# Theoretical and Practical Significance of the Issue of Maritime Delimitation in the Law of the Sea

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This paper aims to show the significance of maritime delimitation in the Law of the Sea, as well as the contribution of international jurisprudence to the creation of the rules of maritime delimitation. The decisions of the International Court of Justice (ICJ) and the awards of arbitration tribunals are especially significant in the part of the Law of the Sea dealing with maritime delimitation. Based on the analysis of the principle of equity and the method of equidistance, the jurisprudence of the courts is shown to have established precedents and to have an irreplaceable role in the development of the international Law of the Sea, particularly in the segment of maritime delimitations.

**KEY WORDS**
~ Delimitation
~ Equidistance
~ Principle of Equity

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## 1. INTRODUCTION

The international Law of the Sea has been striving to develop an equitable regime for delimitation of maritime zones for over half a century. Due to the relative ambiguity of the Geneva Convention on the Law of the Sea (1958) and of the Convention on the Law of the Sea (1982) on the issue of delimitation of maritime zones, case law of international courts, arbitration and ad hoc tribunals has a significant role in the formulation of general principles applicable to the delimitation of maritime boundaries.

In the age when states have, for the most part, stabilized their territorial sovereignty on land, the determination of the limits of their maritime rights and delimitation became major issues in the Law of the Sea in the second half of the 20th century, as seen in the sheer number of bilateral agreements on the delimitation of maritime boundaries signed between states worldwide.

More than 30 % of oceans in the world today fall under some sort of state jurisdiction, creating the need for as many as 430 international maritime boundaries and delimitations. Less than a half are partially aligned and regulated by an agreement.

Although the need to define the rules of maritime delimitation arose at the time of gradual expansion of territorial sovereignty of coastal states from land and inland waters to territorial sea, old maritime regulations establishing state sovereignty over 3-12 nautical miles of territorial sea (Limits in the Seas, 1999), by their very nature, caused overlapping and disputes to a much lesser extent.

Maritime spaces in the international Law of the Sea are defined with respect to the jurisdiction of the respective coastal

state over such spaces. The distinction between maritime boundaries of a state and maritime delimitation must therefore be explained. The establishment of maritime boundaries consists of drawing lines that define maritime spaces under the jurisdiction of a country, i.e. spaces which are not in contact with the maritime spaces of another country. It is a unilateral act by means of which a state separates maritime zones from open sea. Maritime delimitation is an operation conducted by and between two or more states with the objective of separating overlapping areas in which the rights of such coastal states conflict, with each state aspiring to obtain spatial jurisdiction over the same maritime space (Caflish, 1991). One of the basic characteristics of maritime delimitation is emphasized here, i.e. that *it is conducted by and between two or more states*. The delimitation of maritime zones concerns the division of the spatial reach of state jurisdictions. The aforementioned jurisdiction may be considered spatial, given that it refers to a certain space and may be exercised only within that space.

The issue of the source of the part of the Law of the Sea regulating maritime delimitation is specific in many aspects. When the Commission for International Law started to study the issue of maritime delimitation, there were practically no legal rules regulating this area. The onset of formation of legal rules and norms of maritime delimitation was simultaneous with the appearance of the institute of continental shelf in the middle of the last century. As early as 1958, only thirteen (13) years after the first proclamation of continental shelf by American president Truman, the Geneva Conventions codifying continental shelf issues, along with the issues of territorial sea, outer limits and open sea, was signed. Most of the papers on the history of maritime delimitation begin with Truman's Declaration from 1945 or with the discussions of the Commission for International Law in the first half of the last century.

The relevance of common law in the delimitation of maritime boundaries is considerable. However, customary legal principles gradually developed until World War II (WWII) were mainly ignored in the theory of the international Law of the Sea in the segment pertaining to maritime delimitation. Nevertheless, common law remains a significant source of the law of maritime delimitation, as stated in Article 83 of the Convention on the Law of the Sea stipulating that the delimitation of maritime zones needs to be performed *based on international law, as described in Article 38 of the Statute of the International Court of Justice (ICJ), with the aim of reaching an equitable solution* (Convention on the Law of the Sea, 1986). Therefore, the practice of international courts in this field is much more than a subsidiary source. States negotiating an agreement almost invariably strive to base their argumentation on the wording and the spirit of international agreements, as well as on customs and court precedents. Case law also has great weight when used as argumentation in negotiations. The decisions of the International Court of Justice (ICJ) concerning the limits of fishing zones in the disputes between Great Britain and Norway, as well as between Great Britain and Iceland, are important for the segment of the Law of the Sea relating to maritime delimitation (Fisheries (United Kingdom v. Norway), 1951; Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), 1974). Although these disputes do not concern maritime delimitation directly, some of the Court's positions from these judgments are very significant for defining the limits of certain maritime zones. Territorial delimitation dispute between Honduras and El Salvador, which partially revolved around the issue of historical maritime boundaries in the Gulf of Fonseca should be mentioned here (Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras: Nicaragua intervening, 1992).

The International Tribunal for the Law of the Sea is also of great importance for maritime delimitation. The Tribunal was established by the 1982 Convention on the Law of the Sea as a court of specialized jurisdiction based in Hamburg. In accordance with Article 293 of the Convention, the Tribunal "shall apply this Convention and other rules of international law not incompatible with this Convention". Thus, the Convention is the main and other rules of international law secondary sources. The Tribunal may also decide on the basis of equity with the agreement of parties to the dispute.

Presently, and especially with respect to disputes concerning maritime boundaries, once considerable differences between court and arbitration methods of dispute resolution became negligible. There are, of course, special characteristics of these two processes that make them clearly distinct. Having emerged as an alternative in the diplomatic resolution of disputes, arbitration primarily started gaining importance as a manner of quasi-legal resolution of disputes. Starting from the 20th century, arbitration began assuming the characteristics of a real legal process and approximating court proceedings of dispute resolution at a faster pace. The role of equity as a principle, the rules of delimitation and the role of equidistance as a method of delimitation proved to be the most disputable issues in case law of international courts and tribunals among legal issues of relevance for the Law of the Sea.

## 2. EQUITY AS A PRINCIPLE AND RULE IN THE LAW OF MARITIME DELIMITATION

Aristotle was the first great philosopher to explain the functioning of the process of equity in law. Equity is not better than law, it is simply better law and goes beyond the text of the regulations only to the extent necessary for the rectification of some imperfection, the root of which lies in the generality of the regulations – which is almost always inevitable, since it is practically impossible to formulate a text to encompass and predict all situations occurring in real life (Aristotle, 2017).

Aristotle's influence on European legal tradition is significant. Equity in international law is not the same as the concept of equity in domestic law and can be defined and identified in various forms and in many societies. Equity which is the subject of study in international law is mostly related to western legal traditions. The principles of equity developed over time both in Roman law and English common law due to the need to improve the corpus of legal rules. In Roman law, equity was contained in *jus honorarium* by means of which praetors, based on the advice of judges, issued edicts in order to complement or rectify *jus civile*. Resorting to equity is particularly characteristic for early phases of development of branches of law, when practice is not sufficiently developed and enables the full expression and formulation of legal rules. Two great 17th century theoreticians, who had an impact on the creation and development of international law, Grotius and Pufendorf, assigned a significant role to equity. These theoreticians held that a judge who needed to use his/her right of discretion as opposed to the word of law, demonstrated certain tension.

The texts of important decisions and the Conventions on the Law of the Sea state and stipulate that maritime boundaries need to be established and delimited by applying the principle of equity, simultaneously taking into account all the relevant circumstances so as to arrive at a fair result. To acknowledge the great importance of equity in the process of delimitation of maritime zones, the legal function of equity in the fulfillment of such role needs to be defined. Two positions were formulated in the international Law of the Sea. The first position is that the application of equity would result in the change of the general legal rule if required by special case-related circumstances. The second approach gives greater autonomy to equity, treating it as an integral part of the Law of the Sea on its own. The starting point, that the uniqueness of every maritime boundary dispute prevents the establishment and application of general rules of delimitation, is in favor of the notion of autonomous equity, leading us to conclude that equity has a key role in the process of delimitation. The role of equity is to supplement the rules in a particular case and these rules should differ on a case to case basis. A judge of the International Court of Justice (ICJ) and professor of international law Jiménez de Aréchaga, in the continental shelf dispute between Tunis and Lybia (Continental Shelf (Tunis/Libyan Arab Jamahiriya), 1982), defined the principle of equity as follows: *„... to resort to equity means, in fact, to assess and to balance the relevant circumstances of a case, with the aim of enforcing justice, not through a rigid application of general rules and principles, but through adjustment and adaptation of such principles, rules and concepts to the facts, realities and circumstances of each case ...*" According to the Court's reasoning in the case of Tunis/Libya, equity applicable to maritime delimitations is primarily the equity of results, instead of equity of principles and rules. In this case, the International Court of Justice (ICJ) indicated that the Court „is obliged to observe the principles of equity as a part of the international law and to weigh various considerations that the Court deems relevant with the purpose of achieving a fair result (Continental Shelf (Tunis/Libyan Arab Jamahiriya), 1982).The generality of the norm prescribed by the Convention on the Law of the Sea for maritime delimitations leaves a lot of space for the discretionary role of a judge, while to the same extent, reinforcing the role of the courts and tribunals dealing with the issues of delimitation.

## 3. APPROACH TO DELIMITATION BASED ON THE METHOD OF EQUIDISTANCE

In the beginning, states applied the rules for the delimitation of rivers and lakes to maritime boundaries. Therefore, delimitation sometimes relied on *thalweg*, although the method of equidistance was also used. The word equidistance denotes an equal distance, i.e. equal remoteness and spacing between the coasts of two states. It originates from the Latin word *equi* which means equal, even and Latin word *distantia* which means distance.

When we discuss delimitation at sea, Article 15 of the Convention on the Law of the Sea (1982) needs to be mentioned. It provides for three integral elements: agreement, equidistance and special circumstances, due to which it is often referred to in literature as a combined rule: *Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith*. Therefore, agreement remains the first means of delimiting territorial sea in the Convention on the Law of the Sea. Article 15 proves that the rule contained in the first sentence is of dispositive nature and, hence, the states are at liberty to negotiate solutions different from those stipulated by the relevant rules of international law. Sovereign states are always free to conclude or not to conclude agreements and freely determine the contents of the agreement within the limits set by peremptory norms (jus cogens).

In the absence of agreement to the contrary, states are authorized to expand their territorial sea up to the median line. Due to the wide acceptance of the median line, this method of delimitation deserves to be discussed in more detail. This is a line along which every point is equidistant from the nearest points on the baselines from which the breadth of the territorial sea is measured. The theory recognizes three main types of the median line: strict, simplified and modified median line. The simplest

definition of the strict median line is that it is a line created by the strict application of the definition referred to in Article 15 of the Convention on the Law of the Sea from 1982. Strict median line consists of many related flat lines (segments) (Hodgson and Cooper, 1976). With the aim of avoiding such a complex line of delimitation between two states, they often simplify the median life by reducing the number of points at which the boundary line changes direction. Finally, the modified median line is also based on equidistance, but consists of segments that connect the points which are not strictly equidistant from the starting points, having in mind that certain forms have been only partially taken into account. The states are at liberty to select the method of boundary establishment. The analysis of the practice of states indicates that the application of the median line as the method of delimitation was dominant in the last 70 years. Out of 45 concluded agreements, equidistance was used in 33 agreements, among which 15 were concluded between states whose coasts are opposite to each other, and 18 between states with adjacent coasts. From the point of view of the states' practice in the process of delimitation of territorial sea, median line may be concluded to be the most commonly used method of delimitation. The popularity of the rule of equidistance, a special circumstance in early contractual law, may be explained by the fact that this formula managed to balance predictability and flexibility, objectivity and discretion.

While the Commission for International Law and Geneva Conventions proclaimed equidistance a desirable solution in the process of delimitation of continental shelves, the conclusion of the International Court of Justice (ICJ), for instance, in the case of the Northern Sea, was complete rejection of equidistance as the legally necessary first step or a desirable method of delimitation. In the case of the Northern Sea, the International Court of Justice (ICJ) rejected two arguments that spoke in favor of the rule of equidistance, one based on practical advantages and another on the principle. The Court pointed out that the advantages of a certain method did not represent a sufficient basis to make it mandatory, given that its application may lead to unfair results (North Sea Continental Shelf (Federal Republic of Germany v. Denmark), 1969; North Sea Continental Shelf (Federal Republic of Germany v. Netherlands), 1969). The International Court of Justice (ICJ) devoted a lot of attention to proving that equidistance was not a mandatory common law method and its argumentation was the following. At the time of Geneva Conventions, equidistance was certainly not a part of international common law (instead, it represented the rule *de lege ferenda*) (North Sea Continental Shelf (Federal Republic of Germany v. Denmark), 1969; North Sea Continental Shelf (Federal Republic of Germany v. Netherlands), 1969).

Given that, in the case of the Northern Sea, the International Court of Justice (ICJ) presented the principles of common international law governing the delimitation of continental shelfs, the following opportunity for the verification and expression of the mentioned principles was the decision of the Arbitration Tribunal established by United Kingdom and France for purposes of delimitation of the continental shelf in the English Channel (La Manche) (Delimitation of the Continental Shelf (United Kingdom of Great Britain and Northern Ireland and the French Republic), 1977). In this case, the Tribunal reaffirmed the position that the method of delimitation was subjected to the fair aim of the entire operation, strengthening the link between the fairness of the solution and concrete geographical and other circumstances, taking into account that geography became the key factor. The application of the rule of equidistance, in the opinion of the Tribunal, depends on the concrete geographical context and must be viewed in that light. According to the Tribunal, the equity of delimitation is not the result of their categorizations as adjacent or opposite, but of actual geographical circumstances that characterize the overall relation between the coasts and, therefore, the selection must be for the purpose of the concrete geographical circumstances (Bowett, 1978). However, the Tribunal started from the line of equidistance as a temporary line for each sector and adjusted it depending on geographical circumstances.

## 4. CONCLUSION

As a result of the development of the Law of the Sea, it is clearly established today that the starting point of every delimitation is the right of states to expand their maritime zones. International justice has great importance in the resolution of border and other maritime disputes submitted to international courts and arbitration tribunals. The decisions of the International Court of Justice (ICJ) and arbitration tribunal awards have special significance in the part of the Law of the Sea dealing with maritime delimitations. The international law of maritime delimitation is pretty imprecise as defined in the Convention on the Law of the Sea. In support of this claim, it suffices to quote the provision of the Convention on the Law of the Sea which stipulates that coastal states are legally merely required to delimit their boundaries "by an agreement on the basis of the international law". It was perhaps due to this imprecision that coastal states mainly adopted the position that court or arbitration dispute resolution proceedings may, in principle, resolve disputes related to the delimitation of maritime zones. The aforementioned indicates considerable confidence in international judiciary. Consequently, there are currently more decisions on maritime delimitation disputes than in any other area of international law.

The rules of international law on delimitation at sea and on the seashore lack clarity and are insufficient for the successful resolution of disputes between states. In court case law during

the resolution of such disputes, the intention was to find the best solutions based on the most extensive geographical, historical, political, commercial-economic and other arguments, similarly as in Anglo-Saxon law based on *precedents*. Although insufficiently precise, the principle of equity is of great significance, since in the course of its application, a number of criteria were elaborated that should be considered relevant for the selection of the most adequate and appropriate method of delimitation.

## REFERENCES


Aristotle, (2017), Nicomachean Ethics, available at: https://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/aristotle/Ethics.pdf, [accessed 13 March 2017.].

Bowett, D. W., (1978), The Arbitration between the United Kingdom and France Concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches, British Yearbook of International Law, 49(1), pp. 1–29., https://doi.org/10.1093/bybil/49.1.1

Caflisch, L., (1991), The Delimitation of Maritime Spaces Between States with Opposite and Adjacent Coasts, A Handbook on the New Law of Sea, Dordrecht: Nijhoff, pp. 426-427.

Continental Shelf (Tunis/Libyan Arab Jamahiriya), (1982), International Court of Justice, report, available at: http://www.icj-cij.org/en/case/63, [accessed 13 March 2017.].

Convention on the Law of the Sea, (1986), Official Gazette of the Socialist Federal Republic of Yugoslavia (SFRY), International Agreements, XLII(1).

Delimitation of the Continental Shelf (United Kingdom of Great Britain and Northern Ireland and the French Republic), (1977), International Law Reports, 54, pp. 6-138 and 139-213., http://dx.doi.org/10.1017/CBO9781316151815.007

Fisheries (United Kingdom v. Norway), (1951), International Court of Justice, report, p.116, available at: http://www.icj-cij.org/en/case/5, [accessed 13 March 2017.].

Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), (1974), International Court of Justice, report, available at: http://www.icj-cij.org/en/case/55, [accessed 13 March 2017.].

Hodgson, R. and Cooper, R., (1976), The Technical Delimitation of a Modern Equidistant Boundary, Ocean Development & International Law 3(4), pp. 361-388., http://dx.doi.org/10.1080/00908327509545575

Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras: Nicaragua intervening), (1992), International Court of Justice, report 351, available at: http://www.icj-cij.org/en/case/75, [accessed 13 March 2017.].

Limits in the Seas, (1999), National Claims to Maritime Jurisdiction, US Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, 39, pp. 39-50.

North Sea Continental Shelf (Federal Republic of Germany v. Denmark), (1969), International Court of Justice, report, available at: http://www.icj-cij.org/en/case/51, [accessed 13 March 2017.].

North Sea Continental Shelf (Federal Republic of Germany v. Netherlands), (1969), International Court of Justice, report, available at: http://www.icj-cij.org/en/case/52, [accessed 13 March 2017.].