

ASEAN Regional Forum

Regional Confidence Building and the Law of the Sea

Session 1: International Legal Regime
for Disputed Maritime Areas

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Global Challenge in Resolving Maritime Boundaries

- The UN Convention on the Law of the Sea clarified and enunciated international law with respect to maritime entitlements of coastal States.
- 200 nautical mile Exclusive Economic Zones and continental shelf (which may include extended continental shelf beyond 200 nm) resulted in many ocean areas where coastal States have overlapping maritime entitlements.

2015 Jakarta Workshop

- In August, under the auspices of the Expanded ASEAN Maritime Forum, the Asia Foundation and the Indonesia Centre for Strategic and International Studies co-hosted a two-day workshop on “International Law and Best Practices for Maritime Boundary Delimitations”.
- 51 Participants and observers from ASEAN and East Asia Summit States attended.
- A dozen experts in international law and relevant technical disciplines served as faculty at the workshop.

Maritime Boundaries: When and Where

- Maritime boundaries arise when the maritime entitlements of two States overlap:
 - Where States have opposing coasts
 - Where States have adjacent coasts
- Among ASEAN and EAMF partners, every State with a coastline has one or more un-delimited maritime boundaries yet to be negotiated with one or more neighboring coastal States.

Advantages of Resolving Maritime Boundaries

- Clarity and certainty (“good fences make good neighbors”)
- Reduces risks of inter-State conflict
- Clear authorities and responsibilities promote sustainable management and protection of the oceans

Maritime Boundary Delimitation and the UN Convention on the Law of the Sea

- **Territorial Sea** (Art. 15): Delimitation of the territorial sea for states with opposite or adjacent coasts:
 - Failing agreement to the contrary, States do not have right to extend territorial sea beyond an equidistant median line
 - Exception for historic title or other special circumstances
- **EEZ and Continental Shelf** (Arts 74 and 83):
 - (1) Effected by agreement on the basis of international law “in order to achieve an **equitable solution**”
 - (2) If no agreement in reasonable time, states shall resort to Part XV (subject to possible Art. 298(1)(a)(i) declaration)
 - (3) Pending agreement, states shall make every effort to enter into provisional arrangements of a practical nature and during this time not jeopardize the reaching of the final agreement

What is Necessary for States to Effect a Delimitation by Agreement?

- **Technical skills** to determine the scope of the underlying maritime entitlements (e.g., identifying coastal baselines) and to apply those to a maritime boundary delimitation
- **Legal knowledge** to understand the relevant factors and considerations comprising an “equitable solution”
- **Creativity and political will** to identify what may be acceptable to the other country and to “sell” that package domestically

The “Building Blocks”

- One workshop session examined the building blocks for maritime boundary delimitations:
 - Issues related to drawing coastal baselines generally and determining relevant baselines for delimitation (Dr. Ir Sobar Sustina)
 - Maritime entitlements of islands, including “rocks,” and low tide elevations under the law of the sea (Art. 121)
 - Small islands in proximity to littoral states (Dr. Clive Schofield)

Legal Principles to Evaluate What is an “Equitable Solution”?

- In the first instance, countries are expected to attempt to negotiate their maritime boundaries in order to enable them to determine for themselves what is an equitable solution.
- So long as the interests of third parties are not harmed, States have broad latitude to decide that.
- Legal principles for determining an “equitable solution” in the absence of agreement have developed in decisions by courts and arbitral tribunals, most notably the International Court of Justice.

The Three Step Method: The Black Sea Case

In 2009, the International Court of Justice, building on prior judicial precedent, articulated a three step method for determining a single maritime boundary delimiting the continental shelf and exclusive economic zones between Romania and Ukraine in the Black Sea. (Ashley Roach, Lawrence Martin and Dr. Nguyen Thi Lan Anh)

Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 61

Step 1: Provisional Delimitation Line

- “**First**, the Court will **establish a provisional delimitation line**, using methods that are geometrically objective and also appropriate for the geography of the area. . . .
- So far as delimitation between **adjacent coasts** is concerned, an **equidistance line** will be drawn unless there are compelling reasons that make this unfeasible in the particular case. . . . So far as **opposite coasts** are concerned, the provisional delimitation line will consist of a **median line** between the two coasts. (para. 116)
- Note that this step also has a technical dimension as it involves determining/choosing “relevant” coastal base points that reflect the general direction of the coastline.

Step 2: Adjust, if Necessary, to Take into Account Relevant Circumstances

- “[T]he Court will at the next, second stage consider whether there are **factors calling for the adjustment or shifting of the provisional equidistance/median line** in order to achieve an equitable result.” (para. 120)
- Such relevant factors may lead to the adjustment of the provisional equidistant/median line.
- Note that in caselaw, these factors relate largely to coastal geography, such as the configuration of the opposite or adjacent coasts or the effect of islands and other marine features (and their location) on the drawing of the equidistant line.

Step 3: Adjust, if Necessary, to Avoid a Disproportionate Result

- At the third step, the Court “will verify that the line (a provisional equidistant line which may or may not have been adjusted by taking into account relevant circumstances) does not, as it stands lead to an “inequitable result” by reason of any marked disproportion between the ratio between the relevant maritime area of each State by reference to the delimitation line.”

(Paras. 122, 210-216)

Application of Three-Step Method in *Black Sea Case* and in *Nicaragua v. Colombia*

Workshop Session 3 examined the application of three-part test in the Black Sea Case and the ICJ's 2012 decision in *Nicaragua v. Colombia*

- As Colombia was not a party to UNCLOS, the ICJ determined that the relevant law for the case was customary international law. The parties agreed that articles 74 and 83 on delimitation of maritime boundaries and the regime of islands in article 121 “are to be considered declaratory of customary international law.” (para 138) See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p. 91.*
- *Nicaragua v. Colombia* raised the interesting question of how the three-step methodology would apply in the context of relatively small islands situated opposite and proximate to a relatively larger coastal State.

Ways in Which States Resolve their Maritime Boundaries

- Predominant method is through negotiation of an international agreement to delimit the maritime boundary.
 - Assumption that diplomatic process is the best initial path to find solutions to questions of bilateral concern
 - This gives maximum flexibility for States to determine for themselves what constitutes an “equitable solution”
- If diplomacy does not succeed, states have also resolved boundaries through third-party dispute resolution.

Lessons Learned from Case Law

- Decisions and development of a common methodology have helped foster more common understanding of what might constitute an “equitable solution” in helping coastal States determine their national negotiating positions and to determine what would be the reasonable expectations of their potential treaty partners.
- This also means that there is a measure for determining if a State is articulating an extreme negotiating position that would not have a sound basis under international law.

Session on Articles 74(3) and 83(3)

- Professor Mariko Kawano led a Workshop session on “Interpreting and Implementing UNCLOS’s Articles 74(3) and 83(3)” discussing the obligations in these articles “to make every effort to enter into provisional arrangements of a practical nature and . . . not to jeopardize or hamper the reaching of the final agreement” on delimitation.
- “Provisional arrangements of a practical nature” is a very broad category of undertakings and arrangements, varying in greatly in content, formality and scope depending on circumstances.
- Discussion included the negotiating history of the Convention, a 2007 UNCLOS Annex VII arbitral decision in *Guyana v. Suriname*, and practical examples of provisional arrangements.

Moving from Law and Theory to Practice

- Two sessions on the second day discussed practical experiences confronting governments as they deal with un-delimited maritime boundaries:
 - Dr. Robert Beckman and Dr. Xue Guifang discussed when and how states may enter into negotiations, third party dispute settlement and provisional arrangements of a practical nature; and
 - Another session discussed how governments can apply “a whole of government” approach to resolving maritime boundary disputes, developing in-house necessary legal/technical skills within a government team and coordinating among affected ministries.

Case Study: Indonesia- Philippines Maritime Boundary

- A Workshop highlight was a presentation by Mr. Gilberto Asuque and Dr. Arif Havas Oegroseno on the process that led to the successful negotiation of the Philippines-Indonesia maritime boundary in the Celebes Sea.
- Many lessons learned, including the importance of:
 - technical and legal training (especially for junior officers) and applying these disciplines to the negotiating process;
 - development by both negotiating teams of a common understanding and acceptance of relevant international law;
 - understanding and taking into account what the other country would reasonably consider to be an “equitable solution”; and
 - mutual respect and good neighborliness: “We attack the problem, but we do not attack each other.”



Workshop Conclusions

1. All maritime boundary delimitations happen in the context of legal rules. For delimiting overlapping EEZ and continental shelf, the key is to reach an agreement on the basis of international law to achieve an “equitable solution.”
2. Parties in negotiating boundaries have broad discretion to determine what is equitable for them, informed by the relevant international legal principles.
3. While there are advantages to negotiation of international boundary agreements, where diplomacy is unavailing, third-party dispute settlement can provide advantages in solving the problem.
4. In all the case studies discussed, whether involving negotiations, adjudication or other processes, the importance of making reasonable claims grounded in international law was emphasized.



Workshop Conclusions

5. International law also provides rules governing states' activity pending delimitation of a maritime boundary, as reflected in UNCLOS Articles 15, 74(3) and 83(3).
6. Complex, multi-year government-to-government negotiations require building a team with multi-disciplinary skills, involving training of junior officers, who may one day take leadership positions.
7. Because of these many needed skills, increased capacity building, especially for smaller or less developed countries, is essential.
8. There are benefits to greater transparency and information sharing.
9. More discussion is needed, including additional training involving case studies of application of three-step methodology, and including support for existing legal and technical training mechanisms.
10. Future work could also look more closely at Arts. 74(3) and 83(3).

Next Steps

- Workshop an example of useful work done in ARF/EAMF format, on discussions of both substantive issues and in capacity building
- We look forward to having a follow-up Workshop in 2016 at a time and venue to be determined
- Would love to hear ideas for topics, mindful of the importance of complementing existing valuable training provided within the region (notably the National University of Singapore's Centre for International Law)