BRILL

PORTUGUESE YEARBOOK OF THE LAW OF THE SEA
1 (2024) 135–153

PYLS

Maritime Boundaries after Delimitation

Irini Papanicolopulu
British Academy Global professor, SOAS University of London
ip14@soas.ac.uk

Received 15 January 2024 | Accepted 29 January 2024 |
Published online 15 July 2024

Abstract

Legal scholars who have researched delimitation of maritime boundaries have generally restricted their inquiry to the stage leading to the drawing of the line and its incorporation into a treaty or judicial decision. This approach, however, cannot account for the fact that, sometimes, treaties and decisions will not be applied and may be contested by one or both parties to the boundary dispute. This article starts an inquiry into maritime boundaries after delimitation, examining the rules that may apply and drawing conclusions not only on the need to develop further rules addressing consequent stages, but also to probably think again the existing rules concerning the previous stages.

Keywords

maritime delimitation – maritime boundary – rebus sic stantibus – maritime zones – stability – law of the sea

1 Narratives of Maritime Boundaries

Maritime boundaries are paramount in achieving the objectives of the international community. The peaceful settlement of stable and generally accepted maritime boundaries plays a major role in ensuring international peace and security, in accordance with Article 1(1) of the United Nations Charter. Furthermore, stable maritime boundaries are a prerequisite for the

Published with license by Koninklijke Brill BV | DOI:10.1163/29501636-01010008
© IRINI PAPANICOLOPULU, 2024 | ISSN: 2950-1636 (online)
This is an open access article distributed under the terms of the CC BY 4.0 license.

sustainable management of marine resources and the effective protection of the marine environment, ultimately contributing to the Sustainable Development Goals (SDGs).[1] Many rules of the United Nations Convention on the Law of the Sea (UNCLOS),[2] notably those in Part V and Part XII, are premised upon the existence of maritime zones, the boundaries of which have been clearly defined by the States concerned.

The need to have stable and mutually accepted maritime boundaries has prompted states to explore all available avenues for reaching this result. States have resorted to negotiations and, perhaps more than in many other fields, to judicial settlement, bringing cases to the International Court of Justice, the International Tribunal for the Law of the Sea and *ad hoc* arbitral tribunals. Starting from the Grisbadarna arbitration of 1908–1909[3] and the landmark decision of the ICJ in the 1969 North Sea Continental shelf case,[4] the maritime delimitation cases submitted to binding third party settlement have grown exponentially.

For the law of the sea expert, maritime boundaries are a fascinating thing. Their delimitation requires the lawyer to exit from her comfort zone and engage with geometry, chartography, and often other sciences such as geology and biology. The implications of maritime boundaries are also multifaceted and extend well beyond the present and the legal/geographical spheres. In fact, we think of them as thin lines on a map or as a list of coordinates, yet they divide states and communities, prevent entry and exit, and allow some to reap resources that others do not have access to.

It is therefore no surprise that many law of the sea experts have engaged with the delimitation of maritime boundaries as scholars, lawyers and judges. There is an ever-growing literature on maritime delimitation, from the groundbreaking volume by Prosper Weil,[5] to the International Maritime Boundaries series published under the auspices of the American Society of

---

1 "Transforming our world: the 2030 Agenda for Sustainable Development", UNGA Res 70/01 of 25 September 2015, UN doc. A/RES/70/1.

2 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397 (UNCLOS).

3 *Délimitation d'une certaine partie de la frontière maritime entre la Norvège et la Suède* (Norway/Sweden), arbitral award of 23 October 1909.

4 *North Sea Continental Shelf* (Federal Republic of Germany/Denmark and Federal Republic of Germany/The Netherlands), Judgment of 20 February 1969.

5 Prosper Weil, *The law of maritime delimitation – Reflections*, Cambridge, 1989.

International Law,[6] to the many monographs and collected volumes that have been published in different languages in the course of the last 80 years.[7]

And yet, despite this long-standing engagement of lawyers with them, research on maritime boundaries may still lead to identify some unexplored

---

6 Charney & Alexander (eds.), *International Maritime Boundaries*, vol. I and II, Dordrecht/Boston/London, 1993; Charney & Alexander, *International Maritime Boundaries*, vol. III, The Hague/Boston/London, 1998; Charney & Smith (eds.), *International Maritime Boundaries*, vol. IV, The Hague/ London/New York, 2000; Colson & Smith (eds.), *International Maritime Boundaries*, vol. V, Leiden/Boston, 2005; Colson & Smith (eds.), *International Maritime Boundaries*, vol VI, Leiden/Boston 2011.; Lathrop (ed.), *International Maritime Boundaries*, vol VII, Brill|Nijhoff 2016; Lathrop (ed.), *International Maritime Boundaries*, vol VIII, Brill Nijhoff 2020.

7 Angel V. Horna, *Law of the sea and maritime delimitation: state practice and case law in Latin America and the Caribbean*, Routledge, 2023; Xuexia Liao, *The continental shelf delimitation beyond 200 nautical miles: towards a common approach to maritime boundary-making*, Cambridge University Press, 2022; Nicholas A. Ioannides, *Maritime claims and boundary delimitation: tensions and trends in the eastern Mediterranean Sea*, Routledge, 2021; Yoshifumi Tanaka, *Predictability and flexibility in the law of maritime delimitation*, 2nd ed., Hart 2019; Massimo Lando, *Maritime Delimitation as a Judicial Process*, Cambridge University Press 2019; Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch (eds.), *Maritime Boundary Delimitation: The Case Law*, Cambridge University Press 2018; Stephen Fietta and Robin Cleverly, *Practitioner's Guide to Maritime Boundary Delimitation*, Oxford University Press 2016; Paul von Mühlendahl, *L'équidistance dans la délimitation des frontières maritimes: étude de la jurisprudence internationale*, Pedone 2016; Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: the Quest for Distributive Justice in International Law*, Cambridge University Press 2015; Alex G. Oude Elferink, *The delimitation of the Continental Shelf between Denmark, Germany and the Netherlands: arguing law, practicing politics?*, Cambridge University Press, 2013; Irini Papanicolopulu, *Il Confine marino: Unità o pluralità?*, Milano 2005; Gutiérrez Castillo, *España y sus fronteras en el mar*, Madrid, 2004; INDEMER, *Le processus de délimitation maritime. Etude d'un cas fictif*, Paris, 2004; Kim (Sun Pyo), *Maritime Delimitation and Interim Arrangements in North East Asia*, The Hague/London/New York, 2004; Labrecque, *Les frontières maritimes internationales. Géopolitique de la délimitation en mer*, 2a ed., Paris, 2004; Kolb, *Case Law on Equitable Maritime Delimitation*, The Hague/London/New York, 2003; Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of A Political Process*, Leiden/Boston, 2003; Istituto Idrografico della Marina, *The Legal Aspects of Maritime Boundaries*, Genova, 2002; De Almeida Nascimento, *El dereco internacional de la delimitación de los espacios marinos de soberanía económica*, Madrid, 1999; Razavi, *Continental Shelf Delimitation and Related Maritime Issues in the Persian Gulf*, The Hague, 1997; Katsoufros, *Questions de droit international de délimitation maritime dans la jurisprudence de la Cour de justice des Communautés européennes: les lignes de base*, Maastricht, 1994; Oude Elferink, *The Law of Maritime Boundary Delimitation: A Case Study of the Russian Federation*, Dordrecht, 1994; Ahnish, *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea*, Oxford, 1993; Miyoshi, *Considerations of Equity in the Settlement of Territorial and Boundary Disputes*, Dordrecht/Boston/London, 1993; Blake (ed.), *Maritime Boundaries*, London, 1994; Blake, *Maritime Boundaries and Ocean Resources*, London, 1987; Ciciriello, *Le formazioni insulari e la delimitazione degli spazi marini*, Napoli, 1990; Tanja, *The Legal Determination*

topics, which extend beyond the attentive examination of the latest decision by an international judicial organ. One aspect that is generally little considered is the time element in connection with maritime boundaries. Publications dealing with maritime delimitation generally address the legal and technical issues linked with the drawing of the boundary line, including issues of procedure and jurisdiction, and generally terminate their inquiry once the line is incorporated into a treaty or a judicial decision. In the last few years, the stage preceding the drawing of the boundary has started to attract attention, and a few scholars have set out to identify the duties of neighbouring and other states in areas that have not been delimited yet.[8] Even today, however, there is very little discussion about what happens to maritime boundaries *after* the line has been agreed. Like eighteenth and nineteenth century courtship novels, which seem to imply that marriage is the end of the story, accounts of the law relating to maritime boundaries often seem to imply that the actual drawing of a boundary line is the end of the story, and that nothing worth of attention happens afterwards. This impression is strengthened by Art. 62, para 2(a) of the Vienna Convention on the Law of Treaties (VCLT), which provides for the stability of boundaries even in the face of a fundamental change of circumstances. Such a provision seems to imply that, once a boundary has been delimited, there is nothing that can change it.

This article proposes to start an inquiry into what may befall a maritime boundary after its delimitation, questioning the widely held assumption that delimitation is always final, and to suggest that there may still be something to say about maritime boundaries even after they have been delimited. Maritime boundaries may in fact be still contested even after the judgment has been

of International Maritime Boundaries, Deventer/Boston, 1990; Evans, *Relevant Circumstances and Maritime Delimitation*, Oxford, 1989; Orihuela Calatayud, *Espana y la delimitacion de sus espacios marinos*, Murcia, 1989; Sharma, *Delimitation of Land and Sea Boundaries Between Neighbouring Countries*, New Delhi, 1989; Benvenuti, *La frontiera marina*, Padova, 1988; Jagota, *Maritime Boundary*, Dordrecht, 1985; Prescott, *The Maritime Political Boundaries of the World*, London, 1985; Johnston, *The Theory and History of Ocean Boundary Making*, Kingston & Montreal, 1988; Shalowitz, *Shore and Sea Boundaries*, 2 vol., Washington, 1962; Florio, *Il mare territoriale e la sua delimitazione*, Milano, 1947.

8 Youri van Logchem, *The rights and obligations of states in disputed maritime areas*, Cambridge University Press 2021; Marianthi Pappa, *Non-state actors' rights in maritime delimitation: lessons from land*, Cambridge University Press 2021; Lorenzo Palestini, *La protection des intérêts juridiques de l'État tiers dans le procès de délimitation maritime*, Bruylant 2020; Constantinos Yiallourides, *Maritime disputes and international law: disputed waters and seabed resources in Asia and Europe*, Routledge 2019; Enrico Milano and Irini Papanicolopulu, 'State Responsibility in Disputed Areas on Land and at Sea', in (2011) 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 587.

handed down or the treaty has been signed by the negotiators. Refusal to accept them may come from third states and sometimes even one or both parties to the treaty or the judicial process may set aside the boundary or not accept it. Furthermore, boundaries that have been delimited may be put into question because they are affected by nature. These events may have a bearing on the maritime boundary itself and may require adjustments or new delimitations to take place.

The article will first identify the law of the sea rules that regulate delimitation of maritime boundaries and will consider whether these rules concern themselves with the fate of the boundary following its delimitation. It will then provide an overview of different situations that may occur and impact on the boundary line after the conclusion of the treaty or the adoption of the judgment that incorporates it. These include situations in which the agency of natural elements may impact on the perceived definitiveness of the boundary, instances in which it is a third party which contests the boundary, and circumstances in which it is one or both parties to the negotiation or the proceedings that call into question the line thus determined. The latter instance, which has not been addressed by scholars so far, will then be particularly considered, in order to identify the reasons why the assumed finality of the delimitation is illusory. The article will conclude by summing up lessons learnt from an examination of maritime boundaries after delimitation.

Before starting the discussion, a terminological clarification seems necessary. The word "delimitation" is used throughout the article to identify those situations in which the persons tasked by the states to delimit the boundary have agreed upon the drawing of a specific line on a map. This does not necessarily mean that the treaty has entered into force – in fact, as will be discussed in section 4, the boundary treaty might not be ratified – or that the decision will be applied in practice.

2 The Rules on the Delimitation of Maritime Boundaries

Ever since the extension of the breadth of the territorial sea at the beginning of the twentieth century, scholars and practitioners have tried to identify the rules that govern maritime delimitation. This pursuit became a necessity with the further extension of the territorial sea and the creation of new jurisdictional zones – the continental shelf and the exclusive economic zone – that extend hundreds of miles into the sea in the second half of the century. The breadth of these zones, which is much broader than the 12 nautical miles of the territorial

sea, coupled with the geographical configuration of many areas, wherein coasts are seldom distant more than 400 nautical miles, multiplied the cases of overlapping claims between adjacent or opposite states that required delimitation.

Marine space is hard to delimit because of its liquid nature. Land territory presents geographical features such as rivers, lakes, and mountains, which can be used by States to mark boundaries, furthermore, land can be occupied, originating claims for *de facto* control which can be used to prove territorial sovereignty and its boundaries. Unlike land, the sea does not present geographical features, with the possible exception of the seabed, and cannot be occupied. As a consequence, States needed new clear and reasonable rules to draw boundary lines, and these rules must produce a predictable and fair outcome to allow for stability and certainty.

For this reason, in the second half of the twentieth century and the beginning of the twenty-first century a significant number of negotiations, judicial decisions and scholarly endeavour has focused on the definition of legal rules for the delimitation of maritime boundaries. The 1958 Geneva Conventions on the Territorial Sea[9] and on the Continental Shelf[10] include rules for the delimitation of maritime boundaries,[11] and the same is true for the 1982 UNCLOS.[12] In addition, the rather vague formulas of Articles 74 and 83 UNCLOS have been progressively clarified by the International Court of Justice and other international tribunals. Scholarship has played a significant role in this process, contributing to, and sometimes anticipating, the trends that would eventually be incorporated in judicial decisions.

The outcome of this process is the three-step approach conceptualised by the ICJ in a number of decisions and adhered to by other tribunals. It consists in first drawing an equidistance line, then adjusting the line in light of relevant circumstances, and eventually checking the line against the (dis) proportionality test. An equidistance line is defined by Art. 15 UNCLOS as

9 Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205 (GCTS).

10 Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311 (GCCS).

11 Art. 12 GCTS, on the delimitation of the territorial sea; Art. 24, para 3, GCTS, on the delimitation of the contiguous zone; Art. 6 GCCS on the delimitation of the continental shelf.

12 Art. 15, Art. 74, and Art. 83 UNCLOS, dealing, respectively, with the delimitation of the territorial sea, delimitation of the exclusive economic zone, and delimitation of the continental shelf. The UNCLOS does not contain any provision concerning delimitation of the contiguous zone.

the "line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured". Relevant (or special) circumstances are those "circumstances which make it necessary to adjust the equidistance line as provisionally drawn in order to obtain an equitable result".[13] The disproportionality test considers "whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the delimitation line".[14]

In its most recent statement, the three-step approach has been defined by the ICJ in the following terms:

> In the first stage, the Court will establish the provisional equidistance line from the most appropriate base points on the coasts of the parties. [...] in the second stage, [the Court will] consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result [...] In the third and final stage, the Court will subject the envisaged delimitation line, either the equidistance line or the adjusted line, to the disproportionality test.[15]

State practice has been less conceptual, generally maintaining silence as to the method chosen to draw the boundary line incorporated into a delimitation treaty. Sometimes indeed treaties mention the principle of the equidistance line, or that of the equitable result, and they may refer to the relevant articles of the UNCLOS. However, there is generally no contestation of the delimitation method developed by international judges, which may therefore be considered as having been accept by States. True, states may be more inclusive in considering special circumstances requiring an adjustment of the equidistance line, and they will usually abstain from applying the disproportionality test. Nonetheless, the approach of the ICJ is widely understood as the guidance for states and courts alike. This approach privileges geographical circumstances, mostly dependant on the configuration of the relevant coasts and the presence of islands, which are considered as 'objective' ones. It generally mistrusts other circumstances such as economic, social, and political ones, and gives them little, if any, relevance.

13 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar *v.* Bahrain), Judgment of 16 March 2001, para 217.

14 *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment of 3 February 2009, para 78.

15 *Maritime Delimitation in the Indian Ocean* (Somalia v. Kenya), Judgment of 12 October 2021, paras. 123–125.

3 The Life of Maritime Boundaries after Delimitation

A maritime boundary that is drawn applying the rules mentioned in the previous section is celebrated as the end of efforts and the beginning of stability. It is indicative of this approach that the well-known and rightly celebrated series *International Maritime Boundaries*, published under the auspices of the American Society of International Law, is devoted to the examination of maritime boundaries, once they have been delimited and even if they have not (yet) entered into force. The assumption seems to be that after the line is incorporated into the treaty signed by the parties representatives, it is just a matter of time before the treaty enters into force and is then applied. Similarly, the decision by a court or tribunal is discussed as if the boundary line established in it will not be contested or modified by the parties. The treaty or the judgment thus seem to imply the end of the story, and that there is little to say, at least by international lawyers, about what happens after the line has been agreed upon by the negotiators or the judges. In other words, a fairy-tale ending "and they all lived happily ever after".

But is this truly so? In many cases the maritime boundaries thus drawn enter into force and are applied by the parties and any subsequent issue generally relates to the practical difficulty to enforce the boundary, rather than its abstract drawing. However, in a growing number of cases, subsequent events seem to belie this unspoken yet deeply entrenched assumption. In these cases, the actual drawing of the boundary on a map – by a judge or even the parties' delegates themselves – seems not to say the last word concerning the delimitation of a certain sea area.

There are at least three cases in which the boundary treaty or the judicial decision does not actually definitively settle the boundary between the two states. Sometimes it is the natural elements (possibly driven by human agency) that render instable or inadequate maritime boundaries that have been agreed upon by representatives of the States concerned, and which may have been applied by them for a number of years. While in the past unstable river estuaries and coasts subject to erosion had been of concern to states, today it is mostly sea level rise that may affect the direction and even existence of maritime boundaries.[16] Sea level rise may affect basepoints, for example causing a retrocession of the coast or the disappearance of islets or rocks which had been used to measure an equidistance line. Change in baselines and, more

16 Snjólaug Árnadóttir, *Climate change and maritime boundaries: legal consequences of sea level rise* (Cambridge University Press 2022); Kate Purcell, Geographical change and the law of the sea (Oxford University Press 2019).

generally, sea level rise are not addressed in the UNCLOS and it is only recently that the international community has started discussing this issue.[17]

In these cases, notwithstanding the fact that the States concerned had agreed on a certain boundary, this boundary may become inadequate or even inapplicable due to the changing geography of the area under consideration. Coasts may recede of advance, islands may disappear, populations may move, and fish species may change location. These are just some of the effects of rising sea levels and the impact of climate change upon communities and resources. In these cases, furthermore, the inadequacy of the maritime boundary may appear years after the actual drawing of the boundary line, the entry into force of the treaty that incorporates it, and a longer or shorter state practice that did conform with the boundary as agreed. While some states seem to consider that boundaries that have been delimited will continue to apply unchanged,[18] this is not a universal position and the law in this respect seems to be still under development.

A second instance in which the apparent finality of a maritime boundary drawn in a treaty or a decision may be illusory relates to claims by third states in the same region that has been delimited. In these cases, a delimitation of maritime boundaries that overlooks the interests of other States in the region may make these boundaries inapplicable in law or practice. In cases where two state delimit a maritime boundary in an area that is claimed by another state, disregarding the claims of the other state, the agreed boundary is doomed not to be recognised and to be protested against by third states. This is indeed a rare occurrence in practice. International judges will carefully consider whether there are states other than the parties which claim rights over the maritime zone submitted to them for delimitation, and will accordingly restrict their decision to those parts of the area that are uncontested. Similarly, two states that negotiate their delimitation will generally be considerate of neighbours'

17 See the two reports prepared by the Co-Chairs of the Study Group on sea-level rise in relation to international law of the International Law Commission: *Sea-level rise in relation to international law. First issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law*, UN doc. A/CN.4/740 of 28 February 2020 and *Sea-level rise in relation to international law. Additional paper to the first issues paper* (2020)*, by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law*, UN doc. A/CN.4/761 of 13 February 2023. See also Davor Vidas, David Freestone and Jane McAdam (eds.), *International Law and Sea Level Rise. Report of the International law Association Committee on International Law and Sea Level Rise* (Brill 2018).

18 *Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise*, adopted by the Pacific Islands Forum Leaders on 6 August 2021.

claims and, even if they contest them, will abstain from drawing boundaries that overlap with the neighbour(s) claims.

In a few cases, however, two states may decide to delimit a maritime boundary in an area where they know that a neighbouring state has also claims. In these instances, the conclusion of the first delimitation treaty may act as a catalyst for further action by the third state concerned, which may eventually lead to a definitive settlement of the outstanding overlapping claims – or may render issues even more complex. The 1997 maritime boundary treaty between Australia and Indonesia[19] delimited the exclusive economic zone and continental shelf between the two states without taking into account the claims by Timor-Leste in parts of the area subject to delimitation. This circumstance eventually led to lack of ratification of the treaty and its final demise, with the stipulation of a new treaty between Australia and Timor-Leste in 2002.[20] In the Mediterranean Sea, the 2019 Memorandum of understanding between Libya and Türkiye[21] delimited their alleged overlapping continental shelves and exclusive economic zones, without taking into consideration the presence of sizeable Greek islands, including the 8,450 km² island of Crete. This memorandum was immediately contested by Greece and other states in the region[22] and likely determined Egypt and Greece to conclude their own boundary treaty for the delimitation of their maritime zones the following year.[23]

Concerning these instances, again, the law of the sea does not specifically address them. Guidance is only indirect and is to be found in the broad provisions of the UNCLOS articles on delimitation of maritime boundaries, as well as the general principles of international law concerning the validity of treaties and the peaceful settlement of disputes. The UNCLOS, in providing that a maritime boundary needs to be agreed upon by the parties concerned,

19 Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an exclusive economic zone boundary and certain seabed boundaries, 14 March 1997.

20 Timor Sea Treaty, Dili, 20 May 2002 entered into force on 2 April 2003, 2258 UNTS 3.

21 Memorandum of Understanding Between the Government of the Republic of Turkey and the Government of National Accord-State of Libya on Delimitation of the Maritime Jurisdiction Areas in the Mediterranean of 27 November 2019 entered into force 8 December 2019; Najib Messihi, 'Libya-Turkey. Report Number 8–24' in *International Maritime Boundaries*.

22 Letter dated 9 December 2019 by Greece, UN doc. A/74/706 and Note verbale dated 23 December 2019 by Egypt, UN doc. A/74/628.

23 Agreement between the Government of the Hellenic Republic and the Government of the Arab Republic of Egypt on the Delimitation of the Exclusive Economic Zone between the Two Countries, 6 August 2020, entered into force 2 September 2020; Irini Papanicolopulu, 'Egypt-Greece. Report 8–25' in *International Maritime Boundaries*.

implicitly points at the need to consider the – arguably reasonable – claims of all states abutting on a specific sea region. The VCLT, in turn, provides that a treaty is only binding between parties[24] and thus does not produce legal effects for third states, unless these states accept the effects.

4 Can the Parties Contest the Delimited Boundary?

A case that deserves particular attention, as it has seldom been addressed by scholars, is that where one, or more rarely, both states parties to the delimitation contest the delimitation itself and actually end up by not accepting the treaty or disapplying the boundary in their practice. This has happened in both cases of negotiated treaties and, although more rarely, in cases where the parties have asked an international judge to delimit their maritime boundary.

The most famous case of a maritime boundary drawn by a judge which did not settle the dispute between the parties and which was instead set aside by them is the boundary between Canada and France in the area off Newfoundland. When the arbitral tribunal invested of the question rendered it award concerning the delimitation of the continental shelf and exclusive economic zone in the area of St. Pierre and Miquelon,[25] international lawyers were rather surprised by the shape of the maritime boundary – the well-known corridor or "mushroom".[26] The boundary seemed not to serve the interests of any of the two parties to the dispute, and indeed both arbitrators nominated by the parties voted against the majority. The conflict between the parties, indeed, was mostly about access to the living and non-living resources of the area, and the shape and size of the long corridor drawn by the arbitral tribunal made it impossible to manage the resources of the area unilaterally by each state within its own maritime zone.[27] Canada and France have thus had to adopt a number of successive treaties in order to be able to cooperate in the management of fisheries and hydrocarbon exploitation in the area.[28] While Canada and France do not seem to have ever openly contested the decision of

24 Art. 26 and Art. 34 VCLT.

25 *Decision in the case concerning the Delimitation of Maritime Areas between Canada and the French Republic* (10 June 1992), 31 ILM 1149.

26 Jan Schneider, 'Canada-France (St. Pierre and Miquelon). Report No. 1–2 Addendum 2' in *International Maritime Boundaries*, p. 2141, at p. 2142.

27 Phillip M. Saunders and David L. VanderZwaag 'Canada and St. Pierre and Miquelon Transboundary Relations: Battles and Bridges' in Dawn A. Russell and David L. VanderZwaag (eds.), *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles* (Martinus Nijhoff Publishers 2010) 209.

28 Ibid 225–226.

the arbitral tribunal, the award has certainly not settled the dispute between them and they have had to negotiate further treaties to reach a certain stability.

Although it is requested by the partes to the case, a boundary line drawn by a court or tribunal may not provide a permanent solution to the delimitation issue, since it is eventually drawn by a third party which may or may not take into account all concerns of the States involved. This eventuality would seem to be averted in the case two neighbouring states decide to settle their maritime boundaries through negotiations. In this case, each state may bring forward all of its concerns and agree to a boundary line only once this is considered satisfactory.

There are some cases, however, in which the delegations of two states may negotiate and eventually agree on a boundary line and incorporate it into a treaty, only to realise, once they bring it back home to be approved under the domestic procedures, that there may be obstacles in the entry into force. One of both parties may be unable, due to a number of reasons, to finally ratify the treaty which incorporates the agreed boundary line. In many states, boundary treaties need to be cleared or ratified by parliament. While generally a government negotiating a treaty with a neighbouring state will have full parliamentary support and will be able to pass the necessary legislation to ratify and put in force the delimitation treaty, this may not always be the case. The reasons may be political, such as opposition by political representatives, changes in government, changes in policy or political priorities. Internal issues may be further combined with pressure and conditioning coming from relationships with other states in the region.

In 1977, Costa Rica and Colombia concluded an agreement for the delimitation of their maritime zones in the Caribbean Sea, between the continental territory of Costa Rica and the Colombian islands of Albuquerque Cay, South Southeast Cay, and San Andres Island. While Colombia ratified the treaty within seven months, Costa Rica has not ratified the treaty. For Colombia, the treaty was in fact a recognition of its claim to the San Andres Archipelago and the relevant cays. However, those same insular features were also claimed by Nicaragua. In addition, the treaty was contested within Costa Rica for technical reasons.[29] As a consequence, the treaty has never entered into force.

In 1985, Costa Rica and Ecuador concluded a delimitation agreement establishing the boundary between the Costa Rican Cocos Island and the Galapagos archipelago, belonging to Ecuador.[30] The treaty was ratified by

29 Kaldone G. Nweihed, 'Colombia-Costa Rica. Report Number 2–1' in *International Maritime Boundaries*, p. 465–466.

30 Eduardo Jimenez de Arechaga, 'Costa Rica-Ecuador. Report Number 3–8' in *International Maritime Boundaries*, p.

Ecuador but not by Costa Rica. The reasons seem to have been both political and legal and relate to the fact that the 1985 agreement, concluded at a time when Ecuador still claimed a 200 nautical mile territorial sea, expressly mentions this territorial sea in the preamble. This was eventually considered by Costa Rica as not in line with the requirements of the UNCLOS and prevented the ratification of the treaty.[31] Eventually, the 1985 treaty was superseded by a 2014 treaty between the two states, which entered into force in 2016 and settled their maritime boundary.

In 2007, Cyprus and Lebanon agreed on a delimitation treaty which contains the boundary line between the two states in the Eastern Mediterranean Sea. The treaty has not entered into force, mostly due to political issues within Lebanon, as well as relationships with other states in the region.[32] Political and military representatives contested the boundary line contained in the agreement and suggested that it should be revised. Furthermore, Turkey exercised pressure on Lebanon, and the latter probably preferred not to ratify the treaty with Cyprus to leave options open with Turkey for the negotiation of other agreements. Finally, it would seem that the dispute with Israel over the extension of the respective maritime zones was another consideration that has led to lack of ratification by Lebanon. As a consequence, the treaty has never entered into force, although the practice of the two states seems to support the acceptance *de facto* of the line as the boundary between the exclusive economic zones of the two states.

In 2015, France and Italy signed a treaty for the delimitation of their maritime zones in the Mediterranean Sea. The treaty, which requires the ratification by the two states, has never entered into force as it has been ratified by France but not by Italy. Italian fishermen contest a part of the boundary line, which would not take into account their historic fishing practices, while concerns are also expressed concerning the equitableness of the resulting line by a part of Italian political representatives.[33] the treaty has never entered into force and the two states are currently engaged in negotiations to revise the line, so as to better take into account the interests of different stakeholders.

As these examples illustrate, there are some cases in which the boundary line agreed by the states' representative in the course of negotiations, and incorporated into a treaty signed by them, never enters into force because the

31 Arnoldo Brenes-Castro, 'Costa Rica-Ecuador. Report Number 3–8 (2)' in *International Maritime Boundaries*, p. 2.

32 Ioannides, p. 89–92.

33 Fabio Caffio, 'L'accordo con la Francia e i contenziosi marittimi dell'Italia' in *AnalisiDifesa*, available at https://www.analisidifesa.it/2018/03/laccordo-con-la-francia-e-i-contenziosi-marittimi-dellitalia.

treaty fails to be ratified by one or both parties. The UNCLOS does not seem to specifically address these situations. Art. 15 UNCLOS discusses only the rules that apply to the delimitation of the boundary of the territorial sea. Art. 74 and Art. 83 UNCLOS contain a paragraph which addresses the duties of states pending settlement of the final boundary of the exclusive economic zone and of the continental shelf. After stating in their first paragraph that the boundary of the two zones must be effected by agreement between the parties concerned, the third paragraph of the two articles requests states, pending delimitation, to "make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement".[34] The text of the provision is not so clear and it is open to discussion whether it applies only to situations in which there is not written text agreed by the parties on the course of the boundaries, or also to situations in which the treaty has not come into force because it has not been ratified. The provision, in particular, refers to an "agreement" rather than a treaty, and one could argue that the agreement of the states' delegations on a line would be sufficient to trigger the applicability of Art. 74, para 1, and Art. 83, para 1, UNCLOS, even if the treaty which incorporates this agreement has not entered into force. Apart from these ambiguous provisions, the UNCLOS does not contain any further provision relating to the delimitation of maritime boundaries and situations in which one or both parties to a delimitation are not accepting the boundary.

Some further guidance may come from the law of treaties, as contained in the 1969 Vienna Convention on the Law of Treaties (VCLT).[35] According to the well-established principle enshrined in Art. 24 VCLT, if a bilateral treaty provides that it should be ratified by both parties for it to enter into force, and one of the two parties does not ratify it, then the treaty does not enter into force and is not legally binding. Nor can a state invoke Art. 62, para 2 (a) VCLT, which applies only to treaties that have already entered into force.

Parties to unratified treaties, however, have some obligations, as set out in Art. 18 VCLT. This provision obliges a state to refrain from acts that would defeat the object and purpose of a treaty it has negotiated in two cases: (a) when it has signed the treaty and until it "shall have made its intention clear not to become a party to the treaty", and (b) when it has expressed its consent to be bound by the treaty, unless the entry into force of the treaty itself is "unduly delayed". As illustrated in the examples discussed above, a state could free itself from

34 Art. 74, para 3, and Art. 83, para 3, UNCLOS.

35 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

even the few duties provided in Art. 18 VCLT relatively easily. If it has ratified the boundary treaty, it could nonetheless reconsider its position if the other party does not ratify in its turn, thus unduly delaying the entry into force of the treaty. The VCLT is silent on the time necessary to trigger the "unduly delay". Looking at state practice, according to which boundary treaties are generally ratified and entry into force in a matter of a few years, it would seem that any delay in ratification which extends beyond this time frame would satisfy the condition laid down by Art. 18 (a) VCLT. If a state has only signed the boundary treaty but has not ratified it, it is sufficient for that state to clearly state its intention not to become a party to the treaty, to be free from any further duties in connection to it.

A strictly positivist reading of applicable rules would thus seem to point towards the irrelevance of boundary treaties which have been agreed into by states' representatives but which have not entered into force because one or both parties have not ratified them. This approach, however, is not entirely satisfactory. In fact, the agreed boundary has been traced on a map annexed to a treaty text, and is there for all to see; it is therefore difficult to ignore its existence in practice, if not in law. The states involved may, furthermore, be quite ambiguous in their approach to the boundary line opposing the treaty in principle but then using the line in practice. As the example of the delimitation between Cyprus and Lebanon illustrates, even in some cases in which the treaty has not entered into force, states may still *de facto* apply the boundary line contained in it. Finally, as mentioned at the beginning of this article, it is the usual practice of commentators to discuss maritime boundary treaties as soon as they are agreed upon and before they enter into force. All these elements seem to point towards a certain relevance for unratified treaties, or at least an illusion of existence.

In any case, the parties' unwillingness to apply the boundary line is likely to lead, sooner or later, to a renegotiation of the line and the treaty that incorporates it. If both states are not happy with the line, as in the case of St. Pierre and Miquelon, they may be more willing to continue negotiations in order to find a mutually acceptable solution, by either setting aside the old boundary and drafting a new one or by devising a collaborative framework which will address their activities in the area. However, a state may be less willing to reopen negotiations and put again into play the result that had been reached before if it has ratified the treaty. This is understandable, since the state may have invested a lot of time and effort in the first negotiated line and may have lost faith in its neighbour's inclination to agree on a negotiated solution. This may create a stalemate, whereby one state does not accept the line and the other does not accept to restart negotiations.

5 New Rules for the Delimitation of Maritime Boundaries?

As the above examples show, the general assumption that the delimitation of maritime boundaries is a self-contained process which terminates upon the drawing of the boundary line upon a chart and its inclusion in a bilateral treaty or a judicial decision is not always exact.

There are three main instances in which the delimitation of the maritime boundary may not provide a permanent solution. The first is due to the agency of natural elements, which may be driven by human impact, as in the case of climate change induced sea level rise. This new phenomenon has shown the limits of the current normative approach to the delimitation of maritime boundaries, which considers that the sea is unchangeable and consequently attributes to human-made boundaries a stability which may be belied by nature. While international law has yet to develop comprehensive rules to address climate change and sea level rise, including their effects on maritime boundaries, it would seem that states have at least accepted that these are instances that need to be regulated by appropriate rules, which may modify or substitute existing rules.

The second includes all those cases in which a third state may contest the validity of the delimitation, as it also has claims over the area that has been divided between the two states. This instance demonstrates how the general principles governing the law of treaties, according to which treaties are law between the parties but do not produce effects for third states unless the latter accept them, may produce a boundary which is applicable only as between the two parties to the treaty, but which may not be opposed to third states. Yet this is an anomaly, since boundaries, including maritime boundaries, should be opposable against all states to ensure the legal certainty that the rules on maritime delimitation aim to achieve.

Finally, in a third case, it may be the parties to the delimitation itself which may be reluctant to give effect to the boundary line. The reasons for this may vary. In some cases, the line drawn by a judge may not duly consider the interests of the states involved and even the practicalities on the ground, making the boundary hard to apply in practice. In other cases, one of the parties to the delimitation treaty may eventually not ratify the treaty, thus vinifying the line contained in it. The reasons for this lack of ratification may also depend on various circumstances, such as disregard of relevant stakeholders, political pressures, change of government or legislative changes. The law of the sea does not address this instance, and there seems to be no uniform practice concerning what duties, if any, a state has in such circumstances, especially

if that state clearly manifests its intention not to ratify the treaty, thus freeing itself of even the slight duties provided by Art. 18 VCLT.

The brief study of maritime boundaries after delimitation conducted in the present article has highlighted the lack of rules concerning the stages following delimitation. It also has provided some insight into the reason why a delimitation may be ultimately successful or not. This seems to depend not only on the application of the delimitation formula, as articulated by the ICJ in its case-law, but also from other, more elusive elements. Ultimately, an examination of maritime boundaries after delimitation suggests that a change in perspective may be useful. The current scholarly approach, which ends its enquiry with the establishment of the boundary line, could benefit by being complemented by a study of what may befall maritime boundaries after their delimitation, to comprehensively appraise whether a maritime delimitation is ultimately successful or not.

Taking cognisance of what may befall boundaries after the line has been agreed upon or has been drafted by the judges dealing with the case may also benefit those involved in the delimitation of future boundaries. States and other actors may learn from past experiences and may be better equipped to address the unexpected effects that human agency or that of natural elements may have on a boundary line. Furthermore, awareness of what may befall boundaries after their delimitation may also assist states that set out to negotiate them, highlighting aspects which need to be considered in the delimitation process, lest the boundary cannot be applied in practice. And these aspects, as already discussed relate to aspects that go well beyond the simple three step approach advocated by international judges as the method for delimiting maritime boundaries.

To fully benefit from past experience, however, a partial change of perspective is needed. The few rules that have been adopted by states so far do not regulate problematic instances or do so in an unsatisfactory way. More generally, there seems to be a need to assess the capacity of existing rules to achieve a delimitation that not only *appears* equitable on paper, but *is* also equitable in practice and able to stand the test of time. A positivist approach to current regulation shows all its limitations, while critical legal scholarship may provide helpful hints as to the limits that existing rules encounter, identifying the reasons behind these limits and suggesting adjustments.

A first point worth of investigation concerns the allegedly "neutral" nature of the rules on the delimitation of maritime boundaries. The ICJ has often claimed that its approach is objective – being based solely or almost exclusively on physical geography, based on logic, which is traditionally understood as a male

characteristic – and therefore produces outcomes that are fair and equitable.[36] There is a certain paternalistic lining to this approach, however. An unspoken assumption underlying this approach is that geometry is always better than other – social, economic etc – approaches. But is this really the case? Can geography be reduced to a map that depicts some features only but totally ignores the underlying human geography?[37] And is not the alleged neutrality of the geometrical approach just a way of shying away from complexity? This approach also echoes the colonial past, when entire continents would be divided by straight lines, totally ignoring the realities on the ground.

A second point pertains to the capacity of existing rules concerning delimitation of maritime boundaries to produce a result that will be viable and reasonably effective in practice for both States and the communities affected by the delimitation.[38] Maritime boundary negotiations, to a great extent, are still conduct by delegations that are often too homogeneous and do not represent all stakeholders. Participation and the empowerment of underrepresented groups, which constitutes a major issue for the international community, is also visible in the case of maritime boundaries. If a maritime boundary is negotiated only by a handful of men in power within the state, it may be the case that the local communities affected by the boundary may not agree to its delineation, and may therefore exercise pressure so that it be not ratified in the end. Lack of diversity in the bench and the parties' teams may also produce its impact in the solution eventually handed down by an international court, which may be welcomed as "orthodox" by the small community of lawyers but may not concretely work on the ground, producing or exasperating tensions and possibly resulting in conflict.

36 However, the neutrality of the rules would seem to be more apparent than real. At the very moment when the ICJ claims to be neutral in its approach to the delimitation of maritime boundaries, it does introduce a highly aleatory element is saying that, in the first step of the delimitation process, it will draw the provisional equidistance line "from the most appropriate base points on the coasts of the parties". A line that makes use of some basepoints only is by definition not an equidistance line, but a modified one. This is not just a terminological issue, but the concrete evidence of how technicality is used as a cover for what is, in reality, a (sometimes more, sometimes less) subjective exercise.

37 Henry Jones, 'Lines in the ocean: thinking with the sea about territory and international law' in (2016) 4 *London Review of International Law* 307.

38 Yusra Suedi, 'Man, Land and Sea: Local Populations in Territorial and Maritime Disputes before the International Court of Justice' in (2021) 20 *The Law & Practice of International Courts and Tribunals* 30.

In conclusion, looking at maritime boundaries after delimitation leads us to consider also the rules that apply before delimitation, assessing their capacity to prevent issues that may arise ex post. While the delimitation method identified by the ICJ presents undeniable advantages, it still needs to be expanded and complemented by further rules, which the international community should develop. In order to do so, it is necessary to become aware of the biases and prejudices underlying these rules, in order to try and correct them and make them more in conformity with the aspirations of today's international community, as enshrined in the SDGs.