Chapter V

Some Thoughts on Maritime Boundary Delimitation

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I. Introduction

Over the past half century, the international law of maritime boundary delimitation has developed through the jurisprudence (or case law) of the International Court of Justice (ICJ) and the international arbitral tribunals, as well as a great number of international agreements on maritime boundary delimitation. But the more important of the two sources is the relevant ICJ judgments and arbitral awards.¹ Although international agreements are certainly important evidence of the practice of sovereign states, the trouble with them is that there is generally little or no record of how the negotiations were conducted and what produced the eventual agreement. One can only surmise what factors were taken into account in reaching the agreement.²

¹ See, for example, Prosper Weil, Perspectives du Droit de la Délimitation Maritime 13 (1988) (Fr.), where the author who has abundant experience of acting as counsel for parties to maritime boundary delimitation cases before the ICJ and arbitral tribunals says:

La conquête de la délimitation maritime par le droit n’est en fin de compte l’œuvre ni de la convention ni de la coutume, mais celle de la jurisprudence qui, loin d’apparaître comme une source subsidiaire du droit international, remplit ici la mission d’une source primaire et directe de droit, même si elle a choisi modestement d’en porter le credit au compte du droit coutumier. (Emphasis added).

² This is not, of course, meant to say that the practice of states is not important in the development of the law of maritime boundary delimitation. Indeed, the agreements between the states concerned, mostly in the form of bilateral agreements, are the treasure-house of such practice, as evidenced in the massive, over 4,000-page collection of international maritime boundary agreements under the auspices of The American Society of International Law: International Maritime Boundaries Vols. I and II (Jonathan Charney & Lewis Alexander eds., 1993); Vol. III (1998); Vol. IV (Jonathan Charney & Robert Smith eds., 2002); and Vol. V (David Colson & Robert Smith eds., 2005). Especially the “Global Analyses” of nine factors of relevance to delimitation at Vol. I, pages 3–262 and the “Regional Analyses” of ten regions of the world seas at Vol. I, pages 267–365, are reliable sources of information provided and analyzed on the chosen topics by nine and ten world experts, some with first-hand knowledge of the negotiations of agreements. Yet, it is submitted that what is stated in the text above remains true.
By contrast, with the judgments of the ICJ or the awards of the international arbitral tribunals, one has access to the reasoned decisions, and for ICJ judgments, to the written and oral pleadings of the parties as well. These documents greatly help our understandings of the formation and development of the law. For these reasons, the more reliable sources of law in the area are the jurisprudence of the ICJ and the international arbitral tribunals.

II. The Natural Prolongation Doctrine and the Distance Criterion

What does this jurisprudence inform us about the law of maritime boundary delimitation? The law of continental shelf boundary delimitation evolved first and later merged with that of the exclusive economic zone (EEZ), which arrived on the scene some time later.

The first international judicial case of continental shelf boundary delimitation was the 1969 North Sea Continental Shelf Cases before the ICJ.3 Although the Court was requested to apply the principles of boundary delimitation, it started with the analysis of the concept of the continental shelf, in order to explain the basic concept before instructing the parties on the applicable rules and principles of boundary delimitation. The Court defined the continental shelf as “the area . . . that constitutes a natural prolongation of its land territory into and under the sea.”4

This is the genesis of the concept and doctrine of “natural prolongation.” It is clear that this definition gives title to the coastal state when the continental shelf extends into and under the sea. But it is important to note that the Court did not intend to expand this statement beyond “natural prolongation”; it did not regard the definition as the applicable rule or principle of boundary delimitation.

Unfortunately, most international lawyers of the day, both academic and practicing lawyers, seem to have either gained the impression or felt it was decreed by

3 The Abu Dhabi Oil Arbitration of 1951 may be claimed to be the first-ever arbitration of continental shelf boundary delimitation. The arbitrator found, however, that the concept of the continental shelf had not yet established itself in international law. 18 Int’l L. Rep. 155. Therefore, this case is not treated here as the first case of continental shelf boundary delimitation.
5 The arbitrator in the Abu Dhabi Oil Arbitration of 1951 characterized the continental shelf:

The doctrine of the “Shelf” as proclaimed in the Truman Declaration of 1945 arrogated to the United States “jurisdiction and control” over “the resources” of the American Continental Shelf which was described as “appertaining” to the United States.

18 Int’l L. Rep. 153 (emphasis added). His use of the word “arrogated” seems to imply that the Truman Proclamation intentionally attributed to the United States what was not yet established as a legal concept under international law at that time. The arbitrator was not acting on the understanding that the continental shelf was defined as an appurtenance or natural prolongation of the land territory of the coastal State.