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978-1-107-08017-1 - Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law

Thomas Cottier

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EQUITABLE PRINCIPLES OF MARITIME BOUNDARY DELIMITATION

Equity emerged as a powerful symbol of aspired redistribution in international relations. Operationally, it has had limited impact in the Westphalian system of nation states – except for maritime boundary delimitations. This book deals with the role of equity in international law, and offers a detailed case study on maritime boundary delimitation in the context of the enclosure movement in the law of the sea. It assesses treaty law and the impact of the United Nations Convention on the Law of the Sea. It depicts the process of trial and error in the extensive case law of the International Court of Justice and arbitral tribunals and expounds the underlying principles and factors informing the methodology both in adjudication and negotiations. Unlike other books, the main focus is on equity and its implications for legal methodology, in particular offering further guidance in the field of international economic law.

THOMAS COTTIER is a full professor of European and International Economic Law at the University of Bern, Switzerland, and former Managing Director of the World Trade Institute. Much of his professional work has been dedicated to international economic law, in particular international trade regulation, working in the field both as an academic and a negotiator and chair and member of WTO panels.

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The Quest for Distributive Justice
in International Law

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PREFACE

The twentieth century witnessed a new generation of national boundaries. Claims of coastal states to the continental shelf and an exclusive economic zone resulted in new entitlements. They called for co-ordination. In delineating these claims, the principle of equity took on a prominent role. Equity, beyond its traditional functions in legal history, emerged in a process of trial and error as the very foundation of the principles and methodology determining the delimitation of overlapping claims to marine space. As a result, it plays an important role in the allocation of marine resources. This field of study allows for insights to be gained into the modern role and function of equity in international law, assessing both the potential and the limitations of distributive justice in the society of nations.

The book undertakes a detailed analysis of the evolution and process of equity in contemporary international law of the sea. It focuses on the relationship of legal rules on delimitation, in particular equidistance, and of equitable principles and relevant factors. It explores the relationship of law and equity in complex individual cases and particular circumstances which do not lend themselves to the application of ready-made, hard and fast legal rules. The operation of maritime boundary delimitation is essentially based upon a genuine rule of equity. It is determined by a number of standards, employing in the final analysis a topical method of weighing and balancing different and competing interests in a methodologically sound manner. The study seeks to further clarify and contribute to the methodology which, in an abundant series of adjudicated and negotiated cases, has been subject to trial and error. No case is like another. Conclusions cannot be readily drawn. And yet, it is submitted that common and shared methodologies, features and consistencies can be identified and further developed. It is hoped that the book will make a contribution in conceptualizing underlying principles and the methodology which eventually may be applied to other fields of law.

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PREFACE

The book starts with a review of traditional and contemporary functions of equity in international law, showing not only its complementary and corrective functions, but also the aspirations for justice in international law and relations. Part I of the book addresses the advent of the maritime zones and their limited implications for distributive justice. Part II deals with the new boundaries, reviewing state practice and the abundant case law based upon which the doctrine of equity evolved in a process of trial and error. Part III of the book develops the underlying principles of delimitation, identifies the standards to be taken into account and sets out the methodologies for the adjudication of complex cases and for negotiations.

This book is of interest both to the field of maritime boundary delimitation and to legal theory. It offers a complete analysis of more than fifty years of maritime boundary delimitation and should assist lawyers and diplomats in future negotiations and adjudication of complex cases. For legal theory, it is hoped that it is able to demonstrate that recourse to modern equity essentially entails a constructive approach, building on the underlying foundations of a particular concept, taking into account a host of pertinent factors and interests in a topical manner. The discussion of the relationship of equidistance and of equity offers insights into the relationship of rules and equity. Whether courts depart from the law on the basis of equity, or whether they take equitable principles into account in assessing exceptions to a rule, the process is inherently fact-intensive and creative. It is far removed from the traditions of syllogism and the idea of applying pre-existing rules to a particular fact. Relevant factors and interests need to be identified in a transparent manner and brought to the table and balanced against each other. The legitimacy of the decision depends greatly on the pertinence of reasoning and argumentation. Equity has come a long way from correcting the law, providing foundations and a proper methodology based upon which results are composed, rather than simply found.

Insights from maritime boundary delimitation therefore can also be rendered fruitful not only in related areas but also in other areas addressing fact-intensive issues of distributive justice in international law, even beyond the allocation of natural resources. It may inspire other fields of international law, in particular human rights, trade regulation, investment protection, competition law, and environmental

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law. In conclusion, equity revisited reveals an innovative method of
legal discourse in search of justice and solutions supporting peaceful
and friendly relations among nations.

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Equity and this project have been companions of mine for much of my professional life. They strongly informed my thinking on law, justice and legal methodology long after my work moved on to include other areas of international law and of European law. The book describes legal developments of law and equity over roughly seventy years of maritime boundary delimitation since the 1940s. The process of doing so, writing intermittently, stretched to a period of no less than three decades of thinking and rethinking a topic which evolved into one of the main areas of practice in international law relating to natural resources.

Inspired by the emerging case law of the International Court of Justice following the 1969 *North Sea Continental Shelf* cases, I was privileged to take up research as a post-doctoral fellow at Wolfson College and the Faculty of Law of the University of Cambridge from 1984 to 1986. I am grateful to the College and the Faculty of Law for hosting me during what became a formative and important period of my life. I sincerely thank Jörg Paul Müller, Emeritus Professor of Constitutional and International Law at the University of Bern, Switzerland. He strongly supported and encouraged me at the time. I am indebted to the Swiss National Research Foundation for support enabling our young family to move to Cambridge, and laying the foundations for additional support for many other projects in the subsequent years of my research. I am grateful to my parents and my late father Paul in particular for sharing part of his salary to make ends meet at the time. I thank my family, Silvia, Annie, Samuel and Maurice for keeping fond memories of the Cambridge years.

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and intergenerational equity which eventually moved centre stage in work on international economic law. The hospitality of Betty and Derek has remained an example to me and my family. I cherish the memory of discussions with my fellow researcher Esa Passivirta at the old Squire Law Library. Much of what we stand for today was shaped in those days. The two years in Cambridge provided much of the theoretical backbone for my subsequent work, first as a trade negotiator in the GATT Uruguay Round from 1986 to 1993, and subsequently as a full professor of European and International Economic Law at the University of Bern and Managing Director of the World Trade Institute.

During all these subsequent years, work on the project on equity continued steadily, but at a slow pace and in different stages, whenever scarce time allowed for it. The UN Convention on the Law of the Sea, dominating discussions in the 1980s, entered into force in 1994. The case law of the International Court of Justice and of courts of arbitration continued to grow and became one of the most important areas of international litigation next to WTO law (my main area of practice and research today) and investment protection. Without the help from fellows and staff at the Institute of European and International Economic Law and the World Trade Institute of the University of Bern, the project would not have been able to be further developed and completed. I am most grateful for research assistance provided at the time by then doctoral students and research fellows Serge Pannatier, Krista Nadakavukaren Schefer, and Jonas Attenhofer. Their support was critical in editing, updating more recent developments, both in state practice and judicial dispute settlement and the growing body of academic literature on the subject. The work of Jonas has been essential in completing the manuscript over the past two years, incorporating recent case law and developments. Additional persons lent their hands and skills. Beatrice Wettstein retyped an early manuscript. Students at the time, Annie Cottier and Maurice Cottier took on summer jobs checking and completing footnotes. Subsequently, junior research fellows at the Institute, Ruth Peterseil, Christiane Fürst, Raffaella Iseponi, Maya Taylan and Maria Schultheiss assisted in checking and completing footnotes as well as in the compilation of the bibliography. They all moved on into successful careers upon leaving law school, and the book entails fond memories of working with them. Over the years, Susan Plattner reviewed and edited a number of chapters. It laid the foundation of a long-lasting co-operation at the World Trade Institute. Kathrin Rügsegger kindly compiled the maps. To all these persons, I am

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immensely grateful. Shortcomings and omissions will remain. They are my own responsibility.

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Throughout all these years, Silvia my beloved wife has been my companion and main support. She shared all the ups and downs of the project and beyond. To her this work is dedicated: for all we missed and for all we shared.

*Bern
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- Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Arbitration Between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf*, Decisions of the Court of Arbitration dated 30 June 1977 and 14 March 1978, Command Paper 7438, March 1979, reprinted in 18 ILM (1979) p. 397.
- Arbitration Between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of Their Offshore Areas as defined in the Canada–Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada–Newfoundland and Atlantic Accord Implementation Act*, Award of the Tribunal in the Second Phase, Ottawa, 26 March 2002: www.cnsopb.ns.ca/sites/default/files/pdfs/phaseii_award_english.pdf (last accessed February 2014). 346, 746
- Arbitration Between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf*, Decisions of the Court of Arbitration dated 30 June 1977 and 14 March 1978, Command Paper 7438, March 1979, reprinted in 18 ILM 397, 662 (1979). 62, 96, 184, 198, 275, 361, 363, 383, 443, 531, 617, 646, 723
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- Award of the Arbitral Tribunal in the Second Stage (Maritime Delimitation) in the Matter of an Arbitration between Eritrea and Yemen*, 17 December 1999 (hereinafter *Eritrea v. Yemen* (Second Stage)) (2001) 40 ILM 983. 62, 306, 533
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- Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras) Application by Nicaragua for Permission to Intervene*, Judgment, 13 September 1990, ICJ Reports 1990, p. 92. 300, 498
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- Chorzow Factory (Jurisdiction) Case*, Permanent Court of International Justice, Series A No. 9, p. 31 (1927). 489
- Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen: Report and Recommendations to the Governments of Iceland and Norway*, Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen (1981) 20 ILM 797–842. 260, 344, 745
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