

## Maritime Delimitation in International Law and the Law of the Seas: A Critical Analysis

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### ABSTRACT

The sea is spread over an immense surface, covering 140 million square miles, spread across a range of 72 percentage of the world's surface, containing an expansive biodiversity of plants and living beings. The sea depths contains fundamental minerals including oils and natural gases which are the real vitality wellsprings of the world and from earliest written history it has serve for exchange and trade, adventure and revelation. Hence considering the increasing need for interdependency between the state and the use of such maritime resources, it becomes essential to make regulations regarding the state's jurisdiction, its sovereignty, rights and privileges over such resources. However for a long period of time they have been subject to the doctrine of freedom of seas, a principle proposed by Dutch jurist Hugo Grotius as early as 1609 basically constraining national rights and purview over the seas to a limited belt of ocean encompassing a country's coastline. The rest of the ocean was declared to be allowed to all and belonging to none.

### INTRODUCTION

Preceding 1945, the states practiced full control in the issues over the seabed and subsoil, the water section and even the airspace, yet the position soon changed after World War II when there was a shortage of land based natural resources. Then, the emphasis moved on to seaward resources which demonstrated a much better exploitation chances. The classical international law of seas recognized only two Maritime zones, namely territorial sea and high seas. But owing to the scientific and innovative advances indicated potential in natural resources and an idea of continental shelf was produced. An imperative part in the rise of continental shelf was played by Truman proclamation of 1945 in which President Truman asserted the purview over common

assets of subsoil and seabed of continental shelf oil, gas, minerals and so forth.<sup>1</sup>, underneath the high seas and contiguous to the coast of United States, concerning United States. After the Truman declaration, coastal states claimed new maritime zones with altogether different boundaries, to those which define their territorial seas.

Because of the development of new notions of maritime zones, there was a considerable need of increment in the requirement for sea delimitation. International law permits a State to extend its EEZ seaward to a distance of 200 nautical miles from its baseline, as defined by article 57 of the 1982 LOS Convention.<sup>2</sup> Also the CS seaward extension is at least 200 nautical miles from the baseline, and perhaps considerably farther when international law so permits.<sup>3</sup>

It was apparent that the traditional prevailing law of seas needed a reformulation according to the growing present needs and circumstances to serve the interest of the nations. On 18<sup>th</sup> August 1967, Malta's ambassador to the United Nations, Arvid Pardo, also known as Father of the Law of Sea Conference, requested to include in the agenda of the XXII session of the General Assembly the item concerning the reservation exclusively for peaceful purposes of the seabed and ocean floor beyond the limits of present national jurisdiction(i.e. "the area" and the use of their resources in the interest of mankind.<sup>4</sup> In spite of the fact that his initiative was restricted to "an area", in a course of time it brought about the audit and reformulation of the whole Law of Sea. Pardo's drive came when numerous perceived the requirement for updating the freedom of-the-seas principle to consider the innovative changes that had reshaped man's relationship to the seas.

The Conference was gathered in New York from 3<sup>rd</sup>- 15<sup>th</sup> December 1973. It finished nine years after the fact after ten more sessions, with the a gathering on 30th April 1982 receiving a draft of the Convention on The Law of the Sea by a greater part of 130 states. The states collected at

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<sup>1</sup> President Truman proclamation No.2667, 28th September, 1945. "Policy of the United States with respect to the natural resources of the subsoil and the seabed of the continental shelf." Repr. [www.oceanlaw.net](http://www.oceanlaw.net).

<sup>2</sup> International Convention on the Law of the Sea. Done in Montego Bay, 10 December, 1982. Hereafter: 1982 LOS Convention

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<sup>4</sup> <http://legal.un.org/avl/ha/uncls/uncls.html>

Mantego Bay on tenth December 1982 and 119 states at last marked the Convention on the Law of the Sea .Thus finishing the longest gathering in the historical backdrop of international law.

Key words- maritime, delimitation, equidistance, equity

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*As stated by McDougal and Burke, "the historic function of the law of the sea has long been recognized as that of protecting and balancing the common interests, inclusive and exclusive of all people in the use and enjoyment of the oceans while rejecting all egocentric assertions of special interest in contravention of general community interest"<sup>5</sup> "*

### **What is maritime delimitation?**

The legal development of the concept of maritime delimitation took shape slowly over time, owing great deal to the various case laws that shaped the process and played greater role in its development. In the case of **North Continental Shelf case 1969**, the ICJ defined maritime delimitation as *"a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination de novo of such an area"*<sup>6</sup>

In other words it means, it is a process via which the states determine their maritime area whereby it is allowed to claim its sovereignty according to the notions of the international law in case of an occurrence of overlapping titles, through the process of adjudication or negotiation between them making it altogether a political, legal as well as a very complex and technical process involving a minimum of two states which the ICJ confirmed in the case of **Gulf Of Maine** that *"No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States."*<sup>7</sup>

The maritime zones of two States tend to mostly time meet and overlap, and the line of partition must be drawn to differentiate the rights and obligations between the States. Accordingly, delimitation is a procedure including the division of maritime regions in a way in which two or more States have contending claims. The sea delimitation process is a complex subject, in view of both the number of actual and potential circumstances all through the world, and the complexities of the delimitation procedure. The delimitation procedure itself includes a number

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<sup>5</sup> The public order of oceans,p.1

<sup>6</sup> (German Federal Republic/Denmark, and German Federal Republic/Netherlands) 1969 ICJ REP, at p. 18

<sup>7</sup> (Canada v.United States of America) 1984 ICJ REP., para 112.

of issues. One concern is the origin of authority. Another issue includes the important strategies by which delimitation is completed; lastly there are specialized inquiries with respect to the assurance of the actual lines in space.<sup>8</sup> Clearly delimitation by agreement remains the cardinal rule of universal law. The settlement procedure is critical for accomplishing consensus. The delimitation procedure must be affected by understanding between parties based on international law, as it is perceived by 1982 LOS Convention.

The delimitation of the exclusive economic zone/continental shelf with the opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.<sup>9</sup>

## Brief history of the development of the law of maritime delimitation

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### A first stage preceding 1958:

Customary international law just perceived the sovereignty of a waterfront State over the waters promptly nearby its coast (generally a distance of 3 nm) – the territorial sea. A few States have additionally asserted a zone of high oceans adjacent to the territorial sea (or contiguous zone) for prevention and punishment in case of infringement of their customs, immigration fiscal and sanitary laws and regulations. At the time, no customary law existed regarding a general ideal to practice sway in oceanic regions past the territorial sea. In spite of the fact that without progress, the most punctual endeavor by the worldwide group to systematize delimitation standards and strategies was the **Hague Codification Conference** of 1930. This codification exertion was focused on the territorial waters and on the delimitation between inverse States. Accordingly, the preparatory committee for the Hague Codification Conference embedded the draft proposition on inverse delimitation of the Sub-committee. The different delegations differ on the proposed draft Articles. In spite of endeavors, the members to the Conference couldn't concur on the drafting of a delimitation Article.

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<sup>8</sup> Alexander L. M. The delimitation of maritime boundaries. *Political geography quarterly* 5, 1986. PP.

<sup>9</sup> Articles 74 and 83 of the 1982 LOS Convention.

**Second stage:**

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The First United Nations Conference on the Law of the Seas, which was held in Geneva from February 24 to April 27, 1958 adopted four important conventions<sup>10</sup> Article 12, Para 1:” 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 provisions of this paragraph shall 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 with this provision “

And

Article 6, Para 1:” Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured”

**The Third United Nations Conference on Law of the Sea (UNCLOS III)** was convened by the United Nations on account of the following reasons:

- Failure of Geneva Convention of 1958
- The failure of the second United Nations conference on Law of the Seas convened by the Secretary-General upon the request of the General Assembly to settle issues regarding fixing the breadth of the territorial sea and the fishery limits which had not been agreed upon in the said conventions (resolution 1307(III) of 10<sup>th</sup> December 1958.
- The emergence of new points of arguments on the exploitation of the international seabed area .

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<sup>10</sup> the Convention on the Territorial Sea and Contiguous Zone ; the Convention on the High Seas; the Convention on the Continental Shelf and the Convention on Fishing and the Conservation of the Living Resources of the High Seas

Malta's Ambassador to the United Nations, Arvid Pardo on 18<sup>th</sup> August 1967 requested to include in the agenda of the XXII session of the General Assembly the item concerning the reservation exclusively for peaceful purposes of the seabed and ocean floor beyond the limits of present national jurisdiction(i.e. "the area" and the use of their resources in the interest of mankind.<sup>11</sup> In spite of the fact that his initiative was restricted to "an area", in a course of time it brought about the audit and reformulation of the whole Law of Sea. It laid into a motion that spread over 15 years and saw the formation of an Ad Hoc panel in particular United Nations Seabed Committee, the marking of an arrangement restricting atomic weapons on the seabed, the appropriation of the statement by the General Assembly that all resources of the seabed past the limits of national jurisdiction are the normal legacy of humankind and the meeting of the Stockholm Conference on the Human Environment. The following point of interest was the selection of the revelation of standards overseeing the seabed and sea depths, and the subsoil thereof, past the breaking points of national purview, by General Assembly on December 17th 1970.

UNCLOS III was the forum from April 1978 to August 1981 and became a difficult and complex debate to draft and adopt, among others, a new law of maritime delimitation. It was influenced mainly after a recent development which originated in the case of North Sea Continental Shelf and also due to the scientific and technological advances which made it possible to exploit the seabed and ocean floor for the military as well as economic and scientific purposes. The Equidistance/Relevant Circumstances principle that emerged under the case law<sup>12</sup>

On two really important aspects failed to be included in the codification process under UNCLOS III. However the equidistance principle was added in the UNCLOS III in regards to delimitation of territorial sea<sup>13</sup> but in regards to the delimitation of EEZ and the continental shelf, it was strongly challenged.

*Article 74*, Paragraph 1 of the 1982 UNCLOS consistent with delimitation of EEZ between States with opposite or adjacent coasts, which applies with necessary changes required to *Article 83* related to the delimitation of the continental shelf as follows :

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<sup>11</sup> <http://legal.un.org/avl/ha/uncls/uncls.html>

<sup>12</sup> Arbitration between the United Kingdom of Great Britain and Northern Island and The French Republic on the Delimitation of the Continental Shelf, Decision of the Court of Arbitration, 1977, RIAA, Vol. XVIII,

<sup>13</sup> Article 15

*“The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”*

The international law which governs the process of maritime delimitation has been laid out under articles 74 and 83 as:

***Article 74: Delimitation of the exclusive economic zone between States with opposite or adjacent coasts***

1. “The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.”

***Article 83: Delimitation of the continental shelf between States with opposite or adjacent coasts***

- 1 “The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an

equitable solution.

- 2 If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
  - 3 Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
  - 4 Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.”
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- 1 “The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
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- 3 Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to



jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

- 4 Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.”

This process must either be governed by the states concerned, themselves after reaching an agreement or with the help of international judicial authorities. It must be done by following the legal principles developed by any treaty law and all the customary laws in order to reach an equitable boundary line.

But owing to the failure to provide a specific and certain method to reach the process of delimitation especially of EEZ and CS, these two articles are considered nothing but hollow rules.

The Third United Nations Conference on the Law of the Sea (UNCLOS III) prompted the reception of the most extensive convention on the law of the sea to date. UNCLOS III was not just critical for the advancement of the international law of the ocean but also can likewise be considered as a main point of interest in the history of the politico diplomatic arranging framework, and was the most inventive global law-production venture at any point attempted.

The first reason for gathering of states to commence the meeting was due to the fact of development process of number of newly recognized states who were decolonized in the 1950 and 1960s had not partaken in the arrangement procedure undertook in the UNCLOS 1 and whereas 86 States took part in 1958, 165 States partook in UNCLOS III. Another reason being, the need of the States to change the bilateral and multilateral treaty making process to set up a more majority rule and evenhanded global request and in addition to other things and to reconsider the conventional law of the ocean to mirror this new request. A Sea-Bed Committee was set up by the General Assembly in 1968. This Advisory group was viewed as a preparatory committee for the new law of the ocean. But the Sea Bed Committee started becoming overburdened with official explanations, working papers furthermore, government proposition for draft Articles on an extraordinary assortment of issues.

Between 1971 and 1973, the different recommendations for draft Articles were incorporated into the rundown just to fill in as perspectives for transactions and counsels to be led inside a future meeting. The Sea-Bed Committee was under no strain to attempt to reach concurrence on the different proposition, since clearly a thorough law of the ocean meeting would be held without further ado. Since the Sea-Bed Committee couldn't finish its preliminary work and UNCLOS III was assembled in December 1973. The logical inconsistency between the 2 groups, one supporting the principle of equidistance between States and the second group supporting the equitable principle, genuinely hampered the transactions and turned into a difficult issue on the motivation of UNCLOS III.

A few arranging bunches were set up to accomplish an answer; however it appeared that two gatherings of States with inverse positions worked without accomplishment in accomplishing a arrangement. Amid the gathering, numerous draft propositions were exhibited by these two gatherings of States. Obviously, the supporters of the equidistance line (for instance: Denmark, Norway, United Kingdom, Canada, Greece, Italy, Japan) supported the treatment of the equidistance/median line as a standard of delimitation. They demanded that it was the standard of international law administering delimitation cases, depending on Article 6 of the 1958 Convention on the Continental Shelf. They considered that the impartial rule standard was obscure and subjective. Supporters of the equitable approach (for instance: France, Turkey, Ireland, Kenya, Liberia, Libyan Arab Jamahiriya, Poland, Romania) protested the very specify of the equidistance/median line as a standard for delimitation and rejected the height of that standard to the status of a fundamental rule.

The supporters of the equitable approach backed up the decision of the ICJ in the 1969 North Sea Continental shelf case. For this situation, the ICJ stated the importance of a median line/equidistance of Article 6 of the 1958 Continental Shelf Convention and underscored the fair guideline as standard international law on delimitation.

After lengthy and difficult process of negotiations, a mutual decision was reached with a compromise formula for the delimitation. The tenth session of UNCLOS III was held in New York from 9<sup>th</sup> March to 10<sup>th</sup> April. Although they agreed for an international law in maritime delimitation, they failed to concur on the point of linking the process of delimitation with the equitable principle. The other components of the delimitation criteria could likewise not be settled. The two Co-chairman (Ireland representing the equity group) and Spain representing the

equidistance group) independently announced the failure to achieve a certain result of these negotiations to the President. Apart from that, the groups of two chairmen partook informal negotiations with the conference President.

The mediations by UNCLOS III President Koh were viewed as important thus continued the tenth session which produced a compromise formula long being searched. Together with the assistance of the delegate of Fiji, Koh proposed the accompanying substantive arrangement on delimitation:

Delimitation of the EEZ/Continental shelf between States with opposite or adjacent coasts: The delimitation of the EEZ/Continental shelf zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.<sup>14</sup>

This compromise formula was later on fused in the 1982 LOS Convention. The representative of Ireland, Chairman of the equity group affirmed that the proposition received a substantial amount of support. The representative of Spain, Chairman of the equidistance group backed up the comment of the representative of Ireland and that there was in reality general help in his group for the President's proposal.

The reception of the delimitation arrangement for the territorial sea was not really dangerous, since the separation does not surpass 12 nautical miles and a projection of the land outskirt which is utilized, which in pragmatic terms implies a median line. So Article 15 of the 1982 LOS Convention remained for the most part the same as it was in the 1958 Geneva Convention. Failing agreement, and without chronicled titles or other unique conditions, the limit is the median line. The new compromise formula would ensure the interests of the two clashing parties, and also any gathering to a delimitation case. It might be fought that this reference to global law and a fair arrangement is excessively dubious, and that the exact elements to be considered in delimitation, including the esteem or impact to be given to them, have not been determined or cleared up. The arrangement proposed by President Koh and acknowledged by an extensive segment of the Conference, despite the fact that not consummate, is workable

### CONCLUSION:

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<sup>14</sup> Article 74 and 83 of the 1982 LOS convention

In conclusion, the jurisprudence of the Court has evolved establishing a set of unified principal steps for maritime delimitation, whether relating to the territorial sea, the continental shelf, the EEZ or a single maritime boundary. These steps are as follows:

- the first step taken by the court must be to consider whether any part of the maritime delimitation is already subjected to formal or tacit agreement between the parties and if the court finds it so, it not disturb that aspect of the delimitation.
- The Court must then determine the relevant coasts for the delimitation and determine which base points are to be used for the construction of a provisional equidistance line. The choice of base points is to be made on a purely legal basis with any inequities arising from such a choice to be dealt with at a later stage.
- In most cases, the Court will then proceed to draw a provisional equidistance line (unless the special/relevant circumstances are such as to warrant the application of an entirely different method).
- The Court will then consider whether the provisional equidistance line (or other line chosen) needs to be modified to achieve an equitable solution, having regard to a number of special/relevant circumstances. Circumstances related to coastal geography (in particular length of the coastline, shape of the coastline and presence of islands) are the most relevant in this context. However, the Court may also have regard to a range of other circumstances such as historic title, socio-economic considerations, and distribution of natural resources, security and conduct of the Parties.
- The Court may apply an ex post facto disproportionality test to verify whether the delimitation line as modified is equitable and if it is not, make any further necessary modifications.
- Finally, the Court will also need to specify starting and end points to the delimitation and will need to avoid encroaching on the rights of third States.<sup>15</sup>

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<sup>15</sup> *Chinese Journal of International Law*, Volume 9, Issue 2, 1 June 2010