



A Practitioner's Guide to

Maritime Boundary Delimitation

Stephen Fietta and Robin Cleverly

OXFORD

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FOREWORD

Maritime matters have been at the heart of international law since the days of Grotius. The law of the sea has been central to international law for centuries. That law has undergone remarkable development since the Second World War. It has seen both profound progressive development and extraordinary codification. The Third United Nations Convention on the Law of the Sea—‘UNCLOS’—was the product of a decade of intensive, worldwide negotiation. It was the longest, most complex, and one of the most important treaty-making endeavours in world history. In the large, and in multiple respects, UNCLOS is the code of law for the seas, a comprehensive constitution for the oceans—despite the critical fact that, as regards maritime delimitation, the Conference could not produce a clear formula and left the law to development in the light of the sources of international law listed in Article 38 of the Statute of the International Court of Justice ‘in order to achieve an equitable solution’.

The terms of UNCLOS—extensive, encompassing, precise, and yet in respect of maritime delimitation so fundamentally imprecise—are governing not only for its almost universal adherents. Even the handful of States that have not as yet become parties mostly affirm their acceptance of its essential principles or maintain that they constitute customary international law. This includes the United States of America, which was a principal progenitor of UNCLOS, and which, for irrational reasons that defy coherent explanation but which are rooted in the Constitutional singularities of Senate advice and consent to the ratification of treaties, so far stays apart. Even as the Russian Federation and other Arctic States advance their legal claims in the Arctic to the Continental Shelf beyond 200 nautical miles, the United States debars itself from presenting its claims before the Commission on the Limits of the Continental Shelf constituted by UNCLOS.

Maritime delimitation of the overlapping claims of States in the seas has become ubiquitous since the Second World War. Modern international law, in recognizing that States enjoy not only a defined territorial sea and a zone contiguous to it, an exclusive economic zone, and rights in the continental shelf, entails maritime delimitation of overlapping claims of opposite and adjacent States. The increased numbers of independent States contribute to the increased demands that their fishermen and fishing fleets, ships and shipping, companies and governments, and their consuming populations make on and in and through, under, and over the seas. The extraction of petroleum and gas from the seabed is of huge economic importance. The need for maritime delimitation has magnified the world over. That need in recent decades has been met by agreements between the States immediately concerned, by judgments of the International Court

of Justice and by awards of arbitral tribunals, latterly of tribunals constituted pursuant to UNCLOS. It has begun to be met by judgments of the International Tribunal on the Law of the Sea.

A Practitioner's Guide to Maritime Boundary Delimitation addresses that need with exceptional acuity and facility. It recounts and analyzes the modern law and jurisprudence of maritime delimitation. It sets out the practical and technical aspects of maritime delimitation together with its legal elements, and does so with the illumination of multiple, specially prepared maps. The illustrations and technical analyses found throughout the book are the work of Dr Robin Cleverly (how aptly named he is). They go hand in hand, or eye and eye, with the written exposition. They turn the written exposition into graphic demonstration. They also provide a wealth of technical explication and practical advice which will be of material help to the practitioner.

Part A of the book provides a commentary on the content of the modern law; Part B provides an exposition and analysis of the score of cases that have played the predominant role in developing that law; and Part C identifies and examines four future challenges. The chosen challenges are the subjectivity of base-point selection in the drawing of maritime boundaries; inconsistency in the adjustment of equidistance lines to respond to equitable considerations; the role of proportionality in the adjustment of maritime boundaries; and the delineation and delimitation of the outer continental shelf. The exploration of these challenges searches for 'predictable, objectively-determined criteria for delimitation, as opposed to subjective findings lacking precise legal or methodological bases...' (*Barbados/Trinidad and Tobago*, Award of 11 April 2006, 139 ILR 449). The importance of that search is not only a matter of academic or professional concern. The recurring reports in the media about conflicting claims to maritime delimitation in the South China Sea illustrate that maritime delimitation bears on vital questions of international commerce and international peace and security.

A Practitioner's Guide to Maritime Boundary Delimitation provides not only the practitioner, but the student, the professor, the government official, the arbitrator and the adjudicator, and others concerned with maritime delimitation, with a lucid guide to a complex subject of cardinal importance to modern law and life.

Stephen M. Schwebel

PREFACE

We devised this book following several years of collaboration advising sovereign States and energy companies about the legal, technical, and practical implications of international maritime boundary disputes. It struck us both that, despite the many volumes of learned treatises written by eminent commentators during the late twentieth and early twenty-first centuries on the law of maritime delimitation, there was no authoritative text that addressed together the complex legal and technical elements of the subject. This book attempts to fill that void.

The interplay between the legal and technical aspects is central to the modern law and practice of maritime delimitation. A sound legal and technical approach is a *sine qua non* of any reliable and lasting delimitation solution, whether that solution is reached by negotiation or third-party dispute resolution. Moreover, delimitation is at its heart an inherently practical exercise. Professor Malcolm Evans correctly observed in his 1989 monograph on *Relevant Circumstances and Maritime Delimitation* that ‘above all else, delimitation is a practical exercise, despite the amount of theoretical study which both surrounds and obfuscates the subject’.¹

As an early nineteenth-century American advertising executive is reputed to have said, ‘a picture is worth a thousand words’.² In no area of law is that more true than the law of maritime boundary delimitation. The days of lengthy, esoteric legal argument before the International Court of Justice are long gone in this field. Modern delimitation disputes are at the forefront of trial graphics technology, with advocates relying heavily on their technical colleagues to produce illustrations that will convince the bench of the ‘equitable’ nature of one delimitation solution over another. In the same way, the 100 or so original colour illustrations in this book attempt to bring to life to the reader many of the (largely geographical) factors that may be determinative of any given delimitation scenario.

With its emphasis on the technical and practical aspects alongside a comprehensive overview of the law and modern jurisprudence of maritime delimitation, we hope that this book will be of use to a broad constituency interested in the subject, whether they be State leaders or officials, energy companies, legal and technical practitioners, academics, students, or others. If this book is embraced by that broad constituency, then we will have achieved the primary objective of our work.

At the heart of our subject matter is the United Nations Convention on the Law of the Sea of 1982 (UNCLOS), a ‘comprehensive legal order for the world’s seas and oceans’,³ which at the time of writing has 167 States parties and has been described by many as one of the most successful multilateral treaties in the history of international law. But while UNCLOS is

remarkable in its breadth, encompassing sixteen parts, 320 articles, and nine annexes, its provisions about maritime delimitation are famously brief. In order to strike a compromise between the ‘equidistance’ and ‘equitable principles’ camps during the Third Conference negotiations, the final text of Articles 74 and 83 speaks only of the requirement for an ‘equitable solution’. It has been left to subsequent State practice and, more importantly, jurisprudence to explain what that means. This book charts the development of that jurisprudence, starting with the seminal *North Sea Continental Shelf* cases of 1969, and identifies its application across the various zones of maritime jurisdiction that exist under UNCLOS.

This book is divided into three parts, each of which has more specific objectives. Part [A](#) provides a brief overview of the history of maritime delimitation and the relevant treaty texts, before explaining in detail the concepts of equidistance, relevant/special circumstances, and (dis)proportionality that are at the heart of the modern law. It also addresses a number of important practical questions, including the nature and extent of States’ obligations with regard to natural resources prior to delimitation and the effective pursuit of modern maritime boundary litigation. Part [B](#) reviews the maritime delimitation jurisprudence since 1969, identifying the arguments presented in each case and the legal and technical conclusions reached by the court or tribunal concerned. It also assesses the lasting relevance of each judgment or award in today’s law. Part [C](#) identifies four enduring challenges (or, alternatively put, controversies) that the authors expect to be at the forefront of the next generation of delimitation disputes and attempts to identify some potential solutions to those challenges. Finally, we include three annexes consisting of a technical glossary, extracts from the most relevant treaty instruments, and sample arbitration agreements taken from recent delimitation cases in which we have been involved.

This book has been a collaborative exercise from beginning to end and we take joint responsibility for it. We alone are answerable for any errors or inaccuracies in the text or illustrations. No doubt some will be brought to our attention over the months and years ahead. We look forward to taking the opportunity to make the necessary corrections and updates, and thereby to improve our work, in future editions. Nevertheless, we hope this work will prove a reliable and user-friendly text for those with an interest in international law and maritime boundary delimitation.

Stephen Fietta and Robin Cleverly
December 2015

¹ Evans, M. D., *Relevant Circumstances and Maritime Delimitation* (Clarendon Press, 1989).

² In fact, the saying likely has far more ancient roots somewhere in East Asia.

³ *Philippines/China Award on Jurisdiction and Admissibility* (29 October 2015), para. 2.

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This work has been more than five years in the making. Over that time, the authors have been assisted by a flotilla of people too numerous to name here, many of whom share our deep interest and passion for the law of the sea. We extend our sincere thanks to each and every one of them.

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At the outset of our discussions with Oxford University Press in 2010, we received a series of invaluable insights and suggestions on our book proposal from three expert reviewers (Sam Wordsworth QC, Simon Olleson, and a third who has remained anonymous). It is thanks in part to their knowledgeable input that the book takes the form that it does. We are eternally grateful also to Professor Michael Reisman of Yale University for his encouragement at the conception of this project during our collaboration on the *Barbados/Trinidad and Tobago* case, and to Judge Schwebel for his insightful and erudite suggestions on early drafts of our work.

We also thank our publishers (and particularly our editors John Louth, Merel Alstein, and, more latterly, Emma Endean, Caroline Hawley, and Sophie Rosinke) for their support and enthusiasm throughout the project. We were especially delighted by Oxford University Press's decision to make this work its first ever colour legal publication. Without the numerous colour maps and illustrations that support its textual analysis, the practical utility of the book to our readers would have been much diminished. And, of course, the colour theme extends to the artwork featured on the front cover of the book, for which we thank the artist Victoria Leader, who has kindly given permission to use it.

Finally, and above all else, we thank our families for their encouragement, support, and patience over the past five years. Such are the pressures of modern professional life that we have been required to devote innumerable weekends and holidays to getting the book done. Without the

extraordinary understanding and forbearance of everybody at home (particularly Laura and Irene, and not forgetting little Alessia and Sebastian), this work could never have happened. We promise to take a break before starting work on the new edition...

Stephen Fietta and Robin Cleverly

1 November 2015

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