

MARITIME DELIMITATION AND OFFSHORE FEATURES

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The Importance of Maritime Delimitation

The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed. (ICJ *Territorial and Maritime dispute (Nicaragua v. Colombia)*, *Preliminary objections*, Judgment of 3 December 2007, at para 253)

The Codified Rules on Delimitation

- Geneva 1958: a procedural and a substantive rule
- UNCLOS articles 74 and 83: procedural rules only:
 1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

Articles 74 and 83 as Customary Rules

The Court has recognized that the principles of maritime delimitation enshrined in Articles 74 and 83 reflect customary international law (*Nicaragua v. Colombia territorial and maritime dispute case*, para 139)

Arts 74 and 83 and the International Judge

- Although article 74, paragraph 1, and article 83, paragraph 1, of the Convention explicitly address delimitation agreements, they also apply to judicial and arbitral delimitation decisions (ITLOS *Bangladesh/Myanmar, Judgment*, para 183)
- The law applicable under the Convention ... includes rules of customary international law. It follows that the application of such rules in the context of articles 74 and 83 of the Convention requires the achievement of an equitable solution, as this is the goal of delimitation prescribed by these articles (*ibidem*)

The Methodology for the Delimitation of Maritime Areas

The jurisprudence of the ICJ and of the arbitral tribunals, and lately of the ITLOS, has produced a methodology to be followed by the judge in order to draw a delimitation line. Such jurisprudence has gone thorough various phases, and seems to have become consolidated with the most recent decisions.

The Three-Stages Methodology

[The Tribunal] at the first stage.. will construct a provisional equidistance line.... Once the provisional equidistance line has been drawn, it will proceed to the second stage..., which consists of determining whether there are any relevant circumstances requiring adjustment of the provisional equidistance line; if so, it will make an adjustment that produces an equitable result. At the third and final stage ...[it] will check whether the line, as adjusted, results in any significant disproportion between the ratio of the respective coastal lengths and the ratio of the relevant maritime areas allocated to each Party (*Bangladesh/Myanmar* judgment, para 240).

The Importance of Equidistance

Under this methodology, the operation to be performed by the judge does not consist in determining directly a line that can be considered to be an equitable result, but in determining whether there are circumstances that justify considering the provisional equidistance line as not achieving an equitable result

Significant Changes to the Provisional Equidistance Line

Following this approach does not preclude very substantial adjustment to, or shifting of, the provisional line in an appropriate case, nor does it preclude the use of enclaving in those areas where the use of such a technique is needed to achieve an equitable result (*Nicaragua v. Colombia* judgment para 197).

The Alternative: Angle Bisector

- An equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case (*Romania v. Ukraine* para 116, repeated in *Nicaragua v. Colombia*, para 191)
- The alternative method adopted in *Nicaragua v. Honduras* is that of the angle bisector. This method is seen as a simplified version of equidistance, which “remains the general rule” (para 281).

Clarifications to the Law and Limits Thereeto

- Methodology
- Main relevance of geographical circumstances
- Relevant coasts as coasts generating an overlap
- Concavity as a relevant circumstance
- Limited predictability:
- In the determination of relevant coasts in specific cases
- In criteria for adjusting and shifting

Islands in Delimitation Disputes

- Subjectivity prevails
- However, there are *two solid preliminary points in the ICJ jurisprudence*:
 1. Article 121 on islands (in all its 3 paras) and art. 13 on low tide elevations correspond to customary law (Nicaragua v. Colombia, paras 139 and 182)
 2. In delimitations between a territorial sea and an EEZ/CS, the 12 mile territorial sea must always be respected (Qatar v. Bahrein, para 174, Dubai/Sharjah, Bangladesh/Myanmar para 169)

No General Rule on the Effect OF Islands

- The effect to be given to an island in the delimitation of the maritime boundary in the exclusive economic zone and the continental shelf depends on the geographic realities and the circumstances of the specific case. There is no general rule in this respect.
(*Bangladesh/Myanmar*, Judgment para 317).
- St Martins Island: full effect for TS delimitation, no effect for EEZ/CS delimitation

Coastal Islands

In the construction of the equidistance line international courts and tribunals have given varying importance, ranging from full to no effect, to coastal islands, namely islands near the coast of the State they belong to

Coastal Islands: Different Solutions

- *Full effect* : Dahlak and Yemeni islands (Eritrea/Yemen)
- *Less than full effect*: France/UK arbitration (Scilly) Gulf of Maine (Seal), Tunisia/ Libya (Kerkennah but no effect to bigger Djerba)
- *No effect*: Fifla (Libya/Malta), Abu Musa (Dubai/Sharjah) Fast el Jahrim (Qatar Bahrein)

Mid-Sea Islands

Mid-sea islands...by virtue of their mid-sea position, and if allowed full effect, can obviously produce a disproportionate effect – or indeed a reasonable and proportionate effect - all depending on their size, importance and like considerations in the general geographic context (Eritrea/Yemen para 117)

Islands on the “Wrong Side” of the Median Line

- Different solutions:
- Enclave: France/UK for Channel islands; Nicaragua/Colombia for tiny Quitasueno and Serrana (avoiding a “disproportionate effect”)
- 200 miles corridor: Canada/France Saint Pierre et Miquelon arbitration

Delimitation between a Mainland Coast and Islands of Another State Facing It

- Substantial shifting of the median line to make it closer to the islands, with different techniques:
- Libya/Malta: transposition of equidistance by 18'
- Nicaragua/Colombia: giving different weights to base points (“weighed line”)

Conclusions and Relevance for South China Sea

Conclusions:

- Progress made by courts and tribunals is not such as to make delimitation decisions by international courts and tribunals easy to predict
- Judicial discretion remain very important and prevalent when the treatment of islands is concerned

Relevance for South China Sea

- Many issues emerging in the South China Sea belong to the area in which judicial discretion and case-by-case assessment remain important.
- Geographical contexts may be similar in some cases, but they are never identical.
- Judicial and arbitral decisions may be given different weight and interpreted differently, depending on whether they are examined by a court or tribunal or by States assessing the legal bases of their claims and of those of other States and negotiating agreements.