

Stephen Fietta and Robin Cleverly. ***A Practitioner's Guide to Maritime Boundary Delimitation***. Oxford: Oxford University Press, 2016. Pp. 695. £202.50. ISBN: 9780199657476

Alex G. Oude Elferink, Tore Henriksen and Veierud Busch (eds). ***Maritime Boundary Delimitation: The Case Law. Is It Consistent and Predictable?*** Cambridge: Cambridge University Press, 2018. Pp. 433. £85. ISBN: 9781108344302

The law on maritime delimitation is often characterized as judge-made law. This is borne out by the significant number of judgments and awards, more than 20 of which have been rendered since the signing of the United Nations Convention on the Law of the Sea (UNCLOS).¹ It may also reflect the fact that treaty and customary principles in the field are very vague so that courts and tribunals are bound to play a decisive role in determining the concrete rules of maritime delimitation.

In recent years, several texts have attempted to codify, and take stock of, the rich case law on maritime delimitation. Among them are Stephen Fietta and Robin Cleverly's *Practitioner's Guide to Maritime Boundary Delimitation* and *Maritime Boundary Delimitation: The Case Law*, published under the editorial direction of Alex G. Oude Elferink, Tore Henriksen and Veierud Busch; both of these works recognize the significant influence of arbitral and judicial decisions.²

The two books are timely and instructive even for readers already well acquainted with international jurisprudence on maritime delimitation. In essence, both of them are part of a quest for certainty in maritime jurisprudence; to that end, they offer technical and analytical insights into the law of maritime delimitation. They proceed from the assumption that, to fully qualify as law, the rules of maritime delimitation should be clear and objective so as to allow states and other stakeholders (like oil companies) to predict the outcome of delimitation disputes. Given the vagueness of treaty and customary principles (which focus on setting out the proper process of delimitation rather than prejudging concrete outcomes), predictability can only be achieved if the jurisprudence of maritime delimitation is consistent enough – if it sets out an acceptable methodology for delimitation and if it applies this methodology consistently to specific disputes (Elferink, Henriksen and Busch, at 382).

While focused on the same topic, and sharing the essential desire for certainty, the two books complement each other well, as the authors approach the material very differently. Fietta and Cleverly's book is the fruit of their experience advising governments and oil companies in maritime boundary disputes. As its title suggests, the work is intended as a practical guide to maritime delimitation. And it certainly achieves that goal: taking the reader by the hand, it begins with a definition of the essential concepts of the modern law of the sea; then it draws a comprehensive picture of the various dispute settlement mechanisms with their pros and cons, gaps and traps; it continues with a thorough analysis of delimitation cases, including a few decisions predating the entry into force of UNCLOS and, finally, the book concludes with comments on unresolved

¹ Whether a decision is counted as a maritime delimitation is not always obvious. For instance, Elferink and others do not include in this category the *South China Sea Arbitration (Republic of Philippines v. People's Republic of China)*. Award, Merits, 12 July 2016, even though the arbitral tribunal did decide on the maritime entitlements of the Parties.

² For the French-speaking academics and practitioners, one may also refer to the quite substantial chapter by Pellet and Samson, 'La délimitation des espaces marins', in M. Forteau and J.M. Thouvenin (eds), *Traité de droit international de la mer* (2017) 565 (see the review by Roeben, 'Traité de droit international de la mer', 30 *European Journal of International Law* (2019) 703).

issues and offers concrete proposals to dispel remaining uncertainties. The book's most valuable contribution are the multiple maps and sketches that illustrate the legal analysis: these confirm the wisdom of Napoleon's quip that 'un bon croquis vaut mieux qu'un long discours' (a good sketch is better than a long speech). Indeed, to understand maritime delimitation, graphic illustrations are indispensable. Nonetheless, it is rare for books to feature maps, legal analysis and technical expertise so closely aligned as here.³

Elferink, Henriksen and Busch's book is enlightening too but in a different way. Its ambition, as suggested by the subtitle, is to gauge the consistency and predictability of the judge-made law of maritime delimitation. While acknowledging the great progress made by judges and arbitrators towards these goals, the various contributions also identify areas where consistency and predictability are illusory rather than a reality. This critical approach is based on an insightful and detailed comparative analysis of several decisions that, in the view of the editor, have made an essential contribution to the stabilization of the law.

So what is the state of the law on maritime delimitation as reflected in the two books? A careful reading of Fietta and Cleverley, as well as of Elferink, Henriksen and Busch, reflects a regime that has been shaped by jurisprudence whose basic structures seem relatively stable but which, notwithstanding decades of jurisprudence, remains inherently flexible. The remainder of this review explores these features and highlights key insights offered in the two books, beginning with the essential features of the delimitation regime as set out in international jurisprudence.

1 The Road towards a Rule of Maritime Delimitation

The International Court of Justice's (ICJ) judgment in the *North Sea Continental Shelf* cases established equity as the controlling factor of maritime delimitation and rejected the customary value of the equidistance/relevant circumstances principle, which had been adopted in the 1958 Convention on the Continental Shelf.⁴ In the context of decolonization, states, or at least the majority of them, enthusiastically endorsed this approach, and the principle of an equitable solution was adopted during the third United Nations Conference on the Law of the Sea (see Articles 74 and 83 of UNCLOS, which apply to the delimitation of the exclusive economic zone and of the continental shelf respectively). However, the notion itself was anything but clear: equity 'can sometimes be a way for the judge ... to go beyond the law ... [and] introduce subjectivity into the legal reasoning' (Lucie Delabie, in Elferink, Henriksen and Busch, at 172). Subjectivity, in turn, is not conducive to legal certainty and undermines trust in the judicial system. And so, the ICJ in the aftermath of *North Sea Continental Shelf* was facing a dilemma: how should maritime delimitation become predictable? With states endorsing the *North Sea Continental Shelf* approach based on equity, it became difficult for the Court to immediately turn back the clock, especially since, at the time of the adoption of UNCLOS, it was called upon to deliver a series of delimitation judgments (*Tunisia/Libya* in 1982; *Gulf of Maine* in 1984 and *Libya/Malta* in 1985). Only gradually, progressively, was the Court in a position to reintroduce equidistance/relevant circumstances as the preferred method of maritime delimitation. In *Jan*

³ Another example is D. Ortolland and J.-P. Pirat, *Geopolitical Atlas of the Oceans*, initially published in French in 2010, then in English in 2017.

⁴ *North Sea Continental Shelf (Germany v. Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969) 1; Convention on the Continental Shelf 1958, 499 UNTS 311.

Mayen (1993)⁵ and *Qatar v. Bahrain* (2001),⁶ the Court noted that the rule of an equitable solution applicable to the delimitation of the continental shelf and of the exclusive economic zone was ‘closely interrelated’ to the one applicable to the territorial sea, which specifically refers to equidistance/special circumstances (Article 15 of UNCLOS). In *Nicaragua v. Honduras* (2007), the Court stated even more clearly that, even if special circumstances did ‘not allow it to apply the principle of equidistance, the latter remain[ed] the general rule’.⁷

Within this context, the judgment in the *Black Sea* case (2009) reflected a deliberate decision by the Court to close the circle of uncertainty opened by the 1969 *North Sea Continental Shelf* judgments and to definitely adopt what would become known as the ‘three-stage approach’, which proceeds from (i) a provisional equidistance line, then (ii) takes into account relevant circumstances, before (iii) applying a final (dis)proportionality test.⁸ *Black Sea* was what in French would be called a ‘*grand arrêt*’, a case intended to set out the proper interpretation of the law programmatically and with long-term effect. Its decision in the case was the Court’s 100th judgment, and this was not a coincidence but, rather, a symbolic choice. The judgment was adopted unanimously (including by the two ad hoc judges), and no declaration was appended. These extrinsic circumstances confirm the normative value of the *Black Sea* judgment, which provides ‘a cogent formulation of the three-stage methodology of maritime delimitation’ (Elferink, Henriksen and Busch, at 397). Significantly, this method, formulated by the ICJ, has since been referred to, and applied by, the International Tribunal for the Law of the Sea⁹ and by arbitral tribunals¹⁰ and described as ‘an *acquis judiciaire*, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice, [which] should be read into articles 74 and 83 of the Convention’.¹¹

As Donald McRae rightly emphasizes, this view of the *acquis judiciaire* as a source risks ‘blurring the distinction between delimitation law and delimitation method’ and is at odds with the position adopted by states during the third United Nations Conference on the Law of the Sea, which had resisted attempts to tie equity to a particular delimitation method (in Elferink, Henriksen and Busch, at 105, 108). Thus, in the name of legal certainty, ‘the method ... applied by courts and tribunals today has built into it a particular view of the law’ (McRae, in Elferink, Henriksen and Busch, at 105–106). This criticism aside, McRae acknowledges that ‘the three-stage approach provides something which did not previously exist in delimitation law, a starting point in the face of competing claims’ (at 109); this, in turn, has made the process of maritime delimitation by courts and tribunals more predictable and transparent. Furthermore, in the three-stage approach (and unlike in the earlier debates, for example in the *North Sea Continental Shelf* case), equidistance is no longer opposed to equity; the ‘overwhelming primacy of the

⁵ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, 14 June 1993, ICJ Reports (1993) 38, at 62.

⁶ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment, Merits, March 2001, ICJ Reports (2001) 40, at 111.

⁷ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, ICJ Reports (2007) 443.

⁸ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, ICJ Reports (2009) 101.

⁹ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 March 2012, ITLOS Reports (2012) 4, at 66, para. 233; *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Judgment, 23 September 2017, ITLOS Reports (2017), at para. 360.

¹⁰ *bis: Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, Award, 7 July 2014, at paras. 339 and 345; *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, Award, 29 June 2017, at paras. 999 and 1001.

¹¹ *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, Award, 7 July 2014, at para. 339.

three-stage approach [can be explained by the fact that] the use of equidistance of the first stage is transparent and objective, while the application of relevant circumstances at the second stage provides the necessary flexibility ... [while] the third stage is treated as a “final check” of the equitableness of the line’ (Fietta and Cleverly, at 54).

2 Adequateness of the Standard (Three-Stage) Method

In order to balance the subjectivity inherent in equity, the ICJ in the *Black Sea* case held that it must use ‘methods that are geometrically objective and also appropriate for the geography of the area’.¹² Some authors criticize the standard, three-stage method because they consider its starting point – that is, equidistance (also referred to as the ‘median line’) – to produce inadequate results in specific instances. It is true that the Court itself seems at times to doubt the appropriateness of equidistance as a starting point for delimitation. This was particularly the case in *Nicaragua v. Colombia* ‘because of the unusual circumstance that a large part of the relevant area lies ... behind the ... baseline from which a provisional median [equidistance] line would have to be measured’.¹³ Despite the unusual coastal configuration between the two states, the Court still relied on ‘the method normally employed’¹⁴ – in other words, it proceeded from a provisional median line and only then, at the second stage, considered the unusual geographical factors of the case, which, in turn, led it to considerably adjust the provisional line.¹⁵ This suggests two things: first, that at least for the ICJ, the standard method has general application and, second, that unusual features of a coastline come into play to correct the median line in a second step.

This provides important context for McRae’s warning against the ‘reification of equidistance’ and his concern that the jurisprudence had elevated the provisional line into a de facto final boundary (in Elferink, Henriksen and Busch, at 115). This assertion is certainly not true in cases such as *Nicaragua v. Colombia*, where the provisional line was adjusted; these illustrate that international courts and tribunals have not turned a blind eye to equity. Simply put, equitable considerations are now considered to be addressed as part of the second and third stages of the standard method. It is worth noting that, even when the provisional equidistance line eventually became the final delimitation line (see, for instance, *Black Sea* (2009), *Peru v. Chile* (2014),¹⁶ *Ghana/Côte d’Ivoire* (2017)), this could simply be a consequence of a coastline’s unexceptional characteristics or reflect the fact that the Court had identified appropriate basepoints for the construction of the equidistance line in the first instance.

3 Incoherence and Uncertainty within the Standard Method

The choice of basepoints is seen by Fietta and Cleverly as a form of ‘creeping subjectivity’ (at 575). In principle, the ‘equidistance line’ is defined in Article 15 of UNCLOS as ‘the line every point of which is equidistant from the nearest point on the baselines of which the breadth of the territorial seas of each of the two States is measured’. In practice, the nautical charts depicting the low-water line are digitalized, and a special software is used to identify the most salient points on the relevant coasts. This is supposed to be an automatic process (see Fietta and Cleverly, at 55–64). Yet courts and tribunals have asserted their power to select ‘appropriate’ basepoints – that is, those that correspond

¹² *Ibid.*

¹³ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, Preliminary Objections, 13 December 2007, ICJ Reports (2007) 697.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Maritime Dispute (Peru v. Chile)*, Judgment, 27 January 2014, ICJ Reports (2014) 3.

to the general configuration of the relevant coasts.¹⁷ This power of selection has led them to ignore certain insular features as basepoints where they were considered extraneous to the general configuration of the coast (Fietta and Cleverly, at 576–578). As Coalter Lathrop notes, '[t]he objectivity of the equidistance method is severely undercut when basepoints are "selected", all the more so when judges are doing the selecting and when the "appropriateness" is the criterion for that selection' (in Elferink, Henriksen and Busch, at 211). McRae is equally right to observe that, by selecting basepoints on the basis of the coast's general configuration (an aspect that could justify an adjustment of the median line), courts are merging the different stages of the standard method to the detriment of legal clarity: 'When a Tribunal makes the decision that an island ... should not be included in the drawing of a provisional equidistance line, then it is no longer making decisions about basepoints, it is making decisions about the ultimate equitable solution' (McRae, in Elferink, Henriksen and Busch, at 110–111). This criticism is technically correct if one considers that judges should not meddle with geometry. At the same time, the choice of basepoints by courts and tribunals shows that considerations of equity or appropriateness may come into play even at the stage of the drawing of an equidistance line. Geometry and cartography have not replaced legal reasoning, which still tends towards an equitable solution, taking into account all of the relevant circumstances.

Far from relegating them 'to the corrective margins', this merging of stages shows that relevant circumstances 'continue to operate at all stages of the delimitation process as a means of influencing its outcome' (Malcolm Evans, in Elferink, Henriksen and Busch, at 238, 243). This is not a problem as such. However, as there is no consensus on what circumstances qualify as 'relevant' (McRae, in Elferink, Henriksen and Busch, at 110–111), states have been compelled to adopt a precedent-like approach: in proceedings, they inevitably attempt to fit the facts of their case into one of the categories previously recognized as relevant. This has had the effect of consolidating the jurisprudence and of favouring factors relating to coastal geography, which – unlike geological features, resource-related factors or the conduct of the parties – have traditionally been considered relevant (Evans, in Elferink, Henriksen and Busch, at 249–260). Yet '[i]nternational courts and tribunals are not constrained by a finite list of special circumstances',¹⁸ and the catalogue of circumstances recognized as relevant by jurisprudence may enrich itself with new categories. This openness can be said to facilitate equitable solutions.

All of this illustrates the versatility of the standard method of delimitation, which is malleable but stable. One aspect of the standard method, however, is entirely unpredictable, and that is the manner of adjusting the provisional line once relevant circumstances have been properly identified. In this process, judges and arbitrators have a broad discretion. The only guideline is that, 'while an adjustment must be made to its provisional equidistance line to abate the cut-off effect of the line on [one party's] concave coast, an equitable solution requires, in the light of the coastal geography of the Parties, that this be done in a balanced way so as to avoid drawing a line having a converse distorting effect on the seaward projection of [the other party's] coastal façade'.¹⁹ Yet this focus on 'balanced solutions' is so generic that the adjustment process is bound to be a very subjective one. Perhaps reflecting this, Fietta and Cleverly devote an entire chapter of their *Practitioners Guide* to the question of consistency in the adjustment of provisional equidistance lines at (584–594).

If the adjustment of the provisional equidistance line is unpredictable, the outcome of the disproportionality test – the third and final stage of the standard method – is perhaps rather too predictable. As Yoshifumi Tanaka notes, the problem with the disproportionality test is that it 'is always met. ... [Thus] some doubt could be expressed whether [this] test is merely formalistic' (in Elferink, Henriksen and Busch, at 317). This third and final stage 'requires verification that the delimitation line constructed by application of the first two stages of this [standard] methodology does not lead to an inequitable result owing to

¹⁷ *Black Sea case (2009)*, at 101, para. 116; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Judgment, 2 February 2018, ICJ Reports (2018), at 190, para. 136.

¹⁸ *Guyana v. Suriname (2007)*, Award, 17 September 2007, at para. 8.3.

¹⁹ *Bangladesh v. Myanmar (2012)* para. 325.

a marked disproportion between the ratio of the respective coastal lengths and the ratio of the relevant maritime area allocated to each Party' (*Ghana/Côte d'Ivoire* (2017), para. 533). As this statement makes clear, the disproportionality test is not a test of distributive justice, requiring equality between the length of the coasts and the maritime areas attributed to a state. It is probably no coincidence that, so far, this test has always been met in practice: even before conducting a final 'check', a court or tribunal, after all, has already taken into account the relevant circumstances during the first two stages and adjusted the equidistance line in light of equitable considerations. Moreover, the disproportionality test itself remains ill-defined: disproportionality is to be assessed by comparing the length of the relevant coasts and the size of the maritime area allocated to each state. Yet the case law has not established any recommended technique for this calculation (Elferink, in Elferink, Henriksen and Busch, at 173–199; Fietta and Cleverly, at 594–609). But, like the adjustment of the equidistance line, the remaining imprecisions in the application of the disproportionality test have not seriously affected the predictability of the standard method.

4 The Grey Areas of the Law of Maritime Delimitation

There is, however, a domain where international law requires more than marginal clarifications: it lacks a standard for defining states' obligations during boundary disputes and concerns states' obligations pending delimitation – in particular, their obligations of restraint in the disputed maritime area. As Natalie Klein observes, only the *Guyana v. Suriname* decision (2007) addressed this issue, by interpreting common paragraph 3 of Articles 74 and 83 of UNCLOS (in Elferink, Henriksen and Busch, at 117–144). The criteria for assessment provided therein, developed by analogy to the requirements for the indication of provisional measures, have not been considered fully convincing (see the separate opinion of Judge Paik in *Ghana/Côte d'Ivoire* (2017)). During the third Conference on the Law of the Sea, these aspects were little discussed, and the compromise formula adopted in Articles 74 and 83 reflects a lack of state practice and *opinio juris*. There is no doubt, however, that reckless activities and provocations in a disputed maritime area may cause grave damage to bilateral relations and degenerate into an international crisis (the situation in the South China Sea is one example among others). Judicial guidance in this respect would be most welcome. Meanwhile, several academic projects aim at gathering and analysing information on state practice in relation to disputed maritime areas.²⁰

5 Concluding Thoughts

The analysis offered by Fietta and Cleverly and Elferink, Henriksen and Busch shows that the law of maritime delimitation has become considerably more predictable over the course of the past two decades. International courts and tribunals have made the deliberative choice of reversing their earlier decisions, which, having put equity at their core, endangered legal certainty and, thus, the trust in the judicial process of maritime delimitation. Yet, even if these decisions have stabilized the law, there remain gaps and inconsistencies that call for further definition. As in other areas of judge-made law, each new decision contributes to making the '*acquis judiciaire*' denser.

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²⁰ British Institute of International and Comparative Law, *Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in Respect of Undelimited Maritime Areas* (2016), available at www.biicl.org/undelimited-maritime-area; A. Miron (ed.), *ZOMAD/ DAMOZ, an On-going Research Project on Disputed Maritime Areas*, available at <https://zomad.tk/fr/>.