



SEA VIEWS

MIMA'S ONLINE COMMENTARY ON MARITIME ISSUES

No. 9/2014

23 May 2014

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SETTING BOUNDARIES IN THE SEA

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When trying to teach someone a boundary, they learn less from the enforcement of the boundary and more from the way the boundary was established
- Bryant H. McGill -

This commentary provides an overview of the importance of maritime boundaries and the issues involved in determining them.

MARITIME BOUNDARIES AND THEIR IMPORTANCE

A boundary, according to the Oxford English Dictionary, is a line which marks the limits of an area or a dividing line¹ and most often designates a line on a map.² Boundaries are important for they signify the territory of a country or nation whether on land or at sea.

¹ <http://www.oxforddictionaries.com/definition/english/boundary>

At sea the process of defining the boundary is referred to as delimitation in which the maritime boundary encompasses various maritime features, limits and zones,³ starting from the baselines of the respective maritime zones i.e., territorial sea, contiguous zone, exclusive economic zone and continental shelf. In determining maritime boundaries in which the lines can be envisaged but not seen, maps and charts provide guidance for navigation purposes and to avoid encroachments into the territories of other countries or nations.

Delimiting maritime boundaries is a fairly complex process beginning, for coastal states, with identifying the low-water mark from the baselines, related features for basepoints, etc. Making the process even more convoluted is if the boundary overlaps with that of another state whether situated opposite or adjacent to the coastal state which will require negotiations or dispute settlement such as arbitration for resolution by a third party.

One also needs to understand the history or background setting when considering boundary delimitation exercises: the existing boundary may be based on unilateral, bilateral or tripartite agreement or could also be inherited based on *uti possidetis juris* (an international law principle used to define postcolonial boundaries where newly independent states inherit the pre-independence boundaries established by the former colonial power).⁴ In addition, social, economic, environment, navigation and other factors play an important role in the process of maritime boundary delimitation. Most importantly, boundary delimitation requires political will and some form of political expediency to enable the desired results to be achieved⁵ and, as noted by David Anderson a former judge of the International Tribunal for the Law of the Sea, “There are few more rewarding things in diplomacy than a successful negotiation...from which both parties derive some satisfaction. For mutual satisfaction is the best guarantee of permanence...”⁶

Unresolved maritime boundaries may lead to uncertainty in to the area of exploration and

² <http://www.thefreedictionary.com/land+boundary>

³ <http://www.ga.gov.au/marine/jurisdiction/maritime-boundary-definitions.html>

⁴ Sumner, B.T. (2004). Territorial Disputes At The International Court of Justice. Duke Law Journal. Vol. 53: 1779, pg. 1790.

⁵ Carleton, C. (2006). "Maritime Delimitation In Complex Island Situations: A Case Study on the Caribbean Sea" Maritime Delimitation. Eds. Rainer Lagoni and Daniel Vignes. Martinus Nijhoff Publishers, pg. 183.

⁶ Anderson, D. (2006). "Negotiating Maritime Boundary Agreements: A Personal View." Maritime Delimitation. Eds. Rainer Lagoni and Daniel Vignes. Martinus Nijhoff Publishers, pg. 123, quoting Lord Gore-Booth (ed.), (1979). Satow's Guide to Diplomatic Practice, 5th ed., London, Longman.

exploitation of non-living resources and also in relation to fishing rights i.e., living resources. In addition, undelimited maritime boundaries can create “grey areas” - areas which have not been delimited yet and hence belong to no state. “The existence of overlapping claims may inadvertently lead to disputes, e.g., if fishermen from one side are arrested by the coastguard of the other side or if traces of oil are discovered in an area of overlapping claims”.⁷ In this regard, “the establishment of a boundary brings legal certainty permitting economic activity to start in previously “grey” areas: for instance, the oil industry can be licensed right up to the line and fisheries legislation can be enforced similarly”.⁸

Further, in maritime boundary delimitation, “the foregoing boundaries contribute to a complexity of rights existing in marine spaces. There are situations where the boundary overlaps not only at the water surface but also within the water column and seabed spaces”.⁹ Therefore, to resolve the issue of having two separate delimitation for the water column and seabed, there has been a trend for states to draw a single delimitation line.

LEGAL PRINCIPLES RELATING TO MARITIME BOUNDARY DELIMITATION

As mentioned earlier, historic background or settings are factors in maritime boundary delimitation where the established boundary lines may be based on unilateral, bilateral or tripartite agreements or could also be inherited on the *uti possidetis juris* principles.

As such, maritime boundary delimitation processes are based on negotiations, existing agreements as well as legal principles stipulated under the United Nations Convention on the Law of the Sea (UNCLOS) 1982. UNCLOS has established the respective maritime zones i.e., territorial sea, contiguous zone, and exclusive economic zone and continental shelf at 12, 24 and 200 nautical miles respectively from baselines.

Under UNCLOS 1982 the relevant rules of delimitation based on these zones are Articles 15, 74 and 83. The delimitation for territorial seas between states with opposite or adjacent coasts fall

⁷ Anderson, D. (2006). "Negotiating Maritime Boundary Agreements: A Personal View." *Maritime Delimitation*. Eds. Rainer Lagoni and Daniel Vignes. Martinus Nijhoff Publishers, pg. 122.

⁸ Ibid.

⁹ Sutherland, M. & Nichols, S. (2002). *Maritime Boundary Delimitation for Ocean Governance*. Fig XXII International Congress. Washington D.C. April 19 – 26 2002, pg 5.

under Article 15, while Article 74 stipulates the delimitation of the exclusive economic zone and Article 83 relates to continental shelf delimitation.

UNCLOS 1982 also acknowledges existing maritime boundary delimitations established based on agreements before it came into force. Article 74 (4) states that “where there is agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of the agreement”. Article 83 (4) provides the same conditions for continental shelf delimitation.

THE CHOICE OF BASELINES

Before embarking on a delimitation of the respective maritime zones (i.e., territorial sea, exclusive economic zone and continental shelf) baselines need to be established of which there are three i.e., normal, straight and archipelagic. As stipulated under UNCLOS 1982, one or a combination of the three may be used to determine baselines¹⁰ as provided by Article 14 which states that: “The coastal State may determine baselines in turn by any of the methods provided for in the foregoing articles to suit different conditions”. In other words, coastal states may use a combination of methods for determining their baselines.

Baselines are important “as a coastal state’s rights to maritime jurisdiction are measured from them”.¹¹ The types of baselines are described briefly below.

I. Normal Baselines

The normal baseline “is the predominant type of baseline claimed by states and is, in effect, a state’s default baseline” and “it coincides with a low-water line”.¹² Article 5 of UNCLOS 1982 reads as follows: “Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State”.

II. Straight Baselines

¹⁰ Rothwell, D.R. & Stephens, T. (2010). *The International Law of the Sea*. Chapter 2, Coastal Waters, Key Issues in the Delimitation of Coastal Waters. Hart Publishing, pg. 43.

¹¹ Prescott, JRV & Schofield, C. (2005). *Maritime Political Boundaries of the World*. Chapter 5, Normal Baselines, Reefs, and Low-Tide Elevations. Leiden, Brill, pg. 93.

¹² *Ibid* pg. 94.

The second type is the straight baseline which, according to Article 7 of UNCLOS 1982, may be used in the following circumstances:

1. where the coastline is deeply indented and cut into;
2. where there is a fringe of islands in the immediate vicinity of the coast;
3. where the presence of a river delta makes the coastline highly unstable;
4. where there are other natural conditions which make the coastline highly unstable;
5. to and from low-tide elevations with lighthouses or similar installations which are permanently above sea level have been built on them; and
6. to and from such low-tide elevations which have received general international recognition.

III. Archipelagic Baselines

The third type of baseline is archipelagic baselines. Article 46 of UNCLOS 1982 provides the basis for recognition of an archipelagic state as a State constituted wholly by one or more archipelagos and may include other islands. The article also defines archipelago as “a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such”.

Further, the provisions set out in Article 47 of UNCLOS 1982 sets out the five criteria which an archipelagic state must satisfy:

1. An archipelagic state may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.
2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.

3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.
4. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.
5. The system of such baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.

THE DRAWING OF A SINGLE MARITIME BOUNDARY BASELINE

According to Rothwell and Stephens “One phenomenon which may not have been anticipated during the drafting of the Law of the Sea Convention has been the tendency of states to favour the delimitation of a single maritime boundary which encompasses territorial sea and a joint EEZ/continental shelf”.¹³ A single all-purpose maritime boundary divides maritime zones under the jurisdiction of adjoining states regardless of the precise scope of the jurisdiction that the international law entitles each state to exercise over such zones, on either side of the line.¹⁴

“In fact, the trend in state practice, as well as in jurisprudence, demonstrates that the water column of the EEZ and continental shelf can be delimited by a single maritime boundary”.¹⁵ The first case of such a judgement on a single maritime boundary was in relation to the Gulf of Maine where “it can be foreseen that with the gradual adoption by the majority of maritime States of an exclusive economic zone and, consequently, an increasingly general demand for single delimitation, so as to avoid as far as possible the disadvantages inherent in a plurality of a

¹³ Rothwell, D.R. & Stephens, T. (2010). *The International Law of the Sea*. Chapter 16, Delimitation of Maritime Boundaries. Hart Publishing at pg. 407.

¹⁴ Nuno Marques Antunes. (2003). *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process*. Leiden, Nijhoff, p. 337.

¹⁵ McRae, Donald & Cissé Yacouba. (2005). "The Legal Regime of Maritime Boundary Agreements." Ed. ASIL. Martinus Nijhoff Publishers.

separate delimitations, preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation”.¹⁶

Up to 2012, there have been 17 cases on single maritime boundaries based on the International Court of Justice (ICJ), Permanent Court of Arbitration (PCA) and International Tribunal on the Law of the Sea (ITLOS) jurisdictions.

Listed below are the 17 cases on single maritime boundaries:

1	Nicaragua – Colombia 2012
2	Bangladesh-Myanmar 2012
3	Romania - Ukraine 2009
4	Nicaragua - Honduras 2007
5	Guyana - Suriname 2007
6	Barbados - Trinidad and Tobago 2006
7	Cameroon - Nigeria 2002
8	Qatar - Bahrain 2001
9	Eritrea - Yemen Arbitration 1999
10	Denmark (Greenland) - Norway (Jan Mayen) 1993
11	Canada - France (St. Pierre and Miquelon) 1992
12	Libyan Arab Jamahiriya - Malta 1985
13	Guinea - Guinea-Bissau 1985
14	Tunisia - Libyan Arab Jamahiriya 1982
15	Gulf of Maine Area (Canada - USA) 1982
16	France - United Kingdom 1977
17	North Sea Continental Shelf Case (Germany-Denmark; Germany-Netherlands) 1969

Indeed, all the 17 cases indicate the question of a single maritime boundary is guided by jurisprudence.

Anderson also noted that “An all-purpose, single boundary is often the best option since it produces a clean cut, final agreement. Resource activities can be licensed or regulated by each state right up to the line.”¹⁷ It could also contribute towards reducing or mitigating conflict between the states.

¹⁶ Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada vs United States of America). Judgment of 12 October 1984 (Chamber), International Court of Justice at para 194.

¹⁷ Anderson, D. (2006). "Negotiating Maritime Boundary Agreements: A Personal View." Maritime Delimitation. Eds. Rainer Lagoni and Daniel Vignes. Martinus Nijhoff Publishers, pg. 127.

CONCLUSION

It is clear that the issues involved in maritime boundary delimitations are complex, complicated and time consuming as it involves various processes that they entail and require strong commitment and patience before satisfactory solutions can be arrived at, that meet the expectations of the parties concerned.