overlapping claims dispute to international arbitration.⁷² In order to achieve this agreement, Canada had to provide a significant quota to the French in uncontested Canadian waters.⁷³ In the disputed area Canada and France agreed to disagree over the quota to be taken by French fishers.

The two decades of Canada–France negotiations involved creativity, intransigence, compromise, a desire to manage the dispute, and an entanglement of the ocean area dispute with the disagreement over Canada's 1972 treaty obligations to French fishers. The inability of negotiations to resolve the dispute without the intervention of third parties was because of inopportune *timing*. French flexibility of the 1960s and 70s was met by Canadian uncertainty and intransigence. Canada's attempted compromises in the 1980s were unacceptable to France. The agreement to submit the dispute to arbitration, however, was the result of successful negotiation, although mediator assisted,⁷⁴ hence the negotiation process was not a total failure.

71. See McDorman, "The Canada–France Boundary Case," *supra* note 14 at 164; see also *Canadian Counter-Memorial*, *supra* note 55 at 68–70.

72. The 1989 *Compromis*, *supra* note 3.

73. Agreement relating to Fisheries for the Years 1989–91, 30 March 1989, Canada–France; Canadian Note Verbale No. 220 to France (30 March 1989); and French Note Verbale to Canada (30 March 1989) (documents released by Canadian Department of External Affairs and Fisheries and Oceans). See McDorman, "The Canada–France Boundary Case," *supra* note 14 at 164–65, especially note 49.

74. See *infra*, section 4.2.

4.0 *Non-Adjudicative Third Party Intervention*

4.1 *Employment in Ocean Boundary Disputes*

Third party intervention in an international dispute is only acceptable when the disputing states'

own efforts to reach a negotiated settlement have been unavailing and are at an impasse, and where neither prefers such a failure to reach agreement to the alternative possibility of continuing to seek settlement through assistance by, or delegation to, third parties. In this case, both parties may choose to ask third parties for help in their attempts to reach an agreement or, at the extreme, they may simply ask or allow a third party to determine the settlement or outcome.⁷⁵

Non-adjudicative third party intervention can take several forms: good offices, mediation, fact-finding, inquiry, and conciliation. While attempts are made to differentiate the various forms,⁷⁶ ultimately States utilize whatever variation they deem appropriate to assist in dispute resolution. Mediation is usually distinguished from conciliation.⁷⁷ With mediation there is a limited intervention by a third party with the usual goal being to facilitate negotiations either by direct suggestion of proposals or assistance in reconciliation of an impasse in an informal manner. Conciliation, however, usually involves a more formal intervention by a third party seeking to establish the facts in dispute and create non-binding recommendations for resolution of a dispute.

Both mediation and conciliation have been used to resolve ocean area and resource allocation disputes.⁷⁸ Chile and Argentina, on the brink of

75. R.B. Bilder, "International Third Party Dispute Settlement" (1989) 17 *Denver J. Int'l L. & Pol.* 471 at 477-78.

76. See L.B. Sohn, "The Future of Dispute Settlement" in R.St.J. Macdonald & D.M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (The Hague: Martinus Nijhoff, 1983) 1123 at 1123-25.

77. See Bilder, *supra* note 43 at 24; Sohn, *ibid.*; and J.G. Merrills, *International Dispute Settlement*, 2d ed. (Cambridge: Grotius, 1991) at 27-42, 57-79. Mediation and conciliation have a number of similarities. First, employment of non-adjudicative third party intermediaries must be by agreement of the disputants. The parties have to agree upon the choice of third party, the function of the intervenor, and what results are expected. Second, non-adjudicative third party intervention has as its goal the facilitating of a negotiated solution. Neither mediation or conciliation completely removes resolution of the dispute from the control of the disputants, hence the mechanisms are extensions of the negotiating process. Third, a willingness to use mediation or conciliation indicates the disputants interests in compromise, with the role of the intervenor to find that middle ground. Mediation in particular, but also conciliation, is not used by parties to force a favoured resolution on the other party. Fourth, but related to the third point, is that recommendations made during a mediation or conciliation process are not strict applications of law, they are politically based and designed to be acceptable to both parties. The latter three points distinguish mediation and conciliation from third party adjudication.

78. See generally Johnston, *supra* note 43 at 268-70.

war in 1979, agreed to the mediation role of the Vatican and, in particular, Cardinal Antonio Samore in their ocean boundary dispute.⁷⁹ In 1984, an agreement was reached resolving the boundary dispute between the two countries.⁸⁰ A conciliation commission established by Iceland and Norway proposed a compromise regarding the ocean area and resources around Jan Mayen that was ultimately accepted by the two countries.⁸¹ Finally, the dispute settlement regime of the 1982 *LOS Convention* directs that, where states are unable to successfully negotiate resolution of an ocean boundary dispute or are unable to agree to adjudicate the dispute, compulsory conciliation is to be utilized.⁸² The negotiators of the *LOS Convention* clearly gave to conciliation “a prominent place” in its elaborate dispute settlement regime.⁸³

4.2 Use In the *St. Pierre and Miquelon Dispute*

Faced with a breakdown in negotiations in 1988, Canada and France sought the assistance of Enrique Iglesias of Uruguay as mediator.⁸⁴ As one commentator has stated:

Since mediation usually is conducted in circumstances of extreme political delicacy, it may be counter-productive to publish any document or otherwise disclose the nature of the mediator’s input. . . . [T]he success of the mediation is measured in terms of persuasiveness, and successful mediation brings the parties to (or back to) the negotiating table, if not to an actual agreement on a boundary settlement or arrangement.⁸⁵

79. Described in Johnston, *supra* note 43 at 192–96 and T. Princen, *Intermediaries in International Conflict* (Princeton: Princeton University Press, 1992) at 133–85.

80. *Treaty of Friendship and Peace between Argentina and Chile*, 29 November 1984, 24 I.L.M. 11.

81. *Conciliation Commission Report*, *supra* note 9; and see E.L. Richardson, “Jan Mayen In Perspective” (1988) 82 Am. J. Int’l L. 443 and Johnston, *supra* note 43 at 159–63.

82. Article 280 of the *LOS Convention*, *supra* note 8, provides that parties to any ocean dispute can agree to utilize whatever peaceful means they wish to resolve the dispute. Only if a party is unhappy with the activities or non-activities taking place under Article 280 may a State turn to the formal dispute settlement regime of the *LOS Convention*. While adjudication through either arbitration, the International Tribunal for the Law of the Sea, or the International Court of Justice is the primary mechanism for dispute resolution, by declaration a State can exclude ocean boundary disputes from the adjudicative process. In such a case, the mechanism to be employed is compulsory conciliation. See *LOS Convention*, *supra* note 8, arts. 287, 298(1) and A.O. Adede, *The System for Settlement of Disputes Under the United Nations Convention on the Law of the Sea* (Dordrecht, The Netherlands: Martinus Nijhoff, 1987) at 277–81.

83. Merrills, *supra* note 77 at 163–64.

84. Canadian Press, “Uruguayan to Mediate Fish Dispute” *The [Toronto] Globe and Mail* (3 November 1988).

85. Johnston, *supra* note 43 at 270.

True to this view of mediation, the work of the mediator in the Canada–France dispute is evident only in the resulting arrangements. These were the March 1989 agreement to submit the overlapping claims dispute to binding arbitration coupled with the allocation of quotas to French vessels in Canadian waters and the agreement to disagree about French quotas in the disputed area.⁸⁶

The two countries apparently never contemplated the use of mediation or conciliation to directly assist in resolving the ocean area and resources issue. Given the unquestioned predominance of negotiation as a means of peacefully resolving international disputes, *any* employment of a third party intervenor is an unusual step. Canada and France jumped directly to a binding, adjudicative third party mechanism regarding the overlapping claim disputes and by-passed the use of non-adjudicative third party intervention. Given the variation of schemes and trade-offs discussed by the parties during negotiations, the unwillingness (or inability) to utilize either mediation or conciliation as a means to facilitate reaching a resolution can be seen as a missed opportunity.

As with the limited success of negotiations, so too with the non-use of helpful third party intervention, *timing* appears to have been the most important factor.⁸⁷ Prior to the mid-1980s, the two states felt that third party intervention was premature as bilateral negotiations were seen as productive. By the mid-1980s the time for non-adjudicative third party intervention had passed. Negotiations had been frustrated for many years, numerous compromise packages had been suggested and rejected, and any process that prolonged negotiation was seen, by Canada at least, as detrimental to the health of the living resources in the disputed area.

86. The 1989 *Compromis*, *supra* note 3. The fisheries agreements are noted in *supra* note 73.

87. Timing is given of one of the three crucial aspects of third-party intervention in disputes by Chinkin & Sadurska, *supra* note 33 at 65. Specific to mediation, timing is discussed by Merrills, *supra* note 77 at 30–32. At 31–32, he comments:

Mediation is likely to be particularly relevant when a dispute has progressed to a stage which compels the parties to rethink their policies. A stalemate is clearly one such situation; another is when the parties come to recognize that the risks of continuing a dispute outweigh the costs of trying to end it.

More generally on timing and dispute settlement, see Rubin, “The Timing of Ripeness and the Ripeness of Timing” in L. Kriesberg & S.J. Thorson, eds., *Timing the De-escalation of International Conflicts* (Syracuse, N.Y.: Syracuse University Press, 1991) 237.

5.0 *International Adjudication*

5.1 *Employment in Ocean Boundary Disputes*

In only the rarest of situations do disputing States rely on adjudication to resolve or assist them in resolving an international dispute. The reluctance to utilize adjudication arises principally because disputing States lose control over the process and result and hence the opportunity for an unacceptable outcome is enhanced.⁸⁸ As one distinguished authority has written:⁸⁹

[Governments] recognize that there is a place, and even a necessity, for adjudication but as the record shows, the actual recourse to arbitration or courts is comparatively minimal in relation to the number of legal disputes that concern them. It is no great mystery why they are reluctant to have their disputes adjudicated. Litigation is uncertain, time consuming, troublesome. Political officials do not want to lose control of a case that they might resolve by negotiation or political pressures. Diplomats naturally prefer diplomacy; political leaders value persuasion, manoeuvre and flexibility. States do not want to risk losing a case when the stakes are high or be troubled with litigation in minor matters.

Deciding whether to utilize adjudication involves a careful calculation of positives and negatives. Almost all international adjudication is the product of an agreement by the parties that it should be used.⁹⁰ Essential to this agreement is the role to be played by the decision of the adjudicative tribunal in the resolution of the dispute and what type of tribunal is to be utilized. States can utilize adjudication in a number of ways, for example, to fully resolve a dispute; to clarify legal principles that will assist countries in negotiating a resolution; or to deal with one aspect of a much larger dispute. Hence, adjudication can be seen as dispositive (actually resolving the dispute) or facilitative (making a decision that will assist the disputants in reaching a negotiated solution).⁹¹

88. See generally Bilder, *supra* note 43 at 15.

89. O. Schachter, "International Law in Theory and Practice" (1982) 178 *Recueil des Cours* 9 at 208.

90. Agreement to adjudicate can be achieved after a dispute has arisen or can be given prior to a dispute arising where a State accepts in a treaty to adjudicate when disagreements arise about that treaty or the State accepts the jurisdiction of the International Court of Justice to adjudicate disputes. Where prior consent to adjudicate is involved, the situation can arise where a State is an unwilling partner to litigation and this may even go so far that a state will refuse to participate in the litigation even though it had previously agreed to do so. See generally T.D. Gill, *Litigation Strategy at the International Court* (Dordrecht, The Netherlands: Martinus Nijhoff, 1989) at 70–74. Where the consent of a State to adjudicate has been given prior to a dispute arising, the record of litigation in resolving disputes is not good. See Gross, "Compulsory Jurisdiction under the Optional Clause" in L.F. Damrosch *et al.*, eds., *International Court of Justice at a Crossroads* (Dobbs Ferry, N.Y.: Transnational, 1987) 45.

91. Johnston, *supra* note 43 at 29, 237–38.

Two forms of international adjudication exist—judicial settlement, usually the International Court of Justice, and arbitration. Both lead to binding decisions. While differences exist in the operation of the International Court and arbitration panels,⁹² the most significant difference is in the selection of the members of the tribunal. The International Court has its membership and procedural rules established by multilateral agreement.⁹³ An arbitration tribunal is created by the disputing parties which determine its membership and rules of procedure.⁹⁴ The conventional view is that arbitration provides more flexibility for the parties than recourse to the International Court or similar permanent judicial body.

In a surprising number of situations States have agreed to utilize international adjudication, either the International Court of Justice⁹⁵ or *ad hoc* arbitration tribunals,⁹⁶ to assist them in resolving overlapping ocean claim disputes. One commentator has noted:

Most states are reluctant to submit to an international process of adjudication, whether in the form of litigation or arbitration. But national pride is often at stake in a boundary dispute, and the human obsession with territoriality seems to account for the relatively high incidence of boundary-related issues among disputes that are submitted to international adjudication.⁹⁷

In several cases, the role assigned the tribunal has been to pronounce upon the appropriate rules and principles to guide the disputants in resolving their overlapping claims.⁹⁸ In other words, the adjudication was designed to assist the parties in reaching a negotiated solution. More

92. See Sohn, *supra* note 76 at 1125–30 and Merrills, *supra* note 77 at 80–154.

93. See generally Merrills, *ibid.* at 109–30.

94. Merrills, *ibid.*

95. *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, [1969] I.C.J. Rep. 3; *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, [1982] I.C.J. Rep. 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States)*, [1984] I.C.J. Rep. 246; and *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, [1985] I.C.J. Rep. 13.

96. *Anglo-French Award*, *supra* note 42 and *Tribunal arbitral pour la délimitation de la frontière maritime (Guinea v. Guinea Bissau)*, 25 I.L.M. 251.

97. Johnston, *supra* note 43 at 9–10.

98. In particular, see the *North Sea Continental Shelf Cases*, *supra* note 95. This approach was also used in *Continental Shelf (Libya/Tunisia)*, *supra* note 95.

recently, tribunals have been requested to construct or have taken on the task of constructing an ocean boundary for the disputants.⁹⁹

While adjudicative bodies are limited to considering legal principles, the international law on ocean boundary delimitation directs that the principal task of a tribunal is to reach an equitable result.¹⁰⁰ Hence, ocean boundary tribunals have a wide range of options in crafting awards. Tribunals, in evaluating whether a boundary result is equitable, must be aware of the political acceptability of their decision to the disputing parties. This acceptability arises from the logical and persuasive reasoning of the tribunal, the tribunal's response to the arguments presented, and the nature of the compromise struck by the tribunal. One authority has stated:

It is submitted that, in practice, States are aware of, and accept, the element of compromise inherent in the international judicial process. What they are less prepared to accept is a process which is either divorced from the arguments that they have addressed to the Court, or which seems to deny them the opportunity to be heard on all the essential issues which form the foundation for eventual judgment of the Court.¹⁰¹

It has been argued elsewhere that it is a tribunal's freedom from doctrinal rigidity in ocean boundary cases that has led States to utilize adjudication so frequently.¹⁰²

The major limitation that has existed in boundary adjudication, however, has been the emphasis placed on the resolution of the ocean area dispute as opposed to the ocean resource dispute. Tribunals, drawing their

99. *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *supra* note 95 and the *Anglo-French Award*, *supra* note 42. In the *Continental Shelf (Libya/Malta)*, *supra* note 95, the International Court, while not requested to draw the ocean boundary, proceeded to do so as a means of answering the questions presented. It was this boundary that was ultimately accepted by the two countries. See *Agreement Implementing Article III of the Special Agreement and the Judgement of the International Court of Justice, Malta–Libya*, 10 November 1986, reprinted in U. Leanza & L. Sico, eds., *Mediterranean Continental Shelf*, vol. 1 (Dobbs Ferry, N.Y.: Oceana, 1988) at 117.

100. The norm for maritime boundary delimitation was described in the *Canada–France Case*, *supra* note 4 at para. 38, as follows:

The Parties are in agreement with respect to the fundamental norm to be applied in this case, which requires the delimitation to be effected in accordance with equitable principles, or equitable criteria, taking account of all the relevant circumstances, in order to achieve an equitable result. The underlying premise of this fundamental norm is the emphasis on equity and the rejection of an obligatory method.

101. Bowett, "Contemporary Developments in Legal Techniques in the Settlement of Disputes" (1983) 180 *Recueil des Cours* 200 at 200–01.

102. See Bowett, *supra* note 101 at 191, 198–200; Johnston, *supra* note 43 at 246; and T. McDorman, "The Libya–Malta Case: Opposite States Confront the Court" (1986) 24 *Can. Y.B. Int'l L.* 355 at 362–64.

jurisdiction from the agreement by the parties to litigate, have been required to draw a single ocean boundary which has led to reliance upon geography (a line being a geographic construct) in their decisions and ignoring resource use, management and the economic and social reliance upon the resources by the disputants. For example, in the *Gulf of Maine* case, the dispute was over fisheries allocation, yet the decision virtually ignored fishery considerations.¹⁰³ Where a tribunal draws a boundary that apparently resolves an overlapping claim dispute, there is frequently a need for the two countries to negotiate respecting resource sharing and management across the boundary and respecting enforcement issues.¹⁰⁴

5.2 *Use in the St. Pierre and Miquelon Dispute*

During the first round of negotiations between Canada and France in the late 1960s, the possibility of adjudication was discussed.¹⁰⁵ In the mid-1970s, France and the United Kingdom employed an arbitration panel to deal with overlapping ocean claims in the English Channel area.¹⁰⁶ Canada agreed to use a Chamber of the International Court to litigate with the United States regarding the Gulf of Maine.¹⁰⁷ Moreover, in 1985 Canada and France agreed to use international adjudication to resolve differences arising under the 1972 Canada–France fisheries accord.¹⁰⁸ It is not surprising, therefore, that Canada and France viewed international adjudication as an acceptable option in their overlapping claims dispute respecting St. Pierre and Miquelon.¹⁰⁹

Other factors important in the decision to adjudicate included the frustrating, failed negotiations; the urgency, from a resource point of

103. See T. McDorman, P. Saunders & D. VanderZwaag, "The Gulf of Maine Boundary: Dropping Anchor or Setting a Course?" (1985) 9 *Marine Policy* 90 at 101.

104. In the Gulf of Maine region between Canada and the United States, the ocean boundary has not obviated the need for bilateral fisheries management. Differences in regulatory approach to the fishery, however, have been a major stumbling block between the two countries. See generally D. VanderZwaag, *The Fish Feud* (Lexington, Mass.: Lexington Books, 1983) at 37–87. Despite the need, the two countries have been unable to develop a cooperative approach to cross-boundary fisheries management. The two countries, however, have been able to reach an accord on fisheries enforcement in the vicinity of the boundary. See D. Russell, "International Ocean Boundary Issues and Management Arrangements" in D. VanderZwaag, ed., *Canadian Ocean Law and Policy* (Markham, Ont.: Butterworths Canada, 1992) 479.

105. *Canadian Memorial*, *supra* note 10 at 111.

106. *Anglo-French Award*, *supra* note 42.

107. *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *supra* note 95.

108. *La Bretagne Arbitration*, *supra* note 20.

109. Past history and shared values are two of a number of considerations that are important when states seek strategies to resolve international disputes. Note Bilder, *supra* note 43 at 14.

view, of a resolution; the perceived strength by each country of their legal and political arguments; the non-vital nature of the issue in dispute coupled with the negative role the dispute was having on general Canada–France relations; and the realization that an adjudicative-created compromise would be more politically acceptable to a “losing” disputant than a similar, negotiated compromise. The litigation gamble for Canada appears to have been greater than for France. If the French were successful in arguing for a broad ocean area, the effects upon Canadian fishing activity would be significant. If Canada was successful in its argument for a 12 nautical mile enclave for St. Pierre and Miquelon, fishing vessels from France would be displaced but, through the 1972 Canada–France fisheries accord, fishers from the French islands would be protected.¹¹⁰

The two countries opted to employ a five-member *ad hoc* Arbitration Tribunal to which each country appointed a national.¹¹¹ The parties agreed to have the Tribunal construct a single maritime boundary for all purposes.¹¹² As noted above, the requirement that the line be for all purposes had become the general practice, although in the situation of this case it appeared to have been motivated by French fears that previous discussions of multiple, functional lines would undermine its legal argument.¹¹³

Both States hoped that the adjudication would resolve both the ocean area and resources dispute. If the Tribunal adopted the Canadian position of only a 12 nautical mile zone for the French islands, then French fishing would be easily controlled and the activities would have less impact on the worsening stock depletion crisis. If the Tribunal accepted the French argument of a broad zone for the islands determined by reliance on equidistance, then Canadian fishers could be eliminated from the area and resource harvesting and management (fish and oil) would fall exclusively to France. Neither country offered a significant middle ground to the Tribunal.

In June 1992 the five-member Arbitration panel announced its decision. The Tribunal rejected the Canadian proposition that the extent of

110. Admittedly, this is a very Canadian view.

111. The selections by Canada and France reflected the strengths of their positions. France appointed a strong supporter of equidistance and a legal technician. Canada appointed a former bureaucrat who could advocate the equities of the case. See T. McDorman, “Canada and France Agree to Arbitration for the St. Pierre and Miquelon Boundary Dispute” (1990) 5 *Int’l J. Estuarine & Coastal L.* 357. The other tribunal members were Eduardo Jimenez de Arechaga, President; Professor Gaetano Arangio-Ruiz; and Professor Oscar Schachter.

112. The 1989 *Compromis*, *supra* note 3, art. 2(1). See generally McDorman, “The Canada–France Boundary Case,” *supra* note 14 at 167–68.

113. See McDorman, “The Canada–France Boundary Case,” *ibid.* at 163–69.

maritime rights of an island was lessened by political status, size or length of coastline.¹¹⁴ Equally rejected was the French position that equidistance was the appropriate method to be employed.¹¹⁵ The Tribunal created an ocean boundary that gave a 12 nautical mile zone to St. Pierre and Miquelon, a further 12 nautical miles for the western sector of the islands, and an extremely curious 10.5 nautical mile corridor which reaches 200 nautical miles into the Atlantic Ocean from the southern sector of St. Pierre and Miquelon.¹¹⁶ Immediate reaction to the Award was mixed, although generally Canadian officials felt the decision was favourable.¹¹⁷

The countries had hoped that the Adjudication would resolve the resources dispute by resolving the ocean area dispute. However, while resolving the ocean space allocation dispute, the Adjudication only partially resolved the ocean resources allocation dispute. The 10.5 nautical mile corridor which extends into the Atlantic Ocean 200 nautical miles ensures that France has a role to play in resource management discussions. The corridor forces Canada to include France in decision-making about resources, yet France is aware that its voice is weak. The corridor forces cooperation, if resources are to be optimally protected and utilized. The Tribunal was aware that its decision was going to create a need for further negotiation in order to fully resolve the Canada–France dispute around St. Pierre and Miquelon.¹¹⁸

The Adjudication failed to resolve the ocean resources dispute because it was constrained by its single-line mandate and previous adjudications to deal only with the ocean area dispute. Moreover, the Tribunal was constrained by the expected outcome of such an adjudication, namely, that the boundary line would be based on some degree of compromise.¹¹⁹ It is, therefore, not surprising that the Adjudication has not fully resolved the dispute between Canada and France since the mechanism has inherent rigidities and limitations.

114. *Canada–France Case*, *supra* note 4 at paras. 44–52.

115. *Canada–France Case*, *supra* note 4 at paras. 41, 64–65.

116. *Canada–France Case*, *supra* note 4 at paras. 66–71. A most insightful analysis of the decision has been done by G.P. Politakis, “The French-Canadian Arbitration Around St. Pierre and Miquelon: Unmasked Opportunism and the Triumph of the Unexpected” (1993) 8 *Int’l J. Marine & Coastal L.* 105–34. See also Y. Marston, “St. Pierre–Miquelon Arbitration: Canada–France Delimitation Award” (1993) 17 *Marine Policy* 155–70 and L. de La Fayette, “The Award in the Canada–France Maritime Boundary Arbitration” (1993) 8 *Int’l J. Marine & Coastal L.* 77.

117. J. Sallot, “Court Rejects Maritime Boundary Claims” *The [Toronto] Globe and Mail* (11 June 1992) A1; C. Woodward, “Canada Hauls in Fish Border Win” *Victoria Times-Colonist* (11 June 1992) A1–A2; and K. Cox, “Officials Celebrate Fisheries Decision” *The [Toronto] Globe and Mail* (12 June 1992) A5.

118. See *Canada–France Case*, *supra* note 4 at paras. 84–87.

119. See Bowett, *supra* 101 at 191, 198–200.

While the Adjudication did not fully resolve the ocean resources dispute around St. Pierre and Miquelon, the Tribunal's decision has changed the character of the dispute. Rather than an emotive sovereignty clash, the continuing difficulties are about the best way for neighbours to share a dwindling resource. It is a "common good" dispute, rather than a "yours and mine" dispute. Both countries know their respective ocean areas and the ultimate geographic limits of the rights. The most important effect of the Tribunal's decision has been the removal of the St. Pierre and Miquelon dispute from the front page of newspapers and the top agenda item of Canada–France relations.

6.0 *The Continuing Search For Resolution*

An international dispute is only resolved "when each of the parties cease to have a continuing sense of grievance, or at least ceases actively to assert its claim."¹²⁰ After 25 years of effort, Canada and France have successfully resolved the ocean area dispute, but not the resource allocation dispute, in the waters around St. Pierre and Miquelon. The Adjudication has forced the two countries back to negotiations. The post-Tribunal negotiations between Canada and France have not resulted in any agreement on resource allocation. In January 1993, fishers from St. Pierre and Miquelon staged a highly visible protest of the lack of progress in talks.¹²¹ The virtual collapse of Canada's East Coast fishery¹²² has increased the difficulty of discussions.

7.0 *Conclusion*

The Canada–France dispute over the ocean area and resources adjacent to the French islands of St. Pierre and Miquelon located a few miles off the Canadian East Coast is an interesting example of the employment by two countries of different international dispute settlement mechanisms. For twenty years the countries engaged in negotiations that were at times productive and at other times non-productive. By the mid-1980s it was perceived that negotiations on the main issues in dispute, ocean space and resource allocation, were no longer going to be fruitful. A mediator was accepted to assist the two countries to develop an interim fishing accord

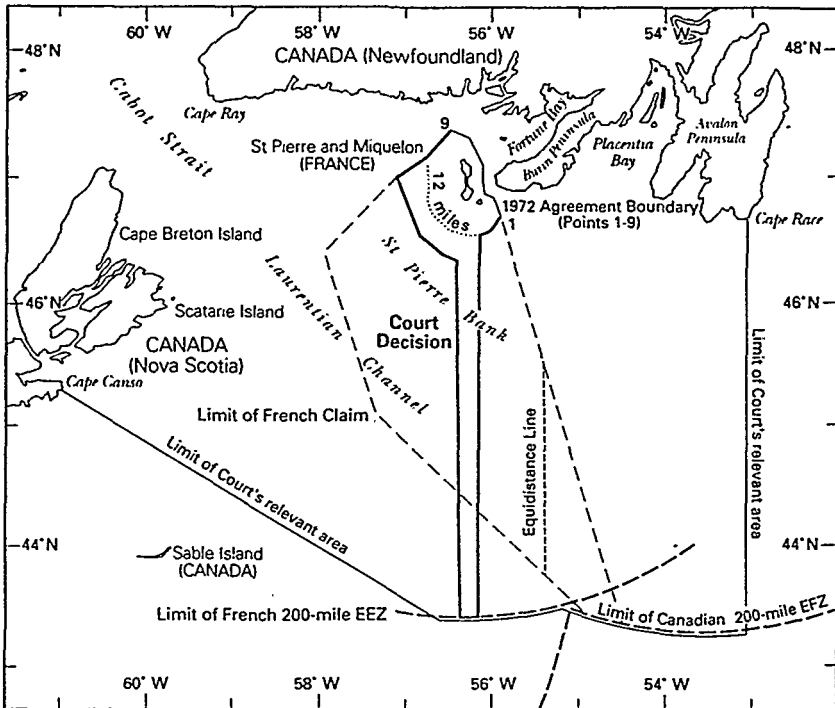
120. Bilder, *supra* note 43 at 28.

121. See "Cod Protest arrests" *supra* note 5 and "Protest Islands Face Bleak Future" *Fishing News International* (March 1993) 6–7.

122. See "Canada's 2-year Northern Ban Starts" *Fishing News International* (August 1992) 4–5; "Northern Cod Fall Goes On" *Fishing News International* (July 1993) 3; and "More Closures in Groundfish Crisis" *Fishing News International* (October 1993) 56.

and to reach agreement to submit the boundary dispute to binding, third-party adjudication. The result of the adjudication is an allocation of ocean space which, although apparently favouring Canada, is a compromise between the positions taken by the two countries in litigation.¹²³ While the areas of national jurisdiction are no longer in question, the resources issue cannot be said to be resolved despite the adjudication. Over 25 years of negotiation, mediation and adjudication have left the two countries only part way to a final resolution of the international dispute.

Appendix A
Map of Canada–France Maritime Boundary Delimitation Award



From G. Marston, "St. Pierre-Miquelon Arbitration: Canada–France Maritime Delimitation Award" (1993) 17 *Marine Policy* 155 at 156.

123. "This Court does not consider that either of the proposed solutions provides even a starting point for the delimitation" (*Canada–France Case*, *supra* note 4 at para. 65).