

MARITIME BOUNDARIES AND LIMITS: SOME BASIC LEGAL PRINCIPLES
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Biography

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Abstract

Maritime boundaries and limits are closely connected with the ownership of valuable resources and coastal state jurisdiction over foreign shipping. Inaccuracies and uncertainties over such sensitive issues are best avoided. There are numerous international disputes over limits and boundaries, some of which could endanger peace and security. In order to minimise the risks caused by legal uncertainties, there is a need to reach consensus on some legal principles and practical methods. Over the past half century, efforts to that end, made at intergovernmental conferences and in international courts and tribunals, have met with mixed success. The UN Convention on the Law of the Sea sets out the modern law, but its boundary provisions are less specific than those in the Geneva Convention on the Continental Shelf. International courts have developed some caselaw, but the decisions have not always followed a consistent line. Recently, in an effort to clarify the relevant considerations, a systematic analysis of the practice of States has been made. However, it is inescapable that governments enjoy freedom of contract, with the result that practice is an uncertain guide. Despite some progress in these different fora, legal uncertainties over the principles of boundary-making persist and the need to reach a wide consensus remains outstanding. Today, increasing attention is focusing on the question of the outer limit of the continental shelf beyond the 200 mile limit.

In these circumstances, there may remain scope for technical bodies such as the IHO/ABLOS, academic legal bodies and practising lawyers to attempt to draw together some of the different threads. The present Conference is a timely opportunity. To that end, this paper attempts to identify some basic legal principles, notably the basic principles of the UN Charter, including the principle of the sovereign equality of states, the ever-present international aspect of maritime limits and boundaries, and the relationship between territorial sovereignty and maritime rights.

I. INTRODUCTION: THE NEED FOR LEGAL CERTAINTY

The theme of this conference concerns accuracy and certainty in regard to maritime boundaries and the outer limits of coastal state jurisdiction. There is clearly a need to seek the greatest possible measures of accuracy and certainty in regard to such sensitive matters as the outer limits of state sovereignty and the boundaries between neighbouring states. This need has been accentuated by the recent growth in both the numbers and lengths of boundaries. The leading work *International Maritime Boundaries*¹ contains

reports on 191 agreed boundaries in its 4 volumes (vol 4 is in the press). Political geographers advise that there could be over 400 boundaries world-wide², so less than half of the potential boundaries have been agreed. There is much work to be done. Where boundaries and limits remain undetermined, major interests may be at stake: natural resources and security on the part of coastal states, and the general interest of all states in the resources of the international seabed area, forming the common heritage.

Legal uncertainty may cause or exacerbate disputes between states. In contrast, the reaching of agreement permits both states to license resource activities right up to the agreed line, often lifting the blight from “grey areas” which had been disputed. The first desideratum, therefore, is that the legal principles applicable to boundary-making should be internationally agreed, clear and accessible to all concerned, soundly based upon science, and just and fair in their results. A second *desideratum* is to have available some international procedures for monitoring claims and for settling disputes by recourse to disinterested third parties, such as commissioners or judges. They too need to be able to apply clear legal principles. How far are we away from these twin *desiderata*?

II. CAUSES OF UNCERTAINTY

There are several sources of uncertainty in the law governing maritime spaces, affecting both boundaries between neighbours and national limits. They include change, differences in charting, and, most importantly, natural diversity.

1. Natural and Legal Change

The first cause of uncertainty is change: Low water lines may advance or retreat and low-tide elevations may appear or disappear, all as a result of natural changes.³ Changes may be man-made. New harbour works may be built on the coast and then marked on large scale charts.⁴ A further type of change is legal change, at both the national and the international levels. New national claims may be made up to the maxima allowed by international law: for example, three mile limits may be extended to twelve miles, thereby creating new basepoints on low-tide elevations lying between three and twelve miles of the coast.⁵

The question arises: Do maritime limits change according to circumstance, or are they fixed for ever once they have been given some legal expression in the form of legislation or a treaty? The answer has been sought on a case by case basis. Some limits are ambulatory, in the sense that they change with events, either from the time when a change occurs or, more realistically, when it is observed, recorded and charted or included in legislation.⁶ Limits should have a valid legal basis at the time when the question of their status arises. Other limits are not ambulatory. For example, most maritime boundary treaties define the lines by reference to co-ordinates of Latitude and Longitude, rather than to the method used to draw the boundary, with the consequence that the lines defined in the treaties are not ambulatory in step with changes in the underlying basepoints. The question is one of treaty interpretation.

Another question is: what would be the legal position should the entire territory of an island state be inundated as a result of a Tsunami or a more gradual sea level rise caused

by melting ice. Something would turn upon the precise facts. The building of new sea-defences on threatened coasts is permissible and the low water lines on new sea-defences constitute new baselines for the island State, without making it an artificial island. However, in the case of a catastrophe causing the total loss of the State's territory, there must be doubts about the survivability of both the State as a legal entity and its maritime claims as a coastal State.

2. Variation in charts

A second, minor cause of uncertainty are variations in state practice in charting may affect the drawing of outer limits and the processes of boundary-making.⁷ In particular, there is no uniformity concerning the chart datum: some charts use the lowest astronomical low water line, whilst others use the mean lower low water springs. In the negotiations between Belgium and France, for example, a feature which was shown as a low tide elevation on French and British charts was no more than a submerged bank on Belgian charts. The problem this difference caused in the negotiations was finally solved by a compromise.⁸ For the future, similar problems in boundary-making could be averted by greater standardisation of charts.

3. Natural Diversity

Finally, a great deal of uncertainty is the inevitable consequence of the natural diversity of the Earth and its coasts. Every coast and every delimitation is unique. The facts of geography are always different. As a result, it is difficult to frame rules which are precise. The point was best put, perhaps, by Sir Humphrey Waldock, writing about the continental shelf, as follows:-

*"The difficulty is that the problem of delimiting the continental shelf is apt to vary from case to case in response to an almost infinite variety of geographical circumstances. In consequence, to attempt to lay down precise criteria for solving all cases may be to chase a chimera; for the task is always essentially one of appreciating the particular circumstances of the particular case."*⁹

Despite the existence of these difficulties, in my view, the making of national claims and the task of boundary-making have so much potential for causing friction between neighbours around the world that constant efforts should be made to refine the statement of the rules, to reduce any ambiguities or uncertainties, and to improve the procedures for monitoring claims and for settling disputes on the basis of the rule of law.

III. THE LAW AND NATURAL DIVERSITY

How do the existing rules in the Convention on the Law of the Sea relating to maritime spaces take account of this enormous diversity in natural conditions? Three approaches have been adopted.

First, on certain points, the Convention sets out objective criteria or mathematical rules. For example, the maximum limits of 12, 24, 200 and 350 n.m. are all measured from the baselines and so can be drawn precisely by a hydrographer, assuming there is no problem over a particular baseline. The arcs of circles rule set out in article 4 produces a clear result and the same rule applies, it is safe to assume, to the measurement of 24 and 200 mile limits.

Secondly, at other points, the Convention combines objective criteria with more general, descriptive wording. An example of an objective criterion is the semi-circle rule for bays contained in article 10. The rule is clear and fairly easy to apply, but article 10 also uses the terms "well-marked indentation" and "mere curvature of the coast" which are descriptive. In the same vein, the "natural entrance points" of a bay may not always be obvious.¹⁰ A second example of mixed criteria is provided by article 76, concerning the outer limit of the continental shelf. Paragraph 1 of article 76 refers descriptively to "submarine areas that extend...throughout the natural prolongation of the land territory to the outer edge of the continental margin." Paragraph 3 is also descriptive: "the shelf, the slope and the rise". Paragraphs 4 to 7 lay down more objective tests for applying the concepts in paragraphs 1 and 3, tests drawn from various Earth sciences. In particular, paragraph 4(b) contains the "Hedberg formula" for the foot of the slope and paragraph 4(a)(i) the "Irish formula" for sediment thickness. Both formulas call for the acquisition of scientific data before they can be applied accurately. A particular problem may be that these ocean sciences are evolving rapidly, partly under the stimulation of the requirement to submit reports under article 76. In all these examples, the objective criteria and the descriptive wording have to be read together, each in the context of the other.¹¹

A third approach is to minimise or avoid altogether the use of any objective criteria and to employ solely descriptive wording. Thus, according to article 7, straight baselines may be drawn where there is "a fringe of islands" or a "deeply indented" coast, without much in the way of definition of those terms. Attempts to establish objective, mathematical criteria have been advanced in learned articles, but the proposals have gained only limited acceptance so far.¹²

Which approach has been followed with regard to delimitation? The equidistance line in article 15 is an objective test, being based on a geometrical construction.¹³ However, it has been combined with an exception cast in exceedingly general terms- "special circumstances,"- a concept which is vaguer even than descriptive language. The provisions of articles 74 and 83 provide a second example of completely general language: paragraph 1 of each article calls simply for "an equitable solution" without more ado. In other words, in regard to delimitation, the third approach is followed much more than the second.

Whatever the precise mix of objective criteria and descriptive language, ascertaining the true meaning of these provisions involves questions of law. Primarily, the questions are ones of treaty interpretation, on which there are rules in the Vienna Convention on the Law of Treaties of 1969. The principal rule is that the terms of a treaty such as the Convention on the Law of the Sea have to be given their ordinary meaning in their context and in the light of the Convention's object and purpose.¹⁴ Where the Convention uses general terms, an important role can be played by courts and tribunals in interpreting and applying those terms in an authoritative manner. A body of caselaw or jurisprudence may be built up over the years, especially where decisions display consistent trends.

IV. NATURAL DIVERSITY AND THE PRINCIPLES FOR DELIMITING

BOUNDARIES

The international community has been wrestling for a long time with the problem of how best to formulate the legal principles governing boundary-making. It would clearly be beyond the scope of this paper to attempt to cover the entire topic, so the focus will be on the formulation of the basic principles.

At the outset, some basic principles may be recalled. First, the basis for rights and jurisdiction over the territorial sea, continental shelf and all maritime zones is sovereignty over the coast: the land dominates the sea.¹⁵ At the same time, whilst claims to maritime rights and jurisdiction are initially unilateral, the delimitation of maritime zones always has an international aspect.¹⁶ These principles find their clearest expression in statements by the International Court of Justice (ICJ). Unfortunately, they have never been codified, but they remain valid starting points for the law on delimitation.

Over the past 50 years, specific formulations of some principles applicable to boundary-making have been advanced by different bodies, notably by the International Law Commission (ILC), by the First UN Conference on the Law of the Sea, by the ICJ (especially in the North Sea Continental Shelf Cases), by the Third UN Conference on the Law of the Sea and by arbitral tribunals. Some key stages in this search for principles can be singled out.

The work of the **ILC** was done during the 1950s when there were few decisions by courts and little in the way of state practice. Delimitation between neighbours was approached in the context of limits which, whilst wider than those of 1945, were still much narrower than those of today. The Commission's final draft articles put forward three elements: agreement, equidistance, and "special circumstances". The Commission stated in its commentary that it had adopted "the same principles" for the territorial sea and the continental shelf. However, its proposals amounted less to a statement of legal principles than to a process or method of delimitation.¹⁷ Exceptions had simply to be "justified by special circumstances" but what circumstances would justify an exception? It was recognised that equidistance "might not infrequently result in an unreasonable or inequitable delimitation,"¹⁸ but neither the principle of equity nor the idea of seeking an equitable result was included in the actual terms of the proposal.

(b) The **Geneva Conference** made one improvement in the proposals. On the basis of a proposal by Norway, the rules for the delimitation of the territorial sea in article 12 of the Convention on the Territorial Sea were recast by the First Committee not as statements of what *was* the boundary but rather as a rule that States were not to exceed the median line in the absence of agreement. This was a much better approach, regulating the situation whilst agreement on a line remained outstanding.¹⁹ However, parallel changes were not made in the Convention on the Continental Shelf. The term "special circumstances" remained undefined in the texts of the two Conventions. The rationale of the agreement/equidistance/special circumstances approach and the underlying principle of equity remained hidden.²⁰

(c) In the **North Sea Continental Shelf Cases**, the International Court of Justice

produced a judgment containing many important points, including the key concept of equity, the factor of proportionality between areas of shelf and lengths of coasts, the concept of minor coastal features which “distort” a median line, and the idea of the “natural prolongation” of the land mass. At the same time, the Court made findings which marked a break in the law, leading to uncertainty. The Court held by a majority of 11 to 6 that the method of equidistance was not binding upon the parties, that article 6 of the Convention on the Continental Shelf (CCS) was not part of customary law, and that under the applicable customary law delimitation was to be effected by equitable principles, the precise content of which was far from clear. Those findings meant that the States Parties to the Convention were bound *inter se* by one set of rules and non-parties were bound by a different set of rules. In other words, States were divided into two groups.²¹ In his separate opinion, Judge Lachs dissented (a rare event) on the grounds that in his view the elements in article 6 did constitute part of customary law, but he then went on to conclude that “there are no special circumstances which justify any departure from” the equidistance line.²² To my mind, and with the benefit of hindsight, the case could have been decided on the two bases that, first, the three elements (agreement, median line, special circumstances) set out in article 6 did reflect customary law in many important ways, notwithstanding the weaknesses of the article as a statement of the law; and, secondly, that the exceptional, concave configuration of the three states’ coasts facing the south-eastern North Sea, meant there existed “special circumstances” justifying departures in favour of Germany from the median lines.²³ Such a decision would have produced the same broad result – a win for Germany –but the alternative grounds would have avoided the division of States into two groups through the separation of customary law from the Geneva Convention.

(d) At the **Third UN Conference on the Law of the Sea**, there was a marked polarisation amongst coastal states over the rules for the delimitation of the EEZ and the continental shelf. There were two opposed groups of approximately the same numbers: the “median line group” which generally supported the approach in article 6 of the CCS and the “equitable principles group” which supported the approach adopted by the Court in the North Sea Cases. The positions adopted were greatly influenced by outstanding delimitations and actual disputes between pairs of neighbours, members of different groups. Delegations were not prepared to make the mental adjustments needed to reach consensus at the global level because of fears over possible repercussions for outstanding bilateral issues.²⁴ The outcome of long debates was, in effect, the rejection as treaty law of article 6 of the CCS in what became articles 74 and 83 of the LOS Convention. As the learned editors of *Oppenheim's International Law* point out, the debate between those who wanted equity to be the guiding principle and those who wanted equidistance can be regarded as having been “based on a false antithesis”. The editors continue: “It is not free from irony that the rejected text of Article 6...was one which nicely combines both equity and equidistance”.²⁵ Perhaps the irony goes all the way back to 1969. As stated above, the same result could well have been reached in the North Sea Cases by different reasoning and, in that event, it is fair to hazard the guess that the history of the Third Conference in regard to the delimitation of the EEZ and the continental shelf would have been rather different - probably shorter and less controversial. As a final irony, the Second Committee decided to retain the Geneva provision on the delimitation of the

territorial sea without controversy, even though the Committee was deadlocked over the delimitation of the EEZ/continental shelf.

(e) Recent decisions of courts and tribunals

It is beyond the scope of this short paper to review the remaining cases *in extenso*. During the twenty years following the decision in the North Sea cases, the different courts and tribunals were preoccupied with the two concepts of natural prolongation and equitable principles, as well as the interplay of customary and conventional law. A learned commentator noted in 1989 that the law on delimitation had acquired a bad reputation.²⁶ Certainly, it was difficult at that time to give confident legal advice to governments as to the outcome of boundary litigation and at least one dispute which had been destined in 1982 for arbitration was settled by agreement in 1988.²⁷

The three most recent decisions have gone some way towards reducing uncertainty in the law. In the case between Denmark and Norway concerning the boundaries between Greenland and Jan Mayen, the Court found in 1993 that the line for fisheries purposes under customary law coincided at all points with the line produced by article 6 CCS, thereby in effect bringing customary and conventional law together. The Court adopted a two stage process of first drawing a provisional median line and then reviewing its fairness with a view to making adjustments if appropriate.²⁸ The Court found there existed a legally significant disparity in coastal lengths, and shifted the provisional line towards the shorter coasts in order to achieve an equitable result. The Court also followed Mr. Thamsborg's approach to defining the "box" for the purpose of ascertaining the extent of the respective areas.²⁹ However, on other points, the decision has not escaped criticism. It has been argued that:-³⁰

- (a) In determining what was equitable in the area, an actual precedent -in the form of Norway's agreement of 1981 with Iceland (based on the report of the Conciliation Commission) to the effect that Jan Mayen's 200 mile zone should not intrude into Iceland's zone - was not followed.
- (b) The shift appeared to be insufficient to ensure proportionality.
- (c) In applying that factor, the frame of reference appeared to have been the area of the overlapping claims, not the whole relevant area as defined by Mr. Thamsborg.

In 2000, the *ad hoc* Arbitral Tribunal in the Eritrea/Yemen case found that "*It is a generally accepted view, as is evidenced by the writing of commentators and in the jurisprudence, that between coasts that are opposite to each other the median or equidistance line normally provides an equitable boundary...*"³¹ No specific authority was cited, but it is supported by a study of state practice, as digested in *International Maritime Boundaries*. The Tribunal decided that the boundary should be a single all-purpose boundary and that it should be a median line drawn as far as practicable between mainland coasts. The Tribunal then proceeded to examine the two coasts, including off-shore islands on both sides, comparing and contrasting the respective basepoints. In the course of this examination, the arbitrators rejected an argument from one of the parties about the respective coastal features on the grounds that "it does not compare like with like".³² The Tribunal applied, as the final stage, the factor of proportionality as a test of the equitableness of the provisional median line between the chosen basepoints, and

found that the result produced by the median line in terms of areas was not disproportionate. The test was applied to the entire line, including those sections where it was a territorial sea boundary.³³ The Tribunal had to address the question of what was the relevant area for the purpose of making the test, given the presence of a group of islands.³⁴

Earlier this year, the International Court of Justice gave judgment in the case between Qatar and Bahrain concerning the delimitation of the territorial sea in the southern sector, and the continental shelf and the EEZ in the northern sector. As regards the territorial sea, the Court applied article 15 of the LOS Convention, stating that : "*The most logical and widely practised approach is first to draw provisionally an equidistant line and then to consider whether that line must be adjusted in the light of the existence of special circumstances.*"³⁵ As regards the continental shelf/EEZ, the Court followed its own precedents and drew a provisional median line before considering whether there were circumstances requiring an adjustment. The Court noted the close relationship of the rules applicable to the territorial sea and those applicable to the EEZ/continental shelf.³⁶ These findings tend to stabilise the state of the law on delimitation. The decision followed the general approach adopted in the case between Eritrea and Yemen.

This survey of the attempts to formulate legal principles relating to maritime boundaries has shown that success has been limited. Natural diversities are so great that it has proved difficult to identify precise legal principles. In addition, other factors such as security interests, economic interests and established patterns of conduct cannot be left out of account. Nevertheless, the approach of first drawing a provisional equidistance line and then considering the equitableness of the result is today supported by both state practice and the most recent decisions by courts and tribunals. This approach has been followed in regard to all types of maritime boundary, whether territorial sea, economic zone or continental shelf, and whether determined in accordance with customary or conventional law.

V. THE PRESENT SITUATION

The LOS Convention is in force for its 137 parties and its package of rules represents the modern law. Now that over three-quarters of coastal states are parties to the Convention, it is prevailing more and more over the Geneva Conventions. The preamble to the LOS Convention states the aim of the negotiating governments as being "to settle in a spirit of mutual understanding and cooperation all issues relating to the law of the sea." It is striking that the LOS Convention contains detailed rules on most issues, but not on the delimitation of the EEZ and continental shelf. However, it did establish the Commission on the Limits of the Continental Shelf (CLCS) in order to review claims to the continental shelf beyond 200 n.m. and, even more significantly, the Convention also contains provisions in Part XV for the peaceful settlement of disputes by means of conciliation, arbitration or litigation, albeit with some qualifications. Potentially, these provisions cover disputes about baselines, national limits and boundaries between states. These provisions in Part XV also apply in principle to disputes over the outer limits of the continental shelf in article 76, whether or not the CLCS has been engaged.

Article 15 concerning the delimitation of the territorial sea repeats the effect of the Geneva Convention. On this important question, there was continuity. Just recently, the ICJ has found that this formulation is part of customary law.³⁷ This is an advance in the quest for legal certainty. The concept of "special circumstances," undefined in article 15, is tending to take on some of the characteristics of the second stage of the delimitation process for the EEZ/continental shelf, the consideration of the equity of a provisional median line.

Articles 74 and 83 concerning the delimitation of the EEZ and the continental shelf contain four paragraphs in similar terms. Several principles from the UN Charter are applied. The principle of the non-use of force entails that boundaries may not be imposed unilaterally by force or by making national claims. This principle finds particular expression in paragraph 1 which prescribes that delimitation is to be effected by agreement. The principle of good faith means that where a boundary has been established by a treaty issues to do with the boundary have to be determined by reference to, and in accordance with, the terms of the particular treaty, a principle reflected in paragraph 4. The key test in paragraph 1 is the "equitable solution". The Charter principle of the sovereign equality of states means, in the particular context of the law of the sea, that coastal states are juridically equal before the law. Their coasts are evaluated in accordance with the same rules and carry the same intrinsic weighting. However, where relevant coasts or coastal features display dissimilar characteristics in some material respect, such as their overall length in the relevant area, they should not be given equal weight. The two relevant coasts should be evaluated on a broad, overall basis and basepoint by basepoint. It is only like things which should receive like treatment. This principle underpins paragraph 1 where it refers to "an equitable solution".

State practice has been systematically examined and analysed in *International Maritime Boundaries*. The editor, Professor Charney, identified some substantial trends and practices, notably the use of the equidistant line as the basis for analysing the situation, as well as often providing the actual solution or pointing the way towards reaching one. He also noted the primacy of coastal geography among the various other relevant factors in negotiations.³⁸ In a recent paper, Professor Mendelson has suggested that what is an equitable solution can be gleaned, with all due caution, from a consistent tendency to reach similar solutions in similar geographical situations. Studies of existing agreements may disclose consistent approaches which can be followed as relevant guidelines for finding equitable solutions in other cases, as a kind of *opinio aequitatis* but not *opinio juris*.³⁹ The ideas of applying equity or seeking equitable solutions are not new. Equitable principles were mentioned in the *Grisbadarna Case*⁴⁰ and in the Truman Proclamation. Some have argued that the resort to equity is to appreciate and balance the relevant circumstances of each case so as to render justice. According to this broadly-conceived equity, "a court should render justice in the concrete case, by means of a decision shaped by and adjusted to the relevant 'factual matrix' of that case."⁴¹ This approach entails greater uncertainty since every case is unique. Other authorities have pointed out that there is a distinction between a decision based on equity as required by law and a decision *ex aequo et bono*. The parties to a case are able to ask for a decision *ex aequo et bono*: where they have not made such a request, the court has to apply the rules

of law, including rules which call for the application of equity or equitable principles or call for an equitable result. In other words, the modern law looks to a structured equity, not equity measured by the length of the judges' feet. Following this approach, the law applies corrective equity to provisional boundaries obtained by other means.⁴²

The law looks to the factor of distance as the first stage. Distance from the coast is a relevant consideration in regard to the security of a coastal state. In principle, an equidistant boundary could be expected to involve comparable risks for the two states. However, the security considerations in regard to particular coastal features may well differ, for example between an inhabited and an uninhabited feature. Moreover, a median line does not normally divide the area to be delimited in equal parts. Indeed, sometimes it produces an manifestly uneven split. Accordingly, as the second stage, the law looks to the equities of the provisional result. Adjustment of the provisional line or even adoption of a fresh method, such as the perpendicular to the general direction of the coast, may be indicated. In particular, the course of the line in regard to practical considerations such as security, navigation and fishing patterns is for consideration, as well as the question of the respective areas produced by the lines. The aim is to avoid unfair results, such as disproportion. In the latter regard, the relative proportions of maritime space are compared with the respective lengths of the relevant coasts, and this has led to decisions by both courts and negotiators to adjust the provisional line by shifting or transposing it. (The idea has also been advanced, as a "more versatile method of delimitation," of finding a ratio between the two coasts, say 1:0.9, and then drawing an equiratio line.⁴³)

It has been emphasised that proportionality does not, in itself, constitute a method for effecting a delimitation and that it is nothing more than a test of equitableness or a factor to be taken into account. At the same time, the significance of the factor of proportionality should not be under-estimated. Proportionality also underlies, in a certain way, the idea that a minor coastal feature may "distort" a line, in the sense that the area of maritime space affected by the feature is much greater than the size of the feature itself. Although in many instances there are security, navigational, economic or social factors to be weighed, nonetheless, leaving such factors aside for the moment, it is this factor of proportionality as a test of equity which has provided the basis in recent cases for adjusting the provisional median line.

A leading expert has pointed out that the test of proportionality is not applicable in all geographical situations.⁴⁴ Certainly, it is difficult to identify the relevant overall area or "box" in geographical settings such as those between Scotland and Ireland and between Scotland and the Faeroe Islands, as well as in a case where only a part of a longer boundary is under consideration, as in the Libya/Malta case before the ICJ. However, some check based on proportionality by area may not be out of place in most instances, even though the check may be difficult to make in some of them.

VI. CONCLUDING REMARKS

1. The question posed at the outset was: how far are we from having clear law and readily available procedures for tackling boundary issues? The written law in the LOS Convention consists, for the territorial sea, of a combination of an objective criterion (the

method of equidistance) and undefined exceptions, whilst for the EEZ/continental shelf, only a very general test of the equitable solution is prescribed. The written law, considered in isolation, does not meet the standards of certainty and clarity required by good, sound law. However, there is now developing a body of caselaw in the ICJ and other tribunals which displays more consistency, something which tends to reduce uncertainty. The more recent caselaw has been based on an examination of the Convention, extending not only to the provisions on delimitation but also to those on limits, baselines, and other related questions. Caselaw and conventional law are beginning to combine to produce better law.

This process can only be assisted by the terms of Part XV of the Convention which provide potential litigants with more jurisdictional possibilities, including the International Tribunal for the Law of the Sea, the ICJ and Arbitration. The monitoring of claims to the continental shelf beyond 200nm is provided for by the Commission on the Limits of the Continental Shelf, which is actively preparing to consider submissions. Thus, during the past five years there have been improvements both in the substantive law and in the procedural arrangements for its application.

2. In the light of the recent developments, there may be benefit in attempting a stock-taking exercise, examining written law, caselaw and State practice. For instance, the factor of proportionality may provide a particular topic for further study by legal and technical experts. On more technical aspects, the time may have come to recognise as best practice the use of geodesic lines in boundary delimitation. The use of straight lines on Mercator charts produced problems in the Channel Arbitration: such problems should be avoided in future by courts and tribunals.⁴⁵ There may also be “best practices” for giving half effect to small features, etc., which could be identified and defined by experts, for the guidance of both negotiators and courts.

3. Lawyers and technical experts both have parts to play in the processes of delimitation. Courts and tribunals perform best when they appoint an expert hydrographer, something provided for in article 289 of the LOS Convention.

4. Each court or tribunal, when considering a case, should do its utmost to maintain the consistency of the chain of decisions. The outcome of a case can never be totally predictable, but a reasonable degree of predictability should be the aim. This means according the highest respect to the decisions of other courts and tribunals. Recent decisions are consistent on several points. Predictability would also be enhanced by paying greater regard to State practice where it exists in the vicinity of a delimitation, as *opinio aequitatis*.

5. In the present climate, it is to be hoped that governments may be more willing in the future than in the past to submit delimitation questions to international courts and tribunals. Relatively few states parties have made the declaration provided for in article 298(1)(a) reserving on the question of delimitation.⁴⁶ The legal uncertainties which have attended this topic of delimitation from the outset have somewhat diminished as a result of recent decisions by courts and tribunals and the growth in state practice.

6. Finally, it should not be forgotten that delimitation is intimately linked with the remainder of the Convention, including the rules on baselines as well as those on the settlement of disputes. The system of the Convention, derived from the "package deal" approach, should be upheld.

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Notes

¹ Charney J.I. and Alexander L.M. (Eds.), *International Maritime Boundaries*, Vols. I and II (1993), Vol. III (1998); Charney and Smith R.W. (Eds.) Vol. IV (2001) in press.

² Smith R.W., *Limits in the Seas* No. 108, *Maritime Boundaries of the World*, p. 3.

³ This has happened during boundary negotiations: see IMB, Report No. 9-17, *Belgium-United Kingdom*, p.1901.

⁴ Harbour works in progress during boundary negotiations but not then completed or charted were not counted in the Agreement between the Netherlands and the United Kingdom: see report No. 9-13 in IMB, p.1859. New harbour works on the Belgian coast were counted in the Agreement between Belgium and the Netherlands: see Report No 9-21 in IMB, vol. IV (in press).

⁵ Case No 146/89, (*Commission v. United Kingdom*) arose from the extension of the territorial sea around the United Kingdom from 3 to 12 n.m., including the use of low tide elevations such as the Goodwin Sands in accordance with the rules of international law, thereby causing uncertainty over access rights enjoyed by certain EC fishermen to a belt of fishing water between 6 and 12 n.m. from the English coast in the southern North Sea. The Court held that the access rights negotiated on the basis of the original 6 to 12 mile belt subsisted despite the outward movement of the belt for other purposes.

⁶ Article 1 of the Convention on the Continental Shelf includes in the definition of the continental shelf the test of exploitability, which is ambulatory.

⁷ For a valuable survey, see Beazley P.B., (1994) *Technical Aspects of Maritime Boundary Delimitation*, IBRU, Durham.

⁸ IMB, Report No. 9-16, vol. II, p.1891.

⁹ Waldock C.H.M., 1979, *The International Court and the Law of the Sea* 13, Leiden (Cornelius van Vollenhoven Memorial Lecture). See also Nelson L.D.M., *The Roles of Equity in the Delimitation of Maritime Boundaries*, 84 *AJIL* (1990) p. 837.

¹⁰ A case arose in a Scottish court concerning the question of the entrance points of the Firth of Clyde.

¹¹ Another example is provided by Part IV of the Convention concerning archipelagic states. At the Conference, maritime states were not prepared to accept the concept unless there were some objective criteria for defining it. In the result, some of the provisions concerning archipelagic baselines in article 47 contain objective criteria, such as the maximum and minimum ratios of land to water and the maximum lengths of archipelagic baselines. At the same time, the definition of "archipelago" in article 46(b) contains descriptive language, notably the phrase "...natural features which are so closely interrelated that (they) form an intrinsic entity...".

¹² Hodgson R.D. and Alexander L.M., (1972) *Towards an Objective Analysis of Special Circumstances*, Law of the Sea Institute, Rhode Island. See also the UN Handbook on the Delimitation of Maritime Boundaries (2000) and Cook P. J. and Carleton C. M. (eds.), *Continental Shelf Limits: The Scientific and Legal Interface* (2000).

¹³ A method defined by S.W.Boggs (1940) *International Boundaries*, Chapter X.

¹⁴ Article 31. Other relevant matters include subsequent agreements, subsequent practice and the relevant rules of international law, including decisions by courts.

¹⁵ In the Aegean Sea Case, the ICJ stated that "continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal state" ICJ Reports 1978, p.1, at p. 36.

¹⁶ ICJ Reports 1951, p. 132.

¹⁷ There was a long argument at the 3rd LOS Conference as to whether equidistance was a legal principle or nothing more than a method of delimitation.

¹⁸ Per the Court of Arbitration in the Channel Arbitration, 1977 (UK White Paper Cmnd. 7438, paragraph 70).

¹⁹ Addressing the Norwegian amendment, Sir G. Fitzmaurice stated that "It was admittedly a weakness that there was no definition of special circumstances ... Nevertheless, special circumstances did exist which, for equity or because of the configuration of a particular coast, might make it difficult to accept the true median line as the actual line of delimitation between two territorial seas." Official Records, Vol. III, 189 (First Committee). A second improvement was the inclusion in the article of historic title as an example of "special circumstances."

²⁰ The British Government's White Paper refers, in the context of article 6 of the Convention on the Continental Shelf, to "the principle of the median line as the starting point for any delimitation..." (Cmnd.584, Paragraph 34).

²¹ Division over the substantive rules creates especially acute problems in the law of the sea, hence the setting of the goal of a single, comprehensive and universally accepted LOS Convention.

²² ICJ Reports 1969 p.3, at p. 218.

²³ Later, in 1985, Judge Lachs presided over the arbitral tribunal formed to decide the difference between Guinea and Guinea Bissau (II International Boundary Cases, 1992, Grotius, Cambridge, p.1301). The Tribunal decided that the general configuration of the West African coastline from Senegal to Sierra Leone had to be considered in delimiting the boundary between the EEZs of the two parties.

²⁴ This factor may well operate still today so as to inhibit the formulation of sound rules since governments are likely again to defend interests in outstanding negotiations.

²⁵ Jennings and Watts (Eds.), 1992, Oppenheim's International Law, p. 780.

²⁶ Prosper Weil, (1989) *The Law of Maritime Delimitation*, p. 288.

²⁷ The boundaries of the continental shelf between Ireland and the UK: see IMB, Vol. II, Report No. 9-5.

²⁸ This is exactly what many negotiating teams do before the first contact with the other side. The best working charts depict the manner in which the median lines have been constructed from the baselines.

²⁹ Verbatim Record of the Court's hearing on 11 January 1993.

³⁰ See Charney, *Progress in International Maritime Boundary Delimitation Law*, 88 AJIL (1994) 227 and IMB, Report No. 9-19.

³¹ Paragraph 131 of the decision.

³² Paragraph 118.

³³ Article 15 was applied in paragraph 158 and the test of equitableness in paragraph 159. On other points of interest, in reliance upon article 5 of the LOS Convention, the Tribunal rejected an argument that it should use the high water line as a baseline, and, in reliance upon article 6, a further argument that it should count a submerged reef as a low tide elevation.

³⁴ Paragraph 167 of the decision.

³⁵ ICJ Reports 2001 paragraph 176. Again, this statement was not supported by authority, but it is supported by state practice as set out in IMB. The Court also applied the test of what is an island in article 121(2) before disregarding some low tide elevations in the area of overlapping claims to the territorial sea. The Court expressed the view that the method of straight baselines must be applied restrictively and refused to treat a cluster of islands as a fringe of islands. A small island lying in the middle of the water between the two states was given a discounted effect in order to avoid disproportion.

³⁶ Paragraphs 230 and 231.

³⁷ Qatar v. Bahrain Case, ICJ Reports 2001

³⁸ *International Maritime Boundaries*, Vol. I, page xlv.

³⁹ M. Mendelson, *On the Quasi-Normative Effect of Maritime Boundary Agreements*, in Wolfrum (Ed.) 2002, *Festschrift for Judge Oda* (in press).

⁴⁰ XI RIAA, page 147.

⁴¹ Per Judge Jimenez de Arechaga in his separate opinion in the Tunisia/Libya Case, ICJ Reports 1981, p.3, at p. 106.

⁴² As Sir Robert Jennings (a most experienced judge) has pointed out, judges have to make choices in deciding between disputants and where a judge is applying equity the range of choices is wider: 42 *Annuaire Suisse de Droit International* (1987) p. 27.

⁴³ Langeraar, W., *Maritime Delimitation-The Equiratio Method*, 10 *Marine Policy* (1986) page 3.

⁴⁴ Jaenicke, G., *The Role of Proportionality in the Delimitation of Maritime Zones*, in Bos and Siblesz (Eds.) *Realism in Law-Making* (1986), p. 51.

⁴⁵ UK White Paper Cmnd. 7438, *Second Decision*.

⁴⁶ According to the UN website, on 13 September 2001 only 8 States had made the declaration excluding boundary disputes.