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The Judiciary and the Law of Maritime Delimitation

Setting the Stage

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1.1 Introduction

The development of the regimes of the continental shelf and the exclusive economic zone in the second half of the twentieth century has extended coastal state jurisdiction to almost half of the oceans. One study from 2011 indicates that the oceans cover 335 million square kilometres and that 130 million square miles are exclusive economic zone and continental shelf within 200 nautical miles from the baselines of coastal states. In addition, the continental shelf beyond 200 nautical miles from the baselines covers some 28 million square kilometres of ocean space.[1] This extension of coastal state jurisdiction also dramatically increased the area of overlapping maritime zones of coastal states. Previously, coastal states in principle only had to delimit the territorial sea, which for most states measured only three nautical miles until the 1970s. With the advent of the continental shelf, this situation changed dramatically.[2] For instance, in the

[1] See T. Schoolmeester and E. Baker (eds.), *Continental Shelf; The Last Maritime Zone; Status in Sept. 2010* (UNEP/GRID-Arendal 2011) 16. It may be noted that the latter figure only concerns the continental shelf beyond 200 nautical miles in respect of which coastal states have submitted (preliminary) information in accordance with Art. 76 of the United Nations Convention on the Law of the Sea (LOSC). A number of states with significant continental shelf areas beyond 200 nautical miles, including Canada, Denmark, and the US, had not submitted such information in 2011, indicating that the actual area of continental shelf beyond 200 nautical miles is more than 28 million square kilometres.

[2] As has been remarked by Gilbert Guillaume, the former President of the International Court of Justice (ICJ), '[d]elimitation of [maritime zones] was long considered a secondary question, involving the fixing of the boundaries between narrow territorial seas. Extension of state jurisdiction to the high seas and technological developments have made this into one

North Sea, the entire seabed became part of the continental shelf of the coastal states, among others requiring boundaries between the UK and its neighbours on the European continent. To give one other example, while Norway and the former Soviet Union only shared a territorial sea boundary in the Varanger Fjord, their continental shelf covered the entire Barents Sea and a part of the central Arctic Ocean to the north of Svalbard. While the territorial sea boundary measures 22.7 nautical miles, the continental shelf boundary that was agreed upon in 2010 between Norway and the Russian Federation has a length of more than 920 nautical miles.[3]

Rules on the delimitation of the continental shelf were first included in the 1958 Convention on the Continental Shelf, and the United Nations Convention on the Law of the Sea (LOSC), which was adopted in 1982, contains a delimitation provision for both the continental shelf and the exclusive economic zone.[4] However, the rules contained in these conventions are of a general nature and provide limited guidance to states when they differ about the interpretation and application of the law and the appropriate method(s) to delimit their maritime boundaries. The clarification of the rules on maritime delimitation has been mostly achieved through the case law of the International Court of Justice (ICJ), arbitral tribunals and, more recently, the International Tribunal for the Law of the

of the main territorial issues of the last 30 years' (G. Guillaume, *Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations; 31 October 2001*, available at www.icj-cij.org/court/index.php?pr=81&pt=3&p1=1&p2=3&p3=1).

[3] Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean of 15 September 2010 (English translation available at www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/NOR-RUS2010.PDF). Most of the continental shelf delimited by this treaty already was part of the continental shelf under the definition contained in Art. 1 of the 1958 Convention on the Continental Shelf (Convention on the Continental Shelf, signed 29 April 1958, entered into force 10 June 1964, 499 UNTS 311). The figures on the length of these boundaries are mentioned in *Om samtykke til ratifikasjon av overenskomst av 11. juli 2007 mellom Norge og Russland om den maritime avgrensning i Varangerfjordområdet* (St.prp. nr. 3 (2007–2008), 2 and *Samtykke til ratifikasjon av overenskomst av 15. september 2010 mellom Norge og Russland om maritim avgrensning og samarbeid I Barentshavet og Polhavet* (Prop. 43 S (2010–2011) 6–7.

[4] The delimitation of the territorial sea is addressed in Art. 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone (Convention on the Territorial Sea and the Contiguous Zone, signed 29 April 1958, entered into force 10 September 1964, 516 UNTS 206) and Art. 15 of the LOSC. See further below for the explanation as to why this volume largely focusses on the delimitation of the continental shelf and the exclusive economic zone.

Sea (ITLOS). As a result, the law of maritime delimitation has also been referred to as judge-made law.[5]

The delimitation of the maritime boundaries is one of the areas of the law of the sea that has been most heavily litigated. At the time of writing, twenty-nine cases on the delimitation of maritime boundaries have either been decided by the judiciary or are pending before a court or tribunal.[6] The majority of this case law is concerned with the delimitation of the continental shelf and exclusive economic zone. Only three of these cases are exclusively concerned with the delimitation of the territorial sea;[7] thirteen with the delimitation of the continental shelf or the continental shelf and the exclusive economic zone;[8] and thirteen with the delimitation of the territorial sea, continental shelf, and exclusive economic zone.[9] In addition, it may be noted that in comparison to the delimitation of the territorial sea, the delimitation of the continental shelf and the exclusive economic zone has led to much more controversy and debate. This may be illustrated by the fact that monographs on the law of maritime delimitation in general focus on the continental shelf and the exclusive economic zone and pay limited attention to the delimitation of the territorial sea.[10] The fate of the delimitation provisions contained in the 1958 Conventions on the Territorial Sea and the Contiguous Zone and the Continental Shelf, respectively, also attests to the larger measure of controversy surrounding the delimitation of the continental shelf and the exclusive economic zone. Article 12 of the former Convention was included almost verbatim as

[5] For instance, President Guillaume of the ICJ in a speech to the Six Committee of the General Assembly of the United Nations submitted that the law in this field had been completely reunified by the Court's judgment in *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* ([1993] ICJ Rep. 38) and that this law 'has reached a new level of unity and certainty' through the development of the case law (Guillaume, n. 2); see also below, Sections 1.2 and 1.5 of this chapter for further references to this speech.

[6] For an overview of these cases, see Table 1.1.

[7] See ibid., entries A.1, A.5 and A.14.

[8] See ibid., entries A.2, A.3, A.4, A.6, A.7, A.8, A.11, B.1, B.2, B.5, B.6, B.7, and B.12. A number of these cases do not concern the delimitation of the exclusive economic zone but concern a 200-nautical-mile fishery zone instead.

[9] See ibid., entries A.9, A.12, A.13, B.3, B.4, B.8, B.9, B.10, B.11, B.13, B.14, and B.15.

[10] See e.g. N. M. Antunes, *Towards the Conceptualisation of Maritime Delimitation* (Martinus Nijhoff Leiden 2003); E. D. Brown, *Sea-bed Energy and Minerals: The International Legal Regime* (Martinus Nijhoff Leiden 1992); T. Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (Cambridge University Press Cambridge 2015); S. Fietta and R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford University Press Oxford 2015); Y. Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart Oxford 2006); P. Weil, *The Law of Maritime Delimitation: Reflections* (Grotius Cambridge 1989).

Article 15 in the LOSC. The almost identical provision contained in Article 6 of the Convention on the Continental Shelf was found to be unacceptable for a significant number of states at the Third United Nations Conference on the Law of the Sea (UNCLOS III). Articles 74 and 83 of the LOSC on, respectively, the delimitation of the exclusive economic zone and the continental shelf do not have any resemblance to Article 6. One explanation for this difference is that incidental geographical features in general will have limited impact on the equidistance line in the restricted area of the territorial sea. This impact may be much larger where the delimitation of the continental shelf and the exclusive economic zone is concerned. As a matter of fact, the ICJ pointed this out in its judgment in *North Sea Continental Shelf*.[11] While the judgment provided states with strong arguments to reject the rule contained in Article 6 of the Convention on the Continental Shelf,[12] the same does not hold true for the rule contained in Article 12 of the Convention on the Territorial Sea and the Contiguous Zone.

For the above reasons, the current volume focuses on the case law on the delimitation of the continental shelf and the exclusive economic zone and does not pay the same amount of attention to the delimitation of the territorial sea. At the same time, it is recognized that an analysis of the case law on the delimitation of the territorial sea may enhance our understanding of the delimitation of the continental shelf and the exclusive economic zone. For that reason, Chapter 2 of this volume is concerned with the delimitation of the territorial sea. This chapter in particular seeks to determine in which respects the regime of the territorial sea and its delimitation differ from that of the zones beyond the territorial sea.

The remainder of the current chapter provides some additional background information to the chapters that follow. Section 1.2 of the current chapter further introduces the research focus of the project that resulted in this volume. Section 1.3 then briefly comments on the development of the law on the entitlement to and delimitation of the continental shelf and the exclusive economic zone. As is explained in that section, the relevant rules contained in multilateral conventions and customary international law provide the framework against which developments in the case law have to be assessed. Section 1.4 of this chapter discusses the availability of third-party dispute settlement mechanisms to resolve disputes on the delimitation of the continental shelf and the exclusive economic zone.

[11] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands)* (Judgment) [1969] ICJ Rep. 18, [8].

[12] See further below at n. 23.

As this discussion illustrates, the option of third-party dispute settlement was considered to be relevant to maritime delimitation from the outset of the debate on substantive delimitation provisions. Section 1.4 also briefly discusses some general trends as regard the delimitation of the continental shelf and the exclusive economic zone through bilateral agreements and third-party dispute settlement procedures. Section 1.5 considers two issues that are not included in the subsequent chapters but still were considered to merit attention. These concern the question how the composition of judicial bodies may shape the law and whether criticism from beyond the bench may have had an impact on the development of the case law. The individual chapters of the volume are introduced in Section 1.6, while a final section presents concluding remarks.

1.2 The Research Focus of the Book

This volume is concerned with the case law of the ICJ, the ITLOS, and arbitral tribunals on the delimitation of the continental shelf and the exclusive economic zone. The title and specific research focus of the current volume and the research project at its basis have been inspired by the ICJ's judgment in *Libya/Malta*, where the Court observed that the justice which the courts had been applying in maritime delimitation cases is

> justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application.[13]

It has been submitted that the law as developed by the judiciary has gradually become much more predictable – a development which started in the middle of the 1980s. This view has been regularly expounded in the academic literature.[14] It has also been forcefully argued by influential judges.

[13] *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, (Judgment) [1985] ICJ Rep. 39, [45].

[14] See e.g. R. R. Churchill, 'The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation,' (2012) 1 *Cambridge Journal of International and Comparative Law* 137, 138, and 151; V. Degan, 'Consolidation of Legal Principles on Maritime Delimitation: Implications for the Dispute between Slovenia and Croatia in the North Adriatic,' (2007) 6 *Chinese Journal of International Law* 601, 609, 616–617, and 619; J. Shi, 'Maritime Delimitation in the Jurisprudence of the International Court of Justice,' 9 (2010) *Chinese Journal of International Law* 271, 290–291; Y. Tanaka, 'Reflections on Maritime Delimitation in the Cameroon/Nigeria Case,' (2004) 53 *International and Comparative Law Quarterly* 369, 405; Y. Tanaka, 'Reflections on Maritime Delimitation in the Romania/Ukraine Case before the ICJ,' (2009) 56 *Netherlands International Law Review* 397, 426; Weil, n. 10, 288.

Of particular note is the speech of Gilbert Guillaume as President of the ICJ to the Sixth Committee of the General Assembly of the United Nations.[15] Referring to the judgments in *Tunisia/Libya* and *Gulf of Maine*, Guillaume observes that

> [a]t this stage, case law and treaty law had become so unpredictable that there was extensive debate within the doctrine on whether there still existed a law of delimitations or whether, in the name of equity, we were not ending up with arbitrary solutions. Sensitive to these criticisms, in subsequent years the Court proceeded to develop its case law in the direction of greater certainty.[16]

Guillaume observes that the Court began this development in *Libya/Malta* and *Jan Mayen*, in which cases the equidistance line was taken as a provisional starting point between opposite coasts. The process was completed in *Qatar/Bahrain*, when the Court found that equidistance also provided the starting point for delimitations involving adjacent coasts.[17] Guillaume concludes that, as a result, 'the Court's case law, has reached a new level of unity and certainty, whilst conserving the necessary flexibility.'[18] More recently, Judge Wolfrum, in a declaration to the judgment of the ITLOS in *Bangladesh/Myanmar*, observed,

> Further objectives to be taken into consideration by international courts and tribunals are to provide for transparency and predictability of the whole process. The ensuing international case law constitutes an *acquis judiciaire*, a source of international law to be read into articles 74 and 83 of the [LOSC].[19]

Notwithstanding these claims, it is open to question whether the case law has been completely successful in this regard. In *Libya/Malta*, a number of judges engaged the Court's claim concerning the consistency and predictability of its decision in the case at hand. Judge Schwebel in his dissenting opinion, while acknowledging that there remained 'considerable room for differences of opinion in the application of equitable principles to problems of maritime delimitation,' submitted that

[15] Guillaume, n. 2. [16] Ibid. [17] Ibid. [18] Ibid.

[19] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, [2012] ITLOS Rep. 4, Declaration of Judge Wolfrum, 2. In the subsequent arbitration between Bangladesh and India, under the presidency of Wolfrum, the reference to the significance of the *acquis judiciaire* was included in the Award (*In the Matter of the Bay of Bengal Maritime Boundary (Bangladesh v. India)* [2014] PCA Case 2010-16, [339]. The authors would like to thank Nigel Bankes for drawing their attention to this point.

> the Court's cryptic references to the length of coasts, the distance between coasts, the sparsity of basepoints, and the general geographical context, suffice to justify the selection of the line of delimitation which it has chosen in this case. Nor do these arrested allusions conduce towards building the sense of consistency and predictability at which the Court and the law so rightly aim.[20]

Some of the recent academic literature also continues to voice doubt about the predictability and consistency of the case law.[21]

In the light of these different views concerning the consistency and predictability of the case law, the current volume is intended to further investigate that issue. To that end, the authors of individual chapters will assess to what extent the case law has been consistent in defining the relevant concepts and applying them to the specific case or not.

Contributors were initially requested to focus on the case law of the first two decades of the present century and to consider the previous case law to the extent this would provide the necessary context for understanding the more recent case law. During the first two decades of the present century, the case law has adopted the so-called three-stage approach to the delimitation of the continental shelf and the exclusive economic zone, which consists of first determining a provisional line, then assessing the need to adjust this line in the light of the relevant circumstances and finally carrying out the so-called proportionality test.[22] There were two reasons for this proposing focus. First, this recent case law has received less scholarly attention than the older case law. Second, the existence of a common

[20] *Libya/Malta*, n. 13, Dissenting Opinion of Judge Schwebel, [1985] ICJ Rep., 172, 187. Similar criticisms were voiced by judges Ruda, Bedjaoui, and Jiménez de Aréchaga (ibid., Separate Opinion of Judges Ruda, Bedjaoui and Jiménez de Aréchaga, 76, 90 [37]), Mosler (ibid., Dissenting Opinion of Judge Mosler, 114, 114–115), and Judge ad hoc Valticos (ibid., Separate Opinion of Judge Valticos, 104, 108 [13]).

[21] See e.g. M. D. Evans, 'Maritime Boundary Delimitation: Whatever Next?,' in J. Barrett and R. Barnes (eds.), *Law of the Sea; UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016), 41, 78; Fietta and Cleverly, n. 10, 579; A. G. Oude Elferink, 'International Law and Negotiated and Adjudicated Maritime Boundaries: A Complex Relationship,' (2015) 58 *German Yearbook of International Law*; I. Scobbie, 'Tom Franck's Fairness,' (2002) 13 *European Journal of International Law* 909, 924.

[22] The three-stage approach was already used in *Libya/Malta* and *Jan Mayen* (both situations involving the delimitation between opposite coasts) but not in *Canada/France* (which could be said to involve both adjacent and opposite coasts). The Court in *Qatar/Bahrain* for the first time took the position that equidistance also provided the provisional starting point in cases involving adjacent coasts. The authors of this chapter consider the latter case to be the starting point of the consistent application of the three-stage approach (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* [2001] ICJ Rep., 91–92 [170] and 111 [230–232].

general approach to the delimitation of the continental shelf and the exclusive economic zone offers the opportunity to assess whether this general approach has been applied in a consistent and predictable manner across cases. However, further consideration of this matter led to the conclusion that it would be counterproductive only to consider the more recent case law in detail. Many concepts of maritime delimitation law have their origins in the earlier case law and cannot be properly understood without an in-depth discussion of that earlier case law.

The editors requested that individual authors, in writing their respective chapters, take into consideration three issues:

1. an analysis of the case law's definition(s) and the characteristics of the main concepts under consideration in the chapter – in this connection, contributors were also requested to consider whether it is possible to distinguish between the approach of the ICJ, the ITLOS and arbitral tribunals;
2. how the main concepts under consideration in the chapter have been applied to the individual case; and
3. an assessment as to how the approach of the case law to the concepts under consideration in the chapter relate to the ICJ's statement in *Libya/Malta* on consistency and predictability.

The choice for an edited volume was deliberate. Current academic practices make it next to impossible to prepare a book of this nature in the form of a monograph. Aside from this practical consideration, the editors hold that an edited volume has the advantage of providing room for different opinions. In particular, in the case of a controversial topic like the law on the delimitation of the continental shelf and the exclusive economic zone, there is a considerable advantage to considering such different views and presenting them to the reader to form her or his own opinion.

1.3 Development of the Law on the Entitlement to and Delimitation of the Continental Shelf and the Exclusive Economic Zone

The relevant rules contained in multilateral conventions and customary international law provide the point of departure for the judiciary in determining the content of that law in more detail while applying it to the individual case. Changes in these relevant rules may be one important factor in explaining the differences in approach to the delimitation process between individual cases. In looking at the development of the case law on the delimitation of the continental shelf and the exclusive economic zone

it is necessary to take into account the development of the applicable law as contained in multilateral conventions and customary international law. First, as in any field of law, the specificity of the applicable law will have an impact on the judge or arbitrator in interpreting and applying that law to the specific case. Second, developments in the applicable law, which may make it less or more specific, may provide the judge or arbitrator with greater or lesser leeway in this respect. In the case of the delimitation of the continental shelf and the exclusive economic zone, two aspects of the applicable law are relevant in this connection. First, this obviously concerns the rules that are applicable to the delimitation of the continental shelf and the exclusive economic zone. Second, as will become apparent from what follows, the rules concerning the basis of entitlement of the continental shelf and the exclusive zone are also relevant in this respect.

From its inception, the case law on the delimitation of the continental shelf and the exclusive economic zone has considered the basis of entitlement to these zones pertinent to determining the content of the rules applicable to their delimitation. The 1969 judgment of the ICJ in *North Sea Continental Shelf* is the starting point of the case law on the delimitation of the continental shelf and the exclusive economic zone. At the time, the negotiations that eventually were to result in the LOSC were in an initial phase and the rules on the entitlement to these zones and their delimitation as they would be included in the LOSC did not have an impact on the Court's judgment.[23] The Court was faced with the question whether

[23] As a matter of fact, the impact ran the other way. The Court's finding that the entitlement to the continental shelf is based on natural prolongation of the land territory (*North Sea Continental Shelf*, n. 11, 30 [40] and 54 [101]) was one of the arguments of the so-called broad margin states to support their view that the entitlement to the continental shelf should not be limited by the 200-nautical-mile limit, but extended to the outer edge of the continental margin (see e.g. A. G. Oude Elferink, 'Article 76 of the LOSC on the Definition of the Continental Shelf: Questions Concerning Its Interpretation from a Legal Perspective,' (2006) 21 *International Journal of Marine and Coastal Law* 269, 272–273). The Court's formulation of the rule on the delimitation of the continental shelf to the effect that 'delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances' (*North Sea Continental Shelf* (Judgment), n. 11, 54 [101]) provided a group of states at UNCLOS III with an argument to reject the rule on delimitation with its reference to equidistance and special circumstances contained in Art. 6 of the Convention on the Continental Shelf. At the same time, archival material related to *North Sea Continental Shelf* suggests that the Court's approach to the applicable law may have been influenced by a wish to impact on the further development of the law of the sea under consideration at the United Nations (see A. G. Oude Elferink, *The Delimitation of the Continental Shelf between Denmark, Germany and the Netherlands; Arguing Law, Practicing Politics*? (Cambridge University Press Cambridge 2013) 244–245 and 325).

or not the Convention on the Continental Shelf provided the applicable law between the parties. Denmark and the Netherlands maintained that either the Convention itself had become binding on Germany or that the Convention reflected customary international law. According to Denmark and the Netherlands, the Convention's rule on continental shelf entitlement, based on adjacency to the coast, implied that this entitlement was based on proximity to the coast.[24] This distance-based basis of entitlement required that the rule of delimitation also had to be based in distance.[25] Denmark and the Netherlands submitted that Article 6 of the Convention of the Continental Shelf, which refers to delimitation by the equidistance or median line[26] and provides for the possibility of another boundary where this is justified by special circumstances, did indeed accord primacy to the distance-based rule of equidistance. In their view, special circumstances only allowed for limited departures from the equidistance line.[27] The Court did not accept this reasoning. The Convention had not become binding on Germany and its rule of delimitation did not reflect customary law.[28] The Court rejected that the notion of adjacency in the Convention equalled a distance-based entitlement to the continental shelf.[29] Instead, the Court found that entitlement to the continental shelf was based on natural prolongation from the land territory of the coastal state.[30] This finding implied that the equidistance method of delimitation was not directly linked to the basis of continental shelf entitlement. The Court did conclude that there was a linkage between entitlement to and delimitation of the continental shelf, observing that 'delimitation is to be effected [. . .] in such a way as to leave as much as possible to each party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.'[31]

Having rejected that equidistance constituted an obligatory rule under customary international law, the Court formulated what it considered to constitute the applicable law: 'delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances.'[32] Although the Court's judgment provided the

[24] *North Sea Continental Shelf* (Judgment), n. 11, 30 [39]. [25] Ibid.
[26] Technically speaking, the equidistance line and the median line are the same. Both lines are at equal distance from the baselines from which the breadth of the territorial of the states concerned is measured.
[27] *North Sea Continental Shelf* (Judgment) [1969] ICJ Rep., 21 [13].
[28] Ibid., 25–28 [25–32]. [29] Ibid., 31–32 [41–42].
[30] Ibid., 32 [43]. [31] Ibid., 53 [101(C)(1)]. [32] Ibid.