DELIMITATION OF MARITIME ZONES BETWEEN SWEDEN AND THE SOVIET UNION— AN APPRAISAL

BY

SAID MAHMOUDI

The announcement by the Swedish Ministry for Foreign Affairs, at the beginning of January 1988, that the 19-year-old controversy between Sweden and the Soviet Union concerning the delimitation of their opposing maritime zones in the Baltic Sea had finally found a solution was received with both relief and surprise. The hard positions of both governments during several rounds of negotiations, and the Soviet Union's persistent reluctance to submit the case to the Hague Court or international arbitration, had generated some pessimism about any immediate solution to the problem. The Swedish announcement caused surprise. The solution of the problem was at the same time a great relief to Swedish fishermen worried about the increasing competition of the non-Baltic fishing fleet in the disputed area, the so-called white zone. The signing of the Agreement between the two countries on January 13, 1988 was followed by other initiatives on both sides to solve other delimitation problems with neighbouring countries.[1]

This paper describes the genesis of the problem, and evaluates the solutions suggested and the one finally adopted, in the light of existing international law and state practice. The analysis can be of special interest for the delimitation of other maritime zones surrounding Nordic countries.

I. BACKGROUND TO THE PROBLEM

The question of maritime boundary delimitation between Sweden and the Soviet Union became topical towards the end of the 1960s and particularly at the beginning of the 1970s, in parallel with the general trend in state practice to increase the breadth of maritime areas under national jurisdiction. The first rounds of negotiation, in November 1969, November 1970 and April 1974, were limited to the question of the delimitation of the continental shelf. After a long recess, negotia-

[1] Sweden negotiated with Poland on the delimitation of an area as large as 500 square kilometres in the Baltic Sea, and an agreement was signed on February 10, 1989. See *Sveriges överenskommelser med främmande makter* (*SÖ*) 1989:77 (Swedish Agreements with Foreign Powers, No. 1989:77). The Soviet Union has shown interest in negotiating with Norway to find a *final* solution concerning the disputed "grey zone" in the Barents Sea. See *Dagens Nyheter*, January 14, 1989, p. 10.

tions were resumed in January 1982, this time with the delimitation of the fishery zones also on the agenda. In the later meetings between the two parties, the delimitation both of the continental shelf and of the fishery zones was discussed simultaneously. Both parties were reportedly in agreement that it was in their interest to have a common border for both purposes.[2]

The main reason for the controversy was the weight which should be given to the Swedish island of Gotland in the process of delimitation. While both parties seemed to agree in principle that the boundary should lie somewhere midway between the two opposing coasts, they differed as to the baselines from which the median line was to be calculated. For Sweden, the acceptable baseline in this case was the one lying east of Gotland, thereby giving full weight to this island. For the Soviet Union, the baseline of the Swedish mainland was the point of departure. The Soviet Union, therefore, completely ignored Gotland. As a result of the application of these two different baseline systems, an area of about 13,500 square kilometres east of Gotland with rich natural resources could be claimed by either Sweden or the Soviet Union. (See figure 1.) This area—the so-called white zone—which used to be part of the high seas and free for all nations to fish, continued to be free pending final settlement of the dispute between Sweden and the Soviet Union.

The Agreement reached by the two governments at the beginning of 1988 awarded 75 per cent of the disputed area to Sweden and the remaining 25 per cent to the Soviet Union. The Agreement also contains a detailed account of the fishing arrangements in the disputed area, which underlines for both parties the significance of fishery in the region.[3]

[2] This is a point maintained by Bo Johnson-Theutenberg, who long acted as legal adviser to the Swedish Ministry for Foreign Affairs. See his book *Folkrätt och säkerhetspolitik*, Stockholm 1986, p. 259. He explains that even if the major part of what is said in the book reflects official Swedish views and positions, it is he himself who bears the responsibility for the content. See, *ibid.*, p. 32. In this paper, the statements contained in the book are generally treated as the positions of the Swedish Government.

[3] The third paragraph of the "Agreement on Principles for the Delimitation of Maritime Zones in the Baltic Sea between the Kingdom of Sweden and the Union of Soviet Socialist Republics" dated January 13, 1988, reads as follows:

> Within the framework of this agreement and during a period of 20 years after the establishment of the delimitation line, Sweden shall permit the Soviet Union a yearly catch of 18,000 tons, 200 tons of which salmon, in her part of the previously disputed area. During the same period, the Soviet Union shall permit Sweden a yearly catch of 6,000 tons, 80 tons of which salmon, in her part of the previously disputed area.

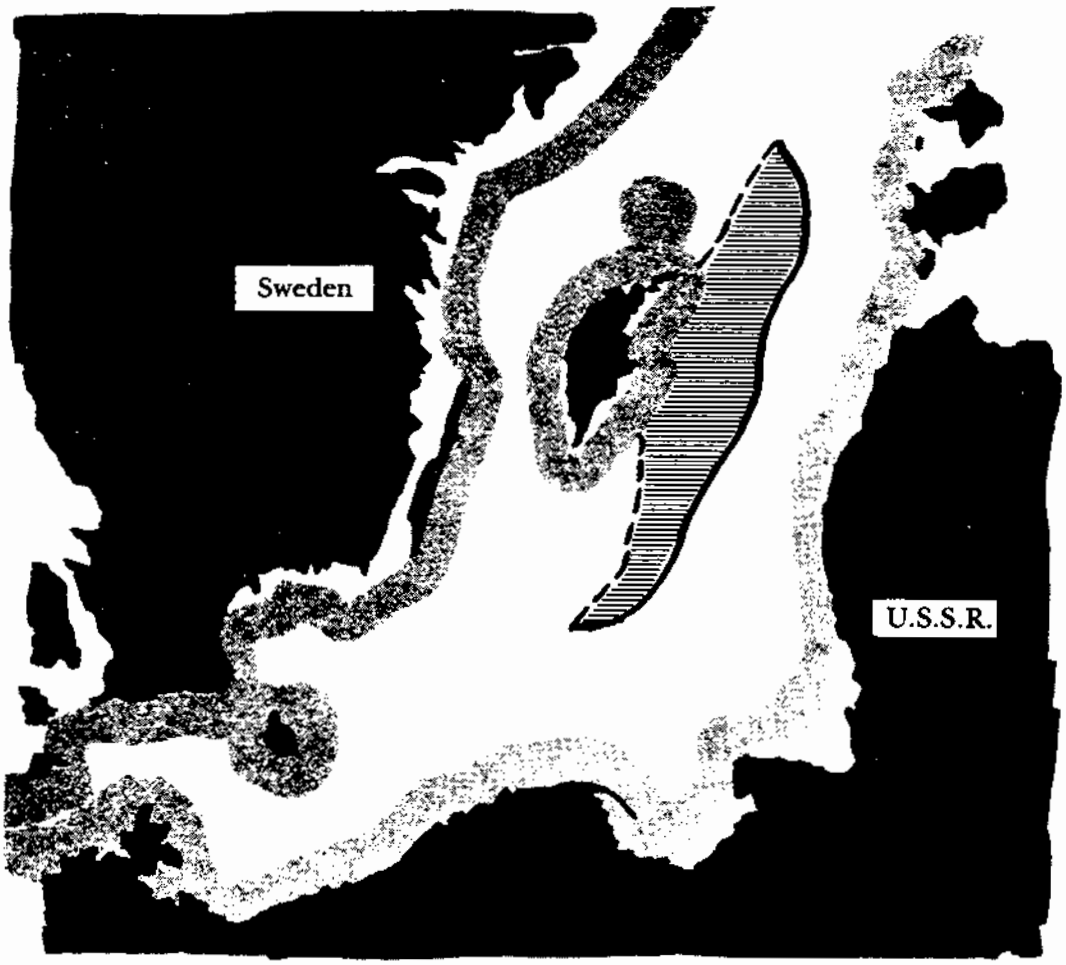

Figure 1.
▤ White Zone (the disputed area between Sweden and the Soviet Union).
▨ Territorial seas.
—— Boundary claimed by Sweden.
– – – Boundary claimed by the Soviet Union.

Although the problem found an agreed solution with no specific reference to the island of Gotland, the main legal question, i.e. the effect of islands on the delimitation of maritime zones remains a highly interesting one. It is also of particular interest to examine the Agreement in the light of the solutions in similar cases.

II. INTERNATIONAL LAW AND THE PROBLEM OF CONTINENTAL SHELF DELIMITATION

As far as the law of the sea is concerned, there is probably no other issue so contentious as the question of maritime boundary delimitation. The

In another paragraph of the same agreement, it is set out that after the 20-year period, both parties shall negotiate for the future catch with due regard to the reserves of the living resources in the area as well as the traditional fishing of Sweden and the Soviet Union. See *SÖ* 1988:3 The actual agreement for delimitation was signed in Moscow on April 18, 1988, and entered into force on June 22, 1988. See *SÖ* 1988:38–40.

reason is rather simple. From a geographical point of view, virtually no two boundary situations are identical. Each case has its own unique characteristics,[4] and the application of a general rule to all cases seems impossible. This is perhaps best manifested in the work of the Third United Nations Conference on the Law of the Sea (UNCLOS III), where the question of maritime boundary delimitation remained as a hard-core issue until the very last stage.

Agreement—There is no doubt that the fundamental principle governing maritime boundary delimitation is *agreement* by the parties. It follows that the maritime boundaries between opposite or adjacent states with overlapping maritime zones should not be established unilaterally. Conclusion of agreement as the main rule for delimitation implies that the parties may, with due respect to international law, avail themselves of any method or take into consideration or disregard any fact in order to reach agreement. Both Article 6 of the 1958 Convention on the Continental Shelf and Articles 74 and 83 of the 1982 United Nations Convention on the Law of the Sea specify *agreement* as the cardinal rule for boundary delimitation. The duty of refraining from unilaterally establishing maritime boundaries is also highlighted by the International Court of Justice (I.C.J.) both in the *North Sea Continental Shelf* Cases and in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* Case.[5]

Genesis of the Equidistance/Median Line—While in the case of states with adjacent coasts the application of one single delimitation method may prove difficult and impractical, the general understanding has been that the maritime boundary between two states with opposite coasts must be easier to establish, because it is "plausible to imagine that the

[4] Cf. R.W. Smith, "A Geographical Primer to Maritime Boundary Making", in 12 *Ocean Development and International Law* 1982, pp. 1–29, at p. 2.

[5] *I.C.J. Reports 1969*, para. 85. In the *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (hereinafter referred to as the *Gulf of Maine* Case), the Special Chamber of the I.C.J. stated that:

> ... for the delimitation of a maritime boundary—whether it concerns the territorial sea or the continental shelf or the exclusive economic zone—both conventional and customary international law accord priority over all others to the criterion that this delimitation must above all be sought, while always respecting international law, through *agreement* between the parties. (emphasis added)

The Chamber, in another part of its decision, stressed:

> ... any delimitation of the continental shelf effected unilaterally by one State regardless of the views of the other State or States concerned is in international law not opposable to those States.

See *I.C.J. Reports 1984*, paras. 22 and 87 respectively.

sovereignty of each would meet in the middle."[6] This general understanding found expression in Article 6 of the 1958 Continental Shelf Convention, which is the first international legal instrument to address the question of continental shelf delimitation in a general manner.[7] Article 6 of this convention stipulates that:

> In the absence of agreement, *and unless another boundary line is justified by special circumstances*, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured (emphasis added).

This convention, to which Denmark, Finland, Sweden and some major maritime Powers such as Canada, France, the Netherlands, the Soviet Union, the United Kingdom and the United States are parties, entered into force on June 10, 1964.

Emergence of Equitable Principles—Specifying the equidistance line as a method of delimitation in the 1958 Continental Shelf Convention, and some state practice to that effect, apparently led to the understanding by some states that this method had found general currency and was the one to apply in the majority of situations. Such was the argument of the Netherlands and Denmark in their disputes with the Federal Republic of Germany concerning the delimitation of their respective maritime zones in the North Sea. The Federal Republic, on the other hand, argued that the application of the equidistance principle would clearly lead to unfair results. The I.C.J., which had been asked for its judgment on this matter, concluded that *first* the case of median line delimitation between opposite states should be considered "sufficiently distinct not

[6] S.M. Rhee, "Sea Boundary Delimitation between States before World War II", in 76 *American Journal of International Law* 1982, pp. 555–88, at p. 559. In support of this statement, Rhee gives an example, and says:

> The maritime frontier between Finland and Sweden, established by the Peace Treaty of September 17, 1809, traversed the middle of the Gulf of Bothnia and the Aaland Sea, where it bisected the rock called the Märket and then entered the Baltic Sea after passing between certain listed Finnish and Swedish islands.

[7] The text of the Convention is the result of several years' work by the International Law Commission. It is noteworthy that there existed no consensus among the members of the I.L.C. concerning the contents of Article 6. Manley Hudson, e.g., speaking about the delimitation of maritime boundaries between adjoining states, said:

> ... there could not be said to be a principle governing the establishment of frontiers in territorial waters, nor a principle enabling the continental shelf to be divided up between two adjoining States, such as between Mexico and the United States, for example. He doubted the possibility of establishing a general principle at the present time.

See Summary Records of I.L.C., 69th Meeting, July 1950, A/CN.4/SR. 69, p. 9.

to constitute a precedent for the delimitation of lateral boundaries;"[8] and *secondly* the equidistance line method is not a mandatory rule of international law except for the parties to the 1958 Continental Shelf Convention.[9] The Court instead found that:

> ... delimitation is to be effected by agreement in accordance with *equitable principles*, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each party all those parts of the continental shelf that constitute the natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.[10]

The concept of equity thus introduced into the discussion of maritime boundary delimitation continued to dominate development in this respect. As a counterbalance to the automatic application of the equidistance line,[11] in all the related international judicial and arbitral decisions after the *North Sea Continental Shelf* Cases, reference has been made to equity (equitable principles, equitable solutions, equitable results). Equity has been treated as the prevailing principle for the delimitation of maritime zones.[12] But the vagueness of the concept of equity and its related combinations as elements of law is evident from the discrepancy which exists about their proper application in all cases.[13] However, it has often been pointed out that equidistance line is one of the many possible methods of reaching equitable results. The I.C.J. in several cases reiterated this position. Thus, in the *Continental Shelf* Case (Tuni-

[8] *I.C.J. Reports 1969*, para. 79.

[9] *Ibid.*, para. 81.

[10] *Ibid.*, para. 101(c)(1).

[11] Cf. J.R. Stevensen and Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: the 1975 Geneva Session", in 69 *American Journal of International Law* 1975, pp. 763–97, at p. 780.

[12] See, e.g., *Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, Decision of 14 March 1978 (hereinafter referred to as the *English Channel* Arbitration), in XVIII *Reports of International Arbitral Awards* (1980), pp. 3–339, at p. 45, para. 70; *Continental Shelf* Case (Tunisia/Libyan Arab Jamahirya), *I.C.J. Reports 1982*, para. 133(1); the *Gulf of Maine* Case, *I.C.J.Reports 1984*, para. 300; *Continental Shelf* Case (Libyan Arab Jamahirya/Malta), *I.C.J. Reports 1985*, para. 44.

[13] For the criticism about the abuse of "equitable principles" in the *Continental Shelf* Case (Tunisia/Libyan Arab Jamahirya) and the *Gulf of Maine* Case, see K.M. Ioannou, "Some Preliminary Remarks on Equity in the 1982 Convention on the Law of the Sea", in Rozakis and Stephanou (eds.), *The New Law of the Sea*, Amsterdam 1983, pp. 97–106, at p. 100, and the dissenting opinion of Judge Gros in the *Gulf of Maine* Case, para. 47. An interesting comment on the concept of equity as applied in cases concerning maritime boundary delimitation is given by Sir R.Y. Jennings in his article "Equity and Equitable Principles" in XLII *Schweizerisches Jahrbuch für internationales Recht*, Zurich 1986, pp. 27–38.

sia/Libyan Arab Jamahirya), it was mentioned that no priority should be given to any particular method.[14] The same view was held by an Arbitration Tribunal consisting of three I.C.J. members dealing with the dispute concerning delimitation of the maritime boundary between Guinea and Guinea/Bissau. The Tribunal stated: "Le Tribunal estime pour sa part que l'équidistance n'est qu'une méthode comme les autres et qu'elle n'est ni obligatoire ni prioritaire ...."[15] The application of the equidistance line need not necessarily contradict equitable principles.[16] This is also evident from the judgment in the *North Sea Continental Shelf* Cases, where the Court—although adhering to equitable principles—concedes:

> The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. Their prolongations meet and overlap, and can therefore only be delimited by means of a median line ....[17]

The increasing claims of coastal states to extended fishery zones, and as from the early 1970s to a 200-mile exclusive economic zone, gave a new dimension to the problem of delimitation which had until then been limited to the territorial sea and the continental shelf. As a result of extended coastal jurisdiction, some 370 maritime boundaries were to be established.[18]

Boundary Delimitation and the 1982 Convention—The UNCLOS III negotiations from 1974 until 1982 were to a great extent characterized by the concern of almost all coastal states about the ultimate rules concerning maritime boundary delimitation. In the negotiations, the equidistance principle and the equitable principles turned out to be two opposite concepts. Proponents of the median/equidistance line derived the force of their arguments from state practice and the 1958 Continen-

[14] *I.C.J. Reports 1982*, p. 79, para. 110.

[15] Tribunal Arbitral pour la délimitation de la frontière maritime Guinée/Guinée Bissau, sentence du 14 février 1985, in LXXXIX *Revue générale de droit international public* 1985, pp. 484–537, at p. 525, para. 102.

[16] See, e.g., the Counter-Memorial of the United Kingdom before the Court of Arbitration, where it was argued:

> ... no rule of international law requires the displacement of the median line by another boundary line, since the median line, which faithfully reflects the geographical configuration of the coasts of the two States in relation to the sea, produces a result which accords with equitable principles ....

See *Reports of International Arbitral Awards* (1980), p. 12.

[17] *I.C.J. Reports 1969*, para. 57.

[18] Smith, *op.cit*, p. 3.

tal Shelf Convention as a primary source of international law. This group, originally consisting of 22 states under the chairmanship of Spain and including Canada, Denmark, Italy, Sweden and the United Kingdom, considered the median/equidistance line as binding international law. The supporters of equitable principles anchored their reasoning in the decisions of the Hague Court and the emerging customary law. Ireland held the chairmanship of this group, which originally comprised 29 states including Argentina, France, Turkey and Venezuela.[19] Towards the end of the work of UNCLOS III, almost two thirds of the states interested in the question of delimitation supported "equitable principles" and one third the "equidistance principle".

To tackle the difficult question of delimitation, UNCLOS III, in 1978, established a special negotiating group under the chairmanship of Judge Manner from Finland. Manner's extensive efforts notwithstanding, the negotiating group could not agree on a unified formula, and finally the President of the Conference, a few months before the adoption of the Convention, suggested a formulation which does not refer to "equidistance line" but contains a reference to Article 38 of the Statute of the I.C.J..[20] According to this article, international conventions should be used as a primary source of law for the settlement of international disputes. This could be interpreted as a reference to the 1958 Continental Shelf Convention and its article 6, which clearly names median line as the applicable method. It is rightly observed that the compromise formulas incorporated in the 1982 Convention with respect to the question of delimitation "have perhaps become so vague that they do not give much guidance to the parties in the drawing up of concrete lines of delimitation."[21]

[19] For details, see J. Symonides, "Delimitation of Maritime Areas between the States with Opposite or Adjacent Coasts", in XIII *Polish Yearbook of International Law*, Warsaw 1984, pp. 19–46, at p. 27.

[20] Article 83 of the 1982 Convention, which deals with the delimitation of the continental shelf between states with opposite or adjacent coasts has a formulation identical to that of Article 74 on the delimitation of exclusive economic zones. Paragraph 1 of Article 83 reads:

> 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.

[21] J. Evensen, "The Delimitation of Exclusive Economic Zones and Continental Shelves as Highlighted by the International Court of Justice", in Rozakis and Stephanou (eds.), *op.cit.*, pp. 107–154, at p. 110. Smith, before the adoption of the Convention, prophesied "Whatever the final wording in the Convention may be, it is quite likely that these two

Equitable Principles As Applicable Law—While equidistance/median line has a clear legal definition in Article 6 of the 1958 Continental Shelf Convention, the concept of equity in general, and related combinations such as equitable principles and equitable solutions in particular, do not enjoy the same degree of clarity.[22] Delimitation in accordance with equitable principles may be interpreted as taking into account all relevant circumstances and applying one or more methods to achieve a just result. The I.C.J., in the *North Sea Continental Shelf* Cases, stated:

> ... there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing up of all such considerations that will produce this result rather than reliance on one to the exclusion of the others.[23]

The Special Chamber of the I.C.J. in the *Gulf of Maine* Case reiterated that regard should be made to the *geographical configuration* of the area and other relevant circumstances in order to achieve an equitable result.[24] However, this emphasis on geographical configuration was somehow weakened in the *Continental Shelf* Case (Libyan Arab Jamahiriya/Malta), where the I.C.J. stated:

> For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion.[25]

One may probably differentiate between the proponents of the equidistance principle and those of equitable principles by pointing out that the latter admit any equitable criterion, including the equidistance/median line, to arrive at a certain result, while the former emphasize the method to be applied rather than the result to be achieved, presumably assuming that the very application of this method entails a tendency to disregard the distorting effects of some geographical configurations.

Islands and the Question of Special Circumstances—As long as there is no island between two opposite coasts, the application of the equidistance

Articles (74 and 83) will remain purposely vague and subject to interpretation. This may not be a bad idea since there must be a certain amount of flexibility ...." See Smith, *op.cit.*, p. 4.

[22] For an interesting analysis of the application of the concept of equity in the law of the sea and particularly in the case of maritime boundary delimitation, see Ioannou, *loc.cit.*

[23] *I.C.J. Reports 1969*, para. 93. See also *I.C.J. Reports 1982*, para. 4. L.M. Alexander, "Baseline Delimitation and Maritime Boundaries", in 23 *Virginia Journal of International Law* 1983, pp. 503–36, at p. 522.

[24] *I.C.J. Reports 1984*, para. 112(2).

[25] *I.C.J. Reports 1985*, p. 13, para. 48.

line normally meets the requirements of both the above-mentioned groups. However, the great majority of delimitation cases are complicated by the presence of one or more islands between the two coasts.

One concept which is normally associated with the role of islands in maritime boundary delimitation is the "special circumstances" condition in Article 6 of the 1958 Continental Shelf Convention. Article 6 prescribes the application of the equidistance principle "unless another boundary line is justified by special circumstances." There is no definition of "special circumstances" in the article itself. The commentary of the International Law Commission on this article, however, explains that "provision must be made for departures (from the median line) necessitated by any exceptional configuration of the coast, as well as the *presence of islands* or of navigable channels" (emphasis added).[26] The bulk of the writing on the subject generally treats the presence of islands on continental shelves as a classical instance of "special circumstances".[27]

The concept of "special circumstances" did not appear in the 1982 Convention,[28] but its implications have certainly found expression in Articles 74 and 83 of the Convention, which provide for boundary delimitation on the basis of international law in order to achieve an equitable solution.

Legal discussion of the significance of the "special circumstances" condition is probably not so interesting as formerly. Judicial decisions have shown that delimitation must be effected by equitable criteria, which in a way covers the implications of "special circumstances". In fact, the establishment of "equitable principles" as the dominant rule by the I.C.J. was the reinforcement of the "special circumstances" to the detriment of the equidistance principle. However, for those states which are parties to the 1958 Continental Shelf Convention and still have unsettled delimitation disputes, the interpretation attached to the "special circumstances" clause may remain a matter of the utmost interest. Given the ambiguity of the word "special", substitutes such as "relevant" have been preferred both in the doctrine and in court practice.

[26] *1956 I.L.C. Yearbook*, Vol. II, p. 300, commentary to Article 72. For discussion on the "special circumstances", see *1953 I.L.C. Yearbook*, Vol. I, pp. 128–32.

[27] D.E. Karl, "Islands and the Delimitation of the Continental Shelf: A Framework for Analysis", in 71 *American Journal of International Law* 1977, pp. 642–73, at p. 648.

[28] This is in spite of efforts by some delegates to insert a "special circumstances" condition in the provisions concerning delimitation of the continental shelf. See, e.g., French proposal, U.N. Doc. A/CONF.62/C.2/L.74.

The presence of islands can be *one* of the factors which *may* constitute special circumstances and justify departure from the strict application of the median line. It is the distorting effect of the islands on the result of the delimitation which makes them "special". The size and location of an island can play a decisive role in this respect. Consequently, it may be argued that *not all* types of island constitute special circumstances, and the presence of islands does *not always* justify modification of the equidistance principle. However, those who base their arguments on the decision of the I.C.J. in the *North Sea Continental Shelf* Cases and further consolidation of the "equitable principles", attach broader content to the concept of "special circumstances". For them, population, economic viability, distance from the mainland, geographical configuration and political status, among other things, should be taken into account for an equitable delimitation.[29]

A question related to the discussion of "special circumstances" is whether this concept as applied in Article 6 of the 1958 Continental Shelf Convention should be considered as a separate "rule" or "method" distinct from the equidistance principle or whether they both are integrated parts of the same rule. This is obviously a matter of interpretation. The United Kingdom, in the *English Channel* Arbitration, argued for separation of these two and for the supremacy of the "equidistance principle" as the general rule over "special circumstances" which, as a separate rule, could only be invoked exceptionally when the general rule was not applicable. According to the United Kingdom, the onus of proof was placed on France, as the party seeking exemption from application of the general rule, to show that special circumstances within the meaning of Article 6 existed, and that thereby a boundary other than the median line was justified.[30]

The Court of Arbitration, however, did not approve this interpretation, and argued:

> Article 6 ... does not formulate the equidistance principle and "special circumstances" as two separate rules. The rule there stated in each of the two cases is a single one, a combined equidistance-special circumstances rule. That being so, it may be doubted whether, strictly speaking, there is any legal burden of proof in regard to the existence of the special circumstances. The fact that the rule is a single rule means that the question

[29] Karl, *op.cit.*, pp. 643–45. A similar list is suggested by Symonides. His list contains factors such as geography, geomorphology, natural resources, navigation, fishing, conservation of natural environment, historic titles and security problems. Symonides, *op.cit.*, p. 43.

[30] *Reports of International Arbitral Awards* (1980), p. 16.

> whether "another boundary is justified by special circumstances" is an integral part of the rule providing for application of the equidistance principle. As such, though involving matters of fact, that question is always one of law of which, in cases of submission to arbitration, the tribunal must itself, proprio motu, take cognizance when applying Article 6.[31]

The Arbitration Court, moreover, found that "the role of the 'special circumstances' condition in Article 6 is to ensure an equitable delimitation, and the combined 'equidistance-special circumstances rule', in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles."[32] The view was later confirmed by the Special Chamber of the I.C.J. in the *Gulf of Maine* Case.[33]

The Effect of Islands on Boundary Delimitation—A complex problem in maritime boundary delimitation between two states with opposite coasts has been the weight which should be given to islands in any concrete case.[34] At least five different approaches have been mentioned in this regard, namely, full weight, *quid pro quo*, no weight, partial weight and enclavement.[35] As this paper is primarily concerned with the case of delimitation between Sweden and the Soviet Union where the single island of Gotland was the source of controversy, we here concentrate on the judicial decisions and state practice in which three of the five above-mentioned approaches, i.e., full weight, partial weight or no weight have been adopted.

Full Weight—A study of state practice reveals that where special circumstances exist in the relative proximity of each of the opposite coasts, attaching full weight to the presence of islands on both sides has been preferred.[36] It is because of this fact that in situations like this, reciprocal treatments are possible. Because of the assumed proximity of

[31] *Ibid.*, p. 421, para. 68.
[32] *Ibid.*, p. 421, para. 70.
[33] *I.C.J. Reports 1984*, para. 123.
[34] Evensen, *op.cit.*, p. 135.
[35] P. Bravender-Coyle, "The Emerging Legal Principles and Equitable Criteria Governing the Delimitation of Maritime Boundaries between States", in 19 *Ocean Development and International Law* 1988, pp. 171–227, at p. 188.
[36] Some examples are: 1965 Agreement between Norway and the United Kingdom, *United Nations Treaty Series* (*U.N.T.S.*), Vol. 551, p. 214; 1965 Agreement between Denmark and Norway, *U.N.T.S.*, Vol. 634, p. 71; 1968 Agreement between Poland and German Democratic Republic concerning the delimitation of the continental shelf in the Baltic Sea, *U.N.T.S.*, Vol. 768, p. 253; 1965 Agreement between Finland and the Soviet Union concerning the delimitation of the continental shelf in the Gulf of Finland, *U.N.T.S.*, Vol. 556, p. 31.

the islands to the mainland and the possibility of using them as the basepoints without causing major change in the location of the median line, such an approach is tantamount to the application of the equidistance line where no special circumstances exist, and the result is usually equitable.[37]

Another situation is where an island is relatively small and is situated near the baselines from which the median line is to be calculated. In this case, giving full weight to such an island normally does not lead to disproportionate results. In the *English Channel* Arbitration, e.g., the Court gave full weight to the island of Ushant (Le Crom), which lies some 10 nautical miles from the French coast within the territorial sea of the French mainland.[38]

Even when two or more islands belonging to two states with opposite coasts are situated far from the mainlands but their location provides for reciprocal treatment without causing any significant distortion on the location of the median line, the full-weight approach may be employed. An example is the delimitation of the continental shelf between Iran and Bahrain, where the two islands of Muharrag (Bahrain) and Nakhilu (Iran) in the middle of the Persian Gulf were given full weight.[39]

Partial Weight—Another approach is to give partial weight to one or more islands in order to abate their distorting effect on the determination of the median line, and to reach an equitable result. Partial weight in practice has been most often half weight. In the *English Channel* Arbitration, the Court defined the method of giving half weight as:

> ... delimiting the line equidistance between the two coasts, first, without the use of the offshore islands as a base-point and, secondly, with its use as a base-point; a boundary giving half-effect to the island is then the line drawn mid-way between those two equidistance lines.[40]

A similar definition is provided by the I.C.J. in the *Continental Shelf* Case (Tunisia/ Libyan Arab Jamahirya).[41]

[37] Bravender-Coyle, *op.cit.*, p. 189.
[38] *Reports of International Arbitral Awards* (1980), p. 116, para. 248.
[39] *U.N.T.S.*, Vol. 826, p. 227.
[40] *Reports of International Arbitral Awards* (1980), p. 117, para. 251.
[41] The definition is somehow more comprehensive. The Court, speaking about the method of half effect, explains:

> ... the technique involves drawing two delimitation lines, one giving to the island the full effect attributed to it by the delimitation method in use, and the other disregarding the island totally, as though it did not exist. The delimitation line actually adopted is then drawn between the first two lines, either in such a way as to divide equally the area between them, or a bisector of the angle which they make with each other ....

See *I.C.J. Reports 1982*, para. 129.

In the delimitation of the continental shelf between Iran and Saudi Arabia, half weight was given to the Iranian island of Kharg, which is situated some 17 nautical miles off the Iranian coast.[42] The same treatment was extended to the British Scilly Isles in the *English Channel* Arbitration.[43] In order to explain why the French island of Ushant lying 10 miles off the French coast had been given full weight and Scilly Isles lying 21 miles off the British mainland only half weight, the Court stated:

> ... without attributing any special force as a criterion to this ratio of the difference in the distance of the Scillies and Ushant from their respective mainlands, (the Court) finds in it an indication of the suitability of the half-effect method as a means of arriving at an equitable determination in the present case.[44]

The I.C.J. in the *Continental Shelf* Case (Tunisia/Libyan Arab Jamahirya) dealt with the Tunisian islands of Kerkennah, which are almost 180 square kilometres and are situated close to the Tunisian coast. Tunisia had argued for full weight and Libya for no weight to be given to these islands. The Court decided to accord half weight to the Kerkennah archipelago.[45]

In the *Gulf of Maine* Case too, the Canadian Seal Island was given half weight. The Special Chamber of the I.C.J. acknowledged that this island, because of its dimensions and geographical position, cannot be disregarded. Nevertheless, it was considered excessive "to treat the coastline of Nova Scotia (the nearest mainland to Seal Island) as transferred ... by the whole of the distance between Seal Island and the coast ...."[46]

It should be noted that with respect to the overall cases of continental shelf delimitations, the partial-weight approach has not been used as frequently as other approaches.[47]

No Weight—Another method is to disregard the presence of islands and other insular formations. It may be applied to the special circumstances of only one coastal state in order to achieve equitable results for both states involved in the boundary delimitation dispute. The method is used mainly in the case of very small islands, islets and rocks or when

[42] *U.N.T.S.*, Vol. 696, p. 189.
[43] *Reports of International Arbitral Awards* (1980), pp. 116–17, paras. 249–51.
[44] *Ibid.*, p. 117, para. 251.
[45] *I.C.J. Reports 1982*, para. 129.
[46] *I.C.J. Reports 1984*, para. 222.
[47] Cf. Alexander, *op.cit.*, p. 526.

the sovereignty over an island is disputed.[48] Examples of this treatment of small islands can be found in both state practice and judicial decisions.

In the 1969 Agreement between Sweden and Norway concerning the delimitation of the continental shelf[49] and in the 1970 Agreement concerning the boundary line dividing the continental shelf between Iran and Qatar,[50] a number of islands situated near the boundary were ignored. In the 1968 Agreement between Italy and Yugoslavia, the Yugoslav islands of Kajola and Pelagruz and the Italian island of Pianosa were disregarded for continental shelf delimitation purposes.[51] The I.C.J., in the *Continental Shelf* Case (Tunisia/Libyan Arab Jamahirya), gave no weight to the island of Jerba for the purpose of delimiting the boundary line.[52]

Generally speaking, the third approach, i.e. the no-weight method, has been applied mainly to *small* islands and minor insular formations located not so far from the boundary line.

Having dealt with some relevant aspects of international law concerning the problem of continental shelf delimitation between two states with opposite coasts, particularly when the presence of one or more islands complicates the process of delimitation, it is now appropriate to deal with the concrete case of maritime zones delimitation between Sweden and the Soviet Union and the role of the island of Gotland in this respect.

III. GOTLAND AND SWEDISH-SOVIET APPROACHES

Gotland, with an area of 3,200 square kilometres, almost 125 kilometres long and 52 kilometres wide, and with a population slightly over 50,000, is situated in the Baltic Sea close to the median line between the mainlands of Sweden and the Baltic States.[53]

Sweden, during the course of negotiations with the Soviet Union,

[48] Bravender-Coyle, *op.cit.*, p. 191; J.G. Collier, "The Régime of the Islands and the Modern Law of the Sea", in Buttler (ed.), *The Law of the Sea and International Shipping*, New York 1985, pp. 173–88, at p. 184.

[49] *SÖ* 1969:3. It is noteworthy that in Article 1 of this agreement, median line is mentioned as the applicable principle. However, in Article 2, some departure from this principle is admitted in order to draw a "practical and appropriate" boundary line.

[50] *U.N.T.S.*, Vol. 787, p. 165.

[51] Cf. Bravender-Coyle, *op.cit.*, p. 222.

[52] *I.C.J. Reports 1982*, para. 120.

[53] Johnson-Theutenberg, *op.cit.*, p. 275.

argued that Gotland was a "continental" island, in contradistinction to normal islands or islets. This was so both because of the history of the island and the impact it had left on continental Europe and Russia, and its undeniable political and economic significance for the Swedish mainland.[54]

The Soviet Union, while not denying the historical and geographical facts concerning the size and particular importance of Gotland for Sweden, was not prepared to give any weight to these factors for the purpose of delimitation.

Before dwelling upon the attitudes of the two states with respect to the effect of Gotland on the delimitation of the continental shelf, two facts should be pointed out. *First*, the first round of negotiations between the parties started in November 1969, almost eight months after the announcement of the I.C.J. judgment on the *North Sea Continental Shelf* Cases. In other words, it coincided with the weakening of the undisputed principle of equidistance/median line in favour of revitalized "equitable principles", which had been coined first in the Truman Proclamations of 1945, and could arguably cover the "special circumstances" condition. The later judicial and arbitral decisions did not change this pattern; on the contrary, they all confirmed that "equitable principles" had come to stay, and prevailed over all other principles and methods of maritime boundary delimitation. *Secondly*, while Sweden had a consistent policy with respect to the delimitation of the continental shelf with her neighbours, the Soviet Union shifted her position from being a fervent proponent of the equidistance/ median line in the case of delimitation with Poland and Finland to supporting equitable principles with respect to the maritime boundaries with Norway and Sweden.

The Swedish View—Sweden, relying on the content of the 1958 Continental Shelf Convention to which both states were parties, based its argument on the supremacy of the equidistance principle over all other methods and principles relating to the delimitation of maritime boundaries. For Sweden, the equidistance principle was the main rule, and "special circumstances" was an exception.[55] One could not, according to Sweden, extend the "special circumstances" condition to *all* sorts of islands. It was only islets, rocks and cliffs which constituted "special circumstances".[56] Gotland, therefore, was no special case. It had, ac-

[54] *Ibid.*, p. 264.
[55] *Ibid.*, p. 266.
[56] *Ibid.*, p. 267; see also *UD informerar*, *Den nya havsrätten*, 1984:2, p. 18 (publication of the Swedish Ministry for Foreign Affairs).

cording to Article 1(b) of the 1958 Continental Shelf Convention, its own continental shelf, and the median line had to be calculated between the eastern baseline of Gotland and the Soviet Union.[57] Sweden also emphasized that Article 1(b) stating that islands also have a continental shelf and Article 6 providing for the delimitation of the continental shelf between two opposite states without naming islands, should be read together.[58]

Another point raised by Sweden was the location of Gotland, which is situated some 50 nautical miles off the Swedish mainland. It was argued that, with respect to the new rules of the law of the sea, Gotland could perhaps "be included in a long straight *baseline system* from the Stockholm archipelago, over to Gotska Sandoen, to Gotland and Oeland, and then back to the Swedish mainland."[59] In other words, its proximity to the mainland together with its location in relation to other Swedish islands could, according to Sweden, justify a median line calculated from its baselines.

As mentioned before, Sweden had a consistent policy regarding maritime boundary delimitation with her neighbours, with the hope that sticking to the median line principle would eventually be used as an argument against the Soviet Union. In 1983, further to some drilling by a Danish company in the disputed continental shelf area between Sweden and Denmark in the Kattegatt, the question was raised as to what weight should be given to some small Danish islands in the process of delimitation.

Following initial expression of doubts concerning any weight to be given to those islands at all, Sweden quickly agreed to accord full weight to the small and uninhabited island of Hesselö, and drew the median line between the baseline of this island and the Swedish mainland. This was obviously to be invoked as a precedent in the forthcoming negotiations with the Soviet Union. This intention is evident from the following statement:

> ... if [Sweden] interprets the rules of international law in this way with regard to the small Danish islands ... this interpretation is of relevance when it comes to a clearer case from the point of international law, namely the most obvious case of *Gotland*.[60]

[57] The fact that even islands have continental shelves is recognized in Article 121(2) of the 1982 Convention, too.

[58] Johnson-Theutenberg, *op.cit.*, p. 265.

[59] *Ibid.*, p. 268.

[60] *Ibid.*, p. 272.

With respect to many examples of disregarding small uninhabited islands in the delimitation of the continental shelf, it is abundantly clear that Sweden easily *gave up* its possible rights in the Kattegatt with the hope of gaining in the much more significant dispute with the Soviet Union.[61]

Looking back to the Swedish stand and legal arguments, one may find both general and specific weaknesses.

The *general* problem with the Swedish reasoning was that it basically rested upon the median line argument. While the trend of international law doctrine was in favour of "equitable principles", thereby strengthening the "special circumstances" argument,[62] Sweden continued to insist on the supremacy of the equidistance/median line as a *general principle* applicable to boundary delimitation disputes.

Another problem which can be classified under general weaknesses was the insistence on applying the 1958 Continental Shelf Convention to a case which concerned the delimitation of both the continental shelf and the fishery zone. The parties had agreed to draw one single line for both purposes. The Special Chamber of the I.C.J., in the *Gulf of Maine* Case, commenting on the applicability of the 1958 Continental Shelf Convention to the delimitation of fishery zones, stated:

> It is doubtful whether a treaty obligation which is in terms confined to the delimitation of the continental shelf can be extended, in a manner that would manifestly go beyond the limits imposed by the strict criteria governing the interpretation of treaty instruments, to a field which is evidently much greater, unquestionably heterogeneous, and accordingly fundamentally different.[63]

Specific problems in the Swedish line of argument were:

First, Sweden tried to give its own definition to the concept of "special

[61] The Swedish negotiators defended this retreat by emphasizing the trade-off between the case of Hesselö in the Kattegatt, which became more beneficial to Denmark, and the case of Danish Ertholmene archipelago in the Baltic Sea, which turned out to be more advantageous to Sweden. Without trying to evaluate the validity of this argument, the quotation above (see *supra*, footnote 60 and the accompanying text) reveals that Sweden mainly thought of the possibility of invoking the precedent of Hesselö in the case of Gotland rather than commanding a balance of interests with Denmark.

[62] This fact is elaborated by the I.C.J. in *Continental Shelf* Case (Libyan Arab Jamahirya-/Malta), in the following words:

> ... there has since 1969 been a clear trend away from equidistance manifested in delimitation agreements between States, as well as in jurisprudence and in the deliberations at the United Nations Conferenec on the Law of the Sea.

See *I.C.J. Reports 1985*, para. 44.

[63] *I.C.J. Reports 1984*, para. 119.

circumstances". It was, according to Sweden, very small islands which constituted special circumstances, and permitted deviations from the equidistance/median line principle.[64] Gotland was a major integral part of the mainland. Consequently, the median line had to be calculated from the baselines of that island. The adoption of such a definition for "special circumstances" and the exclusion of Gotland from this probably took place during the 1960s, when Sweden still had several unsettled maritime boundaries with her neighbours. Invocation of the "special circumstances" condition and departure from the median line method could favour Sweden in some of these cases. But the Swedish definition could get little support in state practice or jurisprudence, and in fact the size and population of islands proved to be only two of the many factors which would contribute to the creation of "special circumstances".

Since this was a question of claims of sovereign rights, it is quite understandable that Sweden had to start the negotiations with the most extreme claim possible as the point of departure. Calculating the median line from the baselines of Gotland was the actual interpretation of this policy and a reflection of a sensitive national interest. However, the problem was that in no judicial decision had full weight been given to an island like Gotland with such a huge distorting effect on the median line.

The delimitation of *insular* continental shelves is *not* mentioned in Article 6, and the inclusion of "special circumstances" in that article could arguably justify deviations from calculating the median line from the baselines of the *mainland's* territorial sea only. Therefore, the Swedish emphasis on the absence of "special circumstances" could only pave the way for acceptance of the Soviet claim that the median line should be calculated from the baselines of the Swedish mainland. To thwart such an interpretation, Sweden invoked Article 1(b) of the 1958 Continental Shelf Convention, asserting that such islands have their own continental shelf, and that the median line should be between Gotland and the Soviet mainland.

It seems that the Swedish line of reasoning was, to say the least, blurred. The main point for Sweden, in this author's view, was not to prove the absence of "special circumstances". The essential issue was rather to evaluate the weight which should be accorded to Gotland in

[64] This is evident from different Swedish contributions to the discussion. See, e.g., Johnson-Theutenberg, *op.cit.*, p. 267; *id.*, "Vi har viktiga principer att försvara", in *Svenska Dagbladet*, August 19, 1983, p. 3; H. Danelius, "Stater skall samarbeta", in *Dagens Nyheter*, August 13, 1983, p. 2; *UD informerar*, *Den nya havsrätten*, 1984:2, p. 17.

the process of boundary delimitation. In other words, the main attention should have been focused on the legal support for giving full weight to Gotland. With respect to the increasing support for "equitable principles", it would perhaps have benefitted Sweden more to accept the presence of "special circumstances", and then insisted on giving full weight to Gotland in that context.

Secondly, Sweden asserted that Article 1(b) of the 1958 Continental Shelf Convention—giving islands continental shelves of their own, and Article 6—delimitation between opposite and adjacent coasts—should be read together. In the Swedish view, even if there was no mention of islands in Article 6, the provisions of this article should be extended to islands too. This was unwarranted.

During the First United Nations Conference on the Law of the Sea in 1958, this point was in fact raised but "parochialism and the delegates' inability to reconcile their conflicting interests resulted in the absence of any explicit reference to islands in Article 6 . . . ."[65] The general view at that conference was that the problem of islands, at least when they are not located on the continental shelf of another state, could be handled by recourse to the "special circumstances" condition.[66]

Thirdly, the somehow bold suggestion of the previous legal adviser to the Swedish Ministry for Foreign Affairs to include Gotland in the straight baseline system drawn along the eastern coast of Sweden has hardly any support in international law.[67] It is true that both state practice with respect to drawing straight baselines and the concept of the archipelagic state have perhaps paved the way for inclusion of broader sea areas in the maritime zones under coastal state jurisdiction; yet it is not permitted to take arbitrary steps in this respect, and the criterion of "reasonableness" governs here as anywhere else in international law.

The Soviet View—Our knowledge of the details of the Soviet arguments with respect to the maritime boundary dispute with Sweden is rather limited. What characterizes the Soviet attitude, however, is first her reluctance to submit disputes involving questions of sovereignty to international tribunals,[68] and secondly a shift of policy from adherence

[65] Karl, *op.cit.*, p. 643.
[66] *Ibid.*
[67] Johnson-Theutenberg, *Folkrätt och säkerhetspolitik*, p. 268.
[68] *Ibid.*, p. 262. Sweden had, in fact, suggested on several occasions that the dispute should be referred to an international tribunal, but the Soviet Union had not agreed. *Ibid.*, p. 261.

to the equidistance/median line method to the support of "equitable principles".

Following the entry into force of the 1958 Continental Shelf Convention in June 1964, the Soviet Union commenced efforts to settle maritime boundaries with her neighbours in the Baltic Sea. From 1965 until 1969, the continental shelf boundaries between the Soviet Union and her neighbours Finland and Poland were determined in conformity with the prescriptions of the 1958 Continental Shelf Convention. The median line was in these cases the guiding principle.[69] However, the problem of maritime boundary delimitation with Norway in the Barents Sea and with Sweden in the Baltic Sea proved to be more difficult to solve.

During the work of UNCLOS III, the Soviet Union kept a rather low profile on this issue.[70] Nevertheless, parallel with her negotiations with both Sweden and Norway, she showed unmistakable indications of relinquishing the equidistance principle in favour of "special circumstances" and equitable principles.[71] Just few months before the announcement of the maritime boundary settlement between Sweden and the Soviet Union, one author rightly observed:

> The Soviet Union in a way has the best of both worlds. While at first a fervent supporter of the equidistance principle, the U.S.S.R. delimited some of its boundaries accordingly. These agreements remaining in force, this country now rather inclines toward the equitable principle as more favourable to some of its lingering delimitation questions.[72]

Remembering the Swedish stand in firmly rejecting the application of the "special circumstances" condition to Gotland, it may arguably be inferred that the Soviet Union insisted on the presence of such a situation. In this case, the only reasonable treatment from the Soviet side could be total disregard of Gotland because of its vicinity to the median line and its possible distorting effect on the result of the delimitation.

The main problem of such an argument is that ignoring an island because of its location near the median line and its ensuing distorting effect may probably be thought of only when the island lacks a macro-

[69] A detailed information about the agreements are given in E. Franckx, " 'New' Soviet Delimitation Agreements with Its Neighbors in the Baltic Sea", in 19 *Ocean Development and International Law* 1988, pp. 143–58.

[70] *Ibid.*, p. 148.

[71] At least since 1985 the Soviet Union had clearly advocated "equitable principles" as its official position in negotiations with Sweden. For this and an interesting commentary on the measures which led to the signature of the Agreement, see P. Schori, "Så drev vi igenom östersjöavtalet", in *Tempus*, May 19, 1988, pp. 8–9.

[72] *Ibid.*

geographical relation to the state to which it belongs,[73] and when both its size and population are insignificant. This is not the case with Gotland.

Maybe the most striking contradiction in the attitude of the Soviet Union has been her position toward Ostrov Zmeinya, a small island in the Black Sea. This island, on which Rumania has a claim of sovereignty, is located 19 miles off the coast, and is occupied by the Soviet Union. In several negotiations between the two countries about the delimitation of maritime areas in the Black Sea, the Soviet Union has invoked the supremacy of the equidistance principle and the suitability of calculating the median line from the baselines of the said island. Compared with the case of Gotland, the position of the Soviet Union with respect to Ostrov Zmeinya is clearly reversed.[74]

IV. EVALUATION OF THE AGREEMENT AND CONCLUDING THOUGHTS

A study of the role of islands in continental shelf delimitation between two states with opposite coasts demonstrates that no two cases are treated identically in all respects. The rather vaguely outlined "equitable principles" with their inherent flexibility have come, through repeated judicial and arbitral decisions and state practice, to stay as the dominant frame of reference for the settlement of such cases.

Gotland, because of the size, population, historical, political and economic links with the mainland, is a unique and unprecedented case. In no previous continental shelf delimitation did identical circumstances exist. Therefore, any effort to draw analogy with similar islands or conclusions from the judgments of the courts in similar cases is rather futile.

The Agreement between Sweden and the Soviet Union awards three fourths of the disputed area to Sweden. This means that the parties have agreed to give *partial weight* to Gotland. A mathematical calculation may suggest something between half and full weight. (See figure 2.) The median line principle is thus abandoned in favour of "special circumstances".

Remembering that Sweden as early as 1982, as a gesture of compromise, was prepared to give 13 per cent of the disputed area to the Soviet

[73] Karl, *op.cit.*, p. 658.
[74] Cf. Johnson-Theutenberg, *Folkrätt och säkerhetspolitik*, p. 271; Franckx, *loc.cit.*

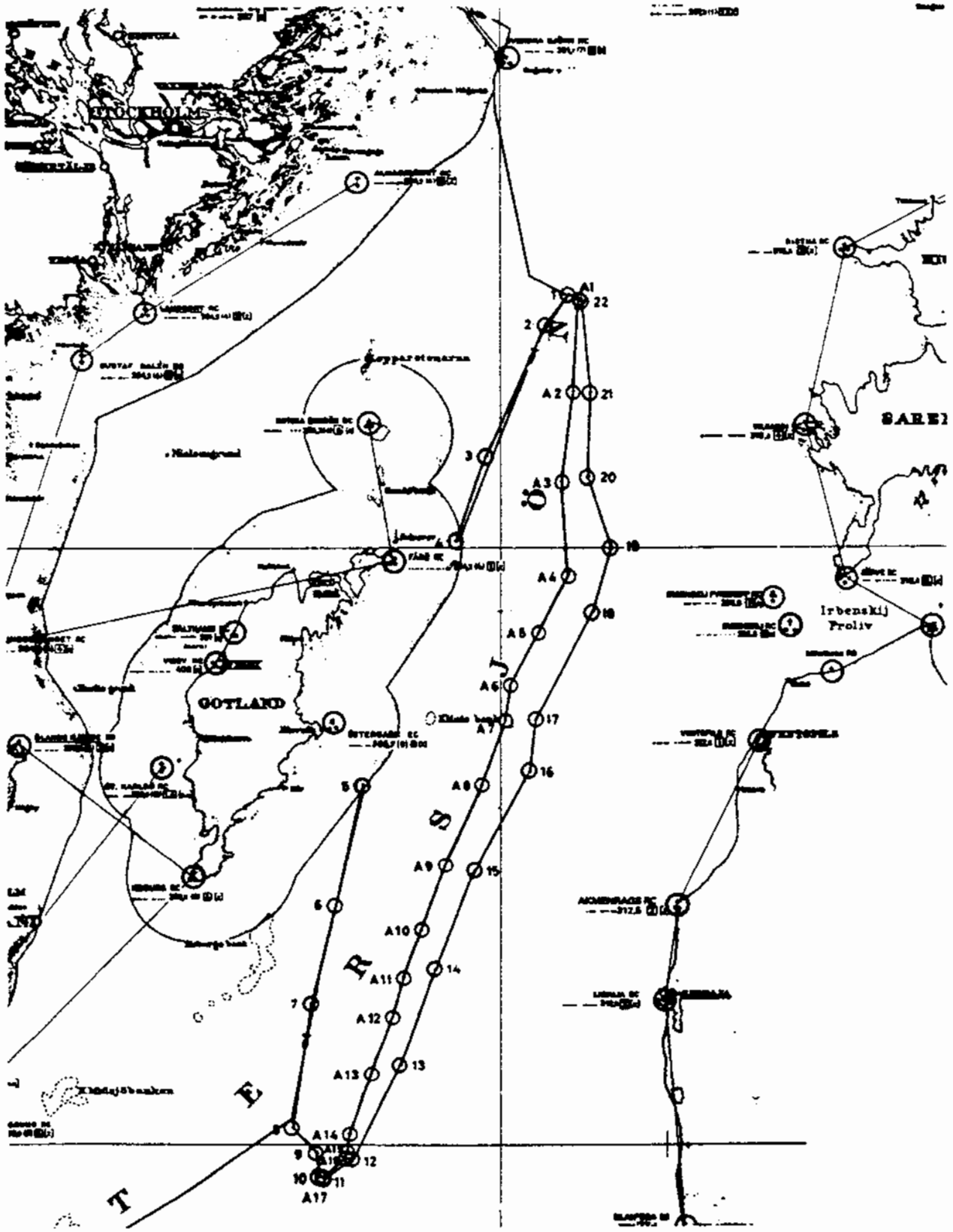

Figure 2. The line connecting numbers 1 to 10 and the one connecting numbers 11 to 22 are the Soviet and the Swedish median-line claims, respectively. The line connecting numbers A1 to A17 is the line drawn according to the Agreement of January 1988.

Union,[75] one may realize that the result of the Agreement should be satisfactory for Sweden. Sweden's satisfaction can also depend on the fact that an eventual third-party settlement could have two extremes, and that the solution now achieved is much closer to the extreme claimed by Sweden.

The present Agreement solely concerns the exploration and exploitation of the living and non-living natural resources. However, there are also security considerations. Although economic interests normally override defence considerations, the concern for security dictates that each party tries to keep the other farther from the coast. Seen from this perspective, the Agreement offers a reasonably acceptable solution to Sweden.[76]

An interesting question is the possible outcome of the submission of the dispute to the I.C.J. or arbitration. But before making any attempt to find an answer to this hypothetical question, it may be appropriate to say a few words about the legal arguments of the parties in support of their claims.

The Swedish assertion that the median line as a *general principle* should be applied, and her firm denial of the presence of "special circumstances", could reasonably imply that drawing the median line between the eastern coast of Gotland and the Baltic States had been taken for granted. It is most probable that a court of justice or arbitration would question this *a priori* assumption. The jurisprudence and judicial and arbitral decisions, *inter alia*, in the *Gulf of Maine* Case and *English Channel* Arbitration, have pointed to the fact that median line is *not* a general principle; it is not necessarily applicable to the delimitation of maritime areas other than continental shelves. Moreover, because of its considerable distorting effect on the location of the boundary, the chances of a court giving full weight to Gotland were rather limited.

The Soviet legal arguments, generally based on the presence of "special circumstances" and the applicability of "equitable principles", were more in line with current trends in international law. Nevertheless, the Soviet Union could hardly hope that a court would completely ignore Gotland and draw a boundary line which could coincide with the outer limits of Gotland's territorial sea.

Taking all factors into consideration, and remembering the result of the majority of the cases settled in recent years, one might perhaps have

[75] *Östersjön–Fredens hav?*, Stockholm 1986, p. 25 (Publication of the Swedish Institute of International Affairs); E. Magnusson, "En halvtimmes samtal—sedan var Östersjöavtalet klart", in *Tempus*, January 21, 1988, p. 6.

[76] Cf. *ibid.*, p. 8; Smith, *op.cit.*, p. 6; Schori, *op.cit.*, p. 8.

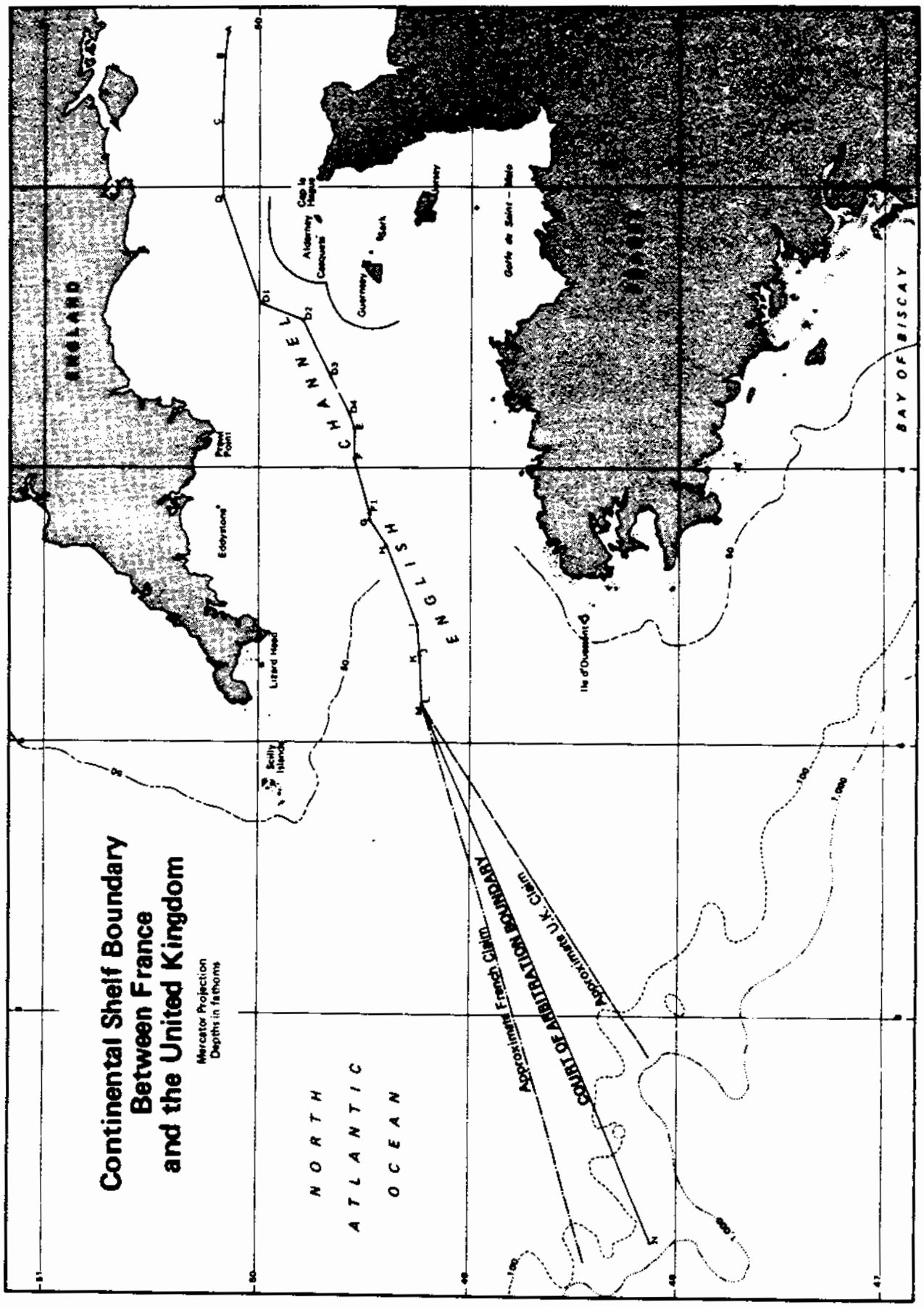

Figure 3. Maritime Boundary in the English Channel and Atlantic area between France and the United Kingdom.

—— Boundary drawn by the Court.

– – – Boundary claimed by the United Kingdom.

–·– Boundary claimed by France.

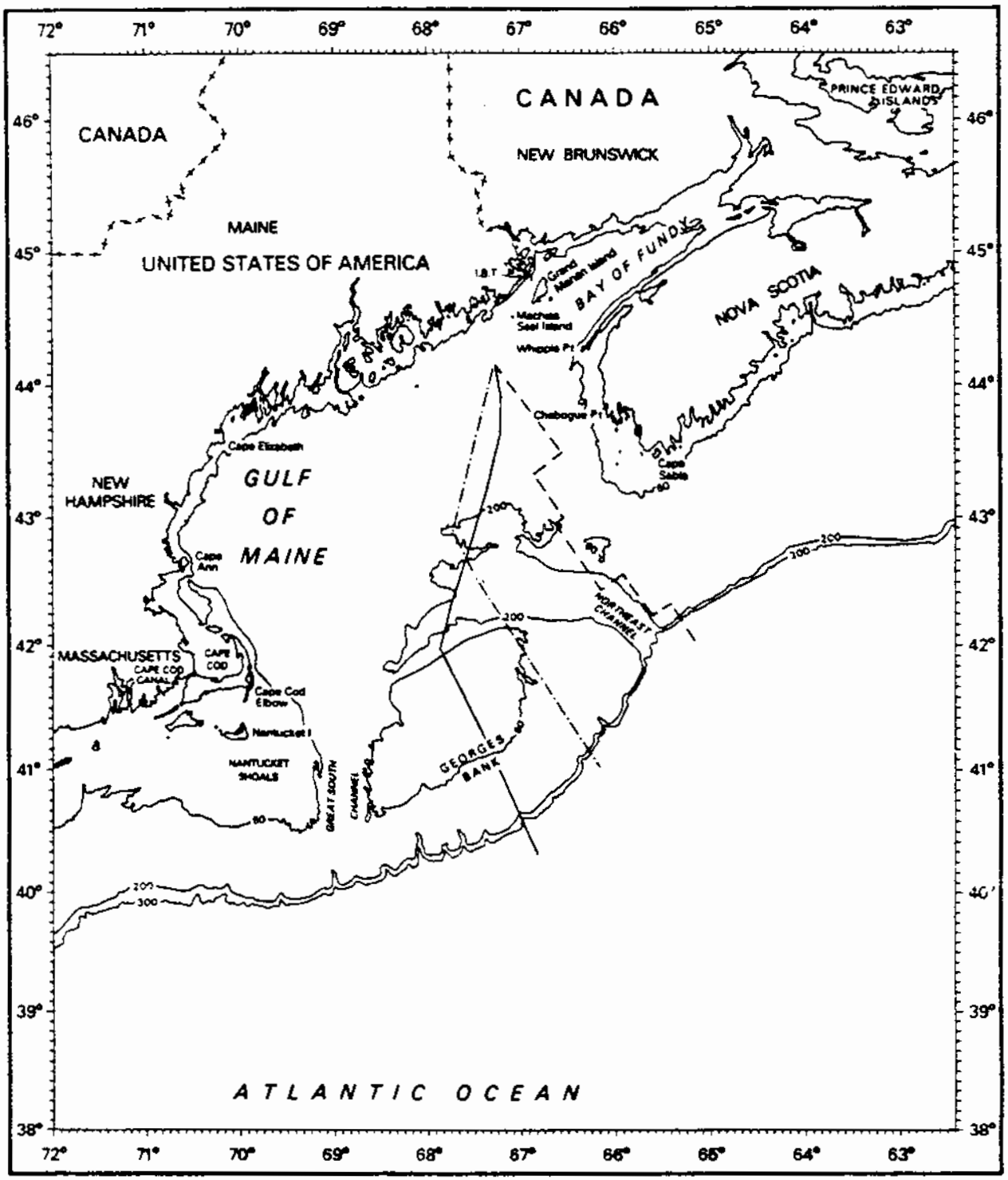

Figure 4. Maritime boundary in the Gulf of Maine.
—— Boundary claimed by Canada.
– – – Boundary claimed by the United States.
–·– Boundary drawn by the Court.

anticipated a boundary line somewhere in the middle of the disputed area should the dispute have been submitted to a court. Both in the *Gulf of Maine* Case and the *English Channel* Arbitration where the parties to the dispute were bound by the 1958 Continental Shelf Convention, and in the maritime boundary delimitation (Guinea/Guinea Bissau) where

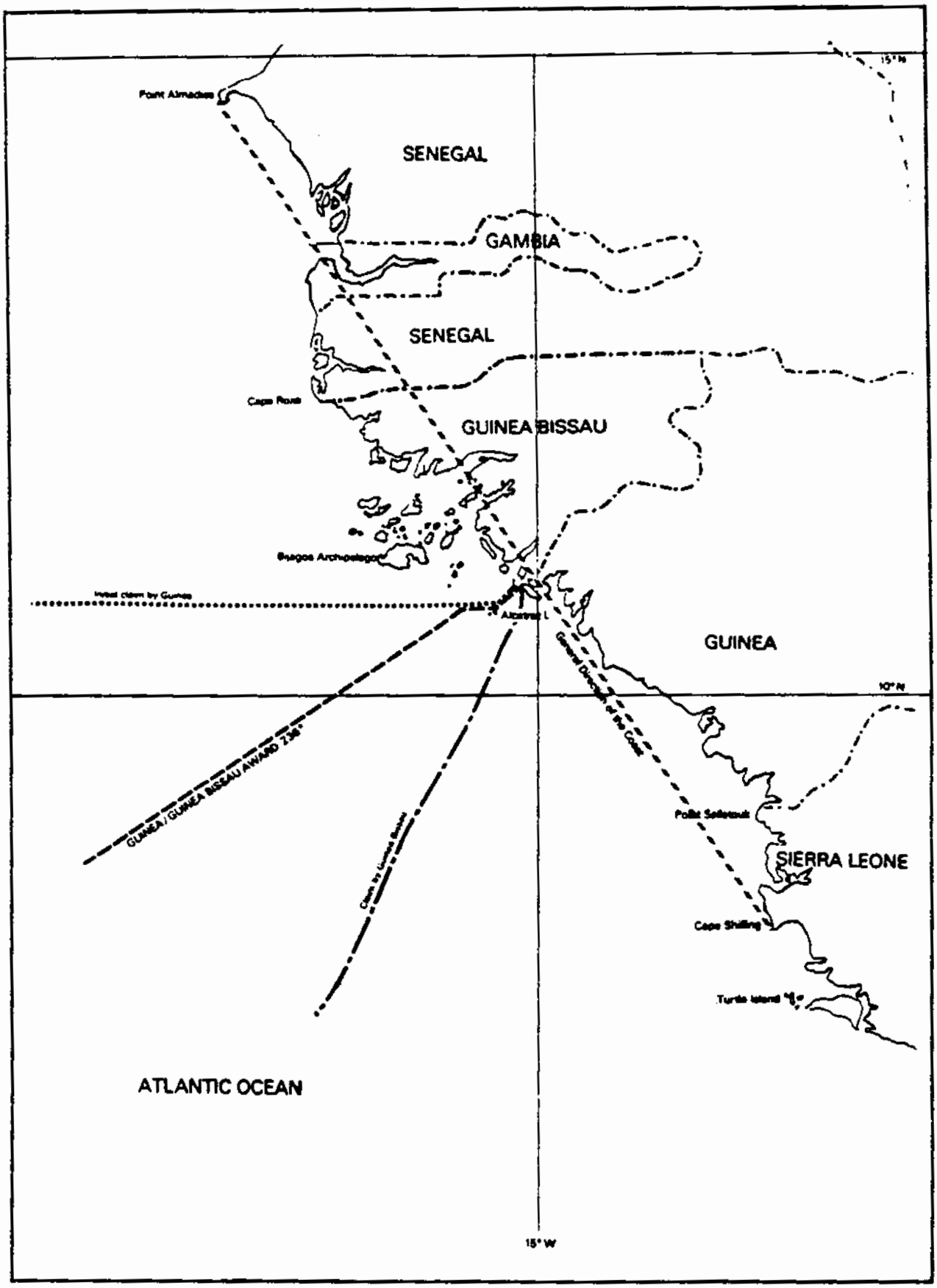

Figure 5. Delimitation of maritime boundary between Guinea/Guinea-Bissau.
···· Boundary claimed by Guinea.
–·– Boundary claimed by Guinea-Bissau.
––– Award of the Tribunal.

the parties had not acceded to the 1958 Continental Shelf Convention, the boundary lines decided by the courts lie approximately midway between the two lines suggested by the parties. (See figures 3, 4 and 5.)

It is of course simplistic to attempt to generalize this conclusion, but in recent judicial decisions the courts have tended to accord half weight to islands where one party has pleaded for total disregard and the other has solicited full effect.[77]

With this in mind, Sweden being the party swimming against the current has every reason to be satisfied with this solution, which seems to be "an agreement in the era of perestrojka" and to a great extent the result of a "new climate which governs the Soviet Union under Gorbachev."[78]

As a final point, it may be noted that Norway seems so far to have followed the Swedish pattern of legal arguments in her negotiations with the Soviet Union concerning the delimitation of maritime zones in the Barents Sea. The legal adviser to the Royal Norwegian Ministry for Foreign Affairs has in a recent article defended the median-line principle as the applicable law. He has rejected all statements to the effect that this principle has weakened as "erroneous, imprecise and misleading."[79]

Although the geographical situations of Gotland and Svalbard are in no way identical—involving opposite and adjacent maritime zones respectively—it seems to this author that maintaining the median-line argument in the case of Svalbard can hardly be a strong negotiating position for Norway. This is borne out not only by recent Swedish experience, but also by several other delimitations of maritime zones in recent years.

[77] Collier, discussing the decision of the I.C.J. in the *Continental Shelf* Case (Tunisia/Libyan Arab Jamahirya) and giving half weight to the Tunisian islands of Kerkennah, maintains:

> It seems that one state has only to argue that islands should be given no effect, and on the other that they should be given full effect, for half effect to be given to them. This is indeed the wisdom of Solomon, and rough and ready justice ....

See Collier, *op.cit.*, p. 188.

[78] The comments of Swedish Prime Minister I. Carlsson and Under-Secretary-of-State P. Schori about the Agreement. See Schori, *loc.cit.*

[79] C.A. Fleischer, "'Muldvarper', desinformasjon og annen feilinformasjon i viktige folkerettsspørsmål—Risiko- og skadefaktorer i forhold til de skandinaviske lands rettslige og faktiske posisjon", in *Festskrift till Lars Hjerner, Studies in International Law*, Stockholm 1990, p. 179.