

Why litigate a maritime boundary? Some contributing factors

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All coastal states have a maritime boundary relationship with at least one neighbouring state. These relationships often involve overlapping claims to the same ocean area, necessitating a maritime boundary to separate the area of one coastal state from that of another. To date, fewer than 200 of the approximately 430 potential maritime boundaries worldwide have been delimited (and some only partially),¹ leaving well over 200 latent or active maritime boundary disputes still to be resolved.² Of those disputes that have been resolved, the vast majority have been resolved by negotiation. However, a significant minority of these disputes have been resolved by litigation.³ So far, litigation has accounted for the settlement of twenty-one disputed maritime boundaries, with three additional cases pending at the time of writing.⁴

¹ Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World*, 2nd edn (Leiden: Martinus Nijhoff, 2005), 218: 'Of these 427 potential maritime boundaries, only about 168 (39 per cent) have been formally agreed, and many of these only partially'.

² Tallies of delimited and potential maritime boundaries vary with time and methodology. Regardless of methodology, it is safe to say that over half of the maritime boundaries in the world are not yet agreed.

³ Here, the term 'litigation' includes both adjudication and arbitration. Political scientists working in the field of international dispute settlement often take the approach of 'treating the two [arbitration and adjudication] as functionally similar'. Todd L. Allee and Paul K. Huth, 'Legitimizing Dispute Settlement: International Legal Rulings as Domestic Political Cover', (2006) 100(2) *American Political Science Review* 219, 220.

⁴ The twenty-one cases, counting both *North Sea* cases, in which an international maritime boundary dispute was addressed if not completely resolved, are as follows: *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgment)*, [1969] ICJ Rep. 3 (*North Sea*); *Beagle Channel (Argentina/Chile) (Award)*, [1977] 21 RIAA 57; *Continental Shelf (United Kingdom/France) (Award)*, [1977] 18 RIAA 3; *Dubai–Sharjah Border (Dubai/Sharjah) (Award)*, [1981] repr. in (1993) 91 ILR 543; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Merits)*, [1982] ICJ Rep. 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States) (Judgment)*, [1984] ICJ Rep. 246; *Continental Shelf (Libyan Arab Jamahiriya/Malta) (Merits)*, [1985] ICJ Rep. 13; *Délimitation de la frontière maritime entre la Guinée et la Guinée-Bissau (Guinée/Guinée-Bissau)*, [1985] 19 RIAA 149 (unofficial English translation

Maritime boundary disputes, like territorial sovereignty or land boundary disputes, imply core sovereignty concerns.⁵ This may account for the relatively few instances in which states have delegated decision-making authority to a third party. Much of the literature that is most relevant to maritime boundary dispute resolution involves studies of the more robust and longer-standing practice in the field of land boundary dispute resolution.⁶ Although similar in nature, the two categories of dispute and their subject matter are not identical. Maritime boundary relationships tend to be younger than land boundary relationships because the regime that created these relationships is derivative of and subsequent

available in 25 ILM 252 [1986]); *Délimitation de la frontière maritime entre la Guinée-Bissau et le Sénégal (Guinée-Bissau/Sénégal) (Award)*, [1989] 20 RIAA 121 (unofficial English translation available as Annex to Application of Guinea-Bissau instituting proceedings before the ICJ, available at www.icj-cij.org/docket/files/82/11289.pdf) (*Guinée-Bissau v. Sénégal*); *Délimitation des Espaces Maritimes entre le Canada et la République Française (Canada/France) (Award)*, [1992] 21 RIAA 267 (unofficial English translation available [1992] 31 ILM 1149); *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway) (Judgment)*, [1993] ICJ Rep. 38 (*Jan Mayen*); *Maritime Delimitation (Eritrea/Yemen) (Second Phase)*, [1999] 22 RIAA 335; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) (Merits)*, [2001] ICJ Rep. 40; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) (Merits)*, [2002] ICJ Rep. 303; *Barbados v. Trinidad and Tobago (Award)*, [2006] 27 RIAA 147; *Guyana v. Suriname (Award)*, UNCLOS Arbitral Tribunal, 17 September 2007; (2008) 47 ILM 164, available at www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras) (Judgment)*, [2007] ICJ Rep. 659; *Maritime Delimitation in the Black Sea (Romania v. Ukraine) (Judgment)*, [2009] ICJ Rep. 61 (*Black Sea*); *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) (Judgment)*, ITLOS, Case No. 16, 14 March 2012), available at www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/1-C16_Judgment_14.02.2012.pdf; *Territorial and Maritime Dispute (Nicaragua v. Colombia) (Judgment)*, ICJ, General List No. 124, 19 November 2012.

The three pending cases, in order of initiation date, are: 'Application Instituting Proceedings', *Maritime Dispute (Peru v. Chile)*, ICJ, General List No. 137, 16 January 2008; *Bangladesh v. India*, UNCLOS Arbitral Tribunal, 8 October 2009 (*Bangladesh v. India*); *Arbitration between Croatia and Slovenia (Croatia v. Slovenia)*, PCA, 13 April 2012.

⁵ 'The sea boundary question . . . lies at the very heart of sovereignty', wrote Gamble in 1976 about plans at that point in the negotiations of UNCLOS to limit the applicability of the dispute settlement provisions in specific situations. John King Gamble, Jr, 'The Law of the Sea Conference: Dispute Settlement in Perspective', (1976) 9 *Vanderbilt Journal of Transnational Law* 323, 331. Indeed, maritime boundary disputes are one of a few categories of dispute for which states may declare that they do not accept the compulsory procedures entailing binding decisions as provided in Part XV, Section 2. See United Nations Convention on Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994), 1833 UNTS 3 (UNCLOS), Art. 298(1)(a).

⁶ See further Chapter 10 in this volume.

to the much older territorial sovereignty regime. Exclusive coastal state sovereign rights and jurisdiction in areas beyond a narrow territorial sea is a twentieth-century invention that is still coming into full effect as coastal states continue to claim sovereign rights and jurisdiction in larger areas of the ocean, including the seabed and subsoil of the continental shelf as permitted under the current law of the sea.⁷ Being young, many of these maritime boundary relationships have not had the opportunity to mature, setting the law and practice of maritime boundary dispute resolution in an early to mid-life developmental stage. From this vantage point, we can assess past practice while watching the development of the dispute resolution process as it continues to unfold.

Contributing to the relative youth of these disputes has been the only recent interest in and ability to exploit valuable hydrocarbon resources on the continental shelf, the land-based version of which has been accessible for centuries. These strategic offshore resources have been at the centre, and often acted as the trigger point, in most of the maritime boundary disputes that have reached litigation.⁸

Other differences between territorial and maritime disputes include the modes of acquisition of title, the sources and rules of law defining rights and obligations in maritime areas, and the procedural and substantive rules which drive the resolution of disputes concerning maritime areas. The differences between the law of territorial acquisition and the acquisition of maritime rights and the manner in which they are secured may impact the costs associated with the non-resolution of maritime boundary disputes. Brilmayer and Klein have argued that, unlike land, which has direct consumption value, is susceptible to occupation, and for which effective occupation may create title, maritime resources, unless they are consumed directly by the coastal state, require marketable title in order to be valuable.⁹ Marketable title is created by operation of law, specifically through the application of the rules of maritime delimitation in negotiation or litigation. Until such resolution, the resources in disputed maritime areas may be of little or no value to the coastal states concerned.

⁷ See, e.g., the ongoing process of making submissions to the Commission on the Limits of the Continental Shelf pursuant to UNCLOS, Art. 76 and Annex II.

⁸ Some exceptions include *Jan Mayen*, in which fisheries resources were the main issue, and *El Salvador/Honduras*, in which the land boundary and island sovereignty issues were the primary considerations.

⁹ Lea Brilmayer and Natalie Klein, 'Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator', (2000-1) 33 *NYU Journal of International Law and Policy* 703, 732-4.

Various approaches have been taken to resolve maritime boundary disputes under vastly different sets of circumstances. Nonetheless, these disputes share several general characteristics. As with most disputes that arise on the international plane, parties to the negotiation or litigation of a maritime delimitation dispute face a co-ordination problem in which neither party may unilaterally compel negotiation or litigation. This is a function of a consent-based legal system. Those parties also face a co-operation or distribution problem in the division of overlapping claims to maritime area, which is often perceived as a zero-sum game. Moreover, like other international disputes over high-saliency subject matter, maritime boundary dispute resolution plays out at two levels: at the international level, where the disputant states interact, and at the national level, where domestic constituencies exert influence over the decision makers who represent the state on the international plane.¹⁰

The main questions addressed in this chapter are why and under what circumstances – given the alternatives of negotiation and non-resolution – do states choose to resolve their maritime boundary disputes through litigation? This chapter begins by setting out the maritime disputes in which one or both states have decided to litigate. The introduction to the cases is followed by some thoughts on the relationship between the two modes of dispute resolution addressed herein – negotiation and litigation. The answers to the questions raised above will be influenced first and foremost by the jurisdictional context in which the parties find themselves. Specifically, does an international court or tribunal enjoy adjudicative jurisdiction over the parties with respect to the dispute, and, if so, how was this jurisdiction created? A lack of jurisdiction must be considered one of the constraints, if not the primary constraint, on the decision to litigate in the international legal system. Jurisdiction on the basis of ad hoc and *ante hoc* consent is briefly discussed in the context of maritime delimitation. If litigation is an option, many contributing factors could bear on the litigation decision-making process. The literature is then reviewed to expose several of the important factors. It is posited that, together, these factors contribute to a state's assessment of the costs of non-resolution, negotiated resolution, and litigated resolution. On the basis of this assessment of perceived costs states will pursue the lowest-cost option. However, because litigation is a bilateral process requiring the consent of both parties, the lowest-cost option for one

¹⁰ Robert D. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', (1988) 42 *International Organization* 427.

state may be blocked by the non-consent of the other. This brings the jurisdictional bases back into the analysis and allows a distinction to be made between the important contributing factors in the presence of ad hoc and *ante hoc* consent. This chapter finishes with some brief concluding remarks.

The cases

Maritime boundary cases are frequently found on the dockets of international courts and tribunals. Writing in the early 1990s, Charney stated that ‘there has been more litigation before the International Court of the Justice (ICJ) on maritime boundaries than any other single subject’.¹¹ That trend has continued, with many more maritime boundary cases arriving on the Court’s docket in the subsequent decades. The ICJ has been presented with sixteen cases involving a disputed maritime boundary since the two inaugural *North Sea* cases, including the maritime boundary case currently pending before the Court between Peru and Chile.¹² The International Tribunal for the Law of the Sea (ITLOS) has now ruled on its first maritime boundary dispute in the litigation between Bangladesh and Myanmar. Eight ad hoc tribunals have been formed to consider maritime boundary disputes.¹³ By definition, the adjudicative jurisdiction in these cases arose from ad hoc consent embodied in a *compromis* or arbitration agreement. The arbitration between Croatia and Slovenia is the most recent example in this category. Finally, four arbitration tribunals have

¹¹ Jonathan I. Charney, ‘Introduction’, in Jonathan I. Charney and Lewis M. Alexander (eds.), *International Maritime Boundaries* (Dordrecht: Martinus Nijhoff, 1993), Vol. I, xxiii, xxvii.

¹² The ICJ reached a judgment with respect to the disputed maritime boundary in thirteen of the sixteen cases; see above n. 4 for those thirteen cases. In the case between Greece and Turkey, the ICJ found that it did not have jurisdiction to entertain the Greek application; see *Aegean Sea Continental Shelf (Greece v. Turkey) (Jurisdiction)*, [1978] ICJ Rep. 3 (*Aegean Sea*). In the case between El Salvador and Honduras, El Salvador asked the ICJ to delimit a maritime boundary in the Gulf of Fonseca. The Court declined to do so; see *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (Merits)*, [1992] ICJ Rep. 351. In the case between Guinea-Bissau and Senegal, the ICJ did not reach a judgment on the merits; see *Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)*, discontinued by Order of the Court, 8 November 1995. Nonetheless, these three cases are important here for what they tell us about the decision making that led to the filing of the case. The delimitation outcome is not relevant to this analysis.

¹³ See above n. 4 for the eight ad hoc arbitrations, including the arbitration pending between Croatia and Slovenia.

been formed pursuant to the United Nations Convention on the Law of the Sea (UNCLOS) Annex VII to hear maritime boundary disputes.¹⁴ In this category, *Land Reclamation* did not reach judgment on the merits, and *Bangladesh v. India* is ongoing.

The total number of maritime boundary litigations that have been initiated, if not concluded, is twenty-eight.¹⁵ With the exception of trade and investment disputes, disputed maritime boundaries are one of the most litigated subjects in the field of public international law, rivalling land boundary disputes and disputes concerning state responsibility. Nonetheless, in absolute terms, there have been relatively few maritime boundary litigations. The number pales in comparison to maritime boundary disputes resolved by negotiation, and the cases provide only a small sample size consisting of units with widely divergent facts and circumstances. To the extent that these disparate cases can be usefully compared and contrasted in order to discern important considerations in the decision to litigate, it seems that the forum is a less important factor than the jurisdictional posture of each case, specifically whether jurisdiction was based on the ad hoc or *ante hoc* consent of the parties.

When the twenty-eight maritime delimitation cases are ordered chronologically, with forum and the jurisdictional basis in mind, two interesting trends are revealed. The first is the trend towards decentralization of the international judiciary. Although the ICJ shared the caseload with ad hoc tribunals nearly from the start, the new UNCLOS institutions – ITLOS and Annex VII arbitration tribunals – are now also available and are being utilized by states to resolve their maritime boundary disputes. This trend towards a multi-forum dispute settlement system will come as no surprise to international legal scholars, especially those concerned with the proliferation of dispute settlement bodies and the potential for fragmentation within the international legal system.

The second trend is more stark. The word ‘trend’ does not capture the abrupt shift in the late 1980s away from litigation on the basis of

¹⁴ See above n. 4 for citations to three of the cases that have been instituted pursuant to UNCLOS Part XV and Annex VII. The case between Malaysia and Singapore, in which Malaysia complained of the impact of land reclamation projects on, *inter alia*, the undelimited boundary in the Johor Strait, was terminated before the tribunal reached a decision on the merits; see *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, [2003] ITLOS Rep 10; [2005] 27 RIAA 133 (*Land Reclamation*).

¹⁵ Recalling that what is important in this study is the pre-litigation decision-making process of one or both states, this count includes those maritime boundary cases that did not end in a judgment on the merits and may not have proceeded past a jurisdictional challenge.

ad hoc consent and towards litigation on the basis of *ante hoc* consent. During the two decades between the 1967 start of the *North Sea* cases to the 1986 start of *El Salvador/Honduras*, fourteen maritime boundary cases were initiated, thirteen of them on the basis of ad hoc consent. The one exception, *Aegean Sea*, initiated by Greece in 1976, did not proceed on the merits for lack of jurisdiction. In contrast, in the two and a half decades since 1986, only two of the fifteen maritime boundary cases have been brought on the basis of ad hoc consent, *Eritrea/Yemen* and *Croatia/Slovenia*. The remaining thirteen were brought on the basis of *ante hoc* consent of the parties.¹⁶ For the first twenty years of modern maritime delimitation, 93 per cent of maritime delimitation cases were brought on the basis of ad hoc consent. Since 1986, only 13 per cent of these cases have been brought on that basis.

Part of this shift may be explained by the 1994 entry into force of UNCLOS, with its compulsory dispute settlement procedures.¹⁷ Five of the post-1986 cases based jurisdiction in the *ante hoc* consent created upon becoming party to UNCLOS, but more traditional bases of jurisdiction were used in eight of these cases, including declarations made under Article 36(2) of the Statute of the ICJ and compromissory clauses in bilateral and multilateral treaties. The shift away from ad hoc consent may also be a function of increasingly clear approaches that will be applied in maritime boundary litigations. Specifically, courts and tribunals have set out a three-step methodology for reaching an equitable delimitation. With clarity and certainty states may better predict an outcome and compare that likely outcome to the status quo. Perhaps this shift away from a reliance on ad hoc consent is an early sign of what Kingsbury calls 'a new paradigm of routinised litigation and judicial governance' in inter-state dispute settlement.¹⁸ Perhaps it indicates a growing confidence among potential litigants in the ability of the international judiciary to

¹⁶ This analysis may overemphasize the superficial or formal aspects of jurisdiction in these cases and underplay the possibility of 'tacit ad hoc consent' that may be masked by form, but it is undeniable that the practice of active consent building through the negotiation and agreement of a *compromis* to structure and to bring a case has fallen off significantly in the past twenty-five years.

¹⁷ It should be noted that, pursuant to Art. 298, maritime boundary disputes may be excluded from compulsory procedures entailing binding decisions. Approximately twenty-five of the 164 states parties to UNCLOS have elected to exclude these disputes.

¹⁸ Kingsbury sees this new paradigm emerging in international human rights, trade, and criminal tribunals, but contrasts it with 'the traditional paradigm of episodic international (inter-state) dispute settlement by tribunals'. Benedict Kingsbury, 'International Courts: Uneven Judicialisation in Global Order', in James Crawford and Martti Koskenniemi

render clear, predictable decisions in maritime delimitation cases, with which respondent states are likely to comply even in the absence of ad hoc, contemporaneous consent.

The relationship between negotiation and litigation

While some maritime boundary disputes have been settled through litigation, most of them have been settled through negotiation. Many resolutions have involved both litigation and negotiation. No single pattern emerges in the relationship between negotiation and litigation considered in the light of these cases. However, several general observations may be made. First, negotiation and litigation are not mutually exclusive. Second, a unidirectional, step-by-step progression from dispute to negotiation to litigation to resolution should not be taken for granted. Third, notwithstanding the second observation, generally litigation may not occur without some prior negotiation. And, fourth, outcomes in negotiations may impact future outcomes in litigation and vice versa.

Negotiation and litigation are not mutually exclusive. Parallel negotiation during litigation, although not often successful in resolving the dispute, is not unknown. As the ICJ wrote in one of its first 'maritime boundary' cases,

The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued *pari passu*. Several cases . . . show that judicial proceedings may be discontinued when such negotiations result in the settlement of the dispute. Consequently, the fact that negotiations are being actively pursued during the present proceedings is not legally any obstacle to the exercise by the Court of its judicial function.¹⁹

(eds.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 201, 210.

¹⁹ *Aegean Sea*, [1978] ICJ Rep. 3, 12. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Jurisdiction and Admissibility)*, [1984] ICJ Rep. 392, 440: '[T]he Court considers that even the existence of active negotiations in which both parties might be involved should not prevent . . . the Court from exercising [its functions]'; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) (Preliminary Objections)*, [1998] ICJ Rep. 275, 304 (*Cameroon v. Nigeria (Preliminary Objections)*): 'Finally, the Court has not been persuaded that Nigeria has been prejudiced as a result of Cameroon's having instituted proceedings before the Court instead of pursuing negotiations which, moreover, were deadlocked when the Application was filed.'

This approach was taken in *Land Reclamation*, during which the parties continued to negotiate in order to arrive at a resolution of their dispute. As it happened, the negotiation outpaced the parallel litigation and the parties settled before the initiation of the written stage.²⁰ The parties in *Guinea-Bissau v. Senegal* also reached a negotiated solution while their maritime boundary case was pending before the ICJ. That litigation was subsequently discontinued. The United Kingdom and France engaged in litigation concerning one part of their maritime boundary – the south-west approaches to the English Channel and in the vicinity of the Channel Islands – while setting aside for negotiation the rest of their boundary through the Channel, the Strait of Dover and into the southern North Sea. In short, litigation does not preclude negotiation and may be superseded by it.²¹

Some boundary relationships do follow a clear progression from recognition of a dispute, to negotiation, to litigation, to resolution by decision of the body hearing the case, but this progression is neither necessary nor always followed. The dispute between Canada and France, ultimately resolved in *St. Pierre and Miquelon*, did follow this pattern, as have many others. Canada's 1966 issuance of hydrocarbon exploration permits on the continental shelf precipitated the dispute.²² This was followed by over two decades of negotiation during which the territorial sea boundary between Newfoundland and St Pierre and Miquelon was agreed in 1972.²³ A mediator was appointed in the late 1980s. On the basis of the mediator's report, the parties signed their arbitration agreement in 1989, and the arbitration award establishing the boundary between Canada and France was issued in 1992. In other instances, the progression has not been so clean or unidirectional. In the *North Sea* cases, negotiation preceded and followed litigation. There the parties asked the ICJ: 'What principles and rules of

²⁰ See *Land Reclamation*, [2005] XXVII RIAA 133.

²¹ As Lowe notes, 'A judgment in a case is only one element in the process of dispute settlement; and it is not necessarily either the final or the most important element.' Vaughan Lowe, 'The Interplay between Negotiation and Litigation in International Dispute Settlement', in Tafshir Malick Ndiaye and Rudiger Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes, Liber Amicorum Judge Thomas A. Mensah* (Leiden: Martinus Nijhoff, 2007) 235, 236–7.

²² Jan Schneider, 'Canada–France (St Pierre and Miquelon)', in Jonathan I. Charney and Lewis M. Alexander (eds.), *International Maritime Boundaries* (Dordrecht: Martinus Nijhoff, 1998), Vol. III, 2141, 2143.

²³ Agreement between the Government of Canada and the Government of the French Republic Concerning Their Mutual Fishing Relations off the Atlantic Coast of Canada (signed and entered into force 27 March 1972), 862 UNTS 209.

international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary' negotiated earlier in near shore areas?²⁴ The Court's 1969 judgment setting out those principles was followed by two years of negotiations resulting in agreed maritime boundaries in the North Sea among the three litigants-turned-negotiators in 1971.²⁵

There are also examples in which the litigation did not resolve all outstanding issues in the maritime boundary relationship, thus requiring subsequent negotiations to fully resolve the dispute. This normally results from jurisdictional constraints placed on the court or tribunal by the parties. For example, the chamber of the Court in *Gulf of Maine* was not asked to resolve, and did not resolve, a section of the maritime boundary in the inner Gulf or the section of the boundary beyond 200 nautical miles from the nearest state. Likewise, the Annex VII tribunal in *Guyana v. Suriname* delimited the maritime boundary only to the 200 nautical mile limit. In both of these cases the coastal states have claimed or could claim continental shelf beyond 200 nautical miles, the delimitation of which would require further negotiation.

Notwithstanding that negotiation may be carried out in parallel with or may follow litigation, some negotiation is, de facto, a necessary precondition of litigation. Clearly, in order to arrive at a *compromis*, the parties must have negotiated the terms of that agreement. In fact, in all maritime boundary cases heard on the basis of ad hoc consent there were attempts to resolve substantive disagreements by negotiation prior to litigation. However, in the context of ad hoc consent to litigate, substantive negotiations are not required. This is so, in part, because the legal dispute which the court or tribunal is asked to resolve will normally have been defined by the parties in the *compromis*.

In contrast, some degree of substantive negotiation may be required in those cases brought by means other than *compromis*. Such negotiations may be necessary in order to identify and define the dispute on which the court or tribunal is asked to rule, or may be required as a formal precondition to the adjudicative jurisdiction of the court or tribunal. Whether negotiation is a prerequisite of litigation may depend on the forum, the basis of jurisdiction, and the applicable law. The ICJ has not

²⁴ *North Sea*, [1969] ICJ Rep. 3, 6 (quoting Art. 1 of the Special Agreements).

²⁵ Lowe notes that here the ICJ 'is in effect acting in support of a negotiated solution to the dispute'. Lowe, above n. 21 at 241.

made diplomatic negotiation a formal prerequisite in all cases, but it has asked ‘whether . . . the dispute between the Parties has been defined with sufficient precision for the Court to be validly seised of it’.²⁶ Prior negotiation by the parties may serve the purpose of so defining the dispute.²⁷ Beyond defining the dispute, some prior negotiation may be a formal precondition of litigation in the compromissory clause on which jurisdiction is founded. UNCLOS dispute settlement provisions contain such a condition,²⁸ and the compromissory clause invoked by Romania against Ukraine in *Black Sea* clearly required negotiation prior to accessing the ICJ.²⁹

To the extent that state practice influences decision making in international courts and tribunals, negotiated maritime boundary agreements should have some impact on litigation outcomes.³⁰ The reverse seems more certain – that the decisions of courts and tribunals in boundary litigation will influence approaches taken in subsequent negotiation. Charney observes:

Developments in the jurisprudence strongly influence the course of interstate negotiations and the resulting delimitation agreements. Diplomats know that – more than for any other area of international law – resort to third-party dispute settlement is a real possibility for maritime boundary disputes. This awareness limits the positions they may credibly take during negotiations by devaluing those that would be untenable if presented for third-party dispute settlement. Based thus on circumscribed negotiating positions, the agreements reflect those restraints.³¹

²⁶ *Cameroon v. Nigeria (Preliminary Objections)*, [1998] ICJ Rep. 275, 322. But see Jonathan I. Charney, ‘Progress in International Maritime Boundary Delimitation Law’, (1994) 88 AJIL 227, 254: assessing this issue in the *Jan Mayen* case, Charney concludes ‘the obligation to establish the maritime boundary by agreement was construed as merely a preliminary obligation’.

²⁷ *Cameroon v. Nigeria (Preliminary Objections)*, [1998] ICJ Rep. 275.

²⁸ Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005), 31: ‘Prior to the resort to compulsory procedures entailing binding decisions, States parties must have recourse to alternative methods of dispute settlement.’

²⁹ See para. 4(h) of the Additional Agreement quoted in *Black Sea*, [2009] ICJ Rep. 61, 70: ‘If these negotiations shall not determine the conclusion of the above-mentioned agreement in a reasonable period of time, . . . [the parties] have agreed that the problem of delimitation . . . shall be solved by the UN International Court of Justice, at the request of any of the parties.’

³⁰ These negotiated agreements carry less weight when characterized as political solutions, devoid of the *opinio juris* required to assert them as evidence of custom. Charney points to ‘the diversity of these boundary settlements’ as one reason why they may not be very influential in litigation. Charney, above n. 26, 228.

³¹ *Ibid.*

While these observations are undoubtedly correct, the power of previous litigation outcomes to influence negotiating positions in a subsequent dispute must also depend on the likelihood of that dispute ever reaching litigation. This, in turn, will depend on the availability of adjudicative jurisdiction.

Jurisdiction to litigate

The relationship between negotiation and litigation exists in the shadow of jurisdictional constraints. One cannot discuss the decision to litigate in the international legal system without addressing the question of adjudicative jurisdiction of international courts and tribunals. At the most basic level, if one of the disputant states has not consented to the jurisdiction of an international court or tribunal for the purpose of resolving a maritime boundary dispute, litigation of the dispute is not an option. Of the many factors that may influence a state's decision to litigate a maritime boundary, adjudicative jurisdiction must be the most important. This is not to say that when jurisdiction does exist a state will always choose litigation, but when jurisdiction is not available, neither is litigation.³² When considering the many other factors which may contribute to the decision to litigate a maritime boundary, this predominant factor must be borne in mind.

Consenting to the jurisdiction of an international court or tribunal for the resolution of a maritime boundary dispute is a sovereignty-compromising, self-binding³³ delegation by the state to an international body with respect to a core sovereignty issue. As such, litigation is not typically an avenue of first resort. It is not surprising that states are reluctant to grant such consent, and this may account for the relatively low proportion of maritime boundary disputes resolved through litigation.³⁴

³² In the absence of adjudicative jurisdiction, a state that prefers litigation may seek to negotiate for the establishment of jurisdiction through ad hoc consent of the opposing party.

³³ See Karen J. Alter, 'Delegating to International Courts: Self-Binding vs. Other-Binding Delegation', (2008) 71 *Law and Contemporary Problems* 37: distinguishing 'self-binding' delegation of decision-making authority by a state to an international court or tribunal from 'other-binding' delegation by a legislative body to the judiciary thereby binding other, usually private, actors.

³⁴ Allee and Huth, above n. 3, 223: 'For all of the aforementioned reasons, in most instances state leaders will prefer a strategy of bilateral concession-making [negotiation] to a legal dispute settlement [litigation]'.

The consent required to create jurisdiction in international law comes in several forms. How that jurisdiction is created plays into the analysis of the other factors that may influence the decision to litigate. The two general bases of adjudicative jurisdiction considered here are jurisdiction arising from ad hoc consent of the parties and jurisdiction arising from *ante hoc* consent of the parties.³⁵

As noted above, in the majority of the cases brought before 1986 consent of the parties was given ad hoc. In these cases there was ‘contemporary mutual agreement . . . to submit that very dispute to the [court or tribunal] for delimitation’.³⁶ Such agreements usually take the form of a *compromis* setting out, among other things, the applicable law and scope of the dispute. The *compromis* often represents a significant negotiating effort in its own right, and, in the context of the decision to litigate, it represents the commitment of *both* parties to resolve their dispute through litigation instead of negotiation.

This co-operative, contemporaneous, express, and mutual approach to establishing adjudicative jurisdiction may be contrasted with situations in which jurisdiction is founded on the *ante hoc* consent of the parties. In those maritime boundary cases the basis for jurisdiction has been the *ante hoc* consent of the parties expressed in Article 36(2) declarations to the ICJ,³⁷ the Pact of Bogotá,³⁸ the dispute settlement provisions of UNCLOS,³⁹ and the compromissory clause in a bilateral treaty.⁴⁰ Initiating a case in reliance on the *ante hoc* consent of the respondent state has,

³⁵ Of course, a respondent state may waive its jurisdictional objections and thereby consent to the jurisdiction of the court or tribunal to hear the merits of the case. A court or tribunal may exercise jurisdiction with this informal *post hoc* grant of ad hoc consent on the principle of *forum prorogatum*. Maritime boundary litigation has not yet witnessed the successful reliance on prorogated consent, but this is another potential jurisdictional avenue into litigation. To improve the chances that this approach would succeed, states might be expected to engage in prior discussions in order to establish agreement not to object to jurisdiction.

³⁶ Charney, above n. 26, 254.

³⁷ See *Guinea-Bissau v. Senegal*, [1989] 20 RIAA 121; *Cameroon v. Nigeria (Preliminary Objections)*, [1998] ICJ Rep. 275; *Jan Mayen*, [1993] ICJ Rep. 38; *Nicaragua v. Honduras*, [1992] ICJ Rep. 351.

³⁸ See *Nicaragua v. Honduras*, [1992] ICJ Rep. 351; *Nicaragua v. Colombia*, *Peru v. Chile*, above n. 4.

³⁹ See *Land Reclamation*, [2005] 27 RIAA 133; *Barbados v. Trinidad and Tobago*, [2006] 27 RIAA 147; *Guyana v. Suriname*, *Bangladesh/Myanmar*, and *Bangladesh v. India*, above nn. 4 and 14.

⁴⁰ *Black Sea*, [2009] ICJ Rep. 61.

at times, taken the form of an ambush in which an applicant state sues a respondent relying on a basis of jurisdiction of which the respondent state may have been unaware,⁴¹ or which the respondent state assumed, because the states were engaged in active negotiations, would not be exercised without further notice.⁴² As a result, jurisdiction (or at least the scope of subject-matter jurisdiction asserted by the applicant state) has often been challenged in these cases.⁴³ One observable effect of the use of *ante hoc* consent is the *ex post facto* withdrawal from adjudicative jurisdiction by the respondent.⁴⁴ A more insidious effect of cases brought without contemporaneous ad hoc consent, and perhaps one that could damage the international judicial system over the long term, is the *ex ante* pre-emptive withdrawal of potential respondent states from compulsory adjudicative jurisdiction in anticipation of cases that could be brought by neighbours.⁴⁵

⁴¹ Nigeria's first preliminary objection to the jurisdiction of the Court was that 'Cameroon, by lodging the Application on 29 March 1994 [*before* the UN Secretary General transmitted copies of Cameroon's 36(2) declaration of 3 March 1994], violated its obligations to act in good faith, acted in abuse of the system established by Article 36, paragraph 2, of the Statute, and disregarded the requirement of reciprocity established by Article 36, paragraph 2, of the Statute and the terms of Nigeria's Declaration of 3 September 1965.' *Cameroon v. Nigeria (Preliminary Objections)*, [1998] ICJ Rep. 275, 284–5. The Court rejected Nigeria's first preliminary objection. *Ibid.*, 325.

⁴² See, e.g., Letter from Runaldo Venetiaan, President of Suriname, to Bharrat Jagdeo, President of Guyana, 23 March 2004, Preliminary Objections Memorandum of Suriname, *Guyana v. Suriname*, Annex I, 23 May 2005, available at www.pca-cpa.org/upload/files/SMem%20Annexes%2001-10.pdf: 'Since the discussions in the Joint Border Commissions of the two countries were still in progress, this action is viewed as premature and not in the spirit of our cooperation expressed during your visit to Suriname in 2002.'

⁴³ See, e.g., the jurisdictional challenges in the cases between Greece and Turkey, Qatar and Bahrain, Cameroon and Nigeria, Guyana and Suriname, and Nicaragua and Colombia.

⁴⁴ See, e.g., Declaration of Nigeria, 30 April 1998, 2013 UNTS 507 (amending the earlier Declaration to except several dispute types, including 'disputes in respect of which any party to the dispute has accepted the jurisdiction of the Court by a Declaration deposited less than Twelve Months prior to the filing of an Application' and delimitation disputes); Declaration of Colombia, 5 December 2001, 2166 UNTS 3 (terminating acceptance of compulsory jurisdiction the day before Nicaragua's Application in *Nicaragua v. Colombia*).

⁴⁵ This effect is difficult to identify. Since Malaysia instituted proceedings against Singapore in July 2003, only eight states have declared that they do not accept compulsory jurisdiction with respect to maritime delimitation under the dispute settlement procedures of UNCLOS. However, six of these eight made their Art. 298 declarations after ratification, indicating a certain level of attention to the issue of jurisdiction and a specific intention to withdraw from that jurisdiction.

The factors

If adjudicative jurisdiction is available through a *compromis* or by virtue of pre-existing consent – that is to say, once litigation is a realistic option – then the question may be asked, what factors influence the decision to litigate a maritime boundary dispute? It seems that many of these factors are not legal but political in nature,⁴⁶ and they appear to include a wide range of considerations, some of which have been studied in depth.

Several authors have attempted to tease out the important factors contributing to the decision to litigate. LaTour et al. investigated dispute settlement preferences among undergraduate students and law students along a spectrum of increasing third-party involvement from negotiation ('bargaining') to litigation ('arbitration' and 'autocratic decision making').⁴⁷ Three factors were considered as determinants of procedural choice: temporal urgency; the presence or absence of a judgmental standard, such as a rule or tradition; and whether the parties' interests are aligned or opposed ('outcome correspondence'). The LaTour study found that preference for high levels of third-party involvement increase '(1) when outcomes are noncorrespondent [interests are not aligned], (2) when a standard is available, and (3) when there is time pressure'.⁴⁸ In most maritime boundary disputes party interests tend to be in direct conflict, suggesting that of La Tour's three factors the existence of a standard and a sense of temporal urgency would be the main considerations in a decision to litigate a maritime boundary.

The substantive standard for maritime delimitation is loose: delimitation 'must be effected on the basis of international law in order to achieve an equitable solution'.⁴⁹ This standard has been tightened up over the years by the development of a three-step procedural approach to the creation of an equitable maritime delimitation. In the first step, a provisional equidistance line is constructed. In the second step, relevant circumstances that may require an adjustment of the provisional line are considered. In the third step, a test of proportionality is administered to

⁴⁶ Sir Arthur Watts, 'Preparation for International Litigation', in Tafshir Malick Ndiaye and Rudiger Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes, Liber Amicorum Judge Thomas A. Mensah* (Dordrecht: Martinus Nijhoff, 2007) 327, 328: 'But essentially the decision [to litigate] is a political one, in which many non-legal factors play their part'.

⁴⁷ Stephen LaTour et al., 'Some Determinants of Preference for Modes of Conflict Resolution', (1976) 20 *Journal of Conflict Resolution* 319.

⁴⁸ *Ibid.*, 349.

⁴⁹ *Bangladesh/Myanmar*, above n. 4, [25] (paraphrasing UNCLOS, Arts. 74 and 83).

check for inequity. Over time, the list of relevant circumstances that might be considered in the second step has been pared down. While this does not allow states to make perfect predictions of outcome, it has increased certainty by narrowing the range of possible outcomes and rationales for those outcomes. Following *LaTour*, we might expect litigation to increase if this standard is further refined.

LaTour's third factor, temporal urgency, appears to be important as well. Although international litigation can seem quite slow when compared with domestic litigation, it tends to be less drawn out than negotiation. Negotiations may be quite protracted when positions have hardened or when one party prefers non-resolution. For example, negotiation of the maritime boundary between Bangladesh and Myanmar began in the mid-1970s and continued for over three decades without reaching a resolution. When Bangladesh initiated litigation in October 2009, the dispute was resolved in two and half years with ITLOS's decision in March 2012. In maritime boundary delimitation, temporal urgency often arises in the context of resource use, specifically the exploration and exploitation of offshore hydrocarbons. Urgency can be created by resource-related conflict events, such as when specific drilling activity is opposed by the threat or use of force,⁵⁰ or by the realization that the opportunity costs of non-resolution are rising with the price of oil.

Fischer discerns several additional factors that have been considered by applicant states in a study based on confidential interviews with individuals personally involved in or familiar with decisions to litigate before the ICJ.⁵¹ Fischer investigated the pre-litigation phases of four disparate cases brought before the ICJ between 1967 and 1976,⁵² and found three

⁵⁰ As Feldman notes, 'Nothing could be more inflammatory than drilling on the continental shelf claimed by another state.' Mark B. Feldman, 'The Tunisia–Libya Continental Shelf Case: Geographic Justice or Judicial Compromise?', (1983) 77 AJIL 219, 234. In fact, *Libya/Malta* was precipitated, in part, by an escalation related to offshore oil resources. McDorman reports that 'Libyan warships surrounded the [Malta-licensed] oil rig and forcefully halted its drilling operations.' Ted L. McDorman, 'The Libya–Malta case: Opposite States Confront the Court', (1986) 24 *Canadian Yearbook of International Law* 335, 337. A similar sequence of events led to the institution of proceedings in *Guyana v. Suriname*. See *Guyana v. Suriname*, above n. 4, [263]–[273] (discussing June 2000 CGX oil rig incident).

⁵¹ Dana D. Fischer, 'Decisions to use the International Court of Justice: Four Recent Cases', (1982) 26 *International Studies Quarterly* 251.

⁵² *Nuclear Tests (Australia v. France, New Zealand v. France) (Merits)*, [1974] ICJ Rep. 253, 457; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, [1974] ICJ Rep. 3; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, [1974] ICJ Rep. 175; *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v.*

factors that were considered by each applicant state. In each case, the applicant state considered that ample time had been spent exhausting all other forms of peaceful dispute settlement ('time and diplomacy'), considered the dispute within the state's overall foreign policy context ('dispute and context'), and considered the likelihood of a good outcome ('probability of winning/losing').⁵³ Presumably, if the applicant had considered that any of these three factors were not in its favour, the applicant would have been more likely to prefer an approach other than litigation.

With respect to time and diplomacy, the maritime delimitation cases seem to support Fischer's findings. In most cases, significant effort has been made prior to litigation to resolve the dispute by some other means, usually negotiation. Prior to their litigation in *Gulf of Maine*, the United States and Canada engaged in 'more than five years of intensive high-level negotiations which failed to reach an agreed result'.⁵⁴ Some disputes take much more time to reach litigation. The maritime boundary in *Nicaragua v. Colombia*, for example, is closely tied to a 1928 treaty allocating insular territory in the south-western Caribbean Sea.

Fischer's overall foreign policy factor, while undoubtedly paramount, is difficult to quantify. By definition, maritime boundary disputants are neighbouring states. As such, disagreement about the location of a maritime boundary is likely to be one of many past or current disagreements between those proximate states. In the circumstance of adjacent states, those neighbours will also share a land border, a possible source of additional disputes. Argentina and Chile, the parties to the *Beagle Channel* maritime delimitation case, share one of the world's longest land borders, which itself has been the subject of several litigations.⁵⁵ Trade relationships across land borders would also fall under this category of foreign policy considerations.⁵⁶ We must assume that long-term neighbours have

Netherlands), [1969] ICJ Rep. 3; *Trial of Pakistani Prisoners of War (Pakistan v. India)*, [1973] ICJ Rep. 328.

⁵³ Fischer, above n. 51, 255–61.

⁵⁴ David A. Colson, 'Canada–United States (Gulf of Maine)', in Jonathan I. Charney and Lewis M. Alexander (eds.), *International Maritime Boundaries*, Vol. I (Dordrecht: Martinus Nijhoff, 1993) 401.

⁵⁵ Marcelo G. Kohen, 'The "Laguna del Desierto" Case between Argentina and Chile', (1993) 1 *International Boundaries Research Unit, Boundary and Security Bulletin* 70.

⁵⁶ Simmons cites figures that 'suggest that arguments over territory may exact a high opportunity cost in terms of trade'. Beth A. Simmons, 'Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes', (2002) 46 *Journal of Conflict Resolution* 829, 832.

all aspects of their bilateral relationship firmly in mind when deciding to litigate their maritime boundary.

The probability of winning specific issues in a delimitation case may influence the decision to litigate. The ability to predict a 'win' on a particular issue is increased by the refined procedural standard discussed above. In the context of maritime delimitation, the particular issue might be the effect of an island on the course of the maritime boundary or the likelihood that a specific location, such as a disputed drilling site, would end up on one or the other side of the litigated line. The effect of small islands is a common cause of maritime disputes. This problem featured prominently in *Black Sea* with respect to Serpents' Island and in *Bangladesh v. Myanmar* with respect to Saint Martin's Island. In both cases, the island was given no effect on the boundary beyond the territorial sea, resulting in 'wins' on that issue for Romania and Myanmar respectively. A specific drilling location was the trigger and subsequently the focal point for Guyana in its case against Suriname. The tribunal in *Guyana v. Suriname* noted that 'Guyana now has undisputed title to the area where the incident occurred'⁵⁷ – a quote that was trumpeted by Guyana's legal team after the decision,⁵⁸ despite the fact the Suriname won other aspects of the case. Some of these 'wins' may have been predicted prior to litigation and may have influenced decisions to litigate.

Allee and Huth mine a large data set related to the resolution of territorial disputes worldwide in the period 1919 to 1995 to test their hypothesis that 'leaders will seek legal dispute settlement [litigation] in situations where they anticipate sizeable domestic political costs should they attempt to settle a dispute through the making of bilateral, negotiated concessions'.⁵⁹ The authors expect that the avoidance of these costs will be a contributing factor only when both sides face high domestic political costs of concession making.⁶⁰ According to the study, domestic political costs rise when leaders 'are highly accountable to domestic political opposition'⁶¹ and the dispute is 'highly salient

⁵⁷ *Guyana v. Suriname*, above n. 4, [451].

⁵⁸ Foley Hoag LLP, 'Foley Hoag Helps Republic of Guyana Assert Sovereignty over Oil- and Gas-Rich Seas in Maritime Dispute with Neighboring Suriname', 2007, available at www.foleyhoag.com/newscenter/presscenter/2007/09/20/foley-hoag-helps-republic-of-guyana.aspx.

⁵⁹ Allee and Huth, above n. 3, 219. ⁶⁰ *Ibid.*, 225.

⁶¹ That is, when leaders face strong domestic political opposition and leaders are from states with democratic institutions. *Ibid.*, 225–6.

to domestic audiences'.⁶² Others have speculated that 'saving face' may contribute to the decision to litigate.⁶³ To the extent that face must be saved before a domestic audience, the Allee and Huth study may provide the empirical support for this idea.

Simmons asks a similar question about the decision of Latin American states to litigate territorial disputes and arrives at a similar answer: states choose to litigate in order 'to achieve results that cannot be realized through negotiations and domestic decision making alone'.⁶⁴ Here, the domestic explanation is couched in terms of assessments of pay-offs from litigated versus negotiated solutions,⁶⁵ but the basic conclusion is the same. Like Allee and Huth, Simmons finds that litigation may be used as an end run around 'domestic political blockage' under certain circumstances.⁶⁶

Conscious of alternative explanations for the decision to access the international judicial system, the Allee and Huth and Simmons studies incorporate realist control variables. Both confirm the realist view that a military imbalance or power asymmetry between the parties makes litigation less attractive to the more powerful party and litigation less likely than negotiation as a mode of dispute settlement.⁶⁷ However, they find that other realist factors have no significant impact on the choice

⁶² That is, when disputed territory involves ethnic co-nationals, the dispute adversary is an enduring rival, and the states have taken a previous hard-line stance. *Ibid.*, 226–7.

⁶³ Arthur W. Rovine, 'The National Interest and the World Court', in Leo Gross (ed.), *The Role of the International Court of Justice* (Dobbs Ferry: Oceana Publications, 1976) 313, 323: 'The Court is also useful for its face-saving or accommodation functions.'

⁶⁴ Simmons, above n. 56, 831: asking 'why do governments sometimes allow third parties to make authoritative rulings on their actions and policies?'

⁶⁵ As Simmons explains, the decision to litigate 'happens because some groups expect arbitration to provide higher payoffs than political concessions; they believe they will win in court, but even if the outcome is the same as the negotiated deal, there is a strong preference to defer to an authoritative body rather than to a political-military rival'. *Ibid.*, 846.

⁶⁶ *Ibid.*, 839.

⁶⁷ Allee and Huth, above n. 3, 232: '[T]he disparity in military power establishes a situation in which the stronger side has considerable bargaining leverage over the weaker party'; Simmons, above n. 56, 839: 'The greater the asymmetry between countries, the greater the expected value of a political settlement for the larger country, making arbitration unlikely'. But see Fischer, above n. 51, 258, who indicates one explanation given for the *Fisheries Jurisdiction* case brought by the United Kingdom and Germany (clearly the more powerful parties) against Iceland: '[Britain] agreed with Germany that using the Court was the easiest way of avoiding the appearance of two big states "bullying" a small one.' A modern example of this dynamic is currently unfolding in the South China Sea between China and its less powerful neighbours.

of dispute settlement. The existence of common security ties between the parties, which should decrease the likelihood of litigation, had no impact on the decision.⁶⁸ States would also be expected to avoid litigation in disputes with serious national security implications. However, both studies found that this factor had no impact on the decision to litigate.⁶⁹

Flexibility may be another factor in the decision whether to negotiate or litigate. One of the advantages of negotiation is flexibility with respect to timing and range of solution, which is usually lost once a dispute is brought to litigation. Courts and tribunals apply the applicable law and are unable to make political side payments or consider issue linkage.⁷⁰

Familiarity with international litigation procedures and forums may contribute to decisions to litigate by states with previous international litigation experience. Five states – Germany, Libya, Guinea-Bissau, Nicaragua, and Bangladesh – have each been involved in, and in most instances have initiated, two maritime delimitation cases with, respectively, Denmark and the Netherlands, Tunisia and Malta, Guinea and Senegal, Honduras and Colombia, and Myanmar and India. For those states claiming that they are at the back of a coastal concavity and therefore zone-locked by their neighbours to either side (Germany, Guinea-Bissau, and Bangladesh) there may have been some strategic advantage to bringing these cases at the same time or even, as in the case of Germany, to the same forum in order to demonstrate the cut-off effect caused by both neighbours' maritime areas when considered together. But it is also possible that familiarity with a forum played some role in the decision. Nicaragua is a good example of a state that is familiar with the ICJ, having appeared in The Hague in four cases before initiating its maritime delimitation cases against Honduras and Colombia.

⁶⁸ Allee and Huth, above n. 3, 232.

⁶⁹ Ibid.; Simmons, above n. 56, 840: 'There is no evidence that high stakes strip governments' desire to commit to arbitration.'

⁷⁰ Klein would likely agree that this is an important factor in the decision to litigate. She writes that 'Coastal States may wish to negotiate boundary agreements rather than refer matters to third parties, as the States concerned are able to take into account human and resource conditions that have been ignored in boundaries settled through adjudication or arbitration.' Klein, above n. 28, 255 (footnotes omitted). See also Prosper Weil, 'Geographic Considerations in Maritime Delimitation', in Jonathan I. Charney and Lewis M. Alexander (eds.), *International Maritime Boundaries* Vol. I (Dordrecht: Martinus Nijhoff, 1993) 115, 121: 'While there are legal norms binding on the courts, there are no legal norms restricting the contractual freedom of states in this area.'

Economies of scale may be a consideration for states with multiple maritime delimitation disputes. Efficiency may be increased if one legal team can address two cases at the same time. In addition to Germany, whose two cases were joined into a single proceeding, Guinea-Bissau and Bangladesh each maintained largely the same legal teams to litigate two simultaneous cases. Nicaragua's maritime cases have overlapped significantly in terms of timing and personnel, and Libya's maritime cases, although sequential, were argued by essentially the same team each time.

According to this limited review, the factors that may contribute to a decision to litigate include urgency of resolution, the existence of a standard, whether all diplomatic options have been exhausted, the larger foreign policy context in which the dispute is situated, assessments of the likely outcomes, avoidance of domestic political costs, power asymmetry between the parties, flexibility of process and solution, familiarity with procedure and forum, and economies of scale. Parties would be expected to make assessments of the costs and benefits of litigation on the basis of these factors. However, it should be appreciated that the two parties may not share the same assessment of each factor. For example, the cost of litigation may be high for the more powerful state, because it would lose a negotiating advantage, but for the less powerful state, litigation – by neutralizing the strategic disparity – might be the low-cost option. With respect to urgency, one state might want an immediate resolution while the other would be content to draw the process out. Of course, the foreign policy context and the domestic political pressures differ significantly from state to state. Finally, the existence of a standard may increase certainty, but if it increases the certainty of a loss it would also increase the cost of litigation for the likely loser.

Other factors, many of them related to those already listed, might be considered as well, such as strategic and tactical concerns; reputational consequences; anticipated duration of the dispute resolution processes; degree of delegation or loss of party autonomy with respect to rules, timing, and decision makers; control of information within the process; financial expenses coupled with personnel and budgetary constraints; finality of a solution; and expected levels of compliance with the outcome. With each of these factors come potential costs and benefits, the assessments of which will not always be identical as between the parties to a dispute.

Any government involved in a serious assessment of its options would try to take the items on this laundry list into account in some form of

multivariate cost–benefit analysis. It is, perhaps, unrealistic to posit the state as a unitary actor,⁷¹ much less a rational actor capable of quantifying the costs or benefits of litigation and negotiation on the basis of such a wide range of disparate factors. However, decisions to litigate (well-considered or haphazard) are ultimately made, and those decisions do bind the state, unitary or otherwise.

Some structure is provided in the following section in an attempt to ground this litany of possible factors in a conceptual framework with particular regard to maritime boundary disputes.

Party preferences and dispute settlement decisions

A state will opt for the resolution of a dispute when the perceived costs of non-resolution exceed those of resolution. Implicit in this truism is the notion that both options – resolution and non-resolution – are actually available. This does not take into account the perceived costs of the other party which may differ and thus remove an option, usually resolution. In other words, it should not be assumed that an unresolved maritime boundary dispute would always be perceived as suboptimal for both states at the same time.⁷² When non-resolution is preferred by one state, stalemate is likely to ensue. However, when resolution is preferred by both states, their preferences may be further refined to account for the choice between modes of resolution: a state will opt to litigate a dispute when the perceived costs of negotiation exceed those of litigation. Here again we must consider that dispute resolution is a bilateral process and that cost–benefit assessments may differ between the disputants, leading to different preferences. This brief exercise sets up the three options that, in the abstract, might be available to, and which could be preferred by, the disputant states: non-resolution, negotiated resolution, and litigated resolution.

In fact these three options are not always available, and, in the case of inter-state dispute settlement, are often unavailable. Negotiation may be effectively unavailable if one of two states is recalcitrant, and litigation will

⁷¹ Putnam, above n. 10, 433: '[A]s all experienced negotiators know, . . . the unitary-actor assumption is often radically misleading.'

⁷² Simmons, above n. 56, 847: It is assumed that governments 'want to solve a problem that, unresolved, constitutes a "suboptimality"'. Rovine notes, however, that resolution is not always optimal. Rovine, above n. 63, 322: 'There are of course occasions when the reverse is true – that is to say, a continuation of the dispute is preferred even to a clear win in Court.'

be unavailable without the consent of both states. Availability of litigation brings us back to the question of jurisdiction, which, being based on the consent of states is a function of their preferences. The matrix in Figure 11.1 below sets out the preferences of hypothetical state A and state B in order to conceptualize the likely dispute outcomes in a variety of preference configurations. It is apparent that preferences will drive the likely mode of dispute resolution, but may also account for the creation of adjudicative jurisdiction by ad hoc consent where preferences match or the use of *ante hoc* consent where they do not. Moreover, the preferences of one or both states may change over time, with the consequence that the likely outcome will change as well.

It bears repeating that the majority of maritime boundaries are not yet resolved. Depending on the states' preferences and the availability of adjudicative jurisdiction, unresolved maritime boundary disputes might be situated in any box other than 2B and 3C. Without knowing the preferences of the states involved, it is difficult to know where within this matrix a particular unresolved dispute might best be placed. Sometimes state preferences may be gleaned from news reports. In recent reporting from Asia, the Philippines has expressed a preference for litigation before ITLOS while China has expressed a preference for resolution through bilateral negotiation, indicating that this unresolved maritime dispute is probably situated in the 2C/3B category.⁷³ At the time of *Aegean Sea*, Greece clearly preferred litigation while Turkey preferred negotiation or non-resolution, placing that unresolved dispute in the 2C/3B or 1C/3A category as of 1976. However, recent reporting indicates a shift in Greek and Turkish preferences towards 2B (negotiated resolution) with hints of a possible resolution in 3C (litigated resolution).⁷⁴

Generally, the disputes in the 1A category tend to be dormant or potential disputes in areas of no particular interest to either state. Here, mutual disinterest may result in the shared perception that the opportunity costs of non-resolution are low. Most maritime boundary relationships start in

⁷³ See Jerry E. Esplanada, 'Philippines Getting Ready to Take Dispute With China to Int'l Tribunal', *Philippine Daily Inquirer*, 2012, available at globalnation.inquirer.net/35475/philippines-getting-ready-to-take-dispute-with-china-to-int'l-tribunal; Pia Lee-Brago, 'China Opposes Taking Dispute to Int'l Tribunal', *Philippine Star*, 2012, available at www.philstar.com/Article.aspx?articleId=800424&publicationSubCategoryId=63.

⁷⁴ International Crisis Group, 'Turkey and Greece: Time to Settle Aegean Dispute', Europe Briefing No. 64, 2011, available at www.crisisgroup.org/en/regions/europe/turkey-cyprus/turkey/B64-turkey-and-greece-time-to-settle-the-aegean-dispute.aspx at 3 September 2012: 'Their foreign ministries have met more than 50 times for "exploratory talks" since 2002, with a view to taking the continental shelf dispute and possibly other unresolved matters to the ICJ.'

Preferences of state B	Preferences of state A		
	1. Non-resolution	2. Negotiated resolution	3. Litigated resolution
A. Non-resolution	1A. Dispute remains unresolved	2A. Protracted negotiations with no resolution	3A. Dispute remains unresolved OR Litigated resolution if <i>ante hoc</i> consent by B
B. Negotiated resolution	1B. Protracted negotiations with no resolution	2B. Negotiated resolution	3B. Dispute remains unresolved OR Negotiated resolution with suboptimal result for A OR Litigated resolution if <i>ante hoc</i> consent by B
C. Litigated resolution	1C. Dispute remains unresolved OR Litigated resolution if <i>ante hoc</i> consent by A	2C. Dispute remains unresolved OR Negotiated resolution with suboptimal result for B OR Litigated resolution if <i>ante hoc</i> consent by A	3C. Litigated resolution

Figure 11.1 Likely dispute outcome based on preferences of state A and state B

1A. The shift out of 1A may occur with the increasing scarcity of a resource, such as fish, or the discovery of a valuable resource, such as oil or gas. In an ideal world, the shift would occur along the bias from 1A to 2B, where the states would arrive at a negotiated solution. And, in fact, this is the progression that many maritime boundary relationships have followed.⁷⁵ Without more information it is difficult to know whether a negotiated resolution is best categorized in 2B, where the negotiated resolution was preferred by both states, or in 2C or 3B, where the negotiated solution was suboptimal for the state that preferred, but could not access, a litigated resolution.

After a dispute is brought to litigation it may be easier to discern the preferences involved. Litigated resolutions arrived at on the basis of ad hoc consent indicate a shared preference for litigation as manifested in the *compromis*. Litigation based on ad hoc consent is easy to distinguish from litigated resolutions that rely on *ante hoc* consent of a respondent state that might otherwise have preferred non-resolution or negotiated resolution. Although reliance on *ante hoc* consent may indicate that the respondent state did not prefer litigation, it is possible that the use of *ante hoc* consent masks a preference for litigation on the part of the respondent. Preliminary objections to jurisdiction add clarity to the respondent's true preference for something other than litigation. The three different preference configurations under which a litigated resolution might occur – both states prefer litigation (3C); one state prefers litigation and one state prefers negotiation (2C and 3B); one state prefers litigation and one state prefers non-resolution (1C and 3A) – are addressed in turn.

Resolution by litigation on the basis of *ad hoc* consent has been the dispute outcome in half of the litigated international maritime boundary disputes. States parties to these disputes clearly preferred resolution over non-resolution, and ultimately preferred litigation over negotiation. Often these litigations were preceded by years of negotiation both on the substantive matters in dispute and on the procedure to be applied in litigation, that is, in the negotiation of the *compromis*. The main question here is what factors contributed to the mutual change in preferences from negotiation to litigation and moved these parties from the negotiating table to the courtroom?

In these instances, the parties faced a true choice between negotiation and litigation, and together they agreed that litigation would achieve something that negotiation could not or would not under the

⁷⁵ As of 2010 there were approximately 165 maritime boundary relationships, which had been resolved, fully or partially, by negotiation.

circumstances. That is to say, the two states shared the perception that the cost of litigation would be lower than the cost of negotiation. A shared desire to reduce their respective domestic audience costs provides the most convincing explanation for the decision to move a dispute from negotiation to litigation.

Negotiating states expect to make some concessions during the course of the negotiating process. In maritime boundary litigation, where the substantive rule is 'to achieve an equitable solution', states also expect (or should expect) that they will not prevail on their full claim before a court or tribunal. As demonstrated by their prior negotiating efforts, these states prefer resolution and know that concessions must be made in order to achieve that goal. In these circumstances, the decision between negotiation and litigation is a matter of choosing by what process and, more importantly, by whom, those concessions will be made.⁷⁶ If, in this two-level game, the cost of making negotiated concessions on the international plane is increased by the domestic audience costs generated for a state leader or political party at the national level, those costs may be reduced, if not avoided entirely, by delegating decision-making authority to a third party.⁷⁷ As with the assessment of costs elsewhere, the perspective of both parties must be taken into account. The move from negotiated resolution to litigated resolution becomes 'relatively more attractive only in those situations in which state leaders on both sides face considerable domestic costs for making negotiated concessions'.⁷⁸ When this does happen – when both states shift preferences from negotiation to litigation – they may create jurisdiction by their mutually agreed, ad hoc consent.⁷⁹

⁷⁶ See Allee and Huth, above n. 3, 223: 'The primary difference between the two options, then, lies with the process by which concessions are made and the different costs and benefits associated with each option.' Lowe notes that 'the aim of litigation might be such that it is essential to proceed to a determination of the merits of the case, regardless of its strength. (This is said to be the case in some boundary disputes, where neither State may wish to give away in negotiations even a tiny part of what has been claimed as national territory, but both States may be content to allow a tribunal to award part of its claimed territory to the other Party . . . It is often convenient to blame everything on the lawyers).' He adds that 'Some States, after all, consciously choose adjudication in order to shift the responsibility for compromising on national territorial claims away from the Government and on to an international tribunal': Lowe, above n. 21, at 241, 246.

⁷⁷ Allee and Huth, above n. 3, 219: '[State] leaders who anticipate significant domestic audience costs for the making of voluntary, negotiated concessions are likely to seek the "political cover" of an international legal ruling.'

⁷⁸ *Ibid.*, 225.

⁷⁹ This moment has been characterized as 'a plateau in the bargaining process where both sides agree that the settlement of the dispute is more important than the relative distribution of objectives resulting from the final decision'. William D. Coplin, 'The World Court

This progression from 2B (agreement to negotiate) to 3C (agreement to litigate) stands in contrast to the other progressions that could ultimately end in a litigated resolution under different jurisdictional constraints. For those litigations initiated on the basis of *ante hoc* consent, it is more likely that the preferences of the disputant states did not match, and that only one state – the applicant state – preferred litigation while the respondent state preferred non-resolution (1C/3A) or a negotiated resolution (2C/3B). In a consent-based system, these mismatched preferences will result in a stalemate, a negotiated resolution that is suboptimal for one party, or a litigated resolution if the respondent state has provided *ante hoc* consent to jurisdiction. When, under these circumstances, the dispute is resolved by litigation, the decision to litigate will have been made unilaterally and the factors that contributed to that decision should be considered from the applicant state's perspective alone.

Here the domestic explanation seems less powerful than it is when the decision to litigate is made in the context of shared litigation preferences.⁸⁰ When litigation occurs in the context of mismatched preferences the choice to delegate decision-making authority to a third party is not made by mutual agreement. Unlike cases brought by *compromis* in which both parties take an active role in framing their dispute, choosing their forum, and creating the jurisdiction under which that forum will hear their case, cases litigated on the basis of *ante hoc* consent result from unilateral action by the applicant state. The decision makers in such a state might look inward to consider domestic audience costs, but here the decision to litigate may be more strongly influenced by outward-looking concerns regarding the actions or postures of the neighbouring state. The common thread in maritime boundary cases brought on the basis of *ante hoc* consent appears to be the applicant state's need to overcome a potentially prejudicial, high-cost status quo resulting from non-resolution of the dispute. In these situations, litigation has been used by the applicant state to break an unfavourable stalemate.

A high-cost status quo may arise from the coastal geography of the disputant states. States that find themselves at the back of a coastal

in the International Bargaining Process', in R.W. Gregg and M. Barkim (eds.), *The United Nations and its Functions* (Princeton: Van Nostrand, 1968) 313, 329, quoted in Fischer, above n. 51, 265.

⁸⁰ However, when the respondent state does in fact prefer litigation, being sued on the basis of *ante hoc* consent given by a previous government would provide even more domestic political cover in the respondent state than would the creation of ad hoc consent in which the current government would take an active role.

concavity and which are therefore disadvantaged and even zone-locked by the application of the equidistance method⁸¹ may resort to litigation in an attempt to 'break out'. Germany and Guinea-Bissau managed this prejudicial situation by negotiating *compromis* with both neighbours and litigating on that basis. In contrast, Bangladesh and Cameroon brought their disputes to litigation on the basis of *ante hoc* consent against Myanmar and India, and against Nigeria⁸² respectively. The presence of islands, which, as a matter of entitlement, are equivalent to mainland territory,⁸³ can create stalemates when a state gives its islands full weight against the neighbour's mainland coast in a delimitation negotiation. Romania faced this situation in the Black Sea with respect to Ukraine's Serpents' Island. Romania brought that dispute to litigation on the basis of Ukraine's *ante hoc* consent.

In addition to coastal geography, state and state-authorized conduct in the disputed area may begin to establish an unfavourable status quo for the weaker or less active state. Power asymmetry may contribute, in particular when naval and law enforcement actions are undertaken by the more powerful state in areas claimed by the other state. Oil and gas leasing, exploration and exploitation practices may begin to create a prejudicial body of conduct. Fisheries licensing, state-sanctioned fishing, and fisheries-related law enforcement may be a factor as well. The establishment of a negotiated boundary between one of the potential litigant states and a third state may also contribute to the prejudicial status quo against which an applicant state feels compelled to move.

Some examples from the cases illustrate these points. The Greek initiation of *Aegean Sea* appears to have been in direct response to seismic work by the Turkish research vessel *Mta-Sismik I*.⁸⁴ This work would have reinforced several years of related oil and gas practice that was prejudicial to Greece's maritime boundary position in this area. In *Guyana v. Suriname*, the combination of hydrocarbon exploration by Guyana and law

⁸¹ Equidistance is the presumed delimitation method in the territorial sea in the absence of special circumstances or historic title. See UNCLOS, Art. 15. Although there is no presumption in favour of equidistance in zones beyond the territorial sea, equidistance is normally the starting point of boundary analyses in those zones and may be the basis of the negotiating position of the state favoured by equidistance.

⁸² Cameroon may have wished to initiate proceedings against its other neighbour, Equatorial Guinea, but that state took pre-emptive action to remove itself from adjudicative jurisdiction by filing a declaration under UNCLOS, Art. 298, declaring that it does not accept jurisdiction with respect to maritime boundaries.

⁸³ See UNCLOS, Art. 121. ⁸⁴ *Aegean Sea*, [1978] ICJ Rep. 3, 10.

enforcement activity by Suriname in response led Guyana to initiate litigation on the basis of the dispute settlement provisions of UNCLOS. Nicaragua's initiation of *Nicaragua v. Honduras* was precipitated by the establishment of a maritime boundary between Honduras and Colombia that bolstered Honduras's maritime claim against Nicaragua, specifically by Honduran plans to ratify that agreement. Oil and gas practice that coincided with the Honduran claim may also have contributed to this situation. Lastly, in *Land Reclamation*, Singapore's baseline-altering land reclamation projects in the Johor Strait contributed to Malaysia's decision to litigate before an Annex VII tribunal. These cases contain diverse histories and a variety of contributing factors, but in each the applicant state attempted, through litigation, to overcome an existing (or developing) state of affairs that could not be overcome by other means. Presumably, the applicant's perceived cost of litigation was lower than the cost of non-resolution or the cost of a suboptimal negotiated solution.

Conclusions

Why do states decide to litigate their maritime boundary disputes and what factors are most likely to contribute to that decision? The information that might provide an authoritative and conclusive answer to these questions is concealed in the internal memoranda and unrecorded discussions among key decision makers in the foreign policy branches of governments around the world. Nonetheless, inductive reasoning applied to the facts surrounding litigated maritime boundary disputes results in the following conclusions.

The primary factor in the decision to litigate must be the availability of this option in the first place, which in turn depends on the consent of both disputant states to the adjudicative jurisdiction of an international court or tribunal. The decision by two states co-operatively to establish jurisdiction by ad hoc consent manifested in a *compromis* or special agreement arises from shared preferences – first, to resolve the disputed maritime boundary and, second, to do so through litigation. Those preferences are a function of the costs and benefits associated with a variety of political, legal, financial, reputational, strategic, and other factors. Disputes are most likely to be litigated if the preference to litigate is shared by the disputant states. However, if the preferences are mismatched, litigation may still occur if, first and foremost, jurisdiction is

available and then only if the cost of litigation as perceived by the applicant state is lower than the cost of non-resolution or of a suboptimal negotiated resolution.

When states have a true choice between negotiated resolution and litigated resolution, the avoidance of domestic political costs must factor heavily into the decision to litigate. However, when litigation has occurred on the basis of *ante hoc* consent, in many instances the applicant state's decision to litigate appears to have been triggered by a need to overcome an unfavourable status quo.