THE LAW OF MARITIME DELIMITATION AND THE MALAYSIAN PRACTICE

BY

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ABSTRACT

Maritime delimitation is an issue of crucial importance under the law of the sea. Until now, the applicable law in maritime delimitation is not clearly established. This research, which is purely from legal perspective, analyse and examine the law governing maritime delimitation based on the International Law of the Sea Conventions, judicial decisions and maritime delimitation treaties. The main idea is to establish a comprehensive practicable delimitation methodology adaptable to all situations of maritime delimitation. Special case study is made on the Malaysia's practice on maritime delimitation dealing with its selected neighbouring states. In conducting this research descriptive, historical and critical analysis is applied. The methodology also includes semi-structured interviews with selected authorities in the field. It is submitted that the comprehensive practicable delimitation methodology is to be based on "equidistance principle" to achieve an equitable result taking into account relevant circumstances. Malaysia, being state party to the 1982 United Nations Convention on the Law of the Sea, has demonstrated a flexible and conciliatory approach towards maritime delimitation. To a certain extent, Malaysia has been successful in the conclusion of both maritime delimitation agreement and provisional arrangement pending final delimitation.

ملخّص البحث

ترسيم الحدود البحرية هو قضية ذات أهمية بالغة في إطار قانون البحار. حتى الآن، لم يتم بوضوح تأسيس القانون المطبق في ترسيم الحدود البحرية. هذا البحث، الذي هو من منظور قانوني محض، يقوم بتحليل ودراسة القانون الذي يحكم ترسيم الحدود البحرية على أساس الاتفاقيات الدولية لقانون البحار والقرارات القضائية ومعاهدات ترسيم الحدود البحرية. والفكرة الرئيسية هي تأسيس منهجية شاملة عملية لترسيم الحدود البحرية وقابلة للتكيف مع جميع الحالات من ترسيم الحدود البحرية. يتم في هذا البحث دراسة حالة خاصة عن ممارسة ماليزيا على ترسيم الحدود البحرية في التعامل مع عدة الدول المختارة المجاورة لها. وفي إجراء وصف هذا البحث، يكون التحليل المطبق تاريخيا وكذلك نقديا. وتتضمن المنهجية أيضا على مقابلات شبه منظمة مع السلطات المحددة في هذا المجال. فمن المسلم به أن منهجية شاملة عملية لترسيم الحدود البحرية هي أن تقوم على "مبدأ تساوي البعد" لتحقيق نتيجة منصفة مع الأخذ بعين الاعتبار الظروف ذات الصلة. ماليزيا، لكونها دولة طرف في اتفاقية الأمم المتحدة لعام 1982 بشأن قانون البحار، قد أثبتت نهجا مرنا استرضائيا تجاه ترسيم الحدود البحرية. وإلى حد ما، كانت ناجحة على حد سواء في اتفاقية ترسيم الحدود البحرية وترتيب مؤقت ريثما يتم ترسيم الحدود النهائي.

APPROVAL PAGE

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any degrees at IIUM or other institutions.

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TABLE OF CONTENTS

CHAPTER 3: MARITIME DELIMITATION AND THE PRACTICE OF STATES

CHAPTER 4: PRINCIPLES AND METHODS OF MARITIME DELIMITATION

LIST OF FIGURES

LIST OF CASES

LIST OF CONVENTIONS, TREATIES AND STATUTES

Agreement between the Government of Malaysia and the Kingdom of Thailand on the Constitution and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority, 1990, available at <www.un.org/Depts/los/>.

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Memorandum of Understanding Between the Kingdom of Thailand and Malaysia on the Establishment of a Joint Authority for the Exploitation of the Resources of the Sea-Bed in a Defined Area of the Continental Shelf of the two countries in the Gulf of Thailand, 24 October 1979, available at <www.un.org/Depts/los/>.

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Treaty between the Kingdom of Thailand and Malaysia Relating to the Delimitation of the Territorial Seas of Two Countries, 24 October 1979 available at <www.doalos.un.org/Depts/los/>.

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Vienna Convention on the Law of Treaties 1969, enter into force 27 January 1980, *United Nations Treaty Series*, vol. 1155 331, available at <http//www.un.org/Depts/los/>.

ABBREVIATIONS AND ACRONYMS

AJIL	American Journal of International Law
ASIL	American Society of International Law
A/CONF	Official records of UNCLOS III
BYIL	British Yearbook of International Law
CLCS	Commission on the Limits of the Continental Shelf
EEZ	Exclusive Economic Zone
IBRU	International Boundary Research Unit
ICJ	International Court of Justice
ICJ Rep.	ICJ Reports
ICLQ	International and Comparatively Law Quarterly
IJMCL	International Journal of Marine and Coastal Law
ILC	International Law Commission
ILM	International Legal Materials
ILQ	International Law Quarterly
ITLOS	International Tribunal for the Law of the Sea
ODIL	Ocean Development and International Law
Off. Rec.	Official Records
UNCLOS I	First United Nations Conference on the Law of the Sea 1958
UNCLOS II	Second United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea 1973-1982
UNTS	United Nations Treaty Series

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF STUDY

The law of the sea, a rapidly develop branch of international law, governs the activities of the states in vast oceans. In essence, it divides the seas into various zones and specifies the rights and duties of states in those zones. At present, the regime of maritime zones as stipulated under the 1982 Convention on the Law of the Sea,[1] can be classified into territorial sea, contiguous zone, exclusive economic zone, continental shelf and high sea, each with a defined limit.[2]

Prior to 1945, there was no standard practice by the coastal states with respect to claiming maritime zones which they could exercise full sovereignty over the seabed and subsoil, the water column and the airspace. This situation was soon changed after the World War II when states began to realise the growing importance of the non-living resources of the high seas as being vital to their economic development. Also, as a result of technological advancement in the 1960s, the resources which are concentrated over the continental shelf were subjected to intensive exploitation. Coastal states efforts to acquire exclusive rights to manage and exploit those resources

[1] Entered into force on 16 November 1994. United Nations, Treaty Series, vol. 1833, 397 available at <http://www.un.org/Depts/los/convention_agreements/textx/unclos/onclos_e.pdf> [Hereinafter 1982 Convention].

[2] A coastal state can claim the territorial sea up to 12 nautical miles, the exclusive economic zone up to 24 nautical miles, the continental shelf up to 200 nautical miles and beyond when the criteria are met - Articles 3, 55 and 76 of the 1982 Convention on the Law of the Sea.

were thus inevitable; in a way resulting on the emergence of the new offshore zone; the exclusive economic zone.[3]

The extension of the limits of existing maritime zones under the sovereignty, sovereign rights and jurisdiction of the coastal states is believed to have further increased the importance of the delimitation of maritime boundaries between states particularly with opposite or adjacent coasts. Taking into account the close geographical proximity between states, it is almost impossible for the states concerned to claim for a maximum limit of maritime zones as provided under the 1982 Convention. In such a situation, overlapping of maritime zones cannot be avoided. Accordingly the line of separation; known as maritime delimitation line, has to be drawn involving the division of those maritime areas.

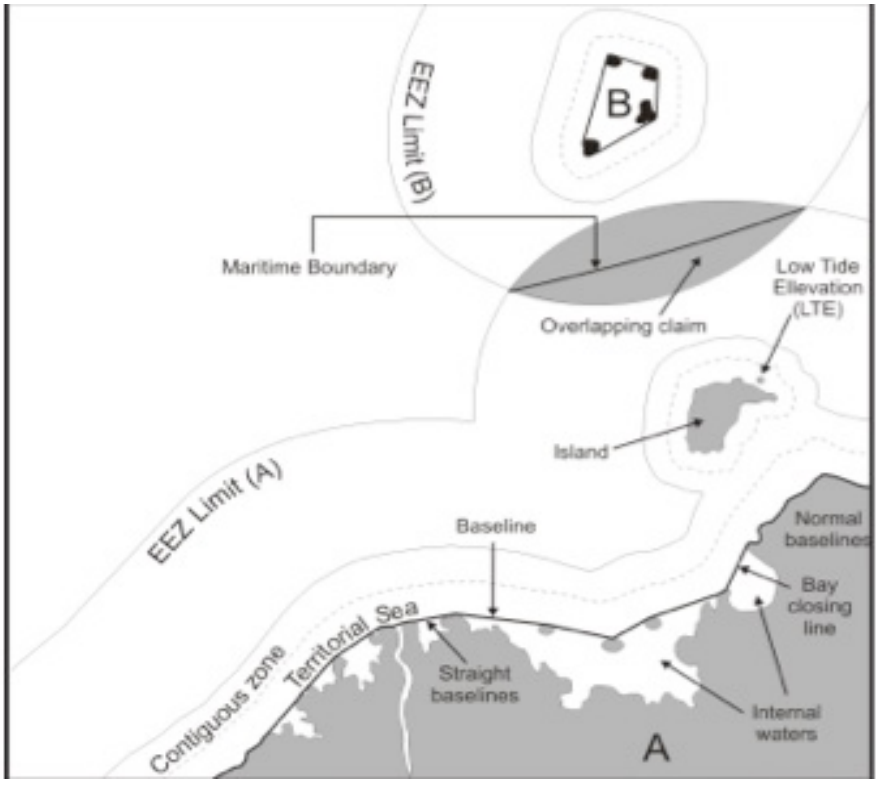

Figure 1.1: Maritime Boundary Delimitation

[3] Edward Jr. Collins and Martin A. Rogoff, "The International Law of Maritime Boundary Delimitation", (1982) vol. 34 *Maine Law Review* at 1-2.

Earliest attempt to codify maritime delimitation rule was during the Hague Conference 1930. However, due to inability to reach agreement on "the breadth of the territorial waters", which is essential in the delimitation process, no agreement has been reached on any delimitation article.[4]

After the establishment of the United Nations, the First United Nations Conference on the Law of the Sea (UNCLOS I) took place. As a result of this, four conventions were adopted including the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone[5] and the 1958 Geneva Convention on the Continental Shelf.[6] Article 12 of the 1958 Territorial Sea Convention and Article 6 of the 1958 Continental Shelf Convention provides for the rules governing the delimitation of the territorial sea and the continental shelf respectively. According to these Articles, the "delimitation should be effected by agreement between the states concerned". In the absence of agreement preference was given to "equidistance rule" unless justified by reason of historical titles[7] or special circumstances. In essence, the principle laid down in Articles 12 and 6 is commonly known as the "equidistance-special circumstances rule".

The Third United Nations Conference on the Law of the Sea (UNCLOS III), led to the adoption of the 1982 Convention, considered the most comprehensive convention on the law of the sea nowadays. The Convention contains 320 Articles and 9 Annexes and deals with almost every aspects of the law of the sea including

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[4] Satya N. Nandan and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht: Martinus Nijhoff Publishers, 1993, vol. II, at 134; Gerard J Tanja, *The Legal Determination of International Maritime Boundaries*, Deventer- Boston: Kluwer Law, 1990, at 6.

[5] Entered into force on 10 September 1964, *United Nations Treaty Series*, vol. 516, 205 available at <http//www.un.org/Depts/los/> [Hereinafter 1958 Territorial Sea Convention].

[6] Entered into force on 10 June 1964, *United Nations Treaty Series*, vol. 499, 311, available at <http//www.un.org/Depts/los/> [Hereinafter 1958 Continental Shelf Convention].

[7] Historic title consideration is not mentioned under Article 6 of the 1958 Continental Shelf Convention.

those areas of the four Geneva Conventions of 1958.[8] Articles 15, 74 and 83 of the 1982 Convention set out the general principles governing the delimitation of the territorial sea, the exclusive economic zone and the continental shelf respectively. There is a difference to be found between Article 15,[9] the rule governing delimitation of territorial sea which gives prominence to a median line, and two other article, namely Articles 74 and 83, dealing with delimitation of the exclusive economic zone and the continental shelf which stress the need to reach an equitable solution.

Apart from the conventional law, the law of maritime delimitation can also be found from the state practice and the jurisprudence of the international courts and tribunals. There seems to be different approaches taken by the international courts and tribunals in the interpretation of the delimitation provisions. Consequently, delimitation methodology as found from the practice of states also varied.

Maritime delimitation is a complicated subject mainly due to the complexities of the delimitation process which involves several types of issues. Among others it concerns the source of authority; where consideration need to be made whether the states are parties to the 1958 Conventions or the 1982 Convention or customary international law applies; the principal methods by which delimitation is carried out as well as the technical questions in the determination of the actual lines in the sea.[10]

In conducting this study, basic approaches to maritime delimitations is given through historical evolution of the law of maritime delimitation. In this context, the delimitation provisions stipulated in the 1958 Conventions and the 1982 Convention is analysed so as to give a better understanding on the development of maritime

[8] According to Article 311 (1) of the 1982 Convention, among the states parties to it, the Convention shall prevail over the 1958 Four Geneva Conventions.
[9] Article 15 is the carbon copy of Article 12 of the 1958 Territorial Sea Convention.
[10] Lewis M. Alexander, "The Delimitation of Maritime Boundaries", (1986) vol. 5 *Political Geography Quarterly*, at 19-24.

delimitation law itself. Apart from that, bilateral delimitation treaties are also evaluated to understand the actual practice of states in the determination of maritime boundary; how far the provisions in those Conventions have influenced the states in the determination of their maritime boundaries. There is also a number of case law starting from the 1969 *North Sea Continental Shelf* cases[11] which have to be considered. The source of authority from case law is very importance particularly in analysing how the courts and tribunals interpreted and applied those provisions.

1.2 STATEMENT OF PROBLEM

Maritime delimitation is an issue of crucial importance for states and also a very complicated one. A number of factors determine the delimitation to achieve a just and equitable solution. First, one needs to ascertain whether the two neighbouring states are in the adjacent or opposite position. Secondly, the delimitation can be for a single maritime zone or it can be for a comprehensive maritime boundary. Thirdly, there are relevant or special circumstances to be considered, such as, configuration of the coasts, islands, low-tide elevation, socio-economic factors and historic title.

Until now, there has been much confusion as to the law or the principle to be applied in maritime delimitation. This is mainly due to the somewhat different approaches taken by the conventions on the law of the sea and the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases. Another factor, which makes the law of maritime delimitation more complicated, is the difference in approaches between the decisions of the international courts and tribunals on one side and the maritime delimitation treaties on the other.

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[11] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark, The Netherlands)* [1969] ICJ Rep. 3 available at <www.icj-cij.org> [Hereinafter *North Sea* cases].

The issue of applicable principle in maritime delimitation is yet to be clearly resolved taking into account different situations of the coastal states where delimitation is to take place and also the kind of delimitation asked for. From state practice, equidistance has proved significantly more popular as the basis for maritime delimitation. However, the international courts and arbitral tribunals in majority of cases have emphasised equitable principles as the basis for maritime delimitation. Recent cases show a tendency by both the courts and tribunals to adopt a provisional equidistance line as preliminary step in the determination of maritime boundaries. There is an urgent need to reconcile these two principles particularly after the emergence of the exclusive economic zone where there is an increasing tendency among states to establish a single maritime boundary, which will delimit various zones of maritime jurisdiction in particular the exclusive economic zone and the continental shelf.

This research is an attempt to dig into the confusing approaches of the international law of the sea conventions, decisions of international courts and tribunals and various maritime delimitation treaties and to look for a compromise solution, which is applicable to various maritime delimitation situations.

Special reference is made to the Malaysia's practice in maritime delimitation with its selected neighbouring states, namely, Singapore, Indonesia, Thailand and Brunei respectively. Apart from the agreed maritime boundary with Indonesia and Thailand in certain areas, Malaysia still has a number of unresolved maritime boundary issues with its neighbours. For example, delimitation of the territorial sea in the Straits of Malacca with Singapore, delimitation of the territorial sea in the north Strait of Malacca, exclusive economic zone and continental shelf around Ambalat block or Celebes Sea with Indonesia. Furthermore, the International Court of

Justice's decision in Singapore's favour on the disputed claim over Batu Puteh would require new territorial sea delimitation between Singapore and Malaysia and this consequently will affect maritime delimitation of Malaysia.

1.3 OBJECTIVES OF THE STUDY

This research seeks to achieve the following objectives:

1) to examine the provisions of the law of the sea conventions concerning maritime delimitation and to see to what extend they provide a useful and workable basis in determining maritime delimitation between states.
2) to analyse the decisions of the international courts and tribunals in order to ascertain their impact on the law of maritime delimitation.
3) to evaluate state practice through maritime delimitation treaties in order to ascertain their impact on future maritime delimitation.
4) to evaluate Malaysia's practice on maritime delimitation with its neighbouring states.

1.4 RESEARCH QUESTIONS

The following are the primary research questions:

1) What is the jurisprudence of the international courts and tribunals in respect of maritime delimitation in cases of adjacent and opposite states?
2) What is the actual practice of states in respect of maritime delimitation as reflective in maritime delimitation treaties?