Settling Maritime Boundaries: Why Some Countries Find It Easy, and Others Do Not

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Introduction

Previously neglected maritime boundary disputes are acquiring newfound economic, political, and academic significance. Rising sea levels, changing distributions of marine natural resources, and growing demand for those resources have combined to create a ‘perfect storm’ for policy-making, diplomacy, and research. When surveying the world’s maritime boundaries, it becomes clear that hundreds of disputes have been resolved. However, why states resolve their disputes, and with what motivation, is often unclear. Most studies describe the process as a matter of legal technicalities, driven by economic interests. As Douglas Johnston argues, boundary-making in the ocean is functionalist: done with an eye towards the functional usage of the maritime space itself.¹

Yet hundreds of maritime disputes remain unresolved. The existence of a dispute can hinder the economic exploitation of offshore resources such as oil and gas and complicate the management of transboundary fish stocks. In other instances, maritime boundary disputes contribute to larger international tensions and conflicts. States do not necessarily resolve boundary disputes for functional purposes whenever it is convenient to do so. Instead, a number of factors may hinder or facilitate dispute resolution.

Maritime Boundaries

Maritime boundaries define the geographic spaces within which states, companies and individuals operate. An international legal regime for the oceans

¹ D.M. Johnston, *The Theory and History of Ocean Boundary-Making* (Montreal: McGill-Queen’s University Press, 1988).
came into being through the 1958 Geneva Conventions, the 1982 United Nations Convention on the Law of the Sea (UNCLOS), and parallel developments in customary international law. As a result, many states implemented 200 nautical mile exclusive economic zones (EEZ) in offshore waters, and a number of boundary disputes arose or became more significant between the maritime zones of ‘adjacent’ or ‘opposing’ coastal states. Some of these boundaries were immediately settled, but a large number remain disputed.

To understand the international law of maritime boundaries, it is essential to understand the difference between land and maritime space. While the concept of occupation is essential in establishing title to land territory, it does not hold relevance in the maritime domain. Contrary to the customary international law rules on sovereignty over land territory, occupation of the continental shelf cannot in itself lead to acquisition of sovereign rights. Thus, a marked separation between land and maritime space has emerged, with rights to the latter deriving from the former. Delimitation of territory on land rests on the principle that the territory belongs to one state, and the central point is to establish which state has the most valid claim. In the maritime domain, however, international law accepts that both states can have valid legal titles to a given area, in which case it becomes a matter of “reasonable sacrifice such as would make possible a division of the area of overlap.”

How to Settle a Boundary

Over the course of the twentieth century, principles of maritime boundary delimitation developed through a combination of treaties and customary international law, with the most important of these being ‘equidistance’. The principle of equidistance entails a boundary that is an equal distance, at every point, from the two states’ adjoining or opposing coastlines. This principle was codified in Article 6(2) of the 1958 Geneva Convention on the Continental Shelf.

However, the International Court of Justice (ICJ) soon took the view that ‘relevant’ or ‘special’ circumstances should also be relevant to the delimitation of a maritime boundary, with such circumstances including—at times—not just coastal length and other geographical variables but also security interests and natural resources. This has been deemed equity, a principle different from

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2 P. Weil, The Law of Maritime Delimitation—Reflections (London: Grotius Publications Limited, 1989), 91–92.
3 499 UNTS 311. See also: T.M. Franck, Fairness in International Law and Institutions (New York: Oxford University Press, 1995), 62.
equidistance. Indeed, as far back as 1969 the ICJ explained that “[e]quity does not necessarily imply equality.” Since 1982, the ICJ has provided greater specificity on the principle of equity, with a focus on geographic rather than societal and political factors.

The ICJ currently makes use of a three-stage approach to maritime boundary disputes, which it outlined in the Black Sea Case between Romania and Ukraine in 2009. First, a ‘provisional delimitation line’ between disputing countries is established based on equidistance. Second, there is a consideration of ‘relevant circumstances’ that might require an adjustment of this line to achieve an ‘equitable result’. Third, the Court evaluates whether the provisional line leads to any ‘marked disproportion’ taking the coastal lengths of the states into consideration. Yet the development of the international law on maritime boundaries is not complete; it will undoubtedly adapt and evolve as new physical, political, technological, and economic developments emerge. Notions of equity and special circumstances also render the question of ‘who gets what’ more political than some international lawyers might admit.

Currently there are changes that are making the settlement of maritime boundary disputes—most of which arose in the 1970s and 1980s as the result of the development of rights over the continental shelf and the EEZ—more salient. Settlement of disputes continues to take place, though quite a number remain. Disputes range from active and conflictual, to dormant and cooperative. Prescott and Schofield highlight that “out of 427 potential maritime boundaries, only about 168 (39%) have been formally agreed, and many of these only partially.” The decisions of international courts and tribunals have shaped the law of maritime boundary delimitation, but the actual number of these decisions is quite limited. States usually rely on UNCLOS and customary international law as basis for settling their disputes, though this process is sometimes complicated by historic claims, treaties or arbitration decisions, as well as domestic politics and law. Moreover, UNCLOS does not specify how states are to settle their maritime boundary disputes, calling only for ‘an

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4 North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) [1969] International Court of Justice (ICJ), “Judgment of 20 February 1969,” para. 91.
5 Maritime Delimitation in the Black Sea (Romania v. Ukraine) [2009] ICJ, “Judgment of 3 February 2009,” para. 116.
6 Id., paras. 118–120.
7 Id., para. 122.
8 V. Prescott and C. Schofield, Maritime Political Boundaries of the World (Leiden: Martinus Nijhoff, 2004), 218.
equitable solution'.

Most maritime disputes are settled bilaterally between the disputing parties, giving them the freedom to choose whichever result they both find comfortable.

**Canada the Laggard?**

A comparison of Canada and Norway provides an excellent example of the complexity of these processes. On 21 September 2010, the Russian and Norwegian foreign ministers surprised the Canadian government with an opinion piece in *The Globe and Mail* newspaper. In their co-authored article, Sergei Lavrov and Jonas Gahr Støre celebrated the conclusion of a Russia–Norway boundary treaty in the Barents Sea. However, they also expressed “hope that the agreement will inspire other countries in their attempts to resolve their maritime disputes, in the High North and elsewhere.”

Given their choice of venue, the message was clearly directed at Canada, which has five disputed maritime boundaries. That is a high number of disputes for a country with only three neighbors—the United States, Denmark (Greenland), and France (St. Pierre and Miquelon). Lavrov and Støre assumed that Canada had not tried hard enough to negotiate solutions and, by writing in a Canadian national newspaper, they were criticizing Canadian diplomats in a public forum. The problem is that Lavrov and Støre's assumption was wrong. We know this because of research we carried out comparing and contrasting Canada's maritime boundaries to Norway's, with the resulting detailed article published in the *Canadian Yearbook of International Law*. In that article, we examined the history of Canada's unresolved or only-partially-resolved boundaries in the Gulf of Maine, Beaufort Sea, Lincoln Sea, Dixon Entrance, and seaward of Juan de Fuca Strait. We also looked at Canada's two fully resolved boundaries between Baffin Island and Greenland and around St. Pierre and Miquelon. We compared the situation with that of Norway, which has successfully negotiated treaties for all seven of its maritime boundaries, including with Russia. We sought to understand whether the two

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9 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 10 December 1982, 1833 *U.N.T.S.* 3, art. 74.

10 S. Lavrov and J. Gahr Store, “Canada, Take Note: Here’s How to Resolve Maritime Disputes,” *The Globe and Mail*, 21 September 2010, http://www.theglobeandmail.com/opinion/canada-take-note-heres-how-to-resolve-maritime-disputes/article4326372/.

11 M. Byers and A. Østhagen, “Why Does Canada Have So Many Unresolved Maritime Boundary Disputes?” *Canadian Yearbook of International Law* 54 (August 2017), doi.org/10.1017/cyl.2017.14.
countries’ different records of boundary settlement are a result of different policy approaches, or whether they are a result of specific factors in each dispute, such as its geography, legal history, political context, or the existence of natural resources. In essence, we sought to understand whether Canada really is a diplomatic laggard. As a case study of the complexity of maritime boundary settlement the situations of both countries are instructive.

Comparing Canada and Norway

Our research revealed some similarities between the two countries’ experiences with maritime boundary disputes. Both Norway and Canada actively sought to resolve their disputes in the mid-twentieth century, after international law gave coastal states exclusive rights to resources on the continental shelf. Norway quickly resolved a number of significant disputes in the North Sea and the Norwegian Sea. Canada settled its boundary with Greenland in 1973 and sought to resolve all four of its disputes with the United States by proposing a ‘package deal’. When the offer was rejected, Canada and the United States sent part of the Gulf of Maine dispute to the ICJ. Also, beginning in 2005, Norway and Canada began paying more attention to the Arctic. Norway settled a small dispute near Greenland in 2006 and its major dispute with Russia in 2010. Canada initiated negotiations with the United States on the Beaufort Sea in 2010 and announced a tentative agreement with Denmark on the Lincoln Sea in 2012.

The similarities end here. Norway’s ability to resolve the Barents Sea dispute was contingent on the preferences of its more powerful neighbor. Russia became willing to make concessions on the boundary because of its desire for legal certainty with regard to offshore oil and gas, as well as a desire to affirm the primacy of the UNCLOS regime in the Arctic. The United States has shown no comparable willingness to compromise in the Beaufort Sea, presumably because the costs of oil and gas development in that remote and seasonally ice-bound region are prohibitively high.

Canada’s unresolved disputes are also related to concerns about creating legal precedents. In both the Beaufort Sea and Dixon Entrance cases, Canada’s legal position is based on a historical treaty or arbitration decision that prevents easy compromises. In contrast, Norway had no old treaties, decisions or judgments complicating its disputes and was able to consistently support the

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12 A. Moe, D. Fjaertoft and I. Øverland, “Space and Timing: Why Was the Barents Sea Delimitation Dispute Resolved in 2010?” Polar Geography 34(3) (2011): 145–162.
win-win principle of ‘equidistance’. Norway and Canada also have different approaches to uncertainty and risk. Norway exhibited a relatively high tolerance for economic risk and was prepared to conclude boundary agreements without knowing the exact location of oil and gas reserves. At the same time, it has shown a low tolerance of risk with regards to its relations with Russia, as the unresolved boundary was seen as a potential flashpoint for conflict.

Canada is more concerned about certainty with regards to natural resources, as was demonstrated in 2011 when it pulled back from negotiations on the Beaufort Sea because of uncertainty about the location of hydrocarbons. It is less concerned about international political risk, because all Canadian boundaries are with North Atlantic Treaty Organization allies. At the same time, Canadian politicians are very concerned about domestic political risk and will avoid making any moves that could be portrayed as ‘selling out’ on sovereignty. Ironically, Canadian politicians are only able to take this approach because of Canada’s mostly amicable relationship with the United States, which makes the ‘management’ of ongoing disputes a viable option. Lastly, Canada is a federal country, and several of its boundary disputes are complicated by provincial claims. The provincial level British Columbia government will not stand quietly by while the Canadian federal government negotiates over Dixon Entrance. When it comes to boundary negotiations, Norway benefits from being a unitary state.

In short, Norway had a collection of boundary disputes that were of a very different character from Canada’s disputes, which are more complicated and difficult to resolve. This does not mean that they are unsolvable. But instead of making assumptions on the basis of a country’s record of settled versus unsettled disputes, policy-makers, diplomats and academics need to delve deep into the specific reasons why particular disputes remain unresolved—and why ‘managing’ a dispute might, in some situations, be the best option available.

The Complexities of Maritime Boundary Disputes

The foregoing case study illustrates the specificity and complexity of maritime boundary dispute negotiation and resolution. Treaty provisions, customary international law, and judicial or arbitral decisions can all play a role in the resolution of a maritime boundary dispute. But while the question ‘who gets what’ is sometimes answered—and is almost always guided—by international law, the question is also political. In this short essay, we have highlighted how diverse factors can influence maritime boundary negotiations and the chances of a settlement. It is at the nexus of international law, international relations,
and domestic politics where the outcomes to disputes are made. Reducing maritime boundary disputes to simple dichotomous options does little to advance our knowledge of how and why states come to an agreement.

At the same time, there are some factors that we might expect to be present, and were certainly present in the cases of both Canada and Norway. The historic origin of a dispute sets its parameters. The engagement, or lack thereof, of interest groups determines the amount of pressure on national governments for-or-against an effort at dispute resolution. These groups are sometimes motivated by the potential for resource development in the disputed area. And historic patterns of enmity or amity can determine the security relevance of the dispute, which in turn might deem a dispute manageable without immediate impetus for a resolution, or demand an immediate resolution.

These insights will hopefully provide starting points for further enquiry, as unsettled maritime boundaries and related disputes are likely to become more salient in the future, including as a result of the recognition of sovereign rights over extended continental shelves and the consequent need (in some instances) to draw boundaries beyond 200 nautical miles. Additional studies of how other states have approached their maritime boundaries will provide further insight into the motivations and complexities of dispute resolution. They will also enable us to address the question of whether agreed maritime boundaries are always needed, or whether some disputes can be successfully ‘managed’ through informal arrangements or resource sharing regimes.