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INTERNATIONAL TRIBUNALS APPROACH TOWARDS MARITIME BOUNDARIES DELIMITATION OF AN ARCHIPELAGIC STATE

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Abstract

One of the most prominent features of the United Nations Convention on the Law of the Sea (UNCLOS) is the recognition of the archipelagic State concept, embodied under Part IV of the Convention. Since the entry into force of the Convention, more than 20 countries have claimed archipelagic State status, all of which are developing countries. Despite the considerable number of archipelagic States and a universal recognition of the concept, judicial jurisprudence remains very limited, if not non-existent, with respect to practices of archipelagic States pertaining to maritime boundaries delimitation. Up to the writing of this abstract, only two maritime boundary delimitation cases involving an archipelagic State were presented before an adjudication tribunal, namely the 2006 Barbados/Trinidad and Tobago Arbitration and the 2023 Mauritius/Maldives Delimitation of the Maritime Boundary in the Indian Ocean. This paper aims to review and analyze, in spite of the limited jurisprudence, how tribunals interpret and apply the provisions of maritime boundary delimitation to an archipelagic State. Mindful of such limitations, this paper does not aim to provide a conclusive review of today’s state of archipelagic State concept. It views the limited jurisprudence as evidence that issues pertaining to maritime boundary delimitation of an archipelagic State are largely unexplored and require further sanctioning through State practices and through judicial decisions.

Keywords: maritime boundaries, archipelagic State, jurisprudence

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I. INTRODUCTION

Among the numerous cases adjudicated before international tribunals, maritime boundary delimitation appears to fall under the ‘popular’ category. 16 maritime boundary delimitation cases have been settled in the International Court of Justice (ICJ) alone.¹ Meanwhile, three cases of maritime boundary delimitation were settled before the International Tribunal for the Law of the

¹ As of the writing of this paper, the most recent judgment of the International Court of Justice is the Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), 13 July 2023. Based on the data as of July 2023, two maritime delimitation cases remain pending before the Court.
Additionally, six maritime delimitation cases were adjudicated under the purview of the Permanent Court of Arbitration as the registry.

Maritime boundary delimitation settlement before international tribunals continues to proliferate. A number of factors can be considered behind the proliferation of maritime boundary cases through third party dispute settlement mechanisms. One of the most relevant factors could be the urgency of not prolonging the maritime boundary negotiation coupled with the jurisdictional possibility, thus the recourse to an international tribunal.

Regardless of the motivation behind a state’s decision to bring the maritime boundary negotiation to a tribunal, these cases gave international tribunals the opportunity to provide clarification, to determine, and to some extent, develop the rule on maritime boundary delimitation.

Since the formal recognition of the archipelagic State concept through its incorporation into Part IV of the United Nations Convention on the Law of the Sea (UNCLOS), 22 countries have thus far claimed archipelagic State status.

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4 Since the turn of the 21st Century, 8 cases have been settled at the International Court of Justice alone and three at the International Tribunal for the Law of the Sea.
5 In Southeast Asia region, no adjudication of maritime boundary dispute has ever been brought to an international tribunal. Loretta Malintoppi highlights the attitude of Southeast Asian countries toward third-party dispute settlement on maritime and sovereignty disputes as “diminishing reluctance” based on the cases involving Southeast Asian states such as the Temple of Preah Vihear, Ligitan/Sipadan, and Pedra Branca cases. None of them, however, concerns maritime boundary delimitation. See Loretta Malintoppi, “Trends and Perspectives of Settlement of Law of the Sea Disputes in Southeast Asia,” Proceedings of the Annual Meeting (American Society of International Law) 107 (2013): 56-60, doi: https://doi.org/10.5305/procanmeetasil.107.0056.
6 Most of maritime boundaries dispute settlement cases before the International Court of Justice are brought to the Court through statutory jurisdictions. While cases submitted through Special Agreement are: 1969 North Sea Continental Shelf Cases, 1984 Gulf of Maine, 1985 Libya/Malta Continental Shelf, and 1992 El Salvador/Honduras Land, Island, and Maritime Frontier Dispute. The fact that since 1992 no cases were brought before the International Court of Justice under Special Agreement suggests the preference of States to settle their delimitation matters at the Court through negotiation unless a statutory jurisdiction permits. While it is interesting to note that all maritime boundaries delimitation disputes (2012 Bay of Bengal Case (Bangladesh/Myanmar), 2017 Maritime Boundary Delimitation in the Atlantic Ocean (Ghana/Côte d’Ivoire), and 2023 Maritime Boundary Delimitation in the Indian Ocean (Mauritius/Maldives) before the International Tribunal for the Law of the Sea (ITLOS) were brought through Special Agreement.
Among these countries, Indonesia is the most prolific archipelagic State in concluding maritime boundary treaties with its neighbors. Until July 2023, Indonesia has concluded 21 maritime boundary agreements.  

Although not as prolific as Indonesia, other archipelagic States in the Pacific, Indian, and Caribbean regions have also concluded maritime boundaries agreements with their respective neighbors. Therefore, there are ample examples of archipelagic States’ practices that could be evaluated in terms of the method of delimitation they employed to conclude their maritime boundaries negotiations.  

Nonetheless, despite the sufficient examples of archipelagic States’ practices that could be evaluated, data with regards to the negotiation history are not always available to the public. Maritime boundary agreements usually display the agreed boundary line without reference to each country’s baseline projection. While it may be technically possible to assess whether a maritime boundary involving an archipelagic State is drawn from the projection of the archipelagic baseline, one cannot reach a definitive conclusion unless they have access to the record(s) of discussion.  

While such data is not available to the public yet, Indonesia’s maritime boundary negotiators seem to put forward the premise that as an archipelagic State, Indonesia “warrants a particular treatment in maritime boundary delimitation by using base points on archipelagic straight baselines”. In the recently concluded agreements with Malaysia and Vietnam respectively in the segments of the Strait of Malacca and the South China Sea, the boundary lines...
are constructed through Indonesian archipelagic baselines. Further studies with respect to the negotiation stance of other archipelagic States are needed.

In comparison to the maritime boundary agreements reached through negotiations, only two maritime boundary delimitation cases involving an archipelagic State were settled before an international tribunal to date. The first case was the 2006 Barbados and the Republic of Trinidad and Tobago Arbitral Tribunal and the second case was the 2023 Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean.

This paper attempts to review and analyze the approach taken by the respective tribunals dealing with maritime boundary delimitation of an archipelagic State, in view of the sui generis status of an archipelagic State under UNCLOS. The research in composing this paper is conducted through literature reviews, judgments reviews, and one expert interview. Bearing in mind the limited jurisprudence with regards to the issue at hand, this paper does not attempt to provide a conclusive review of today’s state of an archipelagic State concept based on the judicial decisions alone. Instead, the limited jurisprudence may provide an archipelagic State the opportunity to develop their own maritime boundary delimitation method that is in line with the unique characteristics of an archipelagic State.

II. THE RULES OF MARITIME BOUNDARIES DELIMITATION

A. BRIEF LEGISLATIVE HISTORY ON DELIMITATION PROVISIONS

The delimitation of maritime boundaries is governed under three international treaties. Two international treaties concluded prior to the UNCLOS era contained provisions regarding the delimitation of the territorial sea and continental shelf. In addition to the territorial sea and continental shelf, UNCLOS also governs the delimitation of the Exclusive Economic Zone boundary.

The 1958 Territorial Sea and Contiguous Zone Convention stipulates under Article 12 the delimitation rule on the territorial sea boundary as follows:

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“Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median 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.”

However, the article provides an exception to the median line rule, where such necessity exists based on historic title or other special circumstances. The legislative history of Article 12 of the 1958 Territorial Sea Convention suggests that the work on composing a delimitation rule began at the 1930 Codification Conference to delimit boundary between opposing States in a strait.

During the negotiation of UNCLOS, two groups emerged. One group preferred the use of equidistance method or median line, while the other emphasized on mutual agreement based on equitable principles. Unfortunately, the Third Law of the Sea Conference was unable to reconcile the differences among these groups and Article 15 of UNCLOS ended up being identical to Article 12 on Territorial Sea Convention. This result led the President of the Conference to release a statement blaming the inability of the Conference in finding a formula that would have narrowed the differences between these groups.

The delimitation rule on the continental shelf boundary can be found in UNCLOS and the 1958 Continental Shelf Convention. The delimitation provision under the 1958 Convention starts with the phrase “where the same continental shelf”, reflective of the predominant “natural prolongation” theory under this Convention. The provision of Article 6 of the 1958 Convention requires States to reach an agreement in the pursuit of delimiting their maritime boundary. Failing to reach an agreement, the Convention requires the States to delimit based on the median line or the equidistance principle, unless special circumstances justify otherwise.

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13 Ibid.
15 Ibid., 135.
16 Ibid., 139.
18 Ibid.
Unlike the 1958 Continental Shelf Convention, UNCLOS does not make an explicit reference to the use of median line or equidistance principle in the delimitation of the continental shelf boundary. UNCLOS provides the following rule:

“The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”\(^{19}\)

Two factors may be taken into account that influenced the negotiation of the provision concerning continental shelf boundary delimitation, namely the 1969 Continental Shelf Cases and the development of technology that made the exploration and exploitation of the sea bed resources more accessible.\(^{20}\) Similar to the negotiation process on the territorial sea boundary, two different approaches advocating different positions emerged in the negotiation on the provision of continental shelf boundary. One approach emphasized on the drawing of a median or equidistance line with a consideration for special circumstances, while another approach would put more emphasis on the equitable principle.\(^{21}\)

The proponents of the use of median/equidistance line were almost equally distributed with the proponents of the equitable principle.\(^{22}\) A proposal submitted by Turkey in the second session of the Conference in 1974 placed importance on the determination of continental shelf boundary through equitable principles whilst taking into account all relevant factors, including the geomorphological and geological structure of the continental shelf. Furthermore, Turkey’s proposal includes references toward the application of special circumstances such as the general configuration of the coasts, existence of islands, and islets.\(^{23}\) However, proposals emphasizing the use of median line emerged, such as a proposal submitted by Greece, and contained a language similar to the provision on the delimitation of territorial sea, which did not allow States to seek entitlement beyond the median line failing agreement.

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21 Ibid., 954.
22 Ibid., 964.
23 Ibid., 955 – 956.
between them.\textsuperscript{24} The President of the Conference described this situation that occurred in 1977 as impossible to “devise a formula which would narrow the differences between the opposing points of view.”\textsuperscript{25}

A compromise that resulted in the current formulation of Article 83 paragraph 1 UNCLOS was achieved only upon the active participation of the newly appointed President of the Conference, Tommy B. Koh, who directly negotiated with Ireland and Spain, each representing the respective group’s approach. The President proposed a paragraph stipulating that delimitation shall takes place, with reference to article 38 of the ICJ Statute, on the basis of international law in order to achieve an equitable solution.\textsuperscript{26}

The Exclusive Economic Zone, being \textit{sui generis}, is the only maritime zone without any reference to earlier international treaties. The delimitation provision of the Exclusive Economic Zone, incorporated under Article 74 of UNCLOS, is identical to the continental shelf boundary delimitation provision.

Similarly, the deliberation on the provision involved the opposing poles of equidistance and equitable principles.\textsuperscript{27} As an example, Kenya and Tunisia proposed an equitable dividing line approach while at the same time noting that median line is not the only method of delimitation.\textsuperscript{28} On the other hand, Romania proposed an equitable principle, taking into account geographical and geological circumstances.\textsuperscript{29} The Virginia Commentary suggests that the determining factor for the different positions in the negotiation of the boundary rule for the Exclusive Economic Zone was rather the concerns of States over the delimitation of the continental shelf.\textsuperscript{30}

Over the course of the negotiations, as evidenced in the discussion surrounding the Informal Single Negotiating Text/Part II and the Revised Single Negotiating Text\textsuperscript{31}, reconciling these opposing views was impossible.

\textsuperscript{24} Ibid., 956.
\textsuperscript{25} Ibid., 964.
\textsuperscript{26} Ibid., 980.
\textsuperscript{27} Ibid., 803.
\textsuperscript{30} Nordquist, et.al., \textit{United Nations Convention…}, 801.
\textsuperscript{31} The ISNT suggested that the agreement between States shall be affected by equitable principles using the equidistance line while taking into account relevant circumstances. Should no
Just like the case of the text regarding the continental shelf boundary, Article 74 in its current form is a compromised text submitted by the President of the Conference.\textsuperscript{32}

An innovative provision with respect to the delimitation of the Exclusive Economic Zone and the continental shelf lies in the obligation of States, pending the final delimitation agreement, to enter into provisional arrangements and not to jeopardize the reaching of the final agreement.\textsuperscript{33} As pointed out in the Virginia Commentary, the two elements in this provision aim to promote certain interim measures and limit the activities in the disputed waters. Activities that would not prejudice the outcome of the negotiation remain allowed to be conducted by the States concerned.\textsuperscript{34} The Tribunal in the Guyana v. Suriname Arbitration Case provides a classification of activities allowed in the overlapping zone. According to the Tribunal, activities in the overlapping maritime area that do not cause physical change to the marine environment would not need other party’s permission and thus could be conducted unilaterally without prejudice to the rights of the other party.\textsuperscript{35}

The formulation of these provisions indicates that in spite of the unilateral nature of delineating the outer limits of the coastal State’s Exclusive Economic Zone or continental shelf, States should be ready and negotiate with each other when the unilateral claims overlap.\textsuperscript{36} In a sense, the end-product of the negotiations on the provisions concerning the delimitation of Exclusive Economic Zone and continental shelf reaffirms the fundamental principle pointed out by the International Court of Justice in the North Sea Continental Shelf Cases that negotiations underlies all international relations.\textsuperscript{37}

B. BASELINES AND BASEPOINTS

The designation of basepoints and baselines play a crucial role in the determination of a State’s maritime zone’s outer limit and in the boundary delimitation. In the 2012 Final Report on Baselines under the International Law of the Sea, the International Law Association highlighted three significant roles of baselines. First, in dividing land territory from the territorial sea. Second, in measuring the outer limits of the territorial sea, contiguous zone, agreement be reached, the countries shall not extend their Zone beyond the median/equidistance line. This formula was later incorporated into the RSNT.

\textsuperscript{32} Nordquist, et.al., \textit{United Nations Convention}…, 813.
\textsuperscript{33} UNCLOS, art. 74/83, para. 3.
\textsuperscript{34} Nordquist, et.al., \textit{United Nations Convention}…, 815.
\textsuperscript{35} Arbitral Tribunal Constituted Pursuant to Article 287 UNCLOS between Guyana and Suriname, Permanent Court of Arbitration, 2007, paras. 466-470.
\textsuperscript{36} Myron Nordquist, et.al., \textit{United Nations Convention}…, 813.
\textsuperscript{37} North Sea Continental Shelf, Judgment, ICJ Reports 1969, 48.
Exclusive Economic Zone, and continental shelf. Third, as a starting point to determine maritime areas subject of overlapping claims.38

The elucidation of the three roles of the baselines by the International Law Association coincides with the United Nations’ observation, published in 2000, that various case laws and State practices indicate that the basepoints for delimiting maritime zones do not necessarily have to coincide with the basepoints and straight baselines.39

UNCLOS regulates three types of baselines: normal baseline, straight baseline, and archipelagic baseline.40 The application of a normal baseline follows the low-water line along the coast.41 The Convention itself does not provide a definition of the low-water line. In this regard, The Handbook on the Delimitation of Maritime Boundaries offers a useful indication to the definition of the low-water line as an intersection of the plane of low water with the shore. In practice, it will be close to the lowest tidal level.42 This definition is identical to the International Hydrographic Conference resolution referred to by the UN Secretary General in 1981.43

The straight baseline is an exception to the normal baseline. For a State to be allowed to draw a straight baseline, the coastline shall be deeply indented and cut into, or if there lies a fringe of islands along the coast of the State, lying in its immediate vicinity.44 Additionally, a coastal State must not draw a straight baseline that departs from the general direction of the coast45 and shall, in principle, not draw it to and from low-tide elevations.46 However, it seems that not all countries adhere to this rule. Observations on the application of straight baselines by coastal States have been conducted by various academics and governments, most notably in the Excessive Maritime Claims publications by Ashley Roach and the Limits in the Seas publications of the United States Department of State. The variations of violation of the straight baseline rule range from the excessive length of the baseline and excessive inclusion of

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40 Other than baselines, UNCLOS also regulates “closing lines” to be applied to close mouths of rivers (art. 9) and bays (art. 10) which also serve as baselines.
41 UNCLOS, art. 5.
42 North Sea Continental Shelf, Judgment, ICJ Reports 1969, 4.
43 Nordquist, et.al., United Nations Convention…, 89.
44 UNCLOS, art. 7, para. 1.
45 Ibid., art. 7, para. 3.
46 Ibid., art. 7, para. 4.
internal waters to the designation of basepoints far away from the mainland.47

As the archipelagic State concept was recognized in the Third Law of the Sea Conference, a formula was devised to define what constitutes an archipelagic State. An archipelagic baseline connecting the outermost points of the outermost islands may be drawn by an archipelagic State that fulfills the water to land ratio of 1:1 and 9:1.48 Unlike the provision on straight baselines, a limit of 100 nautical miles length is imposed upon the archipelagic baselines with an exception of up to 3 per cent of the total number of baselines enclosing the archipelago that may reach up to 125 nautical miles of length.49 Identical provisions appear in this article to the provision on straight baseline, namely that the baseline shall not depart from the general direction of the archipelago and that it shall not be drawn to and from low-tide elevations.50 The rules regulating archipelagic baselines are thus more restrictive and objective compared to the rule on straight baselines. In practice, archipelagic States combine the use of normal baselines, straight baseline, and archipelagic baselines to enclose their archipelagos. Indonesia, as an example, under its 2002 Baseline Regulation, includes 29 normal baselines within the Indonesian archipelagic baseline system.51

A distinct feature of Part IV of UNCLOS on Archipelagic State is the explicit requirement under Article 48 to measure territorial sea, contiguous zone, the Exclusive Economic Zone and the continental shelf from the archipelagic baselines.52

The construction of Articles 5, 7, and 47 of UNCLOS suggests that while a straight baseline is an exception to a normal baseline, it is not the case with the application of archipelagic baseline. The Virginia Commentary mentions other methods to determine baselines besides the low-water line without including archipelagic baseline. Instead, the Virginia Commentary emphasizes the particularity of archipelagic baselines. 53

48 UNCLOS, art. 47, para. 1.
49 Ibid., art. 47, para. 2.
50 Ibid., art. 47, paras. 3 and 4.
52 UNCLOS, art. 48.
53 Nordquist, et.al., United Nations Convention…., 89.
A peculiar fact of UNCLOS is that no reference toward basepoints can be found in the Convention despite the fact that, in practice, the determination of basepoints plays a very important role in the delimitation process. The Handbook on the Delimitation of Maritime Boundaries once again provides a clue through its simple definition that any point on the baseline is a basepoint.\(^{54}\)

Without reference toward basepoints in UNCLOS, one needs to find solace in the wisdom of international judges when determining the question of maritime boundaries delimitation. Needless to say, at least in the International Court of Justice, the discussion concerning basepoints only first emerged in the Gulf of Maine Case. The Chamber, for example, identifies the potential disadvantages if a basepoint is put on tiny islands, uninhabited rocks or low-tide elevations, unless these features possess some degree of importance.\(^{55}\) Unfortunately, subsequent international tribunal judgments after the Gulf of Maine Case so far fail to provide a detailed method for determining basepoint. The primary picture that can be drawn from the judgments is that a tribunal is not bound to use the basepoints proposed by the disputing parties. The lack of clarity and explanation on the appointed basepoints by the Court and tribunals lead to the criticism that the selection of basepoints by the Court or tribunals lacks sufficient objectivity.\(^{56}\)

C. THE ROLE OF THE TRIBUNALS

In light of the debate surrounding the method of delimitation of the Territorial Sea, Exclusive Economic Zone, and continental shelf which resulted into compromised texts that promote equitableness, States are left with the problem to put the equitable criteria into practice. What seems to be equitable for Country A will likely not fall within the spectrum of equitableness for Country B. Thus, as Charney correctly observed, the principles and relevant circumstances are indeterminate and theoretically unlimited.\(^{57}\)

In the history of international adjudication on maritime boundary delimitation, international tribunals have had their share in finding equitable solution. In the 1909 Grisbadarna Case between Sweden and Norway, without explicitly mentioning equitable principles, the arbitral tribunal considered lobster fishing in the shoals of Grisbadarna and the historic rights of Sweden

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\(^{56}\) Maritime Boundary Arbitration between Barbados and the Republic of Trinidad and Tobago, Award, Permanent Court of Arbitration (Arbitral Tribunal Constituted Pursuant to Annex VII UNCLOS).

in the area to determine the maritime boundary.\textsuperscript{58}

In the Tunisia/Libya Continental Shelf Case, the Court states that assessing the equitableness principle must be conducted in the light of its usefulness to arrive at an equitable result.\textsuperscript{59} The Court later reiterated in the Libya/Malta Continental Shelf Case that in the pursuit of equitableness, the goal, and not the means, must be the principle element.\textsuperscript{60} In achieving this equitableness, the Court suggests that it should display consistency and a degree of predictability.\textsuperscript{61} In this regard, equitable principles should include: (i) no question of refashioning geography, (ii) no compensation for the inequalities of nature, and (iii) non-encroachment by one party on the natural prolongation of the other.\textsuperscript{62}

The general configuration of the coast, the physical and geological structure of the continental shelf, and the element of a reasonable degree of proportionality are further criteria of equitableness expressed by the Court in its earlier judgment of the North Sea Continental Shelf Cases.\textsuperscript{63} Nonetheless, no exhaustive list of equitableness criteria has been set up thus far by any international tribunal.

In spite of the difficulty in determining the equitableness of maritime delimitation, international tribunals uphold the value that a delimitation line should be objectively determined. The drawing of a provisional median line, in this regard, is a method consistently employed by international tribunals. As exemplified in the pre-2000 maritime delimitation cases of, to name a few, Gulf of Maine, Jan Mayen, and Libya/Malta, the Court designated a provisional median line prior to adjusting it based on special circumstances.\textsuperscript{64}

In 2009, the International Court of Justice introduced the three-step method of delimitation in the Black Sea Case. The three-step method comprises of: (i) the drawing of a provisional median line, (ii) the adjustment of the provisional median line based on relevant circumstances, and (iii) the disproportionality test.

\textsuperscript{58} Kuen Chen-Fu, \textit{Equitable Ocean Boundary Delimitation} (Taipei: National Taiwan University, 1989), 14-15.
\textsuperscript{59} Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982, para. 70.
\textsuperscript{60} Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985, 38–39, para. 45.
\textsuperscript{61} \textit{Ibid.}
\textsuperscript{62} \textit{Ibid.}, para. 46.
\textsuperscript{63} North Sea Continental Shelf, Judgment, ICJ Reports 1969, 53.
\textsuperscript{64} Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway) (1993), Judgment, ICJ Reports 1993, 60, para. 49 and 62-63, para. 53.
The Court explains that the first step of drawing a provisional median line is does not concern with the consideration of any relevant circumstances. Thus, the line drawn is plotted using strictly geometrical criteria on the basis of objective data. Subsequently, 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 final stage of the delimitation process, the Court verifies that the line does not lead to an inequitable result marked by the disproportion between the ratio of the States’ coastal lengths and the ratio between the relevant maritime area of each State.

The updated method of delimitation in the Black Sea Case was adopted in subsequent cases. It is also worth noting that the Black Sea Case was decided unanimously by the Court. Perhaps, the unanimity added considerable weight to the judgment itself.

A provisional median line can only be drawn once the relevant basepoints have been determined. Case laws have suggested that the Court or tribunal bears the responsibility of choosing the basepoints with no obligation to be bound to choose the basepoints proposed by the Parties. As reiterated by the Court in its recent Somalia v. Kenya Case judgment, the Court may disregard the proposed basepoints of the Parties despite agreements among the Parties.

Relevant in the delimitation between States involving small islands, international tribunals have, on several occasions, decided not to select a basepoint on small maritime feature, or on a small island that is too distant from the mainland, to eliminate the disproportionate effect of small islands.

The drawing of a provisional median line, which includes the determination of basepoints, by international tribunals is meant to be a part of an objective exercise. However, critical observations by some academics questioning the objectiveness of such exercise have surfaced in the discourse of maritime boundary delimitation.

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66 Ibid., para. 120.
67 Ibid., para. 122.
68 Ibid., 108, para. 137.
71 ICJ, Black Sea Case, 110, para. 149.
72 See generally, Fayokemi Olorundami, “Objectivity versus Subjectivity in the Context of the ICJ’s Three-stage Methodology of Maritime Boundary Delimitation,” The International
D. THE RULES IN A NUTSHELL

The treaty rules on maritime boundary delimitation provide more flexibilities to the negotiating parties as long as equitable solution could be reached. Weight toward objectivity in determining maritime boundaries is given more in dispute settlement before international tribunals. Ensuring objectivity has become the principal objective of courts and tribunals. The introduction of the three-step method in the Black Sea Case rests on the notion of ensuring objective criteria in drawing delimitation line.

The rules on maritime boundary delimitation involving an archipelagic State are the same as non-archipelagic States. However, the use of archipelagic baselines, which employs a more restrictive and arguably more objective method than a straight baseline, leads to certain archipelagic States to believe that it warrants a special treatment. Up to this date, only two maritime delimitation judgments have been decided involving an archipelagic State.

III. JUDGMENTS INVOLVING ARCHIPELAGIC STATES

A. BARBADOS V. TRINIDAD AND TOBAGO CASE

The submission of the dispute between Barbados and Trinidad and Tobago was due to the differences between the Parties regarding the access for Barbadian fisherfolk and maritime boundary delimitation, according to Barbados.73 Trinidad and Tobago, on its part, denied the existence of any disputed regarding the maritime boundary location, as meaningful negotiations were ongoing at an early stage.74

This paper will focus on the debate surrounding the delimitation aspect of the Award. At the outset, it is worth noting that the Tribunal proclaimed that it has the right and duty to exercise a judicial discretion in achieving an equitable result.75

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73 Maritime Boundary Arbitration between Barbados and the Republic of Trinidad and Tobago, Award, Permanent Court of Arbitration (Arbitral Tribunal Constituted Pursuant to Annex VII UNCLOS), 17, para. 68.
74 Ibid., 20, para. 75.
75 Ibid., 74, para. 244.
Barbados claims that the most equitable result for delimitation, based on international law, is the equidistance followed by the adjustment through special circumstances rule. To support its claim, Barbados referred to the Libya/Malta Case and other judgments of the International Court of Justice.\textsuperscript{76} The tribunal, in this case, admits that equitableness is an imprecise concept. Thus, equitableness is produced through objectively determined criteria, that among others include, according to the tribunal, the identification of the relevant coasts and the use of the principle of equidistance.\textsuperscript{77}

While in principle agreeing with the use of equidistance/special circumstance approach, Trinidad and Tobago stated further that in many cases, the use of equidistance/special circumstance approach is a means to an end and not an end objective.\textsuperscript{78} In determining relevant circumstances, Trinidad and Tobago pointed out that international tribunals have placed the following circumstances to justify deviation from the equidistance line, namely the (i) projection of the relevant coasts, (ii) proportionality of relevant coastal lengths, and (iii) the existence of any express or tacit agreement to the extent of the maritime areas appertaining to one or the other party.\textsuperscript{79} Additionally, Trinidad and Tobago contends that due regard must be taken into consideration with respect to other delimitations in the region.\textsuperscript{80}

In this case, the relevant circumstance aspect revolved around the Barbadian fisherfolk. Barbados claimed that artisanal fisheries off the island of Tobago by Barbadian fisherfolk had taken place for centuries. Further, the traditional fishing activities were recognized by officials of Trinidad and Tobago.\textsuperscript{81} Barbados further claimed that its community is heavily dependent on fishing activities as its limited area and poor soil quality did not allow Barbados to conduct agricultural diversification.\textsuperscript{82}

While acknowledging the existence of Barbadian fisherfolk, Trinidad and Tobago contended that the fishing activities conducted by the Barbadian fisherfolk did not amount to artisanal or historic considering that, the activities only commenced in the late 1970s through the use of modern ice-boats vessels, as claimed by Trinidad and Tobago.\textsuperscript{83} In addition to dismissing the traditional nature of fishing activities of the Barbadian fisherfolk, Trinidad and Tobago

\textsuperscript{76} Ibid., 33, para. 115.
\textsuperscript{77} Ibid., 70, paras. 230 – 231.
\textsuperscript{78} Ibid., 34, para. 118.
\textsuperscript{79} Ibid., para. 119.
\textsuperscript{80} Ibid., para. 120.
\textsuperscript{81} Ibid., 37, paras. 125 – 127.
\textsuperscript{82} Ibid., 38, para. 129.
\textsuperscript{83} Ibid., para. 130.
claimed that its own coastal community depended greatly on the activities of the fishing fleet.⁸⁴

The Tribunal came to the conclusion and sided with the arguments brought forward by Trinidad and Tobago. The fishing activities conducted by Barbados began with the introduction of ice boats between 1978 – 1980. Hence, those short years are deemed not sufficient to give rise to a tradition.⁸⁵ Due to that, Barbados was not entitled to the adjustment of the equidistance line.⁸⁶

Nonetheless, the Tribunal further reasoned that even if Barbados had established the traditional nature of its fishing activities, delimiting maritime boundary on the basis of traditional fishing is exceptional, particularly as support through customary and conventional international law is lacking.⁸⁷

Other aspects that were discussed in this case was the issue of potential cut-off if the equidistance line was adopted in the Atlantic sector. Trinidad and Tobago claimed that it would allow Barbados to claim 100 per cent of continental shelf to the detriment of the Exclusive Economic Zone’s entitlement of Trinidad and Tobago. This situation, according to Trinidad and Tobago, would violate the principle of non-encroachment.⁸⁸

The role of basepoints to the determination of relevant coast was discussed in this case in which both Parties provided different arguments. Barbados argued that the relevant coastline that ought to be used in the delimitation is the coastline which the relevant basepoints lie that contribute to the equidistance line. Meanwhile, Trinidad and Tobago argued that what ought to be applied is a broader concept of relevant coastlines.⁸⁹ The Tribunal was of the view that basepoints do not play a determinative role in determining the relevant coast. It further underscored that delimitation is not the result of the contribution of coastal frontages resulting from the basepoints used to draw an equidistance line, but rather as a result of the pursuit to attain an equitable and reasonable result.⁹⁰

⁸⁴ Ibid., 39, para. 132.
⁸⁵ Ibid., 82, para. 266.
⁸⁶ Ibid., 83, para. 266.
⁸⁷ Ibid., 83, para. 269.
⁸⁸ Ibid., 46, para. 156.
⁸⁹ Ibid., 99, para. 325.
⁹⁰ Ibid., 100, para. 329.
Figure 1: Claims of the Parties

Source: Maritime Boundary Arbitration between Barbados and the Republic of Trinidad and Tobago, Award
Trinidad and Tobago claimed that coastal lengths of Trinidad and Tobago in comparison to Barbados would play a major factor in the delimitation. The coast of Trinidad and Tobago was claimed to be greater than that of Barbados, in a ratio of 8.2:1. Barbados contested these measurements since Trinidad and Tobago used its archipelagic baselines to support entitlement and to measure it as part of its coast. The Tribunal, however, concluded that Trinidad and Tobago relied on the actual presence of its coastline irrespective of the archipelagic baselines. The Tribunal also noted that for the purpose of drawing the equidistance line, Trinidad and Tobago use the basepoint on the archipelagic baselines. Yet, such baselines were not used by Trinidad and Tobago for determining the coastal orientation.

The Tribunal acknowledged that disparities in coastal lengths may be considered in determining equitableness. The Tribunal stressed further that a coast serves as a basis for maritime entitlement, thus coastal length plays a significant influence and constitutes a relevant circumstance. In terms of baselines, the Tribunal concluded that coastlines’ orientation is not determined by baselines, but instead by the coasts.

B. MAURITIUS/MALDIVES CASE

The case between Mauritius and Maldives is only the second case involving an archipelagic State and the first case to involve two States who have claimed archipelagic State status. It was adjudicated by the ITLOS Special Chamber. Prior to the proceeding on the merits, the Special Chamber had earlier issued a judgment on preliminary objections, in which the Special Chamber found that it has jurisdiction to adjudicate the dispute.

As the Special Chamber decided that it did not have jurisdiction to adjudicate on matter pertaining to the delimitation beyond 200 nautical miles, this part will focus on the delimitation aspect within 200 nautical miles. Both Parties agreed that, in principle, the three-step methodology should be applied

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91 Ibid., 48, paras. 158 – 159.
92 Ibid., 99, para. 326.
93 Ibid., 101, para. 332.
94 Ibid., 101, para. 333.
95 Ibid., 72, para. 237.
96 Ibid., 73, para. 239.
97 Ibid., 102, para. 334.
98 Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Judgment, Merits, International Tribunal for the Law of the Sea Judgment 2023, 37, para. 79.
99 Ibid., para. 80.
in the delimitation of this case.\(^{100}\) The Special Chamber reiterates that the three-steps methodology is a well-established method. Furthermore, the Chamber suggests that the method provides transparency and predictability.\(^{101}\)

In determining the respective relevant coast, Mauritius believed that Blenheim Reef in the Chagos Archipelago should be treated as a “drying reef” within the meaning of Article 47 para. 1 UNCLOS. This would entail Blenheim Reef to be given full entitlement.\(^{102}\)

The claim to Blenheim Reef enjoying full entitlement led to further disagreement to the placement of the basepoints on the reef. Mauritius located four basepoints on Blenheim Reef, to which Maldives believes that it should be rejected.\(^{103}\) Mauritius defended its claim by stating that as a Low-Tide Elevation as governed under Article 13 UNCLOS, the feature would qualify to be a site of basepoints.\(^{104}\)

On the issue of determination site for basepoint, the Special Chamber pronounced that only parts of the relevant coast which meet the geographical and legal criteria can be considered for locating a basepoint.\(^{105}\) As for the issue of the Blenheim Reef, while determining that Blenheim Reef may be used as a baseline and thus relevant in determining the relevant area, the Special Chamber did not consider Blenheim Reef to be a proper site for basepoints for the purpose of delimitation that is distinct from the identification of the relevant coast.\(^{106}\)

Further in its consideration, the Special Chamber mentioned that the selection of basepoints should not result in a judicial refashioning of geography. Thus, according to the Special Chamber, it is not uncommon to dismiss certain features as base points.\(^{107}\) While the process of drawing a provisional median line and determining the basepoints are always considered to be an objective undertaking, the statement of the Special Chamber leaves room for subjectivity in deciding to dismiss a basepoint.

The Special Chamber recognized that base points have rarely been placed on Low-Tide Elevations for constructing provisional median line. Thus, the Special Chamber would need a convincing reason to do so in this case. At the

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\(^{100}\) Ibid., 40, para. 94.

\(^{101}\) Ibid., 41, para. 96.

\(^{102}\) Ibid., 44, para. 101.

\(^{103}\) Ibid., 47-48, paras. 113-114.

\(^{104}\) Ibid., 49, para. 117.

\(^{105}\) Ibid., 56, para. 141.

\(^{106}\) Ibid., 58, paras. 146 – 147.

\(^{107}\) Ibid., 59, para. 151.
end, it sided with Maldives by not considering Blenheim Reef as an appropriate site for basepoints for the construction of provisional median line.\textsuperscript{108}

Nonetheless, Mauritius came up with another argument regarding the status of Blenheim Reef as drying reef within the meaning of Article 47 UNCLOS. It claimed that a drying reef properly located on a proper archipelagic baseline should be able to project full maritime entitlement.\textsuperscript{109} Mauritius further argued that no distinction between the use of islands and drying reefs for the purpose of maritime boundary delimitation and for entitlements can be concluded from Article 47 UNCLOS.\textsuperscript{110} Thus, it was argued that based on Article 48 and 49 UNCLOS, the fullest effect must be given to Blenheim Reef.\textsuperscript{111} This assertion was rejected by Maldives, claiming that Article 47 does not say anything about delimitation line or basepoints to construct provisional median line.\textsuperscript{112}

In its consideration, the Special Chamber disagreed with Mauritius and concluded that Article 47 does not suggest that such points should also be used as base points for the construction of the provisional equidistance line or that such points should be given full effect in the Exclusive Economic Zone and the continental shelf delimitation.\textsuperscript{113} Furthermore, the Special Chamber concluded that Article 48 UNCLOS merely regulates the measurement of outer limit of the maritime zones, and does not address the issue of delimitation.\textsuperscript{114}

Maldives used the opportunity to further claim that the drawing of Mauritius’ archipelagic baseline is not in accordance with Article 47 UNCLOS as most of the Low Tide Elevations at Blenheim Reef are beyond 12 nautical miles of the nearest island.\textsuperscript{115} The Special Chamber reaffirms that under Article 47 para. 4 UNCLOS, Mauritius is entitled to draw an archipelagic baseline joining the outermost points of the outermost islands and drying reefs of the Chagos Archipelago.\textsuperscript{116} However, the Special Chamber interpreted that the use of different terms in para. 1 (drying reefs) and para. 4 (low-tide elevations) meant that only drying reefs (not all LTEs) were eligible for drawing archipelagic baseline.\textsuperscript{117} Therefore, for the purpose of measuring the 200 nautical mile limit of Mauritius, the LTEs at Blenheim Reef that can be used for archipelagic baselines are those situated wholly or partly within 12

\textsuperscript{108} Ibid., 60, para. 155.
\textsuperscript{109} Ibid., 62, para. 162.
\textsuperscript{110} Ibid.
\textsuperscript{111} Ibid., para. 163.
\textsuperscript{112} Ibid., 66, para. 170.
\textsuperscript{113} Ibid., 70-71, para. 184.
\textsuperscript{114} Ibid., 71, paras. 186 – 187.
\textsuperscript{115} Ibid., 67, para. 175.
\textsuperscript{116} Ibid., 80, para. 221.
\textsuperscript{117} Ibid., 80, para. 224.
nautical miles from the nearest main island, Ile Takamaka.\footnote{Ibid., 81 – 82, para. 229.}

As the Special Chamber moved on to the consideration of relevant circumstances after drawing a provisional median line, it considered that completely ignoring Blenheim Reef would not lead to an equitable result, despite having decided earlier to not place any basepoints on that feature. Thus, Blenheim Reef is given a half effect to adjust the provisional median line.\footnote{Ibid., 90, paras. 245 and 247.} Finally, the Special Chamber did not find any disproportion between the ratio of the relevant area and the ratio of the lengths of the Parties’ coasts.\footnote{Ibid., 94, para. 256.}

Figure 2: Provisional Equidistance Line

Source: Delimitation of the Maritime Boundaries in the Indian Ocean (Mauritius v. Maldives), Judgment.

Meanwhile, the declaration of Judge ad hoc Schrijver presents interesting points toward the consideration of the judgment. Judge ad hoc Schrijver argues that Blenheim Reef should have been considered as a single entity instead of multiple separate Low-Tide Elevations.\footnote{International Tribunal for the Law of the Sea, Delimitation of the Maritime Boundary in the Indian Ocean (Mauritius/Maldives), para. 10.} The ad-hoc judge further notes that the Special Chamber did not use the archipelagic baseline in measuring the
200 nautical mile limit of Mauritius from Blenheim Reef. Nonetheless, Judge ad hoc Schrijver considers that the final outcome constitutes as an equitable solution. The declaration seems to suggest that while acknowledging the archipelagic State provision was not entirely applied in the consideration of the case, an equitable solution remains the pinnacle of maritime boundary delimitation.

IV. CONCLUSION

The two cases involving archipelagic State discussed in this paper suggest that some archipelagic States are eager to apply the sui generis nature of the archipelagic State concept into practice. Trinidad and Tobago applied the basepoints on the baselines to determine the provisional median line. Meanwhile, Mauritius attempted to justify the placing of basepoints on Blenheim Reef in its application of Article 47 para. 4 UNCLOS.

However, these two cases indicate that up to this date international tribunals treat the maritime boundary delimitation of an archipelagic State in the same manner as in other non-archipelagic State delimitation. First, in terms of the application of the three-step methodology. Second, the pronouncement of the importance of being able to objectively determine the placing of basepoints, the determination of relevant coast and areas. Third, the tribunals reiterate the notion that basepoints and baselines used for the purpose to measure the maritime zones may not be the same for the purpose of delimitation.

In comparing the two cases, it is interesting to note that discussion on the application of archipelagic State principle per se was not prevalent in the Barbados v. Trinidad and Tobago as in the Mauritius v. Maldives. In the former, the arbitral tribunal merely notes the contradictions of the Parties with respect to the use of archipelagic baseline vis-à-vis the drawing of the median line. The conclusion of the arbitral tribunal that orientation of the coastlines is not determined by baseline but rather by the coasts seems to reiterate the jurisprudence that geographical circumstance remains the main item to be taken into consideration in determining relevant circumstances. It must be stressed, nonetheless, that the jurisprudence concerns mainly non-archipelagic States.

In the latter, it was the first time an international tribunal interprets the application of Article 47 UNCLOS. However, the decision of the Special Chamber to disregard the basepoints on Blenheim Reef for the purpose

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122 Ibid., para. 12.
123 Ibid., para. 14.
of maritime delimitation but to later use the reef’s existence as a relevant circumstance to justify the adjustment of provisional median line is rather peculiar. With consideration to the legislative history of the archipelagic State concept, the Special Chamber should have put more weight on the particular nature of the archipelagic State and hence should be “convinced” to depart from the judicial practices of not placing basepoints on Low Tide Elevation. Only then should the Special Chamber adjust the provisional median line based on other relevant circumstances consideration. Such an approach would further prove the notion that the drawing of the provisional median line is undertaken in the most objective manner.

In both cases, the tribunals did not discuss the particularity of archipelagic baseline vis-à-vis other baselines. Such omission is particularly unfortunate as it would have provided clarity on the construction of archipelagic State provisions under UNCLOS.

The Special Chamber examined Mauritius’ archipelagic baseline’s conformity with Article 47 UNCLOS provision, but it did not examine Maldives’ archipelagic baseline system. The study conducted by the United States Department of State suggests that the archipelagic baseline system of Maldives is not in conformity with Article 47 Para. 2 UNCLOS. The fact that Maldives’ baseline system comprises of 37 segments allows only one segment to be longer than 100 nautical miles, yet Maldives’ baseline system has three segments exceeding 100 nautical miles. Should the Special Chamber considered this fact and examined the issue and found that the baseline system is not in accordance with UNCLOS, it would be interesting to find out whether Maldives would remain entitled to delimit its maritime boundary using its archipelagic baseline vis-à-vis Mauritius.

In the Barbados v. Trinidad and Tobago, the tribunal only considered the orientation of the coastline. But does it necessarily mean that the length of an archipelagic baseline cannot be put into play as relevant circumstances? The Court in the Libya v. Malta Continental Shelf Case stated that a factor which has no part to play in the establishment of the basis of the title should not be considered as a relevant circumstance. While it may be argued that an archipelagic baseline is a basis for a title pursuant to Article 48 UNCLOS, the Mauritius v. Maldives judgment states that article 48 of the Convention does

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125 Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985, 35, para. 40.
not concern with the question of delimitation.\textsuperscript{126}

Having said that, the adjudication of maritime boundaries involving an archipelagic State may potentially become an avenue for examining the legality of the claimed archipelagic baselines which in turn may hamper the potential proliferation of archipelagic State delimitation adjudication. One could imagine that States with “questionable” archipelagic baseline systems may be less willing to bring a matter to a third-party dispute settlement mechanism. Out of 22 countries that have claimed archipelagic State status, only five are deemed to be not in conformity with the requirement under Article 47 UNCLOS.\textsuperscript{127}

Irrespective of that, the fact that more boundary lines are being agreed upon through negotiation than through judicial settlement speaks for itself. In other words, archipelagic States are more keen to rely on negotiation than bringing the matter to an international tribunal to achieve the desired equitable solution. These State practices should also be considered in understanding the rule and its application of the archipelagic State principles, although abundant future archipelagic State practices seem to be unlikely as most archipelagic States have concluded their maritime boundaries negotiations. In view of this, having ten neighbouring countries, Indonesia will be in the forefront of exercising archipelagic State practices in maritime boundary delimitation. Finally, it must be acknowledged that the two judgments helped clarify certain matters pertaining to some provisions of Part IV of the Convention though other matters remain unexplored that would require further sanctioning from international courts and State practices.

\textsuperscript{126} International Tribunal for the Law of the Sea, Delimitation of the Maritime Boundary in the Indian Ocean (Mauritius/Maldives), 71, para. 186.

\textsuperscript{127} Based on the \textit{Limits in the Seas} publications, the five countries are Comoros, Maldives, Papua New Guinea, Seychelles, and Solomon Islands.
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