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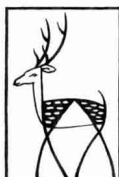
Predictability and Flexibility in the Law of Maritime Delimitation

Yoshifumi Tanaka

STUDIES IN INTERNATIONAL LAW

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Y.T.

To the memory of Professor Emeritus Teruji Kuwahara

Preface

Over the last 50 years, international lawyers have found themselves in effect called upon to re-draw the map of the world. The 1948 Truman Proclamation marked the beginning of a period during which vast areas outlined in atlases without any indication of sovereign affiliation suddenly required to be criss-crossed with lines of division indicating, first the claims of adjacent States, and subsequently their agreed or judicially determined entitlements. First the sea-bed, and then, with the coming of the concept of the EEZ, the superjacent waters had to be partitioned out. This division of the oceans and the seas in some respects resembled the 'scramble for Africa' of the previous century, but with important differences. In the first place, the sea offered no convenient landmarks (ridges, hills, watersheds) that might suggest themselves as reference points or lines for the fixing of convenient boundaries. Secondly, while the lines drawn on the map of Africa reflected the realities of State occupation or control (or at least 'spheres of interest'), it was realised almost at once that the application of such notions to claims to areas of sea and seabed would inevitably lead to anarchy and conflict.

Some other criterion or regulatory system was therefore required; and the accumulation of State practice and (in particular) judicial and arbitral jurisprudence has led to the creation of a real body of accepted maritime delimitation law. It is this construction that is the subject of Dr Tanaka's magisterial survey, compilation and analysis. Its principal pillars were established early on, with the 1958 Geneva Conventions and the pioneer ruling in the *North Sea Continental Shelf* case: the inherent and *ab initio* rights of the coastal State, the requirement for delimitation by agreement, and the emphasis on the role of equity. But much remained to be worked out by State practice and by jurisprudence; and in such a novel field, it is perhaps not surprising that there have been many inconsistencies and reversals. There could be no better guide through this labyrinth than Dr Tanaka, whose sureness of direction is based on very detailed study.

Furthermore, the new law of the sea has (appropriately enough) its own Scylla and Charybdis. Law is something to live by: the subjects of law are entitled to arrange their affairs on the basis of a reasonable knowledge of which actions of theirs would be open to legal challenge, and

which would not, in any circumstances; and this is equally true in a legal system, like the international legal order, in which there is no obligation to submit legal disputes for settlement to a standing tribunal, and to accept its rulings. On the other hand, no system of law can be expected to regulate legal relations in all their variety; there must be provision for the unexpected and the unforeseen. Thus no system of law can be rigid, at least not in its details.

It is the particular merit of Dr Tanaka's study that he has set his analysis of the law of maritime delimitation against the background of these two competing imperatives: the need for predictability of the law, and the need for flexibility in the application of the law. The need for flexibility is evident: no two coasts, and the geographical relationship between them, can be matched point for point with any other pair of coasts, so that a rule appropriate for the one situation is valid in all respects for the other. Predictability signifies, as in other fields of law, the possibility of assessing in advance, with some degree of accuracy, the delimitation that would be likely to be arrived at by a tribunal or arbitrator, on the basis of existing customary law. It goes further than that, however: it must also be possible, when a new maritime boundary is to be negotiated, to have some idea what claims may be advanced consistently with international law, and what circumstances, geographical or other, should properly be taken into account. Without some basis of this kind, such a negotiation can be no more than a test of diplomatic pressure and strength, or more probably will break down without achieving any agreed line.

Dr Tanaka makes extremely clear in what ways the armoury of concepts that have become familiar to experts in maritime delimitation serves to advance these twin aims: eg, equidistance, special circumstances, relevant circumstances, proportionality, coastal fronts, the general direction of the coast, and above all the idea of equity. His analysis is based on a thorough knowledge, and detailed analysis, of the judicial and arbitral case-law, the importance of which he rightly emphasises. But he has also made the fullest use of the materials that have increasingly become available indicating the circumstances in which delimitation agreements between States have been arrived at, and the considerations that contributed to their making: in other words, the evidence of State practice contributing to the growth of custom. Dr Tanaka's observations and conclusions of a general nature are the more to be valued because they are clearly based on a wide and intimate knowledge of this material.

So long as the parcelling-out of the seas and oceans has not been completed, and maritime boundaries remain to be determined, the present work will be invaluable to all those concerned in this branch of the law of the sea. It may well however have a broader value and usefulness, as a study of the possibilities of reconciling predictability with flexibility in a

particularly difficult context, that will, it is to be hoped, serve as a guide when such a reconciliation is required in other fields of law.

Hugh Thirlway
*Principal Legal Secretary, International Court of Justice,
Professor of International Law, University of Bristol.
The Hague, January 2006.*

List of Abbreviations

AFDI	<i>Annuaire français de droit international</i>
AJIL	<i>American Journal of International Law</i>
ASDI	<i>Annuaire suisse de droit international</i>
BYIL	<i>British Yearbook of International Law</i>
CYIL	<i>Canadian Yearbook of International Law</i>
EEZ	Exclusive Economic Zone
FZ	Fishery Zone
ICJ	International Court of Justice
ICLQ	<i>International and Comparative Law Quarterly</i>
IJECL	<i>International Journal of Estuarine and Coastal Law</i>
IJMCL	<i>International Journal of Marine and Coastal Law</i>
ILC	International Law Commission
ILM	<i>International Legal Materials</i>
ILR	<i>International Law Reports</i>
ODIL	<i>Ocean Development and International Law</i>
RCADI	<i>Recueil des cours de l'Académie de droit international</i>
RGDIP	<i>Revue générale de droit international public</i>
UNCLOS	United Nations Conference on the Law of the Sea
YILC	<i>Yearbook of International Law Commission</i>

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