The legal determination of international maritime boundaries. The progressive development of continental shelf, EFZ and EEZ law.
Tanja, Gerard Jacob

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher’s PDF, also known as Version of record

Publication date:
1990

Link to publication in University of Groningen/UMCG research database

Citation for published version (APA):
Tanja, G. J. (1990). The legal determination of international maritime boundaries. The progressive development of continental shelf, EFZ and EEZ law. s.n.
INTRODUCTION

The topic of the determination of international maritime boundaries has only recently attracted considerable attention in international law as shown by an increasing number of delimitation agreements, a steadily growing body of case law and scholarly attention.

Although the nineteenth and early twentieth centuries provide some examples of bilateral treaties establishing a lateral or opposite territorial sea boundary, it was only after the 1930 Codification Conference in The Hague that state practice became substantial. The conclusion of the 1958 Convention on the Territorial Sea provided a new impetus for states to determine their lateral and opposite territorial sea boundaries.1 This part of maritime delimitation law; i.e., the determination of territorial sea boundaries between two (or more) states is, however, not the subject of this book and will only be marginally referred to.

The present study concentrates on the legal determination of international boundaries for resource-related maritime zones; i.e., (Exclusive) Economic zones (E)EZ, (Exclusive) Fishery Zones (E)FZ and continental shelves. It will, however, not analyse the origins, contents and historical background of these regimes.2 As a consequence, this book does not elaborate on the evolution of what may be called 'maritime claims' to areas of sea and/or seabed and subsoil.

As there is a close relationship between legal title to a maritime zone and delimitation, it was quite natural for the International Court of Justice to describe the legal features of maritime delimitation in 1969 along the following lines:

Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination de novo of such an area ... [T]he process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected.3

Since then, however, the 'distance criterion' gained force -not only in relation to the (E)EZ, but also in relation to the continental shelf-, and is now embodied in the 1982 LOSC. Hence, given the correlation between title (or entitlement) to a maritime zone and its delimitation,

1. For an early discussion on the topic of delimitation of territorial seas, see S. Whittemore Boggs, Delimitation of the Territorial Sea, 24 AJIL (1930); S. Whittemore Boggs, Delimitation of seaward areas under national jurisdiction, 45 AJIL 240-266 (1951).
the legal concept of international maritime delimitation has changed. No longer is it concerned with the determination of legal-political boundaries of (continental shelf) areas which 'already, in principle', appertain 'to coastal states'. Delimitation is now the determination of a maritime boundary in a situation where two (or more) states are confronted with overlapping titles. Delimitation means nowadays an *a priori* limitation of the states' functional sovereignty, effected by means of an objective legal and/or negotiating process. Therefore, delimitation (or the legal determination of a maritime boundary) is a process involving the *division* of maritime areas in a situation where two (or more) states have competing claims. For both states it means restriction.

The legal determination of international maritime boundaries must be distinguished from a process by which a *national* maritime boundary is determined. This occurs when a coastal state unilaterally decides to establish the outer (or seaward) limit of, for instance, its continental shelf or (E)EZ in accordance with international law, without infringing upon legitimate 'resource-related' rights of other coastal states. The determination of baselines from which the breadth of the territorial sea and other maritime zones are measured, may also be considered part of the process of national delimitation. Although the determination of baselines bears influence upon the outer limit of maritime zones and, therefore, may affect the legal determination of an *international* maritime boundary, it is only referred to in this study to the extent that this is relevant here and is invoked by the interested parties. The legal determination of appropriate baselines does not belong to international delimitation law proper. See, further Chapter V, subparagraphs 3.3., 3.5., *infra*.

Whereas the competence to determine a national maritime boundary (or outer limit) arises from a legal title (or inherent right) by reference to which a coastal state can validly claim maritime zones (apportionment), international delimitation law is *a priori* of a 'subsidiary' nature and will only be turned to after conflicting claims have materialized or when it is likely that they will occur in the near future.5 Usually, neighbouring coastal states do not simultaneously issue claims, nor define the outer limits of their maritime zones at the same time. Frequently, a claim of coastal state A (or the expressed intention to do so) will prompt neighbouring coastal state B to formulate a (virtually) identical claim in order to protect and safeguard its political, economic and security interests in the region beforehand. In these circumstances states often feel compelled to start negotiations in order to determine stable and permanent international maritime boundaries.

The main goal of this study relates to an identification and examination of principles and rules of international delimitation law which govern the determination of those boundaries. In this respect the author agrees in general with the conclusion the Chamber of the ICJ arrived at in the Gulf of Maine Case:

4. *Intra-national delimitation* refers to the determination of maritime boundaries between federal states in a domestic context, or between parts of states. See *D* for intra-national delimitation for example, J.I. Chamiey, *The Delimitation of Lateral Seaward Boundaries Between States in a Domestic Context*, 71 AJIL 28-67 (1977).

5. As the ICJ aptly observed in the Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) of 1985:

That the questions of entitlement ..., on the one hand, and of delimitation ..., on the other, are not only distinct but are also complementary is self-evident. (ICJ Reports, 1985, § 27, at 21).
INTRODUCTION

has changed. No longer is it
ries of (continental shelf) areas
Delimitation is now the deter-
( or more) states are confronted
a priori limitation of the states’
legal and/or negotiating process.
maritime boundary) is a process
here two (or more) states have
ries must be distinguished from
lined. This occurs when a coastal
ward) limit of, for instance, its
al law, without infringing upon
The determination of baselines
ritime zones are measured, may
ion. Although the determination
time zones and, therefore, may
rvoked by the interested parties.
ong to international delimita-
3.3.5., infra.
itime boundary (or outer limit)
e to which a coastal state can
al delimitation law is a priori
after conflicting claims have
the near future.5
uously issue claims, nor define
. Frequently, a claim of coastal
ot neighbouring coastal state B
fect and safeguard its political,
. In these circumstances states
terminate stable and permanent
and examination of principles
n the determination of those
the conclusion the Chamber
borders of the World (1985) and literature referred to here, at 10-12. Also, the works of Whittemore Boggs, supra.
7. When examining case law in Chapter V, this aspect of the will be addressed as the 'use of the practical
8. For major relevant works in the field of political geography see, J.R.V. Prescott, The Maritime Political

In this study the term rule of delimitation law is, therefore, reserved for a legal norm which
belongs (or allegedly belongs) to contemporary international law, has either a conventional
or a customary nature and is, in principle, directly considered applicable as between parties
in a concrete situation. A delimitation principle is considered to have a more general (legal)
character and is, therefore, less suitable for indiscriminate application in concrete situation,
given the uniqueness of every delimitation process. As rules emanate from principles, a
principle may be embodied in a rule. Once embodied in a rule, a principle (or combination
of principles) receives a more specific legal meaning. Principles of delimitation law
constitute, therefore, to a certain extent the 'sources' of these rules.

The determination of an opposite or lateral continental shelf or (E)EZ/(E)FZ boundary
has, in fact, several legal aspects which have must be distinguished. The first aspect
may be called 'procedural': the agreement between states that, in view of the prevailing
circumstances, a stable and permanent maritime boundary is, in principle, needed and
that meaningful negotiations to this end are necessary. States have, as long as the
rights of third states are not infringed upon, a certain contractual freedom and may in
the course of the negotiations agree on a boundary on the basis of considerations lying
outside the law. The negotiated boundary, however, is still a legally determined maritime
boundary.

The second aspect relates to the identification of applicable principles and rules of
delimitation law. Once the law is established as between the parties, either during
negotiations or by means of third-party settlement, we have to proceed by implementing
these principles and rules in the concrete situation. This may be considered the third
stage in a delimitation process.

The fourth aspect relates to the use of delimitation methods. Applicable delimitation
law prescribes and dictates the use of a certain method of delimitation in a concrete
situation. Since a specific method results from the application of a certain rule, a rule
of delimitation cannot be a method of delimitation at the same time. Although necessarily
closely related to the former, this aspect will be referred to as the demarcation or
delineation of a boundary.7 Demarcation (or delineation) -whether or not based on
agreement,- is concerned with the physical act by which a boundary is drawn or
constructed and is more of a technical nature than that it has a legal connotation.8
This rather technical side of the process will, therefore, not be addressed in this study,
unless examination is found necessary in order to arrive at a better understanding of
the legal framework within which it operates. Hence, when we speak of the deter-
mination of an international maritime boundary, we refer primarily to the legal aspects

... the association of the terms "rules" and "principles" is no more than the use of a dual
expression to convey one and the same idea, since in this context "principles" clearly means
principles of law, that is, it also includes rules of international law in whose case the use of
the term "principles" may be justified because of their more general and more fundamental
character.9

of the delimitation process, unless it is obvious from the context that these terms relate to the practical use of a method stipulated by legal rules and principles of delimitation law.9

Given the nature of rules and principles of international law involved, it goes without saying that international delimitation law concerning the continental shelf, (E)FZ and (E)EZ developed after the contents of the respective regimes had more or less been determined and crystallized in international law. Hence, the first (conventional) rule of international delimitation law can be found in the 1958 Convention on the Continental Shelf, where article 6 inter alia provides:

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

This article, which was prepared by the International Law Commission (ILC), evidences that the rule embodied in the second sentence of paragraphs 1 and 2 is of a dispositive nature; states are free to agree otherwise.

After the conclusion of the 1958 Convention and the adoption of continental shelf legislation by most coastal states in the 1960s, various continental shelf boundary agreements were concluded. The first major dispute resulting from conflicting views on the legal determination of common seabed boundaries occurred in the second half of the 1960s when the Federal Republic of Germany—which was not a party to the 1958 Convention—Denmark and the Netherlands asked the International Court of Justice (ICJ) to indicate what relevant rules and principles of international law governed their bilateral relations in this respect. The dispute resulted in the famous Judgment of the ICJ in the North Sea Continental Shelf Cases (NSCSC; 1969) which rejected the customary character of the provisions of article 6. In a controversial obiter dictum the Court inter alia concluded that:

(1) delimitation is to be effected 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.10

9. Sometimes terms like 'establishment' or 'fixing' of a maritime boundary is used. An examination of relevant state practice, case law and legal literature provided little information on the use of these terms in relation to specific circumstances or situations.
Among the 'factors' to be taken into account during the course of the negotiations figured inter alia:

(3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coastline measured in the general direction of the coastline; account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.11

Despite -or, probably, because of- the Decision of the Court in 1969, several other states followed the example of the above mentioned states, either submitting their disputes to an arbitration tribunal or the ICJ, thereby contributing to a further clarification and development of delimitation law.12 As far as the topic of the study is concerned, until then international delimitation law had mainly been limited to the determination of continental shelf boundaries.

However, with the rapid development and introduction of (E)FZ and (E)EZ regimes in international law this changed and the determination of 'resource-related' boundaries became even more complicated and controversial. At the Third United Nations Conference on the Law of the Sea (UNCLOS III) delimitation of maritime zones was even characterized as a 'hard-core' issue, mainly as a consequence of the existence of two diametrically opposed views on maritime delimitation.13 According to the so-called pro-equidistance states a future provision on delimitation should at least contain a reference to equidistance, whereas the pro-equity states not only denied equidistance to have a preferential status, but rejected any reference to equidistance. Instead, these states based themselves on the 'equity concept' as it was initially developed by the ICJ in 1969, arguing that the application of equitable principles under this concept was required by customary international law which should, therefore, be codified accordingly. Despite prolonged negotiations between the two groups in special negotiating groups, the consensus position ultimately arrived at can best be described as 'an agreement not to agree'.

Apart from this fundamental difference between the two 'schools of thought' the participants at UNCLOS III were faced with the question whether the rules and principles which were considered to govern the international delimitation of the continental shelf were also valid for the delimitation of an (E)EZ and/or (E)FZ; i.e., maritime zones which (also) comprised the water column. Unfortunately, this issue was hardly touched upon and most delegations started their contemplations from the presumption that this was indeed the case, despite the obvious legal differences between the respective regimes and the more comprehensive character of an EEZ regime. Hence, UNCLOS III adopted two virtually identical and rather non-committal articles on maritime delimitation which inter alia provide:

Article 74/83

Delimitation of the EEZ/continental shelf between States with opposite or adjacent coasts.

---

11. Id., at 55.
12. See, in this respect Chapter V, paragraph 3., infra.
13. See, Chapter IV, paragraph 3., infra.
1. The delimitation of the exclusive economic zone/continental shelf 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.

The question is, furthermore, whether a claim to a continental shelf which is limited to seabed rights and which overlaps with a claim to an (E)EZ of a neighbouring state should necessarily result in a single maritime boundary. In lateral situations and in situations where the distance between opposite states is less than 400 nautical miles the result will always be, in the absence of agreement to the contrary, a single maritime boundary. A single maritime boundary is defined in this study as a boundary which is determined for both the superjacent waters and seabed (and subsoil), at the same time, by means of a single line of delimitation. This means that whenever one of the states involved claims an (E)EZ which overlaps with a continental shelf (seabed and subsoil) or (E)FZ (fisheries jurisdiction) claim of another state, the legal determination of the maritime boundary will a priori result in such a single maritime boundary, for the comprehensiveness of the (E)EZ regime ensures that it comprises both and at the same time a delimitation for two different forms of jurisdiction. For the same reason the legal determination of the boundary in a situation of overlapping (E)FZ claims will not necessarily result in a single maritime boundary as defined above, for it only relates to the superjacent waters. Provided that their seabed claims also overlap, the same states may wish to determine their continental shelf boundary by means of a separate boundary, not coinciding with the boundary for the superjacent waters. On the other hand, states are free to select another solution and are free to agree under these circumstances to a single maritime boundary.

In the hypothetical situation that a delimitation conflict arises between a state claiming continental shelf rights under the natural prolongation criterion of article 76 to the outer edge of the continental margin and an opposite state with EEZ legislation and the distance between them is more than 400 nautical miles but, for example, less than 550 nautical miles, the same question may arise. Although it is highly unlikely that such a situation will ever occur, the process will, unless the states agree otherwise, result in an a priori single maritime boundary for the same reasons mentioned earlier: only one state can have sovereign rights to seabed resources. A proper determination of the international boundary guarantees this exclusiveness.

14. Compare in this respect the definition of the outer limits of the (E)EZ and continental shelf in articles 57 and 76 in the 1982 LOSC.
15. A good example of such a situation and accompanying treaty is the 1978 Treaty Concerning Sovereignty and Maritime boundaries in the area between Australia and Papua New Guinea including the area known as Torres Strait and Related Matters where the parties established separate boundaries for seabed and fisheries jurisdiction. See, also Chapter V, paragraph 2., infra.
16. In the Gulf of Maine Case the Court was inter alia requested to decide the "course of the single maritime boundary that divide the continental shelf and fisheries zone of Canada and the United States of America". Here, the parties indicated their preference for a single maritime boundary, but this is not the type of a priori single maritime boundary defined above, for the parties were in a position to ask for a decision on separate seabed and superjacent water boundaries. See, Chapter V, subparagraph 3.4., infra. Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, ICJ Reports, 1984.
17. In such a situation the single maritime boundary extends only to a division of the seabed involved, as the outer limit of the superjacent waters is 200 nautical miles for both regimes.
INTRODUCTION

The continental shelf between States with an continental shelf which is limited to the continental shelf of a neighboring state should situations and in situations where 14 A single which is determined for both the time, by means of a single line of involved claims an (E)EZ which (E)EZ (fisheries jurisdiction) claim a boundary will a priori result in the (E)EZ regime ensures contradiction for two different forms of the boundary in a situation of a single maritime boundary as Provided that their seabed claims continental shelf boundary by the boundary for the superjacent other solution and are free to agree 16 conflict arises between a state prolongation criterion of article 76 opposite state with EEZ legislation nautical miles but, for example, less reasons mentioned earlier: sources. 17 A proper determination of (E)EZ and continental shelf in articles 1978 Treaty Concerning Sovereignty New Guinea including the area known as (E)EZ and (fisheries jurisdiction) claims the "course of the single maritime divide the "course of the single maritime and the United States of America". controversy, but this is not the type of a priori position to ask for a decision on separate paragraph 3.4., infra. Delimitation of the States, 1984, to a division of the seabed involved, as the regimes.