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Maritime Delimitation in the Time of International Tribunals

I Maritime Boundaries and International Tribunals

A considerable share of interstate disputes before international tribunals concerns the delimitation of maritime boundaries. However, the existing rules of international law fail to provide any clear guidance on how to establish maritime boundaries by way of judicial process. Both the rules of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),[1] and the customary rules of international law on maritime delimitation,[2] are exceedingly indeterminate. The main deficiency of such rules is that they do not indicate any method for delimiting maritime boundaries.

International tribunals have grappled with maritime delimitation since the 1969 judgment in *North Sea Continental Shelf*.[3] Judicial decisions on delimitation, influenced by the works of the Third United Nations Conference on the Law of the Sea (UNCLOS III), constitute a significant body of jurisprudence shaping what is now considered to be the method for delimiting the continental shelf and the Exclusive Economic Zone (EEZ).[4] Since the International Court of Justice (ICJ or Court) handed down the *Black Sea* judgment in 2009, international tribunals have been delimiting the continental shelf and the EEZ using

[1] United Nations Convention on the Law of the Sea, 1833 UNTS 3. See Section III.A below.
[2] Ibid.
[3] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3, 51 [96].
[4] See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)* (Merits) [2001] ICJ Rep 40, 94 [176]; *Maritime Boundary Arbitration (Guyana* v. *Suriname)* (2007) XXX RIAA 1, 82 [295]-[296]; *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment) [2012] ITLOS Rep 4, 42–3 [127]-[129]; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India)* (2014) 167 ILR 1, 111–14 [336]-[346].

a three-stage approach.[5] Academic writers have expressed different views on this approach and on its practical application. While some writers emphasised the creation of a uniform law of maritime delimitation, others underscored that international tribunals apply the three-stage approach inconsistently owing to the vagaries of each case.[6]

The introduction of the three-stage approach can be seen to have increased the consistency, predictability and certainty of maritime delimitation before international tribunals. Although the three-stage approach raises numerous issues requiring further elaboration, such issues do not seem to outweigh the benefits of a standard approach to delimitation. International tribunals pursue consistency in establishing maritime boundaries by means of the three-stage approach on four different levels: first, with the relevant conventional and customary rules of international law; second, with the basis of title over the continental shelf and the EEZ; third, with the function of such maritime zones; and fourth, with their own earlier delimitation jurisprudence. However, it does not follow that, by pursuing consistency, international tribunals actually achieve it. While this book emphasises the common principles applied across international tribunals in establishing maritime boundaries, it also focuses on the controversial issues stemming from the implementation of the three-stage approach. Section II outlines the scope of the book. Section III sets out the structure of this book.

II Scope of the Book

The scope of this book is limited to the delimitation of the EEZ and of the continental shelf, both within and beyond 200 nautical miles (nm). The delimitation of the territorial sea is excluded from the present enquiry. Three reasons justify this choice. First, the customary rule of international law on the delimitation of the territorial sea, codified in Article 15 UNCLOS,[7] is different from the customary rules of international law on the delimitation of the EEZ and of the continental shelf, respectively codified in Articles 74 and 83 UNCLOS.[8] Article 15

[5] Chapter 2, section II.B.3 below. See *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Judgment) [2009] ICJ Rep 61, 101–103 [115]-[122].
[6] Chapter 2, section III.B below.
[7] *Qatar* v. *Bahrain* (n. 4) 94 [176].
[8] *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Judgment) [2012] ICJ Rep 624, 666 [114]; *Maritime Dispute (Peru* v. *Chile)* (Judgment) [2014] ICJ Rep 3, 65 [179].

UNCLOS[9] formulates a much more detailed rule than the one contained in Article 74 and 83 UNCLOS. Second, and as a consequence of the detailed rule contained in Article 15 UNCLOS, the method for delimiting the territorial sea is considered to be more firmly established than the method for delimiting the EEZ and the continental shelf.[10] Although international tribunals have recently shown some hesitation in applying the method for territorial sea delimitation, they did not seem to doubt that Article 15 UNCLOS requires the territorial sea to be delimited by means of a two-stage approach. Judicial uncertainties on territorial sea delimitation only concerned the practical implementation of this two-stage approach.[11]

Third, the method for delimiting the territorial sea is distinct from the method for delimiting the EEZ and the continental shelf. The two-stage approach for territorial sea delimitation requires international tribunals to draw a provisional equidistance line, and subsequently to adjust it should special circumstances so require.[12] International tribunals delimit the EEZ and the continental shelf in three stages: they draw a provisional equidistance line; they eventually adjust that line if relevant circumstances so require; and they assess the overall equitableness of that line by checking for the absence of gross disproportionality between the length of the relevant coasts and the marine areas found to appertain to each state.[13] According to some recent suggestions, these two methods are converging. In its 2017 judgment, the Special Chamber of the International Tribunal for the Law of the Sea (ITLOS or Tribunal) in *Ghana/Côte d'Ivoire* decided 'to use the same methodology for the

[9] Under Art. 15 UNCLOS, '[w]here the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.'

[10] MD Evans, 'Maritime Boundary Delimitation' in DR Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea* (OUP, 2015) 254, 255–6; DR Rothwell and T Stephens, *The International Law of the Sea* 2nd edn (Hart, 2016) 431.

[11] M Lando, 'Judicial Uncertainties concerning Territorial Sea Delimitation under Article 15 of the United Nations Convention on the Law of the Sea' (2017) 66 *ICLQ* 589.

[12] See *Qatar* v. *Bahrain* (n. 4) 94 [176]; *Guyana* v. *Suriname* (n. 4) 82 [295]-[296]; *Bangladesh/Myanmar* (n. 4) 42-3 [127]-[129]; *Bangladesh* v. *India* (n. 4) 111-14 [336]-[346].

[13] Chapter 2, Section II.B.3 below.

delimitation of the Parties' territorial seas, exclusive economic zones and continental shelves within and beyond 200 nm'.[14] In its 2017 award, the *Croatia/Slovenia* arbitral tribunal commented that the ICJ applies a method for delimiting 'boundaries without distinguishing between its application to the territorial sea and its application beyond the territorial sea'.[15] Similarly, Kamto wrote that 'la Cour a développé la doctrine de la ligne unique de délimitation de toutes les zones maritimes . . . aboutissant ainsi à une application par glissement ou translation de l'équidistance ou équidistance-circonstances spéciales dans la mer territoriale au plateau continental'.[16]

However, such suggestions are unpersuasive. The approach in *Ghana/Côte d'Ivoire* was based on the Special Chamber's interpretation of the parties' submissions, 'to the effect that it should use the same delimitation methodology for the whole delimitation process, namely the methodology developed for the delimitation of exclusive economic zones and continental shelves'.[17] Therefore, *Ghana/Côte d'Ivoire* could not support the convergence on one methodology for delimiting all maritime zones. Concerning the *Croatia/Slovenia* arbitral award, the authorities cited by the tribunal do not support its blanket statement mentioned above,[18] and, as the tribunal's task was limited to delimiting the territorial sea, comments on the method for EEZ and continental shelf delimitation were unjustified.[19]

Furthermore, the special circumstances in territorial sea delimitation may be different from the relevant circumstances in EEZ and continental shelf delimitation. Relevant circumstances are only those factors having a connection either with the basis of title over the EEZ and the continental shelf, or with their function under international law.[20] However, both the basis of title and the function of the territorial sea are distinct

[14] *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (Judgment), Judgment of 23 September 2017 [263].
[15] *Arbitration between Croatia and Slovenia under the Arbitration Agreement of 4 November 2009 (Croatia/Slovenia)*, Award of 29 June 2017 [1000].
[16] M Kamto, 'Considérations actuelles sur la méthode de délimitation maritime devant la Cour internationale de Justice. De charybde en Scylla?' in J Crawford et al. (eds.), *The International Legal Order: Current Needs and Possible Responses – Essays in Honour of Djamchid Momtaz* (Brill, 2017) 383, 405.
[17] *Ghana/Côte d'Ivoire* (n. 15) [259].
[18] M Lando, 'The *Croatia/Slovenia* Arbitral Award of 29 June 2017: Is there a Common Method for Delimiting All Maritime Zones under International Law?' (2017) 100 *RDI* 1184, 1186-7.
[19] *Croatia/Slovenia* (n. 16) [1103].
[20] Chapter 5 below.

from the basis of title and the function of the EEZ and of the continental shelf. Accordingly, special circumstances affecting territorial sea delimitation could be considered not to be identical to relevant circumstances in EEZ and continental shelf delimitation. Moreover, in his separate opinion appended to the ICJ's 2018 judgment in *Costa Rica* v. *Nicaragua*, Judge Robinson compellingly argued that the proper interpretation of UNCLOS requires international tribunals to distinguish the method for territorial sea delimitation on one hand, and the method for EEZ and continental shelf delimitation on the other hand.[21] Judge Robinson's assessment appears correct.

The distinction between the methods for delimiting the maritime zones within and beyond 12 nm counsels against discussing the two-stage approach alongside the three-stage approach. Therefore, this book focuses on the latter, also in view of their wider variety and of their more contentious character in current international law.

III Structure of the Book

This book is divided into seven chapters. Chapter One and Chapter Seven serve as introduction and conclusion. Chapter Two outlines the historical development of maritime delimitation, with reference both to the positive rules of international law on delimitation, and to the processes developed by international tribunals for implementing such rules. Moreover, Chapter Two discusses the conceptual development of maritime delimitation, by reference to the fundamental notions of the discipline.

Chapters Three to Five examine the components of the three-stage delimitation process. It may seem odd to dedicate *four* chapters to a study of the *three*-stage approach. However, discussing the delimitation process in three chapters would have conflated too many issues in the first of these three chapters, leading to a confusing and thus unsatisfactory discussion of the first stage of the delimitation process. Consequently, this book divides the first stage of delimitation into two parts: first, the identification of the relevant coast and of the relevant area; second, the establishment of an equidistance line.

[21] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua); Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua)* (Judgment) [2018] ICJ Rep 139, 250–61 (Separate Opinion Robinson).

The stages of the three-stage approach cannot be seen to be entirely independent of each other. Maritime delimitation must be understood as a process,[22] which entails that one stage of the delimitation process may considerably impact on a subsequent one. For example, the determination of the relevant coast and of the relevant area, which belongs in the first step of delimitation, greatly influences the disproportionality assessment at the last stage of delimitation. Nevertheless, for ease of exposition this book examines each stage of the delimitation process in turn.

Chapter Three analyses the identification of the relevant coast and of the relevant area. Regrettably, academic writers have not shown great interest in this issue,[23] although identifying the relevant coast and the relevant area has remarkable effects on all subsequent stages of delimitation. Chapter Three examines the connection between the relevant coast and the relevant area on one hand, and the basis of title over maritime zones on the other hand. It critiques the judicial methods for identifying the relevant coast and the relevant area. While building upon such methods, it examines some contentious aspects of the international tribunals' approach, making suggestions for improvement. Chapter Three argues that the identification of the relevant coast and of the relevant area should be considered a full-fledged stage in the delimitation process, additional to the three established stages of delimitation. If such a view were accepted, the delimitation process could be conceived as being constituted of four stages.

Chapter Four examines equidistance as the first stage of the three-stage delimitation process. Since commentators have already explored the multiple facets of equidistance, the discussion focuses on the most recent international jurisprudence. Chapter Four discusses the relationship between equidistance and the basis of title, and the impact of coastal configuration on equidistance. It also explores whether using equidistance in delimiting the continental shelf beyond 200 nm has a sound legal basis. Chapter Four concludes by analysing the methods for constructing an equidistance line, including the selection of base points.

Chapter Five discusses relevant circumstances as the second stage of the three-stage approach. Chapter Five argues that international tribunals have

[22] MD Evans, 'Maritime Boundary Delimitation: Where Do We Go From Here?' in D Freestone et al. (eds.), *Law of the Sea – Progress and Prospects* (OUP, 2006) 137, 145.

[23] A Oude Elferink, 'Relevant Coast and Relevant Area' in A Oude Elferink et al. (eds.), *Maritime Boundary Delimitation – The Case Law: is it Consistent and Predictable?* (CUP, 2018) 173; S Fietta and R Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (OUP, 2016) 45-52 and 595-602; Evans (n. 11) 267-8 and 270-2.

been deciding whether certain factors could be considered to be relevant circumstances pursuant to a dual 'title-function' basis. First, the basis of title could be seen to be the legal basis of geographical relevant circumstances. Second, the function of maritime areas could be seen to be the legal basis of non-geographical relevant circumstances. As a result, all factors unrelated either to the basis of title, or to the function of maritime areas, should be considered to be irrelevant circumstances. With respect to each individual relevant circumstance, Chapter Five shows that international tribunals have mostly decided later cases consistently with earlier decisions, contrary to what some academic authors have suggested.

Chapter Six is dedicated to disproportionality, the third stage of the delimitation process. Chapter Six argues that disproportionality was devoid of legal basis when the ICJ first mentioned it as a factor relevant to delimitation in *North Sea Continental Shelf*, but that it acquired a legal basis due to later developments. Chapter Six clarifies the function of disproportionality in the delimitation process, examines its assessment in the relevant cases, and discusses the impact that coastal configuration could have on it. Furthermore, it explores the relationship between disproportionality and the relevant circumstance of coastal length disparity. The literature has obliquely alluded to this issue, without ever addressing it.[24] Chapter Six criticises the views of certain commentators according to whom international tribunals should dispense with disproportionality in the delimitation process.[25] Although it may not play a major role in delimitation, disproportionality fulfils the important function of ensuring that boundaries achieve the equitable solution required under Articles 74 and 83 UNCLOS.

By way of conclusion, Chapter Seven considers the interaction between international tribunals and states in the development of the delimitation process. Chapter Seven argues that the delimitation process is a judicial creation, which stems both from the difficulty in the formation of customary rules of international law in respect of the delimitation process itself, and from the extreme vagueness of the rules on EEZ and continental shelf delimitation as codified in Articles 74 and 83 UNCLOS. In the context of maritime delimitation, the decisions of international tribunals constitute actual law-making, and are therefore a formal source

[24] MD Evans, *Relevant Circumstances and Maritime Delimitation* (OUP, 1989) 228; Y Tanaka, 'Reflections on the Concept of Proportionality in the Law of Maritime Delimitation' (2001) 16 *IJMCL* 433, 443.
[25] Evans (n. 23) 154-6.

of international law, which should not be seen to be precluded by the traditional notion of judicial decisions as mere 'subsidiary means for the determination of rules of law' in accordance with Article 38(1)(d) of the ICJ's Statute. Chapter Seven also argues that states have sanctioned the creation and development of the delimitation process by international tribunals in a number of ways. States accepted that international tribunals could exercise a law-making function by agreeing that Articles 74 and 83 UNCLOS would be drafted as remarkably indeterminate rules. States have also indirectly approved the judicial elaborations on maritime delimitation by establishing their agreed boundaries following certain principles or certain procedures, through their statements before international organisations and their pleadings before international tribunals, and through their attitude towards compliance with judicial decisions on maritime delimitation.

2

Historical and Conceptual Framework

I Rules and Processes in Maritime Delimitation

The development of maritime delimitation by international tribunals has been greatly influenced by the manner in which the positive rules of international law on maritime delimitation have evolved. States discussed issues of maritime delimitation for the first time at the 1930 League of Nations Codification Conference, but it was only with the adoption of the 1958 Geneva Conventions that rules on maritime delimitation were codified. However, in the subsequent Third United Nations Conference on the Law of the Sea (UNCLOS III) states rejected the rules on delimitation of the 1958 Geneva Conventions, at least as far as the continental shelf was concerned, in favour of more open-ended rules which were eventually codified in the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[1] Such rules governed the delimitation of both the continental shelf and the Exclusive Economic Zone (EEZ), and only stated the objective which delimitation must achieve, without indicating the method for achieving such an objective. The states' change of approach marked by the adoption of UNCLOS was possibly influenced by the 1969 judgment of the International Court of Justice (ICJ or Court) in *North Sea Continental Shelf*, in which the Court found that the rule on the delimitation of the continental shelf contained in the 1958 Convention on the Continental Shelf (CCS)[2] was not part of customary international law, and that continental shelf delimitation was to be effected in accordance with equitable principles.

[1] 1833 UNTS 3.
[2] 499 UNTS 311.

Starting in the late 1970s, states began requesting international tribunals to delimit maritime boundaries with increasing frequency. Owing to the developments which had taken place between 1958 and UNCLOS III, international tribunals found themselves bound to apply a vague rule of international law under which maritime delimitation was to be effected in accordance with equitable principles. Over time, international tribunals developed a methodology for implementing such an indeterminate rule. Viewed from this perspective, one could see the development of the delimitation process as a product of the judicial elaboration which international tribunals undertook case after case. The methodology for maritime delimitation changed considerably over time. Nevertheless, changes to the methodology were independent of the rules on maritime delimitation, which have not been altered since 1982. Such changes appear to be attributable only to the international tribunals' own jurisprudence.

Section II of this chapter traces the historical development of maritime delimitation with respect both to the rules governing delimitation, and to the processes for implementing such rules. Section III discusses the conceptual development of maritime delimitation. Section IV concludes.

II Historical Framework of Maritime Delimitation

This section outlines the relevant rules of international law on maritime delimitation. In addition, it describes the development of the method for continental shelf and EEZ delimitation by international tribunals.

A Rules Governing Maritime Delimitation

The rules of international law on maritime delimitation have evolved considerably since the earliest discussion at the time of the League of Nations. This evolution resulted in the progressive dilution of the content of such rules.

1 The 1930 League of Nations Codification Conference

The earliest multilateral discussions on maritime delimitation took place at the 1930 League of Nations Codification Conference, which ultimately failed to adopt a treaty on the law of the sea.[3] Since at that time both the

[3] On the 1930 Conference, see League of Nations, *Acts of the Conference for the Codification of International Law held at The Hague from March 13th to April 12th 1930*. See also H Miller, 'The Hague Codification Conference' (1930) 24 *AJIL* 674.