

Maritime Delimitation in the Baltic Sea: What Has Already Been Accomplished?

E. Franckx

Research Professor, Member of the Permanent Court of Arbitration

President of the Department of International and European Law, Brussels, Belgium

ABSTRACT: To write a legal paper for an audience consisting primarily of experts in the field of navigation, transport, ocean engineering and maritime technology is not an easy task. Finding an appropriate box to tick when having to indicate the topic of the contribution when the title of the present contribution was submitted to the organizers of the conference, represented already a first hurdle. In the list of about 90 possibilities, not one really fitted the subject matter of the present contribution. This was particularly worrisome, because the instructions here read: "Choose maximum three topics". Consequently, I would particularly like to thank the organizers of the conference for having stretched somewhat the purview of the conference in order to accommodate a legal paper. The next difficulty, of course, rests on the shoulders of the present author, for he will have to write a legal paper understandable to an audience of which not all members may be familiar with the international law of the sea. Having served as a regional expert on maritime delimitation with respect to the Baltic Sea in a world-wide project initiated by the American Society of International Law, and still ongoing today,³⁴ a good number of publications by the present author on this topic have appeared in legal journals or specialized books. Despite the normal practice in legal papers of making extensive use of footnotes, the present paper will only make use of a minimum number of other references, in order to enhance its readability for non-lawyers. Instead, it will provide a listing in annex of the writings by the present author on the subject to which the interested reader, wanting to find out more concrete guidelines and information, may readily turn.

The present paper, first of all, is not concerned with maritime law -- a term to be found in the above-mentioned list -- but with the law of the sea. These two concepts, even though they might have been confused in the past, are today clearly distinguished from one another. The law of the sea concerns the rules of international law governing the different maritime zones and the activities carried out there. It forms a branch of international law, for it concerns mainly the relationship between states and is consequently also sometimes called "international law of the sea" or even "international public law of the sea". Maritime law, on the other hand, is part of the national law of a state, for it deals with private interests at sea in general, and with the relationship between those who exploit ships and those who make use of them more particularly. It is therefore sometimes also called "commercial maritime law".³⁵

After having clarified a few crucial law of the sea notions, the present paper tries to bring some order in the maritime boundary agreements concluded so far in the Baltic Sea. It does so by taking a major political event as caesura, namely the disappearance of the former Soviet Union from the political map of the world during 1991. Finally, some concluding remarks will try to describe the present state of affairs, while comparing it to the situation as it existed on the eve of this major political event of 1991.

1 INTRODUCTORY COMMENTS

In order to be able to tackle the issue of maritime delimitation according to the rules of the law of the

sea, it seems appropriate to first introduce the reader to a number of maritime zones, as well as certain rules applicable therein, of particular interest here.

At present, the law of the sea is codified by means of the United Nations Convention on the Law of the Sea.³⁶ This document, also called the Consti-

³⁴ The project started during the late 1980s and intended to provide an in-depth examination of the state practice arising from the more than 100 existing maritime boundary delimitation agreements already concluded at that time. The outcome of this project is reflected in the International Maritime Boundary series, published by Martinus Nijhoff, of which five volumes have already seen the light of day between 1993 and 2005. A sixth volume will appear in 2011.

³⁵ Salmon, J. (ed.) 2001, *Dictionnaire de droit international public*, Bruylant, Brussels, pp. 375 and 389. In English this latter branch of law is called "Admiralty Law".

³⁶ United Nations Convention on the Law of the Sea. Multilateral convention, 10 December 1982, United Nations Treaty Series, vol. 1833, 397-581. This convention entered into force on 16 November 1994 (available at <www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf>). At the time of writing there were 160 states party to the convention, as well as the European Community. Hereinafter cited as 1982 Convention.

tution for the Oceans,³⁷ is at present adhered to by all states surrounding the Baltic Sea, including the European Union with respect to those areas for which it is competent. This document creates a number of maritime zones of which the most important are, for present purposes at least, the territorial sea, the continental shelf and the exclusive economic zone.

The territorial sea is a zone where the coastal state exercises sovereignty as on its land territory, with certain exceptions such as the right of innocent passage for foreign vessels (1982 Convention, Arts 2-32). The continental shelf and the exclusive economic zone are both zones of functional jurisdiction, meaning that the coastal state does not exercise sovereignty over these maritime zones, but only certain sovereign rights. With respect to the continental shelf, these sovereign rights are primarily related to the living and non living resources of the sea-bed and subsoil (*id.*, Arts 76-85), and with respect to the exclusive economic zone these sovereign rights are moreover related to those same resources of the superjacent waters (*id.*, Arts 55-75). All these zones are limited in distance: The territorial sea to a maximum of 12 nautical miles (nm) (*id.*, Art. 3), the continental shelf and the exclusive economic zone to 200 nm (*id.*, Arts 76(1) & 57 respectively). Only the continental shelf can in certain locations extend beyond this latter limit (*id.*, Art. 76(4-8)), but because of the restricted size of the Baltic Sea, this eventually does not apply there.

All these maritime zones are measured starting from the so-called baseline. This can be either the normal baseline, meaning the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state (*id.*, Art. 5), or a straight baseline in case the coastline is deeply indented and cut into or if there is a fringe of islands located in front of it (*id.*, Art. 7). Under certain circumstances, moreover, bays can be closed off by means of a straight baseline measuring not more than 24 nm (*id.*, Art. 10). It should nevertheless be noted that the influence of straight baselines on maritime delimitation in general, and in the Baltic Sea more particularly, remains in most cases negligible for it will rather be the salient features on the coastline which will resort effect in this respect.

Historically, the territorial sea preceded the continental shelf, and the latter in turn preceded the exclusive economic zone. The origin of the territorial sea predates the creation of modern international law and was for the first time codified in the 1958 Con-

37 Expression used by one of the founding fathers of the 1982 Convention. See 'A Constitution for the Oceans', Remarks by Tommy T.B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea (available at <www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf>).

vention on the Territorial Sea and the Contiguous Zone.³⁸ The origin of the continental shelf is usually related to the Truman Proclamation of 1945. This concept was later cast in legal wording by the International Law Commission of the United Nations and incorporated in the 1958 Convention on the Continental Shelf.³⁹ The concept of the exclusive economic zone, in turn, is a creation of the negotiations leading up to the 1982 Convention, where it was for the first time codified.

Delimitation of these maritime zones, finally, is necessary either between adjacent states, or where the distance between two opposite states is less than two times the maximum extent of a particular zone. Given the fact that the Baltic Sea is nowhere more than 400 nm wide, coastal states are obliged to conclude delimitation agreements not only with adjacent, but each time also with opposite states. The rules applicable to delimitation of these different zones are not identical, and have sometimes evolved over time between the United Nations codification efforts of 1958 and 1982. As far as the territorial sea is concerned, the rules remained identical and consist of three elements: 1) agreement; 2) if no agreement proves possible, the median line every point of which is equidistant from the baseline becomes applicable; 3) unless historic title or special circumstances demand a different delimitation line.⁴⁰ A similar rule existed in 1958 with respect to the delimitation of the continental shelf, the only substantial difference being that historic title disappeared as possible exception to the application of the equidistant line.⁴¹ However, this rule was not retained in the 1982 Convention, mainly because, as clearly indicated by the International Court of Justice in 1969, the application of the equidistance principle to convex and concave coasts may well lead to highly inequitable results.⁴² Instead, the delimitation rule with respect to the continental shelf has been stripped of any substantial guidance criteria and only retains the obligation for parties "to achieve an equi-

38 Convention on the Territorial Sea and the Contiguous Zone. Multilateral convention, 29 April 1958, UNTS, vol. 516, 205, 206-224. This convention entered into force on 10 September 1964 (available at <untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_territorial_sea.pdf>). Hereinafter 1958 TZ Convention. Of all Baltic Sea coastal states at present, only Estonia, Poland and Sweden are not a party to this convention. Latvia and Lithuania acceded in 1992. The German Democratic Republic acceded in 1973, but Germany never became a party.

39 Convention on the Continental Shelf. Multilateral convention, 29 April 1958, United Nations Treaty Series, vol. 499, 311, 312-320. This convention entered into force on 10 June 1964 (available at <untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf>). Hereinafter 1958 CS Convention. Of all Baltic Sea coastal states at present, only Estonia and Lithuania are not a party to this convention. Latvia acceded in 1992. The German Democratic Republic acceded in 1973, but Germany never became a party.

40 1958 TS Convention, Art. 12(1) and 1982 Convention, Art. 15.

41 1958 CS Convention, Art. 6(1-2).

42 North Sea Continental Shelf Cases (Denmark v. Germany; The Netherlands v. Germany), 1969 ICJ Reports 3.

table solution”.⁴³ The delimitation rule with respect to the exclusive economic zone is identical to that of the continental shelf.⁴⁴

This absence of any concrete guidance at present with respect to the rules of delimitation concerning the continental shelf and the exclusive economic zone has led to a marked increase in delimitation cases being submitted before the International Court of Justice or arbitral tribunals. This seems not abnormal, because states very often have totally different perceptions of what constitutes an “equitable solution” in a particular delimitation dispute they are confronted with. Nevertheless, it is to be noted that so far not one single maritime boundary within the Baltic Sea has been arrived at by means of such third party dispute settlement procedures. Instead, parties have up till now always managed to solve these issues by diplomatic means.

Finally, it can be added that there appears to be a natural tendency for states to conclude maritime boundary delimitation agreements first in areas where few so-called special circumstances are present. As a result, the maritime boundaries still to be concluded more often than not are characterized by the presence of such complicating factors. Islands are one such factor, especially when they are located far from the mainland, are small in size, or prove to be uninhabited. No fixed rules exist in international law with respect to the weight to be attributed to islands in general. Especially if one or more of the just-mentioned situations apply to islands, the exact weight to be given to them remains highly uncertain. Either full effect can be attributed to them, or no effect, or in fact any gradation in between, depending on what the parties, or a court or tribunal as the case may be, consider to be equitable under the specific circumstances of the case. If the median line were to be applied between two opposite states, full effect would entail that the median line is calculated starting from the island, whereas no effect would imply that the parties involved agree to draw a line every point of which will be equidistant from their respective mainland. In the latter case it is as if the island simply did not exist, at least not from a maritime delimitation point of view. As mentioned above, all gradations in between these two extremes are possible as well.

2 MARITIME DELIMITATION IN THE BALTIC SEA UNTIL 1991

Four different periods can be distinguished when trying to categorize the maritime boundary agree-

ments concluded so far in the Baltic Sea region. Three of them relate to the period up to 1991.

A first period concerns the years 1945-1972. This period started with a territorial sea agreement concluded between Poland and the former Soviet Union in 1958 and ended with the conclusion between the same countries of an additional agreement concerning the continental shelf in 1969. This first period is characterized by the fact that all these agreements were concluded between former Eastern bloc countries, with the exception of the involvement of neutral Finland. This should not come as a surprise, for it provided several political advantages for the Eastern bloc on the international level, as for instance the 12 nm territorial sea claim of the former Soviet Union, explicitly imbedded in the 1958 agreement just mentioned, and the fact that the former German Democratic Republic, at a time that this country was not allowed to participate in the law of the sea negotiations and the ensuing 1958 conventions, was nevertheless able to claim a continental shelf of its own, which was at that time contested by the former Federal Republic of Germany.

A second period concerns the years 1973-1985. This period starts with the conclusion of the so-called *Grundlagenvertrag* between both Germanies in 1972, which made it possible for them to enter into formal treaty arrangements, including those relating to their maritime boundary in the Baltic Sea. This resulted in the conclusion of such an agreement in 1974 delimiting the waters of Lübeck Bay. Since both Germanies were also admitted as members to the United Nations in 1973, it moreover opened the door for the conclusion of agreements between the two blocs, a typical feature of the maritime delimitation agreements concluded during this period. In 1978, for instance, the former German Democratic Republic settled its continental shelf delimitation with Sweden. No matter how important all these agreements may have been from a political point of view, their importance from a maritime delimitation point of view remained rather slim. The 1974 agreement between the two Germanies only concerned a maritime boundary line of about 8 nm and the 1978 agreement between the former German Democratic Republic and Sweden was rather easy to determine, because of the absence of any special features in the area to be delimited, and rather short as well, for the delimitation line finally agreed upon only had an overall length of 29 nm.

A third period concerns the years 1985-1990, *i.e.* until the dissolution of the former Soviet Union. This has by far been the most productive period as well as the most interesting one from a delimitation point of view. Indeed, during this rather short period, spanning only half a decade, more maritime delimitation agreements were concluded than during

43 1982 Convention, Art. 83(1).

44 *Id.*, Art. 74(1)

the 40 preceding years. It is also the most interesting one, for most of them delimit areas where islands or other special circumstances are to be noted. Some of them merely consolidated previously concluded agreements between the parties. It should not be forgotten that the notion of the exclusive economic zone had in the meantime become well-established.⁴⁵ Some treaties consequently only brought some order in previously concluded agreements by broadening their application to the exclusive economic zone. The former Soviet Union concluded two such agreements in 1985 with Finland and Poland. But most of them added new segments in areas burdened by islands or other special circumstances. The 1984 agreement between Denmark and Sweden is a good example, for the Danish islands of Bornholm, Christianso and Fredrikso as well as the uninhabited Swedish island of Utklippan, all located in the Baltic Sea proper, complicated the delimitation negotiations. Even more problematic was the delimitation between Sweden and the former Soviet Union, because both parties had totally opposite opinions on the effect to be given to the Swedish islands of Gotland and Gotska Sandön, both located at some distance from the coast: According to Sweden full effect should be given to these islands, while according to the former Soviet Union they should have no effect at all for according to this country the median line was to be calculated starting from the Soviet and Swedish mainland instead. After some 20 years of negotiations both parties finally reached a compromise agreement in 1988 in which the disputed area was divided by attributing 75 % to Sweden and 25 % to the former Soviet Union, compensated by reciprocal fishing rights in each other's zone so created in reverse percentages, *i.e.* 75 % Soviet rights in the Swedish part of the formerly disputed zone and 25 % Swedish rights in the Soviet part. In 1988 Denmark and the former German Democratic Republic reached an agreement, whereby the Danish islands of Lolland, Falster, Møn and Bornholm and the German islands of Rügen and Greifswalder Oie all influenced the final line agreed upon. When Poland and Sweden reached an agreement the year after, they encountered exactly the same problem as the one encountered between the former Soviet Union and Sweden, namely the exact weight to be attributed to the island of Gotland. It was solved in a similar manner in the 1989 agreement as well, namely by attributing 75 % of the disputed zone to Sweden and 25 % to Poland. Atypical was the agreement concluded during this period between the former German Democratic Republic and Poland in 1989, for it totally disregarded

a previously concluded continental shelf boundary when adapting this old 1968 line to new circumstances. This period can be concluded by mentioning the adoption of a first tri-junction point agreement in the Baltic Sea, reached between Poland, the former Soviet Union and Sweden in 1989 as well.

At the eve of the dissolution of the former Soviet Union, therefore, the delimitation of maritime zones in the Baltic Sea had reached a very advanced stage, not easily encountered in other regions around the world, even though some of them, like the North Sea, did not know of the political divide characterizing the Baltic Sea region in those days. Disregarding for a moment the remaining tri-junction points, it could be stated that at that time the only remaining boundary to be settled concerned the area south and southeast of the islands of Bornholm between Denmark and Poland.

3 MARITIME DELIMITATION IN THE BALTIC SEA SINCE 1991

A fourth, and at present last period concerns the years following the disappearance of the former Soviet Union from the political map of the world in 1991. Suddenly, the delimitation picture in the Baltic Sea became much more complex. Three new entities emerged, namely Estonia, Latvia and Lithuania, while the former German Democratic Republic disappeared. This raised two sets of new problems in the Baltic Sea region. First, a number of new maritime boundaries needed to be agreed upon, where none had existed before. Starting from the South, the maritime boundaries between Russia and Lithuania, Lithuania and Latvia, Latvia and Estonia, and finally Estonia and Russia needed to be agreed upon, for these water expanses had never really required any delimitation under a unified Soviet state. Only the first three have so far been signed by the respective parties, namely in 1997, 1999 and 1996 respectively. All of these three agreements, except the one between Latvia and Lithuania, have moreover entered into force by now. Second, the much more delicate issue of state succession came to the fore. In the case of the reunification of Germany this did not create too much difficulty. One maritime boundary simply became superfluous, namely the 1974 agreement relating to Lübeck Bay, mentioned above. Germany moreover recognized the maritime delimitation treaties concluded by the former German Democratic Republic, even though the one with Poland caused particular concern in certain quarters because of the disputed land frontier on which it was based. The situation with respect to Latvia, Lithuania and Estonia was totally different because here the question arose as to the exact legal status of previously concluded maritime boundary

45 By coincidence, it was also in 1985 that the International Court of Justice stated that the exclusive economic zone had become part of customary law. See Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 ICJ Reports 13.

agreements by the former Soviet Union after their regained independence. Examples of the latter are the agreements concluded between Estonia and Finland of 1996 and between Estonia and Sweden of 1998. In principle these agreements did not explicitly rely on the agreements previously concluded by the former Soviet Union, a non-negotiable demand of Estonia, but the delimitation line itself did not change, a policy strictly adhered to by the other countries involved. Finally, during this period two more tri-point agreements were concluded: One between Estonia, Latvia and Sweden in 1997 and one between Estonia, Finland and Sweden in 2001.

Before concluding this last period, brief mention can be made of the only remaining maritime boundary agreement of the first category of this fourth period awaiting conclusion, namely the one between Estonia and Russia. A treaty was concluded on 18 May 2005, but because of an introductory declaration attached to it by the Estonian parliament during the internal ratification process, the Russian side withdrew its signature to this document.

4 CONCLUSIONS

Like on the eve of the dissolution of the former Soviet Union, one could argue that the situation as it existed at that time has almost been restored at present, despite the fundamental changes which occurred in the wake of this event, namely the disappearance of one coastal state, the reemergence of three others, and the lessening of the fundamental divide between East and West. Indeed, today all countries surrounding the Baltic Sea are members of the European Union, with the exception of Russia which now only retains the control over the Kaliningrad region and the eastern part of the Gulf of Finland. The maritime zones generated by these coastlines are not very enviable for the former is concave in nature while the latter constitutes a *cul de sac*. Even though a few more tri-points have been agreed upon, the situation is still that the area south and southeast of Bornholm remains to be divided, be it that one has to add now that one maritime boundary is still awaiting (a second) agreement, namely between Estonia and Russia, and another one entry into force, namely between Latvia and Lithuania.

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