



APPLICATION OF THE LAW TO THE FACTS

Valerie Hughes
Counsel

March 13, 2001



“National law is not and cannot be a rival to international law in the international law field, or it would cease to be national and become international, which, *ex hypothesi*, it is not. National law, by definition, cannot govern the action of or relations with other States.”

Sir Gerald Fitzmaurice

Source: Annex 162: H. Thirlway, “The Law and Procedure of the International Court of Justice, 1960 – 1989” at 114, n. 406.



“It seems above all essential to stress the distinction to be drawn between what are principles and rules of international law governing the matter and what could be better described as the various equitable criteria and practical methods that may be used to ensure *in concreto* that a particular situation is dealt with in accordance with the principles and rules in question.”

Gulf of Maine Case



International Court of Justice

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STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states,
 - b. international custom, as evidence of a general practice accepted as law,
 - c. the general principles of law recognized by civilized nations,
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Source: Article 38, Statute of the International Court of Justice

VH-4



“No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. **Such delimitation must be sought and effected by means of agreement**, following negotiations conducted in good faith and with the genuine intention of achieving a positive result.”

Gulf of Maine Case



Article 83

Delimitation of the Continental Shelf Between States with Opposite or Adjacent Coasts

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.



The Law Governing Maritime Boundary Delimitation

1. International law governing maritime boundary delimitation gives pride of place to **agreement** between the parties.
2. The law governing maritime boundary delimitation includes the law governing international agreements.
3. There is no legal vacuum in this case.



Procedural conditions for an international agreement

- | | | |
|---|---|--|
| (i) concluded between States | → | (i) <i>Terms of Reference</i> |
| (ii) governed by international law | → | (ii) <i>Terms of Reference</i> |
| (iii) concluded by representatives authorized to bind the State | → | (iii) Heads of State (Provincial Premiers) |



“With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements.”

Nuclear Tests Case

“On the question of form, the Court need only observe that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement...”

Aegean Sea Continental Shelf Case

Source: Annex 93: *Nuclear Tests Case* at 267; Annex 91: *Aegean Sea Continental Shelf Case* at 638.

INTENT TO BE BOUND



“If an agreement is intended by the parties to be binding, to affect their future relations, then the question of the form it takes is irrelevant to the question of its existence. What matters is the intention of the parties, and that intention may be embodied in a treaty or convention or protocol or even a declaration contained in the minutes of a conference.”

Lord McNair

INTENT TO BE BOUND



The existence or otherwise of an intent to be bound is “determined in the light of all the circumstances of each case.”

Oppenheim's International Law

Source: Annex 108: Jennings and Watts, *Oppenheim's International Law* at 1202; NF Authorities #16.

INTENT TO BE BOUND



“... the question of determining *whether* the instrument concerned does or does not create or give rise to binding legal obligations ... is partly a question of interpretation (of the text itself) and partly a question of substance that may depend on considerations extraneous to the actual text ...”

Sir Gerald Fitzmaurice

Source: Annex 164: Sir Gerald Fitzmaurice, “The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points” at 230. [footnote omitted] [emphasis in original]

INTENT TO BE BOUND



“It is a general principle of law, which has been applied in many contexts, that a party’s attitude, state of mind or intentions at a later date can be regarded as good evidence – in relation to the same or closely connected matter – of his attitude, state of mind or intentions at an earlier date also; ...Similarly – and very important in cases affecting territorial sovereignty – the existence of a state of fact, or of a situation, at a later date, may furnish good presumptive evidence of its existence at an earlier date also....”

Preah Vihear Case

“... whether the Brussels Communiqué... does or does not constitute [an international agreement] essentially depends on the nature of the act or transaction to which the Communiqué gives expression... [I]n determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, **the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.**”

Aegean Sea Continental Shelf Case

Source: Annex 91: *Aegean Sea Continental Shelf Case* at 638 [emphasis added]; NF Authorities #10



“There can be no doubt, in view of [the President’s] functions, that his **public...statements ... as Head of State**, are in international relations acts of the French State. ... Thus in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the **circumstances in which they were made**.

(...)

“... It is from the actual substance of these statements, and from the **circumstances attending their making**, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect.”

Nuclear Tests Case



Contemporary Written Evidence of the 1964 Agreement

- (1) The *Communiqué* issued by the Premiers following their meeting on September 30, 1964 recording that the Premiers “unanimously agreed” that the boundaries described by metes and bounds be the boundaries of the provinces;
- (2) The *Matters Discussed* memorandum recording the Premiers’ agreement on boundaries;
- (3) The correspondence from the Premier of Québec confirming his agreement to the boundaries; and
- (4) The *Joint Submission* presented to the federal government.



“While maps coming from sources other than those of the Parties are not on that account to be regarded as necessarily more correct or more objective, they have, *prima facie*, an independent status which can give them great value ...they are significant relative to a given territorial settlement where they reveal the existence of a general understanding ... as to what that settlement is ...”

Beagle Channel Arbitration

Source: Annex 165: *Beagle Channel Arbitration* at para. 142
[emphasis in original].



Section 48: Settlement Procedure for Disputes

28 C. 28 *Canada-Nova Scotia Accord*

Settlement Procedure for Disputes

Definition of
"agreement"

48. (1) In this section, "agreement" means an agreement between the Government of Canada and the government of a province respecting resource management and revenue sharing in relation to activities respecting the exploration for or the production of petroleum carried out on any frontier lands.

Disputes
between
neighbouring
provinces

(2) Where a dispute between the Province and any other province that is a party to an agreement arises in relation to the description of any portion of the limits set out in Schedule I and the Government of Canada is unable, by means of negotiation, to bring about a resolution of the dispute within a reasonable time, the dispute shall, at such time as the Federal Minister deems appropriate, be referred to an impartial person, tribunal or body and settled by means of the procedure determined in accordance with subsection (3).

(4) Where the procedure for the settlement of a dispute pursuant to this section involves arbitration, the arbitrator shall apply the principles of international law governing maritime boundary delimitation, with such modifications as the circumstances require.

Principles of
international
law to apply

INTENT TO BE BOUND

In sum:

- (1) the parties' intent to be bound is the fundamental requirement for the conclusion of a binding agreement at international law;
- (2) intention to be bound may be expressed in a variety of ways, none of which is mandatory;
- (3) to ascertain whether parties intended to enter into a binding agreement one must consider the terms of the agreement, the circumstances of its conclusion, the object and purpose of the agreement, and the subsequent conduct of the parties.



ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

3. There shall be taken into account together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

INTERPRETATION OF THE 1964 AGREEMENT



The **plain words** of the documents and the **subsequent conduct** of the parties reveal:

- (1) not a proposal on jurisdiction, but a **binding agreement** on boundaries;
- (2) not a proposition to take effect only upon Constitutional implementation, but an agreement **effective from the moment it was concluded**;
- (3) not a regime applicable only in the context of full provincial ownership of the mineral rights of the offshore, but boundary agreement **for all purposes**;
- (4) not a delimitation that was focussed on the Gulf of St. Lawrence, but a complete boundary **extending to the outer limit of the continental shelf**;
- (5) not an imprecise directional line ending at some arbitrary point in the Cabot Strait area, but an accurate directional line extending southeast **on an azimuth of 135°**.