

The delimitation of maritime boundaries



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Indisputably, the delimitation of maritime boundaries around the world has been one of the most significant and complex issues that the international community was faced with over the last two centuries. It has been accepted that from the early stages of human existence the world's oceans and seas have been converted into one of the main resource base upon which a significant percentage of humankind relied for sustenance and livelihood options. In the beginning of the 21st century, they continue to provide tremendous resources, living and mineral, and constitute the foundation for vital economic sectors such as trade, tourism and energy, undoubtedly essential to all States, developed or developing. In short, only few resources have as broad an impact on our economy and communities as our oceans and seas, by becoming vital to homeland security, transportation, trade, environmental and scientific research, historical and cultural heritage.

Based on the foregoing, therefore, countries all over the world have actively passed laws related to the seas in an attempt to determine maritime boundaries and to guarantee the freedom of the high seas to all states. ¹ Despite such an attempt, due to the close geographical proximity of many States, their maritime zones often overlap to a greater or lesser extent, leaving no other option to them but to establish boundaries between such zones in order to avoid disputes and uncertainties over the right to exercise sovereignty, sovereign rights or jurisdiction and to exploit resources. Such a determination, however, has been extremely difficult to be accomplished and has given rise to more cases before the International Court of Justice than any other single subject. ² This particular study, therefore, will be based on the delimitation of maritime boundaries in respect to the different

approaches followed by the International Court of Justice in situations such as those concerning the North Sea Continental Shelf Cases (1969) and the Greenland/Jan Mayen (1993) dispute.

A clear and comprehensive examination of the development of International Law of the Sea will be presented along with the rest of the legal framework including customary law, International Court of Justice decisions and various arbitral tribunals. In addition, special attention will be given to a number of different judgments, which are of more general application and we will try to assess their significance for the international law of maritime boundary delimitation. In order, however, for this discussion to be understood in its context, it will be essential to consider a number of different cases and explore particular difficulties and problems arising out of them. Nevertheless, before we proceed further into the world of the seas and unfold the particular developments and the various problems in relation to the creation and application of the law, it will be a mistake not to mention how precious such a determination of maritime borders is for our nations and our lives. Maritime boundaries are critical elements to the planning of any activity in the ocean realm; from fishing and shipment to the exploitation of valuable resources, sea represents one of the most important portion of our communities. National claims, however, may overlap, creating areas of disputed ownership and jurisdiction that can lead to confrontation and even open conflict.

For example, in the assessment, exploration and recovery of petroleum, mineral or fishing resources, a distance of a few hundred meters can have significant economic importance. The reconstruction, therefore, of maritime

claims and boundaries and their associated jurisdictional aspects is complex, and in many cases, confusing and contradictory. This can easily be proved if we consider the fact that a big number of maritime delimitation problems still remain unresolved. According to a study by the United States department of States, the total number of potential maritime boundaries is 420 while only 200 of them have been resolved by various agreements; merely 48 percent of the potential maritime delimitations. Such diversity, therefore, represents a huge problem and certainly predicts that disputes over maritime delimitation will continue. In addition, the use of oceans by coastal States for living and non-living resources will expand, leading to heightened efforts to delimit maritime spaces.

Consequently without rules and principles to control and protect each state's interests the legal uses of maritime spaces cannot be enjoyed effectively. In this respect, the law of maritime delimitation plays an essential role in the international law of the sea. In order, however, to resolve such contradictions, states are required to lawfully set up boundaries among them based on bilateral treaties and agreements. In an attempt to guide states towards this end, the establishment of a number of general rules and principles has proved to be necessary.

This has certainly been an extremely difficult task for both the 1958 Geneva Conventions and the 1982 Law of the Sea Convention due to the great diversity of coastal geography. For this reason the consideration of customary law and the development of other legal instruments was essential in order to regulate in the best possible way such complex and diverse situations. 4 One of the most important steps, therefore, towards a positive

solution in creating maritime boundaries among states has been the division of the sea into separate zones. Such zones were clearly identified by the UN Convention on the Law of the Sea 1982 after years of debates. From 1973 to 1982, the Third UN's Convention on the Law of the Sea was the subject of what were probably the most prolonged and intense multinational negotiations in history.

The Convention has reshaped, and will continue to reshape, the character of the marine sector. Prior to UNCLOS III, jurisdiction in the oceans was a simple issue: states sovereignty was absolute to the jurisdictional boundary, outside of which freedom of the high seas was absolute. UNCLOS III brought major changes to both these long-standing concepts. Sovereign rights are now phased down through several zones. 5 According to the Convention the sea is divided into multiple jurisdictional spaces such as internal waters, territorial sea, contiguous zone, Exclusive Economic Zone, archipelagic waters, continental shelf, high seas and the deep seabed, which is the common heritage of mankind.

It should be emphasised, however, that the principles of delimitation established by the Convention and other legal sources have been formulated in a very general way. For this reason it is extremely complicated to offer any precise account of the principles of delimitation, such as might be applied in future to unresolved boundaries. In addition, each delimitation involves a situation which has its own unique characteristics and therefore needs to be examined independently. Previous practice and decisions will at best point to the kind of factors to be considered and approach to be adopted, but will not permit the deduction of a precise boundary line which

must be established. 6 Nonetheless, the consideration of a number of different cases will help us understand better the development of the law of the sea and will clearly identify any uncertainties and specific problems. Before, however, precede further into any particular case and try to unfold all the relevant issues, we must note at this stage the existence of the median line principle.

In particular, territorial sea delimitations between opposite states have to be agreed upon a median line, equidistant from the nearest points of the opposing states' shores, as the boundary. This was done for example, in the 1932 Danish – Swedish Declaration concerning the Sound, for a large part of the boundary between the two States. Sometimes States have employed instead the centre line of the main deep – water channel passing between their shores: an instance of this is the 1928 Agreement between Great Britain and the Sultan of Johore concerning the Johore Strait. Also, the delimitation of territorial seas of adjacent states has been less consistent. Substantial use has been made of the equidistance principle by drawing a median line, although, in many situations, the examination of a number of other criteria has proved to be necessary.

7 Furthermore, in respect to the delimitation of the continental shelf, in early years of the twenty century, there is no evidence of the application of any clear principle. It is true that the first ever agreed delimitation, in 1942 between the then British colony of Trinidad and Venezuela, was resolved upon an ' equitable division' between the two territories concerned.

Similarly, the Truman Proclamation in 1945 referred to the application of ' equitable principles' in determining boundaries. The then President of the

United States said that: “ having concern for the urgency of conserving and prudently utilizing its mineral resource, the government of the United State regards the natural resources of the sub-soil and sea-bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.

.. “ 9Despite all the above, however, one of the most significant pages of the International Law of the Sea ‘ book’ was undoubtedly written by the International Court of Justice in the North Sea Continental Shelf Cases (1969). The decision of the Court in this particular case is surely one of the most interesting as well as debatable decisions in its history. It deals with certain aspects of one of the most important new developments of international law, the doctrine of the Continental Shelf and touches on some basic problems of the sources of international law. Beyond all, however, the Court was compelled to formulate certain principles of general equity as applicable to the delimitation of the continental shelves between three of the coastal states of the North Sea.

It is this attempt of the Court to formulate the general principles of equity applicable to a fair allocation of the resources of the Continental Shelf between neighbours that has been the main issue of many academic discussions over the years. In respect to the area concerned, the North Sea has, in the words of the Court “ to some extent the general look of an enclosed sea without actually being one. Round its shores are situated, on the eastern side and starting from the north, Norway, Denmark, the Federal Republic of Germany, The Netherlands, Belgium and France; while the whole western side is taken up by Great Britain, together with the island groups of

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the Orkneys and Shetlands”.¹⁰ After a series of agreements, between the United Kingdom on the western side, and Norway, Denmark and The Netherlands on the eastern side, they have managed to fix the respective boundaries of the continental shelves according to the principle of the median line. In addition, the Federal Republic, by agreements of 1964 and 1965 with Denmark and The Netherlands, established certain partial boundary lines. However, the Federal Republic was unable to reach agreement with Denmark and The Netherlands on the other boundaries, which the latter two states wished to determine in accordance with the “equidistance principle”.

This is defined in Article 6 (1) of the Continental Shelf Convention as “the median line, every point of which is equidistant from the nearest points of the base lines from which the breadth of the territorial sea of each state is measured”. The Court describes the “equidistance line” as “one which leaves to each of the parties concerned all those portions of the Continental Shelf that are nearer to a point on its own coast than they are to any point on the coast of the other party”.¹¹ The problem, therefore, was that the application of the equidistance principle of article 6 would give Germany only a small share of the North Sea Continental Shelf, in view of its concave northern shoreline between Holland and Denmark (Germany had not ratified the Convention). By two special agreements then on 2 February 1967 between Denmark and the Federal Republic of Germany and between the latter and the Netherlands, the States requested the International Court of Justice to declare: “what principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the

continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above mentioned Convention of 9 June 1965? The Court, therefore, was not asked to determine the continental shelf boundaries but to consider which legal principles are applicable to the situation. The delimitation of the continental shelf boundaries was left to the Parties themselves. 12 The International Court of Justice held that the principles stated in article 6 of the Continental Shelf Convention did not constitute rules of international customary law and therefore Germany was not bound by them.

According to the Court's view, " delimitation is to be affected 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 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. Thus, the decision of the Court was that the determination of maritime spaces must be in accordance with equitable principles and the consideration of all relevant issues. Among some of those determining factors was the element of a reasonable degree of proportionality between the lengths of the coastline and the extent of the continental shelf. 13 This particular approach followed by the International Court of Justice in the North Sea Continental Shelf Cases has certainly affected all subsequent cases massively. Despite this, however, and although the delimitation rule in article 6 of the Continental Shelf Convention and the customary rule are rather differently formulated, and even though the Court in the North Sea

Continental Shelf cases stressed that the rule in article 6 had not passed into customary law, there has been a tendency to see them as leading to much the same affect. Thus, in the Anglo-French Continental Shelf case in 1977, it was stated that the equidistance-special circumstances rule of article 6, which the tribunal saw as a single rule rather than two rules, “ 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”.

In addition to that, the International Court of Justice went even further and in the Greenland/Jan Mayen case expressed the view that “ if the equidistance-special circumstances rule of the 1958 Convention is, in the light of this 1977 Decision, to be regarded as expressing a general norm based on equitable principles, it must be difficult to find any material difference- at any rate in regard to delimitation between opposite coasts-between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles”. It seems, therefore, that the Court has associated article 6 of the Convention with the customary international law principles on the delimitation of continental shelf. Such an approach certainly goes further than the view expressed in the Anglo-French Continental Shelf case where the tribunal emphasised that “ under article 6 the equidistance principle ultimately possesses an obligatory force which it does not have in the same measure under the rules of customary law” and that “ the rule of customary law are a relevant and even essential means for both interpreting and completing the provisions of article 6”. Nevertheless, before we consider a different approach adopted by the International Court of Justice in the

Greenland/Jan Mayen Case (1993) and try to explore all the relevant issues that contributed to the development of a more clear and comprehensive legal framework in relation to the delimitation of maritime boundaries, it will be a mistake not to mention the terms ‘ special circumstances’ and ‘ relevant circumstances’ introduced by article 6 of the Convention and customary law respectively. The term ‘ special circumstances’, therefore, has traditionally been considered as being comparatively narrow in scope: for example, the International Law Commission regarded ‘ special circumstances’ as embracing exceptional configurations of the coast and the presence of islands and navigable channels.

On the other hand, ‘ relevant circumstances’ have been recognised as being a much wider term. Indeed, the International Court of Justice expressed the view, in the North Sea Continental Shelf Cases, that there was no limit to the kind of circumstances that might be taken into account in effecting an equitable delimitation. Subsequent cases, however, tended to narrow such circumstances to those that are relevant to the continental shelf and are primarily geographical in character. After revising, therefore, a number of different cases we can confidently identify the existence of a range of special-relevant circumstances. Some of the most consistent and significant one may be the configuration of the coast such as the concavity of the German coast in the North Sea Continental Shelf Cases and the presence of relatively small islands, which either will be given less than full effect as in the Anglo-French Continental Shelf case, or full effect as illustrated by the Greenland/Jan Mayen and Libya/Malta cases.

Additionally, difference in the lengths of the relevant coastlines has been accepted as constituting to a relevant circumstance, especially in the case of the opposite coast. Where an equidistance line is drawn as the provisional boundary between two coastlines of markedly different lengths, there will be a considerable degree of disparity between the ratio of the coastline to each other and the ratio of the areas of continental shelf attaching provisionally to each party. Therefore, courts are under the obligation to adjust the provisional boundary line so that there is a reasonable degree of proportionality, or at least not excessive disproportional, between the length of the each party's coastline and the area of continental shelf attaching to it, as was carried out in the Greenland/Jan Mayen case. Furthermore, another relevant issue, which must be taken into account, is the prior conduct of the parties, such as having contracted a temporary boundary line. In cases like the Tunisia/Libya one or the Greenland/Jan Mayen case, the relevance of the prior conduct has been recognised, despite the fact that Court find that there was sufficient concordance of conduct for it to be relevant.

Moreover, as we have seen in the North Sea Continental Shelf Case, the International Court emphasised on the concept of the natural prolongation of land territory as a factor in continental shelf boundary delimitation. As result, geological and geomorphologic features, such as a deep trench amounting to discontinuity in the seabed, would possibly constitute relevant circumstances.