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► **To cite this version:**

Alina Miron. Book Review : Lorenzi Palestini, La protection des intérêts juridiques de l'État tiers dans le procès de délimitation maritime. *The Law and Practice of International Courts and Tribunals*, 2022, 21, pp.225 - 228. 10.1163/15718034-12341471 . hal-04680627

HAL Id: hal-04680627

<https://hal.science/hal-04680627v1>

Submitted on 28 Aug 2024

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Book Reviews



Lorenzo Palestini, *La protection des intérêts juridiques de l'État tiers dans le procès de délimitation maritime* (Bruylant/Bruxelles, 2020), 526pp., €85.
ISBN: 9782802766087.

Lorenzo Palestini's book, *La protection des intérêts juridiques de l'État tiers dans le procès de délimitation maritime*, is the published version of a doctoral thesis written under the supervision of Marcelo Kohen and defended at the Graduate Institute of Geneva in 2019.

The book addresses a singularly thorny issue of international adjudication, namely the protection of the legal interests of States who are not parties to the dispute submitted to an international court or tribunal but have a legal interest in the proceedings. The author's focus is on maritime delimitation and other cases relating to States' entitlements at sea. These are cases in which the legal interest of the third (neighbouring) State is obvious and can be easily depicted on a map. He approaches the topic principally from the angle of proceedings in which third States have intervened, but he also incidentally addresses broader questions such as the impact of the mere presence of third States' entitlement on the process of maritime delimitation. Such impact may be taken into account through consideration of regional geographical configurations or an examination of the definition of the relevant area for the purposes of delimitation.

The working assumption is that the enlargement of maritime entitlements up to 200 nautical miles, and even more for the continental shelf, considerably increases the probability of overlap between the coastal projections of three or more coastal States. Such is indeed the case in many areas around the world. Because of these overlapping entitlements, there is a risk that a bilateral maritime boundary, whether negotiated by the parties or decided by an international court or tribunal, will encroach upon a third State's maritime areas.

In the pure sphere of legal principles, the third State is protected by the double law of relativity: relativity of *pacta sunt servanda* (*pacta tertiis nec nocent nec prosunt*) and relativity of *res judicata* expressed in Article 59 of the Statute of the International Court of Justice (the “ICJ” or the “Court”) (“The decision of the Court has no binding force except between the parties and in respect of that particular case”). In the arena of international relations and international adjudication, such theoretical protection is illusory or at least insufficient as is amply demonstrated by Palestini’s book.

This being the case, Palestini – as others before him – asks the question why there is so little space left for these other States in international adjudication. He highlights what he considers to be a contradiction in the case law. In the first part of his research, which is the most developed, he shows that judges and arbitrators are mindful of the interests of third States and are taking them into account. In the second part, he demonstrates that, despite the presence of third-State interests in the area to be delimited, the ICJ (which is the only international tribunal that has dealt so far with intervention in maritime cases) takes an overly restrictive approach to intervention.

More specifically, the first part of the book, *De l’État tiers au procès de délimitation maritime* (*About the third State in maritime delimitation proceedings*), Palestini underlines the variety of ways in which a non-party State may have a legal interest in the proceedings. He draws the classical distinction between the third State, which merely has a legal interest, and the indispensable party, whose rights and obligations are judicially determined, even if they do not constitute the main object of the proceedings.

Palestini undeniably has a broad understanding of these categories. He postulates the existence of an interest of a legal nature not only when a coastal State’s particular entitlements are present in the maritime area (at 29 ff.), but also those where a State has an interest in the development of the legal rules (at 34 ff.), thus erasing the difference between the purpose of intervention under Articles 62 and 63 of the ICJ Statute.

However, he does define this legal interest in a restrictive manner: “*l’intérêt d’ordre juridique n’est rien d’autre que la revendication d’un droit subjectif*” (at 49). He underscores several hypotheses in which the legal interest may be affected where there are overlapping entitlements:

- when the establishment of a boundary leads to the substitution of one neighbouring State by another, a hypothesis which Palestini nicely calls “*permutation des relations de voisinage*” (at 70 ff.);
- when courts limit the extent of a decided boundary by the technique of the directional arrow (at 66 ff.);

- when they define the relevant area in such a way as not to intrude too much into a third State's entitlements (at 153 ff.); or
 - when they decide on the legal status of maritime features or areas (at 182 ff.).
- As far as the indispensable party is concerned, applying the *Monetary Gold* criteria, Palestini reaches the conclusion that, whenever the Court establishes a tripoint, the third State is an indispensable party, at least if it is a party to an open dispute in this respect (at 296 ff.). He thus pleads in favour of lowering the bar for intervention, which he thinks would favour a more complete resolution of the dispute.

In the second part of the book, Palestini analyses the distinction between the State intervening as a non-party and the one intervening as a party. This part of the book is shorter, but also more audacious. The author's firm belief is that the high bar raised by the ICJ for the admission of intervention is the sign of a "judicial policy that is locked into a bilateral logic" that he believes to be "misplaced and counterproductive" (cover page).

He advances two considerations that would favour a broader approach to intervention, including admitting the third State as a party whose rights would be decided with *res judicata* effect: on the one hand, the presumption that, when States submit a dispute to the Court, they want it to be decided in full and, on the other hand, procedural economy (for instance, at 347 and 422).

He therefore considers – and this is probably the most audacious argument of the thesis – that intervention should be extended beyond the purposes for which it is generally accepted (i.e. those of informing the Court and protecting the interests possibly affected) to include the submission of a new dispute, connected to the one referred to the Court by the parties (at 439 ff.).

Palestini's thesis is as straightforward as the style is nice (there is no shortage of expressions that hit home). The presence of numerous cartographic illustrations helps the reader have a better understanding of the argument developed (though the addition of legends and the use of a harmonized code of colours would have been welcome). The reader is however a bit lost where the analysis does not sufficiently account for how the jurisprudence has evolved and instead gives significant weight to old or isolated solutions to the detriment of the more recent and convergent ones (for instance, concerning arguments in relation to macro- or regional geography- at 120 ff.).

At times, the book reads more like a piece of advocacy than a dispassionate legal analysis. It is not only that the author has strong views about the errors made by others, including international courts and tribunals, but he describes and refutes arguments in the best tradition of pleadings. One may regret however that legal concepts which seem to be at the heart of the analysis are not

further developed. This is the case for the theory of renunciation *erga omnes* (at 208), the extra-statutory intervention (at 431), and the distinction between *intervention de type principal* and *intervention de type adhésif indépendant* (at 444 ff.).

Having renounced the frivolous attempt to put order in a body of jurisprudence that shies away from systematization (at 20–21), Palestini makes daring proposals for evolution, so that the institution of intervention can finally find its role in international litigation. Is the solution really one of allowing the State seeking to intervene to become a party and thus introduce through the back door a case which would enter the Great Hall of Justice through its monumental doors? It remains to be seen if States and their legal counsel will take the suggestions made by Lorenzo Palestini forward.

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