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EQUITABLE PRINCIPLES IN THE DELIMITATION OF THE AEGEAN CONTINENTAL SHELF

Abstract: The purpose of the article is to present the role of equitable principles in the delimitation of the continental shelf in the specific situation of the Aegean area. First, the theoretical aspects of the equity in international law and its typology are presented, followed by explaining the role of equitable principles in maritime relations. In turn, the author explains the interdependence of equity and geographical conditions, while stressing the unique geography of the Aegean, bearing heavily on delimitation efforts in the region. The context of the Greek-Turkish continental shelf delimitation dispute is explained, drawing attention to the divergent positions of the two countries. The rules applicable to the dispute at hand are then analysed, with a focus on customary law, in the absence of treaty rules applicable between Greece and Turkey as concerns the maritime delimitation. The role of the international courts and tribunals in finding solutions in the disputes involving the delimitation of the continental shelf is discussed, by also presenting their approach to interpreting and applying equity and equitable principles. The three-stage delimitation method elaborated in the case-law based on equitable principles is finally presented, while drawing attention to the difficulties in applying the method in practice and the resulting therefrom inconsistencies.
Finally, the conclusions of the above considerations for the Aegean continental shelf delimitation are drawn and the perspectives for finding a solution in the future are presented.

Keywords: equity, equitable principles, decisions *ex aequo et bono*, maritime delimitation, continental shelf, Aegean region, Greek-Turkish relations, Law of the Sea Convention, islands, international dispute resolution.

* The views expressed in the article are solely those of the author.

1. Introduction

J. Gilas dedicated a significant part of his academic writing to the law of the sea and the delimitation of maritime territories, with a particular focus on the equitable principles in the delimitation of the continental shelf.[2] The purpose of this article will be, by taking J. Gilas' views as a starting point, to present the specific situation of the Aegean and see if and how equitable principles play a role in the delimitation of the continental shelf in the area.

Before, a few remarks will be dedicated to the theoretical aspects of equity in the international law.

2. Equity in International Law and its Typology[3]

Equity is a polymorphous concept, even in the narrow confines of legal language.[4] In the *Tunisia/Libya continental shelf case*[5] the International Court of Justice (ICJ) admitted that in the course of the history of legal systems the term 'equity' has been used to define various legal concepts.[6] In its most general meaning it refers to what is fair and reasonable in the administration of justice.[7] The ICJ further explained that equity as a legal concept is

2 The selected bibliography includes: *Prawo morskie*, co-author Łopuski J.; "Maritime boundaries of Poland with its neighbouring countries", 29-32; „Prawne problemy delimitacji wód terytorialnych w Zatoce Pomorskiej", 47; „Pomeranian Bay: an example of the resolution of disputes between Socialist Countries over natural resources in border areas", 6; „Zasady słusznościowe delimitacji szelfu kontynentalnego", 25-44; "Equitable principles of the delimitation of continental shelf", 1991-1992, Vol. 19, 61-69; "Equitable principles of the delimitation of continental shelf", 1499-1508; "Pojęcie sprawiedliwości w nowej konwencji o prawie morza", 97-112; "Notion of Justice in the United Nations Convention on the Law of the Sea", *Prawo Morskie*, 1988, vol. II, 151-163; „Status prawnomiędzynarodowy Zatoki Pomorskiej", 299-301; „Stan prawnomiędzynarodowy Zatoki Pomorskiej w świetle zmian w prawie morza", 9-12; „Problemy morskich wód przybrzeżnych Polski" (edited Jaskot K.), 58-61; „Prawnomiędzynarodowe problemy delimitacji obszarów morskich PRL z państwami sąsiednimi", 19-27; „Prawnomiędzynarodowe problemy delimitacji obszarów morskich PRL z państwami sąsiednimi", 75-82.

3 See Titi, *The Function of Equity in International Law*.

4 Francioni, "Equity in International Law", para. 1.

5 The *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*) case, Judgement of 24 February 1982, ICJ Reports 1982, 18.

6 Ibidem, 71.

7 Francioni, ibidem, para. 1.

a direct emanation of the idea of justice.[8] According to J. Gilas, equity is the application of justice to a specific case.[9]

However, the precise scope and role of equity among the sources of international norms remains unclear.[10] Article 38(1) of the ICJ Statute[11] does not include equity among the formal sources of international law (i.e. international conventions, international custom or the general principles of law recognized by civilized nations). Article 38(2) of the ICJ Statute allows the Court to decide a case *ex aequo et bono*, if the parties agree thereto. It is debated whether the equity and equitable principles are part of international law and covered by Article 38(1) or remain outside international law – and fall under Article 38(2). According to J. Gilas, initially, the law of the sea, law of rivers and international economic law – areas where the recourse to equity was most common, treated equity as external to international law, but gradually, as the rules of equity were evolving and applied by tribunals, they started becoming part of *corpus iuris gentium*.[12] At present, therefore, as a result of their repeated application by international tribunals with regard to the division of inland waters and the delimitation of the continental shelf, the principles of equity have become principles of international law.[13] In this context, J. Gilas referred to the 'process of internalization of principles of equity' by international law.[14]Also W. Czapliński and A. Wyrozumska note that the international courts and arbitral tribunals often referred to the principle of equity as one of the most important principles of international law.[15] Yet, as concerns the new law of the sea, they admit: the nature of the principle of equity is still unclear and needs to be further developed.[16] This is complemented by the view that the case law still displays a lack of consistency and predictability.[17] While affirming the importance of equitable principles in the delimitation process, the judges

8 The *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*) *case*, *supra* note 4, 71.

9 Gilas, *Prawo międzynarodowe*, 26.

10 Francioni, ibidem, para. 4.

11 https://www.icj-cij.org/en/statute.

12 Gilas, „Zasady słusznościowe delimitacji szelfu kontynentalnego", 28.

13 Whereas, as regards international economic relations, in view of the low effectiveness of the new international economic order, the principles of equity remain external to international law or marginal to international law. See Gilas J., *Prawo międzynarodowe*, 28.

14 Gilas, „Zasady słusznościowe delimitacji szelfu kontynentalnego", 27.

15 Czapliński, Wyrozumska, *Prawo międzynarodowe publiczne*, 104.

16 Ibidem, 106.

17 Delabie, "The Role of Equity, Equitable Principles, and the Equitable Solution in Maritime Delimitation", 149.

and arbitrators did not point out their exact substance. The ICJ attempted to clarify the concept of equitable principles but did not outline their precise content.[18] In spite of the attempts to clarify the role of equity in the maritime delimitation process, strong criticisms have been levelled at the subjectivity and the lack of predictability resulting from this blurred use of the concepts which leads to applying equity outside of the law, in other words 'autonomous equity'.[19]

To start with, it is customary to distinguish between three kinds of equity: equity *infra legem*, which is equity within the law; equity *praeter legem*, which performs a gap-filling function; and equity *contra legem*, which is equity that derogates from the law. These three categories represent ideal types of equity. They are simplifications and the line between them is often blurred: recourse to one or another type of equity is a matter of interpretation.[20]

The exhaustive analysis of the categories of equity can be found in the separate opinion of Judge Ch. Weeramantry[21] in the 1993 *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark v. Norway*)[22] case. Judge Ch. Weeramantry identified the following categories of equity: (a) equity *ex aequo et bono*, (b) absolute equity, (c) equity *praeter legem*, (d) equity *infra legem* (also termed equity *intra legem* or equity *secundum legem*), and (e) equity *contra legem*.[23]

Under the equity *ex aequo et bono*, some authors group together equity *praeter* and *contra legem*, while others view *ex aequo et bono* adjudication as coterminous with equity *contra legem*.[24]

Referring to the ICJ judgement in the *Burkina Faso/Republic of Mali* case,[25] J. Gilas also distinguishes between equity *infra legem*, equity *contra legem* and *equity praeter legem*[26], and further explains that equity was an external system in relation to law, which it corrected with the aim of ensuring justice, when the application of legal norms would not lead

18 Ibidem, 150. Similarily, see Czapliński, Wyrozumska, ibidem, 104-105.
19 Delabie, ibidem 152. See also Czapliński, Wyrozumska, 108.
20 Titi, ibidem, 84.
21 https://www.icj-cij.org/public/files/case-related/78/078-19930614-JUD-01-08-EN.pdf.
22 *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark v. Norway*) case, Judgement of 14 June 1993, ICJ Reports 1993, 38.
23 See paras. 52-73.
24 Titi, ibidem, 84.
25 The *Frontier Dispute* (*Burkina Faso/Republic of Mali*) case, Judgement of 22 December 1986, ICJ Reports 1986, 554, paras. 27-28.
26 Gilas, *Prawo międzynarodowe*, 26.

to justice.[27] However, eventually, through their application by the international courts and tribunals and through including them into international treaties, principles of equity were incorporated into international law, thus becoming legal norms.[28] Indeed, apart from the Convention on the Law of the Sea, the reference to equity/equitable principles is to be found in International Economic Law (within the framework of the so-called New International Economic Order, in the WTO rules, in bilateral investment treaties and in the settlement of related disputes), in Environmental Law and Sustainable Development (the conservation and sustainable development of shared resources of a water basin, the conservation and management of global resources, the equitable sharing of benefits derived from the exploitation of natural resources), as well as in the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.[29]

M. Kotzur explains the relation between equity and decisions *ex aequo et bono* in the following way:[30] equity allows the relevant decision-making bodies, still within the realm of the law, to take the requirements of justice into account when interpreting legal rules or, in the absence thereof, properly filling the lacunae of international law. On the other hand, decisions *ex aequo et bono* go beyond the realm of legal rules, are external to the law, and can even be *contra legem*. The clear distinction between equity as an intrinsic element of international law and the *ex aequo et bono* principle, as a rule of decision departing from and consequently being outside the law, is still upheld in public international law. What both concepts have in common is their reference to considerations of fairness, reasonableness, or policy, and, even more importantly, their function as equitable correctives of unfair outcomes.[31]

Equitable principles can simply be used as a means of legal interpretation, formulating the ethical, social, or cultural context in which an established legal rule has to be understood and focusing on equity as telos of a specific norm (equity *intra* or *infra legem*). Decisions in equity can also

27 Gilas, „Zasady słusznościowe delimitacji szelfu kontynentalnego", 29.

28 Ibidem, 30.

29 For an extensive listing of the relevant treaties and other international instruments, see e.g. Francioni, ibidem, paras. 22-28; Gilas, „Pojęcie sprawiedliwości w nowej konwencji o prawie morza", vol. 1, 97-100; Czapliński, Wyrozumska, ibidem, 106-108. On equity in the WTO, see e.g. Gourgourinis, *Equity and Equitable Principles in the World Trade Organization. Addressing Conflicts and Overlaps between the WTO and Other Regimes*.

30 Kotzur, "Ex Aequo et Bono", para. 2.

31 Ibidem, para. 11.

be *praeter legem*. Equity forms a part of the applicable law within the relevant legal system and has a supplementary or gap-filling function.[32] Decisions *ex aequo et bono*, however, are external to the law and set aside well-established legal rules. In order to do so, they require the explicit consent of the parties involved. Aiming for compromise and conciliation *extra* or even *contra legem*, *ex aequo et bono* findings have their roots in moral, social, and political spheres, and rely on a flexible rule of reason rather than a strict rule of law. They function as a deliberate corrective of the law.[33] H. Lauterpacht clearly states: "Adjudication *ex aequo et bono* amounts to an avowed creation of new relations between the parties' and therefore clearly differs from the application of rules of equity, which form part of international law, as indeed, of any legal system".[34]

Furthermore, *ex aequo et bono* holdings can be described as a result-oriented equity approach, leaving the court broad room for subjective appreciation and discretion. Consequently, they bear some risk of arbitrariness as well as of insufficient predictability of the outcome where legal certainty is at stake.[35] As explained by the ECJ in the *Tunisia/Libya continental shelf* case,[36] this is the result of the application of equitable principles that must be equitable.

> This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result.[37]

The danger of the Court's discretionary power was recognized by Judge S. Schwebel in the *Maritime Delimitation in the Area between Greenland and Jan Mayen* case. In his opinion, the principle of equity applied by the Hague

32 Ibidem, para. 12.
33 Ibidem, para. 13.
34 Lauterpacht, *The Development of International Law by the International Court*, 213.
35 Kotzur, ibidem, para. 13.
36 *Supra* note 4.
37 Para. 70.

judges is "as variable as the weather of The Hague", and therefore the law loses its functions of stability and predictability.[38]

Ch. Perelman, in his study of lacunae in the law, makes the point in the context of arbitrations and judicial decisions in public international law, that a request for a decision *ex aequo et bono* could be read 'dans le sens *contra legem*'.[39]

Absolute equity connotes the application of a just and fair solution – irrespective of whether it overrides existing rules or principles of positive law, however well entrenched they may be. It is a disregard of the letter for the spirit of the law, a disregard of technicalities in favour of justice. Therefore, this term would come close to the connotation of equity *ex aequo et bono*.[40]

The role that equity may play in international law is that of an instrumental criterion of interpretation of the applicable law in order to adapt such law to the specific circumstances of the case. In this case equity is not used as a principle endowed with autonomous normativity but rather as a method for infusing elements of reasonableness and 'individualized' justice whenever the applicable law leaves a margin of discretion to the court or tribunal which has to make the decision. In this sense it is appropriate to speak of equity *infra legem*, i.e. within the boundaries of the law.[41] In this context the relationship between equity and law is one of complementarity. Equity *infra legem* falls squarely within the law and, as a corollary, it is the most uncontroverted kind of equity. It is customary to hold that there is no distinction between equity *infra legem* and the 'law proper'. Some alternative terms figure in the literature – equity *intra legem*, *secundum legem*, or *propter legem* – highlighting the fusion between this type of equity and law.[42]

In relation to the general jurisprudence of the Court, the operation of equity *infra legem* has been summarized by S. Rosenne in the following terms:

> It [the Court] has permitted the first steps to be taken towards creating a conception of international equity, not *contra legem* in the sense that it is

38 *Maritime Delimitation in the Area between Greenland and Jan Mayen* case, Judgement of 14 June 1993, ICJ Reports 1993, 120, cited by Czapliński, Wyrozumska, ibidem, note 3, 105.

39 Le problème des lacunes en droit, 327.

40 Judge Ch. Weeramantry, *supra* note 20, para. 62.

41 Francioni, ibidem, para. 7.

42 Titi, ibidem, 85 and the literature cited therein.

> sometimes said that a decision *ex aequo et bono* may be a decision *contra legem*; but *intra legem*, it being the substantive law, and not the agreement of parties, that calls for its application.[43]

The doctrine of equitable principles applicable to maritime delimitation has already achieved, both with regard to its procedural and substantive elements, a degree of clarity and predictability which is sufficient for it being recognized as a fundamental norm operating within, and not outside, the law.[44]

Equity *praeter legem* refers to filling in gaps and interstices in the law. Even where there is no rule of law to provide for a matter, a decision has nevertheless to be reached, for the judicial function does not permit the court to abdicate the responsibility of judgment because the law is silent. Consequently, the gap has to be filled in some manner. Equity *praeter legem* receives juridical justification from the fact that the body of general equitable principles, as part of 'general principles of law', is itself part of international law.[45]

The hypothesis of equity *contra legem* or *praeter legem*, i.e. in opposition to law or outside the law, is contemplated by Article 38(2) ICJ Statute. Resorting to this concept of equity, which entails the creation of individualized rules by the judge for the settlement of the dispute *ex aequo et bono*, requires specific consent by the parties.[46] The power to decide *ex aequo et bono* under Article 38(2) ICJ Statute must remain distinct from the inherent power of the Court to resort to equity principles as part of international law and of the normal adjudication process.[47] However, it is also observed that customary international law is in constant evolution, and so what is *contra legem* at a given time may become consonant to the law at a later stage of evolution of the applicable rules. Equity may therefore anticipate the crystallization of the law and provide the rational and ethical justification for its transformation.[48]

43 Rosenne, *The Law and Practice of the International Court*, 605, cited by Judge Ch. Weeramantry, *supra* note 20, para. 70.

44 Kwiatkowska, "The International Court of Justice Doctrine of Equitable Principles Applicable to Maritime Delimitation and Its Impact on the International Law of the Sea" 158.

45 Judge Ch. Weeramantry, *supra* note 20, paras. 65-67.

46 Francioni, para. 9.

47 Ibidem, para. 11.

48 Ibidem, para. 17.

Having said all the above, it is noted that a demarcation of the use of equity *contra legem* from equity within the law or associated with the law is extremely problematic, both conceptually and practically. The different types of equity represent, rather than separate categories, a continuum along which the international judge or arbitrator exercises varying degrees of discretion in the interpretation, integration, and correction of the applicable rules and principles of international law. In this context, the characterization of whether equity is contrary to the law essentially depends on the construction of the scope and of the evolutive dynamics of the relevant norms. This is an eminently interpretative operation that falls within the discretion of the judge. However, this is certainly not to entirely exclude the potential for equitable principles to act *contra legem* in very exceptional circumstances, within the framework of equity, *qua* general principles of law, per Article 38(1)(c) ICJ Statute.[49]

3. Justice and Equitable Principles in Maritime Relations

In 1986 J. Gilas published an article dedicated to the notion of justice in the Convention on the Law of the Sea.[50] J. Gilas observed back then that the interest in equity in international relations was mostly confined to two areas: international economic relations and maritime relations between the states.[51] As concerns the latter, J. Gilas referred to the preamble of the Convention, where the Convention was considered "the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked". The codification and progressive development of the law of the sea were to be achieved, as it was declared, "in conformity with the principles of justice and equal rights". Further on, the Convention should contribute to "the equitable and efficient utilization of their resources" and should be "an important contribution to the maintenance of peace, justice and progress for all peoples of the world".

49 Ibidem, para. 21.

50 Gilas, „Pojęcie sprawiedliwości w nowej konwencji o prawie morza". See also Gilas, "Notion of Justice in the United Nations Convention on the Law of the Sea". The text of the Convention available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

51 Gilas, „Zasady słusznościowe delimitacji szelfu kontynentalnego", 25.

In his analysis, J. Gilas referred first to the equity principle mentioned in Article 59 of the Convention, as a basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone. Any conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

Further on, J. Gilas was referring to a number of other provisions in the Convention on the Law of the Sea, where equity was mentioned.[52] Article 74(1), relating to the delimitation of the exclusive economic zone between States with opposite or adjacent coasts (by agreement in order to achieve an equitable solution), Article 76(8), relating to the recognition of the principle of equitable geographical representation as the basis for the selection of the members of the Commission on the Limits of the continental shelf, Article 82(4), relating to the contributions made to the Sea-Bed Authority on the basis of equitable sharing criteria, in Article 140 dealing with the benefits of mankind, it was provided that the Sea-Bed Authority should formulate shares in financial and other economic benefits derived from the activities in the area on a non-discriminatory basis. In Article 83(1), the Convention provides the rules governing the delimitation of the continental shelf – whose ultimate aim is to achieve an equitable solution.

J. Gilas stresses that in the framework of the Convention on the Law of the Sea, justice was understood mainly as equity, which in turn was understood as striking a proper balance among concurring interests.[53] The proportions should be determined on the basis of special international agreements of the relevant states taking into consideration many factors which were indicated in the Convention. A more precise determination of these proportions in cases where the relevant agreements have not been concluded is not possible and, as J. Gilas noted,[54] one can even doubt if the agreements to be concluded in the future might provide a proper basis for the determination of a uniform mathematical formula stating the aforementioned proportions.

J. Gilas observed importantly that the formula of equity was a deviation from the principle of equality – be it understood in accordance with the principle '*qui prior est tempore, potior est iure*' or the principle of equal

52 Gilas, „Pojęcie sprawiedliwości w nowej konwencji o prawie morza", 104.
53 Ibidem, 105.
54 Ibidem.

shares of '*iustitia distributive*'.[55] According to J. Gilas, the aforementioned examples of equity indicate that the Convention on the Law of the Sea was based on the Aristotelian idea of '*iustitia commutative*'. Whilst in connection with the continental shelf of the North Sea, the ICJ seemed to accept the idea of 'iustitia distributive', subsequently, it supported the idea of '*iustitia commutative*' when proclaiming the principle of proportionality of shelves and accepting the criterion of the natural prolongation of the coast in the *Tunisia/Libya continental shelf* case.[56]

J. Gilas further developed the reflections on equity and equitable principles in relation to the delimitation of the continental shelf in his article published in 1990.[57] He noted that it was in relation to the institution of the continental shelf where the international courts have most fully developed the norms by invoking the principles of equity. J. Gilas was examining equity as the basis for adjudication of the courts and identifying the content of the principles governing the delimitation of the continental shelf. An important aspect was drawing attention to the geographical conditions as the factor affecting the delimitation according to the principles of equity.

The catalogue of equitable principles was presented by the ICJ in its judgement in the *Libya/Malta continental shelf* case:[58]

> the principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature; the related principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances; the principle of respect due to all such relevant circumstances; the principle that although all States are equal before the law and are entitled to equal treatment, 'equity does not necessarily imply equality' (ICJ Reports 1969, 49, para. 91), nor does

55 Ibidem.

56 *Supra* note 4.

57 Gilas, „Zasady słusznościowe delimitacji szelfu kontynentalnego". See also Gilas, "Notion of Justice in the United Nations Convention on the Law of the Sea", published in 1993.

58 The *Continental Shelf* (*Libyan Arab Jarnahiriya/Malta*) case, Judgement of 3 June 1985, ICJ Reports 1985, 13, para. 46.

> it seek to make equal what nature has made unequal; and the principle that there can be no question of distributive justice.[59]

The issue of equity and equitable principles in the delimitation of maritime boundaries has been subject to writings by many authors.[60] J. Velos referred in this respect[61] to the ICJ decision in *North Sea Continental Shelf* cases.[62] When considering equitable principles in relation to that continental shelf delimitation, the Court then explained:

> There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy.[63]

The Court of Arbitration in the *Anglo-French* case of 1977[64] took the same view in the matter and explained that:

> Just as it is not the function of equity in the delimitation of the continental shelf completely to refashion geography, so it is also not the function of equity to create a situation of complete equity where nature and geography have established an inequity.[65]

Equity does not necessarily mean equality and that it is not the function of equity to rectify an inequity created by nature or geography. J. Velos is also

59 Gilas, „Zasady słusznościowe delimitacji szelfu kontynentalnego", 33.

60 Recently, see e.g.: Delabie, 145-172; Cottier, *Equitable Principles of Maritime Boundary Delimitation. The Quest for Distributive Justice in International Law*, Miyoshi, "Considerations on Equity in Maritime Boundary Cases before the International Court of Justice", 1087-1101.

61 Velos, "The Aegean Continental Shelf Dispute between Greece and Turkey and the International Law Principles Applicable in the Delimitation of the Aegean Continental Shelf", 1987-88, 121.

62 *North Sea Continental Shelf* cases, Judgement of 20 February 1969, ICJ Reports 1969, 3.

63 Para. 91.

64 The *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (*UK v. France*) case, Decision of 30 June 1977, RIAA vol. XVIII 3-413.

65 Para. 249. See also Gilas „Zasady słusznościowe delimitacji szelfu kontynentalnego", 31.

stressing that equity is not conceived as playing a redistributive role, but as being a means to an end: to ensure that the tools or instruments of delimiting a boundary are equitably used. This is so since equity is working within a framework of legal rules and principles whose application may lead to unequal results.[66]

4. Equity and Geographical Conditions

As J. Gilas noted,[67] application of the equitable principles in every situation makes it necessary to take into consideration all geographical, geological, historical or economic circumstances. In the *North Sea Continental Shelf* cases,[68] it was commanded to take into the consideration for the application of equitable principles to concrete situation such factors as: (1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features; (2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved; (3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.[69]

J. Gilas notes that the method of equidistance can only be applied in the circumstances where geographical situations are not complicated, especially when coasts are situated in direct opposition to each other and look alike.[70] J. Gilas reminds us that in the ICJ's *North Sea Continental Shelf* cases[71] the Court stated:

> in certain geographical circumstances which are quite frequently met with, the equidistance method, despite its known advantages, leads unquestionably

66 Velos, ibidem, 121.
67 Gilas, "Equitable principles of the delimitation of continental shelf", 1504.
68 *Supra* note 61.
69 Para. 101.
70 Gilas, „Zasady słusznościowe delimitacji szelfu kontynentalnego", 34.
71 *Supra* note 61.

> to inequity, in the following sense: (a) The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus, it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity (...).[72]

J. Gilas also noted[73] that the necessity of the modification of the equidistance principle was admitted by the Court of Arbitration in the *Anglo-French* case of 1977.[74] It was maintained there that the aforementioned principle should be corrected by taking into consideration special situations, because "the combined character of the equidistance – special circumstances rule means that the obligation to apply the equidistance principle is always one qualified by the condition 'unless another boundary line is justified by special circumstances".[75]

From the point of view of the subject of our considerations in this article (Greek-Turkish continental shelf delimitation), there is one more important aspect, to which J. Gilas made a reference in his article: that is one involving the islandic character of the territories between which the delimitation is sought.[76] In the ICJ *Libya/Malta continental shelf* judgement,[77] the position of Malta as an island was taken into consideration and its influence on delimitation of continental shelf. The question was especially whether disproportionality of shelf could be based on the insular position of Malta. In that case, the Court did not take it into consideration, but pointed out (without much elaborating though), that the situation of the continental shelf would be quite different, if an island belonged to State, rather than the island itself being a State.[78]

72 Para. 89.
73 Gilas, „Zasady słusznościowe delimitacji szelfu kontynentalnego", 35.
74 *Supra* note 63.
75 Para. 70.
76 Gilas, „Zasady słusznościowe delimitacji szelfu kontynentalnego", 37.
77 See *supra* note 57.
78 Para. 53: "In the view of the Court, it is not a question of an 'island State' having some sort of special status in relation to continental shelf rights; indeed, Malta insists that it does not claim such status. It is simply that Malta being independent, the relationship of its coasts with

5. Unique Aegean Geography

With the above background, let us turn to the particular situation of the Aegean Sea. Many authors draw attention to the unique geography of the Aegean Sea, impacting heavily on the delimitation of the maritime zones between Greece and Turkey.[79] C. Yiallourides describes this as follows:

The Aegean Sea is located in the northeast section of the Mediterranean Sea. It is framed by the coast of Turkey to the east and that of Greece to the west and north. In the south, the Aegean Sea is virtually bordered, but not wholly enclosed, by the chain of the Greek islands of Rhodes, Karpathos, Crete and Antikythera. Compared to other seas of the world, the Aegean is particularly narrow. It is approximately 150 nm wide in its mid-section and less than 200 nm on overall average.[80]

There are more than 1,000 insular features (islands, rocks, islets and low-tide elevations) within this narrow semi-enclosed structure, the majority of which are currently under Greek sovereignty, including those located just a few nautical miles off the Turkish mainland coast.[81] Turkey, on the other hand, despite its substantial landmass, holds only a few island features in the Aegean.[82]

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the coasts of its neighbours is different from what it would be if it were a part of the territory of one of them. In other words, it might well be that the sea boundaries in this region would be different if the islands of Malta did not constitute an independent State but formed a part of the territory of one of the surrounding countries. This aspect of the matter is related not solely to the circumstances of Malta being a group of islands, and an independent State, but also to the position of the islands in the wider geographical context, particularly their position in a semi-enclosed sea."

79 See e.g. Bölükbasi, *Turkey and Greece: The Aegean Disputes: A Unique Case in International Law*, 87-91; Van Dyke, "An Analysis of the Aegean Disputes under International Law", 87; Yiallourides, *Maritime Disputes and International Law: Disputed Waters and Seabed Resources in Asia and Europe*, 45. In general, see Acer, *The Aegean Maritime Disputes and International Law*. In his recent article, Schaller focuses on the Eastern Mediterranean Greek islands - Rhodes, Karpathos, Kasos, Crete and Kastellorizo ("Hardly predictable and yet an equitable solution: Delimitation by judicial process as an option for Greece and Turkey in the Eastern Mediterranean", 2022, 1–20,

80 Yiallourides, ibidem, 45.

81 The Greek island of Samos comes to about one nautical mile from the Turkish coast. Kos and some others are almost as close (Van Dyke, ibidem, 87). The same (1.25 nm) is true for Kastellorizo (Schaller, ibidem, 2).

82 Yiallourides, ibidem, 45.

As C. Yiallourides observes,

> The peculiar geographical configuration of the Aegean Sea, the large number of fully fledged islands and their specific location in relation to the Greek and Turkish mainlands are the key underlying reasons for the uniqueness of the Aegean Sea delimitation complexity, when compared to other semi-enclosed seas. Nowhere in other parts of the world do numerous islands of one State mask nearly 85 per cent of another State's coast. The Greek territorial sea, currently set at 6 nm, amounts to 43.68 per cent of the Aegean, as opposed to 7.4 per cent under Turkish jurisdiction. The remaining 48.85 per cent has the status of high seas as neither State has declared an EEZ in the Aegean Sea so far.[83]

The eastern Aegean islands can be divided into two sub-groups depending on their more specific locations within the eastern sector: those situated in the north-east Aegean Sea, such as the Greek islands of Thasos, Limnos, Lesvos, Samothrace, Ayios Eustratios, Psara, Chios, Ikaria and Samos, and those situated in the south-east Aegean Sea, which are known as the Dodecanese Islands.[84] A number of other Greek islands, such as Karpathos, Astypalea and Kassos are situated further off, but still close to the imaginary median-distance point drawn between the two mainland coasts and Crete.[85]

As further observed by C. Yiallourides, the Aegean Sea represents a complicated situation because it is involving two opposite mainland States with many fully entitled islands of one State, Greece, located closer to the coasts of the other State, Turkey. "In other words, they are located on the 'wrong side' of the virtual median/equidistance line between the Greek and Turkish mainlands".[86]

83 Yiallourides, ibidem, 45.
84 Arki, Patmos, Lipsi, Leros, Levitha, Kalymnos, Nissyros, Kos, Symi, Chalki, Astypalea, Tilos, Kassos, Agathonisi, Alimnia, Rodos, Karpathos and Kastellorizo.
85 Yiallourides, ibidem, 45.
86 Ibidem, 66.

6. Greek-Turkish Continental Shelf Delimitation Dispute

The land boundary between Greece and Turkey was established in 1923.[87] This is due to the above-mentioned complex geographical characteristic and complicated historical Greek-Turkish relations that their maritime boundaries in the Aegean Sea have not yet been formally delimited.[88] In fact, the two countries disagree about how many separate controversies are truly in dispute.[89] Turkey contends that questions of sovereignty over certain islands,[90] the demilitarized status of other islands, the breadth of the territorial sea around Greece's Aegean Islands,[91] the air defence zones around Greece's islands, the control of air traffic over the Aegean, and right of passage through the Aegean are in need of resolution. Greece has taken the position that the delimitation of the continental shelf is the only unresolved issue.[92]

Some of the above issues are interlinked with each other more than the others. As J.M. Van Dyke observed, because some eastern Greek islands 'hug' the Turkish coast, the boundary issues involve delimitation of both territorial sea and the continental shelf.[93] However, the focus in this article will remain on the latter.

On 10 August 1976, Greece instituted proceedings against Turkey in a dispute over the Aegean Sea continental shelf. It asked the Court, in particular, to declare that the Greek islands in the area were entitled to their lawful portion of continental shelf and to delimit the respective parts of that shelf appertaining to Greece and Turkey. In a Judgment delivered on 19 December 1978, the Court found that the jurisdiction to deal with the case was not conferred upon it by either of the two instruments relied upon by Greece: the application of the General Act for Pacific Settlement of International Disputes (Geneva, 1928) – whether or not it was in force – was excluded by

87 Section I, Art. 2(2), Treaty of Peace with Turkey (British Empire, France, Italy, Japan, Greece, Romania, the Serb-Croat-Slovene State and Turkey) (adopted 24 July 1923) (Lausanne Treaty 1923). See Yiallourides C., ibidem, 43.

88 Ibidem.

89 Van Dyke, ibidem, 63.

90 E.g. Kardak/Imia Rocks dispute, see ibidem, 69.

91 Turkey announced that any attempt by Greece to extend the width of the territorial sea around the Aegean islands beyond the present 6 miles, even though allowed under the 1982 Convention, would be considered as *casus belli*. See Yiallourides, ibidem, 49.

92 Ibidem, 63.

93 Ibidem, 87.

the effect of a reservation made by Greece upon accession, while the Greco-Turkish press communiqué of 31 May 1975 did not contain an agreement binding upon either State to accept the unilateral referral of the dispute to the Court.[94] The situation has remained unchanged ever since.

C. Yiallourides has summarized the respective position of Greece and Turkey on the delimitation of the continental shelf between them.[95] The position of Greece is that all Greek islands, including the islands in the mid-eastern sector of the Aegean, enjoy, beyond their territorial waters, maritime zones as any other land territory and that the delimitation between these islands and the Turkish mainland should follow a median line, unless any other boundary is justified by special circumstances. Greece considers that, with the exception of some low-tide elevations and uninhabitable rocks that could be ignored in the delimitation process, the Greek Aegean islands do not qualify as special circumstances, so as to justify any other solution than the median line. Greece emphasized that the delimitation of the continental shelf is based both in theory and practice of international law on the principle of equidistance.[96] Due to the fact that the Greek islands may generate the full suite of maritime areas of their own, a median line of delimitation should be drawn between the Greek islands and the Turkish territory.

Turkey, on the other hand, advocates that under international law the delimitation of the continental shelf, unless the parties have decided otherwise through amicable agreement, should be carried out in accordance with equitable principles, after taking into account all the relevant circumstances, in order to achieve an equitable delimitation result. According to Turkey, the median/equidistance line has a residual character: failing agreement and unless special circumstances justify another boundary so as to reach a just and fair agreement based on equitable principles. Turkey has repeatedly expressed the view that the outer limits of the Turkish continental shelf shall be based on equitable principles, taking into account all relevant or special circumstances in accordance with international law. Therefore, Turkey relies on the 'equitableness' of any delimitation solution whereby no particular delimitation method, including equidistance, has an *a priori* status, because equity can only be defined in the light of the specific

94 The *Aegean Sea Continental Shelf* (*Greece v. Turkey*) case, ICJ Reports 1978, 3.

95 Ibidem, 51. On the parties' maritime claims and entitlements in the Eastern Mediterranean, see Schaller, ibidem, 4-9.

96 Pleadings, oral arguments, documents, https://www.icj-cij.org/public/files/case-related/62/9481.pdf, Annex II, 21. See Yiallourides C., ibidem, 52.

circumstances of the area to be delimited. Furthermore, the Turkish position is that, as a principle, the median line can only be drawn between the mainland of the countries, by totally ignoring islands.[97]

7. Applicable Rules[98]

As mentioned above,[99] there is no common treaty law binding Turkey and Greece with respect to the delimitation of maritime areas in the Aegean.

Turkey was not a party to the 1958 Convention on the Continental Shelf and is not a party to the 1982 Law of the Sea Convention, whereas Greece has been a party to both. In view of this, the provisions of these two treaty instruments are not applicable as such between Turkey and Greece. The rules and principles of international law applicable to the delimitation of the Aegean continental shelf must be those of customary international law.[100]

As J. Gilas explained, the 1958 Convention was the convention progressively developing international law, and not codifying customary rules.[101] Indeed, even though principles of median line or equidistance were provided for by the 1958 Convention, they were not considered customary international law.[102] In the *North Sea Continental Shelf* cases,[103] the Court admitted the value of the equidistance/special circumstances rule only as a conventional rule. It stated that:

> the [1958] Convention did not embody or crystallize any pre-existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance/special circumstances

97 Marghelis, "The maritime delimitation agreement between Greece and Italy of 9 June 2020: An analysis in the light of International Law, national interest and regional politics", 8.
98 In general, see McRae, "The Applicable Law. The Geneva Convention on the Continental Shelf, the LOSC, and Customary International Law", 92.
99 See *supra* note 87 and accompanying text.
100 Bölükbasi, ibidem, 296-297.
101 Gilas, Łopuski, *Prawo morskie*, 315.
102 Gilas, „Zasady słusznościowe delimitacji szelfu kontynentalnego", 26.
103 *Supra* note 61.

basis. A rule was of course embodied in Article 6 of the Convention, but as a purely conventional rule.[104]

On the other hand, the provisions of the 1982 Convention on the Law of the Sea relating to the continental shelf are considered to have a mostly codifying character.[105] In relation to the continental shelf, they have been based on the evolving jurisprudence marked by resistance to the equidistance principle. The equidistance principle has (intentionally)[106] been omitted in the provisions on the delimitation of the continental shelf, as well as the exclusive economic zone (even though retained in the context of territorial sea delimitation).

Article 83 of the 1982 Convention provides that: "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be affected 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."

It is recognized that this provision reflects the international customary law, and thus is relevant for the delimitation of the continental shelf between Greece and Turkey.[107]

Already prior to the 1982 Convention, in 1977 in the *Anglo-French* case, the Arbitration Court stated "(...) in the case of 'opposite' States a median line will normally effect a broadly equitable delimitation, (...)."[108] The equidistance principle has also been endorsed, when it leads to an equitable result, in the *Tunisia/Libya continental shelf* case as follows: "Treaty practice, as well as the history of Article 83 of the draft convention on the Law of the Sea, leads to the conclusion that equidistance may be applied, if it leads to an equitable solution; if not, other methods should be employed."[109] Also according to the subsequent jurisprudence, the equidistance principle is considered as the favoured means used by the judge for the delimitation process because of its scientific character.[110] This has been confirmed by the ICJ[111] and arbitral

104 Para. 69.
105 Gilas, Łopuski, *Prawo morskie*, 317.
106 Bölükbasi, ibidem, 296.
107 See e.g. Van Dyke, ibidem, 87.
108 See *supra* note 63, para. 95.
109 *Supra* note 4, para. 109.
110 Delabie, ibidem, 165.
111 The *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua v. Honduras*) case, Judgment of 8 October 2007, ICJ Reports 2007, 659, para. 272;

tribunals.[112] While in the *Barbados v. Trinidad and Tobago* case, the Tribunal admitted that "no method of delimitation can be considered of and by itself compulsory",[113] in the *Guyana v. Suriname* case, the Tribunal recalls that "it has become normal to begin by considering the equidistance line and possible adjustments and to adopt some other method of delimitation only if the circumstances justify it".[114]

So, even though not provided for explicitly in Article 83 of the Convention (as reflecting the customary law), the median line-equidistance principle in the delimitation may not be discarded, unless its application would lead to inequitable solution.[115]

In the case at hand, the gist of the problem lies in the presence of the numerous Greek islands close to the Turkish coast. The question would thus be what baselines are to be used in the Aegean Sea continental shelf delimitation? Under international law principles, what is more equitable in the delimitation process: to use the two mainland coasts, as Turkey contends, or the coasts of the Greek islands and the mainland coast and islands of Turkey, as Greece advocates? Does each island generate and is entitled to its own continental shelf, or should they be ignored for the purposes of delimitation? Are these islands to be used as base points or should the baselines be measured from the Greek and Turkish mainland?[116]

In that respect, the 1982 Convention in Article 121 provides for the regime of islands. According to paragraph 2, except for rocks which cannot sustain human habitation or economic life of their own (as provided for in paragraph 3), the continental shelf of an island is to be determined in accordance with the provisions of this Convention applicable to other land territory (so, the above-mentioned Article 83).

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the *Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*) case, Judgment of 3 February 2009, ICJ Reports 2009, 61, para. 116.

112 *Arbitration between Guyana and Suriname* (*Guyana v. Suriname*), Award of 17 September 2007, RIAA vol. XXX, 1-144, para. 335; *Arbitration between Barbados and the Republic of Trinidad and Tobago* (*Barbados v. Trinidad and Tobago*), Award of 11 April 2006, RIAA vol. XXVII, 147-251, para. 306.

113 Paras. 304-306.

114 Para. 222.

115 See Velos, ibidem, 114.

116 Ibidem, 114-115. More generally, see: Oude Elferink, "Relevant Coasts and Relevant Area. The Difficulty of Developing General Concepts in a Case-Specific Context", 173; Marques, Becker-Weinberg, "Entitlement to Maritime Zones and Their Delimitation. In the Doldrums of Uncertainty and Unpredictability", 62.

In its decision in the *Nicaragua v. Colombia* case,[117] the ICJ maintained that this provision reflects customary international law.[118] It is thus also relevant for the Greek-Turkish relations. Clearly then the Greek Aegean islands (except for 'rocks')[119] do generate and are entitled to their own continental shelf and can be used as base points in the delimitation.[120]

8. Three-stage Delimitation based on Equitable Principles

In the international judicial practice in relation to Article 83 of the Convention, the three-stage delimitation approach has been elaborated, which by now is considered to reflect customary international law.[121] As explained by the ICJ in the *Nicaragua v. Colombia* judgement:[122] in the first stage, the Court establishes a provisional delimitation line between territories (*including the island territories)*[123] of the Parties. In doing so, it will use methods that are geometrically objective and appropriate for the geography of the area. This task will consist of the construction of an equidistance line, where the relevant coasts are adjacent, or a median line between the two coasts, where the relevant coasts are opposite, unless in either case there are compelling reasons as a result of which the establishment of such a line is not feasible. In the second stage, the Court considers whether there are any relevant circumstances, which may call for an adjustment or shifting of the provisional equidistance/median line so as to achieve an equitable result. If it concludes that such circumstances are present, it establishes a different boundary, which usually entails such an adjustment or shifting of the equidistance/median line as is necessary to take account of those circumstances. In the third and final stage, the Court conducts a disproportionality test in which it assesses whether the effect of the line, as adjusted or shifted, is that the Parties' respective shares of the relevant area are markedly disproportionate to their respective relevant coasts. It

117 The *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) case, Judgement of 19 November 2012, ICJ Reports 2012, 624.

118 Para. 139. See also Yiallourides, ibidem, 56.

119 An extensive analysis of the definition of an 'island' and 'rocks', see Yiallourides, ibidem.

120 Velos, ibidem, 118.

121 Yiallourides, ibidem, 53, 56, with reference to the *Nicaragua v. Colombia* judgment, *supra* note 116, paras. 137-139 and 184-199.

122 *Supra* note 116.

123 Emphasis added.

involves a provisional equidistance drawn from the nearest base points of two adjacent or opposite States – adjusted for equity in the light of relevant/special circumstances and proportionality requirements.[124]

As results, in peculiar geographical situations, approaching the delimitation based on a strict application of an equidistance line – constructed between the islands and the relevant mainland – might not be feasible or equitable. It is submitted[125] that, notwithstanding the entitlement of islands to the full suite of maritime zones, there are a number of instances where islands located away from their mainland and midway or closer to the coasts of the opposite State were either totally discounted for the purpose of constructing the continental shelf boundary or were granted a reduced portion of continental shelf compared to the portion awarded to their opposing mainland (i.e. by shifting the provisional equidistance boundary closer to the island coast, thus allowing a larger ocean/sea space for the mainland territory), with a result of enclaving the islands which happen to be located on the 'wrong' side of the equidistance/median line.[126] The main reason for this were the courts' efforts to reach a just and equitable solution, by avoiding a gross disproportion between the allocated shares and the relevant coastal lengths and by minimising the cutting-off effect of the relevant mainland's maritime zones.[127]

After having analysed the existing case-law on the matter, C. Yiallourides concludes[128] that the treatment of islands in relation to delimitation is so diverse that any generalization as to their effect will be hazardous. It all depends on the geographical realities and the circumstances of the specific case. C. Schofield commented that this variety in the treatment of islands in jurisprudence and State practice is 'unhelpfully inconsistent'.[129]

Nevertheless, C. Yiallourides contends that to consider the Aegean islands as an integral unit of Greece's geographical configuration and, therefore, use their coasts as base points in the construction of the delimitation line would not, in itself, be inconsistent with the past practice on maritime boundary delimitation:

124 Paras. 190-193.
125 Yiallourides, ibidem, 66-67.
126 See the literature cited by Yiallourides, ibidem, note 137.
127 Ibidem, 67.
128 Ibidem, 81.
129 Schofield, "Islands or Rocks, is that the Real Question? The Treatment of Islands in the Delimitation of Maritime Boundaries", 333.

> Whilst some minor insular features (such as rocks falling under Article 121(3) of the Convention on the Law of the Sea or low-tide elevations) may potentially be discounted as base points in the interest of avoiding a disproportionate impact on the construction of an equidistance-based boundary line, an international maritime boundary that would completely ignore the Greek islands of the Aegean would be inherently and necessarily inequitable.[130]

Turkey has argued that the continental land masses should be given primary emphasis in drawing continental shelf boundaries, because the continental shelf is the natural prolongation of such continental land masses and because the Greek islands do not possess continental shelves of their own.[131] Turkey relies on the customary international law principle of non-encroachment, as codified in Article 7(6) of the Law of the Sea Convention, which provides that the maritime zones of one state should not be permitted to cut off the extension of another state's entry into the high seas.[132]

However, one is reminded[133] that, as observed by Judge Jiménez de Aréchaga in his separate opinion in the *Tunisia/Libya continental shelf* case,[134] "there may be geographical configurations in which a boundary line cannot avoid 'cutting across' the coastal front of one State or of both".[135] Given the large number and size of the Greek islands, especially in the eastern Aegean, it is inevitable that some encroachment would be caused to the maritime projections generated by the Turkish coasts. C. Yiallourides further comments: "(...) inasmuch as the various Greek islands would encroach upon the seaward projection of the Turkish coasts, the same inequitable effect would be true for the cutting-off of the seaward projections of the Greek islands' coasts. It would be unwise to approach this principle solely from the perspective of a mainland, as all coasts are capable of generating maritime zones".[136] In this context, C. Yiallourides cites the words of Judge Weil in his Dissenting Opinion in the *Canada/France* case:

130 Ibidem, 83.
131 Van Dyke, ibidem, 88.
132 Ibidem, 90.
133 Yiallourides, ibidem, 85.
134 *Supra* note 4, ICJ Reports 1982, 100.
135 Para. 69.
136 Yiallourides, ibidem, 85.

To achieve an equitable result, the mutual cut-off and encroachment from which the maritime boundary emerges must be shared in a balanced and reasonable manner between the two States and the sacrifice must not be made by only one of them. The delimitation exercise and the assessment of the equity of the result must not be approached solely from the point of view of one of the States.[137]

9. Conclusions

It could be claimed[138] that nature and geography have created an inequity against Turkey by placing the numerous Greek islands so close to the Turkish coast. Admittedly, this may well be the case.

However, as discussed earlier, equity does not necessarily mean equality and it is not the function of equity to rectify an inequity created by nature or geography. The function of equity and of the Court is not to completely refashion nature and geography to remedy these natural inequalities. Equity is not conceived as playing a redistributive role.

Thus J. Velos argues that equity cannot be used to weaken Greece's favourable natural and geographic position and deprive the Aegean islands from enjoying their own continental shelf.[139]

C. Yiallourides concludes that in the Aegean Sea, a reasonable balance must be struck and equal sacrifices must be made from both Greece and Turkey. "Whilst equitable adjustments to avoid a grossly disproportionate result are inevitable, given the unique geography of the Aegean, the net effect of such adjustments on the course on the future international maritime boundary between Greece and Turkey is unclear".[140]

Due to the fact that the delimitation of the continental shelf in the Aegean is so complex, whereas – amid tense relations between the two countries – the likelihood of finding an amicable solution, or any court or tribunal having the chance to adjudicate the matter any time soon, is

137 The *Delimitation of the Maritime Areas* (*Canada/France*) case, Decision of 10 June 1992, RIAA vol. XXI, 265-341, Dissenting Opinion of Judge Weil at p. 307 (para. 17). See Yiallourides, ibidem, 85.

138 See Velos, ibidem, 121.

139 Ibidem.

140 Yiallourides, ibidem, 86.

rather limited (not to say non-existent),[141] some authors have suggested that the best approach would probably be to postpone the delimitation for as long as possible.[142] The proposal offered by the retired Greek Ambassador Byron Theodoropoulos was to impose a 30- to 50-year moratorium on the delimitation and exploitation of the continental shelf in the Aegean.[143]

Yet, it is worth mentioning that in the recent maritime delimitation agreement between Greece and Italy of 9 June 2020,[144] the maritime area between the two countries in the Ionian Sea has been delimited according to the median line measured from the Greek *islands* and the Italian mainland.

The agreement adopts the continental shelf delimitation line agreed in 1977 for the delimitation of the other zones to which both countries are entitled under international law.[145] This has been perceived by Greece as a positive precedent that corroborates Greek views for future delimitation agreements. As A. Marghelis notes,[146] the agreement highlights Greece's position according to which *all* islands have the right to generate a *full* continental shelf. It is noted that for Greece the equidistance principle is a *starting point* for any negotiation rather than an absolute objective from which no deviance can be tolerated. What matters for Greece is the final result of the de-limitation to be close to the median line with full consideration of all islands, and this is indeed the case with the Greek-Italian agreement, as it leads to an almost equal division of the maritime zone proceeding from minor adjustments on the median line drawn by using the Greek islands as baselines. Thus, this agreement adopts two Greek key-positions rejected by

141 For the (gloomy) perspectives, see Schaller, ibidem, 19-20.

142 Van Dyke, ibidem, 100.

143 Theodoropoulos, "The So-Called Aegean Dispute: What Are the Stakes: What Is the Cost?", 101.

144 See Marghelis, ibidem.

145 The agreement, like the one of 1977, uses the median line with minor adjustments. It gives full effect to most of the Greek islands with few exceptions. The tiny but inhabited islands of Othonoí, located in the strait of Otranto – on the northernmost point of the delimitation line – are given limited effect: on the three first points of the delimitation, the line is located from 1.9 to 3.3 nautical miles (nm) closer to the Greek than to the Italian shore. The islands of Strofádes, the southernmost Greek insular territory along the delimitation line, are also given less effect: the two last points of the delimitation are respectively located 1.8 and 5.5 nm closer to these islands than to the Italian island of Sicily. However, the 'losses' from Othonoí and Strofádes are counterbalanced by the greater effect – extending beyond the median line – of Kefallinía island, located approximately in the middle of the delimitation line, where the line is 6,1 nm closer to the Italian shore. The result is the allocation of 46% of the divided maritime area to Greece and 54% to Italy. See Marghelis, ibidem, 1 and 3.

146 Ibidem, 8.

Turkey: the median line calculated from its islands and a final result leading to an equal – or almost equal – division of the maritime zone.[147]

One can doubt whether the Greek-Italian agreement will have any immediate impact on the negotiations between Greece and Turkey and help finding an equitable solution in the very different and complex environment and geographical conditions of the Aegean. Each delimitation remains a unique case and there is no automaticity in the application of delimitation criteria from one case to another. However, the Greek-Italian agreement contributes to the development of international practice. Already in 1990, J. Gilas commented that it was a paradox that the then new codification of the law of the sea was already largely obsolete and expressed the view that in some perspective one could expect conditions in which a new codification of the continental shelf institution would become necessary.[148] This conclusion retains its validity and relevance also today.

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147 Ibidem.

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