

2010

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Recommended Citation

Martin A. Rogoff, *An Overview of Existing Maritime Boundary Disputes And Recommendations For Their Settlement*, 15 Ocean & Coastal L.J. (2010).

Available at: <http://digitalcommons.maine.edu/oclj/vol15/iss2/11>

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AN OVERVIEW OF EXISTING MARITIME BOUNDARY DISPUTES AND RECOMMENDATIONS FOR THEIR SETTLEMENT

*Martin A. Rogoff**

MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE
LAW OF THE SEA. EDITED BY SEOUNG-YONG HONG & JON M. VAN
DYKE. LEIDEN & BOSTON, MARTINUS NIJHOFF PUBLISHERS. 2009.

Boundary disputes, whether terrestrial or maritime, are about control of space and resources, national security, and national honor.¹ Taken together these factors produce highly volatile situations that unsettle interstate relations, often give rise to continuing enmity between states, and in some cases lead to armed conflict.² Disagreements regarding boundaries also adversely affect economic development, as public entities and private parties wanting to exploit the resources of an area in dispute are unable to do so because of insecurity of necessary rights, conflicting claims, and uncertainties regarding regulatory authority. Because of post-World War II development and acceptance by states of the regimes of the continental shelf and exclusive economic zone, extending hundreds of miles from their coasts, questions of entitlement to ocean space have increased exponentially, and maritime boundary disputes have proliferated as a consequence. There is now more at stake, both economically and strategically, as larger areas of ocean space along with their resources have become subject to appropriation or regulation

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1. See Lea Brilmayer & Natalie Klein, *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*, 33 N.Y.U. J. INT'L L. & POL. 703 (2001) (discussing the differences and similarities between terrestrial and maritime sovereignty regimes).

2. A. O. CUKWURAH, *THE SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW* 10 (1967) ("There is some kind of sanctity about state boundaries."); *THE INTERNATIONAL REGULATION OF FRONTIER DISPUTES* 7 (Evan Luard ed., 1970) (referring to the "psychological importance for nations [of territory] that is quite out of proportion to its intrinsic value, strategic or economic. Sentiments of national pride and national honour are aroused by threats to territory more rapidly and more intensely perhaps than any other type of issue. . . . In consequence, disputes over territory have been perhaps the most important single cause of war between states in the last two or three centuries").

by nation states. Also, the post-war decolonization and self-determination movements, given a second life with the disintegration of the Soviet empire, have resulted in a vast increase in the number of states, many of which are small island nations, and have thereby contributed to the proliferation of legally problematic ocean areas.

One major purpose of the United Nations Convention on the Law of the Sea (UNCLOS), which entered into force in 1994, was to provide guidance for the delimitation of maritime boundaries.³ Due to the inability of negotiators to arrive at a common understanding of governing rules and principles, however, provisions of UNCLOS relevant to maritime boundary delimitation are general, imprecise, and sometimes conflicting, leaving much room for disagreement and providing little guidance for negotiation. Decisions of the International Court of Justice and international arbitral tribunals fail to provide much clarification. Furthermore, few principles of a general nature can be drawn from state practice. The problem is the complex interaction of principles underlying the regimes of the continental shelf, the territorial sea and contiguous zone, and the exclusive economic zone, combined with the unique factual circumstances of each particular delimitation (differing resource, economic, and strategic considerations, differing geographical and geological configurations, and differing political factors and historical experiences). Further complicating matters was the constantly evolving nature of all these factors, which remains a particular challenge. Maritime geography changes as shorelines erode and accrete and as islands and other maritime formations (reefs, low-tide elevations, drying rocks, etc.) appear, disappear, and change in nature and therefore in legal significance. In addition, particular maritime resources become more or less important with changes in their utility and value, advances in exploitative capabilities, and the emergence of new problems (emerging environmental or resource-depletion concerns, piracy, international terrorism, etc.). Changes in political factors (like the formation or fragmentation of states) also add to legal instability with respect to maritime boundaries. Finally, as David Caron points out in the first essay in the volume under review, global warming has the potential for dramatically adding to the uncertainty of maritime boundary delimitation, as coastal and insular configurations undergo significant

3. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, U.N. Doc. A/CONF.62/112, *reprinted in* I.L.M. 1261 (1982) [hereinafter UNCLOS]. *See generally* Philip Allott, *Power Sharing in the Law of the Sea*, 77 AM. J. INT'L L. 1 (1983) (viewing the UNCLOS from broad political and jurisprudential perspectives).

alteration due to rising sea levels.⁴ So, along with a workable set of substantive rules for the delimitation of maritime boundaries that provide a framework for negotiations and judicial or arbitral application if necessary, an orderly, accepted process, or processes, for the settlement of maritime boundary disputes is also essential.

Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea provides a useful snapshot of current issues in maritime delimitation law and practice, focusing attention as it does on interrelated doctrinal, procedural, and factual problems. It begins by providing an overview of current and future maritime boundary delimitation problems and principles in provocative essays by David Caron on the instability of oceanic boundaries⁵ and Clive Schofield on the problem of islands and rocks in maritime boundary delimitation.⁶ Legal concepts like natural prolongation, equitable principles, and equidistance are explored in Masahiro Miyoshi's perceptive essay entitled "Some Thoughts on Maritime Boundary Delimitation," in which he rightly points out that the jurisprudence of maritime boundary delimitation attributes primary importance to geographic factors, often disregarding relevant economic factors, sea-bed configurations, and other circumstances.⁷ Most of the other essays in the book deal in detail with specific maritime boundary delimitation problems, although some focus their attention on the process

4. David D. Caron, *Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict*, in *MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA* 1-17 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009). Other recent books on maritime boundary delimitation are NUNO MARQUES ANTUNES, *TOWARDS THE CONCEPTUALISATION OF MARITIME DELIMITATION* (2003) and *MARITIME DELIMITATION* (Rainier Lagoni & Daniel Vignes eds., 2006). See also MARIA GAVOUNELI, *FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA* (2007).

5. Caron, *supra* note 4.

6. Clive Schofield, *The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation*, in *MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA* 19-37 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009).

7. Masahiro Miyoshi, *Some Thoughts on Maritime Boundary Delimitation*, in *MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA* 107 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009). See also Edward Collins, Jr. & Martin A. Rogoff, *The International Law of Maritime Boundary Delimitation*, 34 *MAINE L. REV.* 1 61-62 (1982) (maintaining that "[P]rimacy must be accorded to geographic factors in delimiting maritime boundaries. . . . Nongeographic considerations, such as geological formations and economic use or dependency, pay a subsidiary role in maritime boundary delimitation. Such factors allow for minor variances from a line determined solely by reference to geographic factors only in exceptional situations.")

of dispute settlement⁸ or on mechanisms for cooperation in exploiting and managing boundary-area resources.⁹

David Caron's essay on the problem posed by uncertain boundaries caused by rising sea levels, which are brought about by global warming, suggests "avenues, both normative and institutional, whereby this uncertainty and conflict may be avoided or mitigated."¹⁰ He argues that "states should move toward permanently fixing ocean boundaries and away from the current regime of ambulatory boundaries"¹¹ To do this, he recommends that maritime boundaries should be fixed on the basis of presently-accepted baselines.¹² He maintains that this "would be wise because it promotes stability in boundaries, be fair because it preserves the present allocation of authority over the oceans, and be efficient because it avoids the costs of adjustment while facilitating adaptation to climate change."¹³

The next essay in the volume, by Clive Schofield, considers the legal role of islands and rocks in maritime boundary delimitation.¹⁴ Schofield points out that "islands,' in an identical fashion to mainland coasts, are capable of generating a full suite of maritime zones"¹⁵ UNCLOS, however, does not define "island" in terms of size and habitability, except by negative implication from Article 121(3), which provides: "Rocks which cannot sustain human habitation or economic life of their

8. See, e.g., Ji Guoxing, *Sino-Japanese Jurisdictional Delimitation in East China Sea: Approaches to Dispute Settlement*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 77-105 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009); Helmut Tuerk, *The Contribution of the International Tribunal for the Law of the Sea to International Law*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 253-275 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009); Bernard H. Oxman, *The Tomimaru Case: Confiscation and Prompt Release*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 277-286 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009).

9. Richard J. McLaughlin, *Maritime Boundary Delimitation and Cooperative Management of Transboundary Hydrocarbons in the Ultra-Deepwaters of the Gulf of Mexico*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 199-230 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009).

10. Caron, *supra* note 4, at 1. "Even a modest rise in sea level will be significant for ocean boundaries because . . . those boundaries are generated from baselines that are often tied to rather insubstantial geographic features that will be among the first inundated by a rising sea level." *Id.* at 9.

11. *Id.* at 14.

12. *Id.* at 17.

13. *Id.*

14. Schofield, *supra* note 6, at 19-37.

15. *Id.* at 21 (citing UNCLOS, *supra* note 3, art. 121).

own shall have no exclusive economic zone or continental shelf.”¹⁶ Schofield maintains that “the regime of islands was drafted in an intentionally vague and ambiguous fashion.”¹⁷ Although states negotiating maritime boundary agreements and international tribunals deciding maritime boundary delimitation cases have often found ways to fairly deal with the problems posed by islands and rocks,¹⁸ islands and rocks are still a major source of conflict. Schofield’s point is amply demonstrated by several of the essays in this volume, which provide detailed descriptions of the problems caused by islands in maritime boundary delimitations in Asia.¹⁹ A particularly illustrative case study, which provides a detailed look at the interaction between doctrine and factual circumstances, is Yann-huei Song’s lengthy essay entitled “Okinotorishima: A ‘Rock’ or an ‘Island’? Recent Maritime Boundary Controversy between Japan and Taiwan/China.”²⁰

Boundary delimitation problems in other parts of the world are not neglected. Ted McDorman describes U.S.-Canadian disputes and cooperation in the North Pacific;²¹ Richard J. McLaughlin considers

16. UNCLOS, *supra* note 3, art. 121(3)

17. Schofield, *supra* note 6, at 27.

18. *Id.* at 31-36 (describing such techniques as enclaving islands and giving reduced effect to islands in equidistance delimitations).

19. See Jon M. Van Dyke, *Disputes Over Islands and Maritime Boundaries in East Asia*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 39-75 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009); Seokwoo Lee, *Intertemporal Law, Recent Judgments and Territorial Disputes in Asia*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 119-136 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009); Kentaro Serita, *Some Legal Aspects of Territorial Disputes over Inlands*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 137-144 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009) (dealing with the maritime boundary dispute between Japan and Korea regarding continental shelf and sea areas adjacent to Korean territory occasioned by disputed sovereignty over certain rocky islets); Yann-huei Song, *Okinotorishima: A “Rock” or an “Island”?* Recent Maritime Boundary Controversy between Japan and Taiwan/China, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 145-176 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009).

20. Yann-huei Song, *supra* note 19.

21. Ted L. McDorman, *Canada-U.S. International Ocean Relations in the North Pacific: Disputes, Agreements and Cooperation*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA, 177-197 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009).

U.S.-Mexican boundary-area cooperation in the Gulf of Mexico;²² and Marcus Howard discusses maritime boundary issues in the Antarctic.²³

Given the contemporary importance of maritime boundary delimitation and the rapidly evolving nature of the legal problems it poses (doctrinal, procedural, and factual), the up-to-date survey of these interrelated issues provided by the essays in *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* is a most welcome contribution to the literature of maritime boundary delimitation.

22. McLaughlin, *supra* note 9.

23. Marcus Howard, *The Law of the Sea Convention and the Antarctic Treaty System: Constraints or Complementarity*, in *MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA* 231-251 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009).