UNITE Nach NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS) AND DELIMITATION OF MARITIME BOUNDARIES: A BANGLADESH PERSPECTIVE

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Associate Professor Scott Mann

A thesis submitted in fulfilment of the requirements for the award of the degree
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Western Sydney University
New South Wales, Australia

August 2016
I hereby declare that this thesis under the title *United Nations Convention on the Law of the Sea (UNCLOS) and Delimitation of Maritime Boundaries: A Bangladesh Perspective* submitted in fulfilment of the requirements for the award of the degree Doctor of Philosophy – is wholly my own work unless and otherwise referenced or acknowledged. This thesis has not been submitted for qualifications at any other academic institution.

A K M Emdadul Haque

31 August 2016
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DEDICATION

In Memory of the Father of the Nation of Bangladesh Bangabandhu Sheikh Mujibur Rahman, pioneer of the Territorial Waters and Maritime Zone Act in the Bay of Bengal Sub-region

&

to my beloved parents, wife and children

who have always been a source of inspiration for moving forward
ABSTRACT

The legal regime of maritime boundary delimitation, as developed through the codification and progressive development process of international law, mainly based on two fundamental aspects: precise limit of a maritime zone, and applicable criteria (for example, applicable method, principles etc.) of its delimitation. The United Convention on the Law of the Sea (hereinafter UNCLOS or the Convention), although, provided specific provisions defining precise limit of different maritime zones, lacks specific criteria for delimitation. Article 74 and 83 of UNCLOS set the ultimate goal of delimitation—to achieve an equitable solution, but lack scant guidance to reach that solution.

The International Court of Justice (hereinafter the ICJ or the Court), in the North Sea cases, first took the initiative for developing applicable principles and criteria of equitable solution. In so developing, the ICJ rejected the obligatory use of equidistance method, and applied equity as a rule of international law to develop applicable principles and criteria for reaching an equitable solution. These judicially developed principles and criteria of equitable delimitation have been applied in all subsequent cases by the international courts and tribunals. Despite such consistent use, which principles and criteria constitutes the fundamental criteria for equitable solution, in other words, what constitutes the holistic approach of equitable solution, has yet not addressed. A delimitation result, whether it is effected by negotiations or by compulsory procedures entailing binding decisions (CPBD), may reflect equitability, but it could not be seen effectively applied the law on maritime delimitation in an equitable manner unless the holistic approach of equitable solution is accomplished in the process of reaching that result. This thesis carries out an extensive research in identifying this holistic approach of equitable solution.

Judicial decisions that developed principles and criteria of equitable solution, decided determined delimitation disputes within 200 nm only. Maritime delimitation beyond 200 nm, i.e., the delimitation of the continental shelf beyond 200 nm is comparatively a new aspect of equitable solution which demand compliance with the substantive and procedural requirement of article 76 of UNCLOS, in other words, compliance with the article 76 process. Recent judgements relating maritime delimitation in the Bay of Bengal between Bangladesh,
Myanmar and India (hereinafter the Bay of Bengal cases or BoB cases), for the first time, addressed maritime delimitation beyond 200 nm. These judgements have made confusion regarding compliance with this article 76 process, in particular with the process of delineation before delimitation and intermediate engagement of the Commission on the Limits of Continental Shelf (CLCS) in the delimitation beyond 200 nm, and thus gave rise of the question as to the effectiveness of the legal regime of the law on maritime delimitation in settling the maritime boundary disputes of the BoB sub-region in an equitable manner.

This thesis identifies shortcomings of the BoB cases and with regard to the delimitation beyond 200 nm, argues that the adjudicative bodies could have been applied the law on maritime delimitation more effectively to produce an equitable solution in an equitable manner. Such shortcomings exemplify lack of progressive development of in this part of international law. To overcome this lacking, this thesis proposes a legal framework of equitable solution. The features of the legal framework suggested in this thesis seek to effective application of the law on maritime delimitation towards achieving an equitable solution in an equitable manner. The thesis has argued for the progressive development of the law on maritime delimitation by way of adopting a legal framework of equitable solution in light of the objectives of UNCLOS.
LIST OF SELECTED PUBLICATIONS BY THE AUTHOR

Book Chapters

Journal Articles


Conference Papers and Posters
UNCLOS and Effectiveness of the Law on Maritime Delimitation: A Bay of Bengal Perspective, 19 January 2016, Paper presented in a Seminar held by the Bangabandhu Sheikh Mujibur Rahman Maritime University (BSMRMU), Bangladesh.

Seminar on Marine Spatial Planning: A Bay of Bengal Perspective, 26 January 2016, University of Dhaka, Bangladesh.

Conference on The Architecture of Transnational Governance: The role of non-State actors, 23 October 2015, Western Sydney University, Parramatta Campus, NSW 2150, Australia.

Marine Spatial Planning-How far it is important for the developing States: A Bangladesh Perspective, Poster presented in the Theme Session T3-TS1 Ocean Governance in the Face
of Societal Pressures and Uncertain Predictions, 2nd International Ocean Research Conference, Barcelona, Spain, 17-21 November 2014)


108th Annual Meeting of American Society of International Law, April, 2014, Washington DC, USA.

76th Annual Meeting, of International Law Association, April, 2014, Washington DC, USA.

Australian Leadership Workshop, July 2012, Dandenong, Melbourne, Victoria, Australia

Australian Leadership Forum Seminar, April, 2012, Canberra, Australia
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<tr>
<td>ABLOS</td>
<td>Advisory Board on the Law of the Sea</td>
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<td>AJIL</td>
<td>American Journal of International Law</td>
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<tr>
<td>ASIL</td>
<td>American Society of International Law</td>
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<tr>
<td>BOB cases</td>
<td>Maritime Boundary Delimitation cases between Bangladesh, India and Myanmar</td>
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<td>BoB</td>
<td>Bay of Bengal</td>
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<tr>
<td>CLCS Rules</td>
<td>Rules of Procedure of the Commission on the Limits of the Continental Shelf</td>
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<tr>
<td>CLCS</td>
<td>Commission on the Limits of the Continental Shelf</td>
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<tr>
<td>CPBD</td>
<td>Compulsory Procedures Entailing Binding Decisions</td>
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<tr>
<td>CSC</td>
<td>Convention on Continental Shelf, 1958. Also referred to as the Continental Shelf Convention</td>
</tr>
<tr>
<td>DOALOS</td>
<td>Division for Ocean Affairs and the Law of the Sea</td>
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<td>Doc</td>
<td>Document</td>
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<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
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<tr>
<td>ECS</td>
<td>Extended Continental Shelf</td>
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<tr>
<td>EEZ</td>
<td>Exclusive economic zone</td>
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<td>FAO</td>
<td>Food and Agricultural organisation</td>
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<tr>
<td>FOCS</td>
<td>Foot of the Continental Slope</td>
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<tr>
<td>IBRU</td>
<td>International Boundaries Research Unit</td>
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<tr>
<td>ICE</td>
<td>Inventory of Conflict and Environment</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice. Also referred to as the Court.</td>
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<tr>
<td>ICNT</td>
<td>Informal Composite Negotiating Text</td>
</tr>
<tr>
<td>IHO</td>
<td>International Hygrographic Organization</td>
</tr>
<tr>
<td>IJMCL</td>
<td>International Journal on Marine and Coastal law</td>
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<tr>
<td>ILA</td>
<td>International Law Association</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>ILM</td>
<td>International Legal Materials</td>
</tr>
<tr>
<td>ISA</td>
<td>International Seabed Area</td>
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<tr>
<td>ISNT</td>
<td>Informal Single Negotiating Text</td>
</tr>
<tr>
<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<tr>
<td>LBT</td>
<td>Land Boundary Terminus</td>
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<tr>
<td>LCS</td>
<td>Legal Continental Shelf</td>
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<tr>
<td>LNTS</td>
<td>League of Nations Treaty Series</td>
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<td>LQR</td>
<td>Law Quarterly Review</td>
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LTE Low Tide Elevations
MIMA Maritime Institute of Malaysia
NG Negotiating Group
NILR Netherland International Law Review
nm Nautical miles
OCS Outer Continental Shelf
ODIL Ocean Development and International Law
OECM Outer edge of the continental margin
PCA Permanent Court of Arbitration
PCIJ Permanent Court of International Justice
PDL Provisional Delimitation Line
PEL Provisional Equidistance Line
RCADI Recueil des cours de l'Académie de Droit International de la Haye
RSNT Revised Single Negotiating Text
SCS Single Continental Shelf
SDL Single Delimitation Line
SMB Single Maritime Boundary
TSC The Convention on Territorial Sea and Contiguous Zone, 1958. Also referred to as the Territorial Sea Convention.
UN United Nations
UNCLOS I First United Nations Conference on the Law of the Sea. Also referred to as the First Conference
UNCLOS United Nations Conference on the Law of the Sea
UNGA United Nations General Assembly
UNRIAA United Nations Reports of International Arbitral Awards or Reports of or RIAA International Arbitral Awards
UNSW University of New South Wales
UNTS United Nations Treaty Series
US or USA United States of America
VCLT Vienna Convention on the Law of Treaties
VUWLR Victoria University of Wellington Law Review
YILC Yearbook of the International Law Commission
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CHAPTER 1
INTRODUCTION

I BACKGROUND

The United Nations Convention on the Law of the Sea (hereafter referred to as UNCLOS or the Convention)\(^1\) is the most comprehensive part of contemporary international law. It has been referred to as the ‘Constitution of the Oceans’\(^2\) for its scope in terms of ocean governance.\(^3\) It aims to settle ‘all issues relating to the law of the sea’ and thus to contribute ‘to the maintenance of peace, justice and progress for all peoples of the world’.\(^4\) The global and socially just distribution of the vast resources of the sea is one such issue.\(^5\)

The convention divided the marine areas and their resources according to three distinguished principles: sovereignty, freedom and the common heritage of mankind.\(^6\) Maritime delimitation is the only conventional means of division and is accomplished either by negotiation or by adjudication detailing the control and usage of marine areas and their resources as defined under the principle of sovereignty. In this regard, the convention intends to establish an objective legal order so that ‘a just and equitable international economic order’ can be realised.\(^7\)

The UNCLOS provisions dealing with the maritime delimitation are inherently imprecise. Despite maritime delimitation being such an important task for ‘institutionalized oceans

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4 UNCLOS, above n 1, first preambular paragraph.
7 See UNCLOS, above n 1, fourth and fifth preambular paragraph. See also Roeben, above n 5,36, 39.
governance’, the Convention has only defined the maximum jurisdictional limit of a coastal State, fixing the ultimate objective for this delimitation as reaching an ‘equitable solution’; however, it lacks minimal guidance for reaching such a solution. In this constructive ambiguity and lacuna, the convention failed to provide ‘the ultimate frame of reference for every legal question that arises within its scope’ and thus lacked the absolute ‘comprehensiveness of a constitution’. E. D. Brown rightly pointed this shortcoming of the convention as ‘abominably bad’. However, the amendment of UNCLOS is not an easy procedure and, given the obstacles presented by amendment, this approach is likely to prove an unattractive option.

Therefore, the search for applicable rules and principles within the scope of conventional law is ongoing. The decisions of the international courts and tribunals can be seen to have progressively developed and to be fostering principles and criteria of equitable delimitation based on the fundamental principle of maritime jurisdiction—‘the land dominates the sea’—and thus may be said to have developed a jurisprudence constant for maritime delimitation since the North Sea cases ruling in 1969. Conceivably, UNCLOS imbibes these judicially developed principles and criteria with binding effect for courts and tribunals.

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8 Roeben, above n 5,36, 39.
9 UNCLOS, above n 1, Articles 3, 33, 57 and 76. Article 76
13 Ibid. see also Freeston, above n 11, 3.
15 UNCLOS, above n 1, art. s 312-314.
17 Roeben, above n 5, 36, 37-42.
when deciding cases and for States when settling their boundaries through negotiation. Such binding effect is required not only to establish the objective legal order that the Convention intends, but also to ‘shape the international law on which any delimitation must be based’ for the effective application of the law to maritime delimitation. Understandably, judicially developed principles and criteria are to be applied to all future delimitation disputes.

The BoB is a hydrocarbon-rich basin and is one of the least explored regions in the world. The delimitation of maritime boundaries among the littoral States of the BoB—Bangladesh, India and Myanmar—is a necessary precondition for the peaceful exploitation of these resources. However, the lack of defined boundaries, the presence of numerous deltas and islands and the existence of transboundary oil–gas deposits makes the delimitation process complicated. The maritime boundary disputes among these three littoral States of the BoB sub-region continued for four decades. For this long period, Bangladesh deliberately tried to negotiate a definitive maritime boundary with its neighbours, but its only success was in the form of ‘agreed minutes’ signed between Bangladesh and Myanmar for delimitation of 12 nautical miles (nm) of territorial seas. Failing to reach any formal agreement through

19 Because, UNCLOS’s underpinning the broad objective of equitable delimitation with judicial machinery empowers that machinery to generate equitable principles at a lesser degree of abstraction susceptible of being applied in disputed cases. See Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) Case no. 16 (14 March 2012) 2 (Declaration of Judge Wolfrum) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf> (hereafter referred to Bangladesh/Myanmar case). Furthermore, the Tribunal in the Barbados/Trinidad and Tobago case ascribed that ‘[i]t is ...necessary that the delimitation be consistent with legal principle as established in decided cases, in order that States in other disputes be assisted in the negotiations in search of an equitable solution that are required by Articles 74 or 83 of the Convention’. Award of the Arbitral Tribunal (Barbados/The Republic of Trinidad and Tobago) [11th April 2006] PCA Case No. 2004-02 [243] <https://pcacases.com/web/allcases/> (hereinafter Barbados/Trinidad and Tobago case).

20 Roeben, above n 5, 48.


negotiations, Bangladesh decided to resort to litigation and, accordingly, on 8 October 2009, it instituted arbitral proceedings against India and Myanmar (hereafter the BoB cases) pursuant to Annex VII under Article 287 of UNCLOS (hereafter the Tribunal) with requests to delimit its territorial sea, exclusive economic zone and continental shelf within and beyond 200 nm. Later, the case between Bangladesh and Myanmar was transferred to the International Tribunal on the Law of the Sea (ITLOS) and the other case between Bangladesh and India remained with the Tribunal. On 14 March 2012, ITLOS delivered its judgement on the Bangladesh/Myanmar case—the first ever judgement on maritime delimitation in its history. Within less than three years of this judgement, the Tribunal delivered its award on Bangladesh/India on 7 July 2014. Both these judgements were warmly accepted by the competing States involved in the disputes as if all the parties had won their claims; conversely, though, these judgements gave rise to scholarly debates

24 Although all the three States were parties to the Convention in 2009, none had made a declaration under Article 287 selecting a preferred means for the settlement of disputes. Thus, as per Article 287 (3), Bangladesh had no choice but to go for arbitration under Annex VII of UNCLOS. Article 287 (3) States that ‘A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII’. See UNLOS, Article 287 (3).

25 On 4 November 2009, Myanmar proposed that the case between it and Bangladesh should be transferred to the ITLOS, and made a declaration under Article 287 accepting the jurisdiction of ITLOS for this purpose. On 12 December, Bangladesh made a similar declaration, and accordingly, on 14 December 2009, the case had been entered in the list of cases of ITLOS as case no. 16. Surprisingly, after being enlisted as a pending case of the ITLOS, Myanmar, by a letter dated 14 January 2010 made a new declaration to withdraw its previous declaration accepting the jurisdiction of ITLOS and on the same date transmitted a copy of it to ITLOS and to the Secretary-General of the United Nations simultaneously. It can be speculated that in so doing Myanmar apparently had the intention either to go back to the Arbitral Tribunal under Annex VII or to delay the proceeding of the case in any way. However, that could not be happened as ITLOS rejected Myanmar’s notice of revocation of its earlier declaration according to the legal provision embedded in Article 287 (6) (7), and held that ‘Myanmar’s withdrawal of its declaration of acceptance of the Tribunal’s jurisdiction did “not in any way affect proceedings regarding the dispute that have already commenced before ITLOS, or the jurisdiction of ITLOS with regard to such proceedings”’. Thus ITLOS became the judicial settlement forum for the dispute between Bangladesh and Myanmar. See Bangladesh/Myanmar case, 9-10 [2]- [6], 11-12[8]-[10]. See also UNCLOS, Article 287 (6) - (7).

26 Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (Bangladesh v India) [2014] PCA Case No.2010-16 < https://pcacases.com/web/sendAttach/383> (hereinafter Bangladesh/India case).

particularly relating to the decisions about delimitation beyond 200 nm. While some scholars found that these judicial decisions maintained the consistency of the law on maritime delimitation, others found that they not only established a ‘potentially problematic precedent’ with limited future influence, but also created uncertainty regarding the effective application of the law to resolving future maritime delimitation disputes. This debate brought to the forefront as to the effectiveness of the law governing maritime delimitation and whether further development of this law is needed.

Maritime delimitation, whether effected by negotiation or by adjudication, is a fully legal operation where the effectiveness of the law depends not on the declarations made by the parties involved in the cases as to whether they have won or lost, but rather on how far the result exemplifies consistency and compatibility with established international rules governing maritime delimitation. Remarkably, the rules and criteria were for an ‘equitable solution’ as developed in international case law until the BoB cases focused solely on delimitation within 200 nm; what is even more striking is that the fundamental criterion for

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an equitable solution is a ‘holistic approach’, remains unattended and unaddressed in an explicit manner. Insightful research and critical analysis of international jurisprudence is called for to reveal this ‘holistic approach’ as well as to ascertain the legal basis for such approach. Research and analysis are also required to neutralise potential debates that may arise as a consequence of current ambiguities. The question as to whether the ‘holistic approach’ of equitable delimitation is equally applicable in delimitations of beyond 200 nm is also an issue for analysis, since it relates to the effectiveness of the application of the law governing maritime delimitation, not only with regard to the BoB cases, but with regard to all future delimitations. For this reason, this study has chosen the BoB cases as significant for examining the effectiveness of the law on maritime delimitation. The main aim of this thesis is to investigate areas of the law of maritime delimitation in detail and to examine the above mentioned judgements determining the maritime boundaries in BoB, how far they are consistent and compatible with the rule of equitable solutions and whether it is possible to consider a framework of equitable solution as the basis for further development of the law of maritime delimitation.

II UNCLOS AND THE INTERNATIONAL LEGAL AND POLICY INITIATIVES IN RESPONDING TO MARITIME BOUNDARY DELIMITATION

The development of the international law of the sea has had an important impact upon ocean governance in many ways, with perhaps the most significant being the capacity of coastal States to declare a range of different types of maritime zones. Though the law of the sea has been developing for the last four centuries, the twentieth century in particular witnessed a growth in the international law and relevant State practice associated with maritime boundary delimitations. Besides bilateral State practices, codification and the progressive development of international law on maritime delimitation through multilateral treaties have always been major concerns of the international community.\(^{30}\) In 1982, the Third United Nations Conference on the Law of the Sea (hereinafter the Third Conference or UNCLOS III) agreed to adopt specific provisions on maritime delimitations.\(^{31}\) Despite such adoption,

\(^{30}\) For details, see discussions in Chapter 2.
\(^{31}\) Basically there are two UNCLOS provisions dealing with maritime boundary delimitation. The first is found in Article 15 that deals with the delimitation of the territorial sea between States with opposite and adjacent
this thesis argues that the legal regime of maritime delimitation lacks progressive
development and thus remains an area of continuous growth in international law.\textsuperscript{32} Before
detailed discussion on this topic, a brief discussion of the basic concepts relating to maritime
delimitation is required.

A Maritime Limit, Maritime Boundary and Maritime Boundary
Delimitation: Understanding the Basic Concepts

1 Maritime Limit and Maritime Boundary

A maritime limit refers to the extent of maritime spaces to which a coastal State is legally
entitled to lay claim. Maritime entitlement is generated by title over land territory.\textsuperscript{33} The
greater the limit of the maritime zone, the larger the maritime spaces over which a coastal
State can exercise its ‘sovereignty’\textsuperscript{34} or ‘sovereign rights’.\textsuperscript{35} Articles 3, 33, 57 and 76 of

\textsuperscript{32} For this view, see generally David Anderson, ‘Methods of resolving maritime boundary disputes’ (A
summary of a meeting of the International Law Discussion Group at Chattam House, 14 February 2006) 3;
Budislav Vukas, ‘Possible Role of the International Tribunal for the Law of the Sea in Interpretation and
Progressive Development of the Law of the Sea’ in Davor Vidas and Willy Ostreng (eds), \textit{Order for the
Oceans at the Turn of the Century} (Kluwer Law International, 1999) 103.

\textsuperscript{33} See discussions at section IV A in chapter 4.

\textsuperscript{34} Sovereignty is a quality of a State which means only a ‘supreme legal authority’ within a territory and which
is ‘not subject to a legal order superior to its own legal order’. See Hans Kelsen, ‘Sovereignty and International
Law’ (1960) 48 (Summer) \textit{The Georgetown Law Journal} 62. In this sense, territorial sovereignty connotes the
legitimate territorial jurisdiction of a State or sovereign authority. See Abraham Bell, ‘An Economic Analysis
of Territorial Sovereignty in International Law’ (San Diego Legal Studies Paper No. 13-126, University of San
Diego, School of Law, 2012) 4 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2280746>. Therefore, the
concept of sovereignty over a particular marine space refers to a coastal State’s sovereign jurisdiction which is
as much as applicable as to its land territory. The Concept of State Sovereignty emerged from the Peace of
Westphalia, 1648 that ended the Thirty Years’ War (1618-1648) in the Holy Roman Empire, and the Eighty
Years’ War (1568-1648) between Spain and Dutch Republic. Before the Thirty Years’ War, which was partly
a religious war, the European world of Christendom was largely a diarchic one of pope and emperor. But as a
result of the peace treaty, the Holy Roman Empire was dissolved into hundreds of relatively independent
authorities with more or less equal sovereignty over their populations and territories, which theoretically
marked the birth of the modern nation-State system. State sovereignty remains the basic element of today’s
international community. See \textit{Peace of Westphalia} <http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Peace_of_Westphalia.html>; Miyoshi Masahiro,
‘Sovereignty and International Law’ (Paper presented at 20th Anniversary Conference of the International
Boundaries Research Unit, The State of Sovereignty, Durham University, UK, 1-3 April 2009) 2

\textsuperscript{35} The concept of ‘sovereign rights’ is found in Articles 56 and 77 of UNCLOS. Such rights are regarded as
‘sovereign’ in a relevant maritime area ‘insofar as natural resources, artificial islands and installations, marine
scientific research or marine environment are concerned’. Therefore, sovereign rights are considered to be
inferior to sovereignty or sovereign jurisdiction. See Robin R. Churchill and A. V. Lowe, \textit{The Law of the Sea}
(Manchester University Press, 3\textsuperscript{rd} ed., 1999) 151-156, 166-169.
UNCLOS have recognised four types of maritime zones with defined limits: 12 nm\(^{36}\) of territorial sea, a 24 nm contiguous zone, a 200 nm exclusive economic zone (EEZ) and distances of 350 nm or 100 nm from the 2500 metre isobaths.\(^{37}\)

A coastal State can establish its own maritime limits (except for the outer limits of the continental shelf beyond 200 nm) under the rules and principles of international law and, when the sovereign jurisdiction and interests of that State within those established limits are respected by and protected against all other States, that limit of jurisdiction is then termed a ‘maritime boundary’ in international law.\(^{38}\) Therefore, the task of making a maritime boundary is essentially different from the establishment of a maritime limit.\(^{39}\) While the latter refers to the task of ‘delineation’, the former pertains to ‘delimitation’.\(^{40}\) Once established, a maritime limit has a ‘unilateral’ character, while, on the contrary, a maritime

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\(^{36}\) 1 nautical mile = 1.852 km or 1.150779 statute miles. See Aasen, above n 10, ix. This length of nautical mile (1852 meters) was recommended by the American delegation participated in the 1930 Hague Conference for the Codification of International Law and earlier that this length was adopted by the International Hydrographic Conference at Monaco, in April 1929. See S Whittemore Boggs, ‘Delimitation of the Territorial Sea: The Method of Delimitation proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law’ (1930) 24 (3) American Journal of International Law 542 nn 2.

\(^{37}\) UNCLOS, above n 1, Articles 3, 33, 57 and 76. Defined limit of a maritime zone may is indicative to the ‘outer’ and ‘inner’ limit of another maritime zone. For example, the outer limit of internal waters constitutes the inner limit of the territorial sea, and the outer limit of the territorial sea is the inner limit of the contiguous zone, the EEZ and the Continental shelf; again the outer limit of the EEZ is the inner limit of the High Sea and the outer limit of the continental shelf is the inner limit of the international Seabed Area. See Yoshifumi Tanaka, Predictability and Flexibility in the Law of Maritime Delimitation (Hart Publishing, 2006) 8.


Although the distinction between the terminology ‘boundary’ and ‘maritime boundary’ is not clear and they can be used interchangeably, they are still distinguishable. While the term ‘boundary’ is reserved for land territory and other spaces under full sovereignty, ‘maritime boundary’ refers to maritime spaces where coastal States can exercise sovereignty and sovereign rights. and both functional powers not full sovereignty. Cf L Calfisch, ‘The Delimitation of Marine Spaces between States with Opposite and Adjacent Coasts’ in R J Dupuy and D Vignes (eds), A Handbook on the New Law of the Sea (Martinus Nijhoff Publishers, 1991) 426-427.


\(^{40}\) Lee, above n 38, 1-2.
boundary\textsuperscript{41} has a ‘multilateral’ or ‘international character’\textsuperscript{42} since it legally recognises the ‘spatial jurisdiction’\textsuperscript{43} of a coastal State over a particular area of marine spaces.\textsuperscript{44}

It is possible that a coastal State, in the absence of adjacent or opposite States, can determine its maritime boundary in accordance with international law. However, options are very limited in this regard, since the overlapping of maritime entitlements between two or more States is almost inevitable.\textsuperscript{45} Again, every State is likely to define and claim its maritime zones for the purpose of furthering its interests.\textsuperscript{46} Given the probability of overlapping maritime entitlements and the resulting conflicts of interests between States, there is a clear need for maritime boundary delimitation determining the oceanic scope of each State’s jurisdiction.

2 \textit{Maritime Delimitation}

Maritime delimitation, alternatively known as maritime boundary delimitation, is an internationally agreed upon mode of acquiring territorial sovereignty or sovereign rights over maritime spaces\textsuperscript{47} and, in this sense, the delimitation process, by its nature, is an ‘international operation’.\textsuperscript{48} According to the ICJ, ‘the task of delimitation consists in

\textsuperscript{41} The distinction between the terminology ‘boundary’ and ‘maritime boundary’ is not clear and they can be used interchangeably. See Caflisch, above n 38, 426-27; Tanaka, ‘Predictability and Flexibility’, above n 37.

\textsuperscript{42} For this term see Tanaka, ‘Predictability and Flexibility’, above n 37, 9 nn 35. The concept of spatial jurisdiction is an inclusive concept and thus its scope is wider than the concept of territorial jurisdiction in that ‘[t]erritorial jurisdiction is a typical example of spatial jurisdiction’ where territorial jurisdiction equates to territorial sovereignty, while spatial jurisdiction includes not only territorial sovereignty but also jurisdiction over continental shelf and EEZ.

\textsuperscript{43} Maritime boundary delimitation, effected either by negotiation or by adjudication or arbitration or any other procedure as agreed by the States, results the acquisition of territorial sovereignty over maritime spaces by a coastal State. See UNCLOS, Articles 279-299.

\textsuperscript{44} Because most of the coastal States (except isolated island States) have adjacent or opposite States in relation to their maritime areas. See Lee, above n 38, 2.

\textsuperscript{45} See generally, Barbara Kwiatkowska, ‘The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation’ (2001) 32 (1) Ocean Development & International Law 1-25; There are several modes of acquiring title to a territory recognised in international law, such as, discovery and occupation, accretion, prescription, cession, annexation, and plebiscite. Maritime delimitation is another mode of such acquisition approved by international law. See Peter A Toma, ‘Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctica’ (1956) 50 (3) American Journal of International Law 611.

\textsuperscript{46} Because, the International Court of justice (hereinafter the ICJ) affirmed this view that delimitation cannot be effected unilaterally, rather it must result from a process between two or more States. See Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (Judgment) [1984] I.C.J. Reports 246, 299 [112] (hereinafter referred to as Gulf of Maine case); Continental
resolving the overlapping claims by drawing a line of separation of the maritime areas concerned’, the boundary of which then becomes the exact line ‘where the extension in space’ of the relevant coastal State jurisdictions terminate. In other words, maritime delimitation is ‘an operation’ effected between two or more States to separate overlapping areas where the legal titles of the States compete and each State attempts to exercise spatial jurisdiction over the same maritime space’. In effect, maritime delimitation is the process that determines ‘the extent to which each State must relinquish its maximum potential maritime entitlement in order to avoid the difficulties that would stem from the maintenance’ of an area of overlapping of maritime entitlements. In this sense, the delimitation task involves an inexorable ‘amputation’ of the potential maritime entitlement of the competing States, regardless of how that amputation is considered. However, what is clear from the foregoing discussions is that the very concept of maritime delimitation is founded on the concept of ‘entitlement’ and the task of maritime delimitation presupposes the existence of an area of ‘potential overlapping entitlement’ where the entitlements of a coastal State have to be overlapped by the equally valid entitlements of another State. In this way, determining the extent of maritime entitlement is crucial for assessing the overlapping of entitlement and thus to proceed with the delimitation process. It should be remembered that, given the precise limits of different maritime zones, their delimitation warrants the separate assessment of overlapping entitlements for each. In addition, UNCLOS has provided separate provisions describing delimitation rules for each maritime zone. UNCLOS, both

Shelf (Tunisia/Libya Arab Jamahiriya) (Judgment) [1982] ICJ Reports 73, 66-67 [87] (hereinafter referred to as Tunisia/Libya case). See also Tanaka, ‘Predictability and Flexibility’, above n 37, 8; Aasen, above n 10, 6. See Maritime Delimitation in the Black Sea (Romania/Ukraine) (Judgment) [2009] I.C.J. Reports 61, 89 [77] (hereinafter referred to as Romania/Ukraine case); Aegean Sea Continental Shelf Case (Greece v Turkey) (Jurisdiction) [1978] ICJ Rep 38 [86] (hereinafter referred to as Aegean case). See also Bjorn Kunoy, ‘The Delimitation of an Indicative Area of Overlapping Entitlement to the Outer Continental Shelf’ (2013) 83 British Yearbook of International Law 61.

Tanaka, ‘Predictability and Flexibility’, above n 37, 8.

Antunes, above n 39, 143.

Ibid, 141-144, 416.

See generally, Antunes, above n 39, 137-44; Clive Schofield, ‘Parting the Waves: Claims to Maritime Jurisdiction and the Division of Ocean Space’ (2012) 1 (1) Penn State Journal of Law International Affairs 58; Tanaka, ‘Predictability and Flexibility’, above n 37, 7; Here the word ‘valid entitlement’ refers to the maximum extent of entitlement which, given the geophysical configuration of a particular part of marine spaces, can equally be claimed by the competing States. See Antunes, above n 39, 137-44.

Antunes, above n 39, 144.
theoretically and functionally, requires the task of delimitation for each maritime zone to be conducted individually and separately.

However, the previously defined concept of maritime delimitation is ‘constitutive’ and as far as UNCLOS is concerned the aim of maritime boundary delimitation is not to determine a mere line, but to draw a line which is equitable. The implication of this is that the definition of maritime delimitation and its aim are complementary to each other and that both tend towards the same goal. Taking into account the aforementioned definition and aim of maritime delimitation, it would seem that the concept requires redefinition.

B UNCLOS and the Legal Regime of Maritime Boundary Delimitation

1 Articles 74 and 83 of UNCLOS and the Progressive Development of International Law

The legal regime of maritime boundary delimitation as developed through the codification and progressive development processes of international law is based on two fundamental aspects: the precise limits of maritime zones and their delimitation criteria that comprise the legal principles and methods of delimitation. This development process commenced at the 1930 Hague Conference for the Codification of the Law of the Sea, which dealt with the limits and the criteria for territorial sea delimitation, but concluded without a written agreement. The 1945 Truman Proclamations led to the development of novel concepts in international law such as fisheries zone (later internationally accepted as EEZ) and continental shelf and the principles of delimitation for these zones. However, until 1958 there were no agreed maritime limits or methods of maritime delimitation and States were

56 Because, according to UNCLOS, ‘[t]he delimitation …… shall be effected……in order to achieve an equitable solution’. See UNCLOS, Articles 74 and 83.
57 For details see discussions at Chapter 2.
58 This conference was convened at the request of the League of Nations in 1930. See Asen, above n 10, 10.
engaged in claiming different extents of maritime jurisdiction and employing various methods of delimitation. In 1958 four conventions were adopted as a result of the First United Nations Conference on the Law of the Sea (hereafter the First Conference or UNCLOS I). Though these conventions specified methods for delimiting the territorial sea and continental shelf, they failed to define the precise limit up to which a coastal State would be entitled to exercise its sovereign jurisdiction. Moreover, they had far from universal participation and, as a result, quickly came under pressure from newly independent developing States and experienced unilateral claims from Iceland, Canada and several Latin American Countries. Finally, in 1982, after a nine-year-long negotiation process, the international community adopted UNCLOS, which had specific provisions that not only defined the precise limits of different maritime zones, but also specified the rules governing maritime delimitation. The rules governing the maritime delimitation of EEZ and continental shelf are important topics of international law not only for their greater extent, but also for their potential economic impacts. Therefore, the convention-based rules dealing with the delimitation of the maritime zones are supposed to provide clear guidance.

Unlike the legal provisions relating to the delimitation of the territorial sea, the legal rules governing delimitation of EEZ and continental Shelf set the ultimate objective: ‘to achieve

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61 Tanaka, ‘Predictability and Flexibility’, above n 37, 19-32.
63 Pal Jakob Aasen, above n 9, 9.
65 UNCLOS, Articles 3, 33, 57 and 76.
66 Although a number of its Articles were based on the 1958 Geneva Conventions, others were a departure. Stephen M Schwebel, Justice in International Law (Cambridge University Press, 2011) 83.
67 UNCLOS, above n 1, Article 15.
68 UNCLOS, above n 1, Articles 74 and 83.
an equitable solution’ where no legal tool was provided to assess the equitableness of such solution. As Stated in Articles 74(1) and 83(1) of UNCLOS:

The delimitation … shall be effected by agreement on the basis of international law, as referred to in Article 38 of the statute of the ICJ, in order to achieve an equitable solution.\(^69\)

It is clear that Articles 74 and 83 did not provide any form of guidance\(^70\) towards reaching an equitable solution; on the contrary, they emphasised that disputes shall be resolved ‘on the basis of international law, as referred to in Article 38 of the statute of the ICJ’. Again, UNCLOS did not clarify the meaning of the term ‘equitable solution’. As a result of these shortcomings, a considerable number of maritime disputes remain unsettled throughout the world.\(^71\) This thesis examines whether the term ‘international law’ in reference to Article 38 of the Statute of the International Court of Justice (hereinafter the ICJ Statute)\(^72\) really does refer to any particular delimitation criteria and thus whether Articles 74 and 83 of UNCLOS lack any progressive development in terms of the laws governing maritime delimitation.

\section{Maritime Delimitation Within 200 nm: International Courts and Tribunals Developed Rules Governing Equitable Delimitation}

Articles 74 and 83 of UNCLOS lack the guidance to reach an equitable solution.\(^73\) Nevertheless, it is evident from maritime jurisprudence that the international courts and

\footnotesize{\textsuperscript{69} UNCLOS, Articles 74 and 83 (emphasis added).

\textsuperscript{70}Tunisia/Libya Case, 49 [50]. Pal Jakob Aasen, above n 9, 13. See also Vulkas, above n 27, 47; Rothwell and Stephens, above n 4, 401.

\textsuperscript{71} For example: The Ashmore and Cartier Islands contest between Australia and Indonesia, the South China Sea conflict, East China Sea Conflict, Spratly Island Dispute, the Aegean Sea maritime boundary dispute between Greece and Turkey, the Norway-Russia dispute in the Barents Sea. It is estimated that out of a total 427 potential maritime boundaries, only 168, or 39 per cent, have been formally agreed. See Clive Schofield, ‘Cooperative Mechanisms and Maritime Security in Areas of Overlapping Claims to Maritime Jurisdiction’ in Peter Cozens and Joanna Mossop (eds), Capacity Building for Maritime Security Cooperation in the Asia-Pacific (Centre for Strategic Studies, Wellington, 2005) 99, 101-102; Justin Ryan Marlies, ‘International Maritime Boundary Delimitation and Energy Resource Development: Resolution of the Guyana-Suriname and Nicaragua-Honduras Maritime Boundary Cases Requires a New Look at Offshore Activities in Disputed Waters’ [2007] (October) International Dispute Resolution 7.


\textsuperscript{73}Tunisia/Libya Case, 49 [50].}
tribunals have formulated a three-stage methodology\textsuperscript{74} to reach an equitable solution for maritime boundary delimitations within 200 nm.\textsuperscript{75} The international courts and tribunals have developed principles\textsuperscript{76} and criteria of delimitation\textsuperscript{77} that govern the regimes of equitable delimitation through the passage of this three-stage methodology. What is striking is that, despite a lack of clear legal provision, the judges of the international courts and tribunals settle maritime boundary disputes through applying specific methods or principles related to delimitation. Therefore, questions have arisen as to the legal basis that allows the judges to develop and apply certain rules or principles of delimitation in their decision-making process. As evidenced in the case law, the international courts and tribunals, in so developing relied on equity as a rule of international law while equity expressly has not mentioned as source of international law in Article 38 of the ICJ Statute.\textsuperscript{78} This thesis, therefore, investigates as to reasons why judges resorted to equity; what is the basis of equity in international law and whether equity is source of international law; what is the relation between equity and equitable solution; whether equity provides total flexibility to the judges or limits it. If so, then what is that limit. All of these questions seek to examine the effectiveness of the legal regime of the law of the sea in terms of maritime boundary delimitation. This paper aims to find possible answers to these questions through legal analysis.

Article 15 of UNCLOS specified the median line/equidistance method as the preferred method for territorial sea delimitation,\textsuperscript{79} while Articles 74 and 83 expressly lack any such

\textsuperscript{74} The three-stage methodology comprises drawing a provisional equidistance line, considering special or relevant circumstances to assess whether any adjustment of the provisional line is needed and finally carrying out the disproportionalilty test to assess the equitability of the result. For details, see chapter 4.

\textsuperscript{75} For this view see discussion in Chapter 4.

\textsuperscript{76} For example, the land dominates the sea, equitable principles, non-encroachment and no cut-off effect of the delimitation line etc.

\textsuperscript{77} For example, dominant use of equidistance/relevant circumstances method, maximum reach of the delimitation line, relevant area, relevant coastline, base points, identifying relevant circumstances etc.

\textsuperscript{78} ICJ Statute, above n 72, Article 38.

\textsuperscript{79} See UNCLOS, Article 15. Article 15 of UNCLOS reads as follows:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.
This thesis will examine whether the rule of equity endorses the preferred application of any method at all. UNCLOS simply mentions the concept of special circumstances, it does not provide any information as to what can be considered special circumstances, nor does it provide any suggestion as to why circumstances should be considered special or when and how such consideration might come into play in the process of maritime delimitation. This thesis investigates this issue as well.

Despite the fact that the judicially developed principles and criteria of delimitation were shaped on a case-by-case basis, most of them are in essence qualified to be applied as general rules governing maritime delimitation. Such an assertion is lacking in most scholarly writings on maritime boundaries. The fundamental rule of international law that governs the concept of equitable solution has not yet been addressed, nor have the essential criteria among the judicially developed principles of delimitation that constitute a holistic approach to an equitable solution and play the most important and decisive roles in attaining solutions in an equitable manner. With these in mind, this thesis aims to conduct a critical--legal analysis to ascertain a holistic approach to equitable solutions and thus to analyze the effectiveness of the rule governing maritime delimitation.

3 Establishing the Outer Limits of the Continental Shelf and Delimitation Beyond 200 Nm: Article 76 Procedures Entail New Aspects for Equitable Solutions

In defining the precise limits of a legal continental shelf (hereinafter LCS) as well as establishing its outer limits, Article 76 of UNCLOS (see Appendix I) provides a complete

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80 Anderson, above n 32, 3.
81 UNCLOS, Article 15.
83 The definition of continental shelf in international law is different from that of in science. Scientifically the term continental shelf refers to the platform on which the land lies extending from the low-water line to the depth at which there is usually a marked increase of slope to greater depth; while the legal continental shelf (LCS) not only covers this platform but the whole continental margin, which composed of the continental shelf, the slope (the break of the platform towards the deep ocean floor), and the rise (the area beyond the slope which merges with the deep ocean floor). It is to be noted that continental margin does not include the deep
and clear rule of international law.\textsuperscript{84} In effect, it mirrors the international agreement on the legal extent of LCS that resulted from the ‘package deal’\textsuperscript{85} between the delegates of the Third Conference.\textsuperscript{86} The uncertainty marring the definition and extent of LCS under Article 1 of the 1958 CSC (hereinafter 1958 CSC)\textsuperscript{87} led the Third Conference to reach an agreement\textsuperscript{88} to adopt a defined and precise LCS limit of beyond 200 nm—a position either known as the outer continental shelf (OCS) or the extended continental shelf (ECS).\textsuperscript{89} This ocean floor with its oceanic ridges or the subsoil thereof. Understandably, these four-component of submarine morphology, i.e. the shelf, the slope, the rise and the deep ocean floor are involved in defining the continental margin of any kind of coastal State’s land mass. See generally UNCLOS, Article 76 (1) (3); Ted L Mcdorman, ‘The Continental Shelf’ in Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott and Tim Stephens (eds), \textit{The Oxford Handbook of the Law of the Sea} (Oxford University Press, 2015) 182; Bjarni Mar Magnusson, \textit{The Continental Shelf Beyond 200 nautical miles: Delineation, Delimitation and Dispute Settlement} (Publications on Ocean Development, Brill Nijhoff, 2015) 19; Tanaka, ‘Law of the Sea’, above n 6, 137. See also \textit{The Law of the Sea: Definition of the Continental Shelf} (United Nations, 1993) 44; Churchill and Lowe, above n 35, 141; Philip A Symonds et al., ‘Characteristics of Continental Margins’ in Peter Cook & Chris Carleton (eds.) \textit{Continental Shelf Limits: The Scientific and Legal Interface} (Oxford University Press 2000) 25.

\textsuperscript{84} See Appendix I attached in this thesis.


\textsuperscript{86} For this view see, Suzette V Suarez, \textit{The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment} (Springer, 2008) 42-74.

\textsuperscript{87} Article 1 of the 1958 1958 CSC (hereinafter 1958 CSC) defines the outer limit of the continental shelf stating that ‘the seabed and subsoil within the envelope of waters of a depth of 200 meters or, beyond that limit to where the depth of the superjacent waters admits of the exploitation of the natural resources’. the 200 meters limit was simply a wording and did not provide any specific process of establish such limit. However, this criterion was not controversial as was the alternative criterion to it, the exploitability criterion. This exploitability criterion was elusive one which ‘constitutes the indeterminate nature and the unsatisfactory feature of the definition’ of the continental shelf with the understanding that increasing development of new technologies in exploring offshore hydrocarbon resources would push the limit farther and farther from the shore. See generally \textit{Tunisia/Libya case, 45 [42]}; Shirley Amerasinghe, ‘The United Nations Conference on the Law of the Sea’ in Myron Nordquist (ed), \textit{United Nations Convention on the Law of the Sea: A Commentary} (Martinus Nijhoff Publishers, vol. I, 1985) 3 ; Churchill and Lowe, above n 35, 147. See also Mcdorman, above n 82, 189-190.

\textsuperscript{88} Given the exploitability criterion in 1958 CSC, as one of the vague basis of entitlement to the continental shelf, States were allowed to claim areas of continental Shelf based on their capacity to exploit the mineral resources of the shelf. The outer limits of the continental shelf was, therefore, one of the most contentious and divisive issues at the Third Conference. In order to avoid such uncertainty lying with the 1958 CSC, the delegates to the Third Conference realized the potential of a clearly defined outer limit of the continental shelf and thus, it had become an issue of particular importance to adopt an effective and clear legal framework defining the outer limit of the continental shelf. See generally Suarez, ‘Outer limits’, above n 85, 1; Tanaka, ‘Law of the Sea’, above n 6, 138.

\textsuperscript{89} The continental shelf beyond 200 nm is generally termed as outer continental shelf (OCS) or extended continental shelf (ECS) both by the scholars and jurists. See generally \textit{Barbados/Trinidad and Tobago arbitration, 65-66 [212]-[213]}; Alex G Oude Elferink, ‘The Impact of the Law of the Sea Convention on the Delimitation of Maritime Boundaries’ in Davor Vidas and Willy Ostreng (eds), \textit{Order for the Oceans at the
was one of the fundamental achievements of the Third Conference, as Article 76 not only provided definitive rules on such limits but also outlined procedures as to how the coastal States might delineate this limit in an integrated and harmonised manner.

The real achievement of Article 76 is that it provides defined and ascertainable limits for the OCS;\(^{90}\) delineating such limits is the fundamental objective of this Article.\(^{91}\) The provisions of Article 76 can be divided into two distinct parts—one is a substantive part and the other is a procedural part. Paragraphs 1–3 and 5 of Article 76 detail the substantive provisions and paragraphs 4 and 6–9 represent the procedural provisions.

Paragraph 1 of Article 76 is the controlling provision that defines the concept of LCS and provides two different basis of entitlement to the continental shelf: natural prolongation and distance.\(^{92}\) The term ‘natural prolongation’—used in conjunction with the term ‘submerged prolongation’ in Article 76, paragraph 3—is the criterion that determines a coastal State’s entitlement to LCS where it extends ‘beyond a distance of 200 nm’.\(^{93}\) According to paragraph 1 of Article 76, the extent of LCS is solely controlled by a scientific and technical, yet legal, concept—the *outer edge of the continental margin* (hereinafter OECD)\(^{94}\)—that in fact signifies these two criteria as the bases of entitlement to LCS.\(^{95}\) As far as the limit of

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\(^{92}\) See UNCLOS, Article 76. See also Appendix I.


\(^{95}\) According to the natural prolongation criterion, a coastal State is entitled to a continental shelf out ‘to the outer edge of the continental margin’ while according to the distance criterion, a coastal State is entitled to a continental shelf limited to 200 nm. See Tanaka, ‘Law of the Sea’, above n 6, 77-119, 129, 137, 138. In the Third Conference, in a situation when the problem of defining the limit of the continental shelf was resurged, and the great powers showed a strong interest in extending their sovereignty in the marine areas and many States, particularly the Latin American States—which have virtually no continental shelf in a geological sense -
entitlement is concerned, these criteria of entitlement are related to the location of the seabed where OECM terminates. Therefore, identifying the location of OECM is a necessary precondition for determining whether a coastal State is entitled to claim its LCS within or beyond 200 nm. Since such determination is based on the geological and geomorphological features of the seabed and the subsoil of a particular marine area, paragraph 4(a) of Article 76 provides two alternative but specific formulae for enabling the coastal States to precisely determine OECM. The first one is known as the sediment thickness formula or ‘Gardiner formula’, in which the OECM is to be determined with reference to the outermost fixed points where the thickness of sedimentary rocks is at least one per cent of the shortest distance from the point to the foot of the continental slope (hereinafter FOCS). The second is known as Bathymetric formula or Hedberg formula.

This is obvious, because, where the terminating point of the continental margin locates within less than 200 nm, there the extent of LCS will be based on distance criteria, and where it locates beyond that limit, there the extent of LCS, will be based on natural prolongation criteria.


UNCLOS, paragraph 4 of Article 76. See Appendix I.

The Irish or Sediment thickness formula is based on the ratio (which shall not be less than 1 to 100) between the thickness of the sediments and the distance of the point where the thickness has been measured from the foot of the slope-the line along which the slope ends and the rise begins. See P R Gardiner, ‘Reasons and Methods for Fixing the Outer Limit of the Legal Continental Shelf beyond 200 Nautical Miles’ (1978) 11-12. Francalanci, above n 94, 125. See also Defining the Limits of the U.S. Continental Shelf <http://www.state.gov/e/oes/continentalshelf/>. See also ‘US Extended Continental Shelf Project: Establishing the Full Extent of the Continental Shelf of the United States’ <http://continentalshelf.gov/media/ECSposterDec2010.pdf>.

UNCLOS, Article 76 (4) (a) (i).

The Hedberg method or Bathymetric formula is based on a series of fixed points that have been determined from the foot of the slope at a distance of not more than 60 nautical miles. See G P Francalanci and Tullio
in which the OECM is delineated with reference to fixed points no more than 60 nm from the FOCS (see Figure 1).\textsuperscript{104}

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{figure1.png}
\caption{OECM Established Under Article 76 (4)(a).\textsuperscript{105}}
\end{figure}

Ascertaining OECM is necessarily different from establishing the outer limit of OCS.\textsuperscript{106} Therefore, the setting of some sort of standard limit for the LCS was deemed necessary to adhere to international practice as well as to protect the territorial scope of the Area.\textsuperscript{107} This may be the reason that paragraph 5\textsuperscript{108} (as endorsed by paragraph 2\textsuperscript{109}) of Article 76 specified the substantive limit of the LCS as beyond 200 nm—350 nm from the baselines from which

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\textsuperscript{104} UNCLOS, Article 76 (4) (a) (ii).
\textsuperscript{105} The application of this formula is comparatively easier than the former since it is only dependent on the geometric measurements. See Andrew Serdy, ‘The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate’ (2011) 26 International Journal on Marine and Coastal Law 358.
\textsuperscript{107} Area means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. For details see UNCLOS, Articles 1 (1) (1), 133 and 136.
\textsuperscript{108} Since the effective extent of the continental margin may vary from place to place due to the varied extent of the ‘continental rise’ from the ‘foot of the continental slope. For example, in some places of the submarine area, the extent of the ‘continental rise’ can extend up to 900 nm. See generally Francalanci, above n 94, 128-129; Serdy, above n 103, 357.
\textsuperscript{109} UNCLOS, Article 76 (5). See Appendix I of this thesis.
\textsuperscript{109} See UNCLOS, Article 76 (2). See Appendix I of this thesis.
the breadth of the territorial sea was measured or 100 nm from the 2,500 metre isobaths (see Figure 2).\textsuperscript{110}

![Figure 2 Limits of the LCS Beyond 200 nm.\textsuperscript{111}](image)

However, the question of establishing such outer limits for OCS arises only when the OECM extends beyond 200 nm\textsuperscript{112} and this task combines the ‘influences of geography, geology, geomorphology and jurisprudence, a tour de force of interdisciplinary cooperation’.\textsuperscript{113} Again, the legal process of delineating the limits of OCS ‘involves questions of sophisticated technical judgement’ that may lead to scientific uncertainties\textsuperscript{114} as well as technical and definitional difficulties.\textsuperscript{115} To mitigate the scientific and technical uncertainties and

\textsuperscript{110} Between these two alternative limist, a coastal State is free to choose the most convenient one; but in any case the outer limit of the continental shelf shall not exceed 350 nm on submarine ridges. Such limits of OCS are to be delineated by straight lines not exceeding 60 nm in length, connecting fixed points, defined by coordinates of latitude and longitude. See generally, Francalanci, above n 94, 125; UNCLOS, Article 76 (6) - (7).

\textsuperscript{111} Tanaka, ‘Law of the Sea’, above n 6, 141 (adapted).


\textsuperscript{113} Johnston, above n 90, 91.

\textsuperscript{114} For this view see Allott, above n 84, 1, 18.

\textsuperscript{115} The LCS beyond 200 nm, what might be the limit, foot of the continental shelf (hereinafter FOCS) plays dominant role in the application of both Gardiner and Hedberg formula which serves as the basis to determine the outer limits of the continental margin. But, in practice, it is difficult to identify the FOCS. On the other hand, the suggested error in sediment thickness, which might be as much as 10 per cent, may have a significant impact upon the location of the outer limits of the continental shelf. Nonetheless, the ‘points of the 2, 500 meter isobaths may be difficult to locate when isobaths are complex or repeated in multiples’. See generally, McDorman, ‘The Role of the Commission’, above n 89, 304-305; R Macnab, ‘Initial Assessment’ in P J Cook and C M Carleton (eds), Continental Shelf Limits: The Scientific and Legal Interface (Oxford University Press,
difficulties in establishing limits for OCS, the Third Conference—as an outcome of a package deal approach—established a scientific and technical body entitled the CLCS\textsuperscript{116} and designed a ‘road map’\textsuperscript{117} requiring coastal States intending to establish the outer limits of their LCS as beyond 200 nm to follow a set of mandatory procedures:

- Coastal States are to submit information on the limits of OCS (prepared in conformity with the criteria set out in paragraphs 4–7 of Article 76) to the CLCS within ten years of the entry into force of UNCLOS for that State.\textsuperscript{118}
- The CLCS is to make recommendations to coastal States on matters related to the establishment of the outer limits of their continental Shelf.\textsuperscript{119}
- Coastal States are to establish the outer limits of their OCSs on the basis of recommendations made by the CLCS and outer limits thus established shall be final and binding.\textsuperscript{120}
- Coastal States are to deposit with the UN Secretary General charts and relevant information including geodetic data precisely describing the limits of their OCSs and the Secretary General shall give due publicity thereto.\textsuperscript{121}

In view of the preceding discussions, it can be concluded that the accomplishment of the substantive and procedural requirements of Article 76—in other words, the Article 76 process—mirrors an international agreement regarding the governing rules of international
law for delineating the outer limits of the LCS beyond 200 nm. Understandably, compliance with the Article 76 process is essential for the delimitation of maritime boundaries beyond 200 nm. This issue of compliance has provoked some new issues and considerations in terms of reaching an equitable solution. This thesis intends to investigate and identify the issues that require such consideration in the processes of reaching the equitable delimitations of OCS and to investigate the question as to the intermediary involvement of the CLCS in this process.

III DELIMITATION OF MARITIME BOUNDARIES IN THE BoB AND THE ISSUE OF THE EFFECTIVE APPLICATION OF THE LAW OF MARITIME DELIMITATION

A The BoB and the Coastal States

The BoB is the largest bay off the coast of Bangladesh, India, Myanmar and Sri Lanka (See Figure 3). It is a lobe of the Indian Ocean and forms a roughly oval shape that measures 1,800 kilometres at its widest point and 1,500 kilometres at its longest point, covering an area of nearly 2.2 million square kilometres. The mean depth of BoB is 2586 metres and the continental slope terminates at less than 3000 metres deep.

Bangladesh is situated at the north-eastern corner of BoB. Its entire coastline, which extends for approximately 310 miles (499 km), from the boundary with India in the west to the boundary with Myanmar in the southeast, is concave in shape. The middle third of it forms a second, even deeper concavity within this concave coastline. Conversely, the principal stretches of the coasts of India and Myanmar adjoining BoB are convex in nature. To the

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122 Because, it is clear from the expressed provisions of the Article 76 that in the process of applying and interpreting the Article 76, the substantive and procedural provisions of this Article play a complimentary role to each other and as such they should read together.

123 For example, the criterion of entitlement and the extent of entitlement, delineating the outer limits of continental shelf before or after delimitation, relevant circumstances, methods of delimitation are some of the aspects which require considerations in the delimitation of the continental shelf beyond 200 nm.

124 Rahman, above n 64, 139-152.

125 Ibid.


127 The meeting of its two principal stretches of coasts almost at right angles. Churchill, above n 28, 138.
east and southeast of Bangladesh lies Myanmar, separated by the Naaf River, which forms the boundary between the two States. Myanmar’s coastline along BoB is not concave, but instead runs in a relatively straight north-westerly to south-easterly direction and is marked by a number of offshore islands. The portion of Myanmar’s coastline that fronts the BoB extends for approximately 595 kilometres,\textsuperscript{128} although the entire coastline is not relevant to the delimitation of the maritime boundary with Bangladesh. Completing the picture is India, situated to the west of Bangladesh, and separated from it by the Ichamati, Kalindi, Raimangal and Hariabhanga Rivers. The length of the Indian coastline is about 2759 miles.\textsuperscript{129}

![Figure 3 Geographical Structure of the Bay of Bengal\textsuperscript{130}]

### B Bangladesh and its Boundary Disputes in the BoB

Aside from Bangladesh, the rest of the littoral States of the BoB have reached agreements regarding their maritime boundaries.\textsuperscript{131} Bangladesh shares land and maritime boundaries with both of its neighbours: India and Myanmar. In the absence of agreed maritime


\textsuperscript{129} Lewis M Alexander (ed), \textit{The Law of the Sea –Offshore Boundaries and Zones} (1967) 73.

\textsuperscript{130} \textit{Bangladesh/India} case, 13 (adapted).

\textsuperscript{131} Division for Ocean Affairs and the Law of the Sea, Deposit of Charts <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/IND.htm>
boundaries between these littoral States, the BoB, as the area of overlapping potential entitlements, became the theatre for these three neighbouring States to jostle for space.132

The maritime boundary dispute in the BoB began in 1974 when Bangladesh moved to claim its maritime jurisdiction through enacting the Territorial Waters and Maritime Zones Act133 and issuing the requisite notification134 in which it claimed a territorial sea of up to 12 nm, an economic zone extending to 200 nm, a continental shelf extending to the OECM and a system of straight baselines based on a depth criterion comprising lines connecting eight base points—all of which were located along a ten-fathom deep contour in the submerged delta (Figure 4).135 The enactment of the maritime law and Bangladesh’s subsequent notification proclaiming straight baselines received severe protests from neighbouring States and spurred the initiation of the maritime boundary disputes in the BoB.136 Here, it should be mentioned that, in the Third Conference, the legal provisions regarding straight baselines were adopted in accordance with the proposal made by Bangladesh.137

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133 Bangladesh Territorial Waters and Maritime Zones Act, 1974 (Act No. XXVI of 1974) (14 February 1974). This act is the first ever comprehensive legislation setting out the limits of maritime jurisdiction in South Asia. It came into force eight years before the adoption of UNCLOS, and it was drafted based on the expert advice from the Commonwealth Secretariat and distinguished international lawyers, including Sir Robert Jennings and Professor D.P. O’Connell. See Bangladesh/India arbitration, (Memorial of Bangladesh, vol. I) 44 [3.21].
134 Bangladesh Ministry of Foreign Affairs, Notification No. LT-1-3-7 (13 April 1974).
135 Bangladesh Ministry of Foreign Affairs, Notification No. LT-1-3-7 (13 April 1974). See also Reisman, W.M. and G.S. Westerman, Straight baselines in maritime boundary delimitation (St. Martin’s Press, 1992) xvi, 242; Rahman, above n 64, 278.
137 Considering the highly unstable nature of its coastline and holding the view that Article 4 of the TSC does not cover the characteristics of its coastline and does not cater for its practical needs, Bangladesh made a number of proposals at various stages of negotiations in the Third Conference and Article 7 (2) of the UNCLOS, which describes rules regarding the construction of straight baseline in a geographical location where the coastline is highly unstable due to the presence of a delta or other natural conditions, was adopted as a modified response to Bangladesh’s proposals in the) and Bangladesh ‘is the only deltaic coastal State that, more or less, tried to follow the spirit of Article 7 (2)’. See generally, S Nandan and Sobtai Rosenne (eds), United Nations Convention on the Law of the Sea: A Commentary (vol. II, 1993) 97-100; W. Michael Reisman and Gayl S. Westerman, Straight Baselines in International Maritime Boundary Delimitation (1992) 57-62; Roach and Smith, above n 135, 124 nn 145; Hoque, above n 135, 73-75, 78.
Following this disagreement, the main dispute about maritime boundary delimitation between Bangladesh, India and Myanmar centred on the method of delimitation. While Bangladesh was seeking to resolve these disputes through the application of equitable principles, India and Myanmar were campaigning for the use of the equidistance method of delimitation. The position of Bangladesh was that no rigid principle could be applied in the present case because of the BoB’s special geographical, geological and geomorphological characters as well as other mitigating relevant circumstances. The location of Bangladesh is complex because, while it is adjacent to India and Myanmar, the locations of India and Myanmar are opposite each other. Therefore, Bangladesh, risked restrictions to its EEZ and continental shelf imposed by its neighbours on account of their

![Figure 4 Straight Baselines Constructed by Bangladesh](image)

**Figure 4 Straight Baselines Constructed by Bangladesh.**

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rigid stance in favour of the equidistance principle\textsuperscript{140} that would ultimately make Bangladesh a zone-locked State.\textsuperscript{141}

In addition, Bangladesh is in dispute with India regarding the sovereignty of a tiny island—more specifically, a low tide elevation covering an area of two square miles, mostly known as South Talpatti in Bangladesh and New Moore in India.\textsuperscript{142} The island emerged in the estuary of the river Haribhanga, a border river running between the South Pargana district of West Bengal in India and the Satkhira district in Bangladesh.\textsuperscript{143} Bangladesh claimed that the island was within her territorial waters as the mid-channel of the river flows to the west of the island, while India claimed that the mid-channel flows to the east of the island.\textsuperscript{144} The acquisition of the island was strategically valuable for both Bangladesh and India because of its potential for oil and natural gas\textsuperscript{145} as well as its potential to increase the maritime

\textsuperscript{140}As calculated, Bangladesh, with the application of equidistance method, would lose 48,025 square km to Myanmar and 31,743 square km to India from the area that Bangladesh considers as its own maritime zone which is approximately 207,000 square km. Again, Myanmar seemed to have encroached 18,000 square km into Bangladesh waters. This situation was not less than that of which arose in the North Sea cases during the maritime delimitation in the North Sea between Germany, Denmark and the Netherlands, where Germany was to face the same cut off of its potential area of entitlement due to the application of equidistance principle. Arguably with application of the equidistance principle Bangladesh’s EEZ would be limited to less than 200 miles and would be left without a continental shelf. See generally, Commodore Md. Khurshed Alam, ‘Delineation of outer limits of the continental shelf’, The Daily Star (Dhaka, Bangladesh) 15 September 2006, <http://www.thedailystar.net/strategic/2006/09/02/strategic.htm>; Alam and Faruque, above n 138, 417; Datta, above n 131, 736.

\textsuperscript{141}Bissinger, above n 22, 107.


\textsuperscript{143}This island emerged as a result of siltation after a severe cyclone of 1970 in the wake of acute volcanic activity in the estuary of the Haribhanga river bordering both Bangladesh and India, and off the coast, it is closer to the Indian coast at a distance of 5 km compared to 7 km from the Bangladesh coast. Because the river separated India and Bangladesh, the incidence of the island was strategically valuable. Nonetheless, there was speculation that there might be oil or natural gas beneath its sandy shores. See generally, Alam, ‘The issue of South Talpatty’, above n 141, 13. A S Bhasin, India-Bangladesh relations, documents, 1971-2002 (Geetika Publishers, 2003), cited in Tanaka, above n 137; Datta, above n 131, 735.

\textsuperscript{144}In order to establish its ownership over the Island, India took some steps that might adduce some legitimacy to its ownership claim. Such as, after its emergence in late 1971, India immediately reported the island to the British Admiralty to officially place the island on the admiralty chart as New Moore Island. As the formation of the island was confirmed by satellite in 1975, Indian Border Security Force installed concrete pillars and built a billboard representing the Indian flag and map on the island in 1978. Two years later, complying with orders from the Indian government, the West Bengal government raised a national flag of India in March 1980. This apparent Indian occupation of the island aggravated the Indo-Bangladesh relations. See generally, Bhasin, above n 142; J.A Boutilier, ‘India's maritime security’ (2001) 74 (3) Pacific Affairs 448-449.


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entitlement of its sovereign State. As a result of these potential implications, sovereignty over this island in terms of boundary delimitation is of significant importance to both States.

C Judicial Settlement of the BoB Cases and the Issue of the Effective Application of the Law to Maritime Delimitation

As Stated earlier, the maritime boundary disputes of Bangladesh have been settled through the ITLOS and the Tribunal (Figure 5). The judicial settlement processes of the BoB cases have brought to the forefront the question as to the effectiveness of the application of the law to maritime delimitation in terms of settling maritime boundary disputes in an equitable manner. In particular, decisions concerning the delimitation of continental Shelf beyond 200 nm added weight to this question. Since the accomplishment of the Article 76 process, the legal requirement reflecting the consensus and strong agreement of the international community governing the law of maritime delimitation with particular focus on the continental shelf beyond 200 nm is being questioned; dominant use of equidistance method, the judicial pronouncement on the creation of ‘grey areas’ has been criticised. A further issue of examination is whether the disputes mentioned above have been resolved in accordance with the established rule of international law.

However, the answer to questions regarding the effectiveness of the legal regime on maritime delimitation apparently depends on the satisfactory fulfilment of three main conditions: first, that it is applied consistently and in accordance with the positive and judicially developed rules and principles of international law, taking into account all the circumstances of a given dispute; second, that it is applied in a way that prevents any fragmentation of international law; third, that its application leads to the complete settlement

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146 Datta, above n 131,736. If India is given sovereignty over the island, it can claim an additional 16,000 square metres of continental shelf but this would be much reduced if Bangladesh could prove its sovereignty over the island.

147 Suarez, ‘Outer limits’, above n 85,42-74; Magnusson, ‘Continental Shelf Beyond 200 nautical miles’, above n 82.

148 See generally Elferink, ‘delimitation’ above n 29, 69, 79-80; Elferink, ‘ITLOS’s Approach’, above n 29, 9-12, 15; Huang and Liao, above n 29, 281–307; Schofield, ‘One step forwards’, above n 18, 217-239; Schofield, Telesetsky and Lee, above n 29, 363-388; Schofield and Telesetsky, above n 29, 7; Riesenberg, above n 29; Burke, above n 29; Desai and Sidhu, above n 29, 538.
of the dispute under concern and does not imbue the settlement with any element that may give rise to future uncertainty.\textsuperscript{150} Taking this into account, this thesis aims to analyse the judgements of the BoB cases, to examine how effectively the law on maritime delimitation has been applied to the equitable settling of the maritime boundaries of Bangladesh and to investigate whether a framework of equitable solution is needed to complete the progressive development of the law on maritime delimitation.

\section*{IV Objectives of the Study}

Given the shortcomings of the UNCLOS delimitation provisions, the international courts and tribunals have developed rules through their decisions to govern the process of equitable solution. The objectives of this thesis are as follows: to identify the essential criteria of


\textsuperscript{150} Because, uncertainty and fragmented application give rise question as to the effectiveness of the existing framework of the law.
equitable solution—in other words, to define a holistic approach to equitable solution as developed in maritime jurisprudence, the application of which is paramount to ensuring the effective and equitable utilisation of the rules governing maritime delimitation; to investigate whether ITLOS and the arbitral tribunal have effectively applied the rules and criteria for equitable solution along with the Article 76 procedures in the BoB cases; to investigate whether ITLOS and the arbitral tribunal’s decisions exemplify any fragmentation of international law on maritime delimitation that may necessarily provoke calls for the progressive development of this part of international law; and, finally, to recommend a framework for equitable solution that may play a definitive role in the effective application of the rules governing maritime delimitation in an equitable manner, at distances both within and beyond 200 nm. To achieve these objectives, this thesis carefully analyses the growth and history of the law of maritime delimitation, the insights gained from the treaty-making processes of the international conventions on the law of the sea, and the international case laws on maritime delimitation.

V SIGNIFICANCE OF THE STUDY

Oceans and seas are the most important resources on the planet and they are inextricably connected to the socio-economic and political interests of States. Without the delimitation of maritime jurisdictions, a coastal State cannot explore its resource potential peacefully. This may cause countries to undergo crises that could affect their national and political stability. Therefore, the delimitation of maritime boundaries is an important matter for coastal States not only for determining maritime jurisdiction but also for the full realisation of resource potential in maritime zones. Marine resources are increasingly vital for the sustainable development of coastal States and especially for those fronting the BoB. The lack of agreement among these States about reaching an equitable solution in a reasonable manner has not only complicated their resource exploration capacities, but also poses cause for concern as to the peace and security of this sub-region. As discussed above, the recent

152 Nugzar Dundua, Delimitation of maritime boundaries between adjacent States (United Nations-The Nippon Foundation Fellowship Programme, 2006-2007) 1; Bissinger, above n 22, 111-119.
judicial settlement of the BoB cases has provoked questions as to the effectiveness of the established rules of maritime delimitation in terms of their application in the BoB cases. Taking into account the established rules and criteria of equitable solution, this research makes attempts to answer this important question of international law and recommends a framework for equitable solution involving the progressive development of the law on maritime delimitation with the aim to shape international practices of maritime delimitation. This certainly contributes to the potentially peaceful settlement of the maritime boundary disputes in an equitable manner and especially to the boundary disputes in the South China Sea. Although some research has been conducted into the South Asian perspective, unique research on specific questions pertaining to the rule of equitable solution and the effective application of the law to maritime delimitation, particularly in the BoB cases, is still lacking.

VI RESEARCH QUESTION

The fundamental research question underwriting this study is as follows:

1. How effective is the law of maritime delimitation in settling the maritime boundary disputes of the BoB sub-region in an equitable manner?

The subsequent research questions are as follows:

1. What is a holistic approach to equitable solution in the context of maritime delimitation?
2. Is a framework of equitable solution required for the progressive development of the law of maritime delimitation?
3. What could be the best possible framework for equitable solution?

VII SCOPE OF THE STUDY

UNCLOS is the only international law to regulate and govern ocean spaces. The international community adopted it to ensure a just and equitable economic order that considered the interests and needs of mankind as a whole and especially the interests and needs of developing countries.¹⁵⁴ The present study intends to conduct a legal analysis of UNCLOS in regard to its deficiencies in addressing delimitation issues—an important task

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¹⁵⁴ UNCLOS, above n 1, preamble.
for reaching an equitable solution to the ongoing maritime boundaries delimitation dispute among the coastal States of the BoB sub-region.

**VIII LITERATURE REVIEW**

The law of the sea is at the heart of traditional international law and, because of its manifold and complex problems, it has now become one of the most dynamic, interesting and challenging areas of growth in the body of international law. It is no exaggeration to State that law of the sea is the most vital part of international law in respect to its mandatory binding effect protecting mankind as well as the rights and just claims of coastal States. In particular, issues relating to the effective application of the law to equitable delimitation beyond 200 nm have become a focus for scholarly research. For these reasons, the legal bases of the practice of equitable solution and the concept of natural prolongation and its relation to the geological and geomorphological criteria for deciding the extent of maritime entitlement beyond 200 nm have become crucial. Clearly, the dispute settlement procedures of UNCLOS are weak in this regard. Addressing this shortcoming of UNCLOS is vital to its further development.

UNCLOS is the primary instrument governing the conduct of States in their uses of the oceans. The main purpose of this part of international law is to ensure equitable economic growth as well proper shares of the seas to coastal States irrespective of their statuses and positions. But there are no fixed principles within UNCLOS to ensure this goal. The only measure is to reach an agreement either mutually or as settled by a third party. However, neither the manner in which coastal States can reach a mutual agreement by way of a healthy negotiation—where each applicant shows respect to the just claim of the other—nor the elements that States must consider during the process of negotiation preceding an equitable solution are clear in the relevant provisions of UNCLOS. Nevertheless, the debate concerning the effective application of the rule of equitable solution for settling maritime boundary disputes beyond 200 nm has become crucial following the judicial settlement of the BoB cases. Because of legislative shortcomings, States are facing difficulties conducting peaceful negotiations about the settlement of maritime boundary disputes. Conversely, these

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155 Klein, above n 150.
failings are also providing larger and more powerful coastal States with a chance to extend delimitation disputes.

It has been ascertained that some fundamental research questions remain unanswered in relation to maritime boundary delimitation issues. A literature review further reveals that insufficient research has been conducted in the case of the BoB, particularly in the area of this thesis. This study responds to a demand for further research addressing the lack of stipulation about the process of maritime boundary delimitation in UNCLOS and in the practices of the international courts and tribunals. Therefore, this research will review literatures focusing on the effectiveness of UNCLOS provisions for delimiting maritime boundaries and settling the maritime boundary dispute in the BoB in an equitable manner as well as those that address lacking in the law on maritime delimitation and argue for further development of this law.

In its judgements of the North Sea cases, the ICJ rejected any obligatory use of equidistance principles and established the concept of equitable principles. 156 It is a truism to say that maritime boundaries either negotiated or adjudicated—the equidistance principle is the most widely used method of maritime delimitation. 157 However, an effort to assimilate the equidistance/special circumstances principle (as specified in Article 15 of UNCLOS) to the equitable/relevant circumstances principle (as developed in case law) based on their common objective—to achieve equitable solution—was in motion. 158 Nevertheless, Tanaka and Hendel argued in favour of an opposite view, advocating the obligatory use of the

156 North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), (Judgment) [1969] ICJ Rep 3, 33[47], 36[55], 46-47[85], 48-50[88]-[92], 52[98], 54[101] (Herein after North Sea cases). For a clear view, see also discussion in section IVB of Chapter 4.
157 An analysis of negotiated boundaries reveals that 89 percent of the boundaries between opposite coasts are based on the equidistance method, while 40 percent of the cases involving adjacent coasts employs the equidistance method. On the other hand, 11 out of 20 adjudicated boundaries, or 55 percent of the adjudicated boundaries are based on equidistance method, although only 3 out of 11 cases- 15 percent of the total number of adjudicated cases- are based on strict equidistance, while the rests are on modified or adjusted equidistance method. See A.G. Oude Elferink, ‘International Law and Negotiated and Adjudicated Maritime Boundaries: a Complex Relationship’ (2015) 48 German Yearbook of International Law 8-9.
158 See for example, Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 31 October 2001, <http://www.icj-cij.org/court/index.php?pr=81&pt=3&p1=1&p2=3&p3=1> (emphasis added). See also Lee, above n 38, 6-10. For a definition of equidistance method, see Appendix II of this thesis.
equidistance/relevant circumstances principle in the name of predictability. Conversely, Lee endorsed flexibility in all applicable principles and methods of delimitation. This thesis examines this issue of the flexibility and predictability of the equidistance/relevant circumstances principle to ascertain the extent to which each method is acceptable when reaching an equitable solution or whether the rule of equitable solution requires another approach.

Articles 74 and 83 of UNCLOS emphasise only the need to achieve an equitable solution but lack reference to any precise method for reaching that solution or to any standard for assessing its equitability. In the _North Sea_ cases, the ICJ first introduced the concepts of equity and equitable principles as applicable rules of international law for use in maritime delimitation to reach an equitable solution. In fact, the Court had no other choice but to employ equity as a rule of international law because of its historical evolution as a general principle of law in settling disputes of specific nature. In doing so, the Court was well aware of its obligation to act only within the law. Nevertheless, this judicial policy was highly criticised as a consequence of misperceptions and ignorance regarding the principle of equity. Thus, the concept of equity suffered wrongful evaluation and confusion surrounding its application in law. Rossi has conducted exhaustive research on equity and made positive attempts to detail the concept of equity, to identify realist legal approaches to equity in international law and to identify its role in decision-making processes; however, he has paid little attention to the application of equity in the judicial settlement process of maritime boundary delimitation. Hay asserted that, in terms of geographical distribution, the underlying concepts of equity, fairness and justice denote spatial equality, territorial justice and minimum standards, but his research does not offer specific details as to how these are to be achieved.

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160 Lee, above n 38, 43.
161 _North Sea_ case, above n 155.
162 Rossi, above n 82.
164 Miss A L W Munkman was a lecturer in the Department of Public International Law in the University of Edinburgh in 1969. She was killed in a road accident on 23 December 1972. According to R Y Jennings, she was one of the keenest intellects of her generation, a highly gifted scholar and teacher, devoted to international
and arbitral decision-making process, referred to various territorial and boundary disputes from Jay Treaty\textsuperscript{165} to \textit{North Sea} cases, claiming that to resolve particular disputes definitively—where the specific directions of international law are frequently inadequate—courts and tribunals have the right to interpret their authority extensively and, in this regard, they can, in practice, develop a number of criteria and have the power to decide cases on the basis of criteria not explicitly set out by way of a compromise within the given limits of their judicial function.\textsuperscript{166} However, although she observed that previous scholars have ‘failed to elaborate the content of equity sufficiently to make it serviceable to resolve concrete disputes’,\textsuperscript{167} Munkman herself only examined certain initial aspects of equity, such as estoppel and acquiescence, along with some of the more insightful processes of judicial decision-making, to identify and describe the determining factors or contents required to reach the minimum standard of equitable solution. Further, without taking into account the functions of equity and its distinction from \textit{ex aequo et bono}, Munkman considered the Court’s recourse to equity in the \textit{North Sea} cases to be ‘adjudicate \textit{ex aequo et bono}’\textsuperscript{168}. Sohn seemed to come close to achieving closure in identifying the proper criteria for equity when settling maritime boundary disputes by taking the view that when questions arise in a particular case as to whether equity or the law should be applied, if the Court ‘decides that in principle equity should be applied, it decides which principles—plural—of equity should be applied to the particular case’.\textsuperscript{169} Nonetheless, he failed to maintain this pattern when he described the Court’s endeavour in searching for an equitable result as \textit{contra legem}.\textsuperscript{170} It is a truism to say that equity is an inseparable component of the adjudication process.\textsuperscript{171} It is not the objective of this study to provide a better understanding of the concept of equity as applied by the Courts and tribunals; the aim is rather to investigate and identify normative standards of equity that play definitive role in achieving an equitable solution as well as a

\textsuperscript{165} For example, St. Croix River Case, in Moore, \textit{International Adjudications (vol. 1)} 1.
\textsuperscript{166} Munkman, above n 163, 55-56, 91-116.
\textsuperscript{167} Ibid, 19.
\textsuperscript{168} Ibid 16, 17, 91.
\textsuperscript{170} Ibid, 279.
\textsuperscript{171} Rossi, above n 82, 21.
framework for the process of equitable solution for international courts and tribunals in the process of settling maritime boundary disputes between States.

In terms of establishing the outer limits of LCS beyond 200 nm, Article 76 of UNCLOS provides substantive and procedural rules of international law where the concept of natural prolongation plays the dominant role. None of these substantive and procedural provisions of Article 76 is capable of being applied in isolation. Huang and Liao clarified different roles of natural prolongation in delimitation beyond 200 nm and argues that it not only constitutes the entitlement to continental shelf beyond 200 nm, but also defined it as a relevant circumstances of delimitation beyond 200 nm. 172 Again, Article 76 of UNCLOS established a legal procedure for delineating the outer limits of LCS beyond 200 nm where the CLCS has an interpreting and verifying role to play in terms of the delimitation of the LCS beyond 200 nm. The decisions in the BoB cases evidently rejected natural prolongation as the basis of entitlement to LCS beyond 200 nm and overlooked any role for the CLCS, which gave rise to a legal debate as to whether delimitation should be effected before or after delineation of the LCS beyond 200 nm. As this is a relatively recent issue in international law, this thesis makes effort to find an effective meaning of concept of natural prolongation within the purview of Article 76, and its role in delimitation beyond 200 nm, and, analyses the problem of CLCS involvement in delimitation beyond 200 nm given the internationally agreed legal framework of UNCLOS and the requirement of equity. It also investigates the reasons for favouring delineation above delimitation.

In the BoB cases, international adjudicative bodies created grey areas relating to delimitations beyond 200 nm for the first time. This addition has attracted severe criticism. Elferink; Huang, Yao and Liao; Xuexi; Schofield, Telesetsky and Lee; Riesenber; and Burke condemned this judicial decision as provoking uncertainty about the effective application of the law to maritime delimitation. 173 However, this thesis examines to what

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173 Elferink, ‘ITLOS’s Approach’, above n 29,15; Huang and Liao, above n 29, 281–307; Schofield, ‘One step forwards’, above n 18, 217-239; Schofield, Telesetsky & Lee, above n 29, 363-388; Schofield and Telesetsky, above n 29, 7; Riesenberg, above n 29; Burke, above n 29; Desai and Sidhu, above n 29, 538.
extent the decision to create a grey area was justified under the established rule of equitable solution.

Rothwell and Stephens’s approach to the effectiveness of and need for the further development of UNCLOS is a recent contribution to the international law of the sea. Freestone also analysed the difficulties faced by UNCLOS—an area that is now receiving more attention from scholars. Barnes, Freestone and Ong (eds.) introduced several contrasting issues relating to the effectiveness of UNCLOS and revealed some new issues, such as climate change and its effects on the law of the sea and the protection of the interests of developing countries in deep sea mining—areas that the negotiators of the Third Conference had failed to foresee. They also suggested some further developments. In meeting the challenges of the twenty-first century, the law of the sea, according to Vidas and Schei, is highly inefficient and ‘will remain a serious reason for concern in the years to come’. Oda added the importance of State negotiation for mutual agreement on the delimitation of maritime boundaries and also tried to determine the deficiencies in the relevant provisions of UNCLOS. To avoid the damaging effects of UNCLOS’s provisions regarding maritime boundary delimitation Vukas, judge of the ITLOS, made some recommendations. According to Boyel, unless State parties continue to promote necessary developments within the framework of the conventions, UNCLOS is likely to ossify or become obsolete in the immediate future. Schwebel analysed the progressive development of the international law, reporting that the contribution of international courts and tribunals to the development of international law were inherently different from the

174 Rothwell and Stephens, above n 3.
175 David Freestone, above n 24, 1-5.
process of codification.\textsuperscript{181} Conversely, Freestone identified the lacunae of UNCLOS, maintaining optimism about the capacity of UNCLOS and stating that ‘the world legal order is in a much better position with it than without it’.\textsuperscript{182} The writings of all the scholars mentioned above are very useful for the present study, although none of them embarked on issues particular to the concerns of this thesis.

The role of the international courts and tribunals has been criticised by various scholars as to its completeness and effectiveness in resolving delimitation disputes among competing States. Klein argued that UNCLOS has inspired negotiation rather compulsory procedures. According to Klein, UNCLOS does not dictate how maritime boundaries are to be located in cases of overlapping claims; it rather describes guiding principles to effect an agreement on the basis of international law and to achieve an equitable solution. She also states that a desire to avoid CPBD is obvious since the complicated conciliation process in Article 298 (1)(a) returns States to negotiation.\textsuperscript{183} Rayfuse examined the compulsory settlement procedure of UNCLOS and concluded that the international courts and tribunals have limited scope in developing international law, as far as the role of dispute settlement provisions is concerned, since fears of fragmentation arising from inconsistent interpretations or applications of legal rules have not yet materialised.\textsuperscript{184} In contrast, Thirlway,\textsuperscript{185} Kwiatkowska\textsuperscript{186} and Paulson,\textsuperscript{187} along with other scholars, are convinced that the international courts and tribunals are successful in upholding the notion of equitable solution in critical maritime boundary delimitation disputes. It is noteworthy that, in relation to these disputes, no general principle of equitable solution could be established because of the

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\textsuperscript{182} Freestone, above n 149, 5.
\textsuperscript{183} Klein, above n 150.
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uniqueness of each case. Nonetheless, these literary works are of great assistance to the arguments for the present study.

The Chilling effect may on occasion relate more to the respective reasoning processes of decision makers than to the judgement itself. In the abstract, a decision or award may be fair and just. Alternatively, it may be accepted by States notwithstanding the protestations they harbour or register. However, the prospects of international dispute settlement are not enhanced—on the contrary, they are threatened—when States believe that results are tainted by recourse to individualised applications of justice or applications to which States have not consented and for which an insufficient amount of judicial or arbitral authority is proffered. Even States benefitting from an individualised application of equity might think twice about its prospects for success in future adjudications. These abstract considerations prompted Lauterpacht to remark that ‘it is an open question whether current techniques of judicial settlement are adequately adjusted to the demands which the application of equity places upon them.’ Taking this into account, this thesis addresses the question as to the need for a framework for equitable solution.

The question as to whether a framework for equitable solution can be prepared has also been addressed by several scholars. Analysing case law on maritime boundary delimitation, Leanza described the international courts and tribunals as playing an important role in developing the customary rule of international law on maritime boundary delimitation by stressing a single united approach to achieving an equitable solution, which, with no abrupt changes in direction, has maintained a logical legal continuity in cases from the late 1960s onwards, leading to the conclusion that such judicial practice is very much more consistent and compatible with the relevant provisions on EEZ and continental shelf delimitations as entailed in the Convention than those contained in the 1958 CSC. However, Leanza did not discuss the legal basis or decision-making framework that led the Courts and tribunals

to maintain such legal continuity. Cheng convincingly argued that, among the various branches of international law, the judicially developed international law—as applied by the international courts and tribunals—was ‘at the top end of the spectrum’. Nevertheless, the question as to whether judges actually possess any law-making power was not addressed. This thesis addresses the omissions of each of these scholars.

This research has engaged with literature pertaining to the different kinds of delimitation methods, principles and special circumstances in view of which various international courts and tribunals decide maritime boundary delimitation disputes. Dundua has critically analysed various methods and principles of maritime boundary delimitation and has drawn attention to the fact that, between two adjacent coastal States, maritime boundaries must be determined by way of implementing equitable principles as well as considering all relevant circumstances to ensure an equitable solution. Dehghani argued that the equidistance method cannot be applicable in all cases. Rather, geographical factors such as the general configuration of the coastline and particularly the existence of islands in the delimitation area should be taken into account when delimiting maritime boundaries because each case is unicum. Conversely, some scholars such as Lee and Degan have attempted to assimilate equidistance/relevant circumstances principles to equitable/relevant circumstances principles, despite there being a remarkable difference between these two principles. Degan criticised equitable principles, claiming that they would not lead to predictable results in maritime delimitations and the Court would fail to prove their customary character or nature as a general principle of law. This literature review will make a proposal based on both sides of this argument.

Since this study is focused on maritime boundary delimitation in the BoB sub-region, the literature review must also address research relating to the study site. Rahman has described the evolving of maritime boundary delimitation and argued for the rationality of invoking

192 Dundua, above n 151.
193 Dehghani, above n 187.
194 See generally Lee, above n 38.
the equitable principle, particularly when delimiting the maritime boundaries of the BoB sub-region.\textsuperscript{196} Thang argued for the natural prolongation of continental margins on the application of sediment thickness formulae for delimiting the continental shelf of Myanmar.\textsuperscript{197} Hoque assessed the possibility of delineating the outer limit of the continental shelf of Bangladesh without involving the baselines.\textsuperscript{198} In contrast, Alam and Al Faruque; and Bissinger analysed the importance of maritime boundary delimitation in the BoB and stressed the importance of mutual negotiation for achieving a positive result.\textsuperscript{199} However, though these literatures reflect issues regarding the delimitation of maritime boundaries in the BoB, they do not cover the focal point of this thesis.

Given the academic development regarding the law of the sea, significant research gaps can still be observed and the existing literature is not sufficient to fulfil those gaps. Even the legal provisions for the maritime boundary delimitation in UNCLOS do not conclusively address the critical delimitation issues of the world—one of which is found in the BoB sub-region. However, further development of UNCLOS will occur over time. Therefore, it is anticipated that this research will contribute to the development of a conclusive legal framework for maritime boundary delimitation.

IX RESEARCH METHODOLOGY

Legal research is a purposeful investigation to explain a legal phenomenon that assists in discovering laws that require reforms and can initiate new theories of law, challenge old ones or help to clarify existing theories.\textsuperscript{200} The research adopted a doctrinal research design that ‘analyses the relationship between rules, explains areas of difficulty and predicts future development’.\textsuperscript{201} A qualitative method was used to achieve the objectives of the research,\textsuperscript{202} which involved the study of ‘general theoretical questions about the relationship of law to

\textsuperscript{196} Rahman, above n 64.
\textsuperscript{198} Hoque, above n 135.
\textsuperscript{199} See generally Alam and Faruque, above n 138, 405-423; Bissinger, above n 22, 103-142.
\textsuperscript{201} Terry Hutchinson, Researching and Writing in Law (Thomson Reuters, 3rd edn, 2010) 7.
\textsuperscript{202} J Myron Jacobstein, Toy M. Mersky and Donald J. Dunn, Fundamentals of Legal Research (Foundation Press, 7th edn., 1998) 1.
justice and morality and problem of application of law’ in given circumstances. This research is open ended and critically analyses primary and secondary materials.

The internal and external methods of UNCLOS are analysed through a critical literature review of UNCLOS and its judicial application in the international courts and tribunals; the research addresses the gaps between the delimitation provisions of UNCLOS and the practices of the international courts and States. Since it has been observed that the existing law of the sea pertaining to maritime boundary delimitation is expressly vague and insufficient to ensure equitable solutions to maritime boundary disputes, a critical analysis and evaluation of relevant literature have been undertaken to justify a framework for equitable solutions based on the rules and principles developed in maritime jurisprudence as well as in scholarly writings.

A  Legal Reasoning

This research is based on ‘deductive and inductive’ arguments to establish the reason as to why the gaps in UNCLOS regarding maritime delimitation need to be addressed and why a framework of equitable solution should be adopted to bridge these gaps. This research focuses on maritime boundary delimitation issues, providing an analysis of the legal reasoning for the formulation of the UNCLOS delimitation provisions, the judicial decision-making processes for maritime boundary disputes and the basic arguments and legal principles utilised to reach such decisions.

B  Legal Analysis

This research analyses the background to the formation of maritime boundary delimitation provisions as stipulated in UNCLOS, their effectiveness in guaranteeing equitable solutions to delimitation disputes and their deficiencies in providing a framework for such equitable

205  Hutchinson, above n 200, 38.
solution based on the equitable principles for maritime delimitation. It also analyses the stance of the international courts and tribunals in providing equitable solutions to delimitation disputes. It defines equitable solution, principles of equidistance/relevant circumstances, equitable principles and proportionality, cut-off effects and non-encroachment principles to justify the research themes. It also addresses new aspects of equitable solution in delimitation beyond 200 nm. As the research examines the effectiveness of the law on maritime delimitation in settling maritime boundary disputes in the BoB cases, it critically analyses the BoB cases in light of the findings reached in this thesis.

C Sources of Information

As discussed above, the research is library based; the research materials were obtained from the University of Western Sydney library through various e-resources and databases such as JSTOR, Westlaw International, HeioOnline, LexisNexis, Legal Online (Thomson Reuters), AustLII (Australian Legal Information Institute), Google Scholar, Weblaw and the Social Science Research Network as well as through relevant books, academic journals, Articles and theses. Moreover, relevant laws, treaties, decisions, policies, reports and conference papers have been collected from direct sources or via the Internet.

D Substantive Data Collection

Needless to say, it is important to collect data from direct sources. The Division for Ocean Affairs and the Law of the Sea, the Office of Legal Affairs of United Nations, the ICJ, the ITLOS, the Permanent Court of Arbitration (PCA), the International Maritime Organization and the International Maritime Legal Institute are the direct sources of such data. These institutions deal directly with maritime delimitation issues and provide several internship programmes to build the capacities of developing States regarding maritime delimitation. Various international conferences and seminars are also held by different organisations on maritime boundary issues. Visiting these institutions and participating in their internship programmes and conferences assisted in the development of a clear understanding of the current trends and practices of the law of the sea. Ultimately, these experiences have enriched the research. Since the research was focused on the delimitation of maritime
boundaries in the BoB, visiting the littoral States of Bangladesh, India and Myanmar was also helpful for the collection of primary data and information.

X OUTLINE OF THE STUDY

In addition to this introductory chapter, this thesis consists of seven chapters that critically analyse and investigate issues related to the effective application of the law to maritime delimitation.

Chapter 2: This chapter focuses on the historical development of the law of maritime delimitation. Through an historical evaluation of the concepts of maritime delimitation—from its ancient conception as an abstract notion to its practical modern application—and by illuminating the initiatives undertaken by the League of Nations for the codification and progressive development of the delimitation rules, this chapter argues that the law on maritime delimitation was developed through conflicting scholarly ideas, medieval State practices and the prolonged desire for an equitable international ruling on maritime delimitation that, in fact, paved the way for the growth of the law of the sea as the most influential part of international law.

Chapter 3: This chapter is divided into two parts. The first part describes the different methods and principles of maritime delimitation and identifies the special and relevant circumstances that have been considered in the process of maritime delimitation. The second part investigates and carefully examines the question as to whether the UNCLOS delimitation provisions related to EEZ and continental Shelf really refer to any specific methods of delimitation or define special circumstances and thus whether the Convention, in essence, really provides any applicable legal framework for equitable solution. It then argues that the law on maritime delimitation, as embedded in the Convention, still lacks progressive development.

Chapter 4: Articles 74 and 83 of UNCLOS provide scant guidance towards achieving an equitable solution. The concept of equitable solution was nowhere defined in the Convention: the creators of UNCLOS adopted it as ‘a last-minute endeavour’ to reach an agreement. Given the lack of UNCLOS provisions pertaining to maritime delimitation, the
international courts and tribunals have developed applicable rules and criteria for equitable solutions. This chapter aims to conceptualise the notion of equitable solution as developed by the judges to identify a holistic approach to equitable solution and to examine whether such development may indicate a legal framework for equitable solution. To achieve these aims, this chapter carefully investigates the principles of international law that lend support to the international courts and tribunals as a basis for such development and the essential principles and criteria that provide guidance for reaching an equitable solution. Then, this chapter examines whether maritime jurisprudence has established a framework of equitable solution and thus seeks to identify the yardsticks that justify the effective application of the law to maritime delimitation. Finally, this thesis argues that international case law has evolved into a properly structured functional framework for equitable solution based on principles of equity in line with the delimitation criteria set forth in Articles 74 and 83 of UNCLOS that afford more substantial meaning to the treaty rules. Compliance with this framework, it is argued, in fact justifies the effective application of the law to maritime delimitation.

**Chapter 5:** The established rules governing maritime delimitation, as have been developed through case law, addresses delimitation of the continental shelf within 200 nm only. The delimitation of the continental shelf beyond 200 nm is a comparatively new phenomenon in the law on maritime delimitation. The aim of this chapter is to examine the conventional rules on the delimitation of the continental shelf beyond 200 nm and to investigate whether compliance with the substantive and procedural requirements of Article 76 is required to reach an equitable solution. In doing so, this chapter defines the concept of the natural-prolongation-only legal basis for entitlement to continental Shelf; it also analyses Article 76 and the CLCS rules to ascertain whether delineation before delimitation is a necessary prerequisite for maritime delimitation and investigates new issues that require consideration in the process of delimitation beyond 200 nm.

**Chapter 6:** The settlement of the maritime boundary disputes in the BoB has dissolved a longstanding disagreement. The case between Bangladesh and Myanmar has been settled by the ITLOS. The case between Bangladesh and India was decided by the arbitral tribunal and established in accordance with Annex VII of UNCLOS. In these cases, for the first time, the
international courts and tribunals determined delimitations beyond 200 nm. The decisions of the BoB cases, especially those regarding delimitation beyond 200 nm, have attracted significant attention both from legal jurists and scholars with particular interest in delimitations beyond 200 nm and the effective application of the rule of equitable solution. This chapter critically analyses the decisions of the BoB cases and, in light of the outcomes of the preceding chapters, examines whether the Court and tribunal effectively applied the law of maritime delimitation. Finally, it argues that although they have been able to apply the rule of equitable solution to delimitations within 200 nm, their decision to apply it to delimitations beyond 200 nm is questionable. Therefore, progressive development should be implemented in the law of maritime delimitation and a legal framework for equitable solution could play a definitive role in this regard.

Chapter 7: Based on the arguments and findings of the preceding chapters regarding the effectiveness of the existing legal regime for maritime delimitation, this chapter proposes a comprehensive legal framework for equitable solution with the aim of ensuring an effective and efficient mechanism for delimitation within and beyond 200 nm. The features of the framework are also described in this chapter. This chapter seeks to propose more effective law and policy measures and to devise policy recommendations for the effective and sustainable resolution of future maritime boundary disputes. It also outlines how a framework for equitable solution is still viable and possible to adopt under the framework of the Convention without any amendments required. State parties, international organisations—including international courts and tribunals—international lawyers, legal researchers, research organisations, international organisations related to maritime delimitation and government agencies may benefit from the findings of this chapter.

Chapter 8: This concluding chapter summarises the thesis. It considers the discussions and arguments presented in the preceding chapters; it provides recommendations for outcomes based on the answers to the research questions, expresses the legal impacts of this thesis and suggests future solutions.

Besides 8 chapters, this thesis includes 4 Appendices.
Appendix I: Article 76 of the United Convention on the Law of the Sea has been stated in this appendix. Since a significant part of this thesis deals with the delimitation of continental shelf within and beyond 200 nm, Article 76 has been inserted in this Appendix for having a clear view of the conventional provision in this regard.

Appendix II: In Chapter 4, this thesis argues about the flexible usage of delimitation methods and disregards the dominant use of equidistance principle for reaching an equitable solution. In support of this argument, a clear description about the applicable methods or principles of maritime boundary delimitation is required. Therefore, most of the applicable methods or principles for delimitation are defined in this appendix so that a clear view about the alternative methods of maritime delimitation can readily be found in support of this thesis.

Appendix III: This thesis argues that in order to reach an equitable solution, the State Parties to a negotiation or an international court or tribunal while resolving a maritime boundary dispute is free to consider anything as special circumstances or relevant circumstances. It also argues that the term special circumstances is used with regard to the delimitation of the territorial sea and the term relevant circumstances is used with regard to the delimitation of EEZ and continental shelf. In order to have an idea about the possible circumstances, which have been considered as special or relevant circumstances, are discussed in this appendix. It will be helpful to understand the international trend in considering circumstances as special or relevant to maritime boundary delimitation.

Appendix IV: The bibliography of the literature, case law, national and international documents which have been used during this thesis are arranged separate headings and in an alphabetical order.
CHAPTER 2

HISTORICAL DEVELOPMENT OF THE LEGAL REGIME OF MARITIME DELIMITATION

I INTRODUCTION

Modern maritime boundary delimitation comprises two central concepts: delimitation standards and delimitation criteria. Delimitation standards include different maritime zones and their extents, while delimitation criteria entail the principles and methods of delimitation and the techniques for drawing maritime boundaries between opposite or adjacent States—considering their nature, the configuration of their coasts, the geological and geomorphological aspects of the maritime zones, any special circumstances of the coastal States and the sea zones.

The UNCLOS provisions regarding maritime boundary delimitation—Articles 15, 74(1) and 83(1)—form the primary legal references to the legal regime of maritime delimitation. 1 Maritime delimitation results from a continuum that is constantly developing. 2 The history of the formulation of a legal regime of maritime delimitation is also the history of the international law of the sea itself, which is becoming one of the most dominant branches of international law. The international process of the development of the law of the sea has not always been smooth and has had to pave the way for the ‘universal application’ 3 of international law. Some of the basic tenets of modern international law have emerged from conflicting concepts in the law of the sea. 4

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The aim of this chapter is to examine the historical development of the legal regime of maritime delimitation. In doing so, this chapter investigates the legal theories, scholarly views and various attempts at codification that have informed the progressive development of the law of maritime delimitation.

II THE HISTORICAL DEVELOPMENT OF THE LEGAL REGIME OF MARITIME BOUNDARY DELIMITATION

The legal concept of maritime boundary delimitation was developed for centuries through State practice, scholarly opinions and judicial processes and, finally, through the codification of international law under the UN designating it as ‘mostly a treaty based branch of the law’.5

The concept of rules to govern maritime delimitation was not absent from early State practice and scholarly writings.6 However, it was ‘devised and developed at a particular period of history’7 from the sixteenth century onwards and shaped mostly by European practice and beliefs,8 with some exceptions,9 as a product of ‘European or western civilization’.10 Until the mid-twentieth century, the law of the sea had developed as a law of ‘European lineage’.11 However, the twentieth century proved to be most significant for the growth of the international law of the sea and the relevant State practices associated with maritime boundary delimitation.12 Nevertheless, the precise point in history when the

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9 Colombos asserted the formulation of the law of the sea as a contribution of the practice of the British Commonwealth and United States. See Colombos, above n 6, 7.
modern concept of rules governing maritime delimitation emerged still remains an issue of scholastic debate.\textsuperscript{13} This thesis takes the view that the law of maritime delimitation developed in two stages: first, it developed through customary State practice and the work of scholars and publicists prior to World War II; second, it developed through the successful codification and progressive development of international law under the UN after World War II.

\textbf{A Development of the Concept of Maritime Boundary Delimitation Prior to World War II}

The contemporary concept of maritime delimitation developed through ‘continual conflict between two opposing yet complementary fundamental principles—territorial sovereignty and the freedom of the high sea’\textsuperscript{14}—resulting from great juridical controversies and a ‘battle of books’ between Grotius and other scholars of his time.\textsuperscript{15} However, the early concept of maritime delimitation was formulated to primarily serve the ‘interests of prosperous nations’ of that time.\textsuperscript{16} This concept of maritime delimitation underwent considerable change by the end of the twentieth century through the consecutive, collective approaches of international communities to codifying the law of the sea—a

\textsuperscript{13} For example, while Rothwell, Stephens and Fulton took this view that the law on maritime delimitation took it rise from the scholastic debate of mare liberum or ‘the freedom of the seas’ and mare clausum or ‘the closed seas’ theories which resulted from the States conflicts regarding dominion over the massive marine spaces, Tanaka held this view that ‘the history of maritime delimitation begins with the formulation of the legal institution of the territorial sea in a modern sense, i.e., around the 18th to 19th Century’. See generally, Rothwell and Stephens, above n 12, 2; Thomas Wemyss Fulton, \textit{The Sovereignty of the Sea} (London, 1911) 5; G J Tanja, \textit{The Legal Determination of International Maritime Boundaries} (Kluwer, 1990) 2-3; Sang-Myon Rhee, ‘Sea Boundary Delimitation between States before World War II’ (1982) \textit{76 American Journal of International Law} 555-57; Yoshifumi Tanaka, \textit{Predictability and Flexibility in the Law of Maritime Delimitation} (Hart Publishing, 2006) 6, 7 nn 29.

\textsuperscript{14} E D Brown, ‘Maritime Zones—A Survey of Claims’ (1973) 3 \textit{New Directions} 157. The Concept of territorial sovereignty may be seemed to reflect Selden’s doctrine of \textit{mare clausum} which got its present form as Territorial Sea where a coastal State is entitled to exercise its sovereign jurisdiction. See Article 1-3 of the Convention. On the other hand, the concept of the freedom of the high sea seemed to reflect Grotius’s theory of the freedom of the seas, and contemporary practice of maritime zones beyond territorial sea belongs to this high sea concept where the all States can exercise their freedom regarding navigation, overflight, laying submarine cables and pipelines, not sovereign jurisdiction. See Article 58, 86-89 of the Convention. See also Fulton, above n 13, 25-27.

\textsuperscript{15} See James Brown Scott, ‘Introductory Note’ in Hugo Grotius, \textit{The Freedom of the Seas or the Right which Belongs to the Dutch to Take Part in the East Indian Trade} (Palph Van Deman Magoffin trans, Oxford University Press, 1916) iv-x.

\textsuperscript{16} Roling, above n 11, 15.
process that instigated the ‘forming [of] customary rules’ for international law where the ancient concepts of freedom of the seas and the subsequent concepts that developed through conflicts between *Mare Liberum* and *Mare Clausum* doctrines were neutralised and assimilated in a balanced way.

1 **Efforts to Establish Principles in the Ancient and Middle Ages**

The concept of maritime boundary delimitation developed in the ancient and Middle Ages through the confrontational State practices and scholastic activities of the time.

Fisheries and fish commerce between various parts of the Mediterranean Sea were some of the main income sources for the ancient Greek and Roman States. Since ancient times, powerful maritime States exercised their jurisdiction over seamen, sea-borne commerce, the flying of State flags and, generally, over personal or business relations between merchants and seamen. The maritime laws of Rhodes provided the earliest legislature in this regard, and were tacitly adopted by both Greeks and Romans for the regulation of navigation and sea-borne commerce. Until the second century, both Greek and Roman laws were silent as to the status of coastal States regarding their entitlement to and jurisdiction over the seas and their resources.

In the second century, Roman law relating to the status of the sea began to develop. Gaius (130–180 AD), a prominent Roman jurist, described the sea and its fish as *res nullius*, asserting that things that belong to no one become, by natural reason (*jus naturale*), the property of the first occupant and their uses are subject to *jus gentium* (the early concept

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17 Forming customary rules of international law through codification of new rules, not existed before, has got its essence from the conventions on the law of the sea. Budislav Vukas (Judge, ITLOS) asserted that even substitution, supplementation, amplification, modification or revision of an existing conventional rule by another subsequent conventional rule may form a new binding customary rule of international law. See Budislav Vukas, *The law of the Sea* (Martinus Nijhoff Publishers, 2004) 13-20. See also L B Sohn, *Cases and Other Materials on World Law* (1950) 1008; R R Baxter, ‘Treaties and Custom’ (1970) 129 *Collected courses of the Hague Academy of International Law* 57-75. International Court of Justice has also confirmed the acceptability of forming new rules of customary international law as a product of conventional solution. See *North Sea Case*, 41.


19 Fenn, above n 6, 717.

20 Ibid.

21 D’O Dapper, *Description excte des Isles de, L’Archipel. Traduite du Flamand* (Amsterdam, 1703) 146.

of international common law). However, he was silent about the status of the sea. Marcianus, a Roman jurist who lived in the early years of the second century, was the first to make formal pronouncement as to ‘the legal status of the sea and on the right of men to use the sea and its products’, pronouncing the sea res communes—open to the use of all men. Ulpiam, another Roman jurist living at the end of the second century, agreed with this view and Celsus, a jurist consult of the time of Hadrian, proclaimed that the use of the sea is common to all men: mare communum usum omnibus hominibus. The legal theory of res communes on the status of the sea became law in the Roman Empire and was codified in the sixth century (534 AD) in the legal books of Emperor Justinian—the Corpus Juris Civilis—which have been described as the ‘crowning achievement’ of the Roman Empire. The status of the sea in the Corpus Juris Civilis as res communes meant that it was common to all, owned by none; incapable of being appropriated and open to the common ownership and uses of all men; the shores of the sea had the same legal status. It can be asserted that this was a black period with respect to the law of maritime delimitation.

Nothing like the modern concept of maritime delimitation that encompasses delimitation standards and/or delimitation criteria was considered at that time. An unfocused idea of

23 See Lauren Benton and Benjamin Straumann, ‘Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice’ (2010) 28 (1) Law and History Review 14-15. Res nullius means things without owners, and a related term terra nullius means land without owners. Interestingly, this Roman concept of res nullius along with another concept terra nullius (which sometimes seen as an analogy of res nullius) had found to be used as the basis to defending the imperial claims as well as rationales of imperial ventures: at 1-2. See also A Watson (ed) The Digest of Justinian (University of Pennsylvania Press, vol. 2, 1985) ; E Poste, Gaii Institutiones Iuris Civilis Commentarii Quattuor (Oxford, 3rd ed, 1890).
24 Fenn, above n 6, 726.
25 It is agreed that Marcinus doctrine was ‘known in a written form at least as early as the beginning of the second century’. He belonged to that class of jurists ‘the official pronouncement of which were recognised as being Statement of the law’. His ‘doctrine of the common right of all men to a free use of the sea’ was supposed to be a ‘law of the Roman Empire at the beginning of the second century, although this law was not put in a codified form until the sixth century’. See Fenn Jr, above n 6, 716.
26 Ibid, 722.
28 Fenn, above n 6, 720-23.
29 See generally, D G Cracknell. Roman Law (1964) 24; Fenn, above n 6, 720-23. The corpus juris civilis is the ‘term used to describe the Institutes, Digest and Code of Justinian, and the Novellae’: Cracknell, above n 29, 24.
30 Christopher R Rossi, Equity and International Law: A Legal Realistic Approach to International Decisionmaking (Transnational Publishers, 1993) 27.
31 Fenn, above n 6, 723-27.
maritime zones and their delimitation emerged through medieval State practices when seas became subject to various forms of appropriation and control by powerful States. The most extensive claims to maritime dominion were those made by Spain and Portugal in the 1494 Treaty of Tordesillas by virtue of the papal bull *Inter Caetera* issued by Pope Alexander VI in 1493, under which a straight line was drawn reaching 370 leagues west of Cape Verde Island. All to the east of this line (along with Brazil, which fell to the west) was given to Portuguese expansion and all to the west (other than Brazil) was given to Spanish expansion—a division that also had consequences for the adjoining seas (see Figure 6). Each of these two powers was afforded a ‘monopoly of navigation and commerce with the New World and the East Indies’.

A cautious analyst might observe that the medieval States’ claims over maritime spaces were based on specific purposes and would not qualify as claims to maritime zones under the designation ‘territorial sea’. However, the medieval States’ practice of appropriation of the seas ‘laid the theoretical foundations of the modern international law concept of the “territorial sea”’.  

The first recorded appropriation of this sort was made by the Byzantium under Emperor Leo (889-911 AD) for rights to fishing and salt extraction; that was a point of deliberate departure from the legal doctrine *res communes*. This sort of State’s appropriation of maritime spaces continued up to the sixteenth century; The English Kings started claiming sovereignty over the sea from the tenth century when Edgar the Peaceful styled himself ‘sovereign of the Britannic Ocean’; Denmark and Sweden claimed sovereignty over the Baltic, Denmark claimed all the northern seas between Norway, Iceland and Greenland, England claimed the so-called British Seas which extended to the opposite coasts of the European Continent, Venice claimed sovereignty over the Adriatic, while Genoa and Pisa claimed the Ligurian sea. See DP O’Connell, *The International Law of the Sea* (Clarendon Press, vol. 1, 1982) 2; Freeman, above n 27,107; De Cussy, *Phases et causes celebres du droit maritime des nations* (vol. i, 1856) 8; Fulton, above n 13, 25-34; Colombos, above n 6, 48-9; Pitman B Potter, *Freedom of the Seas in History, Law and Politics* (1924) 36-8; R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed. 1999) 204; Kolodkin, Gutsuliak and Bobrova, above n 2, 97.

33 Colombos, above n 6, 49. See also Freeman, above n 27,108; DP O’Connell, above n 32, 2; Fulton, above n 13, 5; Anand, ‘Tyranny’, above n 6, 417.


35 Freeman, above n 27,108.
In the meantime, a vigorous scholastic debate took place over what could be the possible limit of maritime spaces under a coastal State’s jurisdiction. Bartelo de Saxaferrato (1319–1357) advocated setting the limit of a coastal State’s jurisdiction at a distance equal to two days’ sailing or approximately one hundred miles.\textsuperscript{37} Guillermo de Perno argued for a limit at a distance of as far as the eye could see.\textsuperscript{38} Alberico Gentili (1552–1608) suggested that a coastal State should be entitled to exercise its jurisdiction up to one hundred miles from shore.\textsuperscript{39} Baldus of Ubaldi (1327–1406) and Gentili differentiated the use of the sea, the property of the sea and jurisdiction.\textsuperscript{40} While these sorts of scholastic debates were underway, the modern concepts of territorial and high seas were not clearly developed.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Cantino_planisphere_1502.png}
\caption{The Cantino Planisphere Showing the Line of Tordesillas, 1502.\textsuperscript{36}}
\end{figure}

\textsuperscript{36} The Cantino planisphere, completed by an unknown Portuguese cartographer in 1502, is one of the most precious cartographic documents of all times. It depicts the world, as it became known to the Europeans after the great exploration voyages at the end of the fifteenth and beginning of the sixteenth century to the Americas, Africa and India. It is now kept in the Biblioteca Universitaria Estense, Modena, Italy. See Henry Jones, ‘Boundaries in the History of the Law of the Sea’ (2015) 13 (Spring) Borderlines \textless https://www.dur.ac.uk/resources/ibru/resources/borderlines/Borderlines2015.pdf \textgreater. See also its public domain, Wikimedia Commons \textless http://commons.wikimedia.org/wiki/File:Cantino_planisphere_(1502).jpg \textgreater.

\textsuperscript{37} Freeman, above n 27,108.

\textsuperscript{38} Henry G Crocker (ed) The Extent of the Marginal Sea (Government Printing Press, 1919) 49.

\textsuperscript{39} Coleman Phillipson (ed), Sir Frederick Smith’s International law (McVill, 5\textsuperscript{th} ed, 1918) 112.

\textsuperscript{40} Freeman, above n 27,109.
These two concepts emerged from two conflicting legal theories: *Mare Liberum* and *mere clausum*.

(a) *Mare Liberum v Mare Clausum*

‘The ideological foundation of the law of the sea’ is said to have been ‘formulated in Hugo Grotius’ *Mare Liberum* of 1609 vs. John Selden’s *Mare Clausum* of 1635’. The sixteenth and seventeenth centuries witnessed the conflicting development of these two concepts: ‘freedom of the high seas’ (based on the principle of freedom of the seas) and ‘territorial sea’ (based on sovereign jurisdiction).

The ‘first, and classic, exposition of the doctrine of the freedom of the seas’ was made by the Dutch scholar Hugo de Groot, better known as Hugo Grotius, who proclaimed the ‘freedom of the seas’ principle in his *Mare Liberum*, published in 1609. For his

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41 *Mare Liberum* or the freedom of the seas doctrine renders the meaning that the seas are international territory and all nations are free to use it for navigation, trade and fishery. It had been formulated by the young Dutch Scholar and lawyer Hugo Grotius in order to refute the unjustified claims of Spain and Portuguese to the High Seas and to exclude foreigners therefrom, as well as to defend his country’s right to navigate in the Indian Ocean and Eastern Seas and to trade with the Indian and East Indies against the monopolist claims of Spain and Portugal. *Mare liberum* or the freedom of the seas had been composed as the twelfth chapter of a larger work, *De Jure Praedae* (*Commentary on the law of Prize and Booty*), which Grotius, as advocate of the Dutch East India Company, had written as a legal brief in the winter of 1604-5 to defend the Dutch East India company’s capture of a rich Portuguese merchant ship in the Straits of Malacca, but which he had refrained from publishing. See generally Scott, ‘Introductory Note’, above n 15, v-viii; W S M Knight, *The Life and Works of Hugo Grotius* (*London, 1925*) 79; R P Anand, ‘Maritime Practice in South-East Asia until 1600 AD and the Modern Law of the Sea (1981) 30 (2) International and Comparative Law Quarterly* 440-45.

42 *Mare Clausum* or the Closed Seas doctrine had been formulated by English lawyer, scholar and publicist John Selden in 1617 or 1618, although it was not published until 1685. He wrote it to counter the *mare liberum* doctrine of Hugo Grotius in order to defend the ‘English claims to the high seas to the south and east of England, as well as to indefinite regions to the north and west’. According to Selden ‘the sea, by the law of nature or nations, is not common to all men, but capable of private dominion or property as well as the land’ and ‘the King of Great Britain is lord of the sea flowing about, as an inseparable and perpetual appendant of the British Empire’. See Scott, ‘Introductory Note’, above n 15, viii-x.


44 For details, see generally Anand, ‘Origin and Development’, above n 4, 72-116.


46 Hugo Grotius, *The freedom of the Seas or the Right which Belongs to the Dutch to Take Part in the East Indian Trade* (Palph Van Deman Magoffin trans, edited with an introduction by James Brown Scott, Oxford University Press, 1916) 79. Hugo Grotius’s *Mare Liberum* has been marked as one of the best known publications particularly on the law of the sea and international law in general. See Alex G Oude Elferink, ‘De Groot- A Founding Father of the Law of the Sea, Not the Law of the Sea Convention’ (2009) 30 *Grotiana* 152, 166. There remains a debate whether Grotius was influenced by the Roman law doctrine, *res
contribution to the initial stages in the development of State practices, particularly with respect to the law of the sea and international law in general, Grotius has been acknowledged as a ‘founder’ or ‘father’ of international law as well as the ‘founding father’ of the law of the sea. His articulated principle of the freedom of the seas seems to be based on two definitive arguments. The sea cannot be appropriated because ‘things which are incapable of being occupied, or which never have been occupied, cannot be the private property of any owner, since all property has its origins as such in occupancy’. Further, the sea is common to all ‘because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries’.

He even questioned the Pope’s authority in pronouncing a papal bull in favour of Spain and Portugal, claiming that a donor must be in possession of authority to pronounce such a ruling and the Pope was not, since the Pope had no power to govern commercial issues and no legitimate right to issue the bull.

However, though Grotius had a remarkable influence on contemporary State practice, his legal thesis was initially vehemently criticised. The most substantial response came from the English scholar John Selden in his book Mare Clausum (The Closed Sea) where he

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50 See Hugo Grotius, The freedom of the Seas or the Right which Belongs to the Dutch to Take Part in the East Indian Trade (Ralph Van Deman Magoffin trans, Oxford University Press, 1916) 28. See also Fulton, above n 13, 338-46; Edmond, above n 49, 189.
51 Edmond, above n 49, 192-93.
52 Selden’s book Mare Clausum was published in 1635 under the express command of King Charles in order to explaining the official stand of the Crown as to dominion in British Seas. It was prepared much earlier at
defended a coastal State’s right to claim sovereignty over seas adjacent to its territory on the grounds of appropriation, control and uncontested longstanding use. For the next 200 years Selden’s doctrine was followed by European States that appropriated as much of the sea as their power would permit. However, such State practice began to receive criticism from scholars and, by the end of the eighteenth century, it had been abandoned and the Grotian doctrine of the freedom of the seas had become a necessity for growing interstate commerce as well as for the European colonial powers that would colonise Asia and Africa. Selden’s own country, Great Britain, the greatest colonial power, became not only the strongest champion of the freedom of the seas, but its policeman. However, the contemporary legal framework for the law of the sea, as outlined in UNCLOS, has ‘in large part’ been developed by limiting Grotius’s doctrine of the freedom of the high seas.

While vehemently advocating the principle of the freedom of the seas against the Iberian powers, Grotius did not ignore a coastal State’s right to exercise its jurisdiction over a part of the neighbouring sea for its protection; rather, he ‘recognised the possibility of appropriating a territorial sea’. Even the earliest conception of the delimitation of maritime zones was indebted to Grotius, who had cautiously stated that a portion of the sea might be divided in a manner analogous to the delimitation of international rivers whereby sovereignty extends to the middle of the river. However, his understanding of
the dividing line was ambiguous; he was not sure whether sovereignty should extend to
the middle of the surface of the water or to the middle of the channel.62

Samuel Pufendorf (1632–1694) was the first to propose principles regarding the
delimitation of sea boundaries in his masterpiece De Jure Naturae et Gentium (1672)
suggesting that the boundaries of lakes, rivers, straits or bays between two States should
extend into the ‘middle of the water, from every part of their respective shore’ (designating
a middle line stretching between two lengths of land).63 Pufendorf’s principles have been
regarded as ‘well-organised principles regarding sea boundary delimitation’ that are
‘worthy of close examination even today’.64

The concepts of ‘high seas’ and the ‘territorial sea’ developed in the seventeenth century
as a result of the confrontational State practices of Europe65 and, by the end of the
nineteenth century, they had a recognisable form as delimitation standards in the modern
international law of the sea.66

2 Early Modern Practices and the Development of the Concept of the High Seas
and the Territorial Sea

The development of the law of maritime delimitation remained stable for a considerable
period of history from the seventeenth to the nineteenth century.67 Nonetheless, within
this period, gradual differentiation between the statuses of maritime spaces began to
develop.68 Together with the concept of the freedom of the high seas, another concept of
the territorial waters comprising a maritime zone developed.69 These two new conceptions
of the legal regime of the sea were dominant for a period of nearly two centuries—from

62 Ibid, 556.
63 See Pufendorf, above n 55, 383 (emphasis added)
64 Rhee, above n 13, 556.
65 Freeman, above n 27, 109-10.
66 The status of the High Sea was internationally accepted as res communis. See ‘League of Nations
Committee of Experts for the Progressive Development of International Law, Questionnaire No.2: Territorial Waters’ (1926) 20 (supp) American Journal of International Law 78; Rothwell and Stephens, above n 12,4.
67 Freeman, above n 27, 110.
69 Kolodkin, Gutsuliak and Bobrova, above n 2, 41.
the mid-sixteenth to the early-eighteenth century—as international law and found their definitive forms in the late-eighteenth and early-nineteenth centuries as customary norms of international law.\(^{70}\) This development could only take place in the history of maritime delimitation for two reasons. First, the powerful marine States realised that the free use of the expanses of the high seas could play a key role in ensuring the vitally important interests of all States and began to renounce their exercise of sovereignty over the seas and, second, these States felt the necessity of exercising comprehensive jurisdiction over a comparatively narrow coastal belt, not only for security against alien warships near their coasts but also to retain for themselves the exclusive right to fish in contiguous parts of the sea.\(^{71}\)

The modern concept of maritime zones in regard to limit or breadth emerged in 1702 when judge of the Supreme court of Holland Cornelius Van Bynkershoek (1673–1743), in his work *Dominion of the Sea*, propounded the principle that the ‘power of the land properly ends where the force of arms ends’\(^{72}\) and declared that the territorial sovereignty of a State ‘extended as far as projectiles could be fired from a canon on the shore’.\(^{73}\) His theory was supported by Emmerich de Vattel\(^{74}\) and, in 1782, the limit was accurately defined by Galiani based on the contemporary range of cannons\(^{75}\) as three nautical miles—a procedure commonly known as the ‘canon shot’ theory. This limit became increasingly accepted after its introduction to Anglo-American jurisprudence in the early-nineteenth century and its use in the Anglo-American Treaty in 1818.\(^{76}\) However, it was not universally accepted. While the regime of the territorial sea was initially developing, there remained enormous variations in the breadth of maritime zones and this was greatly

\(^{70}\) Kolodkin, Gutsuliak and Bobrova, above n 2, 97-103;
\(^{72}\) Cornelius van Bynkershoek, *De Dominio Maris Dissertatio* (Oceana, 1744, 1923 trans, 1964 rep) 44.
\(^{73}\) Anand, ‘Tyranny’, above n 6, 419.
\(^{75}\) See F Galiani, *De Doveri de’principi Netrali Verso I Principi Guerregianti, E Di questi verso Neutrali* (1782) 432 cited in Rhee, above n 13, 558.
\(^{76}\) Colombos, above n 6, 93-96; Fulton, above n 13, 576.
reflected in State practice. With the general adoption of the regime of the territorial sea in the early-nineteenth century, attention began to focus on the methods of delimiting maritime boundaries in the coastal waters between opposite and adjacent States.

The boundary problems between opposite States were generally regarded as less difficult than those between adjacent States; it was easy to imagine that the sovereignty of each State would meet in the middle and, as a result, most of the sea boundaries created in the nineteenth century were agreed upon by opposite States. However, the situations of adjacent States were different since there were no established rules for such delimitation.

Scholars of the nineteenth century began to pay attention to delimitation and most of them preferred dual principles. In 1861, Travers Twiss endorsed the principles suggested by Pufendorf by recommending the ‘median line’ principle as general rule and the ‘central deep-water line’ as a supplementary rule. In 1868, Johann Caspar Bluntschli referred to ‘a line or a common zone’ between States without proposing any specific rule. In 1872, David Dudley Field referred to a ‘line equidistant from the territory of the nation occupying the opposite shore or to the middle of the navigable channel (or, if there be several channels, to the middle of the principal one)—a practice known as the ‘thalweg principle’.

77 Different States continued claiming different extent of the sea as their Territorial Waters through various Treaties, Acts, Decrees, and Legislations from the eighteenth to the early part of the twentieth century. See generally Colombos, above n 6, 94-102; Rahman, above n 6, 57-70.
78 Rothwell and Stephens, above n 12, 383. Most of the scholars who proposed rules or principles before the World War II distinguished opposite and adjacent situations. See Rhee, above n 13, 559 nn 24.
79 For example: the maritime delimitation line between Finland and Sweden, established under the 1809 Peace Treaty, pass through the middle of the Gulf of Bothnia and the Aaland Sea; In 1833 two States of the United States, New Jersey and New York, agreed to divide Raritan Bay through the middle of the interState. The 1846 Treaty between United Kingdom and United States agreed a water boundary in the Pacific border region passed through the middle of the Strait of Juan de Fuca and channel separating the continent from Vancouver Island. See Rhee, above n 13,560; 34 British and Foreign State Papers 14 (1845-1846).
80 See Rhee, above n 13,559.
81 Traverse Twiss, The law of the Nations (1861) 251. For a definition of median line method, see Appendix II of this thesis.
82 Rhee, above n 13, 560. In 1879 France and Spain Agreed to establish a common Zone in the Bay of Figuier. See 70 British and Foreign State Papers 176-79 (1880-1881). Similarly, the narrow Bay of Atlaman at the southern boundary of Eastern Roumelia was left to the common use of Turkey and Roumelia by the 1879 Act of the European Commission. See 70 British and Foreign State Papers 1293 (1880-1881).
83 David Dudley Field, Outlines of an International Code (Law Publishers, 1872) 16 (emphasis added) <http://ia600508.us.archive.org/12/items/outlinesofintern00fiel/outlinesofintern00fiel.pdf>.
84 The thalweg principle was first adopted for the Rhine in the 1801 Peace Treaty of Luneville. See Verzijl, above n 8, 537. The term ‘thalweg’ is a German word composed of two separate words, ‘Thal’, a valley,
principles emerged and, when the median line principle proved to be flexible,\textsuperscript{85} it was preferred as a general principle for delimitation in State practices.\textsuperscript{86} Scholars and scholarly bodies of that time deliberately recognised and followed this trend.\textsuperscript{87} Thus, the median line principle survived as a general rule applicable to territorial seas between opposite States.

Thereafter, the issues involved in the delimitation of adjacent territorial seas were virtually ignored until the mid-nineteenth century and, in some cases, the delimitation of an adjacent territorial sea boundary was thought to be unnecessary.\textsuperscript{88} For example, in 1845, the Netherlands rejected a Belgian proposal to extend their land boundary into the North Sea.\textsuperscript{89} However, since the mid-nineteenth century, a backlog of concerns relating to the delimitation of the territorial seas has emerged and several delimiting agreements have been established that suffered from vagueness regarding the exact starting point and direction of the delimiting line.\textsuperscript{90}

In delimiting the sea boundaries between two adjacent States, the thalweg principle was not preferred since the boundary gradually disappeared at a short distance from the coast; the ‘method of latitude or meridian’ was found to be convenient where the coast ran straight along a latitude or longitude; the method of drawing ‘a line perpendicular to the coast’ was found to be preferable if the coast was more or less straight.\textsuperscript{91} In 1908, at the twenty-fifth conference of the International Law Association in Budapest, Deszo Darday dealt with two possible methods of delimitation between adjacent States: one is the extension of a land boundary and the other is a straight line perpendicular to the coast.

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\textsuperscript{85} See J B Moore, \textit{History and Digest of the International Arbitrations to which the United States Has been a party} (vol. 1, 1898) 230.

\textsuperscript{86} See Rhee, above n 13,561 nn 33.

\textsuperscript{87} See Rhee, above n 13,563. See also ‘Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute between Norway and Sweden’ (1910) 4 American Journal of International Law 226-281 (hereinafter referred to as \textit{Grisbadarna Arbitration}).

\textsuperscript{88} In 1894, the Institute of International Law recommended the median line principle for the delimitation of narrow straits. This proposal was accepted in toto by the International Law Association in Brussels in 1895. See Rhee, above n 13,563; See also International Law Association, ‘Report of the 17th Conference Held at Brussels in 1895’ at 105 (1896).

\textsuperscript{89} See generally Rhee, above n 13, 564-65. See also 73 British and Foreign State Papers 272 (1883-1884).

\textsuperscript{90} See Rhee, above n 13, 565 (emphasis added).
from where the land boundary terminates; however, the latter method was found to be inapplicable where a land boundary terminates at the deep corner of a bay; Darday instead suggested ‘the use of the median line principle’ for delimiting territorial seas between two adjacent States.92

Nonetheless, there was no recognised principle for delimiting territorial seas between adjacent States until The Hague’s PCA became the first international tribunal to make its ruling on the delimitation of territorial waters in its 1910 arbitration between Norway and Sweden known as the Grisbadarna arbitration.93 In this case, the tribunal rejected the application of the median line principle claimed by both States as well as the thalweg principle proposed by Norway as an alternative and, on the basis of its view of the prevailing circumstances, preferred a ‘line perpendicular to the general direction of the coast’ to effect the equitable delimitation of territorial seas beyond the ‘inner area’ previously agreed upon by the States.94 The tribunal’s ruling was criticised for lacking historical background in its reasoning about the acceptability of the new principle as a rule of international law.95

By the early twentieth century when laws dictating maritime boundaries were becoming more completely developed, divergent State practices concerning the breadth of territorial seas and the methods of their delimitation were found to have a crucial impact on the growth of the international law of the sea.96 The international community therefore realised that it would be necessary to codify certain customary rules of international law for maritime delimitation. The first official attempt was made under the League of Nations.97

92 Rhee, above n 13, 565.
93 Grisbadarna Arbitration, above n 86, 226
94 Ibid, 230-236 (Grisbadarna Arbitration).
95 For a general view, see Arnold Raestad, Kongens Stromme (1912) 361; Gidel, above n 89, 769, cited in Rhee, above n 13, 570.
96 Rhee, above n 13, 574.
3  Codification Efforts at The Hague Conference in 1930 Under the League of Nations

The formation of the League of Nations just after the end of World War I provided the impetus for new initiatives in the codification of international law and, because of conflicting State practices relating to the breadth of and the methods for delimiting territorial sea, the League of Nations attempted to negotiate an international convention on these subjects through its Committee of Experts, appointed in 1924. The committee took several years to prepare the ground. Along with this initiative, several attempts to establish principles and rules for the delimitation of territorial sea boundaries took place during the 1920s through the work of individual scholars and private associations.

In 1925, the Finish jurist Bjorksten tried to identify the differences between opposite and adjacent situations; regarding opposite situations, he recommended the median line as a ‘presumptive sea boundary’ with the possibility of agreement on the thalweg in special circumstances; regarding adjacent situations, he proposed several options: following the direction of the land boundary, the median or latitude or a line perpendicular to the coast. The rules on maritime delimitation drafted by the International Law Association of Japan in 1926 suggested the median line as a principle for delimiting straits and bays or gulfs between States without mentioning the possibility of locating adjacent sea boundaries in places other than these. The 1929 Draft Convention on Territorial Waters prepared by the Harvard Law School recommended that, in the absence of special agreement, the middle line of a strait should be recognised as the extent of the territorial waters of each State where the width does not exceed six miles, without suggesting the standard’s applicability either in opposite or adjacent State situations.

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99 Colombos, above n 6, 103
100 Antonio Sanchez de Bustamante y Sirven, The Territorial Sea (Oxford University Press, 1930) 63-78.
101 D P O’Connell, above n 32, 60-68, 75-6.
102 S R Bjorksten, Das Wassergebiet Finnlands in Volkerrechtlicher Hinsicht (1925) 93-98, cited in Rhee, above n 13, 574.
103 Rhee, above n 13, 574.
The Committee of Experts, in 1925, formed a sub-committee comprising three experts tasked with preparing a report on questions of territorial waters. However, the members of the sub-committee differed in their views regarding the principles of delimiting territorial seas between adjacent States and merely proposed the median line principle for the delimitation of straits. Their divergent opinions regarding delimitation caused the issue to be excluded from the draft proposal in 1926 and the boundary of ‘a line running down the centre’ of a narrow strait was adopted in principle as the basis of Discussion No. 16 on territorial waters. Interestingly, the provision regarding the delimitation of straits was also removed from the final draft.

The 1930 Hague codification conference convened by the League of Nations was attended by 44 States. Unfortunately, as a consequence of strong disagreement over principles of delimitation as well as the breadth of the territorial sea, the conference failed to reach a consensus. Shockingly, it has been observed that ‘[d]espite its increasing importance, the issue of delimitation of the territorial sea between States was not considered sufficiently ripe for codification, as there existed no uniform principle of delimitation’.

4 Development After the Hague Conference

Though the codification impetus of the League of Nations ultimately failed, it can be considered to be the foundation for initiating a new platform of scholastic thoughts that

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106 Rhee, above n 13, 576.
108 Rhee, above n 13, 576-77.
109 Rothwell and Stephens, above n 12, 4.
110 Jesse S Reeves, ‘The codification of the law of Territorial Waters’ (1930) 24 American Journal of International Law 486; Colombos, above n 6, 104.
111 Rhee, above n 13, 577.
112 But in this conference the term ‘territorial waters’ was affirmed to be renamed as ‘territorial sea’. See Reeves, above n 110, 489; S Whittmore Boggs, ‘Delimitation of the Territorial Sea: The method of Delimitation Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law’ (1930) 24 American Journal of International Law 541 nn 1. Officially the term ‘the territorial sea’ had been decided to be used instead of the term ‘the territorial waters’ at the fourth session of the International Law Commission. See ILC year book [1953] I, 72-73.
later introduced the highly scientific and technical issues of delimitation to the legal framework of maritime boundary delimitation.

As discussed earlier, the median line principle was considered by the preparatory committee to be a method of delimitation, but the median line was an unclear term, not only because it had no uniform method of demarcation, but also because ‘it was often confused with *thalweg* and other similar terms’.113

In 1913, the International Waterways Commission, in its report on the location of the median line between the US and Canada in Lake Erie, observed that the median line principle might entail three possibilities:

- A line being at all points equally distant from each shore,
- a line following the general lines of the shores and dividing the surface water area as nearly as practicable into two equal parts, and
- a line along the mid-channel dividing the navigable portion of the lake, and being at all points equally distant from the shoal water on each shore.114

However, these possibilities were considered imprecise and impossible.115

German Jurist Fritz Munch, ‘the initiator of the technical study of the equidistance line method’,116 tried to define the median line principle from a new perspective and by a new method of drawing.117 However, his method was found to be erroneous owing to its inclusion of a hypothetical and sketchy map which failed to prove the general applicability of his method in both opposite and adjacent situations.118 Gidel, although he supported the median line principle, criticised the technical errors of Munch’s method and suggested ‘the median line perpendicular to the general direction of the coast’119 for delimiting territorial seas between adjacent States.120

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113 Rhee, above n 13, 580.
116 Rhee, above n 13, 587.
117 According to Munch’s method, a perpendicular line is the median line of straight coasts, where every point of the perpendicular line is equally distant from the coasts of neighbouring States. See Fritz Munch, *Die Technischen Fragen des Kustenmeers* (1934) 156, cited in Rhee, above n 13, 582.
118 Rhee, above n 13, 583.
119 Gidel, above n 89, 768, 770-71, cited in Rhee, above n 13, 583.
120 Rhee, above n 13, 583.
In 1936, a new method of drawing the median line was invented by Samuel Whittemore Boggs\textsuperscript{122} who defined the notion of a median line as ‘the line every point of which is equidistant from the nearest point or points on opposite shores’.\textsuperscript{123} He demonstrated how to plot such a line on the chart.\textsuperscript{124} However, his method was suggested only for

\textsuperscript{121} S Whittemore Boggs, ‘Delimitation of Seaward Areas under National Jurisdiction’ (1951) 45 American Journal of International Law 257.
\textsuperscript{122} S Whittemore Boggs was the Special Adviser on Geography for the United States Department of State. He attended The Hague Codification Conference in 1930 as a member of the United States delegation. See Rothwell and Stephens, above n 12, 385. His writings are not legal opinions, but they must be seen in the light of Article 38 (1) (d) of the ICJ Statute, which refers to highly qualified doctrines as subsidiary means of interpreting rules of law. His views, crucial for interpreting the United States’ practice, greatly influenced the development of the international law of delimitation of maritime zones. He was a member of the Committee of Experts that proposed the use of equidistance to the ILC, and his works was cited on various occasions during the ILC debates on maritime delimitation. ILC Yearbook [1950] I, 253; ILC Yearbook [1951] I, 268, 287; ILC Yearbook [1952] I, 180-182; ILC Yearbook [1953] I, 128.
\textsuperscript{123} Boggs, ‘Problems of Water-Boundary’ above n 115, 448; Boggs, ‘Delimitation of Seaward Areas’, above n 121, 240, 256-58.
\textsuperscript{124} According to Boggs:

The median line, being equally distant from opposite shores, follows a straight line that is equally distant from two projecting points on the two shores until a third point that is equally distant is reached; then it usually proceeds in relation to one of the first two points and the new point. Each such straight line lies on the perpendicular that bisects the line connecting the two nearest points on opposite shores; in fact, the median line consists of a series of such straight lines, each of which is extended until it intersects the next. See Boggs, ‘Problems of Water-Boundary’ above n 115, 449.
delimitation in gulfs, lakes, rivers or straits between opposite States (see Figure 7).\textsuperscript{125} When proposing the median line, he was concerned about the existence of islands near the mainland or offshore and he provided an idea as to when and how to treat an island as a part of the mainland for the purpose of using it as baseline when establishing the median line.\textsuperscript{126}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure8.png}
\caption{Application of the Equidistance Method between Two Adjacent States.}
\end{figure}

Boggs also contributed a new method for delimiting maritime zones (territorial seas) between adjacent States. He stated that the maritime boundary between two adjacent States is best demarcated by a straight line drawn from the land boundary (from the nearest land of the two sovereignties) ‘terminus to the equidistant point’ on the outer limit of the territorial sea (see Figure 8).\textsuperscript{127} While suggesting this method, Boggs rejected the method

\begin{itemize}
\item \textsuperscript{125} Boggs, ‘Problems of Water-Boundary’ above n 115, 449, 451; Boggs, ‘Delimitation of Seaward Areas’, above n 121, 257.
\item \textsuperscript{126} Boggs, ‘Delimitation of Seaward Areas’, above n 121, 257-259.
\item \textsuperscript{127} According to Boggs, the most reasonable boundary is the line AB, the point B being the intersection of the envelopes of arcs of three-mile (outer limit of the territorial sea) radius drawn from all points on the shores of the two countries Leftland and Rightland respectively. Line AD is the extension of the last section of the land boundary and line AC is the line perpendicular to the general direction of the coast.
\item \textsuperscript{128} See Boggs, ‘Problems of Water-Boundary’ above n 115, 454-56 (emphasis added) . Boggs was also concerned about instances in which a single straight-line boundary will not serve.
\end{itemize}
for the extension of the land boundary and the method comprising a straight line perpendicular to the general direction of the coast because he felt that both of these methods needlessly resulted in the designation of ‘a zone of waters of controvertible jurisdiction’. Boggs did not explain why he did support the use of a median line drawn based on its equidistance from the nearest point or points of the shores for delimiting territorial seas between adjacent States; however, his ‘equidistant’ principle seemed to be very similar to the standard equidistance principles that he had applied in the past for delimiting territorial seas between opposite States.

Prior to World War II, the international community had paid little attention neither to the breadth of territorial waters and their delimitation criteria nor to the continental shelf. There were no authoritative international cases on these points either and ‘State practice remained active with various claims to territorial sea’. The Truman Proclamation added new dimension to State practice.

B Development of the Concept After World War II

Until the middle of the twentieth century, while coastal States were exercising their rights and jurisdictions over a narrow belt of the sea, the remaining part of the sea was proclaimed free to all and belonging to none. It is not clear whether the status of the seabed including deep ocean floors and the continental margins of the sea adjacent to coastal States was res communes, available to all States or res nullius, subject to national claim. However, following World War II, when scientific and technological development found significant commercial interest in the mineral resources of the continental shelf—in particular, an extensive reserve of oil and gas—the exploitation of those resources was found to be open to all States under the time-honoured freedom of the high seas.

129 Boggs, ‘Problems of Water-Boundary’ above n 115, 454-455 (emphasis added).
130 Rhee, above n 13, 587.
131 Rothwell and Stephens, above n 12, 5.
... doctrine, resulting in a tendency for States to extend national claims over offshore resources through unilateral State practices.

1 The 1945 Truman Proclamation and its Effect on State Practices

Technological progress at the turn of the twentieth century has enabled technologically developed countries to extract the continental shelf’s hydrocarbon resources from the surface of the sea. On 28 September 1945, to protect national interest and jurisdiction over the resources of the US continental shelf and to establish conservation zones for the protection of fisheries in certain areas adjacent to the US territorial sea, President Truman issued two proclamations—known collectively as the Truman Proclamation—that are thought to have played a generative role in the evolution of customary rules in international law on the law of the sea, leading in particular to the crystallisation of two new maritime zone concepts: the continental shelf and EEZ. The proclamation was the first initiative by any State to define its claim and entitlement to certain areas of the sea applying equitable principles for resolving any dispute with States either opposite or adjacent. The Truman Proclamation did not specify the meaning of ‘equitable principles’ nor the method of applying them in countries where these terms have no acknowledged legal meaning; however, the term could be understood to connote nothing more than the desire ‘to provide for the negotiation of a fair and reasonable boundary’.

The unilateral action of the US created a chain reaction and most coastal States quickly accepted this new doctrine in their own interests and unilaterally began to claim continental Shelf in adjacent seas, specifically using the term ‘equitable principles’ or some similar expression in their legislation—in some cases more extensively than in...
the claim made by the US. Following the then State practice, the continental shelf doctrine had become ‘instant customary international law’ and States began asserting their titles to areas that were otherwise res nullius.

2 Codification and Progressive Development Under the United Nations

The failed attempt at codification at the 1930 Hague conference, the collapse of the League of Nations and the outbreak of World War II, the creation of the UN in the aftermath of World War II, the Truman Proclamation and the subsequent unilateral State claims over the extended maritime space—along with disagreements on the breadth of the territorial sea and on the principles of delimitation—led the international community to resume the work of codifying the international law of the sea. The UN took the initiative by establishing the International Law Commission (hereinafter the ILC), a unique body charged with the codification and progressive development of international law, composed of jurists and diplomats, professors and practitioners. The establishment of the ILC immediately created the opportunity to resume serious work on treaty-making in the law of the sea that later contributed to the first codified rules on the delimitation of maritime zones as an outcome of the First Conference in 1958.

139 For example, in 1946, Argentina claimed its shelf and the epicontinental sea above it. Chile and Peru in 1947, and Ecuador in 1950, asserted sovereign rights over a 200-mile zone, hoping thereby to limit the access of distant-water fishing fleets and to control the depletion of fish stocks in their adjacent areas. Mexico and some other South American States claimed not only rights in the resources of the continental shelf, but sovereignty in full over the seabed, water column and airspace. See generally Rahman, above n 6,145–48; ‘The United Nations Convention on law of the sea: A historical Perspective’ <http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Third Conference>.

140 Hersch Lauterpacht, ‘Sovereignty over Submarine Areas’ (1950) 27 British Yearbook of International Law 376, 431.

141 Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi (1952) 1 International and Comparative Law Quarterly 257.


143 The International Law Commission (ILC) was established pursuant to General Assembly resolution 174 (II) of 21 November 1947. See ‘Summary Records and Documents of the First Session including the report of the Commission (12 April-9 June 1949)’ [1949] Yearbook of the International Law Commission V.

144 Rothwell and Stephens, above n 12, 6.
The ILC and the Formulation of the Rules Governing Maritime Delimitation

The ILC commenced its work on the law of the sea in 1949 and, almost immediately, recognised the need to address the question of maritime delimitation. From the outset, the members of the commission were uncertain as to the existence of any customary rules on the delimitation of the continental shelf and commission member Hudson emphasised the need to study and develop delimitation criteria for continental Shelf as he saw that no rule or principle for the delimitation of continental Shelf existed. Special rapporteur François introduced the work of Boggs on the use of the median line in continental shelf delimitation, but the commission initially rejected the inclusion of any delimitation standards in the draft. While discussing the delimitation of territorial seas, the ILC took into account various potential delimitation standards including the draft of the 1930 Hague conference and the delimitation principles proposed by Boggs, but concerns had arisen regarding the existence of special situations that would require those undertaking delimitation to depart from these principles.

When the ILC sought to adopt principles for delimiting territorial seas and continental Shelf between States with adjacent coasts, the transposition of the concept of delimitation onto law also seemed difficult since the ILC found maritime delimitation to be a ‘geometric concept’ (geographical issue), requiring technical expertise. This led to the commission’s proposal to form a Committee of Experts becoming a demand for necessary technical recommendations on how the delimitation line was to be drawn between States with opposite or adjacent coasts. As noted, ‘the commission sought to

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146 See generally ILC Yearbook [1950] I, 228, 232-34.
147 ILC yearbook [1951] I, 268.
149 The ILC made distinction between straits, mouths of rivers, and adjacent States for the purpose of delimitation. ILC yearbook [1952] II, 37-38. Francois referred to the concept of equidistance, as analysed by Boggs in his writings. ILC yearbook [1952] I, 180.
153 In the 171st meeting of the ILC, Lauterpacht vehemently Stated that ‘the Commission was not the appropriate body to discuss such technical issues’, and proposed to form a small committee of experts. His proposal was strongly supported by Special Rapporteur Francois who at one stage of the meeting Stated that ‘he could do no further work […] without expert advice. See ILC Yearbook [1952] I, 181, 185.
address the legal aspect of delimitation only after securing a more complete technical picture’.\textsuperscript{154}

The Committee of Experts (hereinafter the Committee)\textsuperscript{155} was convened to examine matters connected with the delimitation of territorial seas between States with either opposite or adjacent coasts. With respect to opposite States, the committee’s view mirrored that of the ILC: it recommended that the general rule should be a median line boundary ‘every point of which is an equivalent distance from the baselines of the States concerned’ and also recognised the existence of ‘special reasons’ that would justify departing from the median line.\textsuperscript{156} With respect to adjacent States, the committee made explicit reference to different possibilities: a perpendicular line where the coast was straight, the prolongation of land boundaries and a line perpendicular to the general direction of the coast.\textsuperscript{157} However, the principle of equidistance was recommended with the observation that, in some situations, it would prove difficult to achieve an equitable solution where another line, presumably the equidistance line, would have to be adjusted by negotiation.\textsuperscript{158} In respect to islands and low tide elevations within each country’s territorial sea, the Committee felt that they all had to be accounted for. It recommended that these techniques be applied to the delimitation of continental shelf boundaries.\textsuperscript{159} Here, also, the ILC was seriously challenged by the task of translating the technical advice of the Committee of Experts into legal language.\textsuperscript{160}

As François observed, there is uncertainty about delimitation criteria in State practice; he considered it advisable to ask governments for their views on how delimitation was to be effected in cases of overlapping claims.\textsuperscript{161} The statements of States in this regard seemed

\textsuperscript{154} Antunes, above n 1, 31.

\textsuperscript{155} This Committee was consisted of Professor L Asplund, Mr. Whittemore Boggs, Mr. P Couillault, Commander Kennedy and Vice-Admiral Pinke, and had met at the Hague in April 1953 and had established certain rules for delimiting the territorial sea both between States having opposite and adjacent coasts. The Committee proposed application of the same rule for delimiting continental shelf as well. See ILC Yearbook [1953] I, 106[39].


\textsuperscript{157} ILC Yearbook [1953] vol. I/106[39].

\textsuperscript{158} ILC Yearbook /1953/ vol. II/ 216. ILC Yearbook [1953] (II) 77-78.

\textsuperscript{159} ILC Yearbook 1953/vol. I/106; ILC Yearbook [1953] (II) 77-78.

\textsuperscript{160} Antunes, above n 1, 32.

\textsuperscript{161} ILC Yearbook [1952] (I) 186-187.
to constitute an ‘atypical mandate’ given to the ILC to ‘identify or develop substantive delimitation standards’ to assist them in negotiations and to be applied by courts in adjudications’.\textsuperscript{162}

The Committee’s proposals formed the basis of the ILC’s work and their influence can be seen in the draft Articles on delimitation adopted by the commission in 1956 that contained three provisions for dealing with maritime boundary delimitation.\textsuperscript{163} It is remarkable that the ILC separately considered the delimitation of territorial seas and continental Shelf in cases of both oppositeness and adjacency.\textsuperscript{164}

In the draft of Article 12, dealing with the delimitation of territorial seas in straits and between opposite States, the ILC, in the absence of agreement and special circumstances, proposed that the boundary would be ‘a median line every point of which is equidistant from the nearest points on the baselines’.\textsuperscript{165} However, the ILC did not accept the detailed points laid down by the Committee of Experts on this point, considering that ‘it would be wrong to go into too much detail and that the rule should be fairly flexible’ and advising the adoption of a median line as a general rule of delimitation for opposite States, except in special circumstances which ‘probably necessitate frequent departure from the mathematical median line’.\textsuperscript{166} In the case of a boundary between adjacent States, the ILC, in its draft of Article 14, proposed to draw that boundary by the ‘application of the principle of equidistance from the nearest points on the baseline from which the breadth

\textsuperscript{162} Antunes, above n 1, 30; Malcolm N Shaw, \textit{International Law} (Cambridge University Press, 4th ed, 1997) 65. For the comments made by the States, see generally, ILC/1953/vol. II/ 241 -269.


\textsuperscript{164} I \textit{ILC Yearbook} [1952] I, 180-181.

\textsuperscript{165} Article 12 as proposed by the Law Commission on Delimitation of Territorial Sea between opposite States:

1. The boundary of the territorial sea between two States, the coasts of which are opposite each other at a distance less than the extent of the belts of territorial sea adjacent to the two coasts, shall be fixed by agreement between those States. Failing such 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 on the baselines from which the breadths of the territorial seas of the two States are measured.


of the territorial sea of each country is measured’. 167 The ILC considered some options—including the method developed in Grisbadarna arbitration—to challenge the equidistance principle of delimitation between adjacent States. 168 Nonetheless, at the same
time, the ILC reiterated that any principle of delimitation needed to be applied very
flexibly. 169 With respect to the continental shelf, in Article 72, the ILC recommended the
median line in the case of opposite States and the equidistance line in the case of adjacent
States. 170 Here, the ILC again observed that the rules of delimiting continental Shelf
needed to be ‘fairly elastic’ in respect to exceptional coastal features including islands and
navigable channels. 171

The works of the ILC have had an influential role in the decision-making processes of the
Court in cases related to the law of the sea in what Justice Schwebel has termed an

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167 Article 14 as proposed by the Law Commission on Delimitation of Territorial Sea between adjacent States:
1. The boundary of the territorial sea between two adjacent States shall be determined by
agreement between them. In the absence of such agreement, and unless another boundary line
is justified by special circumstances, the boundary is drawn by application of the principle of
equidistance from the nearest points on the baseline from which the breadth of the territorial
sea of each country is measured.


170 Article 72 as proposed by the Law Commission on Continental Shelf Delimitation:
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 baselines from which the breadth of the territorial sea of each country is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the
boundary of the continental shelf shall be determined by agreement between them. In the
absence of agreement, and unless another boundary line is justified by special circumstances,
the boundary shall be determined by application of the principle of equidistance from the
baselines from which the breadth of the territorial sea of each of the two countries is measured.


‘interactive’ or ‘mutual’ influence.\textsuperscript{172} It is notable that, though such influence was present in earlier cases, it has decreased in subsequent cases.\textsuperscript{173}

\textit{(b) The First United Nations Conference on the Law of the Sea}

When a comprehensive report from the ILC on the law of the sea, including recommendations to convene an international conference on this issue, was exclusively considered by the UN UNGA (UNGA), the law of the sea was perceived to be a matter of legal, economic, scientific and political importance and extreme complexity. Accordingly, in 1958, the UNGA convened an international conference of plenipotentiaries\textsuperscript{174}—the First United Nations Conference on the Law of the Sea.

The report of the ILC on the law of the sea served as a basis for discussion at the First Conference.\textsuperscript{175} Territorial sea and continental shelf delimitation issues were considered by separate committees at the conference.\textsuperscript{176} Ultimately, the conference was able to produce two separate conventions on these issues: the Convention on Territorial Seas and Contiguous Zones (the TSC), and the Convention on the Continental Shelf (the CSC).\textsuperscript{177} These two instruments are generally referred to as the 1958 Geneva Conventions.

Article 12 of the TSC was the outcome of merging two draft Articles—12 and 14—into a single, conventional rule that sought to address the situations of opposite and adjacent

\textsuperscript{172} Stephen Myron Schwebel, \textit{Justice in International Law} (Cambridge University Press, 2011) 71, 72, 81.
States in a single provision, pursuant to which the territorial seas of States, in the absence of agreement, historic title and special circumstances, would be subject to the ‘median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea…..is measured’. The convention also required States to mark their agreed boundaries on charts. Although the ILC did not refer to any provisions regarding the delimitation of contiguous zones, this conference endorsed a provision—Article 24(3)—dealing with the delimitation of contiguous zones between opposite and adjacent States, asserting that the contiguous zone, in the absence of agreement, would be the median line equidistant from the nearest points on the baseline.

Article 6 of the Convention on the Continental Shelf provides separate provisions for delimiting continental Shelf in opposite and adjacent situations. These are similar to the provisions in the ILC’s draft Article 72 on the delimitation of continental Shelf. Both provisions emphasise that the boundaries are to be determined by agreement. In the absence of agreement ‘unless another boundary line is justified by special circumstances’, the boundaries of continental Shelf shall be marked by a median line in the case of opposite States and determined by the application of the equidistance principle for adjacent States.

It is to be noted that both the median line and equidistance principles seem to form the same methods of delimitation. It can be observed that the applicable rule—as laid out in Article 12 of the TSC and in Article 6 of the CSC—and the triple rule—agreement–equidistance–special circumstances—are essentially the same; this triple rule has been

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178 1958 TSC, Article 12 (1).
179 1958 TSC, Article 12 (2).
180 Article 6 of the 1958 CSC:
   Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite 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.
182 In the North Sea cases, Judge Sørensen Stated that Art 12 of the Convention on the Territorial Sea and the Contiguous Zone and Art 6 of the Convention on the Continental Shelf were substantially the same. See North Sea Cases, 252.
developed by adopting a model based on the general rule of ‘equidistance–special circumstances’ that was designed to apply in the absence of an agreement.\textsuperscript{183}

Neither the TSC nor the CSC made clear reference to the notion of special circumstances—an omission that, as will be seen, makes the rules of maritime delimitation vague as well as flexible in the acquisition of an equitable result for maritime boundary disputes. The rules dealing with the legal determination of international maritime delimitation underwent a process of codification and progressive development during both the First Conference and its \textit{travaux preparatories}.\textsuperscript{184} This came about as part of a quest for material criteria for delimitation and, since the high seas and the territorial sea were considered closely related, that quest concerned the delimitation of all maritime zones simultaneously. The result was that all rules embodied in the 1958 Geneva Conventions prescribed recourse to the equidistance principle.\textsuperscript{185}

\textbf{(c) Pre-1982 Developments in Case Law}

Alongside the 1958 conventions, case law forms a background of further developments in the rules of maritime delimitation that had significant implications for its further development. Following the adoption of the CSC, overlapping claims for the delimitation of continental Shelf were given enormous attention.\textsuperscript{186}

Indeed, particular concern was directed to the ‘special circumstances’ enabling a State to justify departure from a median line or equidistance line boundary.\textsuperscript{187} These issues were considered in some cases after the First Conference. The \textit{North Sea} cases and the \textit{Anglo-French} arbitration\textsuperscript{188} had direct and relevant impacts on the debates and controversies that

\textsuperscript{183} See Tanaka, ‘Predictability and Flexibility’, above n 13, 37-39 (emphasis added).
\textsuperscript{184} The ILC remarked that trying to identify which draft Articles were merely codification and which were progressive development had proved impossible since some of the Articles did not belong to either category. See \textit{ILC Yearbook} [1956] II, 255-56.
\textsuperscript{185} Antunes, above n 1, 21-22.
\textsuperscript{186} Rothwell and Stephens, above n 12, 389.
\textsuperscript{188} \textit{Delimitation of the continental shelf between the United Kingdom and the French Republic} (UK v France), Reports of International Arbitration Awards (United Nations, Vol XVIII) 1-129 (Hereinafter \textit{Anglo-French} arbitration).
took place in the Third Conference, particularly in regard to continental shelf and EEZ delimitation.

(i) The North Sea Cases

The North Sea cases was the first case to provide a juridical interpretation of Article 6 of the Convention on the Continental Shelf. This case involved disputes between the Federal Republic of Germany and the Netherlands and Denmark in regard to their continental shelf delimitation. While Germany was able to reach separate agreements with both the Netherlands and Denmark over the partial delimitation of the continental shelf based on the principle of equidistance,\(^\text{189}\) it proved impossible to reach an agreement on the further extension of those two boundaries into the North Sea; it was mutually agreed by all three States that their dispute should be referred to the ICJ. The Court was requested to determine the ‘principles and rules of international law’ applicable to the delimitation.\(^\text{190}\) However, it is noteworthy that the Court was not asked to define or draw the boundary lines.\(^\text{191}\) While both Denmark and the Netherlands had ratified the CSC, Germany had not.\(^\text{192}\)

\(^{189}\) Ibid 6.
\(^{190}\) Ibid 6.
\(^{191}\) Ibid 9-22.
\(^{192}\) West Germany had signed the Convention on the Continental Shelf on 30 October 1959 but had not ratified it by the time proceedings were instituted before the ICJ. See Rothwell and Stephens, above n 12, 389 nn 41.
The ICJ considered whether Article 6 of the convention had the status of customary international law. The Court analysed a number of difficulties associated with the principle of equidistance and finally observed that ‘the notion of equidistance as being logically necessary, in the sense of being an unescapable a priori accompaniment of basic continental shelf doctrine, is incorrect’. Since Article 6 of the CSC was similar to the draft Article prepared by the ILC, the Court concluded that the ILC proposed the equidistance principle ‘with considerable hesitation, somewhat on an experimental basis … or as an emerging rule of customary international law’. The Court, nevertheless, admitted suitability of the equidistance method in delimitation between opposite States, denied accepting the equidistance principle as mandatory rule of customary international law for the delimitation of continental Shelf between adjacent States (see Figure 9). Further, the Court proposed a set of rules: the parties were obliged to enter into

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194 North Sea cases, 32 [46].
195 Ibid, 38 [62].
196 Ibid, 46, 53 [81] [101].
negotiations with a view to arriving at agreement, equitable principles were to be applied taking into account all relevant circumstances and the continental shelf was to be understood as the natural prolongation of a coastal State’s land territory.\textsuperscript{197} The Court observed that in some geographical circumstances, such as those of the present case, the use of the equidistance principle could cause an inequitable result\textsuperscript{198} and thus considered that the configuration of the coast, the unity of any seabed mineral deposits and the need for a reasonable degree of proportionality between the length of the coastline and the extent of the continental shelf claimed must be taken into account.\textsuperscript{199}

Viewing the Court’s judgement, it appears that, the Court, while rejected the mandatory use of the equidistance principle adn resorted to equitable principles, it did not refer to any particular method of delimitation, rather emphasised to use one or more methods to reach an equitable solution and thus, asserted flexibility on the applicable methods of delimitation what it foundd as a requirement of equity towards achieving an equitable solution.\textsuperscript{200}

\textit{(ii) The Anglo-French Arbitration}

After four years of unsuccessful negotiations, the UK and France agreed to resort to arbitration to resolve their disputes in a case known as the \textit{Anglo-French} arbitration, where the Arbitral Tribunal was asked to decide the boundaries in the delimitation of continental Shelf in an area encompassing the central and western parts of the English Channel and its (south-western) Atlantic approaches.\textsuperscript{201} A significant area under delimitation comprised the Channel Islands—British Islands located within the continental shelf of France. Unlike the \textit{North Sea} cases, both France and the UK were parties to the Convention on the Continental Shelf, although France had reservations as to Article 6 of the convention. The Arbitral Tribunal found Article 6 applicable to the delimitation in

\textsuperscript{197} Ibid, 47 [85]
\textsuperscript{198} Ibid, 49 [89].
\textsuperscript{199} Ibid, 54 [101].
\textsuperscript{200} For this view see \textit{North Sea Cases}, 46-47 [85 (b)], [90]. See also section IVB in Chapter 4.
\textsuperscript{201} \textit{Anglo-French} arbitration, 17-18 [1-2].
general and only excluded it to the extent of the French reservations; therefore, the Channel Islands region was seen as an area where customary law would be applicable.\textsuperscript{202}

On reviewing the effects of the convention and the relevant customary international law, the tribunal concluded that Article 6 provided for a combined equidistant–special circumstances rule\textsuperscript{203} in which a boundary based on an equidistance line was the general principle unless another was justified by special circumstances.\textsuperscript{204} It is observed that the equidistance–special circumstances rule and customary rules were viewed as having the same object: the delimitation of continental shelf boundaries according to equitable principles. This became clearer when the Court noted that ‘the combined “equidistance–special circumstances” rule in effect gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on the basis of equitable principles’.\textsuperscript{205} In applying these principles, the tribunal—dismissing the relevancy of the Hurd Deep Fault—first delimited the continental shelf boundary in the English Channel on the basis of a median line\textsuperscript{206} and then, in the case of Channel Islands, the tribunal concluded that to attain a ‘more equitable balance’ a twofold solution was needed and, accordingly, a mainland-to-mainland equidistance line was drawn as the primary boundary between the two States; therefore, the Channel Islands were only attributed a 12 nm enclave.\textsuperscript{207} Finally, turning to the Atlantic sector, the most extensive area of the continental shelf under consideration, the tribunal viewed the Scilly Isles—with their distorting effect upon the equidistance line—as constitutive of special circumstances affording a ‘half effect’. The Arbitral Tribunal defined the boundary by drawing a line bisecting the angle formed by two different equidistance lines: one calculated between Ushant and the Scilly Isles; the other calculated between Ushant and Land’s End.\textsuperscript{208}

\begin{footnotes}
\textsuperscript{202} Anglo-French arbitration, 28-48 [29-75].
\textsuperscript{203} Ibid, 44 [68].
\textsuperscript{204} Ibid, 45 [70].
\textsuperscript{205} Ibid.
\textsuperscript{206} Ibid, 59-61[104-110]
\textsuperscript{207} Ibid, 93-96 [196-203]
\textsuperscript{208} Ibid, 110-118 [235-254]
\end{footnotes}
In viewing this case it appears that, although the dispute was between two opposite States, the tribunal tried to associate equitable principles and a rule of customary international law as established in the *North Sea* cases with the equidistance–special circumstances principle and sought to establish the notion that the equidistance–special circumstances principle is no less than a branch of equitable principles.

The decisions given by the ICJ and the Arbitral Tribunal had an effect on the Third Conference.

*(d) The Third Conference*

No doubt that the provisions of the 1958 Geneva Conventions have provided the foundations for contemporary international law on maritime delimitation.\(^{209}\) However, they have not settled the breadth of territorial sea and fishing-zone affected State practices for which the Second United Nations Conference on the Law of the Sea (hereinafter the Second Conference or UNCLOS II) was convened in Geneva only two years after the First Conference in 1960.\(^{210}\) The Second Conference failed to reach any agreement on reforms or modifications to the Geneva Convention. In the meantime, the oceans were being subjected to a multitude of claims, counter claims and sovereignty disputes\(^{211}\) that were generated and fuelled by the fact that the 1958 Geneva Convention did not address many pressing problems related to the world’s oceans, among which, most notably, was the territorial sea. Other solutions (for example, the breadth of the continental shelf linked to the concept of exploitability and its delimitation provisions that were rejected by the ICJ) led to uncertainty, unpredictability and conflicting claims.\(^{212}\) Moreover, the Geneva Convention was not widely accepted and the individual practices of the newly independent developing States had no uniformity. The growing interest in the legal status of the deep seabed created instability and disorder in the law of the sea; hence, the need for a comprehensive convention on the law of the sea to which all States subscribed was self-

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\(^{212}\) Churchill and Lowe, above n 32, 147.
Eventually the UNGA decided to convene the Third Conference in which 160 States participated and that continued from December 1973 to December 1982. The second committee of the conference was allocated the responsibility for dealing with delimitation issues for territorial seas, EEZ and continental Shelf. The conference experienced comparatively less difficulties in adopting Article 15 for the delimitation of territorial seas, which—aside from minor modifications—repeats the equivalent provisions of the Convention on Territorial Seas and Contiguous Zones. This continuity of rules for delimitation of territorial seas from 1958 TSC to UNCLOS has actually formed a part of customary law. However, the issue of adopting a delimitation rule for EEZ and continental Shelf has remained uncertain for a considerable period.

The two Articles adopted in the Third Conference governing the delimitation of the EEZ and the continental shelf—Articles 74(1) and 83(1) of the Convention—are identical. The intention to frame identical wording when delimiting both EEZ and continental Shelf was expressed at a very early stage of the conference. One more reason may be that both the EEZ and the continental shelf are resource-oriented areas; the States may find framing identical provisions convenient for negotiating them jointly.

216 UNCLOS, Article 15:
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 of the baselines from which the breadth of the territorial seas of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two State in a way which is at variance therewith.
218 Article 74 (1) and 83 (1):
The delimitation of the exclusive economic zone [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.
220 Antunes, above n 1, 20.
The history of the drafting of the delimitation formulae for EEZ and continental Shelf as embedded in these two Articles is controversial. While negotiations for these provisions were being conducted, the existence of two opposing groups was revealed: one was the ‘equidistance group’ who argued for the combined equidistance–special circumstances rule and the other was the ‘equitable group’ who preferred the use of equitable principles for delimitation.

The first attempt to set a delimitation rule combining the 1958 conventional rule on delimitation and the judgement of the North Sea case can be found in Articles 61(1) and 70(1) of the informal single negotiating text (ISNT, 1975) and also in the revised single negotiating text (RSNT, 1976) where it was retained as well as in the informal composite negotiating text (ICNT, 1977) stipulating that delimitation should be effected:

by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances.

That neither group were willing to accept this delimitation approach became a contentious issue of the conference that was referred to negotiating group 7 (NG 7). The confrontation came to the forefront during the seventh session when two contrasting

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proposals were submitted by each of the delimitation groups.\textsuperscript{226} The equidistance group proposed that the delimitation should be effected:

by agreement employing, as a general principle, the median or equidistance line, taking into account any special circumstances where this is justified.\textsuperscript{227}

On the contrary, the equitable group finally suggested that the delimitation should be:

effected by agreement, in accordance with equitable principles taking into account all relevant circumstances and employing any methods, where appropriate, to lead to an equitable solution.\textsuperscript{228}

The marked difference between these two groups reflected the dilemma between the predictability and the flexibility of the law.\textsuperscript{229} The proposal made by the equidistance group reflected the notion that ‘equidistance’ should be a general rule of delimitation keeping balance between ‘objectivity (equidistance) and subjectivity (special circumstances)’, while the equitable group argued that equidistance was merely a method and that, by contrast, an equitable principle ‘did not present any objective standard’ for delimitation; rather, the standards it required were ‘subjective (equitable principles, relevant circumstances)’ that conferred flexibility in the application of ‘any method’ to reach an equitable solution.\textsuperscript{230} However, prior to the seventh session, consensus seemed to prevail on two points: first, any measure of delimitation should be achieved through agreement and, second, in the process of delimitation, all relevant or special circumstances are to be taken into account.\textsuperscript{231} Later, a series of proposals were submitted to NG 7, but none of them were found acceptable by the delimitation groups.\textsuperscript{232}

\textsuperscript{226} Tanaka, ‘Predictability and Flexibility’, above n 13, 44.
\textsuperscript{229} Tanaka, ‘Predictability and Flexibility’, above n 13, 45.
\textsuperscript{230} Antunes, above n 1, 91.
\textsuperscript{231} Reports of the Committees and Negotiating Groups, Seventh and Resumed Seventh Session, UN Doc A/CONF.62/RCNG/2, 170.
In the ninth session of 1980, the Chairman of NG 7 advanced another proposal, attempting to combine equidistance and equitable principles. The equidistance group accepted it with caution; the equitable group rejected it, ‘even as a basis of negotiation’. In spite of objection, the proposal was incorporated in the second revision of the ICNT (1980) and, accordingly, the States of the equitable group formally rejected the text. Article 74(1) and 83(1) of the ICNT stipulated that:

The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate and taking account of all circumstances prevailing in the area concerned.

As a consequence of the confrontation between the two schools of thought, further negotiation did not succeed, even up to one year before the adoption of the new convention. Because settling the law of maritime delimitation was one of the most controversial issues at the Third Conference, it was not given proper attention, nor was it afforded the requisite effort to be settled. Proof of this can be found in the fact that, until the very end of the conference, the issue of adopting legal provisions for maritime delimitation was hardly discussed.

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233 Proposal of the Chairman: delimitation should …be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned. See Official Record of the Third United Nations Conference on the Law of the Sea. Vol XIII, 77-78.


238 The Second Committee of the UNCLOS III was assigned to settle the delimitation issue. Till the sixth session of the Conference, no formal meeting held on delimitation issue. Two (105th and 108th) meetings held at the seventh session and two formal meeting held at eighth session. No formal meetings held at the ninth and tenth session. At the tenth session it was decided that the issue of delimitation of maritime boundaries was to be dealt with by two groups of countries directly concerned, and the draft provisions on maritime delimitation was revised at this session by incorporating the proposal presented to the Conference by the President. See generally, Statement on the work of the Second Committee from the fourth to the
However, in 1981, President Tommy Koh, after meetings with the two States representing the delimitation groups (Spain and Ireland), advanced a new proposal. The proposal was as follows:

> 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 ICJ, in order to achieve an equitable solution. 239

The text of the proposal made no reference either to equidistance or to equitable principles and was eventually accepted by both delimitation groups240 and incorporated in the draft convention without changes.241 Later, with a few modifications, it became Articles 74(1) and 83(1) of the Convention.242

It is questionable as to why the conference agreed to formulate such a delimitation provision where no normative delimitation criteria had been prescribed. An exact answer to this question may be difficult to locate, but can possibly be understood by taking into account the different viewpoints on the situation.

In the early stages of the negotiating process, the chairman of the NG 7 Stated that, if an agreement were to be reached, a ‘neutral formula between divergent opinions’ had to be found.243

Antunes tried to argue that the common intention of the negotiating States constituted a compromise making it possible to accept such delimitation formulae.244 According to him...
there may have been two common intentions at work: first, the two delimitation groups desired that the result of the delimitation should not be inequitable and, second, neither group could claim to have won as the adopted wording of the proposal prescribed neither the use of equidistance, nor the use of equitable principles as means of delimitation.  

In this regard, the Statement of the conference’s president must be taken into account; he requested that the States ‘avoid making any interpretative Statements’. However, it is arguable as to whether it would be possible to determine any means of delimitation without a Statement such as Koh’s. There are two reasons that may have accelerated the adoption of Koh’s Statement. First, the two groups might view accepting the text as the only compromise possible under the circumstances where reference to particular delimitation standard was dropped. Second, both delimitation groups might believe that their position could be counted in the wordings adopted. According to Oxman, although the formula was vague, the States adopted it with the intention that it would not endorse the interests of any particular State involved in a maritime delimitation dispute.

However, neither equidistance, nor equitable principles were collectively recommended in the Third Conference and, without giving a subjective solution to the conflict of the two delimitation groups, a vague and incomplete provision for the delimitation of maritime boundaries has been incorporated by UNCLOS—a situation widely referred to as a

245 Ibid, 92, 94.
251 During the Third United Nations Conference on the Law of the Sea participating States divided in to two groups, one is Equidistance Group and the other is Equitable Principles Group; Equitable Principle Group rejected the use of equidistance as obligatory method, on the other hand Equidistance Group favoured the equidistance method as obligatory. See Ki Beom Lee, ‘The Flexibility of the Rules Applied in Maritime
‘package deal’\textsuperscript{252}. Thus, it is argued that the delimitation rules as embedded in Articles 74(1) and 83(1) of the Convention amount to a phraseology that permits reconcilable interpretations of the two different schools of delimitation.\textsuperscript{253}

### III CONCLUSION

The law on maritime delimitation has been developing over the last four hundred years. The concept of modern international law began taking shape alongside this development. It is evident that the law on maritime delimitation started to develop through a conflicting scholarly ideas and medieval State practices. The Grotian response to the papal bull that divided the whole sea of the world into two parts and distributed it to Spain and Portugal, the conflict between the Grotian doctrine of \textit{Mare Liberum} (freedom of the high seas) and Selden’s \textit{Mare Clausum} (the closed sea or sovereign jurisdiction over the sea) founded the conceptual basis of the law of maritime delimitation. The concrete structure of this part of international law started taking shape in the twentieth century, particularly after World War II. A prolonged desire for equitable international rule on maritime delimitation paved the way for the growth of the law of maritime delimitation through the process of codification and the progressive development of international law. The ICJ’s decisions in the North Sea cases added much weight to this process. Finally, through the adoption of the Convention in 1982 and particularly the delimitation provisions as specified in Articles 74 and 83 of UNCLOS, this process of codification took permanent shape. However, whether these provisions reflect the progressive development of the law on maritime delimitation is of particular importance. This will be discussed and analysed in the subsequent chapters.

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\textsuperscript{252} See Package Deal, above n 84 and 94 in Chapter 1.

CHAPTER 3

CRITERIA AND METHODS FOR MARITIME DELIMITATION
UNDER THE CONVENTION

I INTRODUCTION

As mentioned in Chapter 2, the criteria for maritime delimitation involve the principles, methods and techniques for drawing boundaries between States, considering the physical geography of their coasts and submarine areas along with the special circumstances involved in each particular case. The delimitation rules specified in Articles 74 and 83 of UNCLOS reflect none of these criteria, aside from advising that delimitation ‘shall be effected by agreement on the basis of international law, as referred to in Article 38 of the statute of the ICJ, to achieve an equitable solution’. To date, this is the most positive development in international law. The main aim of this chapter is to examine whether this development in the law of maritime delimitation amounts to a progressive development in international law. In the course of this examination, this thesis will analyse and investigate as to whether the Article 38 of the ICJ Statute, as mentioned in Articles 74 and 83 of the Convention, refers to any specific delimitation criteria at all and, if not, what prevailing rule of maritime delimitation exists in today’s international law, whether this delimitation rule contains delimitation criteria and whether such delimitation criteria are implicit in the delimitation rule.

II THE DOMINANT RULES OF MARITIME DELIMITATION UNDER THE CONVENTION

Maritime delimitation is a complex, long-lasting and sensitive political–diplomatic process. A State cannot determine its maritime boundary unilaterally and, where the delimitation claims of different States overlap, the question of boundaries becomes an
The rule of maritime delimitation as embedded in the Convention was designed to settle such international disputes but the effectiveness of UNCLOS in handling these disputes is yet to be ascertained. Although the evolution of the contemporary international law of the sea began with the intention of formulating general principles for maritime boundary delimitation, the final legislation lacks the requisite normativity of a universally applicable delimitation process. This is possibly the reason why Brown described the delimitation provisions of UNCLOS as ‘abominably bad’.

However, examining the effectiveness of the delimitation provisions of UNCLOS requires an analysis of its wording.

A Delimitation of Territorial Seas

Article 15 of the Convention dealing with the delimitation rules for territorial seas refers to the use of the ‘equidistance–special circumstances’ rule prescribed in both conventional and customary law. During the Third Conference, almost all participating States favoured the equidistance–special circumstances rule as the delimitation standard for territorial seas. This issue was not debated extensively by NG nor was the customary nature of Article 15 challenged. In the Qatar/Bahrain case, the Court affirmed the customary nature of this Article. Reasons for this may include the negligible distorting effects of equidistance principles caused by coastal features in territorial seas that were recognised

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2 Undoubtedly Article 74 (1) and 83 (1) of the Convention lacks such normative standard for delimiting the extendable maritime zones, EEZ and continental shelf.
4 Antunes, above n 1, 195.
7 *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahrain) (Judgment)* [2001] I.C.J. Reports 40, 176 (hereinafter referred to as *Qatar/Bahrain case*).
in the North Sea cases, \(^8\) the notion of special circumstances allowing reasonable modifications to overcome inequities resulting from the use of strict equidistance\(^9\) and—unlike the continental shelf—territorial sea delimitations remaining ‘unaffected by the theoretical and judicial controversies’.\(^{10}\) It has been argued that Article 15 prescribes equitable principles for effecting the delimitation of the territorial sea.\(^{11}\) However, such arguments have received criticism on the grounds that the general principle of equity as embedded in Article 15 does not prescribe delimitation in accordance with equitable principles because its source—the dictum in the Anglo-French arbitration—was concerned with continental shelf delimitation, not territorial seas and because ‘delimitation in accordance with equitable principles simply amounts to the proper application of the equidistance–special circumstances rule’.\(^{12}\) This became clear when the Court in the Qatar/Bahrain case distinguished the application of equidistance–special circumstances to territorial seas from the application of equitable principles to the delimitation of other maritime zones; referring to the Jan Mayen case, the Court explained how the delimitation rule for territorial seas can operate through the delimitation of continental Shelf and fisheries where the equidistance–special circumstances principles are applied as a rule of delimitation.\(^{13}\)

An argument may be advanced that the delimitation standard as outlined in Article 15 of the Convention for delimiting territorial seas is clear, well founded and thereby effective; in both conventional law and customary law the principle applicable to territorial sea delimitation has been distinguished from rules applicable to the delimitation of other maritime zones. There are two reasons for this proposition. First, the limits of territorial

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\(^{12}\) Antues, above n 1, 104.

\(^{13}\) Qatar/Bahrain Case, [217], [231].
seas are more flexible: if the strict application of the equidistance rule creates an inequitable result, the rule may be adjusted by considering the prevailing special circumstances, although ‘the Convention does not provide any guidance as to what those special circumstances may be’. Second, the coastal States have absolute sovereignty and jurisdiction over the territorial sea that is deemed to be an ‘inner’ agreed area (analogous to an integral part of the main land) of the coastal State. In accordance with findings by the tribunal in the Grisbadarna arbitration, during the Third Conference, the States may have intended to apply different normative standards of delimitation for territorial seas (as ‘inner areas’) and other maritime zones beyond the territorial sea (as ‘outer areas’). Thus, although they could have implemented clear delimitation criteria for territorial seas, they failed to do so for EEZ and continental Shelf.

B The Delimitation of Continental Shelf and EEZ

The Convention provided two identical delimitation provisions—Article 74(1) and 83(1)—for determining EEZ and continental shelf delimitation between two adjacent or opposite coastal States—which, as recognised by the tribunal in the Eritrea/Yemen arbitration, was a product of a last-minute endeavour at the Third Conference to procure agreement on a very controversial matter and was consciously designed to decide as little as possible. Close scrutiny reveals that these two Articles contain three main parts suggesting that delimitation is to be effected a) by agreement, b) on the basis of international law as referred to in Article 38 of the ICJ Statute and c) to achieve an equitable solution where ‘the sole guiding principle is that the end result of a maritime

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14 During the preparatory work of the ILC, Hsu pointed out that the dividing line would be relatively less important than in the case of the continental shelf since the former were a narrow belt, the latter sometimes had a considerable extent. See ILC Yearbook [1951] I, 288.
16 This concept is consonant with the idea developed by Sang-Myon Rhee while he was discussing the Grisbadarna arbitration. For a clear view, see, See Sang-Myon Rhee, ‘Boundary Delimitation between States before World War II’ (1982) 76 American Journal of International Law 568-569.
17 For a general view, See Rhee, above n 16,566-571.
18 Eritra/Yemen Award (Second Stage), (2001) 40 ILM 983, 1013 [116].
delimitation must be equitable’.\(^{19}\) However, one could observe that the gist of this delimitation provision is ‘to achieve an equitable solution’—an injunction that seems to be vague and indefinite since nowhere in the Convention is it defined. Even the North Sea cases judgement that gave rise to this ‘legal phrase’ did not clearly define its meaning or scope, nor did it outline any framework or standard by which the equitableness of a delimitation solution could be assessed.\(^{20}\)

However, the effectiveness of Articles 74(1) and 83(1) for achieving an equitable solution is intimately dependent on the scope of the two other main parts of the text; first, reference to the agreement as a means of delimitation and, second, reference to Article 38 of the ICJ Statute as a normative basis for effecting delimitation in the absence of an agreement. Therefore, one might enquire as to the effectiveness of the delimitation process and which normative basis of delimitation must be applied.

C The Delimitation Process: Choice of Procedure

1 Agreement

It is settled that States cannot impose boundaries on other States by unilateral declaration.\(^{21}\) Therefore, the delimitation provisions of UNCLOS make reference to the creation of maritime boundaries by ‘agreement’. The process of delimitation by agreement bypasses the fact that delimitation may be effected by adjudication or arbitration seeking a resolution between parties.\(^{22}\) Thus, the question arises as to whether the States are bound to negotiate to reach an agreement to settle maritime disputes and whether, in the absence of agreement, UNCLOS provides other options for arriving at boundary delimitation.

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\(^{20}\) In this case the Court just suggested that whatever means be adopted for delimitation, finally the result should be equitable. See North Sea Cases, [85]- [90],[101].


\(^{22}\) Aasen, above n 10, 13.
That disputes are to be settled by peaceful means (e.g., negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful practices) is a well-accepted principle among States.²³ States are free to choose the most appropriate means of settling disputes²⁴—although such freedom has been criticised and suggested as a means of waiving conventional obligation.²⁵ This provokes questions as to whether, under the Convention, it is obligatory for States to negotiate to reach an agreement.

Historically, no such obligation was intended. During the 1951 session of the ILC, Scelle and Spiropoulos asserted that it ‘had never been implied that States should reach agreement as to the delimitation of their respective parts of the continental shelf unless they found it necessary’.²⁶ Article 283 of UNCLOS imposed an obligation on States involved in a dispute to provide an ‘exchange of views’ as to whether the dispute should be settled by negotiation or other peaceful means.²⁷ This did not mean that the States in dispute were under obligation to negotiate. The exhaustion of prior negotiation is not a prerequisite for the resort to adjudication under Part XV of the Convention. This was affirmed in the Aegean Sea case²⁸ and maintained in the recent Cameroon/Nigeria case.²⁹ According to Merrills, even ‘in the absence of a specific obligation to negotiate, a State is entitled to suggest that another procedure should be used’.³⁰ Despite the fact that in the Libya/Malta case, the Court Stated that there was a duty of the parties to first seek

²⁴ Antonio Cassese, International Law in a Divided World (Clarendon Press, 1991), 213-214. If States fail to resolve a dispute likely to endanger international peace and security, they should refer it to the Security Council. See UN Charter, Article 37 (1) .
²⁶ ILC Yearbook [1951] 293.
²⁷ UNCLOS, Article 283.
²⁸ Aegean Case [1978] ICJ Reports 12-14 [27-31].
²⁹ Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon/Nigeria) (Judgment on Preliminary Objections) [1998] ICJ Reports 302-303 [56].
delimitation by agreement, in view of the cases discussed above, an effort to first seek an agreement is not a prerequisite.

The text detailing the delimitation provisions of UNCLOS does not impose any obligation to reach agreement by negotiation. It has been observed that the ‘reference to agreement in Articles 74 and 83 means simply that, if States want their maritime boundaries precisely and definitively fixed, they must abide by the principle of consent’. Negotiation is arguably not obligatory in maritime delimitation. Nonetheless, most States will not refer to adjudication without first attempting to resolve the dispute by negotiation; hence, the compulsory dispute settlement system incorporated by the Convention does not in any way impair ‘the right of any State parties to agree at any time to settle a dispute between them … by any peaceful means of their own choice’. This is probably why it has been suggested that States are under an obligation to enter into meaningful negotiations in good faith to reach agreements on delimitation. Here, the question might be raised as to whether a basis for meaningful negotiation is required and to what extent such a basis is provided by UNCLOS.

Negotiation is one of the most frequently used dispute settling mechanisms available to States and the best side of negotiation is that it admits flexibility to take into account more variables than adjudication and leaves solutions entirely to the States involved, allowing

31 Case Concerning the Continental Shelf (Libya/Malta) (Judgment) [1985] I.C.J. Reports 13, 39[46] (hereinafter referred to as Libya/Malta case).
32 Antunes, above n 1, 110.
33 Natalie Klein stands for the view that ‘when no voluntary settlement has been reached by the parties and no agreement between the parties excludes any alternative procedure that referral to the compulsory procedures entailing binding decisions found in section 2 of Part XV becomes relevant’. Cf Natalie Klein, Dispute Settlement in the UN Convention on the Law of the Sea (Cambridge University Press, 2005) 51-52.
34 Antunes, above n 1, 113.
35 UNCLOS, Above n 1, Article 280. See also Article 33 (1) of the Charter of the United Nations, to which Article 279 of the UNCLOS makes reference.
36 Barbara Kwiatkowska, ‘The ICJ Doctrine of Equitable Principles Applicable to Maritime Boundary Delimitation and Its Impact on the International Law of the Sea’ in A Bloed and P van Dijk (eds), Forty Years of the International Court of Justice: Jurisdiction, Equity and Equality (Europa Instituut, 1988) 140-143. See also North sea case, 48 [85 (a)]; Tunisia/Libya Case, 66-67[87]; Gulf of Maine Case/1984, 292[87], 299[112].
37 Because international courts and tribunals cannot decide on the basis of the facts of a case without any reference to international law unless empowered to decide ex aequo et bono. See section II in Chapter 4. See also Bjarni Magnússon, The continental shelf beyond 200 nautical miles : delineation, delimitation and dispute settlement (Brill Nijhoff, 2015)138.
them maximum control over the outcome. Negotiation works better where a legal framework exists. The Convention does not provide such legal framework and such a lack proves an obstacle to any meaningful negotiation between States involved in delimitation disputes. The clearest example of this is the delimitation dispute between Bangladesh and its neighbouring States that has remained unresolved for 42 years; another example can be found in the South and East China Sea delimitation dispute that is still continuing.

It is to be expected that States will negotiate boundaries that suit them without considering whether the results are equitable and that validly signed and ratified treaties are essential to achieving equitable solutions. The obligation to achieve an equitable solution, as mentioned in Articles 74(1) and 83(1), is paramount and is consistent with the object and purpose of the LOSC Convention and, since the results of negotiation depend on the negotiating powers and the skills of each State’s negotiator, it is essential for States to invest in negotiation, especially pertaining to maritime boundaries between States with special circumstances. This idea is supported in jurisprudence—as exemplified by the Court in the North Sea cases maintaining that an equitable result was to be produced through negotiation between the States involved. As Stated earlier, negotiation works better within a given framework; a framework for equitable solution in maritime boundary delimitation is a fundamental requirement of our times.

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The adoption of compulsory dispute settlement procedures in the Convention was seen as one of the greatest achievements of the convention. It is argued that States are not

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38 Antunes, above n 1, 182.
41 *ILC year book* [1953] I, 125-126.
42 As per the Court, ‘[e]mphasis is placed on the equitable solution which has to be achieved. See *Tunisia/ Libya* case, [70].
43 UNCLOS, Preamble.
45 *North Sea* case [101]
46 ‘UNCLOS Major Achievements, Bay of Bengal Delimitation Case: The Role of a Judge ad hoc’ (Video lecture of Prof. Oxman recorded at Washington DC, USA, ASIL Annual Meeting, March 2012 as LOS
obliged to resolve their differences at all\textsuperscript{47} and that any delimitation dispute may remain unresolved for an indefinite period of time.\textsuperscript{48} The decision as to whether and when to negotiate is made at the discretion of States.\textsuperscript{49} However, accepting that States should not be engaged in long term disputes endangering international peace and security, the Convention incorporated provisions allowing parties in a dispute to resort to compulsory binding settlement procedures (via arbitration or adjudication) as embodied in Section 2, Part XV of the Convention.\textsuperscript{50} If the parties failed to reach any agreement within a reasonable period of time, according to Articles 74(2) and 83(2) of UNCLOS, they should resort to the procedures provided in Part XV. However, the convention did not specify the length of a reasonable period of time. Therefore, it is assumed that parties to a dispute are not under any obligation to delimit their EEZ or continental Shelf in a timely fashion and they can linger in their disputes for indefinite periods of time. By contrast, it is also assumed that the intention of the Third Conference was to assign a certain period for the relegating of such dispute to adjudication; however, such a time period could not be assigned because of the trade-off approaches of the delimitation groups and had to be left to the discretion of the States. Boyle rightly pointed that the adoption of the compulsory binding settlement procedures in the Convention was the result of a ‘package deal’ aiming for the ratification of the convention ‘in full, without reservations or not at all’.\textsuperscript{51}

According to Article 287, a State is free to choose one or more of the following procedures for settling disputes: a) the ITLOS, b) the ICJ, c) the arbitral tribunal under Annex VII of UNCLOS and d) the special arbitral tribunal under Annex VIII of UNCLOS.\textsuperscript{52} However,
at the same time, according to Article 298(1)(a) of UNCLOS, a State declaring in writing can ‘opt out’ of one or more of the compulsory binding dispute settlement systems for disputes relating to maritime boundary delimitation. This appears to be contradictory. Nevertheless, the history behind the fact of adopting such provision is that, without such exceptions, ‘many States would not have been prepared to accept compulsory dispute settlement at all’. However, in regard to this provision, invoking any such procedure is not mandatory for the States. This is a remarkable shortcoming of UNCLOS that widens the scope of third-party dispute settlement in maritime disputes. It is noteworthy that the procedure of conciliation, as outlined in Article 298(1)(a)(i), relates to disputes that have arisen after UNCLOS’s entry into force and regarding previously agreed maritime boundaries. The incorporation of dispute settlement provisions in UNCLOS was apparently intended to prevent unilateral interpretations of the treaty provisions by

When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
(b) the International Court of Justice;
(c) an arbitral tribunal constituted in accordance with Annex VII;
(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

Article 298 (1) (a) of the UNCLOS States as follows:

When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

(a) (i) disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;

Klein, above n 33, 257-258.
States,\(^{58}\) although it does not affect the right of a State to make its own choices regarding the procedures for dispute resolution.

One important question arising from these provisions concerns the outcome of one State bringing a dispute to a compulsory dispute settlement forum in contradiction of another State that has accepted the compulsory binding procedures of the Convention—or, conversely, in contradiction of another State that has opted out of any or all of the compulsory binding procedures. Judge Tullio Treves made a clear recommendation in response to the former situation, stating that ‘disputes concerning the interpretation or application of the convention may be submitted by a single party, without the need to obtain the consent of the other, to a judge or arbitrator whose decision is binding’\(^{59}\). However, it is difficult to locate a clear position on the latter situation. Beckman argued that when a State chooses to opt out of the compulsory binding dispute settlement systems, as mentioned above, Article 287(3) allows it to accept arbitration in accordance with Annex VII as a default system; therefore, Beckman asserted that China, in the South China Sea delimitation dispute, is party to this default system.\(^{60}\) Beckman’s comments reveal the necessity of interpreting Article 287(3)—jurisdiction in this regard has customarily been left to the international courts and tribunals.\(^{61}\) Without prejudice against the authority of the Courts and tribunals, a plain reading of Article 287(3) reveals two possible interpretations. First, the Article proposes that a State party that has not chosen a compulsory dispute settlement system by any declaration in force—since, according to Article 287(6), there are options to revoke previous declarations regarding choice of procedure—shall be deemed to have accepted the arbitration procedure. Second, it stipulates that any State party that \textit{ab initio} opts out of all compulsory settlement procedures shall be deemed to have accepted the arbitration system as embedded in Annex VII. The arbitration procedure, as a default system, is applicable in the former


\(^{59}\) Treves, ‘Ten Years After Entry’, above n 54, 351.


\(^{61}\) As mentioned in Article 287, UNCLOS, Above n 1.
interpretation; however, it is quite controversial in the latter. If a State were to opt out of all compulsory procedures, then assigning a default to that State would practically infringe on the State’s right to enjoy complete freedom in choosing the appropriate means of settling its disputes.\textsuperscript{62} It is suggested that States should waive such freedom of choice and ‘accept to refer a dispute, or certain disputes, to specific dispute settlement mechanism’ by means of conventional obligation.\textsuperscript{63} As any procedural means are ‘operative only upon the consent of the particular States’,\textsuperscript{64} the choice of means of maritime dispute settlement has been portrayed as an ‘international dilemma’\textsuperscript{65} and deemed as neither ‘comprehensive nor … compulsory as its proponents suggest’.\textsuperscript{66} How far the compulsory dispute settlement system, as embodied in Section 2, Part XV of UNCLOS, is effective remains an important question.

Although State consent is necessary for settling a dispute—whether through negotiation or adjudication—and States may continue to seek settlement through negotiation, even when litigation is underway, there remains some remarkable differences between these two processes in respect to the normative criteria of delimitation. Delimitation criteria play a \textit{de facto} role in almost all delimitations, regardless of the procedural means utilised.\textsuperscript{67} In adjudication, recourse to normative criteria is compulsory, whereas in negotiation States are free to depart from it by mutual consent. Legally, States are only bound by the imperative rules of international law (\textit{jus cogens})\textsuperscript{68} that include no norms

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{62} Cassese, above n 24, 213-214.
\item \textsuperscript{63} Quoc Dinh Nguyen, Patrick Daillier and Alain Pellet, above n 25, 788-789.
\item \textsuperscript{64} Ian Brownlie, \textit{Principles of Public International Law} (Clarendon Press, 5th ed, 1998) 703.
\item \textsuperscript{65} Malcolm D Evans (ed), \textit{Remedies in International Law: The Institutional Dilemma} (Hart Publishing, 1998).
\item \textsuperscript{67} Antunes, above n 1, 183.
\item \textsuperscript{68} The Principle of \textit{jus cogens} is a peremptory norm of general international law. Any treaty is void if in conflict with that norm of jus cogens. The principle of jus cogens is recognised as part of international customary law and is also embodied in the Vienna Convention on the Law of Treaties, Art. s 53 and 64. See J. L. Dunoff, S.R. Ratner and D. Wippman, \textit{International Law, Norms, Actors, Process: A problem-Oriented Approach} (Aspen, New York, 2\textsuperscript{nd} ed, 2006) 58-61. Some authors affirm that negotiated agreements cannot infringe upon the rights of third States. Because the \textit{pacta tertiis} rule protects the rights of third States from obligations created by bilateral agreements. See Jonathan I Charney, ‘Rocks that Cannot Sustain Human Habitation’ (1999) 93 (4) \textit{American Journal of International Law} 873; Gerard J Tanja, \textit{The Legal Determination of International Maritime Boundaries} (Kluwer Law, 1990) xvii.
\end{itemize}
\end{footnotesize}
specific to delimitation. In adjudication, the Court cannot go beyond the set rules of international law and it has to reach an equitable solution by harmonising competing approaches. However, in negotiation, States are free to put ‘forward extreme claims, especially where [their] bargaining power is very strong’; therefore, the outcome of a negotiation may be unreasonably inequitable, since States are free to choose the circumstances and methods of the negotiation, irrespective of their legal relevance, and thereby they are free to shape boundary lines at their will. As a consequence, the majority of delimitation treaties do not explain how the line was determined. All things considered, it appears that great inconsistencies exist in the delimitation processes that do not match the objectives and purposes of the Convention as a whole.

III ACHIEVING AN EQUITABLE SOLUTION ON THE BASIS OF INTERNATIONAL LAW: DOES UNCLOS REALLY REFER TO ANY DELIMITATION CRITERIA?

The main obligation of Articles 74(1) and 83(1) is that ‘inequitable solutions must be avoided’. The means to reaching any equitable solution are mentioned in the Convention through the expression, ‘on the basis of international law, as referred to in the Article 38 of the statute of the ICJ’. This provision is far less specific than the comparable language in the 1958 Geneva Convention on the Continental Shelf. Thus, an equitable solution to delimitation disputes depends on the choice of normative bases available in international law as mentioned in Article 38 of the ICJ Statute by which delimitation is to be effected.

71 Peter Malanczuk, Akehurst's Modern Introduction to International Law (Routledge, 1997), 275.
72 Antunes, above n 1, 183-184.
73 UNCLOS, Above n 1, preamble.
74 Eritra/Yemen Award (Second Stage) , (2001) 40 ILM 983–1013, [116]; Aasen, above n 19, 14; Antunes, above n 1, 99-100, 185.
75 UNCLOS, Above n 1, Article 74 (1) and 83 (1).
76 Antunes, above n 1, 98-99.
Article 38 of the ICJ Statute—though criticised as ‘the treacherous stream of sources’ of international law—remains the most authoritative reference for identifying normativity in international law. It enumerates the sources of international law (in priority order) as follows: international conventions, international customs and general principles of law, judicial decisions and learned writings (as subsidiary means for determining the contents of international law). For Ross, ‘[t]hese sources define and circumscribe the legal foundation on which the international judges base their decisions’. However, keeping these views in mind, one can rightly question the effectiveness of the means of maritime delimitation as exemplified by these various sources of international law, including the Convention; this question has been relatively unexamined and requires further legal analysis.


Articles 74(1) and 83(1) of the Convention refer only to the result attained through the delimitation process (the equitable solution) and do not refer to the means to be used. Therefore, we must ask whether the delimitation criteria mentioned in the Geneva Convention on the Continental Shelf should be applied to the State parties to the Convention. This is actually two questions. First, as regards continental shelf delimitation between State parties to the Convention—referring only to the goal of achieving an

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77 Article 38 (1) of the ICJ Statute:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.


80 Antunes, above n 1, 194.

81 ICJ Statute, Article 38.

82 Rossi, above n 78, 5.
equitable solution—we must ascertain whether the ‘equidistance/special circumstances’ rule as prescribed by the Geneva Convention on the Continental Shelf can be applied. Second, given that the EEZ delimitation did not exist in 1958, it is questionable whether any of the delimitation rules of the Geneva Convention on the Continental Shelf or its sister Convention on the Territorial Sea and the Contiguous Zone can be applied to EEZ delimitation.

When both involved States are parties to the Convention, delimitation is to be effected in accordance with Articles 74(1) and 83(1). Notwithstanding, where the Convention is compatible with the Continental Shelf and TSCs, the latter can arguably be applied. Where one or more involved States have not ratified the Convention, but each are party to the 1958 Continental Shelf and/or TSCs, the latter arguably applies directly. The drafting history of Article 83(1) substantiates the idea that the use of the equidistance–special circumstances rule is allowed and some claim that Article 6 of the 1958 CSC remains applicable. Fleischer has stated that ‘Articles 74 and 83 of the Convention retain, and indeed reiterate, the applicability of the Geneva Convention as between the State parties’. In response to this line of reasoning, this thesis notes four distinct arguments:

- First, it is agreed that any rule or provision of a subsequent convention that has been adopted because of a previous conventional provision corresponds to customary rules of law. From this point of view, the delimitation standard for continental Shelf, as embodied in the 1958 CSC, has not been adopted by the Convention and, therefore, is not considered to be customary law by this ruling; rather, the notion of ‘continental shelf’ becomes customary law.

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84 Antunes, above n 1, 100.
85 Fleischer, 83.
• Second, according to the view expressed by the ICJ in the *North Sea* cases, the manifest intent of the 1958 CSC was not to generate customary international law regarding the equidistance principles of maritime delimitation; rather, it was to adopt the notion of the continental shelf as customary rule of international law. This was because Article 6 of the CSC did not possess any ‘norm-creating character’ and was used by States to make reservations; neither the number of States ratifying the convention nor the elapsed time since the convention was sufficient to form any customary rule of law. Accordingly, it can be argued that the delimitation provisions of the 1958 Geneva Convention on the Continental Shelf are not applicable to the Courts and tribunals established under the Convention, since these are not compatible with the Convention.

• Third, the intention of the Third Conference with respect to the continental shelf delimitation was not to return to the Geneva Convention. UNCLOS has been ratified or acceded by 165 States and is moving towards universal acceptance; therefore, it is so highly consequential that any sort of derogation of its provisions is not expected. As far as Article 311 is concerned, the Convention leaves no room for doubt that UNCLOS prevails over the Geneva Convention in all respects. Nonetheless, opposite interpretations in this regard are found to be absent in case law—though it is apparent that ‘case law seems to have established much the same procedure for maritime delimitation under the Convention as that

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88 See generally Ibid, 894-899.
89 Since Article 293 of the UNCLOS States that a court or tribunal having jurisdiction under section 2 of Part XV of the Convention ‘shall apply this Convention and other rules of international law not incompatible with this Convention’. See Article 293, UNCLOS, Above n 1.
90 ‘Table recapitulating the status of the Convention and of the related Agreements, as on 30 January 2013’, <http://www.un.org/Depts/los/reference_files/status2010.pdf>. United States of America, Venezuela, Libya, Israel and Democratic People’s Republic of Korea are remarkable amongst the States which yet have not ratified the UNCLOS. The United Nations has on various occasions called upon States to become parties thereto ‘in order to achieve the goal of universal participation’. See UN Doc A/Res/56/12 (13 December 2000) preamble and [1].
91 Article 311 (1) of UNCLOS states that ‘This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958’.
prescribed by the Convention on the Continental Shelf: recourse to the corrective/equity approach.\textsuperscript{93}

- Fourth, for the sake of argument, one might suggest that the provisions for delimitation in the 1958 Geneva Convention, as far as they are compatible with the Convention, may apply inter parties. The issue of compatibility as mentioned in Article 311(2) of the Convention only specifies that the rights and obligation of States parties are covered by the convention as far as their ‘agreement’ is compatible with the Convention and does not affect the rights and obligations of third States; this compatibility does not refer to any previous convention\textsuperscript{94} since the status regarding the succession of the Geneva Convention is mentioned in the preceded Article 311(1). Again, regarding the delimitation of EEZ, the succession of conventional rules as referred to by the 1958 Geneva Convention requires no consideration, since EEZ did not emerge before the First Conference and no rule existed in this regard in the 1958 Geneva Convention.\textsuperscript{95} All in all, the existing rule of interpretation clearly describes the status of an earlier treaty that is substituted by a later treaty relating to the same subject matter. According to Article 59 of the Vienna Convention on the Law of Treaties (hereinafter VCLT), any earlier treaty shall be considered as terminated if a later treaty relating to the same subject matter be concluded.\textsuperscript{96} Since the Convention has subsequently been concluded in relation to the same subject matter as the delimitation of continental Shelf in the earlier Geneva Convention on the Continental Shelf, it can legally be assumed that the

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\textsuperscript{93} Aasen, above n 19, 16.
\textsuperscript{94} UNCLOS, Above n 1, Article 311 (2) : This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
\textsuperscript{95} Antunes, above n 1, 195.
\textsuperscript{96} Article 59 of Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into for 27 January 1980) (hereinafter VCLT) States as follows:

1. A treaty shall be considered as terminated if all the parties to it con- clude a later treaty relating to the same subject-matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.
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related provision of delimitation of that convention has been terminated in all respects as stipulated by the aforementioned Article.

**B Customary Rules of International Law and the Delimitation of EEZ and Continental Shelf Under UNCLOS**

Now it must be considered whether any normative criteria for delimitation exist in customary international law. As noted, the principle of equidistance—special circumstances does not correspond to customary law since the ICJ adopted equitable principles as customary rule of law in the *North Sea* cases. Subsequent jurisprudence and scholarship have suggested that the contents of Articles 74(1) and 83(1) do not depart from those of customary law since, under customary law, the delimitation of maritime zones beyond territorial seas is to be effected by recourse to equitable principles. Nonetheless, in practice, States are not bound either to apply any delimitation standard prescribed in international law or to reach an equitable solution. Observing that ‘agreed delimitations may have been dictated by legally irrelevant considerations’, Thirlway concludes that this fact ‘complicates the quest for customary rules of maritime delimitation enshrined in State practice’ and ‘weakens the force of the act as evidence of an *opinio juris*’. Hence, ‘courts have been reluctant to find any evidence of generally applicable norms in State practice, and they have been unimpressed by statistical surveys demonstrating the preponderance of any particular method’. Notwithstanding, Antunes led an extensive survey on State practice in continental shelf and EEZ delimitation and finally came to the conclusion that State practice entails the application of normative criteria of delimitation and that ‘no customary rule exists’. Moreover, it was observed

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99 Antunes, above n 1, 97.
102 Antunes, above n 1, 100-102.
that no customary law for EEZ delimitation exists. However, this may lead to the questioning of the very existence of customary international law. For example, Kelly argues, *inter alia*, that customary law lacks legitimacy as a law-making process, since it allows the manipulation of international law that favours some States to the prejudice of others. Therefore, it is suggested that ‘[t]he effective operation of custom as a source of international law obviously requires further clarification and systematisation of normative criteria for the formation of customary rules’.  

C Status of Judge-made Law:

The enumeration of the judicial decisions and teachings of the publicists in Article38(1)(d) imply the status of judicial decisions in international law. There is debate as to whether judicial decisions can be treated as sources of international law in connection with the settlement of maritime boundary disputes. Rules that qualify as customary law without regard for State practice are judge-made laws. The field of international law where judges’ decisions have ‘played an outstanding’ role in creating law is maritime delimitation. The way in which the delimitation law on continental Shelf and EEZ was devised appears to have afforded the Courts wide discretionary power to consider whatever circumstances they deem relevant and to choose whatever methods they consider appropriate. Conversely, Article 38 of the ICJ Statute imposed obligation on the Courts to apply international law, appearing to limit the Courts’ freedom. One can observe that courts, without ‘sufficiently defining [equitable principles] or giving them an identifiable objective content’ have sought ‘to reach transactional solutions on a case-by-

103 See Caflisch, ‘above n 8, 481.
105 Danilenko, above n 79, 128-129.
106 The expression ‘judge-made law’ was first used by Jennings. See Robert Y Jennings, ‘What is International Law and How Do We Tell It When We See It?’ ( 1981) XXXVII *Annuaire Suisse de Droit International*, 68. Other authors have used it more recently. See Brownlie, above n 64, 28; Schachter, above n 70, 58; Weil, above n 21, 6-8.
107 Antunes, above n 1, 187.
108 Ibid. 97, 196.
109 Ibid. 98.
case basis.' In doing so, the Courts had recourse to equity as the general principle of law; in the *North Sea* cases when the Court referred to ‘general precepts of justice and good faith’ it was referring to the principle of equity. There is apprehension that allowing courts or tribunals to decide cases by practising such a margin of discretion may rely on ‘subjectivity and unpredictability to a vast degree’ and might run the risk of undermining the law of maritime delimitation’, thereby imparting ‘the risk of unbalancing the horizontal nature of the international legal order’. Therefore, whether judge-made law is a viable source of international law still remains doubtful.

Nonetheless, the reference to Article 59 and Article 38 of the ICJ Statute clearly denied the precedential value of international case law. In *Fisheries Jurisdiction* cases the Court stated that proposals *de lege ferenda* should not be imposed on States. It was not expected that judge-made law would take shape in any ‘fundamental manner’. Even the committee of jurists that prepared the statute for the ICJ did not desire that judicial decisions or legal doctrine evolving from any publicist should create law; rather, they understood it as a supplementary means to determine the existing rule of international law. Moreover, despite the *de facto* law-making nature of judicial decisions, ‘the

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110 Georges Abi-Saab, 'The International Court as a World Court’ in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of The International Court of Justice* (Cambridge University Press, 1996) 11-12.
111 *North Sea* cases, 47-48 [85].
112 Aasen, above n 19, 10.
113 Antunes, above n 1, 99
114 Article 59 of the ICJ Statute states as follows: ‘The decision of the Court has no binding force except between the parties and in respect of that particular case’.
115 *Fisheries Jurisdiction (United Kingdom v. Iceland) (Merits), (Judgement)*, [1974] ICJ Reports, 3, 24-25 [53].
117 Baron Descamps, the president of the Committee of Jurists for preparing the draft Articles of the Statute of the Permanent Court of international law, made this point clear by stating that ‘this element could only be of a subsidiary nature; the judge should only use it in a supplementary way to clarify the rules of international law. Doctrine and jurisprudence do not doubt do not create law; but they assist in determining rules which exist. A judge should make use of both jurisprudence and doctrine, but they should serve only as elucidation.’ See Permanent Court of International Justice (Advisory Committee of Jurists) , *Proces-Verbaux of the Proceedings of the Committee, June 16th –July 24th 1920 with Annexes* (Van Langenhuysen Brothers, the Hague, 1920) 336 <https://archive.org/details/procsverbaux00leaguoft >.
law-making powers in international law remain ultimately with the States’. The rule of *stare decisis*—the binding force of judicial precedents that exists in common law—has no place in international law in general. The reason behind the non-acceptance of this doctrine of judicial precedence in international law is that any decision at which a court arrives is mostly focused on the dispute submitted in given circumstances and the decision is based on relative factors, rather than absolute ones. Keeping in mind this reality of international law, the tribunal for the *Barbados/Trinidad and Tobago* case, without turning to precedent, acknowledged the influence of earlier decisions and suggested that ‘the delimitation be consistent with legal principle as established in decided cases, in order that States in other disputes be assisted in the negotiations in search of an equitable solution that are required by Articles 74 or 83 of the convention’. Cheng very clearly expressed his position in favour of this by stating that judicial decisions and the teaching of publicists do not come within the purview of ‘formal sources’ in international law, since ‘they do not create rules of law but only serve as means for determining such rules’; as such, they may ‘properly be called law-determining agencies’. Thus, it is bluntly argued that ‘case law cannot be regarded as a source of law, but rather as an auxiliary means of interpretation and crystallisation of its contents’.

In summary, taking account the above discussion it can be argued that since conventional law and customary law both only prescribe an obligation to achieve an equitable result when delimitating continental Shelf and EEZ, since no customary rule on the delimitation standard has emerged by which an equitable result is to be reached and since the judge-made law cannot be considered a source of international law as a consequence of the non-acceptance of its precedence in international law, the Convention stands for or refers to none of the sources of international law in its given structure. Therefore, questions as to

119 Antunes, above n 1, 99
121 Shabtai Rosenne, ‘The Position of the International Court of Justice on the Foundation of the Principle of Equity in International Law’ in Bloed and Van Dijk (eds), *Forty Years of the International Court of Justice* (Europa Institut, 1988) 87.
122 *Barbados-Trinidad & Tobago* case, [243] (emphatically added).
124 Antunes, above n 1, 99.
what rules of international law govern the law on maritime delimitation and which sources of law States and third-party dispute settlement organisations should follow still remain unanswered. This thesis will address these questions in Chapter 7.

D Scope of Ex Aequo Et Bono

The law on maritime delimitation has been found to be ‘adjudication oriented’, which may raise the question as to whether the Courts or tribunals must decide *ex aequo et bono.* Article 38(2) of the ICJ Statute and Article 293(2) of the Convention Stated that, unless the parties agreed, the Court or tribunal, having jurisdiction under the Convention, shall not decide a case *ex aequo et bono.* It has been argued that the discretion of the Courts and tribunals in choosing normative standards for delimitation and taking account of circumstances ‘equate[s] adjudication to *ex aequo et bono* decision-making’. However, the ILC had to rule out the possibilities of *ex aequo et bono* arbitration even though at the outset they were in favour of it. Even States did not consider it advisable. In the *North Sea* cases, the Court also ruled out the possibility of any decision *ex aequo et bono,* rather accepting equity as a rule of law that calls for the application of equitable principles. In *Barcelona Traction* case, Judge Fitzmaurice in his separate opinion, while differentiating the use of equity from *ex aequo et bono,* supported the legal stance of the judges in the *North Sea* cases and explained that:

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125 Antunes, above n 1, 187
126 Article 38 (2) of the ICJ Statute states that the provision of Article 38 ‘shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto’. See Article 38 (2) of the ICJ Statute.
127 Article 293 (2) of UNCLOS States that the rule that a court or tribunal, having jurisdiction under the Convention shall apply the Convention and other rules of international law not incompatible with this Convention, does not prejudice the power of that court or tribunal ‘to decide a case *ex aequo et bono,* if the parties so agree’. See Article 293 (2), UNCLOS, Above n 1.
128 Antunes, above n 1, 188
129 *ILC Yearbook* 1953 (I), 106, 131; *ILC Yearbook* 1951(I), 411.
130 For example, United Kingdom, in respect of settling delimitation disputes, advised to recourse to international law than *ex aequo et bono* arbitration. *ILC Yearbook* 1953(II), 85. Belgium Stated that ‘legal provisions should be laid down as basis for arbitration and for possible recourse to the International Court of Justice’. Israel asserted the fact that States had ‘in the past shown little propensity to proceed to arbitration or judicial settlement.’ The Netherlands advised ‘to lay down specific rules of law upon which arbitrators could base their decisions’. See generally, *ILC Yearbook* 1953(II), 241-269.
131 *North Sea* case [85-88]
‘[d]eciding a case on the rules of equity, that are part of the general system of law applicable, is something quite different from giving a decision ex aequo et bono, as was indicated by the Court in the North Sea Continental Shelf case…’.

It can be concluded that the means of delimitation as embedded in Articles 74(1) and 83(1) is vague, vacuous, indeterminate and virtually meaningless and bears a regrettable degree of juridical uncertainty. Even an arbitration tribunal could not but call these provisions ‘an empty formula’. Oxman went further stating that it does not ‘purport to lay down a normative rule to be applied in the absence of an agreement’. Again, ‘the meaning of the reference to Article 38 of the statute of the ICJ is not totally clear’. It has been suggested that reference to Article 38 of the ICJ was intended ‘to indicate that international law, as a basis of delimitation agreement,[did] not differ from the law applied’ by the ICJ. It was also observed that the reference to Article 38 of the ICJ and the requirement of attaining an equitable result were a last-minute ‘twist’ that was not discussed in detail at the conference.

What might be the reason for referring to Article 38 of the ICJ Statute as the guiding principle for maritime delimitation in the Convention? It seems clear that the Convention did ‘set the parameters of the delimitation process’, but set no ‘objective parameters of delimitation on the basis of which’ the equitableness of the delimitation result could be evaluated. This means that there remained a legal gap or lacunae in the Convention regarding normative standards for the delimitation of EEZ and continental Shelf. This

134 Gulf of Maine case [8].
136 Antunes, above n 1, 95.
140 Antunes, above n 1, 97.
status of the Convention convincingly exemplifies the justifiability of the observations made by Judge Ammoun who, despite clear provisions on delimitation standards in the 1958 CSC, observed that:

> there is a *lacuna* in international law when delimitation is not provided for either by an applicable general convention (Article 38, paragraph 1 (*a*)), or by a general or regional custom (Article 38, paragraph 1 (*b*)). There remains sub-paragraph (*c*), which appears to be of assistance in filling the gap.\(^{141}\)

While conventional means, customary law and case law were found insufficient for addressing the normative standards of maritime delimitation and for forming the basis of assessing the equitableness of delimitation results, a way still remains to delimit with fairness and reasonableness: equity as a general principle of law. The role of equity within law—as a principle for application within conventional and customary law and as part of the general principles of law—seems to have remained unaffected by Article 38 of the ICJ Statute.\(^{142}\) Indeed, it has been emphasised by way of recourse to the general principles of law as provided in Article 38(1)(*c*) of the ICJ Statute to address a gap in international law.\(^{143}\)

Apart from the normative standards of maritime delimitation, the Convention has also recently drawn attention to two other factors that are implicit within maritime delimitation. First, the proliferation of international courts and tribunals that may cause the unnecessary fragmentation of international law and, second, rising sea levels as an effect of climate change.

### IV SETTLING MARITIME BOUNDARY DELIMITATION DISPUTES:

**THE PROLIFERATION OF COMPULSORY DISPUTE SETTLEMENT SYSTEMS**

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141 *North Sea case*, 132 (Separate Opinion of Judge Fouad Ammoun) (emphasis added).
The proliferation of international courts and tribunals (including quasi-judicial tribunals) has been described as ‘one of the significant developments of international law’ and welcomed by several scholars with the view that such proliferation facilitates the development and expansion of the principles of international law and enlarges the scope for resolving international disputes peacefully. However, such developments have not occurred without criticism as they seem to occupy the centre stage of international law and ignoring them may result in uncertainty and legal disorder that could weaken the international legal order. It is argued that the proliferation of international courts and tribunals acts against a unitary and coherent legal system, makes it difficult to establish formal relations and a harmony of decisions between judicial bodies and decreases the likelihood of State compliance by causing decisions to be seen as illegitimate.

The Convention has provided a range of fora for compulsory binding settlement disputes that rely on the interpretation and application of the Convention and have been seen as informing the ‘fragmented and hesitant progresses’ and ‘haphazard and unplanned growth’ of international law. It is feared that, as a consequence of the proliferation of

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144 As on November 2004, there are 125 international courts and tribunals exits, most of which were established in the last 40 years. See Cesare P R Romano, The Project on International Courts and Tribunals: The International Judiciary in Context-A Synoptic Chart < http://www.pict-pcti.org/publications/synoptic_chart.html>.  
147 Lakshman Guruswamy, above n 143, 298-99.  
compulsory binding settlement procedures, international law and the law of maritime delimitation may become fragmented—not only through the emergence of competing interpretations in a non-uniform manner and through the inconsistent decisions of different tribunals, 152 but through the tendency of different courts ‘to produce a specific variety of international law’.153 The proliferation of international courts ‘gives rise to a serious risk of conflicting jurisprudence’ and the fragmentation of international law because ‘the same rule of law might be given different interpretations in different cases’; this has been recognised by the former ICJ President, Gilbert Guillaume. 154

It is observed that ‘[t]he growing tendency of using international courts and tribunals in resolving international disputes has given a new shape to international relations’, described as the ‘[j]udicialization of international relations’. 155 This is more relevant for the resolving of maritime boundary disputes. However, the proliferation of international courts and tribunals in ‘interpreting and applying international law [such as the provisions of the Convention relating to maritime delimitation] has caused the problem of coordination which is now being viewed as a result of non-hierarchical relationships between these courts’. 156 It is argued that ‘coordination is needed in order to avoid overlapping jurisdiction and disparities in interpreting and applying international law and the substantive law that each produces’. 157 Some even argued for a ‘constitutionalisation’ of the international dispute settlement system 158 as a legal response to the changing international society as a result of globalisation. 159 Therefore, the harmonisation of the

156 Ibid, 287 (emphasis added).
157 Ibid.
international courts and tribunals appeared necessary. In this way, ‘the claim of establishing a hierarchical system, comparing to a national judicial system, in international dispute settlement procedure has been advanced’ where the ICJ would play the role of the top court in the hierarchy. This approach was supported by the observations made by the former ICJ President, Gilbert Guillaume, Jennings and Ram Prakash Anand. The option of filing an appeal against any award pronounced by the Annex VII and Annex VIII tribunals has created the opportunity to consider such a hierarchy. Nonetheless, the attitude of the international courts and tribunals in stating that a rule belongs to customary law without providing any evidence or argument to support the proposition along with the refusal to adhere to proof when considering the arguments of a party has been criticised. It has been observed that ‘more extensive consideration of the relevant points of law and the articulation of arguments in support of or against a legal finding would render the Court’s decision more persuasive, hence more compelling’. Therefore, it is suggested that the Court should provide full reasoning for all findings and legal conclusions.

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162 According to Gilbert Guillaume ICJ could consider the judgements of other international tribunals by way of appeal or review, or these tribunals could seek advisory opinion from the ICJ on general issues of international law raised during their proceedings in order to reduce the risk of differing the interpretations of international law. See Gilbert Guillaume, Statement by President of the International Court of Justice to the United Nations General Assembly, 26 October 2000 <http://www.icj-cij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1>.
165 Since, regarding the finality of Award of the Arbitral Tribunals established under Annex VII, Article 11 of Annex VII of the Convention Stated that ‘[t]he award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure’ and according to Article 4 of Annex VIII of the Convention, Articles 4 to 13 of Annex VII apply mutatis mutandis to the special arbitration proceedings in accordance with Annex VIII. See Article 11 of Annex VII and Article 4 of Annex VIII of the UNCLOS.
167 Ibid, 248.
168 Ibid
The intention of the third conference was that the states would be able to resolve their delimitation disputes through agreement [as a result of meaningful negotiation]. Section 1 of Part XV of UNCLOS also emphasised the adoption of any peaceful means for dispute settlement. Even states in the settlement of a dispute concerning the interpretation and application of the LOS Convention are given the choice of resorting to any procedure (agreed between themselves through general, regional or bilateral agreement) entailing a binding decision other than compulsory adjudication or arbitration procedures as outlined in article 287 of UNCLOS. This provides for the possibility of a future clash in interpretations and jurisdictions concerning the different means of compulsory binding settlements created by UNCLOS and those implementing agreements; the possibility of such a clash cannot be ruled out. In the Southern Bluefin Tuna case and the Mox

169 Reports of the Committees and Negotiating Groups, Seventh and Resumed Seventh Session, UN Doc A/CONF.62/RCN/2, 170 (emphasis added)
170 Since Article 282 of UNCLOS states that:
If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.
173 Two cases arose in this regard. One was adjudicated by ILOS and that is Southern Bluefin Tuna case (New Zealand v Japan, Australia v Japan) (provisional measures) (1999) 38 ILM 1624 (ITLOS) . And another was arbitrated by the Annex VII Arbitral Tribunal and that is Southern Bluefin Tuna (New Zealand v Japan, Australia v Japan) (Jurisdiction and Admissibility) (2000) 39 ILM 1359 .
Plant case\textsuperscript{174}, such issues were discussed elaborately\textsuperscript{175} where the question of express exclusion in the implementing agreement regarding the jurisdiction of the compulsory dispute settlement regime of UNCLOS had become a vital issue.\textsuperscript{176} In the Southern Bluefin Tuna case (jurisdiction and admissibility), even the Annex VII arbitral tribunal was not restrained from commenting that the LOS Convention ‘falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding

\textsuperscript{174} Two cases were filed in this regard. One was adjudicated by ITLOS: \textit{MOX Plant (Ireland v United Kingdom) (Provisional Measures)} (2001) 41 ILM 405 (ITLOS) . And the other was arbitrated by the Annex VII Arbitration Tribunal: \textit{MOX Plant Case (Ireland v United Kingdom) (Jurisdiction and Merits)} (24 June 2003) Order No 3 (Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures) and \textit{MOX Plant Case (Ireland v United Kingdom) Jurisdiction and Merits} (6 August 2008) Order No 6 (Termination of Proceedings) \textltt{http://www.pca-cpa.org/upload/files/MOX%20Plant%20Order%20No.%206.pdf}\textsuperscript{175} These cases gave rise the central question as to the relationship between the dispute settlement procedures created under by UNCLOS and those of other agreements. As ITLOS was called upon to prescribe provisional measures pending the constitution of an arbitral tribunal, ITLOS, both in \textit{Southern Bluefin Tuna case (Provisional Measures)} and \textit{MOX Plant case (Provisional Measures)} , held that the Arbitral Tribunal pursuant to Annex VII would, \textit{prima facie}, have jurisdiction over the cases. But in \textit{Southern Bluefin Tuna case (Jurisdiction and Admissibility)} , the Annex VII Arbitral Tribunal held the opposite view and stated that ‘the dispute settlement provisions of (CSBT) precluded reference to those in UNCLOS’, and in \textit{MOX Plant case (Jurisdiction and Merits)} the Annex VII Arbitral Tribunal suspended further proceedings in the case until the European Court of Justice had given judgement or the Tribunal otherwise determined. See generally Rosemary Rayfuse, ‘The Future of Compulsory Dispute Settlement Under the Law of the Sea Convention’ (2005) 36 Victoria University of Wellington Law Review 688-710; Natalie Klein, \textit{Dispute Settlement in the UN Convention on the Law of the Sea} (Cambridge University Press, 2005) 44-52; Nils Christian Carstensen, \textit{Comment: A Re-Internationalisation of Dispute Settlement in the Law of the Sea}<http://www.zaoerv.de/62_2002/62_2002_1_c_73_76.pdf>; Finally the Annex VII Arbitral Tribunal terminated the proceedings of the MOX Plant Case after having regard to the Judgment of the European Court of Justice (ECJ) delivered on 30 May 2006 (Case C-459/03) and formal notification made by Ireland regarding withdrawal of its claim made against the United Kingdom. See \textit{MOX Plant Case (Ireland v United Kingdom) Jurisdiction and Merits} (6 August 2008) Order No 6 (Termination of Proceedings) \textltt{http://www.pca-cpa.org/upload/files/MOX%20Plant%20Order%20No.%206.pdf}\textsuperscript{176} Although ITLOS, in the \textit{Southern Bluefin Tuna case (provisional measures}, held that the Annex VII Arbitral Tribunal would, \textit{prima facie}, have jurisdiction; but the Annex VII Arbitral Tribunal, in \textit{Southern Bluefin Tuna case (Jurisdiction and Admissibility)} , held that dispute settlement procedure in other implementing agreement excludes the application of compulsory binding settlement procedures as embodied in Part XV of UNCLOS though the particular provision of the implementing agreement did not expressly say so and stated that ‘[t]he absence of an express exclusion ………..was not decisive’. See \textit{Southern Bluefin Tuna (New Zealand v Japan, Australia v Japan) (Jurisdiction and Admissibility)} (2000) 39 ILM 1359 [57]. Carstensen argued that any exclusion of the application of the dispute settlement procedures under UNCLOS needs to be expressly stated in the implementing agreement. In support he submitted a comment made by the President of the UNCLOS III where the President described the dispute settlement mechanism of the UNCLOS as ‘the pivot upon which the delicate equilibrium of the compromise must be balanced’. See Nils Christian Carstensen, \textit{Comment: A Re-Internationalisation of Dispute Settlement in the Law of the Sea}, 74<http://www.zaoerv.de/62_2002/62_2002_1_c_73_76.pdf>; \textit{Third United Nations Conference on the Law of the Sea: Documents}, vol. V, UN Doc A/Conf.62/WP.9/Add.1, 122 [6].
decisions’. However, the view of the tribunal has been criticised and one critic compared the compulsory binding dispute settlement provision of the LOS Convention to ‘a paper umbrella which dissolves in the rain’.

However, given these examples, the proliferation of the Courts and tribunals and the lack of coordination between them, it can be assumed that there remains every chance of the fragmentation of international law evolving in terms of delimitation standards and the definition of equitable solutions. Despite such negative views, one might positively see the proliferation and fragmentation of international courts and tribunals as a sign of the maturity of the international legal system as well as a reflection of the growing strength of the unity and integrity of international law.

V CONCLUSION

Choice in applicable methods of delimitation and consideration of various circumstances are inevitable in the legal operations of maritime boundary delimitation. UNCLOS lacks

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177 Southern Bluefin Tuna Case (Jurisdiction and Admissibility), above n 176, [62].
180 See generally Rayfuse, ‘Compulsory Dispute Settlement’, above n 66, 702-705.
any single description in this regard. Articles 74 and 83 of UNCLOS which provide
provisions on the delimitation of continental Shelf and EEZ are overly vague, providing
scant clear guidance to achieve an equitable solution. The reference to Article 38 of the
ICJ Statute refers to neither conventional nor customary means of delimitation and thus
remains ambiguous, referring to no specific rules and principles of maritime delimitation
that would be applied to reach an equitable solution; if the adoption of the law of maritime
delimitation in the Geneva Convention results in the codification and progressive
development of international law,\textsuperscript{182} the rule of maritime delimitation as adopted in the
Convention lacks the continuity of such progressive development and consequently offers
considerable scope for conflicting interpretations leading to maritime boundary disputes.
Therefore, there remains the possibility of the ‘\textit{fragmentation of international law}’.\textsuperscript{183} The
result is that the law on maritime delimitation \textit{remains where it was before the codification era} and and what remains in hand, is the rule of equitable solution-to achieve an equitable
solution- for achieving fairly demarcated boundaries. While the present legal regime of
maritime delimitation results from a ‘trade-off’ in the Third Conference to adopt
UNCLOS as a whole, the reality of the twenty-first century is quite different; vague
delimitation provisions, the unprecedented impact of changing situations and future
maritime delimitations, coupled with the fragmentation of international law have made it
more complicated for States to reach any equitable solution in maritime boundary
disputes. However, the rule of equitable solution may operate as an inclusive concept
capable of addressing all the criteria of equitable solutions.

\textsuperscript{182} Antunes, above n 1, 114.
\textsuperscript{183} Bennouna, above n 155, 289 (emphasis in original).
CHAPTER 4  
EQUITABLE SOLUTIONS TO MARITIME DELIMITATION

I  INTRODUCTION

The tension between the equidistance—special circumstances rule (articulated in the 1958 Geneva Convention on the Continental Shelf) and the equitable principles rule (declared in the 1969 North Sea cases of the ICJ) prevented the 1982 UNCLOS from stipulating any specific methods for the delimitation of EEZ or continental Shelf. What was specified instead was the phrase ‘to achieve an equitable solution’—the only prerequisite for maritime delimitation. The potential equitability of the result dominates the process of maritime delimitation. Thus, in the absence of any obligatory rule, the only rule for governing maritime delimitation is the rule of ‘equitable solution’. The concept of ‘equitable solution’, because of its indeterminacy whereby the equitable solution for one case is not the same as that for another, has been described as emblematic of the ‘open texture’ of law.¹ With regard to the open texture of law, Hart Stated that ‘[t]here are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case’.² This thesis designates this open texture as the criterion for equitable solution.

The decisions of the international courts and tribunals referred to in Article 38 of the ICJ Statute are of particular importance in determining the content of the law applicable to maritime delimitation under Articles 74 and 83 of the Convention.³ The open texture or criterion for equitable solution in maritime delimitation was developed through the decisions of international courts and tribunals along with the concept of maritime delimitation. Therefore, this chapter aims to identify the criteria that provide substantive guidance to

¹ Regarding the open texture of law, Hart Stated that “[w]hichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an open texture”. See H L A Hart, The Concept of Law (Oxford University Press, 2nd ed, 1994) 127-128.
² Ibid, 135.
³ See generally, Barbados/Trinidad and Tobago arbitration, 147, 210-211 [223]; Bangladesh/Myanmar case, 61 [184]; Bangladesh/India arbitration, 98 [339].
achieve equitable solution and to argue that the criteria for equitable solution as developed in case law accord with the conventional rule of equitable solution; further, although the concept of equitable manner is almost absent in maritime delimitation, the substantive manner or process by which international courts and tribunals reach such solutions can be deemed an equitable manner. In addition, this chapter seeks to reduce misunderstandings and misperceptions of the Courts’ denials of the conventional rules of maritime delimitation and their reliance on equity and equitable principles that have led to the progressive development of international law on maritime delimitation through judicial decisions.

II EQUITY FOR MARITIME DELIMITATION

The concept of equitable solution is a judicial attribution emerging from the judicial settlement process of maritime boundary disputes where equity played an indispensable role. Before the Convention, this concept of equitable solution existed neither in conventional law, nor in State practices. Its absence in earlier treaty law and in State practices created difficulties in conceptualising the notion of equitable solution in the context of maritime delimitation. Moreover, its origin in equity and its indeterminate character that varied from case to case added more weight to these difficulties by producing a considerable amount of legal criticism. In the absence of any approved list of applicable criteria and principles or any clear guidelines to assess the equitability of the results of maritime delimitation, the demarcation of maritime boundaries resulting from the judicial settlement process attracts criticism. Thus, the concept of equitable solution has become the subject of seemingly endless debate in the context of maritime delimitation requiring clear guidance to reach a solution. Since the concept of equitable solution pertains directly to equity, to conceptualise its meaning, it is necessary to examine the relation of equity to equitable solution.

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4 See discussions in section IV (C) of this chapter.
A Equity and Equitable Solution

Equitable solution occurs when equity functions in the context of maritime delimitation in international law. The most structured and systemised roles of equity have been conceptualised, developed and applied in the jurisprudence of maritime delimitation under the concept of equitable solution. Perhaps this is the reason why equity has expressly been made ‘directly part of substantive rule of law for maritime boundary delimitation’ in the Convention as well as in the decisions of the international adjudication and arbitration bodies,\(^6\) despite the expressed differences the opinions of States in the Third Conference. Therefore, a brief discussion of equity, of its relation to international law and of its functions in international law constitutes a starting point for understanding what is meant by the concept of an equitable solution with respect to maritime delimitation. If the true nature of equity as applied in maritime delimitation is clarified, effective and appropriate criteria for equitable solution can easily be identified.

1 Equity and its Historical Origins

Equity is one of those concepts that is better discussed than defined.\(^7\) Wilfred Jenks once announced, ‘[t]he questions “what is equity” is no more answerable than the question “what is truth”’;\(^8\) while Oscar Schachter claimed that ‘[n]o concept of international law resists precise definition more than the notion of equity’.\(^9\)

Generally, equity is seen as a norm that mitigates the rigidity of the application of positive international law. However, the use of equity as invoked by philosophers or legislators may be materially different from that of lawyers trained in common law or judges in international courts and tribunals.\(^10\) Therefore, contrast in working definitions of equity is readily apparent. Equity, as imparted by international law scholars, varies in its different

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\(^8\) See C W Jenks, The Prospects of International Adjudication (Stevens, 1964) 426;
\(^9\) Schachter, above n 7, 82.
\(^10\) Christopher R Rossi, Equity and International Law: A Legal Realist Approach to International Decisionmaking (Transnational Publishers, 1993) 3.
applications. An expansive view was held by Zechariah Chafee, who claimed that '[e]quity is a way of looking at the administration of justice', which at the same time provides 'a set of effective and flexible remedies'. A similar view was held by Lowe, to whom equity comprised 'general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State'. To others, equity in its broader sense is 'a factor of effectiveness'. The most convenient definition of equity for present international law and practice was articulated by Rossi, who described equity as a ‘dynamic concept of law’ best applied in international decision-making processes for its legal realistic approach. Taking all these views in account, the most functional definition of equity for international law can succinctly be summarised thus: equity is a fundamental principle of law best suited to international decision-making processes by way of bridging the gap between law and justice; in a specific case where a solution based on law appears to be unjust, the application of equity ensures the effectiveness of international law.

The concept of equity in international law originated in Aristotle’s thought, although traces of concepts relating to equity are found in diverse legal systems, including Judaism, Islam, Hindu and canonical law. The reason for this is that international law commenced in Europe with the rise of sovereign States. Therefore, first and foremost, the view of Aristotle regarding equity must be examined. Aristotle, in his Nicomachean Ethics, integrated his theory of equity (‘epieikeia’ in Greek) into the spheres of legal justice stating that:

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14 Rossi, above n 10, 3, 17-19.
15 Because justice is the optimum outcome that the positive law necessarily needs to attain, and equity conforms to justice. See generally, Mircea Djuvara, Essays of Law Philosophy (TREL, 1997) 70; Libya/Malta Case, 1985 ICJ report, 13, 39.
18 Rossi, above n 10, 22-23.
19 Y Makonnen, ‘Western Attitudes to International Equity’ (1972-3) 42-43 Annure De L’AAA 82, 86-87, quoted in Rossi, above n 10, 23.
law is universal, but there is some thing about which it is not possible to speak correctly in universal terms … So in a situation in which the law speaks universally, but the issue happens to fall outside the universal formula, it is correct to rectify the shortcoming, in other words, the omission and mistake of the lawgiver due to the generality of his Statement. Such a rectification corresponds to what the lawgiver himself would have acted if he had known. That is why the equitable is both just and also better than the just in one sense. It is not better than the just in general, but better than the mistake due to the generality. And this is the very nature of the equitable, a rectification of its universality.

Generality and universality are the essential characteristics and the basis of law. A plain reading of Aristotle’s notion of equity suggests that in a specific case where the law, as a consequence of its universality, is incapable of addressing justice, equity is there ‘to reduce the gap between law and justice’. This implies a ‘broad concept of equity’, the only aim of which is to attain justice in a specific case. Indeed, equity in Aristotle does not refer to a separate entity from the law; rather, it suggests a supplement to the law that is all the time guided by the law as a means of justice, which Rossi has termed ‘an extension of natural justice’. Whatever his philosophical understanding of equity, the sole point to be appreciated here is that Aristotle focused on defining the ‘function’ of equity (not law), rather than the concept itself—meaning that equity in international law operates as a legal concept within existing law.

Aristotle’s conception of equity has influenced legal thought beyond his age. Grotian thought of equity is very close to that of Aristotle. Aristotelian equity found a place in Roman law as well as in contemporary common and civil law municipal systems that point the way to the proper uses of equity within international law. In the Roman law system, equity

23 Tella, above n 21, 17.
advanced through judicial activities carried out by the *praetor peregrinus* who developed a body of ‘law’ (known as the *jus honorarium*) that pursued flexibility and issued edicts supporting, supplementing or correcting existing law. In common law, equity was regarded as a new system of law and an equity ‘court’ organisation was established as distinct from common law courts. Although civil law was less concerned with the idea of equity, it incorporated ‘equitable principles’ into its texts to soften the rigour of the law. The European legal system was the true precursor to the concept of equity in international law, although the meaning and significance of the concept in international law are essentially different from those of the various European legal systems.

2  **Equity and International Law**

Given the fact that equity is shaped and developed at both conceptual and functional levels through its usage in judicial decision-making processes in municipal legal systems, the principle of equity has been a ready concept for incorporation into international law. However, at the same time, the evolving and familiar topic of the application of equity in municipal law remains the main problem with equity in international law. Equity in municipal legal systems—notwithstanding its conceptual relevance and probable usefulness—is not, *per se*, identical with equity in international law. In other words, while equity in municipal legal systems is in some way separate from or in opposition to the law, equity in international law is not a separate jurisprudence; rather, it is a part of international

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27 *Praetor peregrinus* was a magistrate who had jurisdiction to adjudicate cases involving foreigners and cases involving only Roman citizens were dealt with in the Court of the *praetor urbanus*. The most important element in the development of equity in Roman law was the role of the *praetos* (both *praetor peregrinus* and *praetor urbanus*). They actually blended the rational and volitional aspects of decisionmaking by introducing equitable rules and principles to accommodate changing circumstances and lacunae in the legal system. See generally, Rossi, above n 10, 29 nn 42, 31; W A Hunter, *Roman Law* (2nd ed, 1885) 34.

28 Rossi, above n 10, 30-31.

29 Ibid, 30-34. See also Tomas Rothpfeffer, ‘Equity in the North Sea Continental Shelf Cases’ (1972) 42 *Nordic Journal of International Law* 82.


32 Ibid, 76.


law,\textsuperscript{35} functioning as a unique means of achieving justice and fairness in the context of individual cases.\textsuperscript{36} It should be noted that, before being regarded as a part of international law, equity had to pass the Courts’ ‘positive law test’ to constitute law proper.\textsuperscript{37} As will be shown below, the routes of equity’s entry into international law are self-evident in this regard.

To a great extent, writings of international scholars have dealt with the routes of equity’s entry into the corpus of international law. Despite differing views, most agree on a single point: that the international approach towards reliance on institutional arrangement for resolving international disputes through international arbitrations has created avenues for the reception of equity in international law.\textsuperscript{38} The establishment of the PCA under the Convention for the Pacific Settlement of International Disputes\textsuperscript{39} that resulted from the first Hague conference of 1899 appreciably advanced the usage of equity in international law in a tangible way.\textsuperscript{40} For instance, to govern the resolution of disputes and to guide and maintain the standards of the arbitral awards, incorporation of particular phrases and standards—such as ‘equity and justice shall appear to them as required’, ‘justice and equity’, ‘principles of equity’, ‘justice, equity and good faith’, ‘in accordance with absolute equity’ and ‘international law and equity’—from treaties dating from the Jay Treaty\textsuperscript{41} to special arbitration agreements and international claims conventions, provide examples of where ‘equity’ has been included as a common element in international law.\textsuperscript{42} The \textit{Norwegian

\textsuperscript{35} Shabtai Rosenne stressed on this point that ‘modern international law cannot accept the idea [. . .] probably derived from the experience of the English legal system, that there is some way of opposition between law and equity’. See Shabtai Rosenne, ‘The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law’ in A Bloed and P van Dijk (eds), \textit{An International Law Miscellany} (Martinus Nijhoff Publishers, 1993) 203 (emphasis altered). See also, \textit{North Sea Cases}, [85].

\textsuperscript{36} See Bin Cheng, ‘Justice and Equity in International Law’ (1955) 8 \textit{Current Legal Problems} 211. See also L F E Goldie, ‘Equity and the International Management of Transboundary Resources’ (1985) 25 Natural Resources Journal 674.

\textsuperscript{37} For this view, see generally, Gourgourinis, above n 34, 329, 333-340, 346.

\textsuperscript{38} For example see, Rossi, above n 10, 56, 59; Shabtai Rosenne, \textit{The World Court: What it is and how it Works} (Sijthoff/Oceana Publications, 1973) 18.

\textsuperscript{39} \textit{The Convention for the Pacific Settlement of International Disputes}, the Hague, October 18, 1907, 54 LNTS 435.

\textsuperscript{40} For example see, Rossi, above n 10, 56, 59; Rosenne, above n 38, 18.

\textsuperscript{41} \textit{Treaty of Amity, Commerce and Navigation of 1794 between Great Britain and the United States}, Stat.116 (1794, TIAS no. 105 (effective 28 October 1795) (hereinafter Jay Treaty)).

\textsuperscript{42} Art. 5, 6, 7 of the Jay Treaty; Art.1 of the \textit{Convention on Claims between the United States and Great Britain}, signed 8 February 1853, ratification exchanged 26 July 1853; Art. 2, \textit{Claims Convention between the United States of America and Panama}, signed 28 July 1926, ratification exchanged 3 October 1931, TS Nol 842, 4 Malloy, Treaties, 1923-1937 (1938) 4546; Art. II of the \textit{British-Mexican, Italian-Mexican, French-Mexican and Spanish-Mexican Claims Conventions}; Art. II of the \textit{United States-Mexican Special Claims Convention}; Art. 2
Shipowners’ Claims arbitration is one instance where equity was read referring international law in a more understandable way. In this arbitration, the tribunal defined the phrase ‘according to law and equity’, stating that ‘these words [law and equity] are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State’. However, this does not confer the status of equity in international law, nor does it indicate whether this definition of equity arises from a formal source of international law.

Article 38 of the ICJ statute where the sources of international law are enumerated does not contain any clear reference to equity. The debate as to whether equity should be included as a formal source of international law was at its height during the meetings of the advisory committee of jurists who were preparing Article 38 of the statute of the Permanent Court of International Justice (PCIJ)—substantially what now comprises the ICJ statute. The members of the committee actively considered the inclusion of equity as one of the ‘general principles of law’ in both an explicit and an implied way; however, in the end, ‘no categorical repudiation of equity resulted from the rigid scrutiny’ of the committee under the exercise of unfettered judicial discretion by international arbitrators, raising doubts over equity’s definiteness and the differences in the ‘understandings accorded to it’ by different

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44 Pursuant to Article 14 of the Covenant of the League of Nations, the Committee of Jurists was appointed by the Council of the League of Nations at its Second meeting in London in February 1920 in order to prepare the draft of the Statute of the Permanent Court of International Justice. See Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee 1920 (Van Langenhuysen Brothers, 1920) iii-iv <https://archive.org/details/procsverbauxof00leaguoft> (hereinafter Procès-Verbaux).
45 Ricci-Busatti is the first member of the Committee who specifically proposed to include the phrase ‘principles of equity’ as part of the general principles of law. See Procès-Verbaux 315, 332.
47 See Procès-Verbaux 296, 309, 313, 333.
legal systems\textsuperscript{48} coupled with the failure of the proposed Prize Court Convention, where equity was explicitly mentioned as a source of international law.\textsuperscript{49}

Despite the non-inclusion of equity as one of the general principles of law, equity was recognised and entered into international law via the corridor of the general principles of law. Judicial decisions and the writings of international legal scholars played substantial roles in this regard. The Diversion of Water from the River Meuse case\textsuperscript{50} is an oft-cited case where Judge Hudson defined equity as a part of international law, equating it with the general principles of law underlying Article 38(1)(c) of the ICJ statute and thus arguing for the Court’s freedom to apply it. In his own words:

\begin{quote}
What are widely known as principles of equity have long been considered to constitute a part of international law … Article 38 of the Statute expressly directs the application of ‘general principles of law recognised by civilised nations’, and in more than one nations principles of equity have an established place in the legal system … therefore, that under Article 38 of the statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply’.\textsuperscript{51}
\end{quote}

A contrasting view as to whether equity should be treated as a general principle of law is found in scholarly writings. Janis and Jenks adopted similar views to that of Judge Hudson,\textsuperscript{52} while others, raising doubts as to the generality of the principles that allow for the application of equity, differentiated equity from the general principles of international law.\textsuperscript{53} Still others


\textsuperscript{49} This failure of this Prize Court convention has played an active role for not to embed equity as a general principle of international law. According to Root (member of the Committee of Jurists from the United States) and Loder (member of the Committee of Jurists from the Netherlands), the inclusion of the undefined legal phrase ‘general principles of justice and equity’ in Article 7 of the International Prize Court Convention as a source of international law to be applied by the prize court in absence of a treaty or general rules of international law, had been remaining the major reason for the failure of the Prize Court Convention since Great Britain was not agreeing with such inclusion of new source of international law. See Procès-Verbaux, 309, 312, 316, 317.

\textsuperscript{50} Diversion of Water from the River Meuse (the Netherlands v Belgium) (Judgement) [1937] PCIJ (ser A/B) No 70

\textsuperscript{51} Ibid, 76-77 (Judge Hudson).

\textsuperscript{52} See generally Janis, above n 16, 33-34; C W Jenks, ‘Equity as part of the Law Applied by the Permanent Court of International Justice’ (1937) 53 \textit{Law Quarterly review} 523. See also Lapidoth, above n 22, 175.

\textsuperscript{53} See Akehurst, above n 33, 814; Oscar Schachter, \textit{International Law in Theory and Practice} (Martinus Nijhoff Publishers, 1991) 49.
viewed equity from different angles. For example, Lapidoth, with reference to Hudson’s ‘if not independent of that Article’, observed that the applicability of equity does not necessarily depend on its introduction through Article 38(1)(c) of the ICJ statute. As far Lapidoth was concerned, equity was qualified enough to be applied as international law independently. When it is held by the Court that ‘the legal concept of equity is a general principle directly applicable as law’, more weight is attributed to this view. Pending the debate as to whether equity is a general principle of law or is law itself, some recent scholarly writings have gone in search of an answer to the question as to whether equity is part of international law according to the sources of international law and, in particular, whether equity can be treated as a formal source of international law under Article 38(1)(c) of the ICJ statute. Anastasios Gourgourinis, after an exhaustive analysis of this issue, concludes that ‘the “routes of entry” of equity in international law appear to be in conformity with the doctrine of sources of international law’. However, a definitive answer is yet to be obtained.

Whatever the answer, most scholars agree on a single point: that the most significant route of entry for equity into modern international law is through international adjudicative and arbitral decisions on maritime delimitation where ‘equitable principles’ and ‘equitable solutions’ are two concepts developed by international courts and tribunals through which equity has been adopted in international decision-making processes. At the very outset, equity was brought into the corpus of international case law on maritime delimitation via the concepts of ‘justice’ and ‘equitable principles’. According to Judge Ammoun ‘equity… appears to be nothing other than justice’. As manifested by the ICJ, the actual rules of international law do not aim at ‘applying equity simply as a matter of abstract justice’; rather, they require the application of equity as ‘a rule of law which itself requires the application of equitable principles’. Despite considerable criticisms, some scholars affirm this approach, claiming that ‘equitable principles are simply a sub-set of general principles of law’. However, questions as to which principles could be considered equitable principles in

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54 Lapidoth, above n 22, 176.
55 See Tunisia/Libya Case, [71]. See also Frontier Dispute Case, [149]; Libya/Malta Case, [45].
56 Gourgourinis, above n 34,346.
57 North Sea Cases, 132 (Separate Opinion of Judge Fouad Ammoun).
58 North Sea Cases, 46-47, [85].
59 For example, Akehurst, above n 33, 814.
international law and what could happen if the application of one seemingly ‘equitable’ principle produces an inequitable result have made it difficult for equity to rely solely on equitable principles for its entry into international law. In 1981, through the adoption of the draft convention at the Third Conference,60 the international community accepted equity as the basis for resolving conflicts between the interests of the coastal State and any other State in the EEZ61 and, in particular, undertook equitable solution as the dominant objective to be achieved in the course of maritime delimitation.62 In 1982 in the *Tunisia/Libya* case, one year after the adoption of the draft convention in the Third Conference, a fruitful attempt was made to devise a theoretical framework for equitable solution. In this case the Court clearly mentioned equity as a ‘legal concept’ and found it to be ‘a direct emanation of the idea of justice’, imposing primacy only on achieving an equitable solution and clearly stating that such a solution must be achieved through the application of equitable principles (principles and rules that may be appropriate for bringing about an equitable result). The Court thus proclaimed the subordination of the principles to the result. The concept of equitable solution is the only legal basis that provides for equity’s entry to modern international law.63 Its application became more concrete when the Convention came into force in 1994 because, after the enforcement of the Convention, there remained no other alternative but to reach an equitable solution in maritime boundary disputes, whether they were resolved by mutual negotiation or third-party compulsory binding settlements. Frank may have had this in mind when he observed the scant guidance for achieving an equitable solution as stressed in Articles 74 and 83 of the Convention, noting that, given the absence of such guidance, only equity determines the means to arrive at an equitable result.64 Leanza seemed to support this

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61 See *Official Records of the Third United Nations Conference on the Law of the Sea*, (1973-7982) XV, 184. Article 59 States that ‘[i]n cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the 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’.


63 *Tunisia/Libya Case*, 49 [50], 59-60[70]-[71].

64 Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press, 1995) 68.
view when he claimed that equity as defined in the UNCLOS of 1982 essentially ‘constitutes an instrumental rule which prescribes the exclusive duty to seek a solution’.

In other words, equity in international law acts as law itself through the concept of equitable solution through which the equitable principles derived from equity are applicable as law. Therefore, it can be argued that, in the context of maritime delimitation, the application of equity necessarily requires the achievement of an equitable solution by dint of equitable principles—where equitable solution is the objective consideration of equity and where equitable principles are the subject of all subjective considerations. This may inform Munkman’s view that the detailed criteria of equity are veiled within the concept of equitable solution. However, to arrive at a clear understanding of how equity is applied in international law via the concept of equitable solution, it is necessary to understand, first, how equity functions in international decision-making processes and, second, how it is distinct from decisions made *ex aequo et bono* and from absolute equity.

3 **The Functions of Equity in International Decision-making Processes**

It is a truism to say that equity plays its best role in international judicial decision-making processes. Equity provides a substantial legal basis for governing the international decision-making processes related to maritime delimitation. The way equity operates in this process can be best understood by its different functions that shape the legal arguments of judges relying on justice in a given case, taking into account both facts and laws when deliberating a result that is equitable, just and fair. Scholars have categorised such functions of equity into three different ‘modes’ or ‘types’ in which it may present itself; equity *infra legem*, equity *praeter legem* and equity *contra legem*.

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67 Akehurst, above n 33, 801.
68 Christopher Grauer, ‘The Role of Equity in the Jurisprudence of the World Court’ (1979) 37 University of Toronto Faculty of Law Review 101-102. See also Tella, above n 21, 93.
69 Some scholars described such functions of equity as ‘types of equity’. See generally Lowe, ‘The Role of Equity’, above n 12, 56; Tella, above n 21, 131-35.
Equity *infra legem* is the function of equity that provides options for a judge to choose one among several possible interpretations ‘within’ relevant law and thereby empowers a judge ‘to adapt the law to the facts of individual cases’. As far as the freedom of choice of a judge is consistent with this function of equity, he has no need for prior consent from the parties and thus this application of equity may appear close to the inherent power of a judge. However, if the application of equity *infra legem* is found to be ‘inherent in the functions of the judge’, then one might reasonably raise the question as to whether this function of equity is necessary. The answer would be yes for two reasons: first, it is the legal obligation of the international courts and tribunals to judge according to international law unless the parties explicitly opt otherwise; second, the legality of the judge’s inherent power of choosing one among several interpretations is solely based on this function of equity and thus it protects the judges from making arbitrary decisions in the name of law. Thus, equity *infra legem* actually remains within the law since there is ‘no obvious reason for distinguishing between this and law proper’ and, hence, it is accepted as a set of legal rules that are called *infra legem* or ‘within the law’. There is some confusion as to whether equity *infra legem* includes the inference of equitable exceptions in legal rules. In response to this confusion, Akehurst has very persuasively argued that ‘it is always (or nearly always) possible to find some principle of customary law applicable in a case’ and, if an international court or tribunal applies such a principle in a case where ‘there is no room for equity, or else it makes an equitable exception to the principle’, this means that it is applying equity *infra legem*—and here he stressed the point that ‘in neither case does the tribunal need to apply equity *praeter legem*. 

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70 Grauer, above n 67, 102.
71 Akehurst, above n 33, 801.
72 Lowe, ‘The Role of Equity’, above n 12, 55.
75 Lowe, ‘The Role of Equity’, above n 12, 56.
76 Rossi, above n 10, 9 (emphasis in original).
77 This confusion arose due to the contradictory remarks made in the *North Sea Continental Shelf* cases by Judge Ammoun in his separate opinion, where he Stated that- the principle of equity which must be applied is not the abstract equity contemplated by the Judgment, but that which fills a lacuna, like the principle of equity *praeter legem*. See *North Sea* Cases, 132 (Separate Opinion of Judge Fouad Ammoun).
Therefore, it is apparent that, when a court applies equity, it insists that such an application is always within the scope of equity *infra legem*.

(b)  *Equity Praeter Legem*

The function of equity *praeter legem* is to fill gaps ‘among the positive rules of international law or where it is necessary to elaborate the content of vague or general rules’ to reach an equitable solution. What is of significance here is the question as to whether or not there are *lacunae* in international law. Some scholars consider that there is no gap in international law, while others, acknowledging the gaps in international law, seek to use equity *praeter legem*. However, most scholars seem to avoid endorsing this kind of equity or keep silent in this regard. One reason for this may be that they find limited scope for the application of equity in international decision-making or, as Stated by Lowe, an individual dispute can be settled through several methods provided by international law, including through diverse interpretations of existing law, without reference to equity *praeter legem*. This thesis condones Lowe’s view. However, at the same time, it should be noted that any remaining gap in the law is a result of the judicial mechanism and it depends on the ability of the judges to ‘define the limits of the law with certainty and clarity’. Even then, of course, questions arise as to whether an international court or tribunal, without being expressly authorised, can address gaps in the law by applying equity *praetor legem*. In spite of disagreement among scholars in this regard, judges of the international courts and tribunals did not hesitate to claim such power. Many scholars supported the application of this function of equity on

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78 Akehurst, above n 33, 806.
80 See generally Owen McIntyre, ‘Utilization of shared international freshwater resources-the meaning and role of “equity” in international water law’ (2013) 38 (2) Water International 115; Akehurst, above n 33, 805-806.
81 Akehurst, above n 33, 805.
82 For example, according Judge Ammoun there may be gap in law and equity *praeter legem* is used ‘not…with a view to filling a social gap in law, but ….in order to remedy the insufficiencies of international law and fill its logical lacunae’. See *Barcelona Traction* case, ICJ Rep 1970, 333 (Separate Opinion of Judge Fouad Ammoun).
83 Higgins, above n 72, 220; Lowe, ‘The Role of Equity’, above n 12, 8-63; Akehurst, above n 33, 805.
84 Akehurst, above n 33, 806. See also Rossi, above n 10, 9.
85 Lowe, ‘The Role of Equity’, above n 12, 61.
86 Ibid, 58.
88 For instance, see generally, *North Sea* cases, 132 (Separate Opinion of Judge Fouad Ammoun); *Barcelona Traction* case 3, 333(Separate Opinion of Judge Fouad Ammoun); *Pinson case* (1928) 5 RIAA, 327, 355. See
the condition that it requires the prior consent of the parties. Despite such a view, this thesis does find any concrete reason to encourage the international courts and tribunals to apply equity *praeter legem*, a practice that would circumvent the legal obligations of international judges in treating equity as part of international law and thus keeping themselves within the ambit of international law.

(c) *Equity Contra Legem*

The application of equity *contra legem* begins at the point of the rejection of an applicable law and then travels beyond the ambit of international law, amounting to an extra judicial activity ‘to remedy the social inadequacies of the law.’ The application of equity *contra legem* might even occur in a situation where the application of a substantial rule of law is essential as a result of the particular circumstances of a case, but reference to equity is made as an excuse for not applying it. Equity *contra legem*, so far it concerns the judicial decision-making process, is used to overturn or reject the application of an unjust law. The reality is that a law’s extent depends fully on the discretionary determination of the judges. However, such discretionary power ‘is not within the proper domain of the decision maker’. Significantly, the application of equity *contra legem* has not been welcomed either in academic discussions or international decision-making processes—both of which maintain that the express consent of involved parties is necessary for its application. The question therefore arises as to whether or not there is need for the application of equity *contra legem*. The answer must be no.

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89 See, for example, Higgins, above n 72, 220; Lowe, ‘The Role of Equity’, above n 12,81; Cheng, above n 36, 209-210.
90 Lowe, ‘The Role of Equity’, above n 12, 63.
92 Lowe, ‘The Role of Equity’, above n 12,58.
93 Rossi, above n 10, 10.
94 Ibid, 10 (emphasis added).
95 Ibid.
96 See generally, *North Sea* cases, 139 (Separate Opinion of Judge Fouad Ammoun); McIntyre, above n 79, 115.
This thesis presupposes that the application of equity in judicial decision-making process must be consistent with the function of equity *infra legem*, since it is the only function where equity has an obligation to act within law and where an international court or tribunal is entitled to exercise this function of equity without the consent of the relevant parties. However, functions of equity *praeter legem* and equity *contra legem* should not be considered in judicial decision-making processes because such considerations may instigate the presupposition that equity is separate from international law, which, in the long term, may open the door to legal anarchy.

4  *Equity in International Law Is Distinct from Equity Ex Aequo Et Bono and Absolute Equity*

The most widely accepted understanding of equity in international law and equity *ex aequo et bono* is that equity in international law is a part of international law that is applicable without the consent of State parties, while equity *ex aequo et bono* is a non-legal principle of justice that cannot be applied without the consent of the parties. In fact, equity *ex aequo et bono* evolves at the point of disregarding the applicable law. This might be reason some scholars have found *ex aequo et bono* to be close to ‘conciliation or legislation’97 or a ‘result of compromise’,98 while others found it analogous to equity *contra legem*99 or ‘absolute equity’,100 which allows the freedom to disregard the law in the quest for a fair and just

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97 Goldie, above n 36, 665, 666.
98 D Anzilotti, *Corso di Diritto Internazionale* (1928) 64, cited in Goldie, above n 36, 669. Compromise is a process of dispute settlement under diplomatic or political means of dispute settlement, for example, good faith, negotiation, mediation; and it is significantly distinct from judicial means of dispute settlement. The substantial difference between this two means of dispute settlement is that the result of judicial settlement of dispute is binding and they are made on the basis of respect for law, while the result reduced from diplomatic settlement of dispute is not binding and respect for law may not be of particular potential. See generally Munkman, above n 65, 2-7.
99 Lowe, ‘The Role of Equity’, above n 12, 56 nn 9; North Sea cases, 139 (Judge Ammoun). See also Sohn, ‘Equity in International Law’, above n 90, 285.
100 In general absolute equity imparts the notion that that law can be disregarded. According to Umpire Plumley, whose definition is still cited as the standard legal definition, ‘absolute equity’ means ‘equity unrestrained by any artificial rules in its application to the given case’. While making such definition, he had in mind that ‘international law is assumed to conform to justice and to be inspired by equity’ since he believed that ‘the way is equity, the end is justice.’ See generally, Aroa Mines case (*Great Britain Vs. Venezuela* in R H Ralston and W T Doyle, *Venezuelan Arbitration of 1903* (1904) 386. Considering its character, both Cheng and Jenks, regarded absolute equity as its own category (*sui generis*). See Cheng, above n 36, 184; See Jenks, above n 8, 426. But in modern sense, it is more likely *ex aequo et bono* decision, which does not require to use equity as supplement to the law (praetor legem), as part of the law (infra legem), or, to overturn the law (contra legem),
According to Cheng, the equity of the *ex aequo et bono* is ‘pure equity’ in all its forms, conferring not only the application of equity *praetor legem*, but also the application of equity *contra legem*;\(^\text{102}\) thus, Cheng declined to consider equity *praeter legem* and equity *contra legem* as rule of international law.

Whether equity in international law is accepted as a general principle of law or as a law in itself, in both cases it is distinct from *ex aequo et bono* and absolute equity. Article 38 of the ICJ aptly expressed the distinction between the two connotations of equity—equity in international law and equity in the *ex aequo et bono*.\(^\text{103}\) While most scholars find equity in international law distinct from equity *ex aequo et bono*,\(^\text{104}\) some do not find any ‘bright line’ between equity and *ex aequo et bono*.\(^\text{105}\) Munkman found the line between equity and *ex aequo et bono* to be very fine and her application of equity was most likely produce a decision *ex aequo et bono*.\(^\text{106}\) Jennings held almost same view and further added that the only difference between equity in international law and equity *ex aequo et bono* is that the application of equity is required by a rule of law while the other is sanctioned by the will of the parties.\(^\text{107}\) Conversely, Lauterpacht, held that ‘[a]djudication *ex aequo et bono* amounts to an avowed creation of new legal relations between the parties’ and, he added, ‘[i]t differs clearly from the application of rules of equity…[that] form part of international law as, indeed, of any system of law’.\(^\text{108}\)

Scholars unwilling to distinguish equity from *ex aequo et bono* hold the fear that a decision can be arbitrary without being a decision *ex aequo et bono*, because the Court might use rather allows the freedom to disregard the law in order to reach a fair and just result. See generally, Rossi, above n 10, 63-64.

\(^{102}\) The meaning of pure equity, in Cheng’s words- ‘the application of equity not only *secundum legem* and *praetor legem* but also, if necessary, *contra legem*. See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1st pub 1953, reprinted 1994) 20 nn 85.


\(^{105}\) Munkman, above n 65, 88, 91.

\(^{106}\) Jennings, above n 104, 401.

\(^{107}\) Lauterpacht, above n 103, 213.
equity *ex aequo et bono* under the guise of applying equity as rule of law.¹⁰⁹ This fear grew from the moment when the Court in the *North Sea* cases rejected the imperative character of the equidistance principle and affirmed the obligation to apply equitable principles as required by the application of equity as law in itself.¹¹⁰ Concerns were raised again when the Court in the *Tunisia/Libya* case, without the express consent of the parties concerned, considered the delimitation provisions of the draft convention adopted in the Third Conference solely on the basis of a particular term—‘new accepted trends’—mentioned in the special agreement of the Third Conference.¹¹¹ However, in both cases, the Court was very much concerned that its decision not be criticised and equated with a decision *ex aequo et bono*. In the *Tunisia/Libya* case, the Court seemed to understand the ‘new accepted trends’ as a rule of customary law, not a function of the express consent of the parties. However, the Court’s substantive application of equity was based on its capacity to be applied as law, not as equity *ex aequo et bono*. Therefore, equity *ex aequo et bono* was never welcomed in international law.¹¹² It has not been found that States, coming before the Court, have ever agreed to employ equity *ex aequo et bono* in decision-making processes¹¹³ and neither the ICJ nor the PCIJ has ever decided a case *ex aequo*.¹¹⁴

Other than equity *ex aequo et bono*, the concept of ‘absolute equity’, found in some initial arbitral awards,¹¹⁵ is also noted. According to Cheng, equity *ex aequo et bono* may disregard existing law for the sake of expediency, while absolute equity ignores the letter of law in favour of the spirit of the law.¹¹⁶ Therefore, the notion of absolute equity admits of the corrective role of equity. Cheng adds that absolute equity functions as an implementation of existing law.¹¹⁷ However, as Judge Weeramantry has pointed out, the employment of equity

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¹⁰⁹ Jennings, above n 104, 400, 408; Higgins, above n 72, 228.
¹¹⁰ *North Sea* cases 47[85].
¹¹¹ *Tunisia/ Libya* case, 23[4], 38 [24], 47 [45], 48[47], 60 [72].
¹¹² Lapidoth, above n 22, 172.
¹¹³ Grauer, above n 67, 101.
¹¹⁵ Arbitrations dating from *Jay Treaty* arbitrations and arbitral abuse in the *Venezuelan Arbitrations of 1903*, particularly in *Orinoco Steamship* case, is a vivid example of application of absolute equity. See Rossi, above n 10, 62-78.
¹¹⁶ See Bin Cheng, above n 36, 204.
¹¹⁷ See Ibid, 208.
ex aequo et bono or absolute equity is not a means of applying international law.\textsuperscript{118} These kinds of equity are only required to better understand the concept of equity in international law.

As has been stated above, the current rule on maritime delimitation upholds the primacy to achieve an ‘equitable solution’ where recourse to the principle of equity is ‘indispensable’.\textsuperscript{119} What this means is that equitable solution operates as a concept within existing law, where equity in delimitation must be applied as international law itself and as expressly distinct from equity ex aequo et bono. The only problem in terms of international law is that there is no framework for equitable solution that encompasses equity and equitable principles as part of international law, providing considerable scope for rising debates and criticisms regarding the use of equity and equitable principles in settling maritime boundary disputes. Only a framework for equitable solution with a list of equitable criteria can ensure the application of equity as a part of international law and thus effectively reduce criticisms of using unfettered discretion in the name of equity as a rule of law. To ensure the criticism-free application of equity, Jennings suggested establishing ‘a structured and predictable system of equitable procedures’ as an ‘essential framework for the only kind of equity that a court of law that has not been given competence to decide ex aequo et bono may properly contemplate’.\textsuperscript{120} Agreeing with Jennings’s view, this thesis intends to identify equitable criteria as developed by the decisions of international courts and tribunals and thus to contribute to the establishment of a framework for equitable solution. The usage of equity and equitable principles in settling maritime boundary disputes has been significantly transposed onto the decisions of the international courts and tribunals; therefore, this thesis holds the view that any attempt to develop a framework for equitable solution in maritime delimitation must be based on international jurisprudence. Relying on this premise, the essence of equitable solution will be dealt with in the next section.

\textsuperscript{118} Jan Mayen case, 231 [64] (Separate Opinion of Judge Weeramantry)
\textsuperscript{119} Bangladesh/India arbitration, 4 [5] (Concurring and Dissenting Opinion of Dr. P.S. Rao).
5  Equity Does Not Allow a Blank Cheque to the Decision Makers

There is no doubt that equity plays a role in affording judges a measure of discretion within a flexible structure, commensurate with the uniqueness of each dispute.\(^{121}\) However, equity in international law performs two distinct functions in the international decision-making process: first, it allows decision makers to employ it as a general principle directly applicable as law; second, it permits decision makers to produce criteria that directly controls the outcome of a given dispute.\(^{122}\) Nonetheless, this does not mean that equity allows judges a blank cheque to cash; rather, it sets the ‘limiting conditions of all legal process[es]’.\(^{123}\) As has been observed, equity, although allowing judges to resort to any rule or criteria of international law, does not allow them to go beyond the scope of law unless the disputant parties consent to do so. The ultimate goal of employing equity is to achieve an equitable result.\(^{124}\) This means that equity does not permit the application of any principles or criteria which may not produce an equitable result.

### III Equitable Solution is the Normative Rule of Maritime Delimitation

What is the aim that maritime delimitation is essentially required to achieve? In 1969, when there was no conventional rule requiring decisions on maritime delimitation to be equitable, the Court, in the North Sea cases held that ‘[w]hatever the legal reasoning of a court of justice, its decisions must by definition be just and therefore in that sense equitable’ and the Court went on to add that, as the operation of delimitation is a matter of ‘determining areas appertaining to different jurisdictions, it is a truism to say that the determination must be equitable’.\(^{125}\) In the Tunisia/Libya case, the Court affirmed this view stating that the ‘result

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\(^{122}\) Theodore Kill, ‘Don’t Cross the Streams: Past and Present Over Statement of Customary International Law in Connection with Conventional Fail and Equitable Treatment Obligations’ (2008) 106 (5) Michigan Law Review 853, 860-861. According to Kill, when any applicable law ‘requires an adjudicator to resolve a dispute by employing equitable principles so as to reach an equitable result, equity can provide the rules of decision in the absence of an expressed agreement between the parties to a dispute’: at 861.


\(^{124}\) Tunisia/Libya case, [70].

\(^{125}\) North Sea cases, 48 [88], 50 [92]
of the application of equitable principles must be equitable'. \(^{126}\) This view of the Court regarding equitable solution was echoed and affirmed in all subsequent cases and, finally, in Articles 74 and 83 of the Convention, the rule of equitable solution was adopted as conventional rule, affirming that equitable solution is the only ‘goal of delimitation’. \(^{127}\)

What are the underlying factors that equate maritime delimitation with equitable solution? Why is equitable solution the only goal that has to be achieved in the course of maritime delimitation? Should achieving an equitable solution be the only concern in settling maritime boundary disputes, whether they are settled by State mutual negotiation or third-party settlement? As will be shown, the character and nature of maritime boundary disputes requires the application of equity, recalling an equitable solution at the end.

### A Maritime Delimitation Disputes are of a Unique Category

As Stated above, equitable solution is a concept that is close to Aristotle’s understanding of equitable justice and the only result required by the application of equity in a specific case. Here the concept of ‘specific case’ is noted. To Aristotle, a specific case is a *unique* case where equity comes into play because of the application of positive law that has either resulted in injustice as a result of its generality, or lacks in its construction when reflecting a legislator’s intention to reach a just result. \(^{128}\) Thus, since ancient times, it has been firmly established that the starting point of the application of equity in a case requires the fulfilment of a condition—it has to come within the purview of a ‘specific case’. This confirms the idea that it is mainly the fact and circumstances involved in a given case that require its treatment as specific. The concept of specific case concerns refers back to Aristotle\(^ {129}\) and proves the influence of Aristotelian equity to be far reaching even in the modern period of international decision-making. In fact, no other definition of equity is as simple and effective as Aristotle’s.

Likewise, owing to Aristotle’s concept of uniqueness, maritime delimitation disputes as a whole fall within the category of ‘specific cases’ where each case is ‘unique and requires

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\(^{126}\) *Tunisia/Libya case*, 59 [70].

\(^{127}\) *Bangladesh/Myanmar case*, 61 [183]. *North Sea cases*, 50 [92]


\(^{129}\) Ibid.
specific treatment, the ultimate goal being to reach a solution that is equitable’. In fact, the principle of equitable solution is firmly rooted in the international law of the sea and emanates from the idea of the uniqueness of each case. This uniqueness is the result of a great variety of geographical features on the continental shelf, which indicates that it is very difficult to posit any fixed rule governing the establishment of maritime boundaries between States. The idea of the uniqueness of each delimitation case also finds significant support in the maritime jurisprudence. In the Anglo-French arbitration, the tribunal noted that ‘equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case’. In the Tunisia/Libya case, the ICJ affirmed this view, stating that each delimitation ‘case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances’. Accordingly, in the Libya/Malta case, the Court clearly noted that ‘every case of maritime delimitation is different in its circumstances from the next’, which confirms the idea of the uniqueness of each maritime dispute. The case law reveals that the international courts and tribunals, in settling maritime boundary disputes, repeatedly upheld the view that the maritime boundary ‘delimitation is to be effected … taking into account all relevant circumstances’, and asserted that ‘there is no legal limit to the factors’ that can be considered relevant. Here, the concept of uniqueness or unicum and relevant circumstances reflect a common phenomenon: ‘fact dependency’. This ‘fact dependency’ is the ultimate lens through which the Court sees the justification for employing equity. Higgins rightly observed that equity, though it lacks specific content in international law, operates as a means for considering all the relevant circumstances in a specific case. In fact, whether a case is specific or not depends wholly on the Court’s or tribunal’s consideration of the relevant facts of the case. The judgement of the North Sea cases indicates

130 *Bangladesh/Myanmar* case, 96 [317].
132 Nelson, above n 120, 837–858.
133 *Anglo-French* Arbitration, 397, 426 [97].
134 See *Libya/Malta* Case, 55 [76].
135 *North Sea* Case, 46; *Gulf of Maine* case, 292-93, 313; *Tunisia / Libya* case, 47; *Libya / Malta* Case, 38; *Anglo-French* Arbitration, 421; and *St. Pierre and Miquelon* Arbitration, 31 ILM, 1163.
136 *North Sea* Case 50[93].
137 Higgins, above n 72, 221. Lowe did investigate about the content of equity in international law. To him consideration of anything may infer as content of equity as far as it is necessary and consistent with the concept of fairness and justice in international law and does not override the law. See generally, Lowe, ‘The Role of Equity’, above n 12,78–80.
that the Court, after considering the relevant facts associated with these cases—for example, the geographical circumstances—decided to apply equitable principles. Therefore, when the Court repeatedly affirmed that maritime boundary delimitation must be ‘effected in accordance with equitable principles’, the idea that maritime boundary cases, ab initio, were accorded the status of specific case was supported. Indeed, the uniqueness of facts and circumstances involved in each maritime boundary dispute is the most crucial reason that ‘delimitation must principally be based on criteria of equity’. Thus, it can be argued that the relevant facts and circumstances associated with each maritime boundary dispute are unique and ‘require specific treatment to reach a solution that is equitable’. Indeed, the jurisprudence pertaining to maritime delimitation maintains such a view—from the North Sea case to more recent cases—and this exemplifies the idea that achieving an equitable solution is the normative rule of maritime delimitation.

B Maritime Delimitation Reflects Distributive Justice

The relation between maritime delimitation and distributive justice is an unavoidable topic in international law. Underlying this view is the relationship between equity, equitable solution and distributive justice. Franck considered equitable solution as a means of ensuring distributive justice in maritime delimitation, revealing that Article 83(1) of the Convention required States ‘to achieve an equitable solution’ confirming the acceptance of the concept of ‘broadly conceived equity’ relating to maritime delimitation that put ‘distributive justice in the driver’s seat’—recalling the application of broader notions of distributive justice by the international courts and tribunals. Franck confirmed the distributive character implicit

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138 Concavity of the German Coast and its cut off effect. See North Sea Case, 17 [8], 21 [15]
139 Ibid, 47 [85 (b)].
140 Ibid, 46. See also Gulf of Maine case, 292-93, 313; Tunisia / Libya case, 1982 at 47; Libya / Malta Case, 38; Anglo-French Arbitration, 421; and St. Pierre and Miquelon Arbitration, 1163. The Jan Mayen Conciliation Commission incorporated this opinion in the recommendations if made to help in a dispute over the breadth of the exclusive economic zone between Norway and Iceland. Donald M Johnston, The Theory and History of Ocean Boundary Making (Queens University Press, 1988) 159-163.
141 Leanza, above n 64, 283.
142 Bangladesh/Myanmar case 96 [317].
143 Ibid.
144 See generally Franck, above n 63, 61-67, 68, 69-75. To Franck, under the ‘broadly conceived equity’ approach, equity itself comprises a rule of law and is the dominant applicable rule for maritime delimitation. This approach affords tribunals a great deal more discretion than corrective equity and tends to be more openly distributive: at 57, 58-75.
in corrective equity as expressed in Article 6(2) of the CSC, stating that ‘[t]his rule exemplified the effort to balance determinacy with concern for justice. It invited principled and reasoned fairness discourse, including elements of distributive justice’.\footnote{Franck, above n 63, 61.}

However, the relationship between equity and distributive justice is particularly pronounced in the legislative context of negotiations regarding the law of the sea, where it differs from its usage in the Courts.\footnote{Rossi, above n 10, 194. According to Rossi, the legislative debate regarding delimitation principles of the continental shelf, for example debate regarding the acceptance of either equitable principles or equidistance/special circumstances principles, proves the legislative prominence of distributive justice: at 204-210.} Distributive justice, in terms of maritime boundary delimitation, has not received judicial acceptance, while the concept of corrective justice has been incorporated by the Courts in support of their decisions.\footnote{Rossi, above n 10, 201; McIntyre, above n 79, 120} The Courts in the \textit{North Sea} cases, the \textit{Libya/Malta} cases and the Anglo-French arbitration repeatedly affirmed the corrective role of equity.\footnote{McIntyre, above n 79, 120; Franck, above n 63, 64.} This may be because maritime delimitation is a process of the acquisition of territory through judicial activism; hence, to avoid criticisms regarding legitimacy and the ineffectiveness of court judgements, each court tried to avoid the notion of distributive justice—basically a Stately activity—and embraced the notion of corrective justice to legitimate its decisions under the banner of international law. Whatever the consideration, while resolving maritime boundary disputes the Courts allocate disputed areas between two competing States by employing rules of international law; this is nothing other than distributive justice under the veil of corrective justice. Friedmann has supported this view, stating that the Court ‘applied a kind of distributive justice while denying that it was doing so’.\footnote{Friedmann, above n 113, 229.} Munkman explained such denial by the Court as ‘a matter of judicial technique’.\footnote{Munkman, above n 65, 115.} In view of the above discussion, it can be asserted that, as long as the 1958 Geneva Conventions were in force as a consequence of the obligatory nature of the equidistance principle, the international courts and tribunals had no options but to advocate the corrective role of equity to reach an equitable solution; however, now that the Convention is in force and emphasises only the achievement of an equitable solution while lacking any explicit mechanisms for attaining such a result, the Courts and tribunals have no other alternative than to adopt a

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\item \footnote{Munkman, above n 65, 115.}
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distributive role of equity leading to a proportionate result and, thus, to ensure an equitable solution—since equitable justice is a conferment of proportionate justice where proportionate justice itself reflects a kind of distributive justice. Thus, one may find the close proximity of equitable solution to Aristotelian theory of equitable justice, where Aristotle, seeking to fulfil the requirement of justice, recommends distributive justice by employing the principle of proportionality.\textsuperscript{151}

C Maritime Delimitation is not Apportionment

There are several concepts similar to delimitation, such as allocation and appropriation. Although these concepts refer almost to the same purpose, the unique nature and procedure of maritime delimitation significantly distinguishes it. It should be noted that maritime delimitation by judicial means is distinct from delimitation by States, because delimitation by judicial settlement is a legal operation that must be based ‘on consideration of law’;\textsuperscript{152} while delimitation by States is based on negotiations, ‘which involves political considerations, among others’\textsuperscript{153}

Delimitation, through whatever means it may be achieved, requires an equitable solution in the end.\textsuperscript{154} The fundamental reason underlying this view, according to the Court, is rooted in the conceptual differences and legal distinctions between maritime delimitation and apportionment, and this may be the reason that the Court in the North Sea cases, in the first instance, distinguished these concepts. In fact, the conceptual distinction between the notions of delimitation and apportionment led the Court to employ equity in such a way that an equitable solution could be achieved, rather than to mechanically follow the imperative conventional rule of delimitation that would have led to an automatic result.

\textsuperscript{151} Aristotle, above n 127, 147-48. Aristotle made distinction between two kinds of justice. The first one is distributive justice which consists in the distribution of something in shares proportionate to the deserts of each among several parties. And his second one is Commutative justice which is corrective in transactions between man and man. See Lapidoth, above n 22, 163-164 (quotation omitted).

\textsuperscript{152} Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (The Hague, 14th February 1985), ILM, Volume 25, 252, 193 [120] (hereinafter referred to as Guinea and Guinea-Bissau case); North Sea Cases, 48 [88]; Tunisia/Libya Case, 60 [71].


\textsuperscript{154} ‘The delimitation…… shall be effected ……in order to achieve an equitable solution’. See UNCLOS, Article 74 (1) and 83 (1).
The fundamental difference between delimitation and apportionment is that maritime delimitation presupposes ‘an area of overlapping potential entitlement’ that *ipso facto* and *ab initio* appertains to States as the natural prolongation of their land territory for which they have already acquired legal title by virtue of their sovereignty over the land. On the contrary, apportionment does not relate to any area that already appertains to the involved States; it refers to the determination of disputes regarding an area which is *de novo* in character—*res nullius* or not yet divided. This thesis would like to add that, in delimitation, there is a legal requirement to maintain a common standard, intelligible by international law, for measuring the equitableness of delimitation for two reasons: first, to restrain any arbitrariness by the Courts and tribunals in determining the delimitation processes and result and, thus, to avoid a decision *ex aequo et bono*; second, to ensure an equitable manner of delimitation that can be carried through all maritime delimitation. This may be the reason that the Court in the North Sea cases considered ‘a reasonable degree of proportionality’ as the ‘final factor to be taken account’ and the Court in the Anglo-French case revealed the legal basis for its functioning as a factor for determining the reasonable or unreasonable—the equitable or inequitable—effects of particular geographical features or configurations on the course of a delimitation line. It should be noted that, despite the distinction between these two concepts, given the particularity of a given case, both apportionment and delimitation may lead to a comparable or identical result depending on their proportionate or equal division.

However, it should be recalled that delimitation in an equitable manner is not the same thing as the awarding of a just and equitable share of a previously undivided area. A claim to a ‘just and equitable share’ of a marine area equates to apportionment and even the notion of ‘equitable apportionment’ is found to be inconsistent with that of delimitation. Thus, it can be argued that delimitation and equitable solution actually represent a reciprocal relation and that any issue of maritime boundary delimitation must be conceptualised by recourse to

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155 *Bangladesh/Myanmar* 117[397], *North Sea Cases*, 22[19].
156 *North Sea Cases*, 23.
157 *North Sea Cases*, 52[98]; *Anglo-French Case*, [100]
159 For this view, see, Franck and Sughrue, above n 103, 577. See also *North Sea Cases*, 23, 31.
160 Munkman, above n 65, 86.
equitable solution. In other words, delimitation must reflect an equitable solution and, thus, equitable solution can be equated with maritime delimitation.

However, the adjective ‘equitable’ has been used in several other fields of international law where several equitable results have been achieved on the basis of the concept of equity. For example, ‘equitable solution’ for maritime delimitation; ‘equitable utilisation’ as acknowledged by the Court in the Diversion of Water from the River Meuse case\(^\text{161}\) and codified by the United Nations Convention on the Law of the Non-navigational Uses of International Watercourses in 1997\(^\text{162}\); ‘equitable allocation’ of the common property, in particular the fisheries of the high seas, as established by the Court in the *Fisheries Jurisdiction* cases\(^\text{163}\) and recognised in Articles 56(1), 62(3), 116 of the Convention;\(^\text{164}\) and ‘equitable sharing’ of the common heritage—pertaining to financial and other economic benefits derived from activities in the area as stipulated in Article 140 of the Convention.\(^\text{165}\)

The question therefore arises as to whether there could be any alternative other than the notion of ‘equitable solution’. The answer must be no because of the distinct character of each notion. The notion of equitable solution is related to the process of maritime delimitation between two coastal States presupposing a disputed fringe area of overlapping entitlements,\(^\text{166}\) whereas the notion of equitable utilisation’ is related to the right to utilise shared natural resources under the jurisdiction of a relatively limited group of States in geographical continuity, for instance, riparian States\(^\text{167}\); the notion of ‘equitable allocation’ or ‘equitable sharing’ denotes the interests or right of all related States to common property or common heritage in areas beyond State sovereign rights and jurisdiction. It is worth noting that there remains no option of apportioning any area of marine spaces, since none of these

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\(^{161}\) The PCIJ, in this case, addressed the concept of equitable utilisation while granting the Netherlands a ‘lesser’ right. See *Diversion of Water from the River Meuse case*, (Judgment) [1937] P.C.I.J. Series A./B., No.70, 5-7, 16, 18, 20.


\(^{163}\) *Fisheries Jurisdiction* *(United Kingdom v. Iceland)* ICJ Rep 1974, 27-28 [62], 31-32 [73], 33 [78].

\(^{164}\) UNCLOS, Articles 56 (1), 62 (3), 116

\(^{165}\) UNCLOS Article 140

\(^{166}\) *North Sea Case*, 22 [20]; *Bangladesh/Myanmar Case*, 117 [397].

areas are attributed the status *de novo* or *res nullius*. All the marine spaces of the world are now divided into two parts. Within national jurisdiction every coastal State has *ipso facto* and *ipso jure* acquired sovereign jurisdictions and rights; other zones are beyond national jurisdiction but under international jurisdiction, such as high seas and other areas where any claim of sovereignty is invalid and from which all nations and mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, have the freedom and the common right to benefit.

In summary, it can be concluded that while delimitation forms a legitimate mode of acquiring sovereignty over marine spaces as permitted under international law, equitable solution is the normative rule of maritime delimitation, since it is the only goal to be achieved.

### IV THE PRINCIPLES AND CRITERIA FOR EQUITABLE SOLUTION

It is clearly conceivable from the above discussions that the legal concept of equitable solution provides a direct emanation of equity applicable as law. The detailed criteria of equity are interwoven within the concept of ‘equitable solution’. This assertion necessarily gives rise to the question as to whether equity has solidified into its own legal system reflecting a logical, normative structure for equitable solution and thus providing the Court with a logical and legal basis from which to apply its decision-making processes. Alternatively, according to Jennings and Scovazzi, the Court has developed criteria for equitable solution, mixing both law and equity in a way where equity is applied as an extension of the conventional rule of maritime delimitation as embodied in Article 6 of the 1958 CSC. Whatever the case, it is clear that a structured, listed and defined criteria of equitable solution functioning as the governing rule for maritime delimitation is still lacking.

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168 Article 89 of the UNCLOS States that ‘No State may validly purport to subject any part of the high seas to its sovereignty’, and Article 136 of UNCLOS States that ‘The Area and its resources are the common heritage of Mankind.’

169 UNCLOS, Article 87, Article 140.

170 Cf Remarks made by Professor Mark Janis in the seminar on Equity in International Law’, convened by its Moderator Louis B Sohn. See Sohn, ‘Equity in International Law’, above n 90, 288.

in international law, because the UNCLOS provisions dealing with the delimitation of continental Shelf and EEZ are overly vague. The ambiguity of these provisions, rather than resolving maritime boundary disputes, to some extent offers considerable scope for conflicting interpretations leading to further maritime boundary disputes. Nonetheless, there must be a potential remedy for this ambiguity. Since both the conventional and customary sources of international law are seemingly silent in this regard and the debate regarding equity’s route of entry into international law as a general principle reduces its acceptability as a source of international law, judicial decisions remain the only legal basis for identifying such delimitation criteria. Therefore, a careful and insightful analysis of international case law on maritime delimitation will be helpful in defining such delimitation criteria in ‘a more complete and more precise’ way.\textsuperscript{172}

A brief discussion of the contents of equitable solution that are common to all forms of delimitation and result from the equitable considerations of judges may constitute a starting point in identifying the criteria for equitable solution.

\textbf{A \ The Fundamental Criteria for Equitable Solution}

\subsection{Maritime Entitlement}

Normally, entitlement and delimitation are two distinct concepts but, in the context of delimitation, they are interrelated.\textsuperscript{173} In effect, entitlement is a prerequisite for any maritime delimitation. As in the Bangladesh/Myanmar case, the ITLOS affirmed that delimitation presupposes ‘an area of overlapping entitlement’.\textsuperscript{174} This infers that the first step in any delimitation is to determine whether there are entitlements and whether they overlap. Here the notion of entitlement is noted. Entitlement is the fundamental criterion for equitable delimitation that must be respected and guaranteed in the process of achieving an equitable solution, since it provides the legal basis for the seaward territorial extension of a coastal

\textsuperscript{172} Paul Bravender-Coyle, ‘The Emerging Legal Principles and Equitable Criteria Governing the Delimitation of Maritime Boundaries between States’ (1988) 19 Ocean Development and International Law 172.

\textsuperscript{173} Bangladesh /Myanmar case, 117 [397]-[398].

\textsuperscript{174} Ibid, 117 [397].
State. The *North Sea* cases established much of what became the ground rules for the subsequent consideration of this subject.

Unlike the Convention, which lacked any defined limit for continental Shelf in the 1958 Geneva Convention on the Continental Shelf, the Court in the *North Sea* cases, to achieve an equitable solution, referred to the natural prolongation of a State’s land territory into and under the sea in accordance with its entitlement to the continental shelf, stating that:

> delimitation is to be effected … in such a way as to leave as much as possible to each party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other*.  

Here the Court seems to accept ‘natural prolongation’ as an equitable concept providing the legal basis ensuring a coastal State’s entitlement to the continental shelf. The reason the Court had to introduce the notion of ‘natural prolongation’ as the legal basis for the coastal State’s title over the continental shelf is that the 1958 CSC did not provide any defined limit for the continental shelf; rather, it provided a superficial concept of a 200 metre depth method or exploitability, favouring technologically developed States in their ‘appropriation of the natural resources in accordance with a malleable standard of exploitability’, which, although carefully avoided, exemplifies the status of the continental shelf as *res nullius* and renders the delimitation process as more closely aligned with apportionment. Therefore, the Court had no alternative but to make it clear that the coastal State’s entitlement over the continental shelf existed ‘*ipso facto* and *ab initio*, by virtue of its sovereignty over the land’ because ‘equity does not require that a State without access to the sea should be allotted an area of continental shelf’. Thus, the basis of the notion ‘natural prolongation’ can be found rooted in equity and is designed to transmit the conceptual force of the substantive principle of

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175 *North Sea* Cases 47 [85 (c)], 53 [101 (c) (1)]; In the view of the Court, ‘the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State’. See at 47 [85 (c)].

176 Article 1 of the 1958 CSC.

177 Rossi, above n 10, 213.

178 *North Sea* Cases, 22 [19].

179 Ibid, [91].
maritime entitlement—‘the land dominates the sea’\textsuperscript{180}—into a legal force to create a legal basis for coastal State entitlement over the continental shelf.\textsuperscript{181} ‘The land dominates the sea’ becomes the most fundamental equitable criterion for delimitation. Based on this criterion, another two other equitable criteria—namely, non-encroachment and the ‘non-cut off’ effect—have evolved and are seemingly subordinate to the domination of the land, though their application is deemed essential to ensuring an equitable solution.

(a) Non-encroachment and the Non-Cut off Effect

In the \textit{North Sea} cases, the Court stressed the point that the natural prolongation of a coastal State ‘must not encroach upon what is the natural prolongation of the territory of another State’.\textsuperscript{182} The Court also emphasised that any cut-off effect to the natural projection of the coast (particularly where the coastal shape is concave in nature) resulting from the obligatory use of any particular method must be prevented to ensure an equitable solution.\textsuperscript{183} Thus the non-encroachment of natural prolongation and the avoidance of any cut-off effect have evolved as fundamental criteria for equitable solution since the \textit{North Sea} cases. In these cases, the Court’s effort in making distinction between delimitation and apportionment, between distributive justice and corrective justice, its caution in taking the view that delimitation does not confer the idea of the distribution of common property or a yet undivided area to achieve a just and equitable apportionment, its effort to achieve an equitable result in accordance with equitable principles, all revolved around a single consideration: to ensure a coastal State’s \textit{maximum reach} to the seaward limit of its maritime entitlement without being cut-off and without encroaching the natural prolongation of the land territories of the other State(s).\textsuperscript{184} This view becomes more concrete when the Court ruled that

\textsuperscript{180} See Ibid., 51 [96]; \textit{Tunisa/Libya Case}, ICJ Rep., 1982, 44[39], 47 [44], 61 [73]. See also Mark B Feldman, ‘The Tunisia-Libya Continental Shelf Case: Geographic Justice or Judicial Compromise?’ (1983) 77 (2) \textit{American Journal of International Law} 219, 228-231.

\textsuperscript{181} ibid.

\textsuperscript{182} North Sea Cases 47 [85 (c)].

\textsuperscript{183} Ibid., 17 [8], 21 [15], 31-32 [44].

‘delimitation is to be effected … in such a way as to leave as much as possible to each party all those parts of the continental..’.

Thus, it seems reasonable to infer that the actual intention of the Court was to ensure that, whatever the method or principles employed for delimitation, the limit of entitlement of the coastal States would be respected. This approach of the Court followed in subsequent cases. Even, in the latest Bangladesh/India case, the Arbitral Tribunal affirmed this maximum reach principle stating that a delimitation line must not ‘prevent a coastal State from extending its maritime boundary as far seaward as international law permits’.

It is worth noting that, although the concepts of non-encroachment and the non-cut off effect are interchangeable, they are also different. Such difference can be seen in the Gulf of Maine judgement, where the Court dealt with these two concepts separately. ‘Non-encroachment on natural prolongation’ can form a part of the content of equitable solution when natural prolongation is considered a source of title to a continental shelf. As far as the Convention is concerned, natural prolongation is immaterial up to the 200 nm limit of the continental shelf and any incident of encroachment may take place as a consequence of coastal projection to the maximum limit of different maritime zones as permitted by the convention. On the contrary, the no cut-off” effect forms a part of equitable solution when it refers to the need to ensure the seaward extension of a coastal State as far as international law permits. However, given this premise of entitlement, one may raise the question as to the permissible limits of maritime zones that a State is entitled to project from its coasts.

The Convention has particular provisions defining the limits of different maritime zones. After the Convention came into force, a coastal State was entitled to extend its territory up

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185 North Sea cases, 53-54 [101].
188 Bangladesh/India Arbitration, 122 [417]. In other place of its award, it stated that ‘any delimitation—with or without adjusting an equidistance line—results in limiting the exercise of coastal States’ sovereign rights over the continental shelf off its coast to the full extent authorized by international law’: at 116 [398].
190 Gulf of Maine case, 246,312-313 [157].
to the limit permitted by the convention. The Court in the Libya/Malta case decided that a coastal State was entitled to extend its EEZ and continental shelf up to 200 nautical miles from the coast as outlined in Article 76 of the Convention (see Appendix I in this thesis), irrespective of the geophysical characteristics of the intervening seabed and subsoil. Thus, both positive law and jurisprudence confirm the idea that every coastal State automatically has ownership of a continental shelf for up to 200 nm from its coastline. However, there are some cases, if certain criteria are met, where a coastal State is entitled to extend its continental shelf beyond 200 nm. In such cases, a coastal State is entitled to extend the limit of its OCS to a maximum of 350 nm from the baseline or 100 nm beyond the 2,500 metre isobaths—whichever is greatest.

However, it must be stressed that if the geophysical circumstances of a coastal State permit it to extend its continental shelf beyond 200 nm, equity requires that entitlement of the coastal State to exercise its seaward territorial extension should continue flawlessly, without encroaching on the natural prolongation of the land territory of other States and preventing any cut-off effect up to the limit that law permits in conformity with the basis of its maritime entitlement—unless it is impossible to reach that limit because of geographical and geophysical characteristics. This view may raise more questions as to where the geophysical characteristics of the continental shelf permit the extension of the continental shelf beyond 200 nm between two opposite States and what may be the actual effect of determining the delimitation line if (1) the extent of the marine area between the States exceeds 400 nm and the geophysical features of the continental shelf permit its extension beyond 200 nm and (2)

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192 Article 76 of the Convention mandates two cut-off lines for the outer limit of the outer continental Shelf (OCS) which can be used in any combination so as to maximise the extent of the OCS: first cut-off line is based on bathymetry, and limits an OCS to 100 nm from 2500 meter isobath; second cut-off line is based on distance, and limits an OCS to 350 nm from the coastal baseline. See UNCLOS, Article 76 (5). See also Brian J Van Pay, ‘Disputed Areas Beyond 200 Nautical Miles: How Many and Will Geophysical Characteristics Matter In Their Resolution’ in Myron H. Nordquist abd John Norton Moore (eds), Maritime Border Diplomacy (Martinus Nijhoff Publishers, 2012) 49.

193 See limits of the maritime zones. above n 415 or UNCLOS, Article 3, 33, 57, 76 (1) - (5).

194 The principle of non-encroachment was first articulated by the Court in the North Sea Cases and it is confirmed in later cases. The Court, in the North Sea Cases, decided that ‘delimitation is to be effected …… without encroachment on the natural prolongation of the land territory of the other’. See generally North Sea Cases 47 [85 (c)], 53 [101 (c) (1)]; Anglo-French arbittration, 1977, 49 [79]; Tunisia/Libya Case, 43 [37], 44 [39].

195 Bangladesh/India arbitration, 122 [417].
the length of the States’ coastlines are either similar or grossly dissimilar. Here, there is a very little room for being confused. As delimitation does not equate to appropriation and, on the contrary, remains a task of dividing a maritime area of overlapping potential entitlement between two States, the above mentioned equitable criteria are actually designed to accommodate and neutralise such factual elements and their application—in effect, corresponding to an equitable solution. Again, one may argue that if delimitation is seen as a process of resolving disputes regarding overlapping entitlements between States, then a situation where there exists no competing entitlements would be ideal. Antunes Stated that, in such situation, the legal entitlement of a State would be ‘concretised as exclusive jurisdiction’.196

In conclusion, it can be asserted that maritime delimitation is mainly an operation to establish the maritime jurisdiction of each coastal State while showing proper respect for the basis of its maritime entitlement and requiring the essential application of equitable criteria, namely, non-encroachment and the non-cut off effect, to ensure an equitable result. Any alternative to this will make the result inequitable, since it is not logical to respect the legal rights of one State ‘fully’ and respect the legal rights of another State ‘partially’. As such, respecting each set of legal rights to a different extent would not lead to an equitable result.197 In effect, the non-cut off and non-encroachment principles are the fundamental equitable criteria to be followed in maritime delimitation. The maritime jurisprudence reflects that these criteria have been consistently applied in maritime delimitation cases either directly or indirectly, and they have prevailed over other competing equitable principles almost without exception.198

2 Proportionality

Proportionality is an integral part of moral and legal discourse in every effective legal system.\(^{199}\) In particular, it plays an important role in the discourse of the international courts and tribunals when reaching an equitable solution.\(^{200}\) It is the only legal means that transforms equity from the abstract to the concrete in the context of attaining justice.\(^{201}\) Nonetheless, its inherent ‘suitability’\(^{202}\) makes it central to the effectiveness and fairness of any decision-making process.\(^{203}\) Although proportionality is a commonly used term in modern international law with a range of standards and meanings that vary from discipline to discipline,\(^{204}\) it has been marked as a cornerstone principle in the law of maritime delimitation.\(^{205}\)

Proportionality in regard to maritime delimitation confers the idea that ‘maritime delimitation should be effected taking into account the ratio between the areas of the continental shelf attributed to each party and the lengths of their coastlines’.\(^{206}\) From the very inception of the idea of maritime delimitation, proportionality has been accepted as the most influential element of equity. The earliest method of maritime delimitation as outlined by Pufendorf was

201 Franck and Sughrue, above n 103, 587.
202 According to Han ‘suitability’ of proportionality denotes that the means must be suitable or helpful to achieve the legitimate objectives, and thus it not only weighs the relationship between end and means, but also requires that the end itself must be legal and justifiable. See generally Han Xiuli, ‘The Application of the Principle of Proportionality in Tecmed v. Mexico ’ (2007) 6 Chinese Journal of International Law 636-637; Han Xiuli, ‘On the Application of the Principle of Proportionality in ICSID Arbitration and Proposals to Government of the People’s Republic of China’ (2006) 13 James Cook University Law Review 234-235.
203 Michael Newton, Proportionality in International Law (Oxford University Press, 2014) 15.
204 The principle of proportionality plays an important role in various discipline of international law, such as, self-defence in war or armed conflict, international responsibility, treaty law, human rights, humanitarian law, limits of lawful governance, the limits of lawful State punishment, the regulation of investor-State interests, maritime delimitation, and the law of countermeasure in trade. For a clear view on these disciplines, see generally Newton, above n 200,15-60; Franck, above n 197, 715, 716. Higgins, above n 72, 228-236; J Delbruck, ‘Proportionality’ in R Bernhardt (ed), Encyclopaedia of Public International Law (Elsevier, vol. III, 1997) 1140-1144. Proportionality also plays a primary role in limiting the power of taking countermeasures in response to international wrongful acts. Four different standards of proportionality functions in this countermeasuring activities- Normative standard, retributive standard, coercive standard and executive standard. See generally, Enzo Cannizzaro, ‘The Role of Proportionality in the Law of International Countermeasures’ (2001) 12 European Journal of International Law 889-916.
205 Newton, above n 200, 52.
seen as a composition of dual principles—equality and proportionality—where equality was qualified by proportionality. To achieve an equitable solution in a case of maritime delimitation, Francis Vallat, as early as 1946, was so sure about the capability of this principle that he strongly suggested that ‘where a bay or gulf is bounded by several States … the most equitable solution would be to divide the submarine area outside the territorial waters among the contiguous States in proportion to the length of their coastline’. However, it should be noted that this suggestion was simply a scholarly effort to understand proportionality as one of the ‘methods’ for maritime delimitation. The judicial approach is significantly different.

The North Sea cases were the first delimitation cases where the ICJ held that overlapping areas were to be divided ‘in agreed proportions or, failing agreement, equally’ and proportion was to be considered as the ‘final factor’ to be taken into account to ensure the equitability of the delimitation result. However, in these cases, the Court did not consider proportionality as an independent method or principle of delimitation; rather, it viewed it as one of the equitable criteria of which application is essential to ensuring equitable delimitation. The tribunal in the Anglo-French award clarified the ICJ’s view of the North Sea case by highlighting that ‘it is disproportion rather than any general principle of proportionality which is the relevant….factor’. Although the tribunal rejected the general applicability of proportionality, in doing so it provided the legal basis for checking the disproportionality of a delimitation line and for remedying any inequitability produced by

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207 According to Samuel Pufendorf, the boundary of lake, river, straits, or bay between two States shall extend into the ‘middle of the water, from every part of their respective shore’ (which means a middle line in proportion to the breadths of its land). See Samuel Pufendorf, Of the Law of Nature and Nations (Basis Kennett trans, Oxford, 4th ed, 1729), bk IV, ch V, 383.


209 North Sea Cases, ICJ Reports, 1969, 22 [18], 53 [101]. The reason here the ICJ used the word ‘equally’ might be based on these considerations that the coastlines of the competing three States crossing the North Sea are in fact comparable in length and each of them is entitled to a continental shelf area extending up to this central point of the North Sea: at 21[15], 53 [101 (C) (2)]


211 The reason might be that the number of lines capable of producing the same proportion is limitless, and thus it is quite impossible to determine any concrete delimitation line by using proportionality as a delimitation method. See Yoshifumi Tanaka, Predictability and Flexibility in the Law of Maritime Delimitation (Hart Publishing, 2006) 179.

212 For this view see generally North Sea cases 21 [15], 22[18], 53 [101].

213 Anglo-French case, 58[101].
particular geographical configurations.\textsuperscript{214} However, in the \textit{Tunisia/Libya} case, the function of proportionality in maritime delimitation was altered: it undertook the role of checking the equitability of a proposed result arrived at by some other means, rather than limiting its application to particular geographical circumstances.\textsuperscript{215} Nonetheless, the Court found it to be a function of equity and, as the only absolute requirement of equity to which comparisons could be made and to avoid potential discretionary abuse since all balancing tests rely on judicial discretion, it was designated as a ‘fundamental principle’ for ensuring equitable delimitation.\textsuperscript{216} Later, in the \textit{Libya/Malta} case and in the \textit{Jan Mayen} case, the role of proportionality was altered again and considered in terms of relevant circumstances.\textsuperscript{217} In spite of the diverse roles played by proportionality in international case law relating to maritime delimitation, the concept of proportionality was finally accepted in the \textit{Romania/Ukraine} case as a method for assessing the equitability of a proposed result, rather than as a relevant circumstance or a useful method applied to some particular geographical conditions.\textsuperscript{218}

In sum, the principle of proportionality constitutes part of the equitable result in itself. The reason for this is that an equitable result cannot be defined as such unless it is proportionate. It is evident that proportionality is an important aim of maritime delimitation because it is employed as a legal tool for the post hoc assessment of the equitability of a proposed result. Further, in the \textit{Romania/Ukraine} case, the ICJ invoked the concept of proportionality under the title ‘the disproportionality test’. This confirms the idea that an equitable result can only be achieved if it is not disproportionate. Consequently, proportionality is neither a relevant circumstance nor a useful method applied to particular geographical conditions; instead, it becomes a fundamental aspect of equitable solution, accounting for the equitableness of a result arrived at by other means.\textsuperscript{219} This thesis argues that, to be characterised as equitable solution, proportionality as an aspect of equity must fulfil the requirements of other equitable

\textsuperscript{214} Ibid, 58 [100]-[101].
\textsuperscript{215} \textit{Tunisia/Libya} case, 91 [131].
\textsuperscript{216} \textit{Tunisia/Libya} case, 75 [103], 76 [104], 91 [130]-[131]. See also Yoshifumi Tanaka, ‘Reflections on the Concept of Proportionality in the Law of Maritime Delimitation’ (2001) 16 (3) \textit{International Journal of Marine and Coastal Law} 539..
\textsuperscript{217} \textit{Libya/Malta} Case, 50 [68]; \textit{Jan Mayen} Case, 68-69 [68].
\textsuperscript{218} \textit{Romania/Ukraine} case, 129-130 [210]-[216].
\textsuperscript{219} \textit{Libya Malta} Case, 1985, 45-6 [58]. \textit{Rumania/Ukaraine} Case, 2009, 99-100 [110].
criteria derived from equity\textsuperscript{220} that are intertwined with the fundamental principle of maritime entitlement—‘the land dominates the sea—in a way that will be reflected in the proposed delimitation line virtualising the legal force of the land in an explicit and evident manner. Nevertheless, as will be shown, proportionality is the most influential element that plays both an expressive and implied role under the banner of equity to achieve an equitable result.

3 Single Maritime Boundaries

The term ‘single maritime boundary’ (SMB) refers to a single uninterrupted and all-purpose boundary line delimiting the various zones of maritime jurisdiction both in the sea bed and the superjacent waters appertaining to the coastal States.\textsuperscript{221} This concept emerged from the equitable consideration of the inexpediency that a coastal State faces in exercising its jurisdiction over different maritime zones as permitted by law. The equitable consideration is that, since conventional rule defines distinct limits for different maritime zones involving different rights and duties, maritime delimitation under special circumstances may conceivably lead to the real possibility of a State’s having two legally separate areas beyond its territorial sea and up to a maximum distance of its EEZ at 200 nm. The reason an SMB extends only up to the maximum distance of the EEZ is that two legal maritime zones—the EEZ and the continental shelf—coexist within this common extent.\textsuperscript{222} However, what is the legal basis of establishing an SMB?

The Convention does not provide any legal provision for the establishment of an SMB, except the legal basis for claiming the limit of each maritime zone at up to 200 nm—a figure identical for both zones. Nonetheless, the legal limit of entitlement for the continental shelf as identical to that of EEZ does not necessarily constitute the legal basis for establishing an SMB as the relationship between the EEZ and the continental shelf is not fully clarified. These two maritime regimes have different origins and different bases in international law and the UNCLOS provisions controlling a coastal State’s rights and jurisdictions in these

\textsuperscript{220} Non-encroachment and no cut-off effect.

\textsuperscript{221} Nicaragua/Honduras case, 739 [265]; Saint Pierre and Miquelon case (Newyork, 10 June, 1992) ILM, vol. 31, 1165 [ 47].

\textsuperscript{222} Nuno Marques Antunes, Towards the Conceptualisation of Maritime Delimitation (Martinus Nijhoff Publishers, 2003) 336.
zones are different;\textsuperscript{223} indicating that the area of an EEZ may be different from that of a continental shelf.

However, UNCLOS indirectly supports the concept of an SMB because it has no provision against the establishing of an SMB and no rule for managing the two separate delimitation lines. In the \textit{Gulf of Maine} case, the chamber of the ICJ relied on this argument stating that ‘there is certainly no rule of international law to the contrary, and, in the present case, there is no material impossibility in drawing a boundary of this kind’.\textsuperscript{224} Notwithstanding, the establishment of an SMB in this case cannot be treated as constituting a legal basis for an SMB in the later cases, because the parties involved in this case asked the chamber to draw a single line that would delimit both the continental shelf and the superjacent water column.\textsuperscript{225} The \textit{Jan Mayen} case is the first case where the Court, in the absence of any agreement between the parties in this regard, constructed an SMB under the term ‘two separate but coincident lines’,\textsuperscript{226} where proportionality played an important role.\textsuperscript{227} In the \textit{Qatar/Bahrain} case, the Court finds the basis for constructing an SMB ‘in the wish of States to establish one uninterrupted boundary line delimiting the various—partially coincident—zones of maritime jurisdiction appertaining to them’.\textsuperscript{228} Finally, the Court in the \textit{Nicaragua/Honduras} case makes exemplified that an SMB ‘is suited to achieving an equitable result’.\textsuperscript{229} This means that an SMB is a kind of ‘expediency’ required by equity to achieve an equitable solution.\textsuperscript{230} Therefore, it may reasonably be argued that the dominant feature of achieving an equitable solution is the only legal basis that leads the Courts to constitute an SMB. In sum, an SMB is a part of equitable solution emanating not from the conventional rule of maritime delimitation, but rather from the decisions of the international

\textsuperscript{223} M D Evans, “Delimitation and the common maritime boundary” (1993) 64 \textit{British Yearbook of International Law} 286-293.
\textsuperscript{224} \textit{Gulf of Maine} case, 267[27].
\textsuperscript{225} Ibid, 253.
\textsuperscript{226} \textit{Jan Mayen} case, 53 [43], 58 [45], 61-62 [52]-[53], 79 [90].
\textsuperscript{227} Tanaka, ‘Predictability and Flexibility’, above n 210, 447.
\textsuperscript{228} \textit{Qatar/Bahrain} Case, 93 [ 173].
\textsuperscript{229} \textit{Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua/Honduras) (Judgment)} [2007] I.C.J. Reports 659, 741[ 271] (Hereinafter reffered to as \textit{Nicaragua/Honduras} case).
\textsuperscript{230} In a specific case of delimitation equity requires a court or tribunal to take account ‘all the surrounding circumstances, including economic and political factors and expediency’. See Munkman, above n 65, 19.
courts and tribunals with the aim of establishing a more convenient and pragmatic result ensuring the equitability of maritime delimitation.

B Applicable Law and Principles for Achieving an Equitable Solution

The 1958 Geneva Convention on the Continental Shelf provided equidistance principles as a specific method for delimitation while Articles 74 and 83 of the Convention lack such a specific method with regard to the delimitation of EEZ and continental shelf. The question therefore arises as to the international rules or principles that an international court or tribunal are permitted to employ. Without any express method of delimitation outlined by the Convention, it is uncertain whether recourse to any particular method for effecting delimitation amounts to a decision *ex aequo et bono*. Does the rule of equitable solution indicate the appropriate applicable method or methods of delimitation? This section of the thesis will now deal with these issues.

1 The Demise of the Equidistance Principles and the Rise of Equity and Equitable Principles: A Court-Developed Theoretical Framework for Equitable Solution

The equidistance principle was a conventional rule of delimitation in the 1958 CSC for addressing the delimitation of continental shelf. Article 6 of the 1958 Geneva Convention on the Continental Shelf States that the boundary of the continental shelf between two opposite or adjacent States shall—in the absence of any agreement and unless another boundary line is justified by special circumstances—be determined by the application of the principle of equidistance.\(^{231}\) It is clear from this provision that the convention made the equidistance principle obligatory as well as mechanical and automatic for maritime delimitation. Although a rescue clause is stipulated by the phrase, ‘unless another boundary line is justified by special circumstances’, it is vague since it does not mention any particular circumstances. It lacks the reasonableness of the result at which it intended to arrive through the application of the equidistance principles.

Therefore, in the very first case on maritime delimitation in the *North Sea* cases, the ICJ endeavoured to construct a legal basis and thus to ensure a reasonable result for maritime delimitation.

\(^{231}\) Article 6 of the 1958 CSC.
delimitation. In so doing, it rejected the equidistance principle as an obligatory rule of customary international law and gave rise to new principles for maritime delimitation: namely, equitable principles. In doing so, the Court not only rejected the equidistance principle, but also any other ‘method of delimitation the use of which is in all circumstances obligatory’, stating that ‘delimitation must be the object of agreement between the States concerned’ and that ‘such agreement must be arrived at in accordance with equitable principles’. The Court then offered the following clarification:

in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles … (b) … taking all the circumstances into account, equitable principles are applied.

Here equity as a rule of law calls for the application of equitable principles; for practical reasons it is apparent that the Court relied on equity as an independent legal basis of its decision. The reason for such a requirement for equity in applying equitable principles might be the objective nature of equity itself. As observed by Sohn, ‘[a]pplying the principle of equity is different from applying particular principles of equity … Once the Court decides that in principle equity should be applied, it decides which principles—plural—of equity should be applied to the particular case.’ This means that equitable principles are principles of equity and are not synonymous with ‘equity’, although both aim to carry out individualised justice. Antunes’ view in this regard contrasts with Sohn’s; for Antunes, the emphasis is on the ‘principle of equity’, rather than ‘equitable principles’, meaning that he equates equitable principles with equity. Such a view is absent from most scholars’ writings.

However, the term ‘equitable principles’, as introduced by the Court, was not an innovation of its own. The Court found the basis for the application of ‘equitable principles’ in the practice of States—in particular, in the formal claims to continental shelf areas made in the

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232 North Sea cases, 32-37 [45]-[59].  
233 Ibid, 46 [83], 53 [101].  
234 Ibid, 53 [101].  
235 Ibid, 46-47 [85].  
236 Ibid.  
237 Remarks made by Professor Louis B Sohn in the seminar on Equity in International Law’, convened by him as Moderator. See Sohn, ‘Equity in International Law’, above n 90, 281-282.  
238 Antunes, above n 196, 198.
Truman Proclamation and the subsequent practices of other States. The Truman Proclamation announced that, ‘[i]n cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the US and the State concerned in accordance with equitable principles’. Despite the fact that the concept of ‘equitable principles’ in the Truman Proclamation was ambiguous, the Court readily accepted it as part of customary international law. In light of the dicta of the Court, one might rather say that ‘[t]he court…allowed the “equitable principles” (of undefined content) to move from the sphere of influence on the making of law into the sphere of law proper’.

The reasons the Court rejected the equidistance principle, resorted to equity as rule of law and, thereafter, required the application of equitable principles are both factual and legal. There are several considerations that may have prompted the Court to rely on equitable principles.

First, it finds that no particular method of delimitation is likely to prove satisfactory in all circumstances; rather, ‘all can lead to relative injustice’. For example, the slightest irregularity in a coastline is automatically magnified by the equidistance line in the delimitation of the continental shelf. For instance, in the case of a concave or convex coastline, if the equidistance method is employed, then the greater the irregularity and the further the boundary from the coastline, the more unreasonable the results produced. Again, the use of the equidistance method can ensure an equal division between two opposite States that can be regarded as the natural projection of the territory of each, whereas the use of the same method between two adjacent States often leaves one of the States concerned about areas that are a natural projection of the territory of the other.

Second, the objective of reaching a just and equitable solution warrants that the various applicable methods of delimitation be available under the term equitable principles in accordance with the dissimilar and varying facts and circumstances of delimitation cases.

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239 Truman proclamation No. 2667, above n 59 in chapter 1.
241 North Sea cases 36 [55], 46 [85], 50 [92]
242 Ibid, 49.
243 Ibid, 37 [48].
244 Ibid, 36 [55]
This became evident when the Court in the North Sea cases clearly applied equitable principles ‘taking all the circumstances into account’ of a particular case, observing that for this purpose, besides the equidistance method, ‘other methods exist and may be employed, alone or in combination, according to the areas involved’.\(^{245}\) In practice, employing equitable principles in maritime boundary delimitation normally involves drawing a boundary line using one or more methods of delimitation that will produce an equitable result.\(^{246}\) In fact, it is a requirement of equity.\(^{247}\) In this way, the methods applied by the international courts and tribunals in regard to maritime boundary delimitation are referred to as equitable principles.\(^{248}\) A list of such methods applied by the international courts and tribunals has been described in Appendix II of this thesis.

Third, the equidistance principle as described in Article 6 of the 1958 CSC was a method not a rule of law and a method cannot undertake the role of a rule of law. This view is informed by the work of the ILC\(^ {249}\) and may infer why the Court in the North Sea cases noted that—although the method possessed practical convenience and certainty of application—these factors were not sufficient ‘of themselves to convert what is a method into a rule of law.’\(^ {250}\) There must be a legal platform for such a method to operate in relation to the law to produce an ‘equitable’ or ‘justified’ result. Equitable principles provide such a platform.

Fourth and most importantly, Article 6 of the 1958 CSC necessarily lacks two fundamental legal elements that are required to ensure that the ends justify the means.\(^ {251}\) This means that there is no standard or predictability in the outcome nor is there any legal tool to justify the means that were to be used to reach the end. The Court was concerned that if it chose to proceed with this principle, it may create unnecessary uncertainty, unpredictability and

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\(^ {245}\) Ibid, 46-47 [85 (b)].
\(^ {247}\) See North Sea cases, 49 [89]-[90].
\(^ {248}\) Brownlie, above n 245, 208, 215.
\(^ {249}\) The member of the ILC found equidistance as a method along with other methods of delimitation. Moreover, the members of the Committee of Experts were not lawyers rather cartographers and their concern was suggesting a suitable method for delimitation, not to deal with the relation between the method and the law. The ILC discussed various other method of delimitation along with equidistance principles, such as drawing lines perpendicular to the coast, by prolonging the dividing line of adjacent territorial waters. See North Sea cases, 34 [50].
\(^ {250}\) North Sea cases, 23[23] (emphasis added).
instability in future cases as a consequence of this lack of standards and predictability and, thus, the effectiveness of the law would be brought into question, meaning the Court’s decision might be seen as *ex aequo et bono* and abusive, falling beyond the scope of international law. One might argue that, although the Court refused the equidistance principle as obligatory to delimitation, it could consider the equidistance–special circumstances principle for delimitation.\(^{252}\) This would mean the same lack of minimum standard as to how far the equidistance line could be adjusted in special circumstances—in the absence of which consideration, any sort of adjustment may seem a decision *ex aequo bono*. These may be reasons why the Court proceeded to ‘a broad basis of equity’,\(^{253}\) taking into account ‘a reasonable degree of proportionality’ as the ‘final factor’ in ensuring that delimitation was effected in accordance with equitable principles—not as ‘refashioning geography’, but to ensure an equality that is not ‘sovereign equality’;\(^{254}\) a proportional equality under the banner of quasi-equality.\(^{255}\) In the context of equitable solution, the doctrine of the sovereign equality of States is subordinate to the principle of proportionality and, to ensure an equitable solution, proportionality requires the aid of two fundamental principles of international law—one is the sovereign equality of States and the other is that ‘the land dominates the sea’.\(^{256}\) It should be mentioned here that the concept of ‘proportional equality’ is derived from the Aristotelian theory of justice, where it plays a central role in ensuring equitable justice in cases of the equal and the unequal,\(^{257}\) which, according to Gosepath produces adequate equality where equality is relative to ‘individual contribution’.\(^{258}\) In terms of maritime

\(^{252}\) North Sea cases, 148-150, [52]-[54] (Judge Ammoun).

\(^{253}\) Munkman, above n 65, 91 (emphasis altered).

\(^{254}\) In the context of justice, the principle of sovereign equality does not mean political equality or that all States are equal as regards power, territory, etc., but rather that all sovereign States are juridically equal. See Oppenheim, *International Law* (8th ed, 1955) 22-23, 123, 263-282. The ICJ in the *Libya/Malta Case* rejected Malta’s argument derived from the sovereign equality of States, whereby Malta claimed that the maritime extension generated by the sovereignty of each State must be of equal juridical value whatever the length of the coasts. If this argument would have been sustained, would have meant that proportionality, the touchstone of equity would have been subordinate to the doctrine of the sovereign equality of States and thus it would not be an equitable solution but apportionment, which is not the case of maritime delimitation. See *Libya/Malta Case* 42-43 [54].

\(^{255}\) North Sea cases [91]-[92], [98], [101]. See also Coyle, above n 171, 186.

\(^{256}\) Coyle, above n 171, 185, 186.

\(^{257}\) Aristotle, above n 127, 266.

delimitation, the *coastal front* or *coastal opening*\(^{259}\) of a coastal State constitutes such ‘individual contribution’ as far as the fundamental principle—‘the land dominates the sea’—is concerned, the sea is dominated ‘by the intermediary of the coastal front’\(^{260}\) and, thus, it is the coastal front that forms the legal basis of a coastal State’s entitlement to maritime areas both in and under the seas.\(^{261}\) This is the reason why, in the North Sea cases and despite the similarities between the coastal States, when the Court held that ‘equity does not necessarily imply equality’ and equity requires equality ‘to be reckoned with in the same plane’,\(^{262}\) what it meant was that, in terms of maritime delimitation, equality does not necessarily refer to an equal result, but to a result that is equitable and can be measured by the principle of proportionality as an element of equity. Had the Court performed the delimitation for reasons other than to determine the applicable rules of international law for maritime delimitation, it is reasonable to assume that it would have used equitable principles as a way of applying a ‘rule of law’\(^{263}\) where a proportionate result would be the optimum outcome in arriving at an equitable solution.

However, the Court, by adopting equity and equitable principles in the *North Sea* cases, received criticism that its decision was *ex aequo et bono*. This raises the question as to whether the Court acted within the law and thus passed the positive law test.

\((a)\) Equity, Equitable Principles and UNCLOS: The Courts and Tribunals Acting Within the Law

It is clear that the international courts and tribunals, as legal institutions constituted only for dispensing justice, must act within the law and, thus, in the discourse of their decision-making

\(^{259}\) Coastal front, in other words coastal opening constitutes an essential element in the seaward projection of coastal State jurisdiction and this is why land-locked States, which have no coastline cannot generate jurisdiction over maritime spaces. The size of the land mass of coastal State is irrelevant to maritime delimitation. The ICJ in the *Libya/Malta* case held that ‘the capacity to engender continental shelf rights derives not from the landmass, but from sovereignty over the landmass’, and it is by means of the ‘maritime front’ or ‘coastal opening’ of the landmass ‘that… brings its continental shelf rights into effect’. See *Libya/Malta* case, ICJ Reports 1985, 41 [49].


\(^{261}\) *North Sea* cases, 51 [96].

\(^{262}\) Ibid, 49-50.

\(^{263}\) Ibid, 47 [85]

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processes they must pass the positive test of law. However, in settling maritime boundary disputes, whether international courts and tribunals are acting within the law has always been a question for debate. This debate began when equity and equitable principles were used in the North Sea cases for determining continental shelf delimitation. Munkman and Jennings were among the scholars who criticised the Court’s decision for employing equity and equitable principles in these cases. Both of them described the Court’s use of equity and equitable principles as a decision ex aequo et bono; Jennings, affirming that the term ‘equitable principles’ refers to several undefined and unlisted methods of maritime delimitation, added that the result a court arrives at by choosing or rejecting any such equitable principles at their discretion is ‘in effect a decision ex aequo et bono’, whether the parties ‘wanted it or not’. Nevertheless, their views can be seen as resulting from misleading ideas regarding the concept of equity and equitable principles. In fact, the Court always acts within the law and the only task of the Court is to do justice responsibly and in accordance with the law. The thesis observes that, in doing so, the Court in the North Sea cases successfully passed the positive law test for the following reasons:

First, it resorted to equity and equitable principles within the possible interpretations of Article 6 of the 1958 Geneva Convention on the Continental Shelf, employing equity only as a ‘method of interpretation of the law in force’. The basis of this application emerged from the work of the ILC, which held that if the Court, in given circumstances such as the exceptional configuration of the coast, resorted to any other principles than equidistance, it would not be a case of adjudication ex aequo et bono, but, rather, of equity infra legem—falling within the purview of Article 6 of the Geneva Convention on the Continental Shelf. Sohn echoed this view stating that the Court’s opposition to the equidistance principle as the sole or basic rule of maritime delimitation was not against the law; rather, in rejecting such a claim, the Court ‘is always acting within the parameters of the law, infra legem’.

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264 Munkman, 91 (emphasis added); Jennings, above n 170, 401.
265 Jennings, above n 170, 401 cited in Bangladesh/India arbitration 3 (Concurring and Dissenting Opinion of Dr. P.S. Rao).
266 Frontier Dispute (Burkina Fasov. Mali), 1986 ICJ Report, 554, 567-568.
267 While preparing the draft Articles of the Geneva Convention on the Continental Shelf, the ILC held that ‘arbitration, while expected to take into account the special circumstances calling for modification of the major principle of equidistance, is not contemplated as arbitration ex aequo et bono’. See ILC year book [1953] II, 216 [82].
268 Remarks of Professor Louis B Sohn in Sohn, ‘Equity in International Law’, above n 90, 279.
However, there are also contrasting views. For example, Judge Ammoun found the Court’s invocation of equity and equitable principles to be a means of addressing a gap in the law—a practice that falls under the category of equity praeter legem and that the parties did not consent to. Goldie found the uses of equity to be either infra legem or praeter legem. For the sake of argument, even if the uses of equity are held to be praeter legem, they will be considered infra legem because the function of equity praeter legem has merged with infra legem and not contra legem.

Second, in the River of Meuse case it was established by Judge Hudson that equity in international law falls under the category of the general principles of international law. Hence, in resolving maritime disputes, the application of equity and equitable principles is not viewed in opposition to positive international law, but is seen as an application of the rule of international law itself. As Stated by the Court, ‘it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles’.

Third, the Court’s rejection of the equidistance principle as customary rule of law has been persuasively criticised for not being based on proper reasoning. Antunes led an extensive investigation into the reliance of States on the equidistance principle and tried to establish that the equidistance principle was already a customary rule of law frequently used by States including those whose interests were specifically affected and that courts applied the principle not only as conventional rule, but also as custom. Customary rules of law derive from a combination of State practice and opinio juris. Why opinio juris is an essential...
requirement for the formation of a new rule of customary law is clearly stated by the Court. For the Court, a customary rule must fulfil two conditions: ‘[n]ot only must the acts concerned amount to a settled practice, but … [they] must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’. The State application of the equidistance principle lacks such *opinion juris*. The Court seemed concerned about this process of forming a customary rule of law and this may be one of the reasons why the Court rejected the equidistance principle as customary rule of international law.

These reasons may be relevant for justifying the Courts’ recourse to equity and equitable principles in the *North Sea* and subsequent cases until 1993. However, they are no longer required at present and have not been required since the Convention came into force in 1994. The incorporation of ‘equity’ in Article 59 and ‘equitable solution’ in Articles 74 and 83 of the Convention has made equity a direct ‘part of substantive rule of law for maritime boundary delimitation’ and thus it is ‘equity *infra legem*, not equity in a generalized sense’, but equity as ‘required by law’. Therefore, it can be argued that what ever methods, principles or means be applied to reach an equitable solution that would not be viewed as a decision *ex aequo et bono*, rather as a function of equity *infra legem*—or the application of equity within the scope of law. In line with this argument one might view the rule of equitable solution as established in Articles 74 and 83 of the Convention as a dispersion of the equitable principles that risked mistaking ‘obscurity for profundity’.

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277 *North Sea* cases, 44[77]

278 Other important reasons might be the very concept of maritime delimitation, which, due to the very unique geographical character of each maritime area, requires the application of the rule of equity and its contents which aims to achieve an equitable solution maintaining a reasonable degree of proportionality through the flexible application of delimitation methods instead mandatory application of any particular principle. See discussion on delimitation and apportionment at II (B) 3 in this chapter.


280 Bangladesh/India, 92 [318].

2 The Decline in Importance of the Meaning of Equitable Principles and the Rise of the Rule of Equitable Solution

‘Equitable principles’ played a central role in the North Sea cases and fuelled tension between the two groups supporting equidistance principles and equitable principles in the Third Conference on the law of the sea. To reduce the tension, the conference president proposed a formula stating that ‘delimitation will be effected … to achieve an equitable solution’, which was readily accepted. The newly accepted rule of maritime delimitation—‘to achieve an equitable solution’—became an important consideration for the Court in the Tunisia/Libya case. This was the first case that the Court had decided on the verge of adopting the draft Convention on the Law of the Sea and the omission of any reference to the equidistance method in Articles 74 and 83 of the draft convention was striking—an omission that probably influenced the Court to a considerable extent in articulating the actual rule of maritime delimitation in the judgement of this case. The Court Stated that the absence of any reference to equidistance meant that there was no longer any formal textual guidance as to the content of an equitable solution.

In this case, the Court, in the first instance, confirmed that the equitable result ‘is predominant; the principles are subordinate to the goal’. Thus, it is stressed that the goal of reaching an equitable result must determine the means for achieving it. Here, the Court imposed both flexibility and limitation on the applicable principles explaining that any principle or method of delimitation can acquire the status of an equitable principle if it is appropriate to reach an equitable result. The Court then clarified the appropriateness of such applicable principles, stating that:

[The] application of equitable principles must be equitable … The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an

282 The Tunisia/Libya case was decided on 24 February 1982, and the draft convention on the law of the sea was adopted on 28 August 1981.
283 Tunisia/Libya case, 49.
284 Ibid., [70] (emphasis omitted).
285 Franck and Sughrue, above n 103, 582 (emphasis added).
equitable result. It is not every such principle which is in itself equitable; it may acquire
this quality by reference to the equitableness of the solution.\textsuperscript{286}

The Court did not stress the equitable principles, but the equitableness of the result, deeming
that the principles would not be equitable unless they were capable of producing an equitable
result. It firmly established that the applicable method or principle of delimitation must serve
the objective of delimitation; in other words, it must assist in reaching an equitable solution
and, if the result to which a method leads is inequitable, the method must be rejected. This
may be why the Court held that even the equidistance method may be applied as an equitable
principle if it led to an equitable solution and, if not, other methods should be employed.\textsuperscript{287}
Nonetheless, the Court noted that ‘equitable principles cannot be interpreted in the
abstract’.\textsuperscript{288} Therefore, it is clear that the Court actually referred to ‘equitable principles’, not
as an individual method of delimitation, but as a general legal term and a common legal
premise providing an appropriate legal basis for any method of delimitation required by the
rule of law to reach an equitable result. In this way the term equitable principle differs from
a ‘total’ process of delimitation\textsuperscript{289} or a singular equitable process.\textsuperscript{290}

The most striking point in the \textit{Tunisia/Libya} judgement is that it reduced the importance of
equitable principles by subordinating them to equitable solution, which it referred to as part
of international law and that it afforded ‘equitability of … result’ the highest priority in
maritime delimitation, thus attempting to define a general rule of maritime delimitation and
a rule of equitable solution, which the ILC had failed to do.\textsuperscript{291} The very concept of equitable
principles, as enshrined in the Truman Proclamation was ambiguous and vague. The Court
in the North Sea cases adopted and verified it as the equitable application of a delimitation
method, thus reducing its vagueness. However, some ambiguity still remained regarding the
normativity of this principle; the Court in its judgement in the \textit{Tunisia/Libya} case neutralised
this ambiguity by subordinating it to the objective of delimitation: to achieve an equitable

\textsuperscript{286} \textit{Tunisia/Libya} case [70] (emphasis added) .
\textsuperscript{287} \textit{Tunisia/Libya} Case, 79 [110].
\textsuperscript{288} Ibid, 59 [70].
\textsuperscript{289} Cf Brownlie, above n 245, 219.
\textsuperscript{290} Malcolm D. Evans, \textit{Relevant Circumstances and Maritime Delimitation} (Oxford University
Press, 1989), 77-78.
\textsuperscript{291} See discussion section II B in chapter 2
solution. As will be shown below, the stance of the Court in upholding the equitability of the result has been maintained in all subsequent cases on maritime delimitation and the recent practices of the international courts and tribunals reveal that it is firmly established in their decision-making processes.

Following the *Tunisia/Libya* case, the importance of the meaning of equitable principles has decreased in subsequent cases and, particularly after the *Jan Mayen* case, attempts to understand the meaning of equitable principles have declined. The Court in the *Jan Mayen* case assimilated the equidistance–special circumstances principle that was adopted in the Convention for the delimitation of territorial seas to the equitable–relevant circumstances principle that was held as customary international rule for the delimitation of continental Shelf and was equally applicable to the delimitation of EEZ. The *Jan Mayen* case represented a move towards greater reliance on the equidistance–special circumstances rule and confirmation of this rule in the *Qatar/Bahrain* and *Cameroon/Nigeria* cases made its application more certain and predictable and, in later cases, it was concluded that the certainty of this principle arose from ‘the need for an equitable result’. As such, the ICJ has solidified the methods for attaining equitable maritime delimitation in terms of the similarities between the equitable principle method and equidistance/special circumstances method. Presumably, the assimilation of the two principles of delimitation can be seen as a deliberate decision by the Court to respond to and reduce unnecessary criticisms of the juridical concept of equitable principles.

However, such assimilation does not mean that the Court has diminished the legal concept of equitable principles, that the legal foundation for these principles as articulated in the

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293 *Qatar/Bahrain* case, 111 [231]; *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon/Nigeria) (Judgment)* [2002] ICJ Reports 303, 441[228] (hereinafter referred to as *Cameroon/Nigeria* case).

294 *Barbados/Trinidad and Tobago arbitration*, 74 [242].

295 Leanza, above n 64, 282.

296 Equidistance/special circumstance and equitable/relevant circumstances principles
North Sea cases has been precluded or that the Court has returned to the delimitation rule as described in the 1958 Geneva Convention on the Continental Shelf that it so clearly rejected in the North Sea cases. Rather, these principles have been encapsulated in the various methods of delimitation and, as such and despite the decrease in the juridical importance of equitable principles, the implied reliance on this legal concept has become ascertainable in subsequent case law—particularly, in equitable solutions where the international courts and tribunals have applied various methods of delimitation; for example, an angle-bisector line coupled with a line perpendicular to the general direction of the coast in the Gulf of Maine case, the application of the angle-bisector method in the Nicaragua/Hondurus case, the use of the equidistance/median line principle in the Romania/Ukraine case and the employment of equidistance–relevant circumstances principles in the Bangladesh/Myanmar case and the Bangladesh/India arbitration. All things considered, equitable principles have established strong interactive relations with the achievement of equitable solutions in a way that affirms the evolution and the priority of the rule of equitable solution.

In the delimitation cases subsequent to the North Sea cases, the requirement for attaining an equitable result has been given more priority than the highlighting of equitable principles and, particularly from the Nicaragua/Hondurus case to more recent cases, the rule of equitable solution, as enshrined in Articles 74 and 83 of UNCLOS, has been considered the only applicable law by the international courts and tribunals, where, given the geographical realities and particular circumstances of each case, the only consideration is to ensure an equitable result, no matter what principles are employed to reach that solution. Therefore, questions arise as to the legal tools available for measuring the equitableness of a proposed delimitation. It has been affirmed by scholars and jurists that the principle of proportionality is inherent and fundamental to the notion of maritime delimitation and is considered ‘as a function of equity’, providing an objective measure for the equitableness of a proposed

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This is why the Court, in the context of achieving an equitable solution, adopted ‘a reasonable degree of proportionality’ as ‘the touchstone of equitableness’. While the equitableness of a result is accepted as the fundamental aspect of equitable solution, Lee, in opposition to the focus on the equitableness of results, argued that ‘if the rules governing maritime delimitation dictate the equitability of the “result” achieved, we can dispose of the term ‘equitable principles’ altogether’ and continued that ‘[t]he achievement of an equitable solution in maritime delimitation is preceded by the flexible consideration of relevant circumstances’. This thesis does not agree with Lee’s arguments for several reasons. First, ensuring equitableness of result is not possible unless the equitableness can be measured by a legally accepted tool; the principle of proportionality, as a fundamental element of equity, is just such a legal tool for measuring the equitableness of delimitation and is frequently used by the Court and tribunals to check *post hoc* disproportionality. Second, relevant circumstances, as mere facts, cannot dictate an equitable result because a method cannot undertake the role of law. The degree of a result’s proportionality varies from case to case and the consideration of the special circumstances involved. Again, there may be cases where no special circumstances exist that the Court could take into account. In such a situation, the consideration of relevant circumstances as variables in the achievement of an equitable solution becomes obsolete. How, then, is an equitable solution to be achieved? What would be the variables of equitability? With these questions in mind, the Court in the *Gulf of Maine* case, following the classic formula that ‘the

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300 *North Sea* cases, [101].

301 *Libya/Tunisia* Case, 78.

302 Lee, above n 197, vi.
land dominates the sea’, held that the principle of equidistance may produce an equitable result by ‘an equal division of the areas of overlap … of the two litigant States’ subject to the condition that there are no special circumstances in the case.\footnote{Gulf of Maine Case, 246, 300-301, 312-313 [157] emphasis added).} Here the term equal division does not infer equal results; rather, it confers proportional equality in terms of distributing the overlapped areas between the parties that ultimately exemplifies an equitable solution; alternatively, it is possible to see this equal division as a substitute for apportionment, which is neither the purpose of delimitation, nor the task of the Court.\footnote{North sea cases, 21-22 [18].} Thus, it can be concluded that the application of equitable principles is linked to the concept of proportionality and thus is subordinate to the concept of equitable solution; in a delimitation case, equitable principles are employed under the guise of particular method(s) of delimitation, the application of which produces a proportionate result.

However, if proportionality functions as ‘the golden metewand of equity’, then how it relates to the applicable methods or principles of delimitation becomes a necessary question. In this regard, both scholars and jurists have provided indicative views, concluding that the application of even the equidistance principle can produce an equitable result if the result satisfies the requirement for proportionality.\footnote{See generally Tunisia/Libya case, [176]; Anglo-French arbitration, 397[98]-[101]; Gulf of Maine Case, 246, 300-301. See also Coyle, above n 171, 171, 172, 187-188; Sang-Myon Rhee, ‘Equitable Solutions to the Maritime Boundary Dispute Between the United States and Canada in the Gulf of Maine’ (1981) 75 (3) American Journal of International Law 617-618; Phaedon John Kozyris, ‘Lifting the Veils of Equity in Maritime Entitlements:Equidistance with Proportionality Around the Islands’ (1998) 26 (3) Denver Journal of International Law and Policy 351-355, 360-373.} This implies that the rule of equitable solution warrants flexibility in its applicable methods or principles of delimitation, since the result produced by the application of an obligatory method may not pass the test of proportionality and thus the test of equitableness. This idea goes against the concept of predictability in the applicable methods of delimitation—a contentious issue in international law.

\section*{3 The Debate Regarding Predictability and Flexibility}

This debate first arose when the ICJ rejected the obligatory use of the equidistance principle for delimitation in the \textit{North Sea} cases and found the application of equitable principles to be a requirement of the rule of equity to ensure an equitable solution. Later, the process of
consolidating these principles took place. In 2001, Judge Guillaume, in his speech as the
president of the ICJ to the sixth committee of the UNGA, Stated that ‘it is encouraging to
note that the law of maritime delimitations, by means of these developments in the Court’s
case law, has reached a new level of unity and certainty, while conserving the necessary
flexibility’. 306 Making reference to the Court’s decision in the Jan Mayen Case, Guillaume
clarified his view by observing that ‘the equidistance/special circumstances rule’ applicable
to the delimitation of the territorial sea and ‘the equitable principles/relevant circumstances
rule’, applicable to the delimitation of the continental shelf and the EEZ, are closely
interrelated’ and that ‘in all cases, the Court … must first determine provisionally the
equidistance line’ and ‘must then ask itself whether there are special or relevant
circumstances requiring this line to be adjusted with a view to achieving equitable results’. 307
Tanaka found this to be a ‘corrective equity approach’ applied by the Court. 308 However,
Judge Guillaume seems to appreciate the Court’s approach, seeking to establish that the
equidistance method has acquired an imperative character and thus symbolises predictability
in maritime delimitation, while the existence of special or relevant circumstances designate
flexibility. Similarly, some international law scholars and literature acknowledge the
‘preferential’ or ‘dominant’ 309 use of the equidistance method for supporting the notion of
predictability in the law of maritime boundary delimitation. 310 Tanaka, in his Predictability
and Flexibility in the Law of Maritime Delimitation, attempted to reconcile the predictability
of the equidistance principle with the flexibility of relevant circumstances required to achieve

306 Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the
307 Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the
308 See generally Yoshifumi Tanaka, ‘Reflections on Maritime Delimitation in the Nicaragua/Honduras Case’
‘Reflections on Maritime Delimitation in the Romania/Ukraine Case before the International Court of Justice’
309 For example, Antunes and Tanaka.
310 Davor Vidas, ‘Consolidation or Deviation? On Trends and Challenges in the Settlement of Maritime
Delimitation Disputes by International Courts and Tribunals’ in N. Boschiero et al. (eds), International Courts
Impact of the Law of the Sea Convention on the Delimitation of Maritime Borders’, in Davor Vidas and
Willy Østreng (eds.), Order for the Oceans at the Turn of the Century (Kluwer Law International, 1999) 461;
Antunes, above n 196, 94-97; Tanaka, ‘Predictability and Flexibility’, above n 210,119-121.
an equitable maritime delimitation. These views recall the ‘Methodist’ approach of delimitation as codified in Article 6 of the 1958 Geneva Convention on the Continental Shelf that refer to equidistance and/or equidistance/Special circumstances principles as obligatory for maritime delimitation. Thus, any attempt to establish the predictability of the application of the equidistance principle or equidistance–relevant circumstances principle may be seen as an attempt to make these rules obligatory that was rejected in its very first instance in the North Sea cases. Flexibility of applicable methods or principles is at the heart of a ‘result-oriented equity approach’ that aims to reach an equitable solution. Again, the omission of any reference to the equidistance method in Articles 74 and 83 of UNCLOS can be interpreted as an express rejection of its status as a principle of international law in its own right. Moreover, the most important task of maritime delimitation is not to guarantee predictability through the employment of any specific method(s), but to arrive at an equitable result by the flexible application of methods and principles. Nonetheless, the applicable method(s) or principle(s) of delimitation must respect the legal basis of maritime entitlement—that is, the legal force of the land. This implies that the obligatory uses of any particular method or principle that significantly terminates a delimitation line by deflecting it from the natural projection of the land territory into and under the sea must be discouraged. Therefore, as it is arguable that ‘the normative framework of maritime delimitation is encapsulated by the equidistance–special circumstances rule’, this thesis repudiates any attempt to impose predictability on any method of delimitation. In addition, given the primacy of achieving an equitable solution, the international judicial practice for assessing the equitableness of delimitation results, conceptually developed in the North Sea cases and consolidated in subsequent cases—from the Libya/Malta and Jan Mayen cases onwards—and providing a firm structure for the decision-making process—particularly in the Romania/Ukraine case (since the disproportionality test was first adopted as the third stage of the three-stage method applied in this case)—has the potential to reinforce the refusal

312 Ibid, 119, 123.
315 Antunes, above n 196, 427.
of predictability in any given applicable delimitation method. Rather, international judicial practice emphasises the importance of achieving a *predictable result*—one that guarantees a reasonable degree of proportionality or avoids gross disproportionality—while imposing *flexibility on the applicable rules and principles* of delimitation and defining them to adjust to evolving situations or the particularities of each case. Thus, the predominance of a predictable result (an equitable result) as heralded by the Convention without defining the means to reach it actually envisages allowing ‘absolute freedom of method’ and confers the idea that ‘result dictates method’. It is difficult to imagine ‘something more akin to orthodoxy than the idea that, in reality, maritime boundary delimitation is achieved through the process of drawing an equidistance line and then adjusting it to take account of special circumstances (or relevant circumstances)’. This thesis argues that the objective of maritime delimitation has always been to reach an equitable solution that is predictable and to disregard any obligation to apply any particular method.

In summary, it can be concluded that, in effecting maritime delimitations, any principle(s) or method(s) can be applied if their applications are consistent in producing a result that upholds a reasonable degree of proportionality and can thus be considered equitable. One might find that this conclusion rejects the importance of special circumstances underlying particular

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316 Because it is believed that unpredictability in judicial decisions is one of the main reasons for the reluctance of States to accept the jurisdiction of the international courts and tribunals. See Akehurst, above n 33,811.

317 A reasonable degree of proportionality or absence of gross disproportionality (in other words, a reasonable degree of non-disproportionality) plays a decisive role in both ‘result oriented equity approach’ and ‘corrective equity approach’ as a common ambiance or mood to assess equitableness of a delimitation line. It is as much as conceivable and predictable standard of equitable result that even the Court has nothing but to recognise such predictability. The Court, in *Libya/Malta* Case admitted that equitable justice ‘should display consistency and a degree of predictability.’ *Libya/Malta Case*, 1985 ICJ Rep, 13, 39.


321 Nelson, above n 120, 857-858
cases. However, this is not the case. As will be shown below, both proportionality and the consideration of special or relevant circumstances have joint and decisive roles in determining an equitable maritime boundary.

C Criteria for Drawing an Equitable Delimitation Line

Drawing a boundary line, whether in relation to territorial seas, EEZ or continental Shelf, becomes the most important part of the decision-making process that is required by law to produce an equitable solution. The international courts and tribunals, over the course of time have developed a three-stage methodology indicative of the functional criteria for equitable solution. As is evident in maritime jurisprudence, this three-stage decision-making process involves first drawing a provisional equidistance line (hereinafter PEL), then examining that the line in the light of any relevant circumstances to see whether it requires adjustment to produce an equitable result; finally, it involves verifying the equitability of the proposed delimitation line by checking whether any gross disproportionality exists between the coastal length ratios and the ratios of the areas allocated to each State.\(^{322}\) As the chamber in the \textit{Gulf of Maine} case made clear, equitable criteria, as well as the practical methods of maritime delimitation, can be found ‘in the actual delimitation process[es].\(^{323}\) The persuasive character of this Statement led to the view that any kind of judicial decision that relates to the achievement of an equitable solution can necessarily be seen as constituting the criteria for an equitable solution. Thus, this thesis aims to locate such delimitation criteria through analysis of the international case law on maritime delimitation.

1 Drawing a Provisional Delimitation Line

Before proceeding with the three-stage methodology to achieve an equitable delimitation line, international case law reveals that the international courts and tribunals must make two important decisions that are general to all cases of delimitation and that are of particular importance in laying the foundations for reaching an equitable solution.

\(^{322}\) \textit{Libya/Malta Case, Greenland/Jan Mayen Case, Nicaragua/Honduras case, Romania/Ukraine case, 101-103 [ 115]-[122], Bangladesh/Myanmar case, Nicaragua/Colombia case, 695-696 [190]-[193]; Bangladesh/India Arbitration, Chili/Peru case, 61 [180];

\(^{323}\) \textit{Gulf of Maine case, 300[113].}
(a) Selection of Base Points

To reach an equitable delimitation, identifying not the baselines, but rather (a selection of) the base point(s), has become one of the most important parts of the judicial decision-making process because of the functional and conceptual differences inherent in each concept relating to delimitation.\textsuperscript{324} International jurisprudence on maritime delimitation has established and affirmed the idea that base points should be decided at the very outset of the delimitation process.\textsuperscript{325} As was decided in the Bangladesh/Myanmar case ‘[t]he first step to be considered in the construction of the delimitation line is the selection of base points from which the delimitation line will be drawn’.\textsuperscript{326}

Normally, coastal States determine their own base points\textsuperscript{327} and the number of base points varies according to the shape and geography of and between the coasts involved.\textsuperscript{328} However, all basepoints may not be relevant for the operation of the delimitation and all basepoints chosen by the States may not be designated as ‘controlling basepoints’,\textsuperscript{329} which a court utilises to delineate the limits of the maritime zones. It would seem to be easier for the Courts and tribunals to select base points in circumstances where the base points are common to

\textsuperscript{324} Baseline is a general concept that is used to calculate the breadth of different maritime zones while basepoint is a judicial concept which is determined by a court or tribunal in the operation of delimitation, in particular, to draw provisional median/equidistance line. This difference has become more concrete when the Court, in the Nicaragua/Colombia and Rumania/Ukraine cases, the Court clearly ascribed baseline as a point from which a coastal State’s entitlements to its continental shelf and exclusive economic zone are to be measured and basepoints as the starting points from which a provisional median or equidistance line is to be constructed. It implies that the concept of baselines relates to the delimitation standard while the concept of baseline relates to the delimitation criteria. Nevertheless, basepoints relate to delimitation operation, it should be noted that determination of basepoints only becomes relevant when the delimitation operation starts from drawing a provisional median/equidistance line. If it would not be the case, the Court in the Nicaragua/Honduras case would not avoid determining the basepoints. In this case, the Court noted that the ‘three-stage process is not, of course, to be applied in a mechanical fashion and the Court has recognized that it will not be appropriate in every case to begin with a provisional equidistance/medianLine’. See generally, Nicaragua/Colombia case, 2012, 678 [145]:697 [196]; 698-699 [201]; Rumania/Ukraine case, 108 [137]. Nicaragua v. Honduras, Judgment, I.C.J. Reports 2007 (II), p. 741, para. 272). \textsuperscript{325} Romania/Ukraine case, 103-104 [123]-[125]; Bangladesh/India arbitration, 57 [191]; Bangladesh/Myanmar Case, 51 [153]-[155]. \textsuperscript{326} Bangladeshi/Myanmar Case, 51 [153]. \textsuperscript{327} Ibid., [264]. \textsuperscript{328} For example, the flatter coast generates usually more basepoints than an indented coast and the wider the breadth of the maritime zone, the smaller is the number of basepoints. Again the number of basepoints is larger in a clear case of oppositeness than in a clear case of adjacency. See Antunes, above n 196, 298. \textsuperscript{329} Antunes used this term. To him ‘controlling basepoints’ has the \textit{representativeness} character –i.e. of determining whether the basepoints utilised in the computation of the limits of the maritime zones characterise the coastal relationship between the States involved. See Antunes, above n 196, 298-299.
both contesting parties. However, this may not be applicable in all cases. There are cases where strong disagreements may arise instead of such commonalities. There are even situations where the Court, while constructing a ‘single-purpose delimitation line, can deviate from the base points selected by the parties. Again, there may be instances where either or both parties may abstain from offering base points of their own. In such cases, what does a court do? Is it bound to accept the base points chosen by the parties, or does it have the power to decide base points of its own? In such cases the total responsibility is vested in the Court and, in determining the base points, the Court is required to be guided by equitable considerations so that the outcome will prove to be an equitable result. In the Bangladesh/Myanmar and Romania/Ukraine cases, it was repeatedly affirmed that the Court or tribunal was not obliged ‘to accept base points’ chosen by either or both parties; rather, the Courts were entitled to establish their own base points and, in doing so, they ‘must … select base points by reference to the physical geography of the relevant coasts’. Physical geography and the most seawards points of the two coastlines play a dominant role in this regard. However, this does not mean that, in selecting base points, the Courts and tribunals can exercise their free wills to consider any configuration of the coast. There are guiding and balancing principles. In such cases, base points are selected on the most appropriate points of the coast ‘in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines’. Another maxim assisting the decision makers in selecting appropriate base points is one of the principles of equity: to compare like with like. This was employed when the Court in the Nicaragua/Columbia case selected base points on the islands of each State. In this regard, the Court or tribunal was allowed to exercise a considerable length of discretion to consider specific base points proposed by the parties in connection with the delimitation of each maritime zone as ‘different base points [control] the course of a delimitation line through the territorial sea, the

330 Bangladesh/Myanmar Case, 52 [160].
331 In the Romania/Ukraine case, this view was convincingly adopted by the Court when it deviated from the selected base points by Romania in the seaward end of Sulina dyke to the landward end of the Sulina dyke where it joins the Romanian mainland. Romania/Ukraine Case, 101[117], 107-108 [136]-[139].
332 Bangladesh/Myanmar case [242], 81[260].
333 Such situation arose in the case between Peru and Chile. See Peru /Chile case, 62-63 [185].
334 Bangladesh/Myanmar case [264]; Romania/Ukraine case, 108 [137].
335 Romania/Ukraine case, 101 [117], 105 [127].
336 Nicaragua/Columbia case, 698-700 [200]-[204].
EEZ and the continental shelf within and beyond 200 nm. Nonetheless, the decision regarding the selection of basepoints needed to be balanced in accordance with the achievement of an equitable solution, since ‘the disproportionate area attribution yielded by ‘controlling basepoints’ breached the requirement of equilibrium’.  

Thus, the selection of base points is critical for equitable solution. Normally, base points are selected on the low-water lines of the mainland of coastal States. There may be circumstances where geographical configurations are so unstable that the relevant coasts would make the base points uncertain within a short period of time. What equitable considerations may lead to an equitable solution in such a case? International case law has established that equitable consideration in such circumstances may lead to the assignation of the starting point of the delimitation line ‘at some distance out [to] sea’. Again, a fixed base point may become uncertain in future by being submerged in rising sea levels as an effect of climate change. What would be the consequences of this and how far from those submerged base points would the delimitation line be valid? These questions were raised by the 2014 Washington Conference of the International Law Association where Freestone, in response to such questions, commented that ‘[s]ea-level rise does not necessarily nor automatically trigger the recession of the baselines, given that the location of the relevant base points may well remain unaffected’ and thus ‘boundaries fixed by judicial decision are binding under customary international law in this regard’. Judicial decision on this issue seems more refined. In the Bangladesh/India arbitration, the tribunal, in response to Bangladesh’s argument about rising seawater, ruled that in the event that the geographical configuration of the coastline was affected by ‘climate change in the years or centuries to come’ the ‘tribunal must … choose base points that are appropriate in reference to the time of the delimitation, i.e., the date of its award’. This view confirms that any potential future changes to the coastal configuration must be addressed in future, rather than planned for at

337 Bangladesh/India arbitration [225].
338 Antunes, above n 196, 299 (emphasis in original)
339 Bangladesh/Myanmar case[156]
340 Nicaragua/Honduras case, 755-756 [306]-[311].
342 Bangladesh/India Arbitration, 2014, 62 [214].
343 Ibid, 62 [212].
present. However, the base points are to be selected on the coastline taking into account the coastal geography at the time of delimitation to reflect the general direction of the coast; the Court has discretion to fix a base point at some distance out to sea if the present coastal configuration is unstable. Considering the above discussion, it is logical to question whether baselines have any implication in maritime delimitation. As will be discussed, the issue of baselines has little importance in determining a delimitation line.

(b) Determining Relevant Coasts and Relevant Areas

Relevant coasts are germane to delimitation, not because they provide the legal bases for entitlement, but ‘because [they are] a requirement of the principle of equity’.\textsuperscript{344} Obviously, the coast is the only parameter that the Court considers when measuring a State’s entitlement to maritime areas.\textsuperscript{345} However, a coast becomes relevant only when it generates projections that overlap with those arising from the coast of another party.\textsuperscript{346} This means the relevant coast is the whole coast projecting into an area of overlapping potential entitlements and not simply those parts of the coast from which the 200 nm entitlement will be measured.\textsuperscript{347} There are two different but closely related legal functions in the delimitation of various maritime zones; first, ‘to determine what constitutes in the specific context of a case the overlapping claims to these zones’; and second, since the proportionality test is the prescribed principle of equity for measuring equitable solution, coastal length plays a definitive role by confirming ‘whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the delimitation line’.\textsuperscript{348} Nonetheless, whether the State parties to a case are situated in either adjacent or opposite positions is determined on the basis of relevant coasts.\textsuperscript{349} Conversely, relevant areas comprise the parts of the maritime spaces in which the potential entitlements of the parties overlap.\textsuperscript{350} This means relevant areas should not include areas that are not part of the overlapping entitlements. This becomes pertinent in the final stages of cases when the Court comes to

\begin{footnotesize}
\textsuperscript{344} Antunes, above n 196, 308.
\textsuperscript{345} Barbados/Trinidad-Tobago Arbitration, 72-73 [239].
\textsuperscript{346} Romania/Ukraine case, 96-97[99].
\textsuperscript{347} Nicaragua/Colombia case, 678 [145].
\textsuperscript{348} Romania/Ukraine case 61, 89 [78]; Bangladesh/India Arbitration, 79 [278].
\textsuperscript{349} Tunisia/Libya case, 61[74].
\textsuperscript{350} Rumania/Ukraine case, 99 [110], 100 [114].
\end{footnotesize}
verify whether the line that it has drawn produces a disproportionate result. 351 Under the principle of proportionality, the ratios of relevant coasts are generally used as reference points to divide a relevant area to be defined by the Court.

The underlying general principles that lead the Court to identify the relevant coast are: first, coastal projections in a seaward direction that generate maritime claims; second, the coast considered as relevant for the purposes of delimitation because it generates projections that overlap with those from the coast of the other party; third, the submarine extension of any part of the coast of one party that, because of its geographic situation, cannot overlap with the extension of the coast of the other and is to be excluded from further consideration. 352 In other words, a relevant coast includes the whole coast that projects into the area of overlapping potential entitlements and not simply those parts of the coast from which the 200 nm entitlement will be measured. 353 The principle underpinning a relevant area is that it includes certain maritime spaces that are deemed pertinent ‘depending on the configuration of the relevant coasts in the general geographical context and the methods for the construction of their seaward projections’ and precludes the inclusion of any area that may affect third-party entitlements. 354 In this regard, to be more particular, one may argue that relevant areas should not include areas falling under different maritime zones; for example, relevant areas for territorial seas should not be considered for EEZ and/or continental Shelf. 355 However, such specifications are absent from the case law on maritime delimitation. What is prevalent in the case law is that the Court must first determine the relevant coasts of the parties and then determine the relevant areas 356 and that the calculation of relevant areas must include the sea bed areas below the territorial seas as well as internal waters, since it is a requirement of equity to ensure comparison. 357

Judicial practice as developed in case law provides further evidence that, despite the relevant coasts and areas proposed by the parties, the Court, for the broader outcome of equitable

351 Nicaragua/Columbia case, 683 [159]; Rumania/Ukraine case, 99 [110], 100 [114].
352 Romania/Ukraine case, 96-97 [99].
353 Nicaragua/Columbia case, 678 [145].
355 Antunes, above n 196, 311.
356 Qatar/Bahrain case, 94[178].
357 Tunisia/Libya case, 76 [104].
solution, can depart from the proposals of the competing States to determine relevant costs and areas that it deems germane to the case concerns. The *Bangladesh/Myanmar* and *Bangladesh/India* arbitrations are the best examples in this regard. The processes of determining relevant coasts and areas have come under acute criticism because of their indeterminate natures. However, as will be shown, this indeterminacy is justified because, to achieve an equitable solution, the judges must be able to accommodate indeterminacy to ensure that both parties are able to receive the most apt, accurate and proportionate shares, since the ‘object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas’.

In summary, relevant coasts and relevant areas are two objective criteria of proportionality that provide fundamental bases for an equitable solution. The international courts and tribunals therefore considered establishing relevant coastal lengths and relevant areas as essential aspects of equitable solution, requiring the assessment of equitableness for delimitation results. The fundamental element of equity that plays a role in such considerations of the Court is none other than the principle of proportionality since it is the ‘only absolute requirement of equity that one should compare like with like’ and ‘the resultant comparison’ will, in the view of the Court, ‘make it possible to determine the equitable character of a line of delimitation’. Thus, the Court, before drawing any sort of delimitation line (either provisional or final), finds it mandatory to determine the relevant coastlines and relevant coastal areas of the States by reference to the location of the base points to be used in the construction of the delimitation line.

### 2 Drawing a Provisional Equidistance Line Is Preferred but Not Obligatory

Since the 1985 *Libya/Malta* case heard by the ICJ, it has become a typical process for international courts and tribunals to first draw a PEL and then take account of relevant coastal lengths and areas as essential aspects of equitable solution, requiring the assessment of equitableness for delimitation results. The fundamental element of equity that plays a role in such considerations of the Court is none other than the principle of proportionality since it is the ‘only absolute requirement of equity that one should compare like with like’ and ‘the resultant comparison’ will, in the view of the Court, ‘make it possible to determine the equitable character of a line of delimitation’. Thus, the Court, before drawing any sort of delimitation line (either provisional or final), finds it mandatory to determine the relevant coastlines and relevant coastal areas of the States by reference to the location of the base points to be used in the construction of the delimitation line.

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358 *Bangladesh/India* Arbitration, (concurrent and dissenting Judge PS Rao)
359 *Nicaragua/Columbia* Case, 683 [158], *Romanaia/Ukraine* Case, 100 [111]; *Jan Mayen* Case, 1993, 67 [64], *Libya/Malta* Case, 45 [58], *North Sea* cases, 22 [18].
361 *Romanaia/Ukraine* Case, 89 [78].
362 *Tunisia /Libya* case, [104]. See also *Eritrea/Yemen* case, [118].
363 *Cameroon/Nigeria* case, 442 [290].
circumstances to adjust that line.\textsuperscript{364} Since the \textit{Jan Mayen} case, this has become a fairly consistent methodology for determining an SMB between the overlapping EEZ and continental Shelf of opposite or adjacent States. This process of drawing a PEL has been widely practised in most maritime delimitation cases because of its ‘scientific character and the relative ease with which it can be applied’.\textsuperscript{365} Taking into account this preference for the equidistance principle, it is possible to think that the international courts and tribunals have accepted it as a general, predictable and thus imperative method for maritime delimitation. However, this is not the case at all. If this were the case, the rule of equitable solution could not claim flexibility.\textsuperscript{366} In fact, it is not the provisional drawing of an equidistance line, but the drawing of a provisional delimitation line (hereinafter PDL) that has been the manifest intention of the Court where the \textit{flexible usage} of methods has been accepted in principle.\textsuperscript{367}

In the process of delimiting the EEZ and the continental shelf, the Court affirmed that it ‘will establish a \textit{provisional delimitation line}, using methods that are \textit{geometrically objective} and also \textit{appropriate for the geography of the area} in which the delimitation is to take place’.\textsuperscript{368} This means that drawing a PDL is a part of the process of reaching an equitable solution, while drawing a PEL is just one of the methods employed for drawing such a provisional line; moreover, the Court can employ any method(s) to draw a provisional line that it finds appropriate to a given case under prevailing circumstances. This became more apparent when the Court in the \textit{Nicaragua/Honduras} case denied drawing a PEL confirming the idea that the ‘equidistance method does not automatically have priority over other methods’.\textsuperscript{369} This view of the Court was consistent even when the 1958 Geneva Convention on the Continental Shelf was in force. For example, the arbitral tribunal in the \textit{Anglo-French} award held that


\textsuperscript{365} See generally \textit{Qatar/Bahrain} case, 94 [176]; \textit{Cameroon/Nigeria} case, 441 [288]; \textit{Nicaragua/Honduras} case, 741 [272].

\textsuperscript{366} See discussion in section III B of this chapter.

\textsuperscript{367} For example, in the \textit{Gulf of Maine} case, the Chamber of the ICJ first set the rule that ‘it has first to make its choice of an appropriate practical method for use in \textit{provisionally establishing a basic delimitation}, and that it must then ascertain what corrections to it are rendered indispensable by the special circumstances of the case’, and there after it was affirmed and continued up to the most recent case on maritime delimitation. See generally, \textit{Gulf of Maine} Case, 1984, 333[215]; \textit{Libya/Malta} case, 46[60], [62]; \textit{Jan Mayen} Case, 60-61 [51]; \textit{Romania/Ukraine}, 101 [116]

\textsuperscript{368} \textit{Romania/Ukraine}, 101 [116] (emphasis added). See also \textit{Jan Mayen} Case, 61 [51].

\textsuperscript{369} \textit{Nicaragua/Honduras} case, 2007, 741 [272].
‘the obligation to apply the equidistance principle is always one qualified by the condition unless another boundary line is justified by special circumstances’ and this view of the Court was reflected in all subsequent cases where the Courts repeatedly affirmed that beginning with a provisional equidistance/median line would not be ‘appropriate’ or was not a ‘necessary or obligatory step’.

However, since Article 15 of the Convention has provided the equidistance principle as a specific method for the delimitation of territorial seas, questions arise as to whether the above view of the Court in drawing a PDL using appropriate methods is equally applicable to territorial seas. The answer is yes for three reasons. First, the wording of the special circumstances exception, as specified in Article 15 of UNCLOS, itself envisages the possibility that a special configuration of the coast may require a different delimitation method than the equidistance method. In addition, the genesis of the text of this Article shows that equidistance is not the one and only provisional line in the delimitation of territorial seas as intended by the ILC. This might be the reason that, given the exceptional circumstances in the Nicaragua/Honduras case, the Court adopted an angle-bisector line as provisional, although it nevertheless expressed that equidistance remained the general rule.

Second, unlike Articles 74 and 83 where equitable solution has been accepted as the predominant objective in delimiting EEZ and continental Shelf, Article 15 of the Convention lacks any such objective. However, the insertion of the term ‘special circumstances’ provides ‘particular expression to a general norm that failing agreement, the boundary between States … [is] to be determined on equitable principles’ to achieve an equitable solution. Conversely, a reading of Articles 74 and 83 as juxtaposed with Article 15 may possibly prove that the expected outcome of each Article is nothing other than equitable solution. Third,

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370 Anglo-French arbitration, 45 [70] (quotation omitted).
371 Jan Mayen Case, 61 [51]. Nicaragua/Columbia case, 696 [194].
372 ‘where it is necessary by reason of historic title or special circumstances . . .’. See Article 15 of the LOS Convention.
373 Nicaragua/Honduras case, 743-745 [280]-[281].
374 See ‘Commentary’ (1952) II Yearbook of the International Law Commission, 38 [4]. This view has been taken since Article 15 of UNCLOS is virtually identical to the text of Article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone and at UNCLOS it was adopted without any discussion as to the method of delimitation of the territorial sea. See Nicaragua/Honduras case, 744 [280].
375 Nicaragua/Honduras case, 745 [281], 246 [287]-[288].
376 M D Blecher, ‘Equitable Delimitation of Continental Shelf’ (1979) 73 American Journal of International Law 60, 70.
even the non-existence of special circumstances should not be seen as a reason for the provisional usage of the equidistance method, since ‘once the use of the equidistance method of delimitation is determined as not obligatory in any event, it ceases to be legally necessary to prove the existence of special circumstances to justify not using that method’.  

In view of above, this thesis would like to argue that, to achieve an equitable solution, drawing a PDL is one of the core decision-making processes employed by the international courts and tribunals where the application of the equidistance method is not seen as preferred and is preferable only as ‘provision’ or as a ‘point of departure’ for its logical and common usage and its capacity to produce a ‘high degree of transparency’. Further, such predictability does not overturn the applicability of other methods for drawing a PDL. In this regard, one may misunderstand the view of the Court to mean that the ‘transparency and predictability of the delimitation process as a whole are additional objectives to be achieved in the process’. Here, the word ‘predictability’ does not necessarily mean the predictability of any particular delimitation method or principles, but means the predictability of the delimitation process (the three-stage process) itself because, when a court or tribunal is asked to delimit, it must proceed in defined stages. The decision makers have freedom to choose any kind of delimitation method for drawing a PDL that they find appropriate in given circumstances. In acknowledgement of this freedom, this thesis argues that the international courts and tribunals should prefer the use of the term ‘PDL’ rather than ‘PEL’—otherwise a preference for one particular method of delimitation may reasonably be seen to be prioritised over the achieving of an equitable solution, which is not the case in maritime delimitation.

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377 North Sea Cases 45–46 [82].
378 As far as the three-stage methodology concerns, the Court is of the view that the ‘three-stage process is not, of course, to be applied in a mechanical fashion and the Court has recognized that it will not be appropriate in every case to begin with a provisional equidistance/median Line’. See Nicaragua v. Honduras, Judgment, I.C.J. Reports 2007 (II), 741 [272]. It is further affirmed that ‘the method to be followed should be one that, under the prevailing geographic realities and the particular circumstances of each case, can lead to an equitable result’. See Bangladesh/Myanmar Case, 75 [235]. See also Malcolm D Evans ‘Maritime Delimitation and Expanding Categories of Relevant Circumstances’ (1991) 40 International and Comparative Law Quarterly 17.
379 Ibid, 98 [339]. (emphasis added)
380 Romania/Ukraine case, 101 [115].
The Weighing Up of Relevant Circumstances and the Issue of Adjusting the Provisional Line

The next stage to which a court or tribunal proceeds after drawing a PDL is to consider the relevant circumstances determining whether modification or adjustment of the provisional line is required to reach an equitable solution. It is obvious that the equitableness of a delimitation result depends on the particularities of the delimitation case itself and thus it is a requirement of equity that all relevant circumstances are taken into account and that the Court or tribunal determining a case pays close attention to all facts and circumstances offered for its consideration by the parties. It is virtually impossible to achieve an equitable solution in any delimitation without taking into account the particular relevant circumstances that characterise the area under scrutiny. However, at the same time, it is equally true that a wide variety of circumstances may be relevant to a particular case. Does this mean that all circumstances are equally relevant and warrant assessment? If not, then what are the underlying principles for the inclusion or exclusion of circumstances and what are their indicative roles? Are there any principles that balance such considerations?

(a) Identifying Special/Relevant Circumstances

There is ‘no general rule’ but the obligation to achieve an equitable solution allows the international courts and tribunals to exercise discretionary powers in the course of identifying relevant circumstances. This view is based on the premise that the task of achieving an equitable solution in a specific case depends on the geographic realities and other circumstances of the case. A particular fact or circumstance can be regarded as special or relevant to the delimitation process only when its consideration is necessary for arriving at an equitable result. Equally, if the existence of a fact affects the achievement of an equitable result for a case, it may be defined as a relevant circumstance. Supporters of predictability in the equidistance–special circumstances method for corrective equity may find that such

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381 Tunisia/Libya case, 64 [81].
382 Munkman, above n 65, 12.
383 Tunisia/ Libya case, [72].
384 Bangladesh/Myanmar case, 96 [317].
385 A list of special/relevant circumstances, as applied by the international courts and tribunals, has been provided in Appendix III of this thesis.
386 Bangladesh/Myanmar case, 96 [317].
circumstances may modify the results produced by an unqualified application of the 
equidistance principles.387

Since the consideration of circumstances dictates an appropriate equitable evaluation of the 
facts in the quest for an equitable result, it has become an established judicial principle that, 
to identify relevant circumstances, the international courts and tribunals must pay close 
attention to all the facts and circumstances offered for their consideration by the parties.388 
In other words, they should disregard legal or factual issues that have not been raised by the 
disputants and should resist third-party interventions or court-initiated processes for fact 
finding.389 Prior to the North Sea cases, international courts and tribunals sought to identify 
the relevant circumstances in each delimitation case by reviewing the arguments of the States 
concerned. As Stated in Chapter 3, two broad categories of relevant circumstances have 
emerged through the process of identifying circumstances in delimitation cases: geographical 
circumstances and non-geographical circumstances. Circumstances related to the physical 
geography and the geomorphologies of coasts are given the highest priority when identifying 
relevant circumstances. For example, the concavity or convexity of the coasts were identified 
as relevant circumstances in the North Sea cases and in the Bangladesh/India and 
Bangladesh/Myanmar cases; the marked disparity between the coastal length of two States 
was considered as a relevant circumstance in the Libya/Malta and Jan Mayen cases; the 
geomorphology of the marine area adjacent to the coast, such as the ‘very active morpoph-
dynamism’ of the delta of the River Coco, was taken into account as a circumstance relevant 
to the delimitation process in the Nicaragua/Honduras case, since any equidistance line so 
constructed today would become arbitrary and unreasonable in the near future.390

Notwithstanding, circumstances evolve out of the decision-making process at the very 
moment of judgement and any unforeseen fact may acquire the status of relevant 
circumstances. For example, the decision of the tribunal in the Bangladesh/India arbitration

387 See generally Tanaka, ‘Predictability and Flexibility’, above n 210,125-126; SHI Jiuyong, ‘Maritime 
Delimitation in the Jurisprudence of the International Court of Justice’ (2010) 9 Chinese Journal of 
International Law 279.
388 Munkman, above n 65, 12.
389 Jose E Alvarez, ‘What are International Judges for? The Main Functions of International Adjudication’ in 
Cesare Pr Romano, Karen J Alter and Yuval Shany (eds), The Oxford Handbook of International Adjudication 
(Oxford University Press, 2014) 161.
390 Nicaragua/Honduras case, 743 [280]-[281].
regarded the land boundary terminus as a special circumstance since it was not at a point equidistant from the base points selected by the tribunal, as required by Article 15 of the Convention, which stipulates that, in the absence of any agreement, the delimitation of the territorial sea must begin on the median line. The process of identifying special/relevant circumstances can essentially be found to be interlinked with the expanding nature of relevant circumstances.

(i) The Scope of Relevant Circumstances is Expanding in Nature

The decision regarding the North Sea Continental Shelf specified that ‘there is no legal limit to the consideration which States may take account of for the purpose of making sure that they apply equitable procedures’. Some confusion has arisen from the Court’s assertion that there was ‘no legal limit’; however, the Court itself in later cases seemed to limit the open-endedness of relevant circumstances. For example, in the Tunisia/Libya and Guinea/Guinea–Bissau cases, the Court refused to consider purely economic factors as relevant to delimitation processes on the grounds that they were not of ‘permanent’ nature and that they were relatively uncertain and potentially changeable over the course of time. The unity of deposits was regarded as a factor to be taken into account by the parties but not as a relevant circumstance in itself. Similarly, while the tribunal considered islands (the Channel Islands and the Scilly Isles) as relevant circumstances for delimitation in the Anglo/French award, it refused to take into account Qit’at Jaradah Island in the Qatar/Bahrain case, which it deemed an ‘insignificant maritime feature’, and declined to accept St. Martin’s Island as a relevant circumstance in the delimitation of the EEZ and the continental shelf despite its designation as a ‘significant maritime feature’. There are two different potential impacts of the term ‘no legal limit’ used by the Court: first, since the Court was requested to detail the applicable principles of maritime delimitation rather than to conduct the task of delimitation in the North Sea cases, it may have used the term, ‘no legal limit’, to endorse the freedom of States to consider any circumstances that they deem

391 Bangladesh/India arbitration, 75-76 [271]-[274]; Guyana/Suriname arbitration, RIAA, Vol. XXX, 90 [323].
392 North Sea cases, [93] (emphasis added).
393 Tunisia/Libya case, 77 [107]; Guinea/Guinea–Bissau case [123].
394 Tunisia/Libya case, [107].
395 Qatar/Bahrain case, 40, 104 [219].
396 Bangladesh/Myanmar case, 51 [151], 96-97 [318]-[319].
appropriate for reaching an agreement entailing equitable solution; second, while the Court itself determines a delimitation, this term infers the idea that there should be ‘no legal bindings’ requiring the consideration of any particular circumstances as relevant to a case at hand, even those that may have been considered in a previous case. Underlying reasons for such flexibility may include the unique character of maritime geography and other circumstances, the identification and validation of which are carried out on a case-by-case basis, meaning that the equitableness of a delimitation line differs from case to case as a consequence of its particularity. Again, there may be two reasons why the Court imposed restrictions on relevant circumstances: first, since delimitation by judicial settlement is solely ‘based on legal rules’ that govern the delimitation of something as ‘permanent’ and, since the main task of the international courts and tribunals is to attain an equitable result by providing concrete bases for their decisions to avoid any absurdity and arbitrariness, the Court might have opted to exclude circumstances that were apparently uncertain, ‘virtually extraneous’ or changeable over the course of time; second, the Court must respect a State’s ‘basis of title’ over maritime areas in accordance with the fundamental principle, ‘the land dominates the sea’, as well as the principle of ‘natural prolongation’, for ‘the land is the legal source of power which a State may exercise over territorial extensions seaward’. This implies that a State title is required ‘to disclaim the relevance of any factor unconnected with it’. Therefore, circumstances other than geographical factors should not take precedence. Accordingly, the Court is keen to recognise circumstances that are of importance in securing States’ legal entitlements or in avoiding any distorting or disproportional effects that may hinder the achievement of an equitable solution. In sum, it can be concluded that, in specific cases, the scope for considering circumstances relevant to equitable delimitation is at once open ended and limited, warranting flexibility and adhering to the premise that the

399 *Tunisia/Libya* case, [71]; *Libya/Malta* case, [50].
400 *North Sea* cases, [96]. Some scholars viewed that the principle that the land dominates the sea is, in fact, the principle of natural prolongation ‘in its more modern guise’. See Coyle, above n 171, 185.
Court or tribunal should ‘avoid discarding any consideration that might later be helpful for resolving a dispute in an unforeseen context’. All these views amount to a singular idea: that any attempt to prepare a closed list of relevant circumstances for maritime delimitation is legally impossible.

However, in the process of delimitation while the Court identifies and weighs up relevant circumstances, the issue of flexibility essentially differs from the notion of the expanding categories of relevant circumstances. The ILC envisaged special circumstances as a small and well-defined body of exceptions to the application of the equidistance method. According to Oda, the ILC has rarely considered any element other than geography that might affect the drawing of maritime boundaries. However, the Courts’ assertions about this issue, as detailed earlier, found differently. The potential for expanding the range of relevant circumstances has always been an issue of interest for scholars. Evans pointed out the inadequacy of relevant circumstances and argued for broadening their scope, while Munkmann argued for considering ‘all the surrounding circumstances, including economic and political factors and expediency’ when reaching an equitable solution. Nonetheless, any concrete answer as to the question whether the range of relevant circumstances is, in practice, really expandable and whether international case law has established any significant indication or proof in this regard, can hardly be found in scholarly writings. This thesis finds that, in the course of determining boundary lines for different maritime jurisdictions, it may be possible to expand the scope of relevant circumstances in proportion to the increasing distance of different maritime zones. This view is founded on two substantive bases: first, as shown in Chapter 3, the term ‘special circumstances’ relates to factors pertinent to territorial sea delimitation while the term ‘relevant circumstances’ relates to EEZ and continental shelf.

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403 Ibid.
404 According to the ILC, as in the case of the boundaries, of coastal waters, provision must be made for departures (from equidistance) necessitated by ‘any exceptional configuration of the coast, as well as the presence of islands or of navigable channels’. See Yearbook of the International Law Commission (1953, Vol. II) 216 (emphasis added) . ILC Summary Records, 490th Meeting, [22], 493rd Meeting [44].
407 Munkman, above n 65, 19 (emphasis altered).
delimitation. Both scholars and jurists have observed the difference between special circumstances and relevant circumstances not only for their terminological differences, but also for the differences between their prospective scopes and expanding capacities. Analysis of the rules regarding right and jurisdiction pertaining to different kinds of maritime zones shows that, as the distance from the coast increases, the sovereign rights and jurisdiction of States over maritime areas decreases.\(^{408}\) Likewise, as the degree of sovereignty decreases with the distance of the maritime zones, the possibility of expanding the scope of relevant circumstances increases proportionate to the distance. Second, although the judicial practice of the consideration of relevant circumstances seems to impose restrictions, the scope of relevant circumstances can also be increased within the extent of maritime zones. For example, in the Bangladesh/India award, the tribunal, because of the shorter breadth of the territorial sea (12 nm), did not consider the concavity of the coastline as a special circumstance, yet this concavity was considered as a relevant circumstance during the delimitation of the EEZ and the continental shelf, which extended for greater distances.\(^{409}\) Third, some scholarly writings have shown concrete support in favour of the view that the scope of relevant circumstances normally expands with the extent of different maritime zones. For example, in the writings of Judge Shi Jiuyong of the ICJ, the scope of identifying and considering relevant circumstances is greater in the delimitation processes for EEZ and continental Shelf than for territorial seas.\(^{410}\)

In summary, it is clear that the expanding capacities of relevant circumstances are proportionate to the extents of maritime zones.

\((b)\) Adjusting the Provisional Delimitation Line

Once the relevant circumstances are identified, it becomes the task of the decision makers to assess whether an adjustment of the PDL is necessary to achieve an equitable result. How

\(^{408}\) For example, the coastal States are entitled to exercise sovereign rights and jurisdiction within 12 nm of the territorial sea, while the rights and power that the States are entitled to exercise beyond the 12 nm, in EEZ and continental shelf, amount less to than sovereignty, and the coastal State’s rights in the continental shelf beyond 200 nm has become more and conditioned as stated in Article 82 of the Convention. See UNCLOS, Articles 17-32, 56, 58, 77, 81, 82 See also Antunes, above n 196, 146.

\(^{409}\) Bangladesh/India Arbitration, 75, 105-115

much weight certain circumstances should be given in the course of attaining an equitable result can necessarily be seen as the central question when ascertaining relevant circumstances. To achieve an equitable solution, the effect of each circumstance on the delimitation process may be determined individually or several circumstances may be considered cumulatively as comprising a single relevant circumstance affecting the delimitation.411 Again, the evaluation process may find the same circumstances derived from different contexts and resulting in different delimitation factors. For instance, the presence of an island within the limit of a territorial sea may be seen as a special circumstance in terms of its territorial zone, while the same consideration, for the sake of reaching an equitable solution, may lead to the island not being afforded any significance in the delimitation of an EEZ or a continental shelf.412 Thus, the processes of weighing up relevant circumstances can be seen to play a role ‘within the delimitation process’.413 This has two different implications: first, the consideration and evaluation of relevant circumstances are subordinate to the delimitation process, the major task of which is to ensure equitability in the result; second, a delimitation result may pass an equitability test (disproportionality test) without any consideration of relevant circumstances. The evaluation process for relevant circumstances as observed in the case law is substantially based on this premise.

Evans found that this appraisal process paralleled ‘the decline in the recourse to equidistance as … a standard’ for bringing about a result effecting ‘equitable variations’,414 while Antunes found it useful in determining the course of a delimitation line resulting from a shift in the ‘factual matrix’ to the ‘legal matrix’ in a way that establishes which circumstances ought to be considered to attain the objectives of delimitation. 415 Keeping these views in mind, this thesis finds that the consideration and evaluation of the relevant circumstances, as evidenced in case law, are both interactive and interrelated within delimitation processes that aim to

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412 For example, the St. Martin Island of Bangladesh has been considered as special circumstances at the time of the delimitation of the territorial sea, and it was not considered so during the delimitation of EEZ and continental shelf. See Bangladesh/Myanmar case, 95[311], 96-97 [318]-[319].
415 Antunes, above n 196, 295.
reach an equitable solution, where the process of reaching an equitable solution is solely dependent on the fundamental legal basis of maritime entitlement\(^{416}\) and, more particularly, on the relevant coastal measurements that require the attribution of submarine areas proportionate to them. Thus, it can be seen that the weighing up processes for relevant circumstances are related to the fundamental content of equitable solution—the principle of proportionality or the absence of disproportionality as observed in the Anglo-French award\(^{417}\) that justifies the equitableness of the result. The Court in the *North Sea* cases established much of what became the ‘ground rules’ in this regard.

In the *North Sea* cases—when the Court emphasised the consideration of several factors when applying equitable principles\(^{418}\) and finally concluded that ‘delimitation is to be effected by agreement in accordance with equitable principles *and* taking account of all the relevant circumstances, *in such a way as to leave as much as possible* to each party’, before emphasising the responsibility to exercise ‘a reasonable degree of proportionality’ as the final factor—it is indicative that the appraisal process for relevant circumstances bears an inextricable relation to proportionality. In other words, proportionality has been seen as the dominant consideration for adjusting a provisional equidistance, first by measuring the equitability of the provisional delimitation line and, then, when considering the coastal length, if the PEL reveals a disproportionality between the coastal length and the attributed area, the principle of proportionality insists that the decision makers identify and evaluate relevant circumstances so that the provisional delimitation line can be adjusted to produce a result that reflects a reasonable degree of proportionality or avoids significant disproportionality.\(^{419}\) If this were not the case, the Court in the *North Sea* judgement would not call for the inclusion of all relevant circumstances when producing a result exemplifying quasi-equality (proportionate equality) between the States—although it nevertheless acknowledged that the coastal lengths of the conflicting States were similar.\(^{420}\) This was evident again in the *Libya/Malta* case, in the *Jan Mayen* case and, most recently, in the

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\(^{416}\) Which is based on the governing principle, the land dominates the sea.

\(^{417}\) As the tribunal noted that it is ‘disproportionate rather then any general principle of proportionality which is relevant .. factor’. See *Anglo-French* arbitration, 58 [101].

\(^{418}\) The factors or circumstances are geology, geography, unit of deposit, and proportionality as a final factor. See *North Sea* cases, [95]-[98].

\(^{419}\) For this view see, Coyle, above n 171, 188.

\(^{420}\) *North Sea* cases, 49-50 [91].
Nicaragua/Columbia case, where the Courts explicitly considered the marked disparity of the coastal lengths as relevant circumstances for adjusting the provisional delimitation line and producing a result that espoused a reasonable degree of proportionality.\[^{421}\] If it were argued that the Court in the Jan Mayen case adjusted the provisional delimitation line only on the consideration of ensuring equitable access to the capelin fish resources,\[^{422}\] the basis for such argument would be very weak. Had the two coasts been of a similar length, it would have been very difficult to justify such an adjustment simply to provide equal access to the capelin fish stocks. Thus, it can be assumed that the coastal length is a potential circumstance in all delimitation cases that plays a most decisive, if merely implied, role in the delimitation process as an integrated (inbuilt) relevant circumstance and that there are few cases, as mentioned above, where it has been explicitly considered as a relevant circumstance where there is a marked disparity in the ratio between State coastal lengths.\[^{423}\]

When a PEL between two States produces a cut-off effect in the maritime entitlement of one of the States, as is evident from the North Sea cases, the Bangladesh/Myanmar case, the Nicaragua/Columbia case and the Bangladesh/India arbitration, this cut-off effect is viewed as a relevant circumstance requiring the adjustment of the provisional delimitation line to produce an equitable result—in other words, to attain a proportionate result.\[^{424}\] Thus, to achieve an equitable solution, consideration of the cut-off effect is equally applicable in the delimitation of areas both within and beyond 200 nm. The reason for this is that, in the course of adjusting the provisional delimitation line, the Court should avoid completely cutting off either party from the areas into which their coasts project and thus the delimitation line should reasonably be compatible with the maritime entitlements of each.\[^{425}\] Further, one should be mindful of the fact that, once a State’s cut-off effect has been considered in an earlier case, it cannot be taken into account in later cases, because cases are ‘independent of each other’.\[^{426}\]

\[^{421}\] Nicaragua/ Colombia case, 624, 702 [211].
\[^{422}\] Jan Mayen Case, [75].
\[^{423}\] This view is taken since ‘the frequent references in the case-law to the idea of proportionality - or disproportion
- confirm the importance of the proposition that an equitable delimitation must take into account the disparity between the respective coastal lengths of the relevant area’. See Jan Mayen case 67 [65].
\[^{424}\] For example, North Sea cases, 17 [8], 49 [89]; Bangladesh/Myanmar case, 98 [324]; Nicaragua/Columbia case, 704 [215]-[216]. Bangladesh/India arbitration, 121 [408];
\[^{425}\] Nicaragua/ Colombia case, 704 [216].
\[^{426}\] Bangladesh/India arbitration, 121 [411].
All these instances inform a single idea: as long as the equitableness of a delimitation line depends on a disproportionality test, the extent of the adjustment of a provisional delimitation line is inherent to the process of attaining an equitable solution until it demonstrates a reasonable degree of proportionality in a way where the maritime entitlement of the States are reasonably protected both by avoiding any cut-off effect caused by the provisional delimitation line and ensuring the non-encroachment of the coastal projection of the States in areas of overlapping potential entitlement.\(^\text{427}\) It is worth mentioning that the extent to which a provisional line can be adjusted depends on the relative weight of the relevant circumstances—a fact that is evident in the case law that marks disparities in the coastal lengths is the most important relevant circumstances in this regard.\(^\text{428}\) However, it should not be overlooked that ‘the problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case’.\(^\text{429}\) However, the view taken above, that proportionality dictates the relevancy of circumstances and thus requires evaluation, is more evident in cases where the Court did not find any circumstances to be relevant or special enough to modify the provisional delimitation line. For example, in the Qatar/Bahrain case, the Cameroon/Nigeria case, the Romania/Ukraine case, the Guyana/Suriname case and the Chile/Peru case, the international courts and tribunals all concluded that a PEL would become the final delimitation line.\(^\text{430}\) Nonetheless, this does not mean that the delimitation line did not produce some sort of disproportionality in these cases. The implicit reason that the Court proceeded with such an approach of adjustment is that, as far as the adjustment was based on coastal length, any disproportion did not require an adjustment unless it produced manifest disproportion, since it is a requirement of equity as well as of equitable consideration that an equitable result must reflect a reasonable degree of proportionality between coastal lengths and areas. Antunes claimed that ‘coastal length ought to be considered within the weighing up process, on which the determination’ of the delimitation line is predicated.\(^\text{431}\) Thus it is evident that the principle of proportionality has

\(^{427}\) This thesis finds that the principle of non-encroachment, avoiding cut-off, and attaining a result absent gross disproportionality are supplementary to each other for achieving an equitable solution.  
\(^{428}\) See generally Libya/Malta case 45[58], 48-49 [66]; Jan Mayen Case, 65-69 [61]-[71], 79-81 [92].  
\(^{429}\) North Sea case 50-51 [93].  
\(^{430}\) Qatar/Bahrain Case, 104 -109 [218]-[220]; Cameroon/Nigeria case, 448[305] [306]; Romania/Ukraine case, 129-130 [214]-[216]; Chile/Peru case, 65 [194].  
\(^{431}\) Antunes, above n 196, 312 (emphasis altered).
always been implicitly considered during the identification and evaluation of the relevant circumstances of a concrete case. As such, both Tanaka and Kolb admitted that proportionality is not only an *ex post facto* test of equitableness, but also ‘a *rule of adjustment*’ or ‘a *reason for shifting a provisionally drawn line*’, anchored in the idea of *equal projections for each coastal unit*.\textsuperscript{432} One may find that the philosophy of such adjustment is linked to the logical assertion that any adjustment that ‘makes someone better off and nobody worse off and also improves the outcome for the worst off—passes the test of justice’\textsuperscript{433}

In conclusion, the evaluation process of relevant circumstances is intertwined and interacts with proportionality and the implied use of proportionality at this stage of the decision-making process involves making sure that the delimitation line allows each State to enjoy reasonable maritime entitlements in the areas into which its coast projects. In other words, it can be argued that, invoking the equitable concept of proportionality, all relevant circumstances must be taken into account to produce an equitable result. Thus, if a final delimitation line is ‘determined by the consideration of relevant circumstances’,\textsuperscript{434} such a consideration would be incomplete without the undertaking ‘to ensure a proportionate result (i.e., a reasonable degree of proportionality)’.

\textit{(i) The Relation Between Relevant Circumstances and Proportionality in Terms of Adjustment}

Relevant circumstances and the principle of proportionality interactively affect delimitation processes and play a role in reaching an equitable solution. Their roles, as may be assumed from the foregoing discussion, can be articulated as follows:

The first role regards the choice of the applicable method of delimitation when drawing a provisional delimitation line that is at the same time rejective and receptive. For example, the consideration of special or relevant circumstances is indicative of a decline in the recourse to


\textsuperscript{433} Robin Hahnel, \textit{Economic Justice and Democracy} (Routledge, 2005) 39.

\textsuperscript{434} Cf Tanaka, ‘Predictability and Flexibility’, above n 210,126.
equidistance principles, not only as obligatory methods for delimitation, but also as obligatory or predictable methods for drawing provisional delimitation lines. At the same time, given the circumstances of a given case, informing the choice of appropriate method for upholding an equitable result (reflecting a reasonable degree of proportionality) is also a role played by relevant circumstances. Such a role is inherently flexible because it does not matter how many circumstances are categorised as relevant in jurisprudence, each case in dispute must be ‘considered and judged on its own merits, having regard to its particular circumstances’. Taking this view into account, one might question whether a delimitation case may reflect such a role if it lacks relevant circumstances. This thesis argues that there may be cases where no relevant circumstances may exist to adjust a provisional delimitation line, but, nevertheless, there must always existed relevant circumstances that the international courts and tribunals must take into account when considering the appropriateness of a PEL. In other words, there is no delimitation case where relevant circumstances do not exist and ‘coastal geography’ is a relevant circumstance that is inbuilt, common to all delimitation cases and taken into account before drawing a provisional delimitation line and when examine whether or not a PEL can be drawn. For example, the coastal geography in the Nicaragua/Honduras case indicated that the drawing of a PEL would be inappropriate, as certain geographical problems were identified as relevant circumstances, including the absence of viable basepoints at Cape Gracias a Dios.

In the course of weighing up relevant circumstances and adjusting provisional delimitation lines, the second role of relevant circumstances is implied in the interaction between proportionality and relevant circumstances where circumstances indicate the degree of

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435 Cf Malcolm D Evansm ‘Maritime Delimitation and Expanding Categories of Relevant Circumstances’ (1991) 40 International and Comparative Law Quarterly 3, 33. Evans although agreed that relevant circumstances have an effect upon delimitation process, but he was arguing that the case law has not provide any guidance as to the weighing of relevant circumstances within the delimitation process. Notable that he made this remarks in 1991. The number of cases was few then. But in course of time, when the interntional courts and tribunals have desolved a number of cases, it becomes clear from the judicial practice that it is not possible to provide any guidance in this regard, since the issue of weighing of relevant circumstances itself requires flexibility and because of the nature of circumstances is specific in each case, this flexibility is inherent to the delimitation process.

436 Tunisia/Libya case, [132]; Guinea/Guinea-Bissau case, [89].
437 Nicaragua/Columbia case, 696 [192]-[194].
438 Ibid. 696 [192]-[194].
439 Nicaragua/Honduras case, 742-7473 [277]-[278].
proportionality or disproportionality while proportionality determines the applicable method as well as the construction of the final delimitation line. For example, to reach an equitable solution in a delimitation case, if the prevailing relevant circumstances require the modification or adjustment of a provisional delimitation line, the principle of proportionality plays a role in determining the limit of its adjustment while the highest possible degree of proportionality or the lowest possible degree of disproportionality in the ratio between the relevant coasts and relevant areas of States depends on the weight of relevant circumstances. As will be shown, the greater the weight of the relevant circumstances, the higher the degree of proportionality or the lower the degree of disproportionality. In cases where no relevant circumstances have been identified to require the adjustment of the PEL and where the Court concludes that no significant disproportion is evident in the provisional delimitation line, it is assumed that the PEL has been drawn in consideration of the concept of proportionality. If this were not the case, then it would be evident in case law that the international courts or tribunals had adjusted provisional delimitation lines after performing the disproportionality test. However, such evidence is absent from case law. This suggests that, to assess the equitableness of a delimitation result, when international courts and tribunals invoke the disproportionality test, they do so to compare the predictability of a result that they have already forecast. As such Lapidoth States, ‘judges often begin by determining what is just in their opinion and then look for the legal reasoning to support their conclusion’.440 This may be why Legault and Hankey claimed that ‘proportionality or disproportionality are more often taken into account as relevant factors and equitable considerations influencing the overall result and, implicitly, the choice of method used, rather than as a basis for a mathematical ex post facto test of that result’.441

4 The Disproportionality Test and the Indeterminacy of the Delimitation Result

The disproportionality test is the third and final stage of the decision-making process where the Court tests the equitableness of a proposed delimitation line to verify that the line ‘does not, as it stands, lead to an inequitable result by reason of any marked disproportion between

440 Lapidoth, above n 22, 163.
the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State’. Until the Romania/Ukraine case, this stage was subsumed within the previous two-stage method of the decision-making process that involved drawing a provisional delimitation line and weighing up the relevant circumstances and potential adjustment of the provisional delimitation line. The judgement in the Romania/Ukraine case is the first instance where the Court recognised proportionality as an independent criterion and separated it from the other stages for its decisive value and potential to ensure equitableness, introducing it in a more deliberate and structured way under the title of the ‘disproportionality test’ to assess the equitableness of the delimitation line demarcated through other processes. The international courts and tribunals appear to have found this three-stage methodology to form a well-structured decision-making framework and this may account for why this three-stage methodology has been followed in all cases subsequent to the Romania/Ukraine case. However, the priority given to the disproportionality test as the final determining factor in the decision-making process may give rise to confusion as to whether the application of proportionality, in its strict sense, requires the drawing of a delimitation line in a way that is mathematically determined by the exact ratio of the lengths of the relevant coastlines.

It has become evident in case law that judges are likely to avoid any direct and strict mathematical application of proportionality; rather, they prefer to maintain its indeterminate character in their decision-making processes. Some scholars have opposed such application of proportionality, considering it ‘too indeterminate and subjective to be much help’. Nevertheless, proportionality is indeterminate to avert gross disproportionality in the coastal lengths and marine areas being attributed. Because of differing geographical configurations, conflicting claims to resources, maritime access and historical sites and differing societal expectations, it has been suggested that ‘there cannot be a simple mathematical formula for fairness’. Thus, it follows that the proportionality check does not purport to be precise, but

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442 Nicaragua/Colombia case, 696 [193]. See also Jan Mayen case, 67 [64]; Romania/Ukraine case, 103 [122].
443 Libya/Malta case, 46 [60].
444 Romania/Ukraine case, 101 [115]-[116], 129-130[210]-[216]
445 Jan Mayen case, 3-11 (Separate opinion by Judge Schwebel) ; R Higgins, problem and process, 230, 236 .
446 Newton, above n 200, 52.
to be approximate.\textsuperscript{447} The Court clearly stressed the point that jurists must avoid ‘applying a principle of strict proportionality’ since the purpose of delimitation is not to apportion equal shares of an area, nor indeed proportional shares;\textsuperscript{448} rather, it is ‘to achieve a delimitation that is equitable, not an equal apportionment of maritime areas.’\textsuperscript{449} This suggests that an attributed area should not necessarily be proportionate to coastal length. It should be noted that, though the Court has rejected any endeavour to achieve a predetermined arithmetical ratio in the relationship between the relevant coasts and the submarine areas generated by them, it did consider the relationship between the lengths of the relevant coasts in determining the delimitation line in such a way that a ‘broad assessment of the equitableness’ of the result could be made on the grounds of equity—not as required by equities in arithmetical terms, but as required by the test of proportionality as an aspect of equity.\textsuperscript{450} Although the international courts and tribunals, in most cases, accomplish a proportionality check through employing mathematical calculations with reference to relevant coastlines and relevant areas, in some cases they make no such precise calculations. What this means, according to the Court, is ‘engage[ment] in a “broad assessment of disproportionality”’.\textsuperscript{451} However, rejection of the concept of proportionality in \textit{sensu stricto} and reliance on the legal norms of a ‘broad assessment of the equitableness’ and a ‘broad assessment of disproportionality’ may attract questions as to whether a delimitation result is of indeterminate nature and thus supports the standard of ‘a reasonable degree of proportionality’.

According to Voigt, indeterminacy is so inherent to general principles that the ‘principle of equity or proportionality’ as a general principle ‘must necessarily comprise of such quality’\textsuperscript{452}. This may be why, in the \textit{North Sea} cases, the Court emphasised the achievement of an equitable result by taking into account ‘the element of [a] reasonable degree of proportionality’.\textsuperscript{453} Here the requirement for a reasonable degree of proportionality seems to

\textsuperscript{447} Romania/Ukraine case, 129 [212].  
\textsuperscript{448} Romania/Ukraine case, 2009, ICJ, 99 [110].  
\textsuperscript{449} Romania/Ukraine case, 100 [111]. See also North Sea casea., 22 [18]; Jan Mayen case, 67[64].  
\textsuperscript{450} Libya/Malta Case 54-55 [75].  
\textsuperscript{451} Chile/Peru case, 65 [193] (emphasis added)  
\textsuperscript{452} Voigt identified three different nature of general principles which are inherently interlinked. They are indeterminacy of their scope, discretion, and dynamism. See Christina Voigt, ‘The role of general principles in international law and their relationship to treaty law’ (2008) 31 (2/121) \textit{Retfærd. Nordisk Juridisk Tidsskrift} 9.  
\textsuperscript{453} North Sea cases 52[98], 53-54 [101 (D) (3)].
envision only the rejection of an unreasonable degree of disproportionality.\textsuperscript{454} For example, the tribunal in the \textit{Barbados v Trinidad and Tobago} arbitration held the view that, although the principle of proportionality is ‘mathematically certain … this would in many cases lead to an inequitable result’.\textsuperscript{455} The tribunal went on to State that the relative lengths of coastal frontages are one element in the process of delimitation taken as a whole and the degree of adjustment called for by any given disparity in coastal lengths is a matter for judgement made in light of all circumstances of the case.\textsuperscript{456} The tribunal specified that proportionality functions as ‘a final check upon the equity of a tentative delimitation to ensure that the result is not tainted by some form of gross disproportion’.\textsuperscript{457} Recently, in the Bangladesh v Myanmar case, the ITLOS seemed to uphold this view in seeking to avoid a ‘significant disproportion’ of result.\textsuperscript{458} In sum, the purpose of the disproportionality test is to ensure that the result achieved reflects a reasonable degree of proportionality and, at the same time, avoids any gross or significant disproportionality that might taint the result and render it inequitable in the light of the circumstances of the particular case. This may be the reason that Franck concluded that fairness (as proportionality) plays a tempering role in maritime delimitation, where it ‘occurs in the context of an infinite number of geographical, geological, topographical, economic, political, strategic, demographic and scientific variables and where ‘hard and fast’ rules are likely to produce a \textit{reduction ad absurdum}.’\textsuperscript{459}

Despite such legitimate indeterminacy, the disproportionality test, because of its mathematical and quantitative character—as evident in the case law—has created some level of objectivity and predictability in the law of maritime delimitation and its role has been enhanced through its effective application by the international courts and tribunals in a way that has been described as a ‘sort of judge-made law’.\textsuperscript{460} The only matter that still remains an issue for debate is the objective criteria of proportionality.

\textsuperscript{454} Antunes, above n 196, 311.
\textsuperscript{455} \textit{Barbados v Trinidad and Tobago} Arbitration, 449, 547.
\textsuperscript{456} Ibid.
\textsuperscript{458} \textit{Bangladesh Myanmar} case 499.
\textsuperscript{459} Franck and Sughrue, above n 103, 594.
The main point of debate regarding the objective criteria of proportionality, as outlined by Tanaka, is the need to define objective criteria for delimiting relevant coasts and relevant areas and to calculate their lengths and surfaces.\textsuperscript{461} It is argued that, unless the international courts and tribunals establish such criteria, the legitimacy of proportionality in maritime delimitation may be at stake. However, if the case law related to maritime delimitation is carefully scrutinised, it will become clear that the international courts and tribunals in their dicta have established these objective criteria in several respects. First, the Court defines the relevant coastlines that it takes into account during the examination of necessity adjustments to a provisional delimitation line as well as when testing the equitableness of the result in terms of whether it ensures a reasonable degree of proportionality. According to the Court, the relevant coastlines of the parties refer to the locations of the base points that are to be used in the construction of the equidistance line.\textsuperscript{462} The Court, while drawing the coastline, emphasised the drawing of straight baselines following the general direction of the coast. This was made clear at the very beginning of maritime jurisprudence in the North Sea cases where the Court concluded its view by stating that:

A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines—these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts or to reduce very irregular coastlines to their truer proportions ... drawing a straight baseline between the extreme points at either end of the coast concerned, or in some cases a series of such lines ... can play a useful part in eliminating or diminishing the distortions that might result.\textsuperscript{463}

Second, while considering the relevant area, the Court always tries to accommodate as much as possible by the designation of the area, so that both parties can benefit from their proportionate share to the greatest extent.

\textsuperscript{461} Ibid, 462-463. See also Bangladesh/India Case (separate opinion of judge Rao).
\textsuperscript{462} Cameroon/Nigeria Case, 2002, 442 [290].
\textsuperscript{463} North Sea Cases, 52 [98], 54 [101 (D) (3) ]
However, maritime jurisprudence does not show any interest in establishing defined objective criteria for proportionality in terms of relevant coasts or relevant areas and seems to keep this issue indeterminate. Court decisions seem to generate the fragmentation of law because of the indeterminate nature of the decision-making process and, thus, indeterminacy can be equated with fragmentation of the law. It can be speculated that such indeterminacy in the Courts is deliberate, since a court may find it necessary for the sake of justice. Thus, one can argue that such indeterminacy in the Courts is a kind of marvel of the decision-making process that the Courts employ only to achieve an equitable solution. Again, one might see this indeterminacy and fragmented nature as a sign of the maturity of the international legal system as well as a reflection of the growing strength of the unity and integrity of international law.\(^{464}\) If such indeterminacy were to be defined by any objective criteria, this may destroy the discretionary power of the Court in reaching an equitable solution of its own accord and as it deems fit and proper. It must be noted that, although the Court may not intend to set such objective criteria for relevant coastal lengths and relevant marine areas, throughout the history of judicial decision-making processes, the basic instinct of the principle of proportionality in terms of upholding an equitable solution is maintained—accommodating great a marine area as possible so that both parties can benefit from their proportionate shares to the fullest extent.

In summary, in terms of maritime delimitation, the principle of proportionality appears to be analogous to beauty, ‘not because it is so indeterminately in the eye of the beholder, but, rather, as an example of an indeterminate principle’, the consistent and continuous practice of which gradually builds its ‘objective determinacy’.\(^{465}\) The careful, consistent and continuous practice of this principle in the settling of maritime disputes by judges has not only deepened and narrowed the jurisprudential stream, but also strengthened its embankments.\(^{466}\) The principle of proportionality has thus attained objective determinacy in

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\(^{466}\) Franck, above n 462, 242.
achieving equitable results in cases related to maritime boundary disputes. The philosophical background of this principle, in terms of ensuring justice, seems to be so perfect that it has been enshrined even in religious scriptures. For example, both the Holy Quran and the Old Testament uphold almost the same injunctions—life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound equal for equal and stripe for stripe—that insist that any response to an illegal act must be proportionate to the provocation and not exceed it.\textsuperscript{467} In terms of distributive justice, this principle is so fair that even God has chosen it while creating the universe, its living and non-living objects and, most particularly, humans. Every part of the human body is proportionate. Therefore, the principles of ‘a reasonable degree of proportionality’ can be considered as a predictable standard for assessing the equitableness of a decision settling maritime boundary disputes.

In summary, the UNCLOS provisions dealing with the delimitation of continental Shelf and EEZ are explicitly overly vague and, consequently, this vagueness of the provisions, instead of resolving maritime boundary disputes, offers considerable scope for conflicting interpretations leading to increasing complexity in settling maritime boundary disputes. However, there must be a remedy for this ambiguity. Taking into account all the discussions above, it can be concluded that, though the Convention lacks any indication of specific criteria that could give guidance to interested States in their efforts to obtain equitable delimitation,\textsuperscript{468} the process adopted by the international courts and tribunals in producing an equitable solution has evidently developed and established essential delimitation criteria for settling maritime boundary disputes between States in an equitable manner. The delimitation criteria as developed in maritime jurisprudence include:

\begin{itemize}
\item[a.] The application of equity and equitable principles.
\item[b.] The determination of relevant areas and relevant coastlines in such a way that each State can be provided with the greatest maritime area possible.
\item[c.] Flexibility in the applicable methods of principles.
\item[d.] The consideration of all circumstances put forward by the parties.
\end{itemize}


\textsuperscript{468} Tunisia/Libya Case, 49 [49]-[50].
e. The taking into account of relevant circumstances when justifying the equitable character of the final delimitation line as consistent with the principle of proportionality, a fundamental concept of equitable solution.

f. The provision of a reasonable degree of proportionality or at least the absence of gross disproportionality in the final result.

g. Evidence of proper reflection in the final delimitation line, giving due respect to the fundamental bases for maritime entitlement as the equitable criteria of delimitation—the non-encroachment of the natural projection of the land terminus point in an area of overlapping potential entitlement and the prevention of any cut-off effect resulting from the application of any particular delimitation method—applied both expressly and implicitly.

In view of the above, it can be asserted that Articles 74 and 83 of the Convention accommodate all requisite delimitation criteria under the mantle of the sole delimitation rule—‘to achieve an equitable solution’—that was developed through the judicial acts of the international court and tribunals. This view provokes another important question as to whether the rule of equitable solution as embodied in the Convention provides a kind of ready approval to the judicial decision-making process regarding the achievement of equitable maritime delimitation, or whether the judicial decision-making process maintains close proximity to the conventional rule of equitable solution through contributing to the development of the evasive character of the conventional rule of equitable delimitation. As shown below, both Statements may be found to be correct.

It is true that the vague nature of Articles 74 and 83 regarding the reaching of an equitable solution resulted from ‘a last-minute endeavour’ to produce agreement on maritime delimitation issues at the Third Conference.469

The participants in the Third Conference negotiating the rules governing maritime delimitation were beholden to two legal bases—first, the previous conventional rule of maritime delimitation that advocates primacy of method and, second, the judicial decisions of the international court and tribunal that materialised the supremacy of equitable solution. At the Third Conference, when the disagreement between the two groups supporting

‘equidistance’ and ‘equitable principles’ was at its height, the president of the conference had no choice but to propose a new formula, generally known as a ‘package deal’ that referred to neither method of delimitation, but rather emphasised the final goal of maritime delimitation as ‘to achieve an equitable solution’. Prior to this, international case law on maritime delimitation was the only legal basis for propounding such a concept of equitable solution, which was subsequently developed as a consequence of equity and equitable principles in the North Sea cases. Nonetheless, the president’s proposal was readily accepted by both conflicting groups, who agreed to reject the method-oriented mandatory conventional rule of maritime delimitation and, in turn, preferred to accept the result-oriented rule of maritime delimitation—the rule of equitable solution—which currently acts as the one and only delimitation rule developed from international case law. In this way, by accepting the judicially developed rule of equitable solution, the international community recognised and thus extended their approval to the judicial approach of effecting maritime delimitation.

Once the rule of equitable solution was adopted, it became the responsibility of the international courts and tribunals to contribute to the further development of the imprecise conventional rule of delimitation, utilising it ‘not outside but within the rules’ of law. One such contribution is evident in the Court’s decision in the Tunisia/Libya case of 1982 just after the adoption of the draft convention at the Third Conference. In this case, the Court, for the first time, clearly defined a theoretical framework for the equitable solution of maritime boundary delimitations by developing the equity trio: equity, equitable principles and equitable solution. This trio was emphasised again in the Jan Mayen case and subsequent cases. From 1994 onwards, after the Convention came into force, the international courts and tribunals, in the operation of delimiting maritime boundaries, have only made reference to the conventional requirements for achieving an equitable solution without making reference to the source of the law or to the principles applicable for reaching such an equitable solution. Most recently, in the Bangladesh/Myanmar case and in the Bangladesh/India arbitration, it

470 See Package Deal, above n 84 and 94 in Chapter 1.
471 One of the he reasons why both the parties accepted the compromising text is that the text utilised an alternative form of words not reflective of either side’s view and thus acceptable to both. See Robert Beckman & Clive Schofield, Moving Beyond Disputes Over Island Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait, (2009) 40 Ocean Development & International Law 1, 11-12.
472 North Sea cases, [88].
has been affirmed that, since Articles 74 and 83 of the Convention ‘do not provide for a particular method of delimitation’, international jurisprudence on maritime delimitation determines ‘the content of the law applicable to maritime delimitation’ and thus ‘constitutes … a source of international law’ under Articles 74 and 83 of the convention.\textsuperscript{473} Therefore, it can be concluded that the rules of equitable solution as developed in international case law are very close to the conventional rule of equitable solution and have every capacity to serve as guidelines to States and third-party compulsory dispute settlement organs as well as the means to justify their conduct. In this context, it can also be argued that as long as the States are party to the Convention, the settlement of maritime boundary disputes will be conducted either by judicial means of dispute settlement or by mutual negotiations between States; further, it must be consistent, compatible and in line with jurisprudence as outlined by the international courts and tribunals aiming to achieve an equitable solution.

\section{V \hspace{2em} \textsc{settling maritime boundary disputes in an equitable manner}}

The term ‘equitable manner’, in terms of maritime relevancy, is very much akin to the term ‘equitable treatment’. However, in the context of maritime delimitation, as far as the term ‘equitable manner’ is concerned, it is distinct from the terms ‘fair and equitable treatment’ that are commonly used in the treaties and agreements related to international investment law. Most scholarly literatures available on this topic address ‘fair and equitable treatment’\textsuperscript{474} as the emergent minimum standard of the international investment law\textsuperscript{475} (that

\textsuperscript{473} \textit{Bangladesh/Myanmar} case, 61 [183]-[184], [72] [226]; \textit{Bangladesh/India} arbitration, 98 [339].

\textsuperscript{474} The term ‘fair and equitable treatment’ represents a general clause while its two notions ‘fair’ and ‘equitable’ may be described by synonymous wording which make this term as vague as the terms ‘fair’ and ‘equitable’ themselves. See Ronald Klager, ‘\textit{Fair and Equitable Treatment’ in International Investment Law} (Cambridge University Press, 2011) 41, 42. According to Black’s Law Dictionary, ‘fair’ means impartial; just; equitable; and free from bias or prejudice, and ‘equitable’ means just, consistent with principles of justice and right; and thus the term fair and equitable is hardly able to provide any guidance of how to apply it in a particular case. See generally B A Garner (ed), \textit{Black’s Law Dictionary} (8th ed., 2004); Zachary Douglas, \textit{The International Law of Investment Claims} (Cambridge University Press, 2009) 82. However, this term has been marked as the most vaguely formulated investment protection standard due to which some of the most controversial questions of international investment law took place in spite of the presence of considerable arbitration awards and scholarly literature. Ronald Klager, ‘\textit{Fair and Equitable Treatment’ in International Investment Law} (Cambridge University Press, 2011) 3.

\textsuperscript{475} Paparinskis viewed the concepts of international minimum standard and fair and equitable treatment as synonymous, but distinguished them in terms of concepts. To him international minimum standard is a concept that belongs to classical customary law and fair and equitable treatment is concept that belongs to modern treaty
is still mainly composed of a network of bilateral investment treaties)\textsuperscript{476} from an investment protection point of view.\textsuperscript{477} The most recent literature on this issue analyses the relation between the concepts of international minimum standard and fair and equitable treatment in the light of the customary rule of law and the fairness of judicial processes in dealing with investment disputes.\textsuperscript{478} However, as the term ‘fair and equitable treatment’ is itself vague and suffers from indeterminacy, it gives rise to conflicting views in both arbitral jurisprudence and scholarly writings. Therefore, the drive for a common international minimum standard of fair and equitable treatment is enduring.

However, this is not the case in the context of searching for a legitimate standard for measuring the equitableness of a maritime delimitation line. This is because of the dominance of equitable solution in determining maritime boundary disputes and the predictability of the delimitation process (the three-stage methodology) as developed in customary rule of international law through the judicial decision-making process that ultimately developed and affirmed a certain, consistent and equitable approach to ensuring the equitability of a delimitation line. Considering international case law on maritime delimitation and in view of the foregoing discussions of this chapter, this thesis argues that international judicial practice has firmly established an equitable approach that prescribes the equitable manner of a delimitation result as dependent on the fulfilment of two fundamental requirements of equity regarding maritime delimitation. The first requirement involves the meeting of a delimitation standard to establish outer limits for different maritime zones in particular marine areas to which a coastal State has legal entitlement. From an analysis of maritime jurisprudence, it is evident that—aside from some unusual cases where the coastal lengths of two opposite States are highly disproportionate—in other cases, particularly between adjacent States, the delimitation line is determined in such a way that both parties may be provided a marine space out of the overlapping areas of potential entitlement, where applicable and up to the highest limit of their legal entitlement. The second requirement relates to delimitation criteria

\textsuperscript{476} Klager, above n 471, 2.


\textsuperscript{478} Paparinskis, above n 472.
where the proposed result must be capable of being justified as reflecting a reasonable degree of proportionality with due respect to the fundamental principle of maritime delimitation—‘the land dominates the sea’—so that the required application of two basic equitable criteria of maritime delimitation that are subordinate to the non-encroachment and ‘no cut-off’ zones of the natural prolongation of the land territory, have been accomplished and thus are observable in the proposed delimitation line. This well established approach of the Court has created room for the legitimate expectation of the States that such an approach shall prevail in any upcoming case not only to produce an equitable solution but also to exemplify ‘certainty, equity and stability’ in a way that ensures the procedural fairness of delimitation and thus establishes a legal rule promoting consistency, non-arbitrariness and even-handedness in the decision-making process that, in the long run, must uphold justice. Here, the ‘required application of the equitable criteria’ is to be noted. It has now become a customary rule of international law that a proposed delimitation line must produce a result that necessarily evidences a reasonable degree of proportionality and thus justifies the disproportionality test. However, mere proportionality does not make a delimitation result equitable, since it is possible to draw a delimitation line in any direction to produce a proportionate result. Until a delimitation line is established in accordance with the equitable criteria of delimitation as mentioned above, any result, however proportionate, would only be proportionate and not necessarily equitable. Therefore, it is not sufficient to claim that a proposed delimitation line will only produce a proportionate result; it must reflect the application of equitable criteria, since it is a requirement of equity that ‘delimitation must involve the application of equitable criteria’. As asserted by the chamber of the ICJ, maritime delimitation, ‘whether effected by direct agreement or by the decision of a third party, must be based on the application of equitable criteria and the use of practical methods capable of ensuring an equitable result’. Again, it is also a requirement of equity that the end result must uphold justice and fairness in a way that fulfils the legitimate expectations of the parties, since justice requires the fulfilment of such expectations.

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479 See discussions at III A (1) of this chapter.
480 Coyle, above n 171, 181 (quotation omitted).
481 Gulf of Maine case, 299-300[112]-[113] (emphasis added).
should be noted that equity requires a result that ‘a non-partisan observer would consider acceptable in light of the general body of law, including state practice and case law, and the particular facts of the case’. Therefore, the question as to whether a court or tribunal has dissolved a maritime boundary dispute in an equitable manner has a strong nexus with the fulfilment of these requirements of equity. Any decision related to maritime delimitation can be referred to as settled in an equitable manner only when such requirement of equity has been fulfilled through all the stages of the decision-making process (three-stage methodology) by which the international courts and tribunals reach an equitable solution. Any alternative to this may imply the idea that a decision lacks such equitability, despite the result being seen as equitable. As noted by the ICJ in the North Sea cases:

Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.

In sum, this thesis argues that each maritime boundary dispute, irrespective of the dispute settlement forum, that has been resolved with an aim to achieve an equitable solution by way of ensuring a reasonable degree of proportionality and equally protecting the maritime entitlements of each State in a way that is balanced by a ‘no cut-off’ effect and the non-encroachment of the coastal projections of each State, necessarily ensures the equitable manner of the dispute settlement process—and this is the holistic approach of the rule of equitable solution. The orchestrator of the Convention referred to this judicially developed ‘holistic approach’ of equitable delimitation under the term ‘equitable solution’. Any otherwise any decision, absent the disputant parties’ consent, would render a decision ex aequo et bono reflecting equity contra legem which the international commons did not agreed upon in the LOS Conference.

484 North Sea cases, 22 [18] (emphasis added).
VI CONCLUSION

The very conception of ‘equitable solution’ is derived from equity. In other words, to reach an equitable solution, the means are equity and the end is justice. Thus, ensuring justice in maritime delimitation equates to the achievement of an equitable solution where the processes of such an attainment are seen to be equitable. This equitable process calls for the identification and application of an appropriate method of delimitation in the light of relevant circumstances. Again, in the context of maritime delimitation, achieving an equitable solution is to render justice. This means that equity requires a court to ‘render justice in [a] concrete case, by means of a decision shaped by and adjusted to the relevant ‘factual matrix’ of that case’, endorsing the idea that equitable solution is created by, for and of equity. This ‘renaissance of equity’ in international law has been enshrined and developed in the work of international judges on a trial-and-error basis that has now achieved a concrete, certain and stable shape in international law. This judicial innovation in international law has been formally recognised and adopted by the international community in the Third Conference. Thus, although the criteria of equitable solution was not developed through any positive international law, by the time the concept of ‘equitable solution’ was adopted as the final goal of delimitation, the very notion of ‘equitable solution’ itself contained and explained its own required criteria, thereby accepting and accommodating each and every development required to achieve an equitable solution. This thesis would like to argue that all criteria (both theoretical and procedural) that has been developed and will be developed through the passage of the judicial settlement processes of maritime boundary disputes can necessarily be considered as the required criteria for equitable solution. Whatever the developments, no solution can be described as an equitable solution unless it has been achieved in an equitable manner. That means the solution must respect the Parties’ maritime entitlement and must apply the fundamental equitable criteria of non-encroachment and the ‘no cut-off’ effect, reflecting a reasonable degree of proportionality. This is the only legal tool for measuring the equitable character of an equitable solution. Any alternative to this

486 Tunisia/Libya Case, 3, 106 (separate opinion of Per Judge Jiminez de Arechaga).
may be seen as lacking equitable manner and thus equitability and in this way resemble a decision *ex aequo et bono*. However, these assertions are based on judicial decisions involving the settlement of maritime boundary disputes within 200 nm. Therefore, the issue of delimitating maritime boundaries beyond 200 nm requires further consideration.
CHAPTER 5

DELIMITATION OF THE CONTINENTAL SHELF BEYOND 200 NM: A NEW ASPECT FOR EQUITABLE SOLUTION

I INTRODUCTION

The legal definition of the continental shelf has become the part of customary international law and exemplifies that every coastal State has an inherent right to claim its continental shelf to a distance of 200 nm or to the OECM on the basis of the natural prolongation criterion. \(^1\) Therefore, a coastal State can in no way be deprived of its rightful claim to its LCS, whether it is within or beyond 200 nm. \(^2\) In delimitations beyond 200 nm, compliance with the Article 76 process to establish the outer limits of the LCS beyond 200 nm has become an aspect of significant importance, where the principle of natural prolongation provides the fundamental legal basis for a coastal State’s entitlement to the LCS beyond 200 nm. \(^3\) In fact, the outer limit of the LCS can only be established by way of integrating the abstract concept of natural prolongation with scientific and technological precision. \(^4\)

From the above chapters, it is evident that the rule of equitable solution as developed in case law is mainly founded on the judicial decisions determining delimitation within 200 nm. The issue of delimitation of the LCS beyond 200 nm is a comparatively new question for equitable solution. It requires significant attention not only because of the potential for resources, but also for the sustainability of the rule of equitable solution. Article 76 of UNCLOS has provided the fundamental legal basis for such consideration, where the provision relating to the establishment of the outer limits of the continental shelf beyond 200 nm is of particular importance. \(^5\) The aim of this chapter is to carefully examine the

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\(^2\) Ibid.

\(^3\) For this view, see discussions at section II B in Chapter 1.


\(^5\) See discussions in section III B (1, 2) of this chapter.
question as to whether the international courts or tribunals, while determining the delimitation of the continental shelf beyond 200 nm, should consider new aspects, including compliance with the Article 76 process as well as the involvement of the CLCS in meeting the challenges of achieving an equitable solution in an equitable manner.

Before beginning the core discussion, it may be useful to start with the concept of natural prolongation in the context of Article 76.

II NATURAL PROLONGATION IS THE BASIS OF ENTITLEMENT TO A CONTINENTAL SHELF BEYOND 200 NM

The concept ‘natural prolongation’ is apparently abstract. It is ‘the same as that which stems from the Truman Proclamation, the Convention of 1958 and the North Sea Cases’. The concept now comes into play only where there exists a natural prolongation of the land territory of the coastal State into and under the sea beyond the distance of 200 nm as far as the point where the natural prolongation ends at the OECM and the deep ocean floor begins.

The debate about the abstractness of the natural prolongation concept is deep rooted in the very definition of a continental shelf itself as enshrined in Article 76(1), where the concept of natural prolongation secures the prime consideration for determining the limit of the continental shelf. This abstractness has also been reinforced by several courts that, by rejecting any application of the natural prolongation criterion in delimitation within 200 nm, established the view that natural prolongation criterion retains its primacy in determining entitlement to the LCS beyond 200 nm. A similar view has also been ascribed by some scholars. The focus of paragraph 4, Article 76 is on the geomorphology

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7 See UNCLOS, Article 76 (1) (3). See also Libyan/Malta case, [34]; Bjorn Kunoy, ‘A Geometric Variable Scope of Delimitations: The Impact of a Geological and Geomorphological Title to the Outer Continental Shelf’ (2006) 11 Austrian Review of international and European Law, 49, 68; Anderson, above n 6, 97.
8 This means that the legal continental shelf (LCS) concept has departed ‘from the principle that natural prolongation is the sole basis of the title’. See Tunisia/Libya case, 48 [48]. See also Libya/Malta case, 35 [39].
9 For example, see Alex G Oude Elferink, ‘The Impact of the Law of the Sea Convention on the Delimitation of Maritime Boundaries’ in Davor Vidas and Willy Ostreng (eds), Order for the Oceans at the Turn of the
of the submarine area and not geological continuity. This view led some scholars to hold the extreme view that, since geomorphological dominance inevitably ensures a coastal State’s jurisdiction over the outer limits of its continental shelf, the notion of natural prolongation has lost its potential in maritime delimitation. However, this thesis holds a contrary view to such scholars because it does not find any abstractness in the concept of natural prolongation; rather, Article 76 provides a practical legal approach linking it with the scientific concept of geomorphology as long as the concept of the OECM is considered as an essential element in determining a coastal State’s entitlement to its LCS beyond 200 nm.

There are two reasons for this view. First, since the natural prolongation of land territory (including the shelf, the slope and the rise) of a coastal State constitutes its LCS, there is no continental shelf beyond 200 nm without the natural prolongation of the land territory and, in this respect, the concepts of natural prolongation and continental margin are interrelated and refer to the same area that is beyond 200 nm but within the outer limit of the continental shelf and is determined only on the basis of geomorphological formulae and criteria according to international law as provided in Article 76(4) of UNCLOS. In this way, natural prolongation provides the theoretical basis for the constitution of entitlement to a continental shelf as outlined in Article 76(1), ‘to lend support to the trend towards expanding national jurisdiction’ to the extent of the OECM. On the other hand, Article 76(4) of UNCLOS provides the procedural or functional criterion which is based on the geomorphological features of the concerned seabed and subsoil that provide a

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10 The wording used in Article 76 of UNCLOS, ‘base of the slope’, ‘foot of the slope’ and the differences between submarine elevations, submarine ridges, and ocean ridges point to the primacy of geomorphology (the shape of the seafloor) rather than the geological continuity between the adjacent land and seafloor. See generally, Mcdorman, above n 1, 201; Bjarni Mar Magnusson, *The Continental Shelf Beyond 200 nautical miles: Delineation, Delimitation and Dispute Settlement* (Publications on Ocean Development, Brill Nijhoff, 2015) 20.

11 For example, see Magnusson, ‘Continental Shelf Beyond 200 nautical miles’, above n 10, 20.

12 The word ‘as long as’ has been used deliberately.


14 *Bangladesh/Myanmar* case, 127 [433].
scientific basis for determining the OECM through the test of appurtenance.¹⁵ Second, the
meaning of ‘natural prolongation’ cannot be construed in isolation. In this regard, Article
76 has to be considered as a whole and in relation to geophysical contexts. The concept of
natural prolongation does not provide any guidance for establishing the outer limit of the
continental shelf in accordance with Article 76(5) and, most strikingly, no further
reference to it is found in the subsequent paragraphs of Article 76. However, this cannot
be construed as rejecting any relation between natural prolongation and geomorphology.
The word ‘natural prolongation’ follows the prolongation of ‘the land territory to the
OECM’. Therefore, if the natural prolongation of a State or territory is deemed to be the
primary and fundamental importance in assessing a coastal State’s entitlement to a
continental shelf beyond 200 nm, the geomorphological features of the seabed and subsoil
constitute the only parameter to be employed in determining the extent of such natural
prolongation within the OECM¹⁶ and thus plays a controlling role in establishing the outer
limits of the continental shelf beyond 200 nm in accordance with Article 76(5).¹⁷ In all
logic, this is the legal position of international law. As will be shown, any alternative to
this view is absent both from scholarly writings and judicial dicta.

III THE DELIMITATION OF THE CONTINENTAL SHELF BEYOND 200 NM:
EQUITABLE SOLUTION WARRANTS A NEW APPROACH

Unlike the North Sea cases where, because of the insertion of the vague exploitability
criterion in the 1958 Geneva Convention on the Continental Shelf, the ICJ was required
to introduce the concept of natural prolongation as the legal basis for maritime entitlement
and the extent of the limit of the continental shelf, Article 76 of the Convention discarded
the vague criterion as an element in the definition of the continental shelf, adopted the
clearly defined concept of the LCS with a defined outer limit and outlined the process for
establishing that limit (where the OECM extends beyond 200 nm).¹⁸ The natural

¹⁵Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, Doc
CLCS/II (13 May 1999) 12 [2.2.6], 13[2.2.8]
¹⁶Anderson, above n 6,96-97.
¹⁷Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, Handbook on the Delimitation
¹⁸UNCLOS, Article 76 (1) , (3) , (4) – (9) .
prolongation of the land boundary was granted the main role in the application of its geomorphological criterion. The whole process of determining the limit of the continental shelf beyond 200 nm has brought to the forefront the issue of delimitation that must be considered as a new aspect of equitable solution.

A The Continental Shelf Beyond 200 nm Is a Distinct Maritime Zone

Establishing specific and defined limits for different maritime zones under national jurisdiction was one of the objectives of the Third Conference, resulting in the adoption of four different maritime zones with precise limits. Interestingly, most of the limits of the different maritime zones, including the continental shelf within 200 nm, are based on the distance criterion while the limit of the continental shelf beyond 200 nm is based on the natural prolongation criterion. As will be shown, this distinct nature, along with other legal indications, conceivably differentiates the continental shelf beyond 200 nm from other maritime zones.

1 Article 76 Does Not Refer to the Single Continental Shelf: The 200 nm Limit Creates the Point of Differentiation

There is continuing debate among scholars as to whether Article 76, in the context of delimitation, refers to a single continental shelf (SCS) or differentiated the shelf into two parts: inner and outer continental shelf (OCS). This debate has been extended even to the judicial settlement process. While the ICJ in the Tunisia/Libya, Libya/Malta and Nicaragua/Honduras cases distinguished delimitation within and beyond 200 nm based on the different bases of entitlement, the arbitral tribunal in the Barbados/Trinidad and Tobago arbitration rejected any such distinction in delimitation and refuelled the debate by observing that ‘in any event there is in law only a single “continental shelf” rather than

19 Tunisia/Libya case, 48 [47].
22 Tunisia/Libya Case, 48 [47]-[48]; Libya/Malta case, 33 [33], [34], 35 [39], 36 [40], 55-56 [77].
an inner continental shelf and a separate extended or OCS’.\textsuperscript{23} This thesis is of the view that the concept of an ‘SCS’ as adduced by the tribunal is utterly confusing and vague and is inconsistent with interpretations of Article 76. Article 76 does not refer to an SCS for both legal and practical reasons.

\textbf{Figure 10 The 200 nm Limit Creates the Point of Differentiation.}\textsuperscript{24}

First, since ‘entitlement to a given maritime area is the starting point or point of departure [for] any delimitation’,\textsuperscript{25} there is a clear distinction between the continental shelf within 200 nm and that beyond 200 nm in the delimitation process. As clarified in Chapter 1, Article 76 provided two types of LCSs based on two different bases of entitlement,\textsuperscript{26} while the different basis of entitlement beyond 200 nm presupposes the idea that every coast does not necessarily project an area beyond 200 nm\textsuperscript{27} and, therefore, the entitlement beyond 200 nm may not follow the same direction as the continental shelf within 200 nm.

\begin{itemize}
\item \textsuperscript{23} Barabados/Trinidad and Tobago arbitration, 65-66 [212]-[213].
\item \textsuperscript{24} Tina Schoolmeester and Elaine Baker (Eds), \textit{Continental Shelf: The Last Maritime Zone} (UNEP/GRID-Arendal, 2009) 9 (adapted).
\item \textsuperscript{25} Barbados/Trinidad \& Tobago arbitration, 837 [224].
\item \textsuperscript{26} The entitlement within 200 nm is based on distance, while the entitlement beyond 200 nm is based on natural prolongation criterion and subject to the verification by the CLCS, which can be extended either up to 350 nm or shall not exceed 100 nm from the 2500 meter isobath. See section in II B (3) in Chapter 1.
\item \textsuperscript{27} Because, it is possible that a particular coast may project continental shelf both within and beyond 200 nm, but that might not be the case for every single coast.
\end{itemize}
For these reasons, the delimitation line within 200 nm may not be extended without changing its direction.

Second, the emergence of a uniform limit of 200 nm as a customary principle of entitlement contributes to the evolution of the twofold continental shelf.\textsuperscript{28} This uniformity evolved in the ICJ’s decision in the \textit{Tunisia/Libya} and \textit{Libya/Malta} cases, where the Court repeatedly confirmed the rejection of the natural prolongation criterion as the basis for entitlement within 200 nm and noted that every coastal State is entitled to a continental shelf within 200 nm irrespective of its geophysical structure.\textsuperscript{29} The judicially developed SMB concept further confirmed the uniform practice of the 200 nm limit,\textsuperscript{30} essentially rendering it a point of differentiation.

Third, the arbitral tribunal in \textit{Barbados/Trinidad and Tobago} arbitration articulated this concept only for assuming its jurisdiction to delimit a continental shelf beyond 200 nm under this logic that Article 83 of UNCLOS does not differentiate between delimitations within and beyond 200 nm.\textsuperscript{31} However, it also forbids any such differentiations. In this regard, it must be noted that the legal basis for assuming jurisdiction is essentially different from the principles and methods of effecting delimitation that are to be employed in the process of exercising that jurisdiction.

Fourth, coastal States’ rights and obligations to continental Shelf beyond 200 nm are distinct from those for Shelf within 200 nm, mostly in terms of revenue sharing.\textsuperscript{32}

\textsuperscript{28} See discussion at IIB (1). See also Barbara Kwiatkowska, ‘Equitable Maritime Boundary Delimitation-A Legal Perspective’ (1988) 3 \textit{International Journal of Estuarine and Coastal Law} 296.

\textsuperscript{29} \textit{Tunisia/Libya} Case 1982, 48 [47]- [48]; \textit{Libya/Malta} case, 33 [33], [34], 35 [39], 36 [40], 55-56 [77].

\textsuperscript{30} \textit{Gulf of Maine} case, 253, 267[27]; \textit{Jan Mayen} case, I.C.J. Reports 1993, 53 [43], 58 [45].

\textsuperscript{31} \textit{Barbados/Trinidad and Tobago} arbitration, 65-66 [212]- [213].

\textsuperscript{32} For example, a coastal State has sovereign rights over living and non-living resources of the water column and the seabed and subsoil up to 200 nm, while it has sovereign rights only over the non-living resources of the seabed and subsoil beyond 200 nm. Nonetheless, a coastal State which is a party to the Convention, is obliged to share revenue in respect of the exploration of non-living resources of the continental shelf beyond 200 nm while there is no such obligation imposed for exploration in the continental shelf within 200 nm. See generally UNCLOS, Article 56, 77-82.
Fifth, most scholars differentiate continental Shelf within and beyond 200 nm by terming it either OCS, ECS or the continental shelf beyond 200 nm, and thus assume the continental shelf beyond 200 nm as a distinct maritime zone. In sum, this thesis argues that the 200 nm limit concept has become a customary principle for entitlement to the continental shelf within 200 nm, irrespective of the geophysical character of the particular sea bed and subsoil, while the entitlement beyond 200 nm is completely based on geomorphological criteria as specified in Article 76(4) of UNCLOS. Thus, the concept of a 200 nm limit line has conceivably created a point of differentiation between continental Shelf within and beyond 200 nm (Figure 10). The endpoint of the 200 nm limit can well be treated as the starting point of the OCS that may extend for 150 nm from the 200 nm limit, or for 100 nm from the 2500 metre isobaths. Therefore, conventional definition and judicial clarification along with scholarly revision clearly indicate that the continental shelf beyond 200 nm is a separate maritime zone. Presumably, this identity as a separate maritime zone necessarily suggests that the process of its delimitation should be different and that the international courts and tribunals should treat the continental shelf beyond 200 nm as a distinct maritime zone in the process of effecting its delimitation.


B The Rule of Equitable Solution Requires Different Consideration in Delimitations Beyond 200 nm

The judicial settlement process established the idea that the delimitation of each maritime zone must be dealt with separately. As discussed in Chapter 4, the three-stage methodology (drawing a provisional line, adjustment of that line and the proportionality test) of delimitation has now become the customary rule of international law for its consistent and continuous practice in the judicial settlement processes of maritime boundary disputes. To achieve an equitable solution, this three-stage methodology has been applied in the delimitation of each maritime zone. If the continental shelf beyond 200 nm is considered as a separate maritime zone, it certainly calls for separate legal treatment and thus such methodology would equally be applicable in the delimitation of continental Shelf beyond 200 nm. However, the application of methodology may not necessarily follow the same stages for the delimitation of continental Shelf beyond 200 nm. Evidently, the three-stage methodology was designed by the international courts and tribunals so that delimitation criteria could be applied in an equitable and harmonious manner; nonetheless, in doing so, the Courts were concerned only with the delimitation of maritime zones of up to 200 nm. The delimitation of continental Shelf beyond 200 nm is certainly a new addition in this regard. Taking into account the Court’s disregard to delimit continental shelf beyond 200 nm Tunisia/Libya, Libya/Malta and Nicaragua/Colombia cases, this thesis is of the view that the Court, based on the different basis of entitlement to continental shelf within and beyond 200 nm, actually intended to delimit the self beyond 200 nm separately and thus the three-stage methodology is equally applicable in the delimitation of continental Shelf beyond 200 nm, but—as will be shown—the sui generis character of the continental shelf beyond 200 nm would require different considerations for some aspects when effecting delimitation. As pointed out by a committee member of

35 Because, determining the extent of entitlement is crucial for delimitation and Article 76 requires meeting the legal and scientific criteria for establishing that extent. For an extended view See, Nuno Sergio Marques Antunes, Towards the Conceptualisation of Maritime Delimitation: Legal and Technical aspects of a Political Process (PhD Thesis, vol I, University of Durham, 2002) 146.
36 For this view see generally the discussion at section III of Chapter 4.
38 See generally Tunisia/Libya Case, 48 [47]-[48]; Libya/Malta case, 33 [33], [34], 35 [39], 36 [40], 55-56 [77]; Nicaragua/Colombia case, 668-669 [126]-[129].
the International Law Association committee, ‘the fact that the basis of entitlement to [a] continental shelf and its delimitation are linked suggests that the process of delimitation may be different’ within and beyond 200 nm.39

1 The Delimitation of the Continental Shelf Beyond 200 nm: Establishing the Outer Limits of the Continental Shelf Is a Necessary Precondition

One of the examples of the comprehensiveness of UNCLOS is that it has provided precise limits for all maritime zones, including for the continental shelf beyond 200 nm. Nevertheless, since the establishment of the outer limit of the continental shelf beyond 200 nm is based on geomorphological criteria and needs to undergo a particular legal process as enshrined in Article 76, without fulfilling such a requirement, any attempt to delimit a continental shelf beyond 200 nm would essentially be seen as violating not only conventional law but also the rules of equity and equitable solution. This might be the reason why the ICJ in the Nicaragua/Honduras case declined to delimit the continental shelf beyond 200 nm unless its outer limits were established accordingly. However, compliance with the legal requirements of Article 76 is not the only reason for establishing the outer limits of the continental shelf beyond 200 nm before proceeding with its delimitation. As will be shown, the very task of delimitation—along with the established rule of equitable solution and the international legal arrangement on maritime delimitation—warrants the establishment of outer limits of a continental shelf beyond 200 nm prior to its delimitation.

(a) Delimitation by Its Definition Requires an Established Outer Limit of the Continental Shelf Beyond 200 nm

In terms of the definition of delimitation, the existence of an area of ‘potential overlapping entitlement’ is essential.40 Where there is no overlap of entitlement, there is no need for

40 See discussions at Chapter 1.
delimitation, there is simply delineation.\textsuperscript{41} Here, the terms ‘entitlement’ and ‘overlapping of maritime entitlement’ are to be noted.

A coastal State’s entitlement to a continental shelf exists because of its sovereignty over the land territory.\textsuperscript{42} Therefore, the basis for delineation cannot be other than pertinent to that of entitlement itself.\textsuperscript{43} This assertion infers an interactive relation between entitlement and delineation—where delineation marks the endpoint of the extent of entitlement. Certainly, this endpoint refers to the outer limits of the maritime zones and of the continental shelf beyond 200 nm. Since establishing the outer limits of the continental shelf is the only objective of Article 76,\textsuperscript{44} without such establishment, the delineation of the outer limits of the continental shelf beyond 200 nm will most likely be impossible from both a legal and a practical point of view. If a coastal State’s entitlement to a continental shelf up to 200 nm is taken for granted on the basis of a distance criterion where the outer edge of the continental shelf does not extend beyond that limit, then it must also be taken for granted (in accordance with Article 76) that, in a case where the OECM extends beyond 200 nm, the coastal State has every right to extend its entitlement out to 350 nm or 100 nm from the 2500 metre isobaths on the basis of the natural prolongation criterion.\textsuperscript{45} Any effort to go beyond this assertion can be seen as reducing the concept of entitlement to a superficial and ultimately obsolete concept.

Conversely, according to the definition of delimitation, if the overlapping of maritime entitlement is considered the only prerequisite for maritime delimitation then, without establishing the endpoint for a coastal State’s extent of entitlement to the continental shelf beyond 200 nm, the question of assessing its overlapping entitlement to the shelf becomes legally baseless and impractical. Likewise, in other maritime zones\textsuperscript{46} where the delineation of outer limits played a substantial role in assessing the overlapping claims of


\textsuperscript{42} Bangladesh/Myanmar Case, [409].

\textsuperscript{43} Libya/Malta case [27].


\textsuperscript{45} Because an entitlement to continental shelf based on the distance criterion does not take precedence over an entitlement based on the criterion of natural prolongation. See Nicaragua/Colombia case 667 [121].

\textsuperscript{46} Territorial Sea, EEZ and Continental Shelf within 200 nm.
the coastal States and thus in determining a delimitation line, the issue of delimitation of
the continental shelf beyond 200 nm could not account for the uncertainty of delineation.
Any endeavour to go beyond this definition of delimitation may be seen as encouraging a
step towards appropriation as opposed to delimitation, rendering a decision *ex aequo et
bono* and thus beyond the scope of international law.

(b) *The Equitable Criteria for Equitable Solution Require Definite Limits to Achieve
an Equitable Solution in an Equitable Manner*

As discussed in Chapter 4, to achieve an equitable delimitation in an equitable manner,
the application of the equitable criteria for an equitable solution—the ‘non-cut off’ effect
and non-encroachment—is crucial whether the delimitation is to be effected within or
beyond 200 nm.\(^\text{47}\) Neither conventional rule and case law nor scholarly views seem to
make any difference to this fact. What is of importance here is that the equitable concepts
of the ‘non-cut off’ effect and ‘non-encroachment’ are inextricably linked to the outermost
limit of a maritime zone,\(^\text{48}\) requiring that, in an appropriate case, a delimitation line must
reach the maximum limit of the continental shelf beyond 200 nm without any cut-off or
encroachment as permitted in UNCLOS.\(^\text{49}\) Otherwise, questions as to the limits of the ‘no
cut-off’ effect and the non-encroachment will be remain and create doubts as to the
fulfilment of the equitable criteria that only aim to ensure an equitable solution in an
equitable manner. In the *North Sea* cases, the Court had to determine the extent of
entitlement of the circumjacent States ‘towards a central point situated on the median line
of the whole seabed’ before it examined the cut-off effect of the equidistance line to
achieve an equitable solution in an equitable manner.\(^\text{50}\)

(c) *The Outer Limits of the LCS Beyond 200 nm Provide a Trade-off Against Revenue
Sharing*

The acceptance of Article 76 in its present form is the result of a ‘package deal’ approach
among negotiators at the Third Conference and the sentiment that a State or judicial body

\(^{47}\) See discussion in section IV (A) of Chapter 4.
\(^{48}\) Ibid.
\(^{49}\) Lee, above n 41, 150-151.
\(^{50}\) *North Sea* cases, 20-21 [15], 22 [18], 49 [89].
ought not to choose what it likes and disregard it does not like.\textsuperscript{51} The outer limits of the LCS beyond 200 nm as embedded in Article 76 are part of that package deal.\textsuperscript{52} The proposal to extend the outer limits of the continental shelf beyond 200 nm was agreed on and accepted by the States advocating a 200 nm limit for continental shelf in exchange for another benefit: revenue sharing on the continental shelf beyond 200 nm, as enshrined in Article 82 of UNCLOS.\textsuperscript{53} Therefore, delineation of the outer limits of the continental shelf beyond 200 nm is warranted by UNCLOS itself, not only to fulfil the agreement of the negotiators, but also to show respect to the compromise made between them at the conference. Essentially, if a State has to share its profit with respect to the exploitation of the continental shelf beyond 200 nm, it has every right to claim a continental shelf beyond 200 nm (in cases where the OECM extends beyond 200 nm) out to the maximum limit as prescribed in Article 76(5) of UNCLOS—otherwise the international agreement would be violated. In sum, the conventional arrangement of establishing the outer limits of the continental shelf beyond 200 nm derived from the ‘package deal’ approach should be upheld in the process of delimitation.\textsuperscript{54}

\textit{(d) The Outer Limit of the LCS Beyond 200 nm Ensures Sovereign Rights, Executes the International Imperative to Define Areas and Preserves the Common Heritage of Mankind}

UNCLOS contains no specific legal provisions that may provide scope for considering even a single portion of the seabed and subsoil as \textit{res nullius}—these will either be under


\textsuperscript{52} For this view, see footnote 94 in Chapter 1 of this thesis.

\textsuperscript{53} See generally, Suarez, ‘Outer limits’, above n 22, 39, 42-73. According to Article 82 of UNCLOS, a coastal State, which is not a net importer of a mineral resource produced from its continental shelf beyond 200 nm, is obliged to make payments or contributions in kind in respect of the exploration of the non-living resources of that shelf. Such payments or contributions are to be made with respect to all production at a site at the rate of 1 per cent after the first five years of production at that site, and the rate is to increase by 1 per cent annually for a period of seven years and remain at 7 per cent thereafter. Point to be noted that such payments or contributions will be accounted after excluding the cost incurred in connection with such production. The International Seabed Authority (herein after ISBA) is to distribute them to the States Parties to the Convention on the basis of equitable sharing criteria, taking into account the interests and needs of the developing States, particularly the least developed and land-locked States. See UNCLOS, Article 82.

national jurisdiction or beyond national jurisdiction and known as 'the area'.\footnote{UNCLOS defines Area as 'the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction'. See UNCLOS, Article 1 (1).} The area and its resources are the \textit{common heritage of mankind}\footnote{UNCLOS, Article 136. The pioneer of establishing this principle is the permanent representative of Malta to the United Nations, Dr. Arvid Pardo. On 17 August 1967, he made a historic proposal that the seabed and its natural resources beyond the limits of national jurisdiction should be used for the benefit of mankind. On December 1967, General Assembly Resolution 2340 declared that the seabed and ocean floor are the common interest of mankind and that exploitation and utilization of the seabed and ocean floor and subsoil thereof should be for the interest of all mankind. Later, Pardo’s proposal was discussed in the permanent committee on the Peaceful Uses of the Sea-bed and Ocean Floor beyond the limits of National Jurisdiction and the Committee submitted its reports to the 24\textsuperscript{th} and 25\textsuperscript{th} sessions of the UN General Assembly. In 1969, 24\textsuperscript{th} UN General Assembly adopted Resolution 2574 D (XXIV) declaring that pending the establishment of an international regime, ‘States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction’. On 17 December 1970, the 25\textsuperscript{th} UN General Assembly adopted Resolution 2749 (XXV) declaring \textit{Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction}, in which for the first time it was declared that ‘[t]he seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind’ and ‘[t]he area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof’. See generally Yoshifumi Tanaka, The International Law of the Sea (Cambridge University Press, 2nd ed., 2015) 179-180.} and are to be explored and exploited for the benefit of mankind as a whole.\footnote{UNCLOS, Preamble.} Hence, the boundary of the area is of particular importance. Interestingly, the institution charged with the responsibility of organising and controlling activities in the area—the International Seabed Authority (ISBA)—has no role in boundary demarcation.\footnote{Piers RR Gardiner, ‘The Limits of the Area beyond National Jurisdiction—Some Problems with Particular References to the Role of the Commission on the Limits of the Continental Shelf’ in Gerald Blake (ed), \textit{Maritime Boundaries and Ocean Resources} (Barnes & Nobel Books, 1987) 68.} Therefore, the delineation of an LCS beyond 200 nm is not merely an issue between coastal States, but an issue pertaining to international commons. This thesis observes two legal implications in differentiating national and international jurisdictions by way of establishing the outer limit of an LCS beyond 200 nm. First, it secures the integrity of the legitimate geographical divisions between national and international jurisdictions and thus ensures coastal State freedoms to exercise their rights and jurisdictions without violating those of the international commons in the area.\footnote{Yu and Ji-Lu, above n 13, 324-326.} Once a coastal State determines the ‘final and binding’ outer limits of its LCS beyond 200 nm,\footnote{UNCLOS, Article 76 (8).} it limits the area.\footnote{The relationship between the outer limits of the continental shelf of coastal States and the Area can be described as a trade-off—an inch of the continental shelf beyond 200 nautical miles under the jurisdiction of the coastal States is 1 less inch of the international seabed area. Yu and Ji-Lu, above n 13, 317, 320.} Second, the area restrains coastal State
attempts to make exaggerated OCS claims and prevents the common heritage of mankind from subsequent creeping jurisdiction. Otherwise, unhealthy competition among coastal States may lead to the kind of international disorder that existed before the codification of the law of the sea.

(e) **There Cannot be an SCS Without Established Outer Limits**

The legal definition of the continental shelf comprises the shelf, slope and rise of the shelf and dictates whether its outer limit will extend within or beyond 200 nm as dependent on the accomplishment of the Article 76 process. Therefore, until the outer limit of an LCS is established in accordance with this Article, it would be a legal mistake to address these areas of the shelf as an SCS. Making such a general assertion may necessarily be construed as rejecting different legal bases of entitlement to the continental shelf beyond 200 nm as a whole.

In view of the above, it can be concluded that the requirement for establishing the outer limits of a continental shelf beyond 200 nm is an essential precondition for delimitation. However, the extent to which the UNCLOS and the CLCS rules accord with this assertion is of particular relevance here.

2 **Delineation and Delimitation: The UNCLOS and the CLCS Rules Indicate an Order**

Delineation under Article 76 and delimitation under Article 83 are logically connected in the sense that delimitation of a continental shelf presupposes the existence of a shelf to delimit. However, it remains an issue of scholarly and juristic debate as to what should be the order between delineation and delimitation—whether delineation should come before delimitation, delimitation should come before delineation or both should be simultaneous processes. This is because there is no legal provision in the UNCLOS or in the CLCS rules clearly stating that the international courts or tribunals can or cannot

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assume jurisdiction to delimit the continental shelf beyond 200 nm before delineating its outer limit on the basis of the CLCS’s recommendations. Kunoy argued that such jurisdiction of the Court or tribunal is not admissible until after the outer limits of the continental shelf are determined by the CLCS,\(^64\) while Barbara described Kunoy’s view as misconceived and unfounded, commenting that ‘the CLCS’s recommendations must in no way encroach upon existing and prospective boundary delimitations, nor must they prejudice other land or maritime disputes, which can thus well be adjudicated-arbitrated or otherwise resolved prior, or in parallel to or sometimes in a follow-up to the CLCS’ engagement’.\(^65\) These two contradictory views make it difficult to understand the legal stance of UNCLOS. Nonetheless, this thesis is of the view that UNCLOS itself is very much indicative of an order that is worthy to be followed in delimitations beyond 200 nm.

(a) The Term ‘Without Prejudice’ Provides the Legal Basis for an Order

Article 76(10) of UNCLOS States that the ‘the provisions of this Article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts’. A similar provision has also been embedded in Article 9, Annex II of UNCLOS. The use of the words ‘without prejudice’ confers the idea that if delineation can be achieved without prejudice to delimitation, then delimitation can equally be conducted without prejudice to delineation. However, as will be shown, the words ‘without prejudice’ used in this Article provide an important caution with respect to the order of the functions of delineation and delimitation. In terms of the delineation and delimitation of the outer limits of the continental shelf, the insertion of the term ‘without prejudice’ implies two alternative meanings. First, these two functions may continue simultaneously or in parallel to each other; second, these two functions should occur individually and independently, one after another, without prejudice to each other, maintaining an order for the sake of justice as well as to fulfil the purposes and objectives of UNCLOS.

\(^64\) Kunoy, ‘The Admissibility of a Plea’, above n 33, 237, 270.

\(^65\) See Kwiatkowska, ‘submission’, above n 33, 5, 16, 167.
(i) **Delineation and Delimitation Functions Cannot Occur in Parallel**

Neither the UNCLOS and CLCS rules nor the decisions of the international courts and tribunals provide any legal basis for the simultaneous delineation of the outer limits of the continental shelf beyond 200 nm and their delimitation. Therefore, the option to conduct both functions in parallel is not sustainable and another option must be considered. Since both functions of delineation and delimitation are separate and independent from each other, it is essential to consider which comes first.

(ii) **Delineation Before or After Delimitation—Understanding the Indications of International Law**

Because of the functional and legal distinctions between delineation and delimitation, a coastal State can bring its dispute related to the delimitation of the outer limits of its continental shelf before an international court or tribunal prior to the CLCS’s recommendations being made in the submission(s) made by that State. However, as the actions of the CLCS ‘shall not prejudice matters relating to delimitation’, since the provisions regarding the delineation of the outer limits of the continental shelf as described in Article 76 ‘are without prejudice to the question of delimitation’, because Article 83 is equally applicable to the delimitation of the continental shelf within and beyond 200 nm and since States are entitled to claim an ECS only after making submission to the CLCS, the concerned international court or tribunal shall have the jurisdiction to render its judgement or award regarding the outer limits of the continental shelf beyond 200 nm prior to the CLCS’s recommendations; further, this judgement or award will be ‘final

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66 It is an established rule that in order to bringing a dispute before a court or tribunal for the delimitation of the continental shelf beyond 200 nm, a coastal State must make a submission to the CLCS in accordance with Article 76 to establish its claim over a continental shelf beyond 200 nm and such submission can be seen as the prima facie proof of its claim to that shelf.

67 UNCLOS, Article 9 of Annex II.

68 UNCLOS, Article 76 (10).

69 See Nicaragua/Colombia case, 668 [125]. It is because a State cannot claim an outer continental shelf beyond 200 nm without having prima facie scientific and technical data in hand. As noted by Suarez, ‘States that claim continental Shelf beyond 200 nm might be free to start a negotiated settlement but this cannot be completed without the participation of the Commission. These States must go through the submission process’. For this view, see Suarez, ‘Outer limits’, above n 33, 229.

70 Cf Bjorn Kunoy, ‘The Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the CLCS’ (2010) 25
and binding’ in nature. Note should be taken that such *jurisdiction* has never been claimed by the ICJ; rather, it was first claimed by the arbitral tribunal in the *Barbados/Trinidad and Tobago* arbitration, although it was not applied in this arbitration. Nonetheless, the admissibility of such jurisdiction of the Court or tribunal and the binding nature of their judgements or awards cannot be construed as restraining the CLCS’s authority to make its recommendations on Shelf subjected to third-party settlements.

Since the consideration of the submitted data and other materials concerning the outer limits of the continental shelf and the making of recommendations thereto is the primary function of the CLCS; since submitting those recommendations to the concerned coastal States as well as to the UNGA is essential; since the outer limits of a coastal State’s continental shelf cannot be final and binding unless they are established on the basis of the CLCS’s recommendations, notwithstanding whether such OCS will or will not border on the International Seabed Area (ISA); and since all these roles have been entrusted with the CLCS under the mandate of the international community, the CLCS is duty bound to make its recommendations on coastal State submissions regarding the outer limits of continental Shelf, no matter whether such limits encroach upon existing and prospective boundary delimitation. In such cases, the CLCS must take into account the endpoint of the delimitation line and whether or not it extends up to the maximum limit of LCS (350 nm or 100 nm from the 2500 metre isobaths). However, it should be mentioned that

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*International Journal on Marine and Coastal Law* 237-270. Kunoy suggested that the CLCS’ determination must precede maritime boundary delimitation by the ICJ or other courts or tribunals.

71 See generally Article 59 and 60 of the ICJ Statute; UNCLOS, Article 33 of Annex VI, Article 11 of Annex VII, Article 4 of Annex VIII. See also Kwiatkowska, ‘submission’, above n 33,46.

72 Cf Kwiatkowska, ‘submission’, above n 33, 46.

73 UNCLOS, Article 3 (1) (a) of Annex II.

74 UNCLOS, Article 6 (3) of Annex II.

75 There are outer limits of the continental shelf that border on the International Seabed Area (ISA), such as in the future delimitation in the Gulf of Maine, between France (Crozets) and South Africa (Prince Edward Island), between Barbados and Guyana. Again there are outer limits which will not border on the ISA. Such as, between Nicaragua and Colombia, in the Bering and Barents Seas delimitations relevant to Russia’s Submission. See Kwiatkowska, ‘submission’, above n 33,46-47.

76 Cf Kwiatkowska, ‘submission’, above n 33,17, 167. The basis of this view is that such encroachment does not prejudice any existing or prospective delimitation, rather provides a clear view of overlapping of entitlement which calls for effecting delimitation. The CLCS’s recommendations are of significant importance in that if it does not make its recommendations, the question of encroachment on the international seabed area may arise. See Suzette V Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment* (Springer, 2008) 18, 81.

77 An example of this kind may be the delimitation agreement between Norway and Russian Federation regarded to the continental shelf beyond 200 nm in the Barents sea where the extent of the delimitation line does not exceed the 350 nm limit as specified in Article 76 (5) of UNCLOS. See Suarez, ‘Outer limits’,
restrictions imposed on the CLCS 78 barring it from considering a coastal State’s submission while it is involved in an existing land or maritime dispute cease to be in force as soon as the existing delimitation dispute resolves either by negotiations or by third-party compulsory decision; it does not matter whether such delimitation involves a continental shelf within and/or beyond 200 nm as long as the delimitation is effected prior to the CLCS’s recommendation. This may be the reason why judges ad hoc Mensah and Oxman acknowledged that there may be a situation where a court or tribunal, in its judgement or award, delimits a continental shelf beyond 200 nm prior to the recommendation of the CLCS and such a judgement or award ‘does not prejudice the right of each party under paragraph 8 of Article 76 to establish final and binding outer limits of its continental shelf on the basis of the recommendations of the commission through the process prescribed by the convention’ because the CLCS’s recommendation-making ‘process is neither adjudicative nor adversarial’. 79 If this is the case, then—once the coastal States involved in a delimitation case establish the outer limits of their continental shelf beyond 200 nm on the basis of the CLCS’s recommendation—the possibility of a new delimitation dispute is very likely if two necessary conditions are fulfilled: first, if the endpoint of the earlier delimitation line fails to reach the maximum limit of the continental shelf and, second, if the entitlements of two or more coastal States overlap. Undoubtedly, the competing States can resolve this newly emerged dispute either by negotiation or through the decisions of an international court or tribunal that has due jurisdiction in this regard.

The UNCLOS hint that the delineation process under Article 76 should be undertaken first. Article 4, Annex II of the convention requires a coastal State to make its submission to the commission ‘as soon as possible but in any case within 10 years’ of the convention’s entry into force for the State in question. Conversely, States are not obliged to enter into delimitation agreements under Article 83 within a specific timeframe. Article 83,

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78 See paragraph 5 (a) of Annex I of the CLCS Rules.
paragraph 2, merely explains that, if no agreement can be reached ‘within a reasonable period of time’, the States concerned shall resort to the dispute settlement procedures under UNCLOS. Given the precise time frame for delineating the outer limits of the shelf, it supports the presumption that delineation should be undertaken first. Again, Article 76 is ‘expressly to be of no assistance’ in determining the delimitation line—a task left to Article 83 of UNCLOS—and the combination of these two provisions does not mean that ‘States can escape the consequences of the CLCS submission process or electing not to go through that process’, rather they must undergo the submission process.80

Moreover, the structural designs of the UNCLOS and CLCS rules are very much indicative of delineation before delimitation. The order in which the Articles were enumerated in UNCLOS 81 exemplifies their hierarchy and the priority of their implementation. Article 76 of UNCLOS provides legal rules as to how the outer limits of the continental shelf are to be determined on the basis of the CLCS’s recommendations, while Article 83 provides legal provisions for how to effect delimitation. Numerically, Article 76 precedes 83 and the order of these Articles in UNCLOS implies that the negotiators of the Third Conference preferred the delineation of the outer limits of the continental shelf beyond 200 nm to occur before the process of delimitation. The assertion that ‘the decision of an international court or tribunal delimiting the lateral boundary of the continental shelf beyond 200 nm is without prejudice to the delineation of the outer limits of that shelf’,82 based on the principle of application ‘without prejudice to the question of delimitation’, 83 cannot be construed as rejecting the requirement for establishing the outer limits of the continental shelf in accordance with Article 76 of UNCLOS. The State practice—where States negotiating the delimitation of their continental Shelf beyond 200 nm are free to choose any limit as the outer limit of their

81 The negotiators of the Third Conference arranged the rules on delineating the outer limits of different maritime zones and delimitation thereof in such an order where the rules related to the former has been ascended and enumerated before the rules that relates to the latter. For example, the rules of delineating the outer limits of the territorial sea, EEZ and continental shelf have been described in Article 4, 57 and 76 while the rules related to their delimitation have been embedded in Article 15, 74 and 83 of the UNCLOS.
82 Bangladesh/India Arbitration, 22[80].
83 UNCLOS, Article 76 (10) .
LCS beyond 200 nm—\textsuperscript{84} is different from the judicial settlement process for two reasons. First, negotiation or conciliation is not the task of the international courts and tribunals, rather they are mandated to act within the scope of the law; second, it is not the function of international adjudicative bodies to decide the limits of the OCS prior to the completion of the work of the CLCS, relying only on the ‘hypothetical State of facts’ that both States are entitled to a continental shelf beyond 200 nm. \textsuperscript{85} Given the absence of any recommendation by the CLCS, if the international adjudicative bodies delimit the OCS wholly or partly, this will not only affect the holistic approach of Article 76 as far as it relates to the objective of delimitation to achieve an equitable solution, \textsuperscript{86} it will also affect the credibility of the international adjudicative bodies in exercising their jurisdiction within the scope of international law (equity \textit{infra legem}). \textsuperscript{87} Nonetheless, the flow chart concerning a submission made to the CLCS as embedded in the CLCS rules clearly indicates that the delineation of the outer limits of the continental shelf should be accomplished before initiating any delimitation activities related to those outer limits. \textsuperscript{88} In addition, the final and binding nature of the CLCS’s recommendations and of the judgements or awards of the international courts and tribunals are also indicative of the preference for delineation as prior to delimitation. Since a judgement or award in terms of

\textsuperscript{84} An example of this kind may be the delimitation agreement between Norway and Russian Federation regarding the continental shelf beyond 200 nm in the Barents sea where the extent of the delimitation line does not exceed the 350 nm limit as specified in Article 76 (5) of UNCLOS. See Suarez, ‘Outer limits’, above n 76.202-203. See also Comments of the Permanent Mission of Norway to the United Nations on the Russian Submission submitted to the United Nations Secretary General, 20 March 2002, CLCS.01.2001.LOS/NOR, at p. 1-3; Report of the Secretary-General, Oceans and the Law of the Sea, A/57/57/Add.1 of 8 October 2002, 9 [39].

\textsuperscript{85} Bjorn Kunoy, ‘The Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the CLCS’ (2010) 25 \textit{International Journal on Marine and Coastal Law} 270.

\textsuperscript{86} The holistic approach of the equitable solution is that the delimitation line must reflect a proportionate result ensuring that the principle of non-encroachment and no cut-off effect have been given due respect. For details see discussion at Section V of Chapter 4.

\textsuperscript{87} This is not an issue that relates to the admissibility of jurisdiction of the international courts and tribunals, rather an issue of resolving a maritime delimitation dispute in accordance with rule of international law. In the course of settling maritime boundary disputes, the established international law does not mandate the jurisdiction to the international courts and tribunals to decide a case \textit{ex aequo et bono}. If they decide prior to the CLCS’s recommendations, it will entail that idea that in interpreting the conventional law, the international adjudicative bodies are going beyond the scope of law (equity \textit{contra legem}) and thereby deciding \textit{ex aequo et bono}, while rule of international law requires them to remain within the law (equity \textit{infra legem}). For this view the discussion at II (A) (3) of Chapter 4. See also Bjorn Kunoy, ‘The Admissibility of a Plea to an International Adjudicative Forum’, above n 85, 270.

\textsuperscript{88} \textit{CLCS Rules}, Section VII of Annex III.
the delimitation of the continental shelf beyond 200 nm is of a final and binding nature, there is a general sense that it should conclude all matters pertaining to the case, including the outer limits of the continental shelf beyond 200 nm in accordance with Article 76. Otherwise, if delimitation fails to respect the outer limits of the continental shelf, then a coastal State may be potentially apprehensive about losing a substantial area of its continental shelf to which it has an inherent right. This may be why the Court in the Nicaragua/Honduras case stated that ‘any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder’ \(^{89}\) and, subsequently, this view was confirmed by the Nicaragua/Colombia case in which the Court claimed that ‘the Court is not in a position to delimit the continental shelf’ beyond 200 nm until the OECM is established and the overlap of entitlement is evidenced thereof.\(^{90}\) All in all, the order of delineation before delimitation is warranted by UNCLOS not only to protect international peace and security\(^{91}\) but also to encourage and promote international practice in an integrated and harmonised manner.

Nevertheless, it is a fact that the functions of delineation and delimitation are of distinct character. This thesis is of the view that, in terms of achieving an equitable solution, these two operations are intertwined, complement one another and lead to the same objective— the reaching of an equitable solution—hinting that although delineation before delimitation is the preferred order, it is possible to delineate even after a delimitation dispute has been filed before an international court or tribunal. When the submitting States have filed their delimitation dispute before an international court or tribunal and while the CLCS is yet to make its recommendations, the concerned court or tribunal, before determining the delimitation regarding the continental shelf beyond 200 nm and with the consent of the concerned States,\(^{92}\) may request that the CLCS make its decision within a given timeframe—not only to ensure an equitable solution, but also to expedite the

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\(^{89}\) Nicaragua/Honduras case, 759 [319].

\(^{90}\) Nicaragua/Colombia case, 668-669 [126]-[129].


\(^{92}\) Here this consent of the States to the concern court or tribunal would be seen as ‘prior consent’ required under paragraph 5 (a) of Annex I of the CLCS Rules. See *CLCS Rules*, paragraph 5 (a) of Annex I.
settlement of the dispute. This is consistent with the provisions of UNCLOS and the CLCS rules as well as with international practice.

In sum, it can be concluded that delineation before delimitation is the preferred and most logical order in the context of achieving an equitable solution in the delimitation of continental Shelf beyond 200 nm. However, since the outer limits of continental Shelf beyond 200 nm cannot be final and binding unless they are established on the basis of the CLCS’s recommendation, the question, therefore, arises as to whether CLCS engagement is required in a situation where the parties to a delimitation dispute have already made their submissions for the CLCS’s consideration and, pending the CLCS’s recommendation, have asked the concerned international court or tribunal to effect delimitation—or, alternatively, in a situation where both parties to a delimitation case have made their submissions to the CLCS and one of them has received the CLCS’s recommendation while the other is still awaiting it.

3 Engagement of the CLCS in the Process of Effecting Delimitation Beyond 200 nm

The Article 76 procedure requires that coastal States intending to establish the outer limits of their LCSs beyond 200 nm must submit information to the CLCS and, on the basis of the CLCS’s recommendations, they can establish the outer limits of their LCS that will be final and binding. This assertion raises the question as to whether the CLCS should be involved in the delimitation of LCSs beyond 200 nm. In the view of this thesis, the answer is in the affirmative. The following discussion will assist in clarifying this position.

(a) The Formation of the CLCS Was a Deliberate Act of the International Community

The CLCS is the only ‘international decision-making institution’ formed pursuant to Article 76 and Articles 1 and 2(1) of Annex II of UNCLOS. As mentioned by McDorman, it is ‘a technical body in a political world’ constituted according to the framework of

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There are two reasons why the international community constituted such an international institution. First, the greater seaward extent of the LCS: since establishing the outer limits of the LCS as beyond 200 nm is a unilateral delineation process to be effected by States, the factor that convinced the international community to accept this extent for continental Shelf was the formation of the CLCS—meaning that a coastal State’s claims, whether exaggerated or not, could be evaluated and validated under an agreed international arrangement capable of producing transparency in the delimitation of LCSs beyond 200 nm. Second, there was a need to mitigate various scientific, technical and legal issues in establishing the outer limits of the continental shelf. The substantive provisions of Article 76 establishing the outer limits of the continental shelf ‘abound with scientific and technical terms which at the same time have legal connotations’ and the task of establishing the outer limits is ‘fundamentally a legal activity with legal consequences’. Therefore, in establishing the outer limits of the continental shelf, Article 76 of UNCLOS produced a scientific, technical and legal interface warranting the application of ‘a combination of legal, scientific and technical methods’. To overcome this challenge, the delegates of the Third Conference realised the importance of creating an institution that to ‘participate in a decidedly international activity: the establishment of the outer limits of the continental shelf beyond 200 nm’ in a harmonised manner and this realisation resulted in the adoption of the relevant UNCLOS provisions for

96 Article 76 has provided a clear indication that the legal concept of continental shelf is solely based on the geomorphological criterion which relies solely on scientific and technical data. Since the scientific aspects of geomorphological criterion has been incorporated in the legal framework of UNCLOS and thus attained legal meaning under international law, the function of establishing the outer limits of the continental shelf consequently gives rise of the legal, scientific and technical interface. For details see generally Suarez, ‘Outer limits’, above n 76,119-175.
97 Ibid, 119, 175.
98 Because the application of only science and technology in establishing the outer limits is not only improper, but potentially also a violation of the law as provided for under Article 76. See Suarez, ‘Outer limits’, above n 76,175.
establishing the CLCS. This participation of an international body in the international activity delineating the outer limits of continental Shelf has been given such priority that the arbitral tribunal in the Canada and France (St. Pierre et Miquelon) arbitration declined to make any decision regarding the parties’ claims over the continental shelf beyond 200 nautical miles without such participation. Thus, it can be asserted the engagement of CLCS in delimitation beyond 200 nm has already been legally recognised.

(b) Making Recommendations is the Fundamental Role of the CLCS

The establishment of the outer limits is activity pursued by two main actors: the coastal States and the CLCS. Since the establishment of the outer limits of the continental shelf is a matter for sovereign discretion, the coastal State remains the principal actor, while the latter possesses evaluative or reviewing powers to fulfil its mandate under the convention; as such, the role of the CLCS in establishing limits is of pivotal importance. To materialise the international activity of the establishment of the outer limits of the continental shelf, UNCLOS has mandated the CLCS:

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\text{to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, to make recommendations in accordance with Article 76.}
\]

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101 Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre et Miquelon) (Newyork, 10 June 1992) reprinted in ILM, Volume 31, 1149, [78].

102 There are other relevant actors mandated by the Convention to participate in the process of establishing the outer limits of the continental shelf. Those actors are the Secretary-General; and various international scientific organizations. Other actors involved by reason of their responsibility to assist the Secretary-General include the Secretariat and the UN Legal Counsel as well as the Secretary-General of the International Seabed Authority (ISA). See Suarez, ‘Outer limits’, above n 76, 242.

103 Suarez, ‘Outer limits’, above n 76,119, 175. The mandate includes the task of interpreting the legal concept of Continental shelf beyond 200 nm and to ensure proper implementation of the rules establishing the outer limits contained in Article 76 of UNCLOS. .


105 UNCLOS, Article 3 (1) (a) of Annex II (emphasis added) .
This role of the CLCS might be seen as imposing limits on the sovereignty of the very States that created it.\textsuperscript{106} However, this is not the case. Despite the fact that ‘[f]or an international institution to perform the mandate given it by its founding States, it must, in one way or another, impose limits upon their sovereign prerogatives’,\textsuperscript{107} the CLCS, in establishing the outer limits of the continental shelf for the coastal States, plays a determinative role with the aim of promoting a common and effective international order—a feat that certainly would not be possible if left to the sovereign will of the coastal States alone. Nevertheless, States create international institutions or organisations to conduct the work or activities that individual States are unable or unwilling to undertake alone.\textsuperscript{108} Making recommendations for establishing the outer limits of the continental shelf is one such international activity that has been entrusted to the CLCS, which is duty bound to play a role in the process of establishing limits by making its recommendations. In other words, UNCLOS has provided for the CLCS a \textit{procedural} role in the establishment of coastal State outer limits for continental Shelf pursuant to the provisions of Article 76 that is not adjudicative so much as administrative and, with which, compliance is mandatory. Without this role, the provision entailing that such outer limits shall not be final and binding unless they are established on the basis of the CLCS’s recommendations would not be adopted. However, although the CLCS is not a juridical body, while fulfilling its role under Articles 76 and 3 of Annex II of UNCLOS, it exercises some sort of legal discretion in interpreting the substantive provisions contained in Article 76 with regard to establishing the outer limits of the LCS.\textsuperscript{109} Although, such an interpretative role of the CLCS cannot be seen as constituting an authoritative interpretation of UNCLOS,\textsuperscript{110} in its very fundamental role of making recommendations,

\textsuperscript{106} Since it is a coastal State’s sovereign prerogative whether or not to establish outer limits of its continental shelf as well as where to locate such limits. \\
\textsuperscript{108} Suarez, ‘Outer limits’, above n 76, 15, 119. \\
\textsuperscript{109} Tanaka, ‘Law of the Sea’, above n 54, 142. Oystein, above n 92, 175, 182. In terms of interpreting Article 76 of UNCLOS, the institutions under the UNCLOS, i.e., the CLCS and the international courts and tribunals, ‘do not merely complement each other. Their activities—to interpret and apply Article 76—can overlap. The difference is that while the Courts and tribunal interprets Article 76 in cases of litigation, the Commission interprets Article 76 when examining each submission’: at 175. \\
\textsuperscript{110} Bjorn Kunoy, ‘The Terms of Reference of the Commission on the Limits of the Continental Shelf’, above n 104.
the CLCS assumes authority as an international institution of the first instance to interpret Article 76 by defining the outer limits of the LCS beyond 200 nm.

However, confusion may arise as to the rules restricting the CLCS from making recommendations in cases where submission-making States are in dispute. Therefore, questions are evoked as to the compatibility of this rule with UNCLOS.

(i) The CLCS Rule—Restricting the CLCS from Making its Recommendations is Inconsistent with Article 76 of UNCLOS

The CLCS’s role of making recommendations has been described as ‘an invaluable stimulation’ for the peaceful settlement of maritime boundary disputes with regard to continental Shelf beyond 200 nm. However, such attribution can essentially be found to be inconsistent with paragraph 5(a) of Annex I of the Rules of Procedure of the Commission on the Limits of the Continental Shelf (the ‘CLCS rules’) where the CLCS imposed restrictions on its own right to consider any submission stating that:

where a land or maritime dispute exists, the commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.\(^\text{112}\)

Apparently, where a dispute exists, the CLCS shall not consider any coastal State’s submission that is involved in that dispute. This seems to be a general, negative principle that is subject to the exception of prior consent given by all States involved in the dispute. However, the extent to which it is legally possible for the CLCS to restrain itself from considering a coastal State’s submission when it was created under Article 76 of UNCLOS to perform this sole function is difficult to discern.

The word ‘dispute’ is not mentioned in Article 76 nor in any Article of Annex II of UNCLOS. This means that the CLCS must make its recommendations on the coastal State submissions regardless of whether they are involved in a surviving land or maritime

\(^{111}\) Kwiatkowska, ‘submission’, above n 33, 2, 3.  
\(^{112}\) CLCS Rules, paragraph 5 (a) of Annex I (emphasis added) .
dispute. However, paragraph 5(a) of Annex I of the CLCS rules has unjustifiably narrowed the CLCS’s scope for making recommendations in areas that directly concern it. This CLCS rule is contrary to the provisions of Article 76 of UNCLOS for several reasons. First, the objective of Article 76—the establishing of the outer limits of the LCS beyond 200 nm—cannot be achieved unless the CLCS makes its recommendations to the States. Second, the UNCLOS provision ‘ranks higher than those CLCS rules in the legal hierarchy and constitutes the basis of the establishment of the CLCS’ and ‘Article 76 is the context for the interpretation of the CLCS rules’; therefore, the CLCS rules must be interpreted in a manner consistent with the provisions of Article 76. Third, paragraph 5(a) of Annex I of the CLCS rules reversed the presumption that the delimitation disputes would not hinder or prejudice the delineation process by the CLCS. Through this CLCS rule, disputant States could prejudice the delineation process by vetoing the CLCS process. Thus, while the CLCS is not a dispute settlement body, when a dispute arises, it returns it to the affected States and this raises the question as to whether the CLCS has created a new right for States that goes beyond what was envisaged by UNCLOS.

However, it can be assumed that the States are in no need to invoke paragraph 5(a) of Annex I of the CLCS rules. Because paragraph 10 of Article 76 guarantees that submissions are without prejudice against bilateral maritime boundaries and that submissions to the CLCS are considered independently of each other, the outcome of one does not influence the outcome of the other and the CLCS is not obliged to decide which

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114 Ibid, 16.
116 Paragraph 5 (a) of Annex I of the CLCS Rules
State has the right to a shelf beyond 200 nm; on the contrary, it must examine only whether each State’s submission meets the threshold test for falling within its own primary entitlement.\(^{119}\)

Based on the preceding discussions, this thesis finds that this CLCS rule should be amended by the CLCS itself in accordance with rule 59 of the CLCS rules. However, there might be a positive intention at work behind the incorporation of such self-restriction that may assist the coastal States ‘in creating certainty about the location of the outer limits of the continental shelf to the largest extent possible’ in a peaceful manner, ‘thus significantly contributing to the stability and finality of maritime boundaries’ for which the condition of the prior consent of all disputant States is a catalyst.\(^{120}\) However, waiting for an indefinite period for States’ consent may go against the interest of particular States, which may have potential consequences for the peace and stability of the region. Maritime disputes in the South China Sea provide examples in this regard. This thesis provides evidence of the legal impact of CLCS recommendations as discussed below.

\(\text{(c) CLCS’s Recommendations Are Final and Binding}\)

Article 76(8) of UNCLOS States that the limits of continental Shelf beyond 200 nm, ‘established by a coastal State on the basis of the recommendations of the CLCS, shall be final and binding’.\(^{121}\) Although there is confusion as to whether compliance with the CLCS’s recommendations by a coastal State for the establishment of the outer limits of its continental shelf is sufficient enough to make it final and binding for other States,\(^{122}\) a UN study suggested that the limits established on the basis of the CLCS’s

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\(^{120}\) Constance Johnson and Alex G Oude Elferink, ‘Submissions to the Commission on the Limits of the Continental Shelf in Cases of Unresolved Land and Maritime Disputes: The Significance of Article 76 (10) of the Convention on the Law of the Sea’ in David Freestone, Richard Barnes, and David Ong (eds), The Law of the Sea: Progress and Prospects (Oxford University Press, 2006) 179.

\(^{121}\) UNCLOS, Article 76 (8) (emphasis added).

\(^{122}\) Because, despite the fact that a State established the outer limits of its continental shelf on the basis of CLCS’s recommendations, other State have legal right to disagree with such establishment; and unless such outer limits lack contestability from other States, it would not be final and binding. See McDorman, ‘The Role of the Commission’, above n 92, 315.
recommendations form an obligation *erga omnes* that is final and binding for all States.\(^{123}\)

To understand the definitive role of the CLCS’s recommendations for establishing the outer limits of continental Shelf beyond 200 nm, an understanding of the legal impact of both terms—‘on the basis of’ and ‘final and binding’—is of importance.

(i) *The Term, ‘On the Basis of’, Is Indicative of the Primacy of CLCS Recommendations*

The legal implication of the term, ‘on the basis of’, as incorporated in Article 76(8) of UNCLOS is that the outer limits established by a coastal State must be consistent with those recommended by the CLCS; thus, this term represents ‘a substantive obstacle to the ability of coastal States to proceed independently in establishing “final and binding” outer limits of their continental shelf beyond 200 nautical miles’.\(^{124}\)

Again, only individual States (both submitting and non-submitting) and not the CLCS, the ISA or the UNGA, can assess whether the outer limits of a coastal State’s continental shelf are established on the basis of the CLCS recommendations.\(^{125}\) Any dispute between the States requires the interpretation of the term ‘on the basis of’ and the international courts and tribunals established under UNCLOS\(^ {126}\) are the appropriate authorities empowered in this regard. Since these judicial bodies lack the competence to assess technical and scientific information regarding the formation of the seabed and the subsoil of marine areas, their power to interpret the outer limits of a coastal State’s continental shelf is limited by the legal comparison between the CLCS’s recommendation and the outer limits established by the States,\(^ {127}\) and by the legal examination as to whether the CLCS, in making its


\(^{125}\) McDorman, ‘The Role of the Commission’, above n 92, 313-316.

\(^{126}\) See UNCLOS, Article 287.

recommendation, has overstepped the bounds of its competence as defined in the Convention, or ultra vires or that its recommendations are invalid for other reasons.\textsuperscript{128} Thus it upholds the finality of the CLCS’s recommendations.

(ii) \textbf{The Term, ‘Final and Binding’, Infers the Conclusiveness of the CLCS Recommendations}

The reference to the term ‘final’ implies that ‘the outer limits line shall no longer be subject to change but becomes permanently fixed’ and the reference to the term ‘binding’ implies an obligation to accept the outer limits line concerned.’\textsuperscript{129} Recommendations made by the CLCS are conclusive for several reasons.

First, such recommendations may become final and binding for a coastal State that accepts and complies with them without the consideration of any objections made by its adjacent or opposite coastal States.\textsuperscript{130}

Second, where the CLCS’s recommendations relate to the outer limits of a continental shelf for two or more adjacent or opposite coastal States, there may be two possible outcomes: one or all of them may \textit{accept} the recommendations or may \textit{disagree} with them. In both situations, the CLCS recommendations bear significant weight. When they are accepted, they become an obligation for the States that have accepted them in the establishment of the outer limits of their LCSs beyond 200 nm and they assume the status of ‘final and binding’. Once such limits are established, the delimitation process is ready to proceed. Therefore, States should not pursue any process of delimitation regarding LCSs beyond 200 nm unless submission in this regard is made to the CLCS.\textsuperscript{131} The States


\textsuperscript{130} CLCS Rules, Section VII of Annex III (last part of the summary flow chart of the procedures concerning a submission made to the Commission).

\textsuperscript{131} There are two reasons underpinning this view: first, a State cannot claim an outer continental shelf beyond 200 nm without having proper scientific and technical data supporting its claim. As noted by Suarez, ‘States that claim continental Shelf beyond 200 nm might be free to start a negotiated settlement but this cannot be completed without the participation of the Commission. These States must go through the submission process’. For this view, see Suarez, ‘Outer limits’, above n 76, 229. Second, paragraph 10 of Article 76 serves as a reminder that delimitation of an area of the helf beyond 200 nm presupposes an overlap
are free to accept anything in their negotiations; therefore, in delimitation beyond 200 nm, it is not necessary that they must structure the limits of their continental Shelf as recommended by the CLCS. Rather, the CLCS must make its recommendations based on the charts and coordinates of the delimitation lines submitted to it by the States and the extents of the negotiated delimitation lines must not encroach on the outer limits of their continental Shelf as recommended by the CLCS. Conversely, where delimitation is to be effected by means of third party dispute settlement process under Article 287 of UNCLOS, that third party, whether it is an international court or tribunal, must take into account the recommendations made by the CLCS in regard to the outer limits of the continental shelf not only for the reason that this is required for the implementation of Article 76 of UNCLOS, but also because the competence of the international court or tribunal ‘cannot override the CLCS’s express power to assess the technical and scientific aspects of the establishment of the outer limits of the continental shelf’. Nonetheless, such consideration of the CLCS’s recommendations by an international court or tribunal is required to ensure the application of equality—a necessary element of equitable entitlements of the concerned States to that area, and the extent of such overlapping entitlement can only be determined once those States establish outer limits of their shelf beyond 200 nm on the basis of the CLCS’s recommendations. See generally Andrew Serdy, ‘Delineation of the Outer Limits of Canada’s Arctic Ocean Continental Shelf and Its Delimitation with Neighboring States: Does It Matter Which Comes First?’ in Suzanne Lalonde and Ted L. McDorman, *International Law and Politics of the Arctic Ocean: Essays in Honor of Donat Pharand* (Brill-Nijhoff, 2015) 426; Suarez, ‘Outer limits’, above n 76, 229.

132 Because, it is a legal obligation for the States involved in the process of delimitation of the outer continental shelf to deposit charts and relevant information, including geodetic data permanently describing outer limit lines of the continental shelf and the lines of delimitation with the Secretary-General of the United Nations and the Secretary-General of the International Seabed Authority (ISA) as well as to give due publicity thereof. See See UNCLOS, Article 76 (9), 84; 54 (2). It should be noted that mere depositing charts and information with the Secretary-General and giving publicity thereto does not mean that it will automatically become final and binding on other States, unless any protest or objection be submitted within a reasonable time. Because, neither the Secretary-General of the United Nations nor the Secretary-General of the International Seabed Authority (ISA) has independent authority to review or evaluate the information provided by the submitting State. See McDorman, ‘The Role of the Commission’, above n 92, 316.

133 This is an accepted criterion maintained in State practices. For example, the extent of the delimitation line in the delimitation agreement between Norway and Russian Federation as to the delimitation beyond 200 nm in the Barents Sea, does not exceed the 350 nm limit as specified in Article 76 (5) of UNCLOS. See Suarez, ‘Outer limits’, above n 76, 202-203. See also Comments of the Permanent Mission of Norway to the United Nations on the Russian Submission submitted to the United Nations Secretary General, 20 March 2002, CLCS.01.2001.LOS/NOR, at p. 1-3; Report of the Secretary-General, Oceans and the Law of the Sea, A/57/ 57/Add.1 of 8 October 2002, 9 [39].

solution. Without making submission to the CLCS, States cannot pursue any process of delimitation regarding LCSs beyond 200 nm.\footnote{135}{For this view, see Suarez, ‘Outer limits’, above n 76,229.}

Alternatively, a coastal State that disagrees with the CLCS’s recommendations is prevented from effecting delimitation beyond 200 nm until another recommendation is made by the CLCS on a new or revised submission made by that State in accordance with Article 8 of Annex II of UNCLOS and rule 53 (4) of the CLCS rules.\footnote{136}{See generally UNCLOS, Article 8 of Annex II; CLCS Rules, Rule 53 (4). See also Suarez, ‘Outer limits’, above n 76,230.} In this case, the CLCS will have to follow the same procedures that it followed before making its previous recommendation.\footnote{137}{CLCS Rules, Section VII of Annex III (last part of the summary flow chart of the procedures concerning a submission made to the Commission).} Here the words ‘revise’ and ‘new’ are to be noted. The mention of the terms ‘new’ and ‘revise’ and the lack of any legislated endpoint for making such submissions does not mean that this submission process could become an endless ‘“ping-pong” procedure’ that may go on indefinitely.\footnote{138}{Cf Gardiner, ‘Limits’, above n 57, 69; R W Smith and G Taft, ‘Legal Aspects of the Continental Shelf’ in P J Cook and C M Carleton (eds), Continental Shelf Limits: The Scientific and Legal Interface (Oxford University Press, 2000) 20.} A coastal State’s further submission will not be recognised as ‘new’ unless new aspects have evolved after earlier recommendations made by the CLCS\footnote{139}{For example, such a new aspect may evolve if a court or tribunal rules that the outer limits adopted by the coastal state are not in accordance with Article 76, regardless of whether or not such were adopted on the basis of the CLCS’s recommendations or even outside of the submission process, the coastal state has two alternative options: to revise its outer limits in accordance with the judgment or, if it adopted its limits on the basis of the CLCS’s recommendations, to make a revised or new submission in accordance with the judgment. The underpinning reason of this view lies with the practical consequences of the judgement. Since a coastal state must comply with a judgment that differs with the recommendations of the Commission, there is a de facto disagreement between the coastal state and those recommendations. See generally, International Law Association, Legal Issues of the Outer Limits of the Continental Shelf, Berlin Conference (2004), in: Report of the Seventy-First Conference, 2004, 788; Suarez, ‘Outer limits’, above n 76, 236-237.} and, when a revised submission is considered and accordingly recommended by the CLCS, this amounts to a reviewed decision that cannot be subject to review again\footnote{140}{Because the CLCS cannot revise its recommendations proprio motu. See Alex G Oude Elferink, ‘The Continental Shelf beyond 200 Nautical Miles: The Relationship between the CLCS and Third Party Dispute Settlement’ in Alex G Oude Elferink and D R Rothwell (eds), Oceans Management in the 21st Century: Institutional Frameworks and Responses (Brill Academic Publishers, 2004) 107, 122.} and, thereby, the coastal State shall automatically lose its right to resubmission.

\begin{enumerate}
\item For this view, see Suarez, ‘Outer limits’, above n 76,229.
\item See generally UNCLOS, Article 8 of Annex II; CLCS Rules, Rule 53 (4). See also Suarez, ‘Outer limits’, above n 76,230.
\item CLCS Rules, Section VII of Annex III (last part of the summary flow chart of the procedures concerning a submission made to the Commission).
\item For example, such a new aspect may evolve if a court or tribunal rules that the outer limits adopted by the coastal state are not in accordance with Article 76, regardless of whether or not such were adopted on the basis of the CLCS’s recommendations or even outside of the submission process, the coastal state has two alternative options: to revise its outer limits in accordance with the judgment or, if it adopted its limits on the basis of the CLCS’s recommendations, to make a revised or new submission in accordance with the judgment. The underpinning reason of this view lies with the practical consequences of the judgement. Since a coastal state must comply with a judgment that differs with the recommendations of the Commission, there is a de facto disagreement between the coastal state and those recommendations. See generally, International Law Association, Legal Issues of the Outer Limits of the Continental Shelf, Berlin Conference (2004), in: Report of the Seventy-First Conference, 2004, 788; Suarez, ‘Outer limits’, above n 76, 236-237.
\item Because the CLCS cannot revise its recommendations proprio motu. See Alex G Oude Elferink, ‘The Continental Shelf beyond 200 Nautical Miles: The Relationship between the CLCS and Third Party Dispute Settlement’ in Alex G Oude Elferink and D R Rothwell (eds), Oceans Management in the 21st Century: Institutional Frameworks and Responses (Brill Academic Publishers, 2004) 107, 122.
\end{enumerate}
The CLCS’s ‘recommendations are not judgements or verdicts, but instruments that bear some resemblance to ‘soft law instruments’ that ‘have important legal effects, not least as means of interpretation under the VCLT. To achieve an equitable solution, the CLCS’s recommendations should be taken into account both by coastal States and international courts and tribunals while negotiating or determining maritime boundary disputes in respect to the continental shelf beyond 200 nm. Such considerations will certainly add potential value to the finality and bindingness of the CLCS’s recommendation. A coastal State’s compliance with CLCS’s recommendations may be questioned by parties in the dispute or by at least one party in a delimitation case. Thus, it can be argued that, in a delimitation case where the disputant States have already made their submissions to the CLCS and are waiting for its recommendations, an international court or tribunal dealing with a particular case is competent enough either to defer its decision until the CLCS makes its recommendations, or to request that the CLCS make its recommendations within a given timeframe before determining delimitation, not only to expedite the proceeding of the concrete case but also to achieve an equitable solution in an equitable manner on the whole. An international court or tribunal can alone make such a request that cannot be requested by the parties for two legal reasons: first, there is no provision either in UNCLOS or in the CLCS rules that clearly permits or restricts the Court in such options; second, a court or tribunal, in exercising its judicial role, is at liberty ‘to define the manner in which it chooses’ to determine a case.

In conclusion, it can be argued that compliance with the procedural requirements of Article 76(8) is essential when confirming the ‘procedural guarantee’ of Article 76 to assure that the coastal State establishes its outer limits in accordance with Article 76. Engagement by the CLCS in maritime delimitation beyond 200 nm is an unavoidable part of this procedure; the CLCS plays a transitive role in establishing the outer limits of LCSs beyond 200 nm. Nonetheless, the institutions constituted by UNCLOS must assume the roles assigned to them that are ‘complementary to each other so as to ensure coherent and

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141 Oystein, above n 92, 171, 175, 182.
143 For example, the adjudicative bodies, the CLCS, the ISA and the Meeting of States Parties etc.
efficient implementation of the convention’\textsuperscript{144} This is also an expected impact of UNCLOS.\textsuperscript{145}

Besides the issue of engagement, as will be shown, there are other issues that require consideration in the process of applying the three-stage methodology to achieve an equitable solution.

4 Drawing a Delimitation Line Beyond 200 nm: Equity Warrants Different Rules and Criteria for Equitable Solution

To achieve an equitable delimitation, the international courts and tribunals have confirmed the application of the three-stage methodology as a ‘chain locked process’ for effecting delimitation that is incapable of being applied partially.\textsuperscript{146} Therefore, the application of the three-stage methodology is requisite in the delimitation of LCSs beyond 200 nm. However, the application of this methodology requires the consideration of issues that are new to the established rule of maritime delimitation.

(a) The Relevant Areas and Relevant Coasts of Continental Shelf Beyond 200 nm Are Different from Those Within 200 Nm

Relevant areas and relevant coasts are two indispensable equitable concepts that are not only employed in the final stage (the proportionality test) of the three-stage methodology to assess the equitability of the delimitation result, but are also used as necessary legal bases for identifying an area of overlapping entitlement.\textsuperscript{147} As discussed earlier, in delimitations within 200 nm, the relevant area is determined by taking into account the

\textsuperscript{144}Bangladesh/Myanmar case, 110 [373].
\textsuperscript{145}Because, a coastal State cannot establish the outer limits of its continental shelf beyond 200 nm unless the CLCS makes recommendations on its submission, and the CLCS has been constituted and authorised only to carry out this tasks entrusted to it, and in this way, a court or tribunal must take account of the CLCS’s recommendation in the exercise of its jurisdiction. See Elferink, ‘The Impact of the Law of the Sea’, above n 9, 469. See also Bangladesh/Myanmar case, 36 [106] (Separate Opinion of Judge Tafsir M. Ndiaye).
\textsuperscript{146}Achieving an equitable solution in the delimitation of each maritime zone is the ultimate requirement of UNCOS. This is what lead the international courts and tribunals to develop the three-stage methodology in a way which not only ensures the achievement of an equitable solution, but also exemplify transparency, stability and consistency of their decision making process.
\textsuperscript{147}For this view see, discussion at chapter 4.
overlapping entitlements of the parties that are projected from their relevant coasts.\textsuperscript{148} However, since the basis of entitlement to areas beyond 200 nm is based on something other than the distance criterion and, since this difference cannot be ignored when determining the spatial scope of overlapping entitlements to that shelf, the SCS concept of international law\textsuperscript{149} and the distinctive characters of the basis of entitlement to the areas within and beyond 200 nm necessarily alter the governing principles of delimitation operations, differentiating the function of determining relevant areas and relevant coasts beyond 200 nm from the process of ascertaining those within 200 nm.\textsuperscript{150} It follows that the identification of the relevant coasts becomes redundant for the purposes of identifying the relevant areas beyond 200 nm.\textsuperscript{151} Understandably, identifying areas of overlapping entitlement beyond 200 nm is a complicated task. It becomes more complicated when the States must comply with the substantive and procedural requirements of Article 76 of UNCLOS. Considering the variations in geophysical factors, it would be very difficult to predict that the extent of entitlements beyond 200 nm for two coastal States that would terminate at the same location of the seabed. Moreover, it is possible for the continental shelf beyond 200 nm of one State to overlap with that within 200 nm of another State.\textsuperscript{152}

All things considered, the relevant areas in delimitations of overlapping entitlements within 200 nm ‘cannot be transposed to determine the relevant area[s]’ in delimitations beyond 200 nm\textsuperscript{153} and the Court or tribunal should determine the relevant areas beyond 200 nm separately by taking into account the areas of overlapping entitlements based on the geomorphological criterion under Article 76. This assertion may, therefore, give rise to the question as to the basis for identifying such relevant coasts where the international courts or tribunals must identify base points as the bases for drawing provisional delimitation lines.

\textsuperscript{148} See discussion at chapter 4. See also Romania/Ukraine case, 99 [110], 100 [114].
\textsuperscript{149} Barbados/Trinidad and Tobago arbitration, 27 RIAA, [213].
\textsuperscript{150} Bjorn Kunoy, ‘The Delimitation of an Indicative Area of Overlapping Entitlement to the Outer Continental Shelf’ (2013) 83 The British Yearbook of International law 61-62.
\textsuperscript{151} While the coastal configuration plays dominant role in identifying relevant coast as well defining extent of entitlement within 200 nm, for the same reason of different basis of entitlement, such role of the coastal geography becomes otiose in determining overlapping entitlement beyond 200 nm. See Kunoy, ‘Indicative Area of Overlapping Entitlement’, above n 150, 62, 78-81.
\textsuperscript{152} Elferink, ‘The Impact of the Law of the Sea’, above n 9, 463.
\textsuperscript{153} Kunoy, ‘Indicative Area’, above n 150, 61.
(i) **Identifying Relevant Coasts and Base Points: Equity Requires Different Considerations**

A preliminary question in this context is whether the coastal opening can be used for delimitation beyond 200 nm as it can within 200 nm. The answer is in the negative. The rejection of the concept of SCS and the transformation of the 200 nm limit to a point of differentiation for delimitations within and beyond 200 nm occur for the same reasons that the coastal opening should not be considered relevant for delimitations beyond 200 nm.\(^{154}\)

Since the delimitation of a given maritime area starts from the point of entitlement, the delimitation of the continental shelf beyond 200 nm starts from the point of 200 nm.\(^{155}\) This Statement clearly indicates the inapplicability of the *coastal opening* (relevant coast) and base points identified for the delimitation of the continental shelf within 200 nm to that of beyond 200 nm. Therefore, the question remains as to how the relevant coast and base points effecting the delimitation of continental Shelf beyond 200 nm are to be identified. Neither the case law nor State practices provide any indication in this regard. However, sufficient indication has been found in scholarly writings.

\[\text{Figure 11 The 200 nm opening.}\]\(^{156}\)

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\(^{154}\) See discussion at IV A of this Chapter.

\(^{155}\) Antunes, above n 35, 337.

\(^{156}\) Antunes, Vol 2, 526, 527 (Adapted).
Lilje-Jensen and Thamsborg introduced the idea of using the 200 nm limit as a coastal opening for the delimitation of continental Shelf beyond 200 nm. They persuasively argued that, in contrast to the coastal opening in the context of continental Shelf within 200 nm, the length of the 200 nm opening (Figure 11) ‘should be given the status of basic parameter … [in] the allocation of shares of outer shelf to the individual claiming State’. Antunes supported this attribution. However, it is possible to argue that the FOCS may constitute a relevant basis for the drawing of a provisional delimitation line when effecting delimitation of continental Shelf beyond 200 nm. Nonetheless, the persuasiveness of such argument is potentially weak because the FOCS is used only to determine the OECM and it has no direct connection in measuring the extent of the outer limits of continental Shelf beyond 200 nm; in fact, such an option would, in practice, create more uncertainty and inconsistency as far as delimitation beyond 200 nm is concerned. This thesis holds that, to achieve equitable solutions in the delimitation of continental Shelf beyond 200 nm, ‘the 200 nm opening’ should be considered as relevant coast and appropriate base points should be identified thereon for the following reasons:

- The customary rules for identifying the relevant coasts and relevant areas are equally applicable for a 200 nm opening.
- The 200 nm opening reduces and overcomes difficulties and disputes relating to baselines.
- The 200 nm opening principle provides the most suitable basis for identifying relevant coast as well as base points, not only because it represents the basis for entitlement beyond 200 nm, but also for the reason that it better reflects the application of the fundamental principle of maritime delimitation: the land dominates the sea.

158 Antunes, above n 35, 335-338.
160 See discussion at IV C 1 (b) in Chapter 4.
The concept of the 200 nm opening does not reject, but rather commends and is consistent with the application of the principle that the Court must, when delimiting the continental shelf, select base points by reference to the physical geography of the relevant coasts.\[^{161}\] Two reasons inform this view. First, despite the fact that the distance-based outer limit of the LCS—whether 200 nm or 350 nm—must be measured from the baselines from which the breadth of the territorial sea is measured,\[^{162}\] for the purpose of drawing a provisional delimitation line, it is legally possible to identify base points in places other than on the mainland coast.\[^{163}\] Second, the condition for measuring the outer limit of the continental shelf ‘from the baselines from which the breadth of the territorial sea is measured’ is not applicable when the outer limit of the LCS is 100 nm from the 2,500 metre isobaths.\[^{164}\]

The international courts and tribunals should apply this 200 nm opening principle in determining the delimitation of continental Shelf beyond 200 nm, not only to achieve an equitable solution by ensuring the application of equitable concepts—such as comparing like with like’—but also to certify that judicial practices are stable and consistent with the established legal regime of maritime delimitation. This is also a rightful legal expectation.

\[^{161}\] Romania/Ukraine case, ICJ Reports 2009, 108 [137].

\[^{162}\] Article 76 (1) of UNCLOS States that ‘[t]he continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured’, and Article 76 (5) of UNCLOS States that ‘[t]he fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a) (i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2, 500 metres’.

\[^{163}\] For example, in the Nicaragua/Colombia case, the Court, while identified Nicaraguan relevant coast on the mainland of Nicaragua for the purpose of measuring its 200 nm entitlement as well as disproportionality test, but the Court, at the same time, for drawing the provisional delimitation line, selected Nicaraguan base points on its offshore islands rather than on the relevant coast which was identified on the Nicaraguan mainland. See Nicaragua/Colombia case, 680 [153], [168]-[169], [200]-[201], [239]-[247].

\[^{164}\] See UNCLOS, Article 76 (5).
Despite the fact that the UNCLOS provisions controlling the rights and jurisdictions for EEZ and continental Shelf have made these two zones distinct from each other, since they coexist for up to 200 nm, the equitable concept of an SMB was developed for exercising the ‘complementary and joint jurisdiction’ of these two zones within 200 nm.

For both legal and practical reasons, the jurisdiction is quite different in the delimitation of the continental shelf beyond 200 nm. First, the concept of an SMB is intertwined with the distance criterion of entitlement within 200 nm where the criterion for the natural prolongation or OECM has no role to play. Second, since the EEZ and the continental shelf are two distinct maritime zones and the shelf has been made a separate identity by the legal provisions of UNCLOS that have been confirmed by the international courts and tribunals, an SMB is not possible in the same sense as for a continental shelf within 200 nm since the EEZ does not extend beyond that limit.

Third, a delimitation line within 200 nm, as discussed earlier, may not be extended without changing its course. However, it is possible to draw a single delimitation line (SDL) with regard to the continental shelf both within and beyond 200 nm in a situation where the continental shelf within 200 nm may be extended beyond 200 nm without a change in direction; however, it would be a mistake if the principle of an SCS were to be relied upon in this sense for the reasons Stated above in this chapter.

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165 Because the rules governing rights and jurisdiction for EEZ only refers the water column up to 200 nm and the rules that describes rights and jurisdiction for the continental shelf refers only the seabed and subsoil of the sea which may extent up to 350 nm. See UNCLOS, Articles 56, 57, 60, 76, 77.


167 The UNCLOS provisions governing delimitation, right and jurisdiction of the continental shelf are applicable only to extent of its limit both within and without 200 nm and this separate identity confirmed by the ICJ in Continental Shelf (Libya v Malta) Case. See UNCLOS, Articles 76, 77, 78, 83; Continental Shelf (Libya v Malta) Case [1985] ICJ Rep 13, 33.

168 Objectively speaking, 200 nm distance criterion is the sole basis of the equitable concept of SMB in that while it is possible to have a continental shelf without an EEZ, it is not possible to have an EEZ without a corresponding continental shelf within 200 nm. In other words, the two regimes out to 200 nm are co-mingled. It is the rule of equitable solution that warrants the application of the concept of SMB in order to ensure an equitable solution within 200 nm. See, generally Libya/ Malta case, 13, 33 [34]; UNCLOS, Article 56 (1) (3) and Article 68.

169 See discussions at III (B) in this Chapter.
(c) The Three-stage Methodology Invites New Approaches for Reaching an Equitable Solution

To achieve an equitable delimitation, the international courts and tribunals have confirmed the application of the three-stage methodology as a ‘chain locked process’ for effecting delimitation that is incapable of being applied partially.\(^{170}\) Therefore, application of the three-stage methodology is required in the delimitation of LCSs beyond 200 nm. However, the application of this methodology requires the consideration of issues that are new to the established rule of maritime delimitation.

(i) The Equidistance Principle Cannot Be a Preferred Method for Drawing a Provisional Line

Despite the fact that the equidistance method has played an important role in delimitation within 200 nm,\(^{171}\) it is argued that this method, under the rule of equitable solution, should not be treated as predictable; rather, it is asserted that the option of choosing an applicable method should remain open and flexible.\(^{172}\) This argument is relevant and rational in delimitations beyond 200 nm for three reasons. First, the equidistance method is not linked to the entitlement criterion beyond 200 nm as it is within 200 nm.\(^{173}\) In fact, no other single method of delimitation could occupy such link in the context of the delimitation of LCSs beyond 200 nm.\(^{174}\) Moreover, the case-by-case approach of maritime delimitation

\(^{170}\) Achieving an equitable solution in the delimitation of each maritime zone is the ultimate requirement of UNCOS. This is what lead the international courts and tribunals to develop the three-stage methodology in a way which not only ensures the achievement of an equitable solution, but also exemplify transparency, stability and consistency of their decision making process.


\(^{172}\) For this view see discussion at IV B in Chapter 4 of this thesis.


hints at the appropriateness of delimitation method in the case at hand. Therefore, in delimitation beyond 200 nm, it is necessary to identify appropriate methods on the basis of this criterion defining entitlement beyond 200 nm. The equidistance method could still provide a provisional starting point for resulting in equitable solution. However, depending on the geophysical features of a certain marine area, ‘a different method that does achieve such a result should be chosen as a starting point’. The ICJ’s findings in the North Sea cases are worth considering in this regard.

Second, Article 83 of UNCLOS neither supported nor rejected the application of the same delimitation method within and beyond 200 nm. To achieve the ultimate objective of this article, an equitable solution, therefore, requires applying different principles and rules within and beyond 200 nm.

Third, the relevant areas of a continental shelf beyond 200 nm may not entail the total continuation of those within 200 nm and, thus, the relevant coast under consideration for delimitations beyond 200 nm may also be different and might, without extending the provisional delimitation line drawn within 200 nm, call for the drawing of a separate provisional delimitation line in delimitations beyond 200 nm using a method to best suit the geophysical circumstances of the concerned seabed and subsoil. However, unless these circumstances preclude the use of the equidistance method, it is possible to draw a PEL, even in the case of the delimitation of continental Shelf beyond 200 nm.

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175 Ibid.
176 Ibid, 15.
177 Ibid, 13. In the North Sea cases, the ICJ concluded that delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other[...]. See North Sea cases, 53 [101 (C) (1)].
(ii) Economic Circumstances can Potentially be Considered as Relevant Circumstances

As argued in Chapter 4, the expanding of relevant circumstances is proportionate to the extent of the maritime zones. In accordance with this view, this thesis argues that although economic and social circumstances have not been considered relevant in cases delimiting continental Shelf within 200 nm, these circumstances may accrue relevance in cases delimiting continental Shelf beyond 200 nm, not only in terms of conceptual and factual differences between continental Shelf within and beyond 200 nm, but also to ensure equitable access to the natural resources on continental Shelf beyond 200 nm.\(^{179}\) In this regard, the development of the legal regime of the continental shelf is was directly tied to the resources potential of these zones and, therefore, delimitation can arguably be viewed as an essential precursor to the full realisation of such resources as well as to the peaceful management of the oceans and seas.\(^{180}\) Taking into account the economic interests underlying the OCS, the international courts and tribunals, while determining delimitation boundaries for the OCS, should properly ensure equitable access to the natural resources. Although delimitation is not a matter of simply dividing natural resources in a distributive manner, the equitable criteria of equitable solution (non-encroachment and the ‘no cut-off’ effect) aim to ensure access to the natural resources of continental Shelf in an equitable manner. It is expected that the Courts will one day open their doors to economic considerations ‘where the effect is more certain and permanent and more profoundly disturbing to the judges’ sense[s] of fairness’.\(^ {181}\)

(iii) A Disproportionality Test Should Be Performed Differently

It has already been argued that the relevant areas and relevant coasts for the delimitation of continental Shelf beyond 200 nm are different from those beyond 200 nm; therefore, the final stage of delimitation—the disproportionality test—should consider only those areas and coasts that represent the continental shelf beyond 200 nm. The concept of the

\(^{179}\) For details see Appendix III.

\(^{180}\) Mcdorman, above n 1, 183; Prescott V and Schofield C. The maritime political boundaries of the world (2005) 216.

\(^{181}\) Thomas M Franck, Fairness in International Law and Institutions (Clarendon Press, 1995) 73.
200 nm opening can be considered as a decisive parameter in this regard.\footnote{Lee, above n 40, 209.} This thesis asserts that consideration of the 200 nm opening would be most equitable approach for achieving an equitable solution.

IV  \textbf{THE CONCEPT OF A GREY AREA IS INCONSISTENT WITH THE RULE OF EQUITABLE SOLUTION}

UNCLOS does not contain any provisions regarding the concept of a grey area, a concept that first evolved in scholarly writings.\footnote{See generally, Alex G Oude Elferink, ‘Does Undisputed Title to a Maritime Zone Always Exclude its Delimitation: The Grey Area Issue’ (1998) 13 (2) \textit{The International Journal of Marine and Coastal Law}143-192; Elferink, ‘The Impact of the Law of the Sea’, above n 9,463; \textit{Bangladesh/Myanmar} case, 55 (Dissenting opinion of Judge Lucky); Antunes, above n 35, 348-350.} According to Oude Elferink, this concept refers to an area that lies within 200 nm of the coastline of one State but beyond the boundary of another State.\footnote{Alex G Oude Elferink, ‘Does Undisputed Title to a Maritime Zone Always Exclude its Delimitation: The Grey Area Issue’ (1998) 13 (2) \textit{The International Journal of Marine and Coastal Law}143-192.} According to scholars, the grey area emerges in situations where the entitlements of two States to a continental shelf extend beyond 200 nm and relevant circumstances call for a boundary other than the equidistance line (Figure 12). What is striking, UNCLOS provides provisions defining EEZ and continental shelf and sets out the manner in which disputed areas in each zone should be delimited; but it provides no provisions to govern the situation where these two maritime zones overlap, creating grey areas.\footnote{Bangladesh/Myanmar} case, 60 (Dissenting opinion of Judge Lucky).

Although it is possible to see the emergence of the grey area as a practical consequence of achieving an equitable solution in the delimitation of continental Shelf beyond 200 nm,\footnote{For this view, see generally Alex G Oude Elferink, ‘Does Undisputed Title to a Maritime Zone Always Exclude its Delimitation: The Grey Area Issue’ (1998) 13 (2) \textit{The International Journal of Marine and Coastal Law}143-192; Elferink, ‘The Impact of the Law of the Sea’, above n 9,463.} for several reasons, it is also possible to see the grey area as against the holistic approach of equitable solution and, in particular, against the established rules of delimitation.
First, the concept of a ‘grey area’ emerged only when equidistance method was taken as an obligatory method for drawing a provisional delimitation line and when the line was adjusted to reach an equitable solution. However, its emanation is harmful to equitable solution itself, not only because the obligatory use of any delimitation method is against the rule of equitable solution, but because it creates an area of residual jurisdiction in contrast to equitable solution that aims to achieve a simpler and more coherent delimitation. While the adjustment of an equidistance line is required to achieve an equitable solution, such adjustment must be total and not partial.

Second, the emergence of the concept of a ‘grey area’ is inconsistent with the fundamental rule of maritime delimitation: ‘the land dominates the sea’. This is because there is no correspondence between the grey area and the coast of the State that claims it and its position falls in the opposite direction to the boundary line of that State.

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187 Antunes, Vol 2, 529 (Adapted).
188 For this view, see discussion in section III B of Chapter 4.
Third, the concept of the ‘grey area’ is incompatible with the ‘SMB’ for delimitations within 200 nm for two reasons. To begin with, the entitlement of a coastal State within 200 nm is solely dependent on the 200 nm distance criterion and no longer rests on the adjacency, natural prolongation, depth or exploitability criteria; the creation of a grey area challenges the unity of the distance criterion. Further, the grey area rejects the established principle that it is possible to have a continental shelf without an EEZ, but it is not possible to have an EEZ without a corresponding continental shelf within 200 nm. In the same way, it also contradicts the notion of the 200 nm opening.\footnote{For this view see discussion at IV B (4) in this Chapter.}

Fourth, the idea of a ‘grey area’ operates against the rule of equality, an essential element for ensuring an equitable solution in an equitable manner by comparing like with like. Beyond the jurisdiction of 200 nm, if one State faces another State’s EEZ at the starting point of its continental shelf beyond 200 nm, while another State faces the high sea, an area in which all States share equal rights,\footnote{UNCLOS, Article 87, 89.} this does not exemplify equality in the true sense—at least not in the sense of equality as comparing ‘like with like’—because the rights and duties of coastal States in EEZ and high seas are significantly different.

Fifth, the grey area essentially creates a ‘water zone-locked’ situation, at least in the area of the grey zone, for the State beyond whose 200 nm jurisdiction it is located.

Sixth, the grey zone gives rise to conflict concerning the rights of the EEZ and the continental shelf. While one might submit that a coastal State’s jurisdiction over a continental shelf should have priority over that of an EEZ,\footnote{Because though the Convention distinguishes between the rights that arises under multiple maritime zones, Article 56 (3) of the Convention states that the rights of a coastal State with respect to the seabed and subsoil in the exclusive economic zone are to be exercised in accordance with the regime for the continental shelf. See, UNCLOS, Article 56 (3) and Part VI. Another reason, per this author might be that the water column for the EEZ cannot be thought of without the seabed and subsoil, ie., the continental shelf.} on the contrary, others may claim that the rights of a coastal State over the water column and the
The seafloor within 200 nm are ‘indispensable and inseparable parts’ of a unitary EEZ.\(^{193}\)

- The creation of a grey area may pose significant threat to the peaceful usage of the sea and its resources, which is not the purpose of UNCLOS at all. It is evident from the maritime jurisprudence that the total purpose of delimitation is to settle inter-State maritime boundary disputes once and for all by distributing definitive areas to each competing State where one State can effectively exercise its sovereign rights (such as exploitation) without the need for the permission of other State(s).\(^{194}\) Grey areas do precisely the opposite. When, in practice, a State in possession of an EEZ and a State in possession of a shelf begin to exercise their sovereign rights in their respective areas of jurisdiction, potential conflicts are likely to arise from competing interests involving security, navigation and scientific marine research—as well as the protection and preservation of the marine environment—as a result of the direct and indirect inconsistencies underlying the exercise of the water column and shelf rights.\(^ {195}\) Interestingly, UNCLOS provides little or no guidance as to how to address the problem of the exercise of shelf rights and EEZ rights over the same area by different coastal States.\(^ {196}\) A grey area may thus create more problems for the parties now forced to cohabit in the same area than potential benefits. The purpose of delimitation is not to create grounds for prospective and potential disputes; rather, it is to resolve existing disputes so that States can enjoy their conventional rights in a peaceful

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193 Because, according to Article 56 (1)(a) of the Convention the EEZ of a coastal State includes rights to the seabed and subsoil which, in essence, fall within the regime for the continental shelf. See UNCLOS, Article 56 (1)(a). For example, Rao held this view that ‘[t]he creation of a grey area is entirely contrary to law and the policies underlying the decision taken in UNCLOS to create the EEZ as one single, common maritime zone within 200 nm which effectively incorporates the regime of the continental shelf within it’. See Bangladesh/ India arbitation, 3 [31] (dissenting opinion of Dr. Rao).

194 All maritime delimitation disputes, till the Romania/Ukraine cases, so far settled by the international courts and tribunals, evidence this fact that all those cases are settled once and for all. See also Bangladesh/ India arbitation, 19[35] (dissenting opinion of Dr. Rao).


196 Ibid. The delegates to the Third Conference did not contemplate such complex legal issue with regard to the overlapping jurisdiction of EEZ and continental shelf. Probably, the reason is that UNCLOS provided same criteria of delimitation within 200 nm,’ leading to the assumption that the two could not fall to different States if calculated by the same method’.
manner. This is an essential aspect of the achievement of an equitable solution as well.

In summing up the foregoing discussions, it can be submitted that the principle of natural prolongation plays the most dominant role in determining the entitlement to the continental shelf beyond 200 nm. Although there are opposing views that rejected such role of this principle and put emphasis on geomorphological aspects, this thesis differs with such view because it finds that while natural prolongation principle provides the *theoretical* basis for the constitution of entitlement to a continental shelf as outlined in Article 76(1), the geomorphological aspects as detailed in Article 76(4) of UNCLOS provides the *procedural or functional criterion* for measuring the extent of that entitlement by way of determining the OECM. With regard to the delimitation of the continental shelf beyond 200 nm, Kwiatkowska opposed Kunoy’s view with respect to delineation before delimitation; the Tribunal in *Barabados/Trinidad and Tobago* arbitration rejects the difference between inner and outer continental shelf on the basis of SCS principle; Mangnussons argues that instead of 200 nm opening, the FOCS should be considered as the relevant coast for drawing a provisional delimitation line in delimitation beyond 200 nm. In response to these opposing views, this thesis categorically argues that the difference between the basis of entitlement to the continental shelf within and beyond 200 nm and the very definition of maritime delimitation, in essence, attributed the continental shelf beyond 200 nm as an independent maritime zone which requires effecting its delimitation individually, and in so doing warrants delineation before delimitation and drawing of a provisional delimitation line treating 200 nm opening as relevant coasts. Elferink’s innovative concept of grey area, should not be applied in delimitation beyond 200 nm, because, this concept exists neither in Conventional law nor

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197 Magnusson, ‘Continental Shelf Beyond 200 nautical miles’, above n 10, 20.
198 See discussions at section II in this Chapter.
200 *Barabados/Trinidad and Tobago* arbitration, 65-66 [212]-[213].
in customary law, and never experienced in maritime jurisprudence and thus there exists no legal basis for the application of this concept. Moreover, it not only goes against the rule of equitable solution, but also against the very purpose of the LOS Convention- to ‘contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights’.

V CONCLUSION

The legal definition of the continental shelf beyond 200 nm and the rule establishing the outer limits of that shelf—as a consequence of their *sui generis* characteristics—have caused the emergence of a new maritime zone, known as the ECS or the OCS. The basis of entitlement for a continental shelf beyond 200 nm—the principle of natural prolongation—plays the most dominant role in such delimitations. The natural prolongation criterion cannot be construed in isolation. To understand and realise this concept, the provisions of Article 76 must be read as a whole. The primacy of the basis of entitlement to a continental shelf beyond 200 nm occurs because Article 76 created the point of differentiation between Shelf within and beyond 200 nm that, in essence, warrants the consideration of various new aspects in delimitation beyond 200 nm. For example, considering the 200 nm opening as a relevant coast--and considering the area projected from such relevant coasts as a relevant area—entails flexibility in choosing delimitation methods, in considering the socio-economic status of the disputant States as relevant circumstances and in conducting the disproportionality test separately from those undertaken within 200 nm. The basis of entitlement beyond 200 nm warrants that international courts and tribunals comply with the substantive and procedural requirements of Article 76—otherwise known as the Article 76 process—before determining delimitations beyond 200 nm. This confers the legal proposition, delineation before delimitation—or the establishing of the outer limits of the continental shelf beyond 200 nm before delimitation. In this process of delineation, the CLCS is to be engaged in an appropriate manner. The increasing number of coastal State submissions to the CLCS

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203 UNCLOS, para 7 of the Preamble.
is sufficient to observe the requirement for such consideration. Such legal propositions and engagements are necessary not only to achieve an equitable result in an equitable manner, but also to ensure the complementary role of the institutions constituted under the Convention as well as to promote the equitable and peaceful use of the oceans. Any sort of deviation in this regard may prejudice justice.

204 Of the 192 United Nations Member States, 155 are coastal States. Among these coastal States, 79 have made 118 submissions claiming the continental shelf beyond 200 nm till 2012 and 58 out of these claims overlap covering an area of approximately 3, 227, 110 square kilometres. These overlaps give rise to multiple ‘new’ outer continental shelf boundaries and, it would appear, a proliferation in potential outer continental shelf boundary disputes. Further, the process is not yet at an end as, a further seven more States are likely to (or may yet decide to) make submissions in due course but have yet to do so because the deadline for their submissions has yet to pass. The States that have yet to make submissions are: Canada, Ecuador, Liberia, Morocco, Peru, USA and Venezuela. See Brian J Van Pay, ‘Disputed Areas Beyond 200 Nautical Miles: How Many and Will Geophysical Characteristics Matter In Their Resolution’ in Myron H. Nordquist abd John Norton Moore (eds), Maritime Border Diplomacy (Martinus Nijhoff Publishers, 2012) 47, 56, 58, 65-67.
CHAPTER 6

THE EFFECTIVE APPLICATION OF THE LAW OF MARITIME
DELIMITATION IN SETTLING MARITIME BOUNDARY DISPUTES IN
THE BoB

I INTRODUCTION

The delimitation of maritime boundaries in the BoB sub-region between Bangladesh, India and Myanmar remained largely neglected for over four decades. The invocation of CPBD by Bangladesh in initiating the BoB cases in 2008, led to the peaceful settlement of these disputes. Note should be taken that the BoB cases are the first adjudicative processes to effect maritime boundaries in South Asia. The decisions of these cases established the boundaries of the territorial sea, the EEZ and the continental shelf both within and beyond 200 nm between the littoral States of the BoB—as comprehensive delimitation task as has ever been made by any international court or tribunal. As such, legal analysis of these decisions has become crucial for understanding the effective application of the law of equitable solution as well as for examining whether further development of this law is required.

The BoB cases are very close in nature to the North Sea cases, not only in terms of geographical and geological configurations, but also in their selection and application of delimitation rules and procedures. In the North Sea cases, concavity of the coast was found in one State—Germany—whereas in the BoB cases it was found in Bangladesh. As in the North Sea cases, the role of geomorphology and the relevance of the concept of natural prolongation in determining the boundaries of a continental shelf received much attention in the BoB cases. The judges of the international courts and tribunals had to face the same situation in dealing with the boundary disputes both in the North Sea cases and BoB cases—the North Sea cases were first cases where the judges for the first time had to deal with the

continental shelf delimitation without any guiding precedence, and on the other hand, the BoB cases are the first cases where, for the first time, they had to deal with the delimitation of the continental shelf beyond 200 nm without any prior case decided in this regard. What was the consequence, the judges, both in the North sea and BoB cases, given the absent of prior judicial decision, had to exercise their law-making powers. In the North Sea cases, the ICJ had to determine the rules for the delimitation of the continental shelf, while in the BoB cases the International Tribunal on the Law of the Sea (hereinafter the ITLOS) and the Arbitral Tribunal established under Annex VII of UNCLOS (hereinafter the Arbitral Tribunal) had to determine the methods for delimiting the continental shelf beyond 200 nm. However, one dissimilarity between these two cases is that in 1969 there was no international procedure for delimitation aside from the Grisbadarna award and the rules and methods finally determined by the ICJ were developed through scant State practice; conversely, today—and during the determination of the BoB cases—the judges have a set of readily applicable rules and principles that has been developed in the course of judicial decision-making over the past 40 years and that has now taken the shape of a jurisprudence constante. These judicially developed rules governing maritime delimitation strongly affect boundary delimitation both within and beyond the 200 nm mark by way of clarifying the law and ensuring legal certainty and predictability. In other words, no judicial decision should significantly depart from the established law as developed by the international courts’ and tribunals’ ‘law-making’ capacities.

As Stated earlier, maritime delimitation, whether it is effected by adjudication or arbitration, is a legal operation where the effectiveness of the law depends not on the declarations made by beholders as to how far the results indicate a win or a loss, but rather on how far the results exemplify the effective application of the established international rule governing maritime delimitation. Therefore, the main aim of this chapter is to investigate and examine the above

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II THE SETTLEMENT OF MARITIME BOUNDARIES IN THE BoB

A The Delimitation of Maritime Boundaries Between Bangladesh and Myanmar as Determined by the ITLOS

After the ICJ’s judgement in the Romania/Ukraine case in 2009, the judgement of the Bangladesh/Myanmar case was delivered in 2012, provoking much hope and anxiety from the ITLOS for two reasons: first, this case was first of its kind before the ITLOS and its judgement was the first to be determined by the ITLOS; further, it was the first delimitation case in Asia that was to be decided through third-party compulsory settlement procedures; second, before the delivery of the judgement, there was anxiety among scholars as to whether the ITLOS, as the principal judicial forum established under UNCLOS, would maintain the continuity and consistency of the rule governing maritime delimitation—the ‘rule of equitable delimitation’ as developed and established in maritime jurisprudence. Therefore, a legal analysis of this case bears potential significance in terms of the investigation as to how far the ITLOS’s judgement is consistent and compatible with the legal concept of maritime boundary delimitation as well as the rule of equitable solution that is firmly established in international law. It is convenient to start this analysis with a brief discussion of the claims made by the State parties.

1 Claims Made by Bangladesh Before the ITLOS

Both parties submitted their claims and counter claims to the ITLOS in writing. In its memorial and replies, Bangladesh requested the ITLOS to adjudge and declare that the maritime boundary between Bangladesh and Myanmar in the territorial sea should be that line first agreed between them in 1974 and reaffirmed in 2008. From the endpoint of the territorial sea, the SMB for the EEZ and continental shelf within 200 nm of Bangladesh and Myanmar follows a line with a geodesic azimuth of 215° to the point located at 17° 25’ 50.7” N, - 90° 15’ 49.0” E and, from this point, the maritime boundary for the continental shelf beyond 200 nm between Bangladesh and Myanmar follows the contours of the 200 nm limit...
drawn from Myanmar’s normal baselines to the point located at 15° 42’ 54.1” N, - 90° 13’ 50.1” E (Figure 13). In contrast, Myanmar requested that the ITLOS adjudge and declare that the boundary line continued along the equidistance line in a south-westerly direction following a geodetic azimuth of 231° 37' 50.9” until it reached the area where the rights of a third State may be affected (Figure 14).

![Figure 13 Delimitation Line Proposed by Bangladesh.](image)

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3 Bangladesh/Myanmar case, 17-18 [32].
4 Ibid.
Bangladesh argued that the ‘agreed minutes’ of discussions between the parties in 1974 and 2008, although they had never been converted into a formal treaty, constituted a tacit

Figure 14 Delimitation Line Proposed by Myanmar.\(^6\)

2 Delimitation of the Territorial Sea

Annotations:


\(^7\) The text of 1974 Agreed Minutes was reaffirmed in the 2008 Agreed Minutes except two minor modifications. First, the ‘coordinates as agreed in 1974 of the ad hoc ‘Understanding’ were plotted in the 2008 Agreed Minutes.
agreement for the purpose of Article 15 of UNCLOS—terms and conditions that were respected and maintained in the conduct of both parties—while Myanmar denied any such binding agreement stating that the agreed minutes ‘were never intended to constitute a legally binding agreement’ and that, rather, these documents constituted an ‘ad hoc conditional understanding’. The ITLOS rejected Bangladesh’s argument, holding that the agreed minutes were no more than a record of a conditional understanding and not an agreement within the meaning of Article 15 of the convention. The ITLOS also rejected Bangladesh’s argument that there was a tacit or de facto agreement concerning the territorial sea boundary resulting from the consistent conduct of the parties over three decades, finding that there was no convincing evidence to this effect. Bangladesh’s argument that Myanmar was prevented from denying that there was any territorial sea boundary other than that set out in the agreed minutes was also found unconvincing by the ITLOS. It was held that the conditions required for an estoppel in international law had not been met. Since the ITLOS did not find any legally binding agreement between the parties and both the parties agreed that Article 15 of UNCLOS provided the law applicable to the delimitation of the territorial sea, the ITLOS proceeded to apply the terms of Article 15 for the delimitation of the territorial seam and, in doing so, it accepted the base points advanced by the parties and drew an equidistance line from the land terminus point—as agreed on by Burma and Pakistan in 1966—up to a point beyond which the territorial seas of the parties no longer overlapped.

It follows from Article 15 that the territorial sea boundary is to be an equidistance line unless ‘it is necessary by reason of historic title or other special circumstances to delimit the

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9 Bangladesh/Myanmar case, 32 [76], 33 [78].
10 Because, according to ITLOS, the Agreed Minutes were not intended to create legal obligations; the head of the Myanmar delegation did not have the authority to engage his State in accordance with Article 7 of the VCLT; and the Agreed Minutes had not been submitted to the procedure required by their respective constitutions for binding international agreements. See generally Bangladesh/Myanmar case, 37-38 [92]-[98].
11 Bangladesh/Myanmar case, 42-43 [112]-[118].
12 Ibid, 44-45 [124]- [125].
13 Ibid, 45-46 [128]-[129].
14 Ibid, 51-53 [156]-[164].
territorial seas of the two States in a way which is at variance therewith’. Neither Bangladesh nor Myanmar suggested that it had a historic title to any of the waters concerned, but Myanmar argued that St. Martin’s Island, which was situated off its coast, was a special circumstance and should not be subject to the territorial sea delimitation. However, the ITLOS observed that there were no compelling reasons that would justify treating the island as a special circumstance or preventing it from being attributed the full effect when drawing the territorial sea boundary.\textsuperscript{15} and, accordingly, the ITLOS drew an enclave awarding Bangladesh a 12 nm territorial sea around the island where the territorial sea no longer overlaps with that of Myanmar (Figure 15).\textsuperscript{16}

\begin{center}
\textbf{Figure 15 The Line delimiting the Territorial Sea.}\textsuperscript{17}
\end{center}

\textsuperscript{15} Ibid, 51 [151]-[152]

\textsuperscript{16} Because, according to the ITLOS, ‘[a] conclusion to the contrary would result in giving more weight to the sovereign rights and jurisdiction of Myanmar in its exclusive economic zone and continental shelf than to the sovereignty of Bangladesh over its territorial sea’. See Ibid, 55-56[169].

\textsuperscript{17} Clive Schofield and Anastasia Telesestsky, ‘Grey Clouds or Clearer Skies Ahead? Implications of the Bay of Bengal Case’ (2012) 3 (1) \textit{Law of the Sea Reports} 3 (adapted). See also \textit{Bangladesh/Myanmar} case, 54, 57 (Sketch Map I & 2).
In reality, the territorial sea boundary established by the ITLOS produced a delimitation line that was ‘essentially the same as that contemplated by’ the parties in the 1974 agreed minutes.\(^{18}\) Despite the fact that the ITLOS rejected Bangladesh’s claim that the agreed minutes constituted a *de facto* agreement, it could not overlook the three decades that followed these minutes and, as a result, its decision resembled to the boundary as stipulated in the agreed minutes and was no less than an implied recognition of the fact that the agreed minutes constituted a tacit or *de facto* agreement.

### 3 Delimitation of the EEZ and Continental Shelf Within 200 nm

With respect to the delimitation of the EEZ and continental shelf within 200 nm, the ITLOS, at the very outset, decided to draw an all-purpose SMB line commencing from where the outer limit of the 12-mile territorial sea around St. Martin’s Island intersected with the equidistance line drawn by the ITLOS\(^ {19}\)—a position in line with international judicial practice.\(^ {20}\) The ITLOS determined that the legal provisions applicable to EEZ and continental shelf delimitation are described in Articles 74 and 83 of UNCLOS.\(^ {21}\) At the same time it also recognised that when these Articles required delimitation to be effected ‘on the basis of international law, as referred to in Article 38’ of the ICJ statute, the decisions of the international courts and tribunals referred to in this Article are also of particular importance in determining the content of the law applicable to maritime delimitation under Articles 74 and 83.\(^ {22}\) This was the first time that any international court or tribunal recognised judicial decisions as a source of international law. However, the ITLOS identified the relevant coast on the basis of principles developed in maritime jurisprudence and thus determined that the fixed length of Bangladesh’s relevant coast was 413 km, while that of Myanmar’s was 587 km—and found that the ratio between these coastal lengths was approximately 1:1.42 in favour of Myanmar (Figure 16).\(^ {23}\)

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\(^{18}\) For this view see, *Bangladesh/Myanmar* case, [2] (Joint Declaration of Judges ad hoc Mensah and Oxman).

\(^{19}\) *Bangladesh/Myanmar* case, [168]-[169], [271]-[274], [337].

\(^{20}\) For this view, see discussion at III A (2) in Chapter 4.

\(^{21}\) *Bangladesh/Myanmar* case, 60-61 [182]-[184].

\(^{22}\) Ibid, 61 [183]-[185], 72-75 [225]-[235].

\(^{23}\) See Ibid, 61-66[185]-[205 ].see also discussions at III C (1) (b) of Chapter 4.
In terms of the applicable method of delimitation, while Bangladesh was arguing for the application of the angle-bisector method under the banner of equitable principles—in particular the 215° azimuth line—Myanmar was wedded to the application of the equidistance method.\textsuperscript{24} This created a deadlock regarding the applicable method of delimitation as it was anticipated that Myanmar’s favoured equidistance line, because of its cut-off effect, would produce an inequitable result by way of annexing much of the marine area of Bangladesh to Myanmar.\textsuperscript{25} The ITLOS, while determining the method of

\textsuperscript{24} Bangladesh/Myanmar case, 70[217], 71 [222].

\textsuperscript{25}Ibid, 70[216].
delimitation, found that although Articles 74 and 83 of UNCLOS only emphasised the achievement of an equitable solution; they lacked guidance as to what specific methods should be applied to achieve one. However, these difficulties were overcome when the ITLOS ruled that the ‘international courts and tribunals have developed a body of case law on maritime delimitation which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of methods employed to that end’. According to the case law, the ITLOS decided that the equidistance/special circumstances approach constituted the appropriate method for achieving an equitable delimitation in this dispute and opted to apply the three-stage approach pioneered in the Black Sea Case. By endorsing and applying this three-stage methodology, the ITLOS, in effect, produced _opinion juris_ in favour of this methodology, imposing a customary character on it. Further, the use of the equidistance/relevant circumstances principle in this methodology can necessarily be seen as an equitable principle that Bangladesh, in essence, argued for the ITLOS to apply as a delimitation method.

In approaching the first stage of drawing an equidistance line, the ITLOS had first to select the base points for the construction of that line. As such, the construction of an angle-bisector line did not require any base point; Bangladesh did not identify a base point and Myanmar identified five. The ITLOS pointed that, while Bangladesh argued that the number of base points selected by Myanmar was insufficient for the construction of an equidistance line, it did not question the five base points selected by Myanmar. However, in selecting the base points, the ITLOS followed the same approach as the international courts and tribunals in earlier cases, where the international court or tribunal is not obliged to follow the base points indicated by the parties but can establish its own base points ‘on the basis of the geographical facts of the case’. Accordingly, the ITLOS selected six base points including the five suggested by Myanmar and, using these base points, the ITLOS constructed a PEL beginning

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26 Ibid, 72 [226].
27 Ibid, 76 [240]. The three-stage methodology comprises, first, the construction of a provisional delimitation line based on equidistance, second, consideration of any factors that might lead to a modification of the provisional line with a view to achieving an equitable result and, third, a (dis) proportionality test. See Romania/ Ukraine case, 101-103[-116]-[122]
28 Bangladesh/Myanmar case, 77-79 [242]-[252], 81 [260]..
29 Ibid, 81 [263].
30 Ibid, 81 [264].
from a midway point in the mouth of the Naaf River.\textsuperscript{31} The ITLOS decided not to use St. Martin’s Island as a base point because the island was located immediately in front of Myanmar’s mainland coast and so its use as a base point would create a line that blocked the seaward projection from Myanmar’s coast, resulting ‘in an unwarranted distortion of the delimitation line’ and amounting to ‘a judicial refashioning of geography’.\textsuperscript{32} However, one may find that the ITLOS’s failure to consider such ‘potential critical base points itself represents a judicial refashioning of geography’.\textsuperscript{33} Nonetheless, this thesis finds that, in terms of selecting the base points, the ITLOS’s decision conforms to the established legal principles of maritime delimitation for two reasons: first, it demonstrates the primacy of the fundamental principle of maritime delimitation—that the land dominates the sea—and, second, it removes any apprehension of unequal treatment by ensuring the essential element of equity: ‘comparing like with like’.\textsuperscript{34}

In the second stage, the ITLOS proceeded to determine whether there existed any relevant circumstances, calling for an adjustment of the PEL to achieve an equitable delimitation.\textsuperscript{35} While Bangladesh pointed that there were three relevant circumstances—the concave shape of its coastline, St. Martin’s Island and the Bengal depositional system—Myanmar argued that there were no such circumstances.\textsuperscript{37} Since it is a requirement of equity that a court or tribunal must consider all circumstances brought before it by the parties, the ITLOS took into account all circumstances presented by Bangladesh and examined their relevancy. On examination, the ITLOS rejected St. Martin’s Island and the Bengal depositional system as relevant circumstances (Figure 17), while it considered the concavity of the coast as a

\textsuperscript{31} Ibid, 82 [266], 85 [272].
\textsuperscript{32} Ibid, 82[265].
\textsuperscript{33} Schofield and Telesetsky, above n 17, 74.
\textsuperscript{34} Had the ITLOS chose St. Martin’s Island as a base point for Bangladesh, it would have to choose May Yu Island (Oyster Island) as a base point for Myanmar to ensure comparing like with like, whereas these two islands are equal neither in size not in potential economic life.
\textsuperscript{35} Bangladesh/Myanmar case, 87 [275].
\textsuperscript{36} Bangladesh argued that its concave coasts should be taken into account, since Bangladesh’s two equidistance lines, first with India and then with Myanmar, would meet only 137 nm off its coasts, cutting it off from the centre of the Bay of Bengal. Second, Bangladesh contended that the seabed to be delimited was an uninterrupted geological projection of its land mass (together constituting the Bengal depositional system) , Finally, Bangladesh submitted, as an alternative to its first argument, that St. Martin’s Island, as an important geographical feature, should be given full weight in constructing any line of delimitation. See Bangladesh/Myanmar case, 88 [279], 92 [298], 97 [320].
\textsuperscript{37} Ibid, 87 [276], 90[288].
circumstance relevant to the case. As to St. Martin’s Island, while the ITLOS, in principle, considered that this island could be held as a relevant circumstance for the purpose of the law on maritime delimitation, contemplating ‘the geographic realities and the circumstances of the specific case’, it did not attribute St Martin’s Island the status of relevant circumstances due to the cut-off effect it was alleged to be capable of producing in the context of coastal projection from Myanmar’s coasts.\footnote{Ibid, 96 [317]-[319].}

As to the Bengal depositional system, the ITLOS summarily rejected its relevancy on the grounds that an SMB within 200 nm was to be determined on the basis of coastal geography\footnote{Bangladesh/Myanmar case, 42 (Illustrated Map 2) (Separate opinion of Judge Gao) (adapted).}

\textbf{Figure 17 Effect of St. Martins Island In delimitation within and beyond 200 nm}\footnote{Bangladesh/Myanmar case, 42 (Illustrated Map 2) (Separate opinion of Judge Gao) (adapted).}

As to the Bengal depositional system, the ITLOS summarily rejected its relevancy on the grounds that an SMB within 200 nm was to be determined on the basis of coastal geography...
and not the geology or geomorphology of the seabed of the area to be delimited. Thus, the dominance of distance criteria in the delimitation within a 200 nm distance was endorsed. As to the concavity of the coast of Bangladesh, the ITLOS innovatively considered it as a relevant circumstance by, stating that it was not the concavity, but rather the cut-off effect on the maritime entitlement of a State resulting from the concavity that required adjustment to reach an equitable result. Here the word ‘entitlement’ essentially corresponds to the 200 nm limit of the SMB. This becomes evident in the ITLOS decision in the adjustment of the PEL from point 11 (see Figure) ‘where it begins to cut off the seaward projection of the Bangladesh coast’ and in the subsequent determination of the delimitation line as a geodetic line with an azimuth that continues until it reaches a point that is located 200 nm from the baselines from which the breadth of the territorial sea of Bangladesh is measured. Although the ITLOS decision that the delimitation line would be 215° azimuth was made so that it would avoid the cut-off effect of the seaward projections of the coasts of both Bangladesh and Myanmar, in effect, this delimitation line was the same as the angle-bisector proposed by Bangladesh. The ITLOS offered no mathematical formula for such an adjustment and deferred carrying out the third stage of delimiting the SMB, the disproportionality test, until after it had delimited the boundary of the continental shelf beyond 200 miles.

4 The Delimitation of the Continental Shelf Beyond 200 nm

Despite the fact that some recent treaties have established boundaries beyond 200 nm, this was the first time that an international court or tribunal had had to address the law and practice

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40 Bangladesh/Myanmar case, 97 [322].
41 Ibid, 90-91 [291]-[292]. In order avoid cut-off effect resulted from the concavity, the ITLOS has also defined the process of adjusting the equidistance line. It noted that ‘the provisional equidistance line is to be deflected at the point where it begins to cut off the seaward projection’ of one State ‘in a balanced way so as to avoid drawing a line having a converse distorting effect on the seaward projection of the other State’: at 98 [325], 99 [329].
42 Bangladesh/Myanmar case, 99 [329], 100[334]-[335], 101[340].
for delimiting such an area. The ITLOS thus pioneered the principles and rules, not only for this case, but also for future cases. It is important to consider how far these developments in delimitation law are consistent with the established principles and criteria for equitable solution.

At the very outset of the delimitation of the continental shelf beyond 200 nm, the ITLOS resolved debates regarding core theoretical issues related to delimitation. However, in doing so, the ITLOS failed to provide any singular view and gave rise to yet more debate.

In terms of the question as to whether the ITLOS has jurisdiction to delimit the continental shelf beyond 200 nm, the ITLOS was correct in arguing that it had jurisdiction to delimit the continental shelf in its entirety, since Articles 77 and 83 refer only to an ‘SCS’, without making any distinction between the shelf within and the shelf beyond 200 nm. It is true that Article 83 did not vary the delimitation processes for areas within and beyond 200 nm, but it is also true that it did not impose any barrier to effecting delimitation separately within and beyond 200 nm based on different bases of entitlement and delimitation criteria. However, the act of assuming jurisdiction is conceivably different from the act of exercising that jurisdiction. This thesis is of the view that the ITLOS started to deflect from the reasonable and legal as soon as it decided to exercise its jurisdiction to delimit the continental shelf beyond 200 nm, relying on guidelines that were overly vague, inherently contradictory and to some extent logically inconsistent.

First, the ITLOS recognised that the concept of entitlement and the delimitation of the continental shelf beyond 200 nm are interrelated and observed that ‘delimitation presupposes an area of overlapping entitlements’ where such entitlements are confirmed once the coastal States establish the final and binding outer limits of their shelves on the basis of the CLCS’s recommendations and, thus, the determining of entitlement as well as the ascertaining of the

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44 Bangladesh/Myanamar case, 108 [360]-[363].
45 In support of its decision to exercise its jurisdiction, the ITLOS reasoned that ‘the absence of established outer limits of a maritime zone does not preclude delimitation of that zone. Lack of agreement on baselines has not been considered an impediment to the delimitation of the territorial sea or the exclusive economic zone notwithstanding the fact that disputes regarding baselines affect the precise seaward limits of these maritime areas’. See Bangladesh/Myanmar case, 110[370]. The first reason is apparently vague because maritime zones within 200 nm have established outer limits on the distance basis while the establishment of the outer limits of the continental shelf beyond 200 nm is conditioned by some substantive and procedural requirement as described in Article 76. The second reason has no implication in the function of delimitation.
extent of entitlement is the first step in any delimitation. However, in practice, the ITLOS deliberately avoided the task of establishing any such extent of the entitlements (in other words, the outer limit of the LCS beyond 200 nm), which is an essential legal element, not only for determining an area of overlapping entitlement for commencing the delimitation task, but also for achieving equitable delimitation by way of avoiding encroachment and cut-off effects brought about by the equidistance line. To justify its decision, ITLOS differentiated between entitlement to the continental shelf beyond 200 nm and establishing the limits of such entitlement. Obviously, the issue of entitlement is distinct from the extent of entitlement. However, when involved in an issue of delimitation where the ultimate goal is to achieve an equitable solution, they must not be read in isolation from each other for the reasons stated above. The ITLOS, not only considered these two notions as distinct, but also interpreted and employed them in a way that was inconsistent, not only with the UNCLOS provisions, but also with its own understanding. For example, when the ITLOS held that ‘the notion of natural prolongation and that of continental margin under Article 76, paragraphs 1 and 4, are closely interrelated’ and that ‘[t]hey refer to the same area’, it seemed to be confusing the question of entitlement (as regulated by Article 76, paragraphs 1 and 3) with the specific procedure (as regulated by Article 76, paragraph 4) by which the OECM is determined by concluding that ‘entitlement to a continental shelf beyond 200 NM should thus be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with Article 76, paragraph 4’. In this regard, the thesis finds the opinion of Judge Gao compatible with the meaning of Article 76, and thus, affirms that the term ‘natural prolongation’ as understood by the ITLOS is ‘not only confusing, but, perhaps,

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46 Bangladesh/Myanmar Case, 117-118 [397]-[399], 120 [409]-[410], 127-131 [435]-[449].
48 Because a coastal State has an inherent right to claim its entitlement to its adjacent maritime zones for having its title over the land, while the outer limit or extent of such entitlement is neither inherent nor indeterminate, rather agreed by the international community and defined in the Convention. See Article 3, 57 and 76 of the UNCLOS.
49 Bangladesh/Myanmar case, [437].
50 Ibid, [437].
51 Judge Gao, in his separate opinion stated that ‘[B]y stating that “[e]ntitlement to a continental shelf beyond 200 nm should thus be determined by reference to the outer edge of the continental margin”, the Judgment seems to prescribe that the outer edge of the continental margin by itself constitutes a separate and independent criterion of entitlement to a continental shelf beyond 200 nm. This is certainly not a correct interpretation of article 76 of the Convention …’ See Bangladesh/Myanmar case, 37 [90] (Separate opinion of Judge Gao).
legally wrong’. 52 Again, despite its understanding that ‘200 nm opening’ generates projections of the continental margin; 53 and it is the location of the outer edge of the continental margin that determines the extent of entitlement to such shelf; 54 it not only refrained itself from locating the outer edge of the Parties’ continental margins, but also refused to consider natural prolongation as the legal basis of entitlement by way of dismissing the importance of natural prolongation both in the geological and geomorphological sense; 55 Nonetheless, in assuming the Parties’ entitlement to the continental shelf beyond 200 nm, it relied on a more general notion of basis of entitlement, ‘sovereignty over the land territory’; 56 than to the more specific basis for entitlement, natural prolongation, and failed to link these two notions as the Court did in Libya/Malta case. 57 In consequence, the ITLOS relied on a ‘questionable legal basis’ of entitlement to the continental shelf beyond 200 nm. 58 It made this issue more complicated and confusing when it further held that such entitlement ‘does not require establishment of outer limits’ and assumed overlapping entitlement on the continental shelf beyond 200 nm—notwithstanding the fact that there were no overlapping entitlements on the continental shelf beyond 200 nautical miles, since the claim of each party was exclusive from the other. 59 Unless the parties’ entitlements are defined and the extents of their entitlements are established, the issue of determining overlapping entitlements becomes completely hypothetical as well as superficial, hardly calling for maritime delimitation; thus, the admissibility of the ITLOS’s jurisdiction to delimit was otiose. 60 The

53 When the ITLOS noted that every coast does not generate entitlements to a continental shelf beyond 200 nm, it actually recognised the concept of 200 nm opening. Because, if a State does not have 200NM opening, it cannot claim any title to the continental shelf beyond 200 nm, even if it is closer to the shelf beyond 200NM. In such a case, a single State out of two adjacent or opposite States having 200NM opening can claim its entitlement to the whole continental shelf beyond 200 nm. For the view see discussions at IV B (4) in Chapter 5.
54 Bangladesh/Myanmar case, 125-128 [428]-[438].
55 Ibid, 133[460].
56 Ibid, 120 [409].
57 Libya/Malta case, 35 [39].
59 Bangladesh/Myanmar case, 120 [409], 121 [414]-[415], 131 [449].
60 See discussions at IV B (1) in Chapter 5.
ITLOS clearly went against the primary objective of Article 76.\(^{61}\) This was not consistent with the international judicial practice. For example, the ICJ in the North Sea cases, to avoid a cut-off effect on the equidistance line, had, at the very outset of its decision-making process, determined the extent of the coastal State’s entitlement to the continental shelf by drawing a median line among the coastal States fronting the North Sea.\(^{62}\)

Second, although the ITLOS recognised the fundamental and inevitable role of the CLCS in evaluating the claim of a coastal State’s entitlement to a continental shelf beyond 200 nm and in making recommendations as to the extent of that entitlement and although it noted the functions of the CLCS and the international adjudicative bodies as complementary to each other,\(^{63}\) it effectively overrode the function of the CLCS by addressing the parties’ entitlement to the continental shelf beyond 200 nm—a task that lies solely within the mandate and competence of the CLCS.\(^{64}\) This overruling took place as soon as the ITLOS held the ‘uncontested scientific evidence’ of the parties about the thickness of the sedimentary rocks of the ocean floor of the BoB—as well as their submissions to the CLCS—as satisfying the geomorphological criteria of Article 76(4) of UNCLOS.\(^{65}\) The ITLOS concluded that its decision relied mainly on the distinct roles of delineation and delimitation of the continental shelf beyond 200 nm that coexist without prejudice to each other.\(^{66}\) Although the functions of delimitation and delineation are distinct from each other, for reasons described in Chapter 5, this thesis contends that, to achieve an equitable solution, the functions of delineation and delimitation must be interlinked where delineation is an essential precondition for delimitation so far it exemplifies the extent of a coastal State’s entitlement to the continental

\(^{61}\) The primary objective of Article 76 is to establish final and binding outer limits of the continental shelf beyond 200 nm. For clear view see discussions at II and IV B in Chapter 5. See also Alex G Oude Elferink, ‘Causes, Consequences, and Solutions Relating to the Absence of Final and Binding Outer Limits of the Continental Shelf’ in Clive Ralph Symmons, Selected Contemporary Issues in the Law of the Sea (Martinus Nijhoff Publishers, 2010) 253.

\(^{62}\) North Sea cases, 17-18 [8], 20-21 [15].

\(^{63}\) Bangladesh/Myanmar case, 110 [373], 118 [400], 119-120 [407].

\(^{64}\) See discussions in section III B of chapter 5. See also Bangladesh/Myanmar case, 129-131 [443]-[449].

\(^{65}\) The Tribunal referred to the unchallenged academic literature submitted by both the parties indicating the existence of some 14-22 km depth sedimentary rock underlying the Bay of Bengal. For example, Joseph R. Curray, ‘The Bengal Depositional System: The Bengal Basin and the Bay of Bengal”, 23 June 2010; Joseph R. Curray, ‘Comments on the Myanmar Counter-Memorial, 1 December 2010’, of 8 March 2011; and Hermann Kudrass, ‘Elements of Geological Continuity and Discontinuity in the Bay of Bengal: From the Coast to the Deep Sea”, of 8 March 2011). See Bangladesh/Myanmar case, 128 [437], 129-130 [444]-[445].

\(^{66}\) Bangladesh/Myanmar, 110-115 [371]-[394].
shelf. The ITLOS evidently failed to give proper consideration to this part of international law.

Third, the ITLOS pointed out that its delimitation task would not impede the CLCS from carrying out its function and thereby equated the judicial functions of dispute settlement with those of negotiations in justifying the fact that the exercise of its jurisdiction cannot be seen to be an encroachment on the functions of the CLCS. Because coastal State negotiation does not preclude the CLCS from making its recommendations on the submissions of the negotiating States, in essence, a mistake in law has occurred. Holding such view, the ITLOS, in fact, seems to proclaim its functions more as negotiator or conciliator than adjudicator, while the only task of the ITLOS as an adjudicative body is not negotiation; rather it is to adjudicate in accordance with law. Therefore, it lacks the competency to rely on the considerations put forward by the States in their negotiations.

Fourth, the ITLOS referred to the CLCS’ s decision to defer consideration of the submissions made by Bangladesh and Myanmar as an impediment to the establishment of the outer limits of the continental shelf under Article 76 and, to resolve such an impediment, it made the delimitation; this act of the ITLOS was inconsistent and contradictory with its earlier view as to the complementary role of the institutions formed under UNCLOS. If Bangladesh had made a submission seeking the CLCS’s recommendation, the parties could have developed positions in relation to the recommendations of the CLCS with regard to the existence of their entitlements to the OCS as well as their seaward extensions; this would have compelled the ITLOS to interact with the CLCS when making its recommendations. The binding

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67 See discussions in section III and IV of Chapter 5.
68 Bangladesh/Myanmar case, [378]-[390], [393].
69 Ibid, 115[393].
70 Ibid, 115 [390].
71 Although Bangladesh, in order establish the outer limits of its continental shelf beyond 200 nm, had prepared necessary scientific data on the basis of geomorphological criteria under Article 76 (4) and made submission of those data to the CLCS, it continued to claim its entitlement to the outer continental shelf on the basis of natural prolongation by virtue of the geological and geomorphological continuity between its land mass and the seabed and subsoil of the Bay knowing that the concept of entitlement on the basis of geological continuity or discontinuity had been rejected by the ICJ long before in the Tunisia/Libya case. Moreover, Bangladesh stuck to its view that the CLCS should not make any recommendation until the delimitation dispute be resolved by the ITLOS or any other court or tribunal. Understandably, Bangladesh did it from an apprehension of cutting off its outer continental shelf due to the application of the equidistance method as well as it wanted to make sure its access to the continental shelf beyond 200 nm.
nature of such a submission by any party should not be seen as a requirement for a court to interact with other institutions formed under UNCLOS. It is a requirement of equity that a court or tribunal, if it is not restricted by any expressed provision of law, must resort to all possible avenues including those that require travelling to ensure an equitable solution. As mentioned earlier, every court and tribunal established under Article 287 of UNCLOS has such authority as vested in them by the ‘judicious course’ as well as the legal expectation of the Third Conference. Thus, the ITLOS itself, to resolve the boundary disputes once and for all by involving the CLCS in the delimitation process, was competent to make a preliminary ruling by way of referring to the CLCS to make its recommendations in relation to the parties’ submissions within a given timeframe. If ITLOS had proceeded as mentioned above, this would have, according to Judge Tafsir’s observation, paved the way for other international fora to deal with this difficult issue in an effective manner.

However, ITLOS, instead of making any recourse to the CLCS, proceeded with the task of delimiting the continental shelf beyond 200 nm, since it concluded that it was not only authorised to but should do so.

In the process of delimiting the shelf beyond 200 nm, the ITLOS—considering the task of delimitation as separate from that of the shelf within 200 nm—treated the continental shelf beyond 200 nm as an independent maritime zone, which, undoubtedly, was a judicial innovation. When it decided to continue the delimitation method employed within 200 nm—that is, the application equidistance–relevant circumstances method through a consolidation of the customary, three-stage methodology—it was a judicial novelty.

But, this innovation started with doctrinal problems. ITLOS’s decision to continue the application of equidistance/relevant circumstances method presupposes an inherent relation

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72 Bangladesh/Myanmar case, 37 [109] (separate opinion of Judge Tafsir).
73 See discussions at IVB (3) in Chapter 5.
74 For the reasons underlying this view see discussions at IVB (3) in Chapter 5. Judge Tafsir, in his separate opinion also held the same view stating that, ‘the Tribunal should have referred the matter to the Commission at this stage in the proceedings, without there being any need for one of the Parties to request it to do so, since the Tribunal should have considered itself unable to dispense justice in the circumstances of the case’. See Bangladesh/Myanmar case, 36 [108] (separate opinion of Judge Tafsir).
75 Bangladesh/Myanmar case, 37 [109] (separate opinion of Judge Tafsir).
76 Bangladesh/Myanmar case, [363], [394].
77 Ibid, 131-132 [454]-[455].
between this method and the very general definition of the basis for entitlement-sovereignty over the land territory. The ITLOS did not explain how this method relate to this basis, and it also failed to distinguish this method from the extent and object of the shelf rights. Again, the ITLOS decided to extend the adjusted delimitation line beyond 200 nm at 215° azimuths until it reaches the area where the rights of third States may be affected. It is striking that although in delimitation within 200 nm, the ITLOS determined the terminus of the delimitation line at the point of 200 nm limit, it refrained from so doing in delimitation beyond 200 nm, rather it only determine the direction of the boundary line. This decision of the ITLOS might be seen as deliberate for several reasons: first, in this way, the ITLOS might have considered that its exercise of jurisdiction would not be treated as an "encroachment" to the CLCS’s recommendation making functions; second, the Arbitral Tribunal, in its upcoming decision in the Bangladesh/India case, might have the opportunity to delimit Bangladesh’s outer shelf on the basis of CLCS’s recommendation; and third, by using the clause until it reaches the area where the rights of third States may be affected it might have speculated that the 215° azimuths would terminate at a location on the outer limit of Bangladesh’s continental shelf beyond 200 nm beyond which, as expressed in the Figure 20, it would only affect India’s shelf rights. Bangladesh seemed to understand this decisional motive of the ITLOS, which reflected in its submission in the case against India.

This thesis contends that the decision of the Court was nothing other than ex aequo et bono for several reasons. First, the parties did not consent to any such decision. Second, the ITLOS—although, in the process of delimitation—treated the continental shelf beyond 200 nm as a separate maritime zone, it did not identify any relevant coasts or relevant areas for the delimitation of the continental shelf beyond 200 nm—the fundamental elements for assessing the equitability for delimitation of each maritime zone through proportionality

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78 Ibid, 132 [455].
79 Ibid, 134 [462](emphasis added).
80 Ibid, 101 [340].
81 The reason for Bangladesh’s support in favour of an undefined terminus point of the delimitation line beyond 200 nm might be that Bangladesh might had in mind that in its case against India, it would submit to fix the outer limit on the basis of the CLCS’s recommendations first, then to effect delimitation beyond 200 nm. Had the ITLOS fixed any terminus before establishing the outer limits, it might prejudice Bangladesh’s desired extent of entitlement to the CS beyond 200 nm. Such indication found substance when Bangladesh, in its case against India submitted to establish the outer limits of its continental shelf beyond 200 nm before effecting delimitation thereof. See Bangladesh/India arbitration, 15 [60].
Third, it is evident in Figures 18 and 19 that the PEL is stopped short of the 200 nm limit, let alone area of overlapping entitlement beyond 200 nm. If the provisional equidistance line is located outside the area of overlapping entitlement beyond 200 nm, the decision to continue the adjusted equidistance line beyond 200 nm cannot be justified relying only on the undefined relation between delimitation method and ‘questionable legal basis’ of entitlement-sovereignty over the land territory. The ITLOS, being an adjudicative body, should have to avoid such improper and inadequate reasoning. Fourth, without drawing a PEL, when the ITLOS considered the concavity of the Bangladesh coast to be a relevant circumstance, this resembled a decision based on an ‘imaginative act of delimitation’ that had never taken place in any case on maritime delimitation. Whatever may be the reason for arriving at such decision, it was completely inconsistent with the rule of equitable solution. Fifth, since the concept of an SMB, by its origin, cannot be extended beyond 200 nm, the ITLOS’s decision regarding the continuation of the SDL within and beyond 200 nm gave rise to a ‘conceptual black hole’ in the very concept of SMB. Further, when it relied on the distinction between a coastal State’s sovereign rights to a continental shelf and the extent of those rights, it established a bad precept for reasoning. Additionally, a fragmenting of law took place when the ITLOS, without determining the outer limit of the shelf, found resolution in the cut-off effect of an imagined equidistance line beyond 200 nm- which even did not locate within area of overlapping entitlement, by the application of the equidistance–relevant circumstances method. Again, its refusal to accept Bangladesh’s ‘most natural prolongation’ argument on the observation that ‘natural prolongation is not an independent basis for entitlement’ is seemingly improper; it would be more appropriate for the ITLOS

82 For this view see, discussions at III C (1) in Chapter 4, at IV B (4) (6) in Chapter 5.
84 For this view see discussion at III A (2) in Chapter 4 and at IV B (5) in Chapter 5.
85 See also Bangladesh/Myanmar case, 132 [455]. Because, it is clear from the case law on maritime delimitation that the function of avoiding cut-off effect of equidistance line is primarily aimed at taking the boundary line, where applicable, up to the outer limit of a maritime zone.
86 Because Bangladesh’s argument on ‘the most natural prolongation’ actually indicating the outer limits of its continental shelf which it depicted in its submission to the CLCS. See also Bangladesh/Myanmar case, 132 [457], 133 [460].
to determine the outer edges of the parties’ continental margins before rejecting such an argument.

Figure 18 Stopping Short of the 200 nm Limit of the Equidistance Line.\textsuperscript{87}

Figure 19 Maritime Delimitation between Bangladesh and Myanmar\textsuperscript{88}

\textsuperscript{88} Schofield and Telesetsky, above n 17, 84, 86, 103 (Sketch-map 4-6)
5  The Grey Area Issue

As discussed, the ‘grey area’ concept neither has any conventional basis, nor is founded on any judicial precedence; rather, it evolved at the hands of the scholars. Despite Bangladesh’s strong argument against a grey area, the ITLOS adopted this innovative concept for the first time in the history of maritime jurisprudence and implemented it by establishing a bifurcated national jurisdiction between Bangladesh and Myanmar, limiting Bangladesh’s jurisdiction over the continental shelf and Myanmar’s jurisdiction over the EEZ, suggesting that sovereign rights over EEZ and continental Shelf are different and separable. Apparently, this decision was viewed as charming; however, in all respects, it went against the rule of equitable solution for the reasons Stated in Chapter 5. It also acted against the basic concept of ‘overlapping entitlement’. While the act of delimitation encompasses only the overlapping of the intra-zonal entitlements of the parties and not inter-zonal overlapping entitlements, the grey area results from the overlapping of inter-zonal entitlements. Although the ITLOS denied the implementation of a grey area resulting from the delimitation of the overlapping inter-zonal entitlements, in reality, such a denial has no substance. The creation of a grey area cannot be seen as bearing any delimitation value. Rather, it can be seen as mere delineation, which is not the task of an adjudicative body. Conversely, the grey area arguably leaves the parties with potentially contentious issues to resolve in future, especially with respect to as yet unresolved ocean governance arrangements. While the parties have proved unable to resolve the disagreement regarding maritime delimitation, despite many years of diplomatic effort, the issue of joint or mutual governance of the grey area may be jeopardised by potential disagreements in future—despite the fact that the parties expected the complete resolution of their dispute by the ITLOS. This contradicts the ICJ’s view that ‘the public order of the oceans’ requires ‘a simpler and more intelligible division’ of maritime space and maritime resources. In this case, the ITLOS did not wholly resolve the issues of marine governance that the two States

89 See discussion at IV B (7) in Chapter 5.
90 Bangladesh/Myanmar case, 134-135 [463]-[467].
91 Ibid, 136[474].
92 See discussions at IV B (7) in Chapter 5.
93 Cf Bangladesh/Myanmar case, 136[471].
94 Schofield and Telesetsky, above n 17, 10.
95 Nicaragua/ Colombia case, [230].
faced in the BoB, leaving a number of complex and potentially problematic concerns outstanding, including the unique creation of what has been termed a ‘grey area’, the governance arrangements for which are open to debate.\(^{96}\)

6 Disproportionality Test

As the third and final stage of the three-stage methodology is the disproportionality test, the ITLOS first determined the relevant areas—namely, the maritime areas subject to the overlapping entitlements of the parties in the case. In doing so, the ITLOS followed the ‘coastal projection’ principle in general—both for the purpose of the delimitation of the EEZ and the continental shelf\(^{97}\)—and held that the inclusion of a third-party claim in the relevant area is not prevented. Calculating the size of the relevant area to be approximately 283,471 square kilometres, the ITLOS was of the view that the ratio of the allocated area between Bangladesh and Myanmar (i.e., 1:1.54) was not significantly disproportionate to the ratio of the relevant coast (i.e., 1:1.42). Although the final result represents a reasonable degree of proportionality, the way that the ITLOS determined the relevant areas does not reflect a proper judicious course. As long as the disproportionality test related to the delimitation of maritime zones within 200 nm, ITLOS was correct in its decision because the extents of entitlement of all the maritime zones within 200 nm were based on the distance criterion and, therefore, the relevant areas could be easily determined by identifying the relevant coasts. However, since the different bases of entitlement to the continental shelf beyond 200 nm differentiated the determination of relevant areas and relevant coasts beyond 200 nm from those within 200 nm,\(^{98}\) the ITLOS should have checked the disproportionality of the delimitation of the continental shelf beyond 200 nm separately. In doing so, it would have identified the relevant areas resulting from the projections of the 200 nm openings of the parties. This would be a proper judicious course.

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\(^{97}\) Bangladesh/Myanmar case, 141 [489].

\(^{98}\) For this view see the discussions at IV B (4) in Chapter 5.
B The Delimitation Between Bangladesh and India

On 7 July 2014, the Arbitral Tribunal established under Annex VII of UNCLOS delivered its much-awaited award in the longstanding dispute concerning the determination of the land boundary terminus (LBT) and the courses of boundary lines through the territorial sea, the EEZ and the continental shelf both within and beyond 200 nm. Before beginning the core discussion on this determination, the submissions by the parties to the Arbitral Tribunal must be illuminated.

1 The Submissions of the Parties

To delimit the territorial sea, the EEZ and the continental shelf both between and beyond 200 nm, Bangladesh, in its final submissions, requested that the Arbitral Tribunal declare and adjudge that its maritime boundary with India would follow the geodesic azimuth of 180° from the location of the LBT at 21° 38′ 14″ N, 89° 06′ 39″ E to the point located at 17° 49′ 36″ N, 89° 06′ 39″ E; from the latter point, the boundary would follow the geodesic azimuth of 214° until it met the outer limits of the continental shelf of Bangladesh as established on the basis of the recommendations of the CLCS (Figure 20).99 In terms of the delimitation of the continental shelf beyond 200 nm, Bangladesh reversed its earlier view of effecting delimitation before establishing the outer limits of the continental shelf on the basis of the CLCS’s recommendation100—a recommendation that in fact followed the due course of law.

99 Bangladesh/India Arbitration, 15 [60].
100 See discussions at section II A (1) in this chapter.
Conversely, India, in its final submissions, did not make any such request to establish the outer limits of the shelf; rather, it requested that the Tribunal declare and adjudge that the maritime boundary between India and Bangladesh would be an equidistance line defining the course of the boundary through the territorial sea, the EEZ and the continental shelf within and beyond 200 nm—which would be the course depicted in Figure 21.

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101 Bangladesh/India Arbitration, 16.
Figure 21 The Maritime Boundary Proposed by India.

2 Admissibility and Exercise of Jurisdiction

In the determination of the course of the boundary line between Bangladesh and India, the Arbitral Tribunal first considered its jurisdiction over the dispute and, in particular, its jurisdiction to delimit the continental shelf beyond 200 nm. In doing so, it followed the same reasoning as applied by the ITLOS in the Bangladesh/Myanmar case. In assuming its jurisdiction to delimit beyond 200 nm, ITLOS relied on the ‘single continental shelf’ concept as well as on the without prejudice relation between functions of delimitation and delineation. See Bangladesh/India arbitration, 20-22 [74]-[82].

Further, taking into account the parties’ submissions to the CLCS, as well as their agreement as to the existence

\[\text{\textsuperscript{102}}\text{In assuming its jurisdiction to delimit beyond 200 nm, ITLOS relied on the ‘single continental shelf’ concept as well as on the without prejudice relation between functions of delimitation and delineation. See }\textit{Bangladesh/India} \textit{arbitration, 20-22 [74]-[82].}\]

\[\text{\textsuperscript{103}}\text{The arbitral tribunal first considered its jurisdiction over the dispute, in particular its jurisdiction to delimit the continental shelf beyond 200 M. On May 11, 2009, India made a partial submission to the CLCS claiming areas of continental shelf beyond 200 M in the disputed area. Bangladesh objected to the Indian submission in a note verbale dated November 29, 2009, claiming that the submission failed to comply with UNCLOS and the}\]
of a continental shelf beyond 200 nm in the BoB and their entitlements to that shelf,\textsuperscript{104} the Arbitral Tribunal consolidated its power to delimit the continental shelf beyond 200 nm before its outer limits were established.\textsuperscript{105} The tribunal’s reliance on such submissions and agreements resembles a decision based on \textit{compromise} that is clearly incompatible with the provisions of Article 76(4) and 76(8) of UNCLOS. If \textit{compromise} is taken as the basis of maritime delimitation beyond 200 nm, then the very adoption of Article 76 of UNCLOS becomes futile. However, this is not the case as far as UNCLOS is concerned. Any decision of a court or tribunal established under Article 287 of UNCLOS must be compatible with the provisions of UNCLOS, unless it has been consented to decide \textit{ex aequo et bono}.\textsuperscript{106} Neither Bangladesh nor India provided such consent to the tribunal. However, after assuming its jurisdiction to delimit marine areas beyond 200 nm, the Arbitral Tribunal commenced its task of delimitation addressing first the disputed issue regarding the LBT.

3 \textit{The LBT}

Although the parties agreed to use the land boundary as the starting point for the maritime delimitation and that the LBT should be determined by the application of the award of the Bengal Boundary Commission of 1947 (the Radcliffe Award), they disagreed on how to locate the LBT under the Radcliffe Award (Figure 22). The Arbitral Tribunal concluded that the LBT was positioned ‘midstream of the main channel’ of the Haribhanga River (Figure 23).\textsuperscript{107}

\begin{footnotesize}
\textsuperscript{104} Bangladesh/India arbitration, 21 [78].
\textsuperscript{105} Bangladesh/India arbitration, 20-22 [74]-[82].
\textsuperscript{106} Article 293 of UNCLOS States that
\begin{enumerate}
\item A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.
\item Paragraph 1 does not prejudice the power of the Court or tribunal having jurisdiction under this section to decide a case \textit{ex aequo et bono}, if the parties so agree.
\end{enumerate}
\end{footnotesize}
On the basis of a series of contemporaneous maps (including the map used in the Radcliffe Award), the Arbitral Tribunal concluded that the position of the LBT was 21° 38′ 40.2″ N, 89° 09′ 20.0″ E (WGS–84). The Arbitral Tribunal held that an exchange of letters between the civil servants of the governments of Bangladesh and India was not sufficiently authoritative to constitute a subsequent agreement on the interpretation of the Radcliffe Award within the purview of Article 31(3)(a) of the VCLT. Given the absence of an agreed LBT, this thesis holds the view that it would have been more reasonable for the Arbitral Tribunal to determine the median point at the joint river estuary of the rivers Haribhanga and Raimangal as the LBT, where the midstream of the main channel of the Haribhanga River could meet.

108 India’s Rejoinder, dated … (Figure RJ 2.1).
109 Bangladesh/India arbitration 52 [188].
110 Ibid, 47 [165].
4 The Delimitation of the Territorial Sea

The Arbitral Tribunal followed the ITLOS in terms of delimiting each maritime zone independently and separately and thus confirmed the idea that each maritime zone is worth delimiting independently.

\[111\] Bangladesh/India arbitration, 51-52 [185]-[188], 55, Map 2,
(a) The Selection of the Base Points

At the very first approach to the delimitation of the territorial sea, the Arbitral Tribunal determined the location of the base points. The Arbitral Tribunal found the parties’ positions on base points entirely at odds.\(^{112}\) India’s proposed base points were on the low tide elevations (LTEs), while Bangladesh’s base points were at low-water line.\(^{113}\) Again, Bangladesh challenged several of India’s proposed base points located on LTEs—in particular the one on South Talpatty/New Moore Island, since it had permanently disappeared below the surface by the early 1990s. Based on the principles set out in the Romania/Ukraine case,\(^{114}\) the Arbitral Tribunal held that, while LTEs may be used as base points for measuring the breadth of the territorial sea, it did not necessarily follow that they were appropriate base points for use by a tribunal delimiting a maritime boundary.\(^{115}\) The site visit conducted by the Arbitral Tribunal did not confirm whether South Talpatty/New Moore Island constituted an LTE and the Arbitral Tribunal held that it was not a suitable geographical feature for the location of a base point for delimitation purposes.\(^{116}\) This decision of the Arbitral Tribunal relieved Bangladesh from the apprehension of losing a larger maritime area of its projected territorial sea. Conversely, the tribunal, based on the principle of ‘physical reality at the time of the delimitation’, discarded Bangladesh’s argument that its unstable coastline was caused by climate change and rising sea levels, which Bangladesh had advanced in support of its low-water line base points.\(^{117}\) The Arbitral Tribunal then selected base points on its own and, in doing so, it relied on the principles set out in maritime jurisprudence\(^{118}\) as well as establishing a novel principle whereby ‘different base points control the course of an equidistance line though the territorial sea, the EEZ and the continental shelf within and beyond 200 nm’.

\(^{112}\) Ibid, 61 [208], 62 [211].
\(^{113}\) Ibid, 61 [209], 61 [211].
\(^{114}\) Ibid, 73-74 [261].
\(^{115}\) Ibid, 73-74 [259]-[262].
\(^{116}\) Ibid, 74 [263]-[265].
\(^{117}\) Ibid, 62-63 [213]-[215].
\(^{118}\) Ibid, 61-64 [210]-[224].See also discussion at IV C in Chapter 4.
(b) **Determining Delimitation Methods**

Although Bangladesh initially argued against the application of the equidistance method, both parties later accepted the equidistance–special circumstances method as referred to in Article 15 of UNCLOS as applicable for the delimitation of the territorial sea.\(^{119}\) Nevertheless, the parties were in disagreement regarding the starting point of the equidistance line\(^{120}\)—whether it would be the median line or the LBT. However, the Arbitral Tribunal decided to apply the median–equidistance method for the delimitation of the territorial sea\(^{121}\) and disregarded Bangladesh’s argument that special circumstances, such as concavity at the head of the BoB, unstable coasts and the risk of significant changes in base points caused by rising sea levels, called for an approach other than the median–equidistance line. The tribunal, accordingly drew a PEL starting from the median–equidistant point between the land terminus point of both States and, while considering the adjustment of that line, declined to consider any special circumstances put forward by the parties because of their temporary character as well as the insignificance of their impact in producing a cut-off effect warranting the adjustment of the median line.\(^{122}\) However, since the LBT as determined by reference to the Radcliffe Award is not at a point on the median–equidistance line, the tribunal, undertaking a major departure from established principle, decided on the need to connect the LBT to the median line as constituting a special circumstance requiring the deflection of the median line from its starting point to the point of the LBT (Figure 24).\(^{123}\)

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119 India was advocating for the equidistance method, while Bangladesh was arguing for 180 degree angle-bisector method. However, after ITLOS’s decision in the Bangladesh/Myanmar case, Bangladesh agreed to the application of an equidistance line, and thus the issue was resolved. See Bangladesh/India arbitration, 71 [248].

120 Bangladesh objects to India’s proposed equidistance line on the ground that the incorrect location of the land boundary terminus claimed by India results in an incorrect starting point for the proposed line. Bangladesh also contends that, as explained above, the base points selected by India are inappropriately located, which leads to an erroneous equidistance line constructed from these points. Bangladesh/India arbitration, 68 [236].

121 Ibid, 72 [249].

122 Ibid, 71 [248], 75 [272].

123 Ibid, 76 [274].
5  *The Delimitation of the EEZ and the Continental Shelf Within 200 Nm*

Next, the Arbitral Tribunal identified the relevant coasts and relevant areas for the parties that, in its view, generated projections, taking into account the continental shelf beyond 200 nm. The Arbitral Tribunal thus calculated the relevant coasts of Bangladesh and India as 418.61 and 803.7 kilometres respectively and determined an area of 406,833 square

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124 Ibid, 77.
kilometres as relevant. In doing so, it followed the generally applicable principles developed in case law, including the ITLOS decision. However, the way it applied these principles is contradictory as well as inconsistent with the established rules of delimitation for several reasons.

First, the ITLOS found the Indian coasts between Devi Point and Sandy Point to be relevant, which do not project into an area that overlaps within 200 nm of the relevant coasts of Bangladesh; conversely, it did not identify any such area within 200 nm of the relevant coasts of the Andaman Islands (see Figure 5). Although the coast between Devi Point and Sandy Point may generate projections beyond 200 nm that overlap with those generated from the coast of Bangladesh; the ‘SCS’ principle on which the Arbitral Tribunal relied to justify its decision to include marine areas within 200 nm of the coasts between Devi Point and Sandy Point cannot be accepted because entitlements to the continental shelf within and beyond 200 nm are, as specified in Article 76, significantly different—a fact that should have ruled out any possibility of considering other concepts or principles as the bases for entitlement to this area of the shelf. Nonetheless, the use of the SCS principle as delimitation criteria is absent from case law; it has always been used for assuming jurisdiction when delimiting continental Shelf beyond 200 nm. However, the act of assuming jurisdiction is completely different from exercising that jurisdiction.

Second, while determining the relevant area beyond 200 nm, the ITLOS identified the same area specified in Bangladesh’s submission to the CLCS and at the time when Bangladesh’s submission was awaiting CLCS recommendations; in doing so, it not only overstepped its limits of competency by overriding CLCS authority, but was also unable or unwilling to provide a single reason for reaching such decision. Therefore, its decision resembles a

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125 Ibid, 81 [286], 87-88[305].
126 For the generally applicable principles on relevant coast and relevant area, see discussions at III C (1) in Chapter 4. See also Bangladesh/India arbitration, 79 [279], 88 [306].
127 Bangladesh/India arbitration, 85 [299].
128 The Arbitral Tribunal in the Barbados/Trinidad and Tobago arbitration used this principle for assuming its jurisdiction to delimit the continental shelf beyond 200 nm, which the ITLOS accepted on the same background. The preceding view of the Arbitral Tribunal and the ITLOS cannot be construed as admitting applicability of the same method and principles for the delimitation of the continental shelf within and beyond 200 nm. See Anglo-French Arbitration, 49 [78]-[79]; Barbados/Trinidad and Tobago case, 147, 208-209 [213]. See Bangladesh/Myanmar case, 108 [361]-[362].
129 Bangladesh/India arbitration, 88 [306]-[311].
decision reached beyond the scope of law and thus suffices to indicate a potential violation of the mandates bestowed on the CLCS and a violation of the ‘package deal’ that results from the adoption of Article 76.¹³⁰

Figure 25 Relevant Coasts and Relevant Areas¹³¹

(a) Delimitation Methodology

While the parties agreed that the construction of an equidistance line was the first step in the delimitation process, they disagreed on the centrality of the equidistance–relevant

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¹³⁰ For this view see discussions at III in Chapter 5.

¹³¹ Bangladesh/India arbitration, 89, Map 4.
circumstances method. However, the Arbitral Tribunal was aware that Articles 74 and 83 of UNCLOS do not refer to a specific method of delimitation and made it clear that ‘[t]he reference in Article 15 to the median line as method of delimitation cannot be read into Articles 74 and 83 of the convention’. It then made the bold decision that international case law formed an *acquis judiciaire*—a source of international law—under Article 38(1)(d) of the ICJ statute and noted that, for the transparency and predictability of the delimitation process as a whole, a court or tribunal should choose a delimitation method based on such *acquis*, provided that its method suited the prevailing geographical realities and specific circumstances of each case. This decision of the Arbitral Tribunal echoed the argument on the flexibility of delimitation methods. However, following the decisions of the Romania/Ukraine and Bangladesh/Myanmar cases, the tribunal, discarded Bangladesh’s argument for the use of the angle-bisector method under the reasoning that there were no ‘factors which make the application of the equidistance method inappropriate’ and decided instead to apply the equidistance–relevant circumstances method through the utilisation of the three-stage methodology. Thus, the Arbitral Tribunal endorsed this three-stage methodology providing greater certainty for its use in future cases.

In approaching the first stage of the three-stage methodology, the Arbitral Tribunal drew a PEL using the base points it had selected earlier (Figure 26).

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132 While India was arguing in favour of the dominant usage of equidistance method rejecting any adjustment of the equidistance line, Bangladesh was arguing that the consideration of the relevant circumstances would call for the application of the angle-bisector method. 91-97[312]-[336].

133 *Bangladesh/India* arbitration, 98 [338].

134 In the language of the Tribunal, “[t]he ensuing—and still developing—international case law constitutes, in the view of the Tribunal, an acquis judiciaire, a source of international law under Article 38 (1) (d) of the Statute of the International Court of Justice, and should be read into Articles 74 and 83 of the Convention’. See *Bangladesh/India* arbitration, 98 [339].

135 Ibid, 98 [339].

136 See the argument at IV B in Chapter 4.

137 *Bangladesh/India* arbitration, 99 [345]. See also
Turning to the existence of relevant circumstances, the tribunal, as in its territorial sea delimitation, rejected Bangladesh’s arguments concerning the relevance of coastal instability and the risk of rising sea levels, stating that ‘[f]uture changes of the coast, including those resulting from climate change, cannot be taken into account in adjusting a provisional equidistance line’. This dictum seems to mark the fate of all future delimitations as to their certainty and permanency. The Arbitral Tribunal also rejected the relevance of Bangladesh’s dependence on fishing in the event of a lack of sufficient evidence in this regard. However, the Arbitral Tribunal concluded that, since the concavity of Bangladesh’s coasts produced a

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139 Ibid, 116 [399].
140 Ibid, 123-124 [422]-[424].
cut-off of its maritime entitlement, this constituted a relevant circumstance that called for an adjustment to the provisional equidistance line to achieve an equitable result (Figure 27). The concerns of the Arbitral Tribunal then became how to avoid a cut-off effect in delimitations both within and beyond 200 nm and to what extent the provisional delimitation line should be adjusted.

Figure 37 The Cut-off Effect of the Provisional Equidistance Line.

The Arbitral Tribunal did not provide any clear answers to these questions; rather, it pointed out two criteria that required satisfying before considering whether a PEL produces a cut-off: ‘first, it ‘must prevent a coastal State from extending its maritime boundary as far seaward as international law permits’; second, if it were not adjusted, it would fail to achieve

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141 Ibid, 117 [402].
142 Ibid, 117 [403].
143 Ibid, 111, 145.
equitable solution. Nevertheless, the Arbitral Tribunal advocated the extension of the adjusted line up to the limit ‘as far seaward as international law permits’, where the term ‘international law’ refers to the maximum continental shelf area within and beyond 200 nm as stipulated in Article 76. In essence, the ITLOS actually drew an SDL to adjust the PEL within and beyond 200 nm and, in doing so, it relied on the old concept of an SCS, a concept that was rejected as a basis for entitlement to the continental shelf beyond 200 nm as soon as the geomorphological criterion was accepted in Article 76(4) of UNCLOS as the basis for such entitlement. As will be shown, this became crucial during delimitation beyond 200 nm.

6 Delimitation of the Continental Shelf Beyond 200 Nm

The tribunal’s decision to delimit the continental shelf beyond 200 nm as separate from that within 200 nm affirmed the ITLOS’s view in this regard and thus added value to the idea that the continental shelf beyond 200 nm is worth considering for delimitation as an independent maritime zone because of its different bases of entitlement. Consistent with the ITLOS’s decision, the tribunal’s determination to employ the three-stage methodology under the premise of the application of equidistance–relevant circumstances principles provided further certainty to the future use of this methodology in delimiting areas beyond 200 nm. To delimit the continental shelf beyond 200 nm, Bangladesh’s claim for drawing a line (at 215° azimuth) up to the outer limit of its continental shelf as claimed in its submission to the CLCS that run parallel to the boundary line decided by ITLOS in Bangladesh/Myanmar case (see Figure 20) —seemed to be couched in strong and mature arguments and in line with conventional rules. However, the Arbitral Tribunal discarded Bangladesh’s arguments for

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144 Ibid, 122 [417]. In other place of its award, it Stated that ‘any delimitation—with or without adjusting an equidistance line—results in limiting the exercise of coastal States’ sovereign rights over the continental shelf off its coast to the full extent authorized by international law’: at 116 [398].
145 Ibid, 118 [404], 129 [437].
146 Ibid, 142[465].
147 For example, (1) Bangladesh withdrew its ‘most natural prolongation’ argument which was based on geological continuity and accepted that the outer limits of the Parties’ entitlements beyond 200 nm are to be determined by application of Article76 (4) of UNCLOS, and thus acknowledged that neither party is entitled to claim a superior entitlement based geological or geomorphological factors in the overlapping area. (2) An equidistance line would allocate to India areas in the outer continental shelf that India has never claimed before the CLCS, and which were claimed by Bangladesh and Myanmar. (3) the fact that there is only one continental shelf in law does not mean that the line adopted within 200 nm must necessarily be extended unchanged through the area beyond 200 nm, because, as the International Tribunal for the Law of the Sea observed in
a parallel line based on the same ‘SCS’ concept and drew a PEL that continued the same provisional line drawn for the delimitation of areas within 200 nm. Next, consistent with ITLOS’s decision, the Arbitral Tribunal also considered the cut-off effect of Bangladesh’s concave coast as requiring the adjustment of the provisional line and accordingly adjusted the provisional line by drawing an SDL from delimitation point 3, with an initial azimuth of $177^\circ 30' 00''$, until it met with the maritime boundary between Bangladesh and Myanmar. The Arbitral Tribunal found that the ratio of the allocated areas (1:2.81) was not significantly disproportionate; it tested the disproportionality of the delimitation both within and beyond 200 nm.

![Figure 28 Area of Overlapping Entitlements beyond 200 nm from Both Bangladesh and India](image)

**Figure 28 Area of Overlapping Entitlements beyond 200 nm from Both Bangladesh and India**

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*Bangladesh/Myanmar, “the method to be followed should be one that, under the prevailing geographic realities and the particular circumstances of each case, can lead to an equitable result”. See Bangladesh/India arbitration, 131-132 [439]-[443].

148 Ibid, 142[465].

149 Ibid, 144 [475].

150 Ibid, 154 [497].

151 Bangladesh/India arbitration, 139.
Despite the fact that, in delimiting the continental shelf beyond 200 nm, the Arbitral Tribunal introduced some unexpected and novel ideas,\(^{152}\) its decision can be seen to be inconsistent with conventional rule as well as contradictory to its own views, and lacking equitable manner not only for the reasons stated earlier in this chapter and in Chapters 5 and 6, but also for the reasons stated below:

First, since the basis of entitlement to the shelf beyond 200 nm is different from that of within 200 nm and since every coast does not project a continental shelf beyond 200 nm,\(^{153}\) the tribunal’s reliance on the ‘SCS’ as the generally applicable rule of delimitation both within and beyond 200 nm is inconsistent with the provisions of Article 76(4).

Second, in identifying relevant areas for delimitation beyond 200 nm, the Arbitral Tribunal only considered the coastal projections of the parties within and beyond 200 nm,\(^{154}\) while such projections would need to be considered from the 200-nm opening as well as in their entitlement to the shelf beyond 200 nm. At the time, the extent of these latter entitlements was yet to be confirmed by the CLCS. However, the Arbitral Tribunal ignored the CLCS’s mandate in this regard, which expressly rejected the substantive and procedural requirements of Article 76. The Arbitral Tribunal had a good opportunity to overcome the legal shortcomings incurred by ITLOS’s decision through interacting appropriately with the CLCS and thus ensuring the harmonious functioning and interaction of the institutions constituted under UNCLOS. The ITLOS may have speculated that the Arbitral Tribunal would involve the CLCS in determining the outer limits of Bangladesh and this could be the reason it avoided specifying any terminus in the delimitation line beyond 200 nm.

Third, the way the Arbitral Tribunal adjusted the provisional line beyond 200 nm was against the rule of equitable solution. Nevertheless, the Arbitral Tribunal, for the delimitation of the continental shelf beyond 200 nm, determined the relevant area\(^{155}\) and area of overlapping entitlement\(^{156}\) up to the outer limits of the continental shelf submitted to the CLCS by

\(^{152}\) For example, it considered the task of delimiting continental shelf beyond 200 nm different from that of within 200 nm, considered different base points for drawing delimitation line, identified a relevant area

\(^{153}\) *Bangladesh/Myanmar* case,

\(^{154}\) *Bangladesh/India* arbitration, 144 [474].

\(^{155}\) Ibid, 88 [306]-[311].

\(^{156}\) Ibid 138-141 [456]-[458].
Bangladesh (See Figure 25 & 28) and considered cut-off effect as a relevant circumstances requiring adjustment of the PEL,\(^{157}\) and in light with this affirmed ICJ’s fundamental view as to cut-off effect of the equidistance line in the *North Sea Continental Shelf* cases\(^ {158}\) and accordingly held that a cut-off produced by a provisional equidistance line must meet two criteria to warrant a adjustment of that provisional line: first, the line prevents a coastal State from extending its maritime boundary as far seaward as international law permits; second, the line must be such that—if not adjusted— it would fail to achieve an equitable solution,\(^ {159}\) still the adjusted line failed to reach up to that outer limit of Bangladesh’s continental shelf and thus failed to avoid the cut-off effect of the PEL. The Arbitral Tribunal was right to start the adjustment from delimitation point 3, since the cut-off effect began at that point. However, the line could have stopped at the 200 nm limit and then, another line could have been drawn as provisional delimitation line using method or principle other than the equidistance method which could be adjusted beyond 200 nm that would start from the 200 nm point and continue until it intersected with the boundary line between Bangladesh and Myanmar at the point where, as identified by the Arbitral Tribunal, the outer limit of Bangladesh’s continental shelf beyond 200 nm situates as to its claim made in its submission to the CLCS. Such adjustment in favor of Bangladesh would not produce an unreasonable result for India.\(^ {160}\) The reason why the Arbitral Tribunal did not adjust the provisional delimitation line to the maximum reach of Bangladesh’s entitlement is not convincing as far as the circumstances of the BoB are concerned.\(^ {161}\) It is clear from international case law that—aside from the delimitation between opposite States—in cases between adjacent States, the international courts and tribunals extended the delimitation line up to the maximum reach

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\(^{157}\) Ibid, 121 [408], 143-144 [469]-[474].

\(^{158}\) The Court in the *North Sea* cases held 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’. See the *North Sea Continental Shelf* cases, 49 [89].

\(^{159}\) Bangladesh/India arbitration, 121-122 [409]-[417].

\(^{160}\) Cf ibid, 123 [419], 135 [448].

\(^{161}\) The Tribunal cited that it ‘wishes to point out in this context that international jurisprudence on the delimitation of the continental shelf does not recognize a general right of coastal States to the maximum reach of their entitlements, irrespective of the geographical situation and the rights of other coastal States’. See *Bangladesh/India* arbitration, 143 [469].
of 200 nm and did not decide on any delimitation beyond 200 nm. If the maximum reach of 200 nm is granted to avoid a cut-off effect in delimitations within 200 nm from the coast, then the outer limit established under Article 76(4) should be granted as the maximum reach to prevent the cut-off effect in delimitation beyond 200 nm. This is somewhat required for meeting the application of the fundamental equitable criteria toward achieving an equitable solution. What happened in the Bangladesh/India arbitration, the Arbitral Tribunal seems to applying those fundamental criteria fully in the delimitation within 200 nm and partially in the delimitation beyond 200 nm, which something that equity does not permit and consequently produces a decision ex aequo et bono.

Fourth, since the Arbitral Tribunal acknowledged that entitlements beyond 200 nm are determined by the application of Article 76(4), and identified a separate relevant area for delimitation, it could have advanced its delimitation process by developing methodology that was suitable for the delimitation beyond 200 nm. For example, it could identify the relevant 200 nm opening as the coastal opening for delimitation beyond 200 nm and it could have selected base points. Fifth, the Arbitral Tribunal considered concavity of Bangladesh’s coastline for adjusting the PEL. This thesis views that in order to avoid the cut-off effect of the PEL and thus to ensure maximum reach of Bangladesh’s entitlement of continental shelf beyond 200 nm, the Arbitral Tribunal could have considered the issue of Bangladesh’s equitable access to the natural resources as a relevant circumstance along with concavity of its coast. This would be more consistent not only with the rule of equitable solution, but also with the purpose of the LOS Convention- ‘to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole’.

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163 The fundamental criteria of equitable solution were discussed in section IV (A) of Chapter 4.
164 Bangladesh/India arbitration, 144 [471]-[475].
166 See UNCLOS, para 5 of the preamble.
Sixth, based on the different bases of entitlement within and beyond the 200 nm limit, the Arbitral Tribunal could have conducted the disproportionality test for the delimitation results within and beyond 200 nm differently.

7 The Grey Area

Following the ITLOS decision, the Arbitral Tribunal also adopted the concept of a grey area and decided that the delimitation line it had adopted gave rise to an area that lay beyond 200 nm from the coast of Bangladesh and within 200 nm from the coast of India; yet, this area also lay to the east of the tribunal’s delimitation line and, in deciding it, the Arbitral Tribunal employed the same factors as the ITLOS. It is true that in this case Bangladesh endorsed ITLOS’s approach as to grey area and considered it appropriate; but Bangladesh had no other alternative once the ITLOS determined such area in Bangladesh/Myanmar case. This thesis considers that neither Bangladesh nor the Arbitral Tribunal had any other choice but to adopt the grey area, otherwise its findings would have been inconsistent with and contradictory to the ITLOS’s decision and would have created more uncertainty in the delimitation process in the BoB region (Figure 29). However, in doing so, both the ITLOS and the Arbitral Tribunal jeopardised Bangladesh by placing it into a position of double inequality for the reasons outlined in this chapter and in Chapter 5.

III The Effectiveness of Maritime Boundary Delimitation in an Equitable Manner in the BoB

It is clear from the previous discussions in Chapter 4 that, though Articles 74 and 83 of UNCLOS did not provide any precise rules for delimitation except the objective of achieving an equitable solution, the international courts and tribunals have established necessary normative standards, principles and criteria for effecting maritime delimitation in an equitable manner and thus constitute an acquis judiciaire—a source of international law

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167 Bangladesh/India arbitration, 156-157 [503]-[508].
168 In its reply Bangladesh submits that the Arbitral Tribunal should adopt the same solution in this case. The area beyond 200 M from Bangladesh but within 200 M from India should be continental shelf as to Bangladesh and EEZ as to India. Beyond 200 M from India, the boundary would be a pure continental shelf boundary. See Bangladesh’s Reply, 5.58.
169 See discussion in section IV B in Chapter 5.
under Article 38(1)(d) of the ICJ Statute. This thesis assumes that, as far as delimitation within 200 nm is concerned, both the ITLOS and the Arbitral Tribunal’s decisions are consistent with the legal regime of maritime delimitation as established in the case law and thus effective for achieving an equitable solution in an equitable manner. However, as far as delimitation beyond 200 nm is concerned, this requires careful consideration.

The understanding of both the ITLOS and the Arbitral Tribunal on natural prolongation is neither accurate nor convincing. Their decision to reject the concept of natural projection as an independent basis of entitlement to the continental shelf beyond 200 nm and to determine such entitlement by reference to the ‘outer edge of the continental margin’ was confusing as well as legally wrong. They could avoid such confusion if they could recognise ‘natural prolongation’ as the conceptual basis of entitlement to the continental shelf beyond 200 nm and could recognise the ‘outer edge of the continental margin’ as providing the scientific-legal basis to realize that concept.

In the context of delimitation beyond 200 nm, the ITLOS, although it adopted an innovative idea to continue the application of the equidistance/relevant circumstances method for delimiting continental shelf beyond 200 nm; however, the way it proceeded with the delimitation task was nothing less than a judicial adventure. It linked ‘the basis of entitlement to the continental shelf with the equidistance/relevant circumstances method in a way that was completely divorced from the view expounded in the case law’. The Arbitral Tribunal in Bangladesh/India case, nevertheless it fulfilled some lacking of the delimitation process that remained with ITLOS’s decision, followed the same reasoning as cited by the ITLOS in effecting delimitation beyond 200 nm. Unlike the ITLOS, the Arbitral Tribunal decided separate relevant areas for delimitation within and beyond 200 nm based on the outer limits

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170 Bangladesh/India arbitration, 98 [339].
171 See section II in Chapter 5. See also Bangladesh/India arbitration, 131 [439]; Jensen, ‘Delimitation Beyond 200 Nautical Miles’, above n 51, 603.
172 See section II in Chapter 5.
174 For example, not using the three-stage methodology in proper sense by the ITLOS.
specified in Bangladesh’s submission to the CLCS,175 but neither ITLOS nor the Arbitral Tribunal made effort to locate the outer limit point of the continental shelf beyond 200 nm. This not only cut-off Bangladesh’s entitlement to the shelf beyond 200 nm,176 but also acted against the conventional order in such cases: delineation before delimitation.177 If equitable solution within 200 nm requires the avoidance of a cut-off effect, areas beyond 200 nm must require the same procedure. It cannot be said that equitable solution does not extend beyond 200 nm. A delimitation result may represent a reasonable degree of proportionality but, without achieving the possible maximum reach of entitlement by avoiding the cut-off effect, it cannot be said that the result is achieved in an equitable manner and thus equitable. Thus, despite the absence of significant disproportionality, a result may be inequitable because it lacks an equitable manner. The creation of the grey areas in these cases put more weight to Bangladesh’s claim to extend its boundary line out to the outer limits of its continental in that if India and Myanmar were given EEZ right within Bangladesh’s boundary 200 nm, then Bangladesh had every right to get its delimitation line beyond 200 nm to be extended out to the outer limits as specified in its CLCS submission. Two incidents may substantiate this proposition: first, if any coastal projection, drawn from relevant coast of India near to the land terminus boundary between Bangladesh and India, could reach to an extent greater than the boundary line determined by the Arbitral Tribunal in Bangladesh/India arbitration, that would be potential to question the equitability and equitable manner of the delimitation result;178 second, after these delimitations, when the CLCS will make recommendation as to the submissions of these three States, then, if the delimitation line beyond 200 nm between India and Myanmar, whether it would be determined by negotiation or adjudication, cross the extent that of determined in the BoB cases for Bangladesh, that will expressly evident the fact that the judgements in the BoB cases produced an inequitable result. In addition, if the delimitation line, drawn from the coasts of Andaman and Nicobar Islands, despite their less population and less economic activities, could reach the maximum extent of the continental shelf beyond 200 nm, that will not only put more weight to this inequitablity, but will also

176 Since the boundary line well stopped way far from the outer limit of Bangladesh’ continental shelf.
177 Because fixing the limit or extent of jurisdiction is the necessary precondition for delimitation. See discussion at IV B in Chapter 5.
178 Apparently, such projection is possible from the adjacent relevant coasts of India (See Figure 26 & 27).
question the purpose of UNCLOS in terms of achieving an equitable international economic order. In this way, this thesis argues that the ITLOS’s decision as well as those of the Arbitral Tribunal regarding delimitation beyond 200 nm are inconsistent with the rule of equitable solution as far as the application of the fundamental criteria of equitable solution are to be ensured to achieve an equitable solution in an equitable manner.

Entitlements over continental Shelf beyond 200 nm can only be confirmed by the concerned coastal States after delineating ‘final and binding’ limits of their OCS on the basis of the CLCS’s recommendations. Neither the ITLOS nor the Arbitral Tribunal should have delimited beyond 200 nm on the strict condition that this process be fulfilled; on the contrary, though, both assumed the absolute authority to define entitlements beyond 200 nm and not only rejected the CLCS mandate in this regard, but also avoided CLCS engagement during the delimitation process. The adventurous decisions of these judicial bodies exemplify a kind of negligence in refusing to comply with the substantive requirements of Article 76 and acting against the ‘package deal’ approach of the Third Conference, on the premise of which this Article was founded and as such bears a customary character, since it is based on the agreement of the States that participated in the conference and necessarily exemplifies State practices in this regard. The principles ‘without prejudice’ and ‘SCS’ that were relied on in the production of the Article are misunderstood and misconceived. The tendency to avoid the CLCS in determining the entitlement and the extent of that entitlement to the continental shelf beyond 200 nm essentially creates confusion regarding the very purpose of the institution and creates a potentially problematic precedent for cases where there may not be comparable certainty regarding the existence of a continuous continental shelf beyond 200 nm as there was in the BoB sub-region. As a consequence, a potentially erroneous message is delivered to prospective State parties regarding their entitlements and delimitations beyond

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179 This deal was simply based on this trade-off that a coastal State, having prima-facie entitlement to a continental shelf beyond 200 nm under Article 76 (4), cannot establish its outer limits unless its claim is reviewed and accordingly recommended by the CLCS (on behalf of the international community), and once such limit is established it will have to share its economic benefits (certain percentage) with other States of the world.

180 For the view see discussion in section IV of Chapter 5.
200 nm,\textsuperscript{181} a result that may turn the legal regime of maritime delimitation beyond 200 nm into a non-effective legal function.

The creation of double grey areas through these two judicial decisions raises more concerns about the effectiveness of the law on maritime delimitation mainly for three reasons: first, the concept of grey area is inconsistent with the rule of equitable solution;\textsuperscript{182} second, in the grey areas the EEZ of India and Myanmar not only overlap with the continental shelf of Bangladesh, but also the grey area created by the Artbitral Tribunal for India admittedly overlaps in part with the grey area created by the ITLOS for Myanmar\textsuperscript{183}(see figure 29); third, this is an outcome which the parties did not seek.

The parties asked the adjudicative bodies to delimit the overlapping marine areas by a single line, and to effect the delimitation once and for all without leaving any option for arising disputes in future.\textsuperscript{184} This thesis views that the decisions as to creating grey areas resembles a decision that endorsed an option of interlocutory delimitation, ie. delimitation within delimitation which is not only contradict the rule of equitable solution,\textsuperscript{185} but also provoke uncertainty in terms of achieving the fundamental objectives of UNCLOS.\textsuperscript{186} Because, due to lack of established legal and policy framework with regard to the management and governance of these grey areas as well as lack of mutual agreement among the Parties, this unprecedented decision as to grey area creates scope for potential threats to the peace and

\textsuperscript{181} The States may consider this ignorance in other way where these judicial decisions may entail the idea that for delimitation beyond 200 nm, it is not necessary to test the appurtenance under Article 76 (4) as well as to establish the outer limit of the continental shelf by the CLCS before delimitation. As a consequence, any coastal State, just making submission to the CLCS, may file a case for delimiting area beyond 200 nm showing a dispute in existence. Again, it may be conceived as a demonstration on the part of the international court and tribunal that they are superior and not under compulsion to interact with CLCS both in examining entitlement and extent of that entitlement, although judges are not experts on geophysical matters. If it would be the case, it will instigate an unhealthy competition between institutions constituted under UNCLOS resulting CLCS non-functional. If the instance of ignoring CLCS in the process of delimitation beyond 200 nm is taken as granted and keep continuing, it may turn CLCS to an institution with no effect.

\textsuperscript{182} For this view see discussion at section IV in Chapter 5.

\textsuperscript{183} Bangladesh/India arbitration, 156 [506].

\textsuperscript{184} Bangladesh/India arbitration, 57 (Dissenting opinion of Judge Lucky).

\textsuperscript{185} Ibid, 58.

\textsuperscript{186} To ‘promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment’. See UNCLOS, para 4 of the Preamble.
security of the BoB sub-region.\textsuperscript{187} Certainly, Bangladesh will suffer the greater loss if India and Myanmar deny its access to the outer continental shelf.\textsuperscript{188} According to Rao ‘inviting the Parties to negotiate a solution in the grey area may lead to further problems’ resulting failure of the judicial decisions ‘to delimit the maritime areas in a definitive manner’,\textsuperscript{189} which, according to Judge Lucky, might make this whole issue a subject to future adjudication.\textsuperscript{190} It is not the task of the international courts and tribunals to give rise to any uncertainty in regard to either the application of law or peace and security; rather, in international disputes, such bodies must respect legal limitations and avoid violating the existing rights of States to create new rights for other States.\textsuperscript{191} Rao is correct in making the assertion that the grey areas were ill-conceived.\textsuperscript{192} Non-creation of the grey areas would be more equitable in delimitations beyond 200 nm, and once created, their allocation to Bangladesh, as Judge Lucky did in his dissenting opinion, would signify the ultimate objective for achieving an equitable solution.\textsuperscript{193}

In summary, it can be concluded that the two judicial organs deciding the BoB cases have applied both conventional and judicially developed law governing maritime delimitation in an effective and consistent manner in delimiting maritime areas within 200 nm; however, their decisions delimiting maritime areas beyond 200 nm not only demonstrate significant inconsistency with the case law and non-compliance with conventional law, but also give rise to uncertainty in the context of achieving an equitable solution in an equitable manner.


\textsuperscript{188} Bangladesh/Myanmar case, 58 (Dissenting opinion of Judge Lucky).

\textsuperscript{189} Bangladesh/ India arbitration, 19 [36] (concurring and dissenting opinion of Dr. Rao).

\textsuperscript{190} Bangladesh/Myanmar case, 60 (Dissenting opinion of Judge Lucky). To him, the Parties’ failure to settle their boundary disputes for 34 years is very much indicative to give rise of such adjudication: at 58.

\textsuperscript{191} Bangladesh/ India arbitration, 18-19[33] (dissenting opinion of Dr. Rao).

\textsuperscript{192} Bangladesh/ India arbitration, 15[26] (dissenting opinion of Dr. Rao).

\textsuperscript{193} Bangladesh/Myanmar cases, 55-60 (Dissenting opinion of Judge Lucky).
and thus resembles a decision *ex aequo et bono*. Creation of the grey areas demonstrates that none of the judicial bodies did ‘wholly resolved the issues of marine governance’ once and

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**Figure 29** Detailed depiction of the Grey Areas created in the *BoB* cases.\(^{194}\)

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\(^{194}\) As adapted from *Bangladesh/India* arbitration award by Raghavendra Mishra. See Raghavendra Mishra, ‘The “Grey Area” in the Northern Bay of Bengal: A Note on a Functional Cooperative Solution’ (2016) 47 (1) *Ocean Development & International Law*, 35.
for all, rather left ‘a number of complex and potentially problematic issues outstanding …..the governance arrangements for which are open to debate’.\(^{195}\) Conceivably, their judgements concerning delimitation beyond 200 nm produced ‘so called equitable solutions’\(^{196}\) which might be seen as a *compromise*\(^{197}\) between the interests of the two parties, which, in essence, although enhanced the possibility of Parties accepting the judgements, contributed a problematic precedence for the courts and tribunals who will be deciding cases regarding delimitation beyond 200 nm in future.\(^{198}\)

### IV CONCLUSION

The judgements and awards of the ITLOS and Arbitral Tribunal in the *BoB* cases have brought an end to decades of uncertainty in maritime boundary disputes in the BoB. The ITLOS’s endorsement of the three-stage methodology has provided greater certainty for this process in delimitation both within and beyond 200 nm and its decision to delimit beyond 200 nm has opened the deadlock regarding delimitation beyond 200 nm. The operation of delimitation beyond 200 nm by the Arbitral Tribunal in the *Bangladesh/India* case confirmed the ITLOS’s approach and thus contributed to developing the international law of maritime delimitation. Despite the fact that these judicial decisions in the *BoB* cases have been recognised and confirmed the application of the three-stage methodology, as developed in case law, for delimitations both within and beyond 200 nm and produced a reasonable degree of proportionality taking into account all relevant circumstances, the confused definition of the concept of natural prolongation, the failure to differentiate the basis of entitlement from


\(^{197}\)Because, each of the disputant Parties gained from the Tribunal. For example, both the judicial bodies made the delimitation line in favour of Bangladesh within 200 nm, but in the delimitation beyond 200 nm, Myanmar got access to the continental shelf beyond 200 nm regardless of Bangladesh’s contentions based on natural prolongation, and comparing to Bangladesh’s delimitation line, India’s line got maximum reach beyond 200 nm. For this view, see Ibid, 306.

the extent of entitlement, the non-consideration of the legal order of maritime delimitation (delineation before delimitation), the non-compliance with the substantive and procedural requirements of Article 76 for delineating the outer limits of the continental shelf beyond 200 nm and—pending consideration of submissions made by the disputant States—the tendency not to engage the CLCS in the process of delimitation beyond 200 nm, the failure to prevent the cut-off effect of the maritime boundary beyond 200 nm in an appropriate marine space such as the BoB and, finally, the creation of the overlapping grey areas that made the whole process of delimitation beyond 200 nm uncertain, causing it to resemble a decision *ex aequo et bono*. Moreover, indeterminacy in the ITLOS’s decision regarding the terminus point of the boundary line beyond 200 nm and—without adhering to the requirement for CLCS recommendations—the arbitral tribunal’s assuming of the outer limits of the continental shelf on the basis of the submissions made by the parties to the CLCS, added more weight to this uncertainty and thus produced a fragmentation of international law.

This uncertainty has not only raised questions as to the necessity of the existence of the CLCS, but it has also created a potential threat to the consistent application of the rule of equitable solution. Therefore, this thesis assumes that the law on maritime delimitation requires further development to overcome these uncertainties. An internationally agreed framework for equitable solution can provide the necessary foundation for such development.
CHAPTER 7

THE LEGAL FRAMEWORK FOR EQUITABLE SOLUTION FOR EFFECTIVE MARITIME DELIMINATION

I INTRODUCTION

Although achieving an equitable solution in an equitable manner is the ultimate aim of Articles 74 and 83 of UNCLOS, they lack proper guidance in this regard.¹ This thesis began by addressing the vagueness of the international legal regime on maritime boundary delimitation.² In Chapter 4, this thesis outlined how, to achieve and equitable solution in an equitable manner, the international courts and tribunals have developed not only the legal principles and criteria for equitable solution, but also developed a three-stage methodology to ensure the equitable application of these criteria and principles. In Chapter 5, the thesis analysed and examined the legal framework in Article 76 and argued that delimitation beyond 200 nm requires the consideration of a new aspect to ensure an equitable solution in an equitable manner. In Chapter 6, this thesis also investigated and examined the BoB cases and found that the international tribunals involved in these cases failed not only to follow the due course of Article 76, but also to uphold the holistic approach of equitable solution particularly with respect to the delimitation of the continental shelf beyond 200 nm. This is alarming not only for the peaceful settlement of existing and prospective boundary disputes involving delimitation both within and beyond 200 nm, but also for the effective application of the law on maritime delimitation irrespective of the fora for settling boundary disputes. What is also alarming is the lack of transparency and credibility in the State claims to the outer limits of the continental shelf. Only a stable, consistent and sustainable State and judicial practice, respecting the judicially developed rule of equitable solution and taking into account the potential legal and factual issues linked with the delimitation of continental Shelf beyond 200 nm, can provide a way forward in the progressive development of the law of maritime delimitation.

¹ See discussions in section II (D) of Chapter 3.
² See discussions in Chapters 1, 2 and 3.
After considering all these factors, this thesis determined the need to formulate a legal framework for equitable solution to aid and simplify the effective application of the legal regime of maritime delimitation by way of bridging the gap between positive international law and international case law with an aim to achieve an equitable solution in an equitable manner. This thesis holds that the structure of the framework should be consistent with the international law on maritime delimitation as provided in UNCLOS as well as developed in the hand of the international judges.

The objective of this chapter is to investigate the rationality for adopting such a legal framework, then to examine the reason why the judicial development of the law on maritime delimitation should be considered when preparing the proposed framework. The second objective is to describe the salient features of the framework and then to suggest how such a framework can contribute to the progressive development of the law of the sea in maritime delimitation issues.

II THE RATIONALE FOR ADOPTING A FRAMEWORK FOR EQUITABLE SOLUTION

The word ‘framework’ means ‘a basic structure underlying a system, concept, or text’\(^3\) \textit{vis-à-vis} ‘a set of ideas, rules, or beliefs from which something is developed, or on which decisions are based’.\(^4\) The term ‘legal framework’ refers to ‘a broad system of rules that governs and regulates decision-making, agreements, [and] laws’.\(^5\) Therefore, such a framework is necessary for any law the application of any law and becomes vital when the requirement to interpret and apply the law is taken into the hands of the judges. As stated by Judge Fitzmaurice, in cases of a specific nature, ‘where general rules produce substantial unfairness’, justice requires a legal framework for the effective and efficient application of the rules of law.\(^6\)

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\(^3\) Oxford Advanced Learner’s Dictionary, 9\textsuperscript{th} edition.
As argued, cases relating to maritime boundary disputes are, on the whole, cases of a specific kind.\(^7\) As investigated in the preceding chapters, the negotiators of the Third Conference have adopted the judicially developed concept of ‘equitable solution’ as the only ‘rule’ governing maritime delimitation without mentioning the applicable legal principles and delimitation criteria to reach that solution. The international courts and tribunals, with an aim to achieve an equitable solution, have developed and confirmed the application of certain equitable criteria and equitable methods and principles for effecting maritime delimitation in an equitable manner, that, in essence, addressed the incompleteness and vagueness of the conventional rule of equitable solution. As outlined in Chapter 5, to maintain the legacy of the established rule of equitable solution in effecting the delimitations of continental Shelf beyond 200 nm, other considerations such as the delimitation process and the engagement of the CLCS are required in addition to the previously developed principles and criteria for equitable solution and ensuring the equitable manner of the delimitation result. However, while, in Chapter 6, this thesis examined the decisions of the BoB cases with regard to the delimitation of the continental shelf beyond 200 nm, it can be assumed that the tribunals’ approaches were more adventurous and were far from being consistent with the existing principles and criteria for equitable solution; as a consequence, the results finally achieved lack an equitable manner—a key element of equity.\(^8\) This judicial adventure has not only created uncertainty regarding the consistent and effective application of the international legal regime of maritime delimitation in settling maritime boundaries in an equitable manner, it has also created potential doubt and confusion regarding the appropriate application of the firmly established legal definition of maritime delimitation insofar as an ‘overlap of maritime entitlement’ is an essential requirement for effecting delimitation.

To minimise the risks caused by such legal uncertainties and to ensure the effective application of the delimitation rules and criteria in an equitable and consistent manner in the settlement of all future and prospective delimitation disputes and thus to establish an international order of equitable solution, there is a need to reach consensus on some legal

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\(^7\) See discussion in section II (B) (1) in Chapter 4.

\(^8\) For example, in the BoB cases, the delimitation line beyond 200 nm did not reach the maximum reach of the outer limits of Bangladesh’s LCS beyond 200 nm. see discussion in section IV of Chapter 6.
principles and practical methods ensuring equitable solution; therefore, a framework for equitable solution is of relevance. This will ensure the transparent and credible application of the established criteria and principles of maritime delimitation and it will also remove any uncertainties and inconsistencies from the concepts of equitability and equitable manner in the process of effectively achieving a delimitation result.9 Some other legal and factual matters that exemplify the rationale of adopting a framework for equitable solution are as follows:

First, a framework for equitable solution is needed to differentiate between the application of equity as a part of international law and equity as ex aequo et bono. The processes by which maritime boundaries are to be determined in concrete situations will always have a sui generis character.10 The sui generis character of maritime boundary disputes coupled with the generality of the applicable laws warrants the application of equity for achieving equitable solutions. Modern law requires an equity that is structured, not an equity measured by the length of the judges’ feet.11 It is true that, while employing equity, international courts and tribunals cannot go beyond the scope of law. The term ‘scope of law’ remains vague and undefined. According to Jennings, this vagueness may inescapably lead to a decision ex aequo et bono.12 A framework for equitable solution can effectively avoid these pitfalls and thus limit the indeterminacy and arbitrariness of the

9 Because, there may be a situation where the delimitation result can be equitable while the applied criteria and principles of reaching such result may lack the equitable manner. On the other hand, there may be a situation where in spite of the application of the delimitation criteria and principles, the delimitation result may lack equitability. The delimitation process of the continental shelf beyond 200 nm in the BoB cases is most recent example in this regard. The equitable mode of ex post decision making through interpretation better works in modular system where the options of choose and pick are available. Evidently, the lack of a ‘modular structure’ of maritime delimitation, would turn the whole process chaotic, unless there is a framework is adopted, it will allow judges too great a ‘degree of judicial discretion’, which will ultimately lead to judicial arbitrariness and fragmentation of international law. The equitable mode of ex post decision making through interpretation better works in modular system where the options of choose and pick are available. Such risk can only See generally Henry E Smith, An Economic Analysis of Law and Equity (28 October 2010) 9-17 <http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf>; See also Higgins, above n 72, 224, cited in Owen McIntyre, ‘Utilization of shared international freshwater resources—the meaning and role of “equity” in international water law’ (2013) 38 (2) Water International 123-24.


Courts’ uses of equity.\textsuperscript{13} Jennings seems to support this view.\textsuperscript{14} Therefore, to avoid apprehension about the potential delivery of a decision \textit{ex aequo et bono}, underpinned by the vagueness of the delimitation rules as laid down in Articles 74 and 83 of UNCLOS, a framework for equitable solution would be helpful.

Second, a framework is needed to prevent the ‘opportunistic exploitation of law’ in the name of equity.\textsuperscript{15} This may be achieved by combining both law and equity.\textsuperscript{16}

Third, in delimitation through negotiation, where the law operates in a much more complex environment than in adjudication and where each States wants to justify its claim as credible and in accordance with the law, a legal framework of equitable solution would certainly put ‘limits on what States can credibly claim’.\textsuperscript{17} On the other hand, in delimitation through adjudication, the indeterminacy of the law applicable to the delimitation of maritime boundaries made it difficult for States to ascertain what the outcome of a legal determination of their boundary would be.\textsuperscript{18} An internationally agreed framework of maritime delimitation can well reduce this problem of indeterminacy of the law as well as its outcome. It should be bear in mind that, the aim of negotiation and adjudication is same-to achieve an equitable solution, therefore, ‘the consensual basis of the

\textsuperscript{13} Because, the ‘liberal use of equity may undermine the persuasiveness of judicial decisions and the legitimacy of the Court itself’. See J I Charney, ‘Book Review’ (1995) 89 \textit{American Journal of International Law} 458.

\textsuperscript{14} Jennings, taking account the view that equity is indispensable in settling maritime delimitation disputes, urged to establish ‘a structured and a predictable system of equitable procedures’ as an ‘essential framework for the only kind of equity that a court of law that has not been given competence to decide \textit{ex aequo et bono}, may properly contemplate’. See R.Y. Jennings, ‘Equity and Equitable Principles’ (1986) XLII \textit{Annuaire Suisse de Droit International} 27, 38. See also Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, PCA, 2014, 4 (Concurring and Dissenting Opinion of Dr. P.S. Rao) <http://www.pca-cpa.org/showpage.asp?page_id=1376>.

\textsuperscript{15} Because, nevertheless, equity prevents opportunism, but finding proxies of unforeseeable opportunistic exploitation of law is hard. Henry H Smith, ‘Property, Equity, and the Rule of Law’ in Lisa Austin and Dennis Klimchuk (eds), Private Law and the Rule of Law (Oxford University Press, forthcoming) 11 <http://econ.as.nyu.edu/docs/IO/30656/Smith_09162013.pdf>.


negotiation process leading to a binding agreement’ cannot infringe ‘the goal of achieving an equitable solution.’ In this connection, one must not lose sight of the fact that the ICJ, in the *North Sea* cases, basically detailed method and principles as well as mood of effecting delimitation as a guideline which are to be taken into account generally as well as in the course of negotiations so that the disputant Parties of those cases could reach agreed boundaries in an equitable manner.

Fourth, enough time has now passed for a framework for equitable solution to be detailed. Four decades is a considerable period of development. Starting from the *North Sea* cases and continuing to the latest *Bangladesh/India* arbitration, the law on maritime delimitation has undergone significant developments through continuous and consistent dispute settlements heard by the international courts and tribunals. A framework for equitable solution would entail the codification of commonly acceptable criteria, principles and methodologies for the delimitation of maritime boundaries in an effective manner.

Finally, and most importantly, a framework is needed to make the achievement of an equitable solution predictable and certain in any delimitation case, ensuring that the disputant parties may readily find the applicable rules and methodologies for delimitation and thus maintaining the effectiveness of the international legal regime of maritime delimitation in settling maritime boundary disputes and achieving an equitable solution in an integrated and harmonised manner.

### III JUSTIFICATION FOR THE LEGAL FRAMEWORK FOR EQUITABLE SOLUTION

A recent study shows that the number of maritime boundary disputes is increasing because of overlapping entitlements. Recent judicial decisions in the *BoB* cases concur with such findings. Apprehensions about judicial arbitrariness through the uncertain application of the principles and criteria of maritime delimitation may diminish the efforts of coastal

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20 *North Sea* cases, 53 [101].
21 See footnote no. 71 in Chapter 1.
States to achieve the peaceful settlement of maritime boundary disputes through CPBD and may endanger regional and international security. Nevertheless, the most powerful coastal State in the world, the US, is still to sign the Convention. An internationally agreed legal framework for maritime delimitation could reduce these uncertainties and apprehensions and thus provide coastal States with the necessary confidence that the international legal regime of maritime delimitation is sufficiently effective to reach an equitable solution in an equitable manner. An initiative for an internationally agreed framework for equitable solution is possible where the non-signing status of the US plays a catalyst role.²²

IV LEGAL BASES FOR THE FRAMEWORK

A The Reasons for Considering Judicial Decisions as Bases for a Legal Framework for Equitable Solution

As clarified in Chapter 3, the reference to ‘judicial decisions’ in Article 38 of the ICJ statute as subsidiary to the determination of rules of law is a catalyst for reasonable confusion regarding the status of judge-made law as a potential source of international law.²³ Therefore, it must be ascertained whether international judges really possess any law-making power. Otherwise, reliance on judicial decisions for preparing a legal framework for equitable solution may undermine the very attempt.

1 International Judges have Law-Making Power

While the committee of jurists were working to prepare the statute of the PCIJ and, particularly, to fix the sources of international law, the point whether judges should have law-making power was discussed with significant import. Jurist Lapradelle submitted that ‘[a] judge must … judge according to law … the Court must not act as a legislator … the Court would concern itself only with the application of law’.²⁴ However, admitting the

²² Because, It is possible that the USA could negotiate a legal framework of equitable solution as a pre-condition for signing the Convention.
²³ For this view, see discussions in section II (D) (3).
unjustifiability of forcing a court to consider only the law, he advocated allowing the Court to consider whether any particular legal solutions were just and equitable and, if necessary, modifying as given situations arose the legal solutions ‘according to the exigencies of justice and equity’. Hagerup, supporting the English principle of judge-made law, argued that, to avoid a *non-liquet* when no positive law exists, ‘the judges must seek to find analogies [and] precedents’. However, the reverse view was also found among the committee members: Ricci-Busatti was not in support of giving legislative powers to the international judges. According to Lord Phillimore, an international court cannot have legislative power, since legislation in matters of international law could only be carried out by the universal agreement of all States. Apparently, the committee of jurists could not provide a fitting response.

However, following Lord Phillimore’s argument, if it is held that judges cannot make law, then it must be asked whether they can contribute to the development of international law. This question was perhaps most clearly proposed by the Dutch representative, Loder—one of the members of the committee of jurists for drafting the statute of the PCIJ. In the thirteenth meeting of the committee of jurists, while debates and discussions ensued on the issue of which rules other than treaty law and customs should be applied by the Court, Loder asserted that the most applicable rules were:

rules which were, however, not yet of the nature of positive law, but it was precisely the Court’s duty to develop law, to “ripen” customs and principles universally recognised, and to crystallise them into positive rules; in a word, to establish an *international jurisprudence*. Loder’s proposition bears a resemblance to Marshall’s idea for developing international law. Jurists earlier in the modern age, such as Chief Justice John Marshall of the US Supreme court, in some cases understood that the law of nations is partly unwritten and partly conventional and the unwritten part of international law can be ascertained and

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26 Ibid.
27 Ibid, 316.
28 Ibid, 295.
29 Ibid, 294 (emphasis added).
developed to become ‘fixed and stable’ by the Courts through ‘a series of judicial decisions’ based on the great principles of reasons and justice. That the international courts and tribunals necessarily have an effective role in the development of international law seemed also to be recognised by Schwebel, the former president of the ICJ, while he was differentiating the task of developing law from that of making law.

The constant process of the development of the law includes a considerable element of ‘judicial innovation’ or ‘judicial discovery’ that most likely occurs through the exercising of legislative power. Legal rules in international law, because of their ambiguity, rarely constrain international courts from making law. While applying a necessarily abstract rule of law to a concrete case, the Court creates the legal rule for the individual case at hand within the scope of existing law through a process of equitable judicial interpretation and reasoning—a process that ‘must often of necessity be judicial law making’. Choosing one interpretation as binding out of several possible meanings or interpretations of a positive law is, indeed, ‘a law-making act’, giving an appropriate

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30 See 30 Hogshead of Sugar Vs Boyle and others, 13 US (9 Cr) (1815) 191; 1 Deak, American International Law Cases (1937) 3, 6 as cited in Christopher R Rossi, Equity and International Law: A Legal Realist Approach to International Decisionmaking (Transnational Publishers, 1993) 76 (quotation omitted, emphasis added).
31 He differentiates the tasks developing from that of making law. To him, the Court’s ‘contribution to the development of international law are inherently different from the process of codification and progressive development of international law by such bodies as the international law Commission or by international conventions’. See Stephen M Schwebel, ‘The Contribution of the International Court of Justice to the Development of International Law’ (Paper presented at The Hague’s 750th Anniversary International Law Conference, ‘The Hague, Legal Capital of the World’, 4 July 1998) 3.
32 According to M Shapiro, since it is humanly impossible to set down an absolutely complete and particularized body of pre-existing law designed exactly to meet every potential conflict, ‘judicial discovery’ should be employed to resolve such conflict. See Martin Shapiro, Courts: A Comparative and Political Analysis (University of Chicago Press, 1981) 29.
meaning to the text’. The making of such creative choices by the international courts is not an ‘unwarranted encroachment’; rather, it is ‘a reasonable accomplishment of the function entrusted to international courts’. The legal practice of judges determining appropriate meaning falls under their legal responsibility ‘to render a definitive decision of the dispute referred to them’ that they cannot declare non-liquet solely because of the insufficiency of the law. The process of developing international law through the uniform interpretation and application processes of the Courts and tribunals has been approved by a UN resolution, where the law-making power of the Court was recognised in this Statement: ‘the development of international law may be reflected’ in the decisions of the ICJ and its ad hoc chambers.

In sum, where the international law is ambiguous, the judges of the international courts and tribunals can develop new rules through the practices of judicial innovation following the processes and techniques of the interpretation of law to ascertain the applicable rules of international law. However, the effort of developing law through interpretation cannot go beyond the ‘legislative intent’. This is the only yardstick that can justify a judge’s efforts in developing the existing law and practice; otherwise, judges are held to a standard of prudence in gathering sufficient proof for legislative intent. In conclusion, this thesis contends that the judges of the international courts and tribunals have law-making power to ‘in effect … exercise a power of delegated legislation for the individual case’.

38 Munkman, above n 33, 92.
40 Munkman, above n 33, 94, 110, 111 (footnote omitted).
44 Munkman, above n 32, 113 (emphasis added).
(a) **The Law on Maritime Delimitation is a Judge-made Law**

The ICJ has developed important sections of international law, such as the law on maritime delimitation, by deploying a relevant amount of creativity as well as by stating what is implied in existing rules and extracting general principles from such rules.\(^4^5\) As explained in Chapters 4 of this thesis, given the absence of clear and appropriate guidance towards achieving an equitable solution in UNCLOS, the international courts and tribunals not only developed generally applicable legal principles and equitable criteria for maritime delimitation, but also developed a methodology for effecting delimitation by way of implementing those criteria and principles. Importantly, all these developments have been accomplished with the application of equity as part of international law. The *dicta* of the judgements of the *North Sea* cases reflecting the interpretation of Articles 6 and 12 of the CSC and TSC respectively—and the subsequent recourse to the application of equity and equitable principles—provide a good example in this regard. It is evident from the maritime case law that the rule of equitable solution as developed by the ICJ in the *North Sea* cases has been affirmed and followed in all subsequent cases, which exemplifies that the law on maritime delimitation has been developed and nourished at the hand of international judges—a process that has, in essence, become a source of international law. The Arbitral Tribunal in the *Bangladesh/India* Arbitration affirmed this view, stating that ‘[t]he ensuing—and still developing—international case law constitutes, in the view of the tribunal, an acquis judiciaire, a source of international law under Article 38(1)(d) of the statute of the ICJ and should be read into Articles 74 and 83 of the convention’\(^4^6\).

In sum, this thesis argues that the only objective of Articles 74 and 83 of UNCLOS—‘to achieve an equitable solution’—convenes a kind of approval to the implied law-making power of the international courts and tribunals and, on the basis of such power, the rule of equitable solution has been developed by international judges through the continuous and consistent practice of equitable decision-making. Whether this judge-made law can be


\(^{46}\) *Bangladesh/India* Arbitration, 98 [339].
considered the basis for the progressive development of the law on delimitation is of particular importance.

2 Judicial Decisions Provide the Basis for the Progressive Development of the Law on Maritime Delimitation

Judicial decisions exemplify at least two elements for potentially advancing the progressive development of the law on maritime delimitation through the adoption of a legal framework.

(a) Judicially Developed Criteria and Principles of Maritime Delimitation Transform the Judicial Policy of Dispute Settlement from Subsidiary Means of Law to a New Customary Rule of International Law

Judicial decisions are only described as a subsidiary means for the determination of rules of international law in Article 38(1)(c) of the ICJ statute. The stance of this provision regarding judicial decision does not restrain the capacity for international judicial decisions to create a new customary rule of law.

Nevertheless, while the Courts and tribunals cannot change conventional rule, their ‘judgements [or] orders’ can contribute ‘to the crystallisation of new customary norms in the field of the law of the sea and other domains of international law’. When any court, for the sake of justice, adopts the same solutions to the same concrete problems in a number of cases and refers to its previous decisions in the later cases, an objective norm is developed and, if such norm is later confirmed, a new customary rule of law is generated. Indeed, cases relating to maritime boundary disputes fall within such a category. According to Scovazzi, this ‘tremendous contribution’ of the Court deserves to be recognised as the ‘new rules of customary international law’. In fact, the customary rules of international law are ‘none other than judge-made law’, because ‘the customary

47 ICJ Statute, Article 38 (1) (d).
50 Scovazzi, ‘Where the Judge’, above n 38,305-306.
norm has no existence until the judge determines its content’ and ‘[i]t is this determination which gives it life and identity’.\textsuperscript{51} This confirms the idea that the decisions that help to determine the law applicable to maritime delimitation are, indeed, developing a new rule of customary international law.\textsuperscript{52} If it would not be the case, then in disputes where States are not party to UNCLOS, the Court or tribunal may not be able to find applicable law other than customary international law as reflected in the decisions of the international courts and tribunals.\textsuperscript{53}

However, the concept of precedence, as developed in common law, is expressly absent from international law. Taking into account the arguably customary character of the judicially developed maritime boundary delimitation law, the question may arise as to whether the customary nature of judicially developed maritime delimitation law is, in fact, a reflection of the doctrine of precedents.

\textbf{(b) The Customary Character of Judicially Developed Maritime Delimitation Law Resembles an Interactive Precedential System in International Law}

The concept of precedent is a common law doctrine that generally refers to a ‘judgement or decision cited so as to justify a decision in a later, apparently similar case’.\textsuperscript{54} Ratio decidendi is ‘the legal principle upon which a case is decided’.\textsuperscript{55} More clearly, this means ‘any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion’.\textsuperscript{56} Obiter dicta refer to ‘Statement[s] of law based on facts which are not material in a case, or not forming the basis of the decision’ (for example, a Statement on

\begin{footnotes}
\item[52] Bangladesh/Myanmar Case, 60-61 [182]-[184]; Nicaragua/Colombia case, 666 [114]-[118].
\item[53] Nicaragua/Colombia case, 666 [118].
\item[54] Leslie Basil Curzon, \textit{Dictionary of Law} (Pitman Publishing, 3\textsuperscript{rd} ed, 1988) 338. Precedents are of several kinds-an authoritative precedence is generally binding and must be followed; a persuasive precedence (based on \textit{obiter dicta}) need not be followed; a declaratory precedent merely applied an existing rule of law; an original precedent creates and applies new rule of law.
\end{footnotes}
which a dissenting judgement is based); *obiter dicta* are based on persuasive authority only.\(^{57}\)

Articles 74(1) and 83(1) State that maritime delimitation shall be effected by agreement on the basis of international law—as referred to in Article 38 of the ICJ Statute. Article 38(1)(d) of the ICJ statute clearly defines the status of the international judicial decisions as ‘subsidiary means for the determination of rules of law’.\(^{58}\) Again, the direction in this Article to apply judicial decisions as ‘subsidiary means of interpretation’\(^{59}\) is subject to Article 59 of the ICJ statute that limits the binding nature of the Court’s decision not only to the particular case in hand,\(^{60}\) but also to the *concrete legal findings* underlying those decisions.\(^{61}\) Thus, one might hold the view that Article 59 actually intends to prevent any system of binding precedent in international law.\(^{62}\)


\(^{58}\) ICJ Statute, Article 38 (1) (d). It suggests that international judicial decisions are a source for recognizing the law and not in and of themselves a source of law. Alain Pellet, ‘Article 38’ in A Zimmermann, C Tomuschat, and K Oellers-Frahm (eds), *Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2nd ed, 2012) 731 [304]-[305].


\(^{60}\) ICJ Statute, Article 59. Article 59 of the ICJ Statute States that ‘[t]he decision of the Court has no binding force except between the parties and in respect of that particular case’. Article 33 (2) of the ITLOS, as embodied in the Statute of International Tribunal for the Law of the Sea (Annex VI of UNCLOS) devised with almost same wordings. It States that ‘[t]he decision shall have no binding force except between the parties in respect of that particular dispute’. See UNCLOS, Annex VI, Article 33 (2). However, this provisions of this Article clearly limited only to the decisions of the concern court or tribunal. It gives rise of the possible interpretation that if the purpose of this Article were to prevent decisions of the ICJ or ITLOS from exerting precedental effect with binding force’, then the decisions of other courts and tribunals may presumably stand on higher ground, since they do not fall within the limitation of these Articles. It is argued that the reference to judicial decisions in Article 38 (1) (d) include decisions of arbitral tribunals other than the international court or tribunal, and thus it is suggested that such interpretation of those Articles is incorrect. See Jennings, ‘The Judiciary’, above n 55, 1, 6.


Nonetheless, a system of binding precedent for international judicial organs is inevitable, since it is already in practice in the form of implicitly recognised ratio decidendi. From a consideration of the maritime jurisprudence, it becomes evident that in international case law on maritime delimitation—other than the initial North Sea cases—the international courts and tribunals have usually relied on previous case references in support of or to defend their decisions as well as to accept or reject any arguments advanced by the parties in support of their claims. Thus, it can be argued that, despite the restrictions of Article 59 that disregards the binding force of a decision in general, in practice, the very acceptance of the judicially developed maritime delimitation law as a new rule of customary international law reflects the idea of ‘a body of de facto precedence’ with an ascertainable binding force. In this sense, the restrictions of Article 59 apply only to ‘the final decision [and do] not affect to the same degree the underlying reasoning of the decision, particularly when such reasoning is drafted in broad terms, projecting general rules on which the Court may rely in future findings’. The very use of the words jurisprudence or case law in the decisions by the international courts and tribunals is an example of self-explained recognition of the existence of the notion of precedence in maritime delimitation.

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63 Jennings, ‘The Judiciary’, above n 55, 11. Following the common law legacy of ratio decidendi and obiter dicta, Robert Jennigs recommended to establish ‘a proper intellectual discipline in the use of international decisions as precedents’ to distinguish what part of the decision should be regarded as the precedent (ratio decidendi) and what parts should not (obiter dicta); at 1, 6, 10-12.

64 According to Professor Janis’s remarks- ‘the toughest equity case in all the maritime boundary delimitation cases was the first one, because that was only one that had no judicial precedent to apply’. First one means the North Sea cases. Remarks made by Professor Mark Janis in the seminar on Equity in International Law, convened by its Moderator Louis B Sohn. See Louis B Sohn, ‘Equity in International Law’ (1988) 82 (April 20-23) Proceedings of the Annual Meeting (American Society of International Law) 288.


67 The term ‘ascertainable binding’ used in this sense that the restrictions of Article 59 apply only to ‘the final decision, it does not affect to the same degree the underlying reasoning of the decision, particularly when such reasoning is drafted in broad terms projecting general rules, on which the Court may rely in future findings’. Pierre-Marie Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’ (1999) 31 New York University Journal of International Law and Politics 791, 802.
international law. This became more prevalent when the Arbitral Tribunal in the Bangladesh/India arbitration decided to follow the principles set out by the ITLOS in the Bangladesh/Myanmar case, asserting that, ‘[s]ince Articles 74 and 83 of the convention do not provide for a particular method of delimitation, the appropriate delimitation method—if the States concerned cannot agree—is left to be determined through the mechanisms for the peaceful settlement’ that were designed by international courts and tribunals guided by the paramount objective to achieve an equitable solution. Thus, the ensuing and still developing international case law on maritime delimitation can be defined as ‘an acquis judicature, a source of international law under Article 38(1)(d)’ of the ICJ statute. Precedence in international law should not be misunderstood in cases such as when the Arbitral Tribunal in the Bangladesh and India arbitration materially refused to consider the judgement pronounced by the ITLOS in the Bangladesh/Myanmar case in its decision-making process and considered it as res inter alios acta. The Tribunal took this view only because it wanted to limit the dispute to the parties and to keep deter any third party from becoming involved in the dispute, the matter of which had already been solved, because such involvement may have prejudiced the dispute settlement process as well as created an inequitable result.

B Reasons for Considering Scholarly Writings as the Basis for a Legal Framework for Equitable Solution

As explained in Chapter 1, most of the initial development of the legal concepts regarding delimitation standards and delimitation criteria, such as the Mare Liberum and the Mare Clausum, the ‘cannon shot’ theory, the median line, proportionality, the Irish formula and Bathymetric formula for determining the OECM, have been delineated in the writings of scholars and jurists and later absorbed into State practices. Such State practices

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68 See, for example, Nicaragua/Colombia case, 41 [100], 666 [114], 668 [125], 700 [205], 705 [220], 708 [231], 717 [245].
69 Bangladesh/India case, 98 [339].
70 Bangladesh/India Case, 121 [411]. The latin term res inter alios acta refers a special rule of evidence which means that a transaction done between others or between third parties or strangers should not prejudice another party and generally binds only the parties making it. See Henry Campbell Black, Black’s Law Dictionary (West Publishing, 1968) 1470; Leslie Basil Curzon, Dictionary of Law (Pitman Publishing, 3rd ed, 1988) 385.
71 Bangladesh/India Case, 121 [411].
consequently formed the customary rules of international law, which were later considered to be ingrained enough for codification. Even at the time of such codification, some progressive development took place on the basis of scholarly writings. It is evident in the *travaux preparatories* of the 1958 CSC that the adoption of equidistance principles as an obligatory rule of maritime delimitation was a progressive development of the law on maritime delimitation that was adopted on the basis of the scholarly writings of Boggs.72

As outlined in Chapters 5 and 6, the delimitation of the continental shelf beyond 200 nm requires different considerations in the judicial settlement of boundary disputes in an equitable manner, which the ITLOS and the Arbitral Tribunal under Annex VII failed to consider in their decision-making processes; this part of the framework could well be developed through scholarly writings.

In summary, this thesis argues that international case law as well as scholarly writings on maritime delimitation offer necessary legal bases for the progressive development of the law on maritime delimitation through the adoption of a legal framework for equitable solution.

V A LEGAL FRAMEWORK FOR EQUITABLE SOLUTION FOR MARITIME DELIMITATION

A The Scope of the Framework

As argued earlier, to achieve an equitable solution in an equitable manner through the effective application of the international legal regime of maritime delimitation, the adoption of a framework for equitable solution within the scope of UNCLOS is a worthwhile endeavour. Since this would be a framework for maritime delimitation, it should first include the legal definition of the maritime delimitation. Since maritime delimitation refers only to the delimitation of maritime zones, the limit up to which a coastal State is entitled to extend its claim is of potential significance for the framework. Following this, the theoretical basis of equitable solution—that is, the legal principles and equitable criteria generally required to achieve an equitable solution in an equitable

72 See discussion at II B(2) in Chapter 2.
manner—will be addressed. The functional basis for applying these principles and criteria—in other words, the delimitation methodology—will also be included in the framework. Although this methodology would be broadly applicable to the delimitation of each separate maritime zone, because of the different bases of entitlement to the continental shelf within and beyond 200 nm as well as the different and additional considerations required for the delimitation of such areas, the methodologies for the delimitation of maritime zones within and beyond 200 nm will be addressed separately.

B The Salient Features of the Framework

1 The Definition of Maritime Delimitation

The aim of the international courts and tribunals dealing with maritime delimitation is not to ascertain a sole delimitation line, but to arrive at an equitable result. This means, there may be several delimitation lines; however, a court or tribunal must choose the one that best produces an equitable solution. In this way, the concept of maritime delimitation and equitable solution are analogous to each other. Therefore, the adoption of an agreed and unambiguous definition of maritime delimitation is of particular importance for the rule of equitable solution. UNCLOS did not provide a definition for maritime delimitation. It was the ICJ that first delivered a definition of maritime delimitation stating that ‘the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned’, the boundary of which then becomes the exact line ‘where the extension in space’ of the relevant coastal States’ jurisdictions terminate.\(^{73}\) This definition seemed to be accepted by most scholars. Nonetheless, throughout the passage of this thesis, it has been observed that this definition lacks the criterion of addressing equitable solution in an equitable manner. Since this thesis argues that a solution is equitable unless it is achieved in an equitable manner,\(^ {74}\) a proper definition of maritime delimitation must include this criterion. Therefore, the definition of maritime delimitation to be included in the framework should be as follows:

\(^{73}\) *Romania/Ukraine* case, 89 [77]; Aegean Sea Continental Shelf Case (Greece v Turkey) (Jurisdiction) [1978] ICJ Rep 38 [86]. See also Bjorn Kunoy, ‘The Delimitation of an Indicative Area of Overlapping Entitlement to the Outer Continental Shelf’ (2013) 83*British Yearbook of International law* 61.

\(^{74}\) For this view see discussions at section V in Chapter 4 of this thesis.
Maritime delimitation is process of establishing maritime boundaries between two or more coastal States by way of resolving their overlapping claims to maritime entitlement through achieving an equitable solution in an equitable manner.

As outlined earlier, the determination of an area of ‘overlapping maritime entitlement’ is the precondition for achieving an equitable solution in an equitable manner. Unless the extent of coastal State entitlement is decided, the determination of the overlapping of maritime entitlement is otiose. Although UNCLOS has provided specific limits for each maritime zone, the judgements of the BoB cases, particularly with regard to the delimitation of the continental shelf beyond 200 nm, created reasonable doubt as to the entitlement of coastal States to extend their delimitation lines to the full extent of those limits. Therefore, how far a boundary line should be extended in determining the delimitation of the maritime zones between two coastal States is of particular importance for this framework for equitable solution.

2 The Extents of Entitlement and Assessing Areas of Overlapping Entitlement

UNCLOS has divided maritime zones into four categories with specific limits—the 12 nm territorial sea, the 24 nm contiguous zone, the 200 nm EEZ and the continental shelf extending up to 200 nm (where the OECM does not extend beyond that limit) or up to 350 nm or 100 nm from the isobaths (where the OECM does extend beyond that limit). Each of these limits is based on the distance criterion—except the limit of the continental shelf beyond 200 nm, the entitlement to which is based on the natural prolongation criterion, the establishment of which depends on meeting the substantive and procedural criteria as detailed in Article 76(4)–(9). It is accepted both by jurists and scholars that every coastal State is entitled to a continental shelf up to a distance of 200 nm, irrespective of the geological or geomorphological features of the seabed and subsoil. Therefore, coastal State entitlement to a continental shelf up to 200 nm from the land is easily granted and 200 nm forms the only legal point of departure for such a decision. This entitlement cannot be infringed even in a situation where one State’s entitlement to the continental shelf beyond 200 nm encroaches into the 200 nm limit of another State. The framework should address this entitlement and potential overlap issue as follows:
The extent of a coastal State’s entitlement to maritime zones shall be upheld to the limit of each maritime zone as defined in UNCLOS.

Every coastal State is entitled to a continental shelf out to 200 nm irrespective of the geophysical features of its seabed and subsoil.

The reference to natural prolongation in Article 76(1) should be understood in light of the subsequent provisions (paragraphs 4–7) of the Article requiring that the entitlement to a continental shelf beyond 200 nm as well as the extent of such entitlement should be determined by recourse to the OECM.

Coastal States must establish the endpoints or outer limits of their entitlements on the basis of the CLCS’s recommendations as warranted in Article 76(8) and Annex II of UNCLOS and the CLCS rules.

Between two opposite States, where the distance between their coasts does not exceed 400 nm, 200 nm limits will provide the extents of entitlement for each coastal State when identifying areas of overlapping entitlement.

Between two opposite States, where the distance between their coasts exceeds 400 nm and both States are entitled to a continental shelf beyond 200 nm, the area beyond the 200 nm limit from the coasts of the States shall form the area of overlapping entitlement that is relevant for delimitation purposes. However, where the distance between the coasts of two opposite States exceeds 400 nm and only one State is entitled to a continental shelf beyond 200 nm, the extent of such entitlement will be one of two alternatives—either it will be the endpoint of the outer limit of the shelf where that limit does not encroach on the 200 nm point of the opposite State beyond 200 nm and the remaining area becomes common heritage for mankind; or, if the endpoint of the outer limits of the continental shelf beyond 200 nm encroaches on the 200 nm point of the opposite State, the extent of entitlement to the continental shelf beyond 200 nm shall be the point where the 200 nm limit of the opposite State terminates.

Between two or more adjacent States where the outer limits of their continental Shelf extend beyond 200 nm, the extent of their entitlements to such shelf will be the outer limits established by them on the basis of the CLCS’s recommendations.
and the area where the entitlement of these States overlap will be the area of overlapping entitlement.

3 The Applicable Equitable Criteria for Equitable Solution

As has been clarified, a delimitation result should not be seen as equitable unless it is achieved in an equitable manner and, thus, demonstrates a holistic approach to equitable solution. Therefore, the criteria for equitable solution that ensure the achieving of an equitable result in an equitable manner should be included in this framework for equitable solution. These equitable criteria should include:

- The application of the principle of proportionality with an aim to avert gross disproportionality between the coastal lengths and marine areas attributed.
- The application of the principle of non-encroachment in such a way that the natural prolongation of a coastal State does not encroach on the natural prolongation of the territory of another State.
- The application of the principle of the no cut-off effect in such a way that the delimitation line may avoid interfering with the extent of each maritime zone.

4 The Applicable Legal Principles

As explained in Chapter 4, the international courts and tribunals have developed some fundamental principles on the basis of equity with an aim to provide a theoretical basis for maritime delimitation. These principles are the driving force behind equitable solution and the legal framework should essentially include them as guidelines for achieving equitable solution. The legal principles are as follows:

- The delimitations of maritime zones are individual and separate from each other. For the purpose of delimitation, the continental shelf beyond 200 nm will be treated as a separate maritime zone within the scope of Article 76.

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75 See discussions in Section V of chapter 4.
• Equidistance cannot be granted as a preferred method of delimitation.\textsuperscript{76} The choice of applicable methods or principles must be flexible, rather than obligatory\textsuperscript{77} and judges must enjoy the freedom to choose any method of delimitation that best suits the circumstances of a concrete case.

• When drawing a provisional divisional line, an international court or tribunal should choose a delimitation method or a principle that produces a result that is closest to a proportionate result; however, one should be mindful that drawing such a provisional delimitation line is nothing more than the first step towards drawing a final delimitation line and in will no way prejudice the ultimate solution that must be designed to achieve an equitable result.

• The relevant area will be an area in which the potential entitlements of the parties overlap and it should preclude the inclusion of any area that may affect third-party entitlements.

• The relevant coast of a coastal State will include the parts of the coasts that generate projections overlapping with those of other coasts; the lengths of the relevant coastlines should be measured according to the general direction of the coasts by way of drawing straight lines between the extreme points at either ends of the coasts concerned.

• Different base points control the course of a delimitation line through territorial seas, EEZ and continental Shelf within and beyond 200 nm from a coast. A base point should be selected considering the most appropriate points of the concerned relevant coasts of each State and it must be capable of being compared to other base points as ‘like with like’.

• A court or tribunal must consider all the circumstances involved in a concrete case. However, it has the discretion to determine whether a particular circumstance should be considered relevant or not. The scope of relevant circumstances increases with the extents of the maritime zones and the consideration of the

\textsuperscript{76} Because, as the distance from the coastline grows, the inequity of the resulting line becomes increasingly severe. Specifically, in the case of a concave coast, the results of the equidistance method become more unreasonable as the equidistance line moves further from the coast. See North Sea case, 49, [89].

\textsuperscript{77} Since
relevant circumstances mainly aims to achieve a proportionate result that better represents the equitability of the solution.

- The result finally achieved, must reflect a reasonable degree of proportionality and, at the same time, must avoid any gross or significant disproportionality that may taint the result and render it inequitable in light of all the circumstances of the particular case.

5 **Delimitation Methodology**

It is evident from the maritime jurisprudence that the international courts and tribunals have developed an innovative process for enabling maritime delimitation to function in a structured way and this has been followed throughout the judicial settlement processes in most maritime boundary disputes. The ICJ has named this process the ‘three-stage methodology’ that includes drawing a PEL, adjusting the PEL on the basis of the consideration of relevant circumstances and conducting the disproportionality test. As evidenced in the case law of maritime delimitation, this three-stage methodology is to be applied separately during the delimitation of each maritime zone. As has been argued in Chapter 4, equidistance cannot be granted as a preferred method for the equitable delimitation of maritime zones; this thesis is of the view that the first stage of the three-stage methodology should be termed ‘drawing a provisional delimitation line’ instead of ‘drawing a PEL’. Again, as explained in Chapter 5, the delimitation of the continental shelf beyond 200 nm requires considerations that are different from those for delimitations within 200 nm. A legal framework should address the three-stage methodology for the delimitation of maritime zones within and beyond 200 nm separately, as indicated below:

(a) **The Three-stage Methodology for Delimitation Within 200 nm**

The three-stage methodology shall include drawing a provisional delimitation line, adjusting that line on the basis of the consideration of relevant circumstances and a disproportionality test.

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78 See discussion in section IV of Chapter 4.
Since Article 15 of UNCLOS forms part of customary law\(^{79}\) and has clearly emphasised the usage of the median–equidistance method for the delimitation of the territorial sea, the international courts or tribunals, while drawing provisional delimitation lines for effecting delimitation, should prefer the application of the median–equidistance method first. However, this procedure would not be the same while drawing a provisional delimitation line for the delimitation of EEZ and continental Shelf within 200 nm. Since EEZ and continental Shelf within 200 nm are different from territorial seas and, according to the judicially developed rule of equitable solution, an SMB is to be drawn for the purposes of delimitation; the endpoint of the boundary line delimiting the territorial sea would be located where the provisional delimitation line was drawn to delimit the EEZ and the continental shelf within 200 nm. The international courts or tribunals, while determining the applicable method for drawing a provisional delimitation line, shall enjoy the freedom and flexibility to choose one or more delimitation method or principle that best suits the physical geography of a given maritime area to be delimitated. For this purpose, a list of applicable delimitation methods or principles under the banner of equitable principles can be included in the framework, comprising the median or equidistance principle, the perpendicular line, the angle-bisector method, enclaving, the thalweg system, parallel lines or any other method or principles deemed fit and proper. It should be noted that among the above mentioned methods or principles, the equidistance principle—for its transparency—may be preferable, but not necessarily preferred.

Once the provisional delimitation line is drawn, the concerned court or tribunal can consider any circumstances that it finds relevant or special in achieving an equitable solution—provided that, in doing so, they do not consider any circumstances that are not of permanent nature. The aim of the disproportionality test is to avoid marked disproportionality in the ratio of the respective coastal lengths and in the ratio of the relevant maritime areas of each State. Therefore, the disproportionality test should not necessarily follow the principle of strict proportionality, because the purpose of delimitation is not to apportion equal shares of an area, nor even to assign proportional shares; rather, it is to achieve a delimitation that is equitable.

\(^{79}\) See discussion at III B (2) (d) in Chapter 2
Methodology for Delimitation Beyond 200 nm

To achieve an equitable solution in an equitable manner in the delimitation of continental Shelf beyond 200 nm, the legal framework for equitable solution and the aforementioned considerations for delimitation within 200 nm should incorporate some additional considerations required by equity for the delimitation of a continental shelf beyond 200 nm. These considerations include:

- The continental shelf beyond 200 nm is a separate maritime zone in terms of its different basis of entitlement and its different entity; therefore, the three-stage methodology must be applied not partially, but in total form.

- To delimit the continental shelf beyond 200 nm, a provisional delimitation line should be drawn from the point at which the boundary line within 200 nm ends and the 200 nm opening starts and should take into account the structure of the 200 nm opening line and the relevant areas therein; the concerned international court or tribunal shall have ample flexibility in choosing an appropriate delimitation method or principles for drawing such a provisional line.

- The outer limits of the continental shelf must be delineated or established first—not only to determine a coastal State’s extent of entitlement beyond 200 nm, but also to determine the overlapping of maritime entitlements. Even if the concept of an SCS is taken for granted, it also requires such an establishment.

- Although the international courts or tribunals have jurisdiction to delimit the continental shelf beyond 200 nm, they should not proceed to do so until the outer limit of the shelf is established on the basis of the CLCS’s recommendations by the concerned coastal States.

- In a situation where a coastal State seeks to establish the outer limits of its continental shelf beyond 200 nm, where the State has made a submission for the CLCS’s evaluation and subsequently brought a delimitation case before a judge, the concerned court or tribunal must not proceed with the delimitation until the CLCS has made its recommendations. In such a case, the concerned court or
tribunal, with the consent of the parties, should interact with the CLCS for its recommendations.

- The relevant area beyond 200 nm is different from that within 200 nm because of its different basis of entitlement and, for the same reason, the relevant coast will be different. A coastal State’s entitlement to any maritime zone is based on its title over the land and this is reason why the ‘coastal front’ or ‘coastal opening’ is considered as a relevant coast for the delimitation of a continental shelf within 200 nm. Since the continental shelf beyond 200 nm may not necessarily form a natural prolongation of the whole continental shelf within 200 nm, instead of the ‘coastal opening’, the ‘200 nm opening’ should be considered as the relevant coast for the delimitation of the continental shelf beyond 200 nm, as it better represents the sovereignty of the coastal State.

- Since the concept of SMB is not applicable beyond 200 nm and because of the different bases of entitlement to the continental shelf beyond 200 nm, it cannot be claimed that the concept of a SCS is equally applicable to the whole shelf area; therefore, the provisional delimitation line drawn for the delimitation of the continental shelf within 200 nm cannot be used as the provisional delimitation line for the shelf beyond 200 nm.

- Since a coastal State has an obligation to share its revenue from the continental shelf beyond 200 nm and the purpose of UNCLOS is to ensure an equitable international economic order, the socio-economic circumstances of a coastal State should be taken into account during delimitation.

- The disproportionality test should be performed taking into account the ratio of relevant areas beyond 200 nm and the ratio of relevant coast identified at the 200 nm opening.

- The creation of a ‘grey area’ is a by-product of the application of the equidistance principle as a preferred method of delimitation. Such a creation should not be encouraged, not only for the reason that it violates the principle of SMB, but also
for the reason that it goes against the rule of equitable solution. The issues of governing such a grey area may create potential threats to the enjoyment of the sovereign rights of either State.\footnote{For this point see discussions at IV in Chapter 5.}

In sum, a legal framework should include as many guidelines as required for achieving an equitable solution in an equitable manner. However, one might question whether it is possible to adopt such a legal framework without amending UNCLOS.

\section*{VI \hspace{2em} \textbf{ADOPTING A LEGAL FRAMEWORK WITHOUT AMENDING THE CONVENTION}}

To overcome the shortcomings of Articles 74 and 83 of UNCLOS through adopting a legal framework for equitable solution as discussed above and thus to advance progressive development of international law, it is necessary to answer the question as to whether it is possible to amend the Convention. If the answer is no, then the question arises as to the alternative mechanisms that may be available to accommodate progressive development within the corpus of positive international law.

According to Articles 312 and 313 of UNCLOS, amendment is the only conventional arrangement for the further evolution of the law of the sea. This argument is quite strong for several reasons. First, the Convention is not a ‘framework treaty’ in the sense that, like some environmental treaties, it has no formal provision for the adoption of further protocols and annexes as a means for developing the legal regime to meet new priorities and problems.\footnote{For example, the \textit{1985 Ozone Layer Convention} and the \textit{1992 Framework Convention on Climate Change}. Both treaties are in effect outline agreements, requiring further negotiation of more detailed implementing provisions, for example, in the 1987 Montreal Protocol and the 1995 Kyoto Protocol respectively. See Alan Boyle, ‘Further Development of the Law of the Sea Convention: Mechanism for Change’ (2005) 54 (3) \textit{International and Comparative Law Quarterly} 564 nn 8.} Second, the Convention lacks a body charged with verifying its implementation and adjusting its contents to evolving situations; it also lacks any provision for correcting failures.\footnote{Robert L Friedheim, ‘A Proper Order for the Oceans: An Agenda for the New Century’ in Davor Vidas and Willy Ostreng (eds), \textit{Order for the Oceans at the Turn of the Century} (Kluwer Law International, 1999) 554-556} These lacks may encourage some scholars to foresee
the possibility of convening a Fourth United Nations Convention on the Law of the Sea (hereinafter UNCLOS IV). The amendment procedure of the Convention is likely to prove an ‘unattractive option’ and has rightly been described as a ‘purely academic’ matter. In addition, no State has so far made any proposal to the Secretary General regarding any amendment of the Convention. It is also apparent that the UN is not considering the convening of a conference on the law of the sea at present or in the immediate future. What, though, would be the situation if a problem emerged requiring amendment or recalling clearer rules for the effective interpretation and application of the convention? As often Stated, if the law cannot or does not evolve, it will not last. The question therefore arises as to whether it is possible to adopt a binding agreement related to the interpretation and application of the delimitation provisions of UNCLOS based on rules and principles under analysis from judges and scholars without amending its existing structure.

The adoption of the convention as a constitution for the oceans suggests that ‘different rules should apply to its amendment than is generally the case for international instruments’. Like a constitution, it precisely defines the basic structure of ocean

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84 The amendment procedure provided in Article 313 of UNCLOS starts with the requirement of a negotiating conference and relies on a non-objection procedure to secure adoption. However, it only takes one objection for this procedure to fail. Amendment(s) proposed at a negotiating conference also require consensus, although they can be adopted by vote when all efforts to reach consensus have failed. This procedure mirrors the adoption by vote of UNCLOS itself. However, adopted, an amendment must still be ratified or acceded to by at least 60 States parties, and it can then enter into force only in regard to others who also accept the amendment. See generally; UNCLOS, Article 312, 313; Boyle, above n 80, 564; D H Anderson, ‘Further Efforts to Ensure Universal Participation in the UNCLOS’ (1994) 43 International and Comparative Law Quarterly 886; J J Charney, ‘Entry into Force of the 1982 UNCLOS’ (1995) Virginia Journal of International Law 381.


86 Ibid. Article 312 requires at least half the States Parties to agree to an amendment conference, consensus or a two-thirds majority for the adoption of the amendment and a two-thirds majority of accessions or ratification for entry into force. Article 313 requires consensus for a proposed amendment to be adopted. See UNCLOS, Article 312 and 313.

governance by positing important principles and leaves ‘the actual management rules to those who will follow’—that is, States, the UN and the institutions empowered under this constitutional approach. Accordingly, while the Convention, as a constitution, provides the skeleton, the institutions involved with it are bestowed with an implied power to address the lacunae of the skeleton by defining and developing theoretical concepts and operational measures under a framework approach. Thus it can be claimed that the Convention, from a ‘constitutional’ point of view, is a UN-based, multilateral treaty-making process that addresses all issues involved in the seas and oceans; conversely, a framework approach, defining and detailing the process of implementing any precise provisions in this convention, is a non-conventional product that may come into operation either in the form of legally binding agreements, such as through the implementation of an agreement, or in the form of soft law, such as the UNGA resolution, conference declarations or codes of conduct. It should be noted that the ‘consensus negotiation’ of the States is the basis for the legally binding character of any of these mechanisms, which remains ‘the most effective means of securing generally accepted changes and additions to the corpus of UNCLOS law’. Now, it must be considered how far it is possible to adopt such an agreement or soft law through the interpretation and application of any particular provision of the Convention on the basis of the international case law on maritime delimitation—and how far this is practicable and compatible with the existing practices of international law.

Pointing out the general and vague instructions contained in Articles 74(1) and 83(1) regarding maritime delimitation, Vukas stressed that such vagueness renders ‘ample space for the creative role of the competent courts and tribunals’ and concluded that their ‘judgements, orders and advisory opinions could be a source of … new conventional rules, and … of new customary norms in the field of the law of the sea and in other domains of international law’. This assertion indicates two possibilities: it is possible to adopt such

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89 Boyle, above n 80, 564, 572, 584.
90 Boyle, above n 80, 584 (emphasis added).
91 Vukas, ‘Possibile Role’, above n 47, 103 (emphasis added).
judicially developed rules and criteria on the law of maritime delimitation under a framework approach either within the law-making scope through conventional means or within the law-making scope through customary means.

International organisational practice suggests that, without convening UNCLOS IV, a framework approach detailing or modifying any provision of the Convention and maintaining compatibility with its provision is possible within the capacity and scope of the Convention. The Convention is viewed as forward-looking text, flexible enough to absorb many new trends and developments.92 Two agreements adopted by the UNGA relate to the following: (1) the implementation of Part XI of the Convention adopted in 1994 (and entered into force on 28 July 1996) and (2) the conservation and management of the straddling fish stocks and highly migratory fish stocks adopted in 1995 (and entered into force on 11 December 2001).93 These agreements provide evidence of flexibility; further, the process of modifying and elaborating particular conventional measures through interpretation and agreement is consistent and compatible with Article 31(2)(3) of the VCLT.94 In effect—though not in form—each agreement is a de facto alternative model for amending the Convention and is legally binding to the States who are party to it.95

This process of developing the law of the sea has also received significant support from scholars. Freestone and Oude Elferink explained the adoption of implementing agreements not as amendment in a purely academic sense, but as amendment through another mechanism that is able to adapt the convention to changing circumstances by providing detailed rules and practical methods for its effective implementation as well as strengthening it as an international regime.96 Treves strongly supported adopting such an implementing agreement under the conventional framework of the Convention. To him,

94 See Article 31 (2) (3) of VCLT.
95 Boyle, above n 80, 572.
this kind of development is very much compatible and consistent with the strong and resilient character of the Convention—strong in the sense that ‘the terms of the new agreements are without prejudice to the rights, jurisdiction and duties of States under the convention and must be interpreted and applied in the context of and in a manner consistent with the convention’—and resilient in the sense that it is capable enough of accepting and accommodating the elaboration and expansion of its brief and puzzling provisions under its conventional framework by way of adopting such implementing agreements.\(^\text{97}\) The Convention ‘established principles which lend themselves to further development of the law of the sea within the basic framework of its provisions’ and ensured ‘a built-in flexibility which allows for response to new and changing circumstances without challenging the integrity of the convention as a whole’.\(^\text{98}\) Given the experience with the two implementing agreements, Treves added that ‘the future problems arising from the use of the ocean and its resources will be resolved within the framework of the convention, through such cooperation’.\(^\text{99}\) Therefore, further attempts at progressive development of the law of maritime delimitation are possible by detailing particular provisions in the Convention through interpretation for the adoption of a clearer, more effective and sustainable applicable legal framework in the form of an implementing agreement. Since, Article 13 (1)(a) of the Charter of the United Nations mandated the UNGA to encourage the progressive development of international law;\(^\text{100}\) like implementing agreements, the UNGA may adopt resolution or declaration interpreting


\(^{100}\) See \textit{Charter of the United Nations} (signed on 26 June 1945 in San Francisco, entered into force on 24 October 1945). Article 13 (1) (a) of this Charter states as follows:

\begin{itemize}
  \item Article 13
  \begin{enumerate}
    \item The General Assembly shall initiate studies and make recommendations for the purpose of:
    \begin{enumerate}
      \item promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;
    \end{enumerate}
  \end{enumerate}
\end{itemize}
rules governing maritime delimitation and according to Article 31(3)(a) of the Vienna Convention such resolution or declaration may constitute ‘agreed interpretations’ of the Convention having persuasive force.\textsuperscript{101} One should be mindful that before advancing any initiative in this regard, States’ consensus is required. However, the question remains as to whether—other than the UNGA—there is any proper international forum related to sea affairs available under the Convention to pursue such international consensus.

This question would not have arisen unless Friedheim suggested establishing some sort of ‘universal ocean institute’ charged with the duty to bring ocean law continuously up to date by way of dealing with ‘incrementally outstanding issues’, accommodating adaptive needs and promulgating new solutions.\textsuperscript{102} Conceivably, by using the notion ‘universal ocean institute’ Friedheim means a non-UN organisation\textsuperscript{103}—such an institute is apparently not possible within the framework of the UN since it is a principal public international organisation. However, there already exists a UN-based institution constituted under the Convention that can serve these functions and that was actually constituted to do so. The name of this institution is the ‘Meeting of States Parties to the Convention’\textsuperscript{104} and it has become one of the major functional UN institutes for ocean governance.\textsuperscript{105} It is comparable to an institute that provides the State parties with an

\textsuperscript{101} For example, the provisions of the General Assembly Resolutions like 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res, 1514(XV) and 1970 Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) are a must applied according to Article 31(3)(a) of the Vienna Convention States that ‘[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.’ See Boyle, above n 80, 572 nn 47; Vienna Convention, above n 102.

\textsuperscript{102} For example, Robert L Friedheim, ‘A Proper Order for the Oceans: An Agenda for the New Century’ in Davor Vidas and Willy Ostreng (eds), \textit{Order for the Oceans at the Turn of the Century} (Kluwer Law International, 1999) 554-556 (emphasis added).


\textsuperscript{104} For this view, see Treves, ‘Ten Years After Entry’, above n 96, 350-351.

\textsuperscript{105} Article 319 (2) (e) of the UNCLOS provides that the Secretary-General ‘shall convene necessary meetings of States Parties in accordance with this Convention’. See UNCLOS, Article 319. In order meet the requirement of Article 319 (2) (e) of the UNCLOS, the General Assembly passed resolution 37/66 approving ‘the assumption by the Secretary-General of the responsibilities entrusted to him under the Convention and the related resolutions’. See, ‘Third United Nations Conference on the Law of the Sea, GA Res 37/66 (adopted 3 December 1982 in the 91st plenary meeting) <http://www.un.org/Depts/los/general_assembly/documents/a_res_37_66.pdf >. Resolutions 49/28 and 52/26 requested that the Secretary-General should continue ‘preparing for and convening the Meetings of States Parties to the Convention and providing the necessary services for such meetings, in accordance with
opportunity to act through ‘competent international organizations or general diplomatic conference’.\textsuperscript{106} Notably, the possibility of a potential overlapping of agendas and conflict between the UNGA and the Meeting of States Parties cannot be ruled out.\textsuperscript{107}

What alternatives may be considered if an international consensus cannot be reached in favour of adopting an implementing agreement? This thesis identified that even in the event of such a failure, there is an alternative mechanism that may still be employed. That mechanism is the provision of ‘an advisory opinion’ by a competent international court or tribunal.

According to Article 96 of the charter of the UN, the UNGA (through its open ended, informal consultative process)\textsuperscript{108}, the Security Council or any other organ or specialised agency of the UN that is authorised by the UNGA may request the ICJ to give an advisory opinion on any legal question. Therefore, to produce an elaborate, effective and authoritative interpretation of Articles 74 and 83 of the Convention focusing on the applicable rules and methods of maritime delimitation, the UNGA or any other specialised organisation of the UN—even the newly constituted institute under the Convention, the Meeting of States Parties, as authorised by the UNGA—may request the ICJ to give

\textsuperscript{106} For this view, see David Freestone (ed), \textit{The World Bank and Sustainable Development: Legal Essays} (Martinus Nijhoff Publishers, 2103) 143 (footnote omitted).

\textsuperscript{107} Elferink, above n 84, 2.

advisory opinion with an aim to adopt a framework for maritime delimitation on the basis of the principles and methods developed in the decision-making process of the Court in a way that may be followed by the States as well as the Courts and tribunals in the future settling of maritime boundary disputes.\textsuperscript{109}

The Court is competent to provide such opinion; not only it is allowed to do so under Article 65 of the ICJ Statute,\textsuperscript{110} but it also has power conferred on it ‘for the settlement of disputes concerning the interpretation or application’ of the Convention.\textsuperscript{111} Although this competence of the Court is not mentioned in the Convention, it is the general competence of the Court that allows it to provide relevant opinion.\textsuperscript{112} In addition, such an advisory opinion may be sought from the ITLOS, since it is also charged with the authority of settling disputes concerning the interpretation or application of the Convention.\textsuperscript{113}

Having obtained such advisory opinions from the Court, the UNGA can record them in the document to be adopted as an implementing agreement. Alternatively, it can do two things: it can make a declaration regarding such advisory opinion of the Court or it can adopt a resolution calling on the States and competent international courts and tribunals to follow that advisory opinion in their decision-making processes. In all cases, the Courts and tribunals dealing with maritime boundary disputes shall be bound to follow such advisory opinions in their decision-making processes as a rule of customary international law. There are reasons for the binding nature of the Court’s advisory opinion.

First, the Court cannot provide any such opinion that is not based on the customary rule of international law and that is incompatible with the provisions of the Convention.

\textsuperscript{109} The General Assembly of the United Nations expressly encouraged seeking this sort of advisory opinion from the ICJ. In one of its resolutions it adopted that …..United Nations organs and the specialized agencies should, from time to time, review legal questions within the competence of the International Court of Justice that have arisen or will arise during their activities and should study the advisability of referring them to the Court for an advisory opinion, provided that they are duly authorized to do so; See Review of the role of the International Court of Justice, GA Res 3232 (XXIX) , UN GAOR, 29\textsuperscript{th} Sessrion, 2280\textsuperscript{th} plen mtg, Supp No 31, UN Doc A/9631 (1974) , 12 November 1974, 141-142 <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3232 (XXIX) >.

\textsuperscript{110} ICJ Statute, Article 65.

\textsuperscript{111} UNCLOS, Article 287.

\textsuperscript{112} Vukas, ‘Possible Role’, above n 47, 96.

\textsuperscript{113} UNCLOS, Article 287.
Second and most importantly, the Court cannot provide any opinion that is not practised by the Court itself.\(^{114}\) This may be the reason why Article 68 of the ICJ statute determines that the Court, in exercising its advisory functions, ‘shall … be guided by the provisions of the present statute which apply in contentious cases to the extent to which it recognizes them to be applicable’.\(^{115}\) Again, when the authority of the Convention, as an instrument, has been recognised for establishing a customary rule of international law,\(^{116}\) any advisory opinion provided by the Courts on the basis of their earlier decisions and practices regarding the interpretation and application of any particular aspect of the Convention, may bear the same weight and value as a customary rule of law. Boschiero and Scovazzi supported this view when they affirmed that ‘[t]here are a number of decisions which are inevitably recalled as the first step, or a decisive step, in the process of the formation of a new rule of customary international law’.\(^{117}\) Further Leanza, analysing the case law on maritime delimitation, came to the conclusion that the international courts and tribunals develop the customary rule of international law in terms of maritime boundary delimitation.\(^{118}\)

Third, there are examples where the advisory opinion of a court has been recognised as providing the content of customary rule of international law. For instance, the advisory opinion provided by the ITLOS on the \textit{Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area}\(^{119}\) has been

\(^{114}\) For this reason, see Pierre-Marie Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’ (1999) 31 \textit{New York University Journal of International Law and Politics} 791, 806. In terms of the development of international law through judicial activities, he held this view that ‘the Court should consider itself responsible for respecting the basic principles providing the grounds for public international law as a legal order. This should result in its members sharing a legal philosophy according to which there is some kind of international legal order that should be respected, under any circumstances, by each and every subject of that law’.

\(^{115}\) ICJ Statute, Article 68.

\(^{116}\) Treves, ‘Ten Years After Entry’, above n 96, 350.


\(^{118}\) For this view, see generally, Umberto Leanza, ‘International Courts and the Development of the International Law of the Sea on the Delimitation of the Continental Shelf’ in Nerina Boschiero, Tullio Scovazzi, Cesare Pitea, Chiara Ragni (eds), above n 116, 281-290.

\(^{119}\) \textit{Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area} (Request for Advisory Opinion submitted to the Seabed Disputes Chamber, ITLOS), Advisory opinion, 1 February 2011, \(<\text{http://www.itlos.org/index.php?id=109&L=1AND1%3D1}>\). The Chamber was chaired by Judge Tullio Treves and the opinion was adopted unanimously.
described as a ‘contribution to a more precise definition of the content of customary rules relating to the protection of the marine environment’. 120

Fourth, the resolution of the UNGA that ‘the development of international law may be reflected, *inter alia*, by declarations and resolutions of the UNGA which may to that extent be taken into consideration by the ICJ’ 121 implies that the international courts and tribunals will consider such declaration and resolution by the UNGA as the development of international law.

Fifth, the advisory opinion of the Court has been viewed as a kind of international law-making process. 122

Taking into account the above discussion, the advisory opinion of the Court may be seen to amount to the creation of a new customary rule of law. Thus, Vukas could be said to be accurate in his claim that the ‘advisory opinions’ of the Court can ‘be a source of … new customary norms in the field of the law of the sea’. 123

**VII CONCLUSION**

The delimitation beyond 200 nm in the *BoB* cases established a bad precedent for not respecting the fundamental criteria of equitable solution as well as for non-compliance to the substantive and procedural requirements of Article 76 of UNCLOS. Taking into account the increasing number of potential maritime boundary disputes, this judicial practice is alarming, not only in respect to the peaceful settlement of existing and prospective boundary disputes, but also for the potential effectiveness of the international legal regime of maritime delimitation in resolving maritime boundary disputes in an equitable manner. To overcome these shortcomings along with the lacks of positive international law as specified in Articles 74 and 83 of UNCLOS, codification and

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120 Scovazzi, ‘Where the Judge’, above n 38,306.
123 Vukas, ‘Possibile Role’, above n 47, 103 (emphasis added).
progressive development of the law of maritime delimitation is of great importance. Adopting a framework for equitable solution is the way forward when undertaking such codification and progressive development. Judicial decisions as well as scholarly writings on maritime delimitation can necessarily be seen as providing the basis for the progressive development of international law. The framework outlined in this chapter may provide a necessary legal basis for the effective settlement of maritime boundary disputes in an equitable manner. UNCLOS has proven itself capable of being subject to modification and expansion, not only in the form of ‘implementing’ agreements, but also via State practice, the actions of international organisations and soft law. The adoption of such a legal framework is possible in light of the objectives of UNCLOS. The longevity of UNCLOS will remain pivotal to the maritime law regime in future and its capacity to be adjusted and modified will be essential to this longevity.

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124 The 1994 Agreement Relating to Part XI and the 1995 UN Fish Stocks Agreement, above n 2.
125 Boyle, above n 15, 564-65; See also Rothwell and Stephens, above n 4, 28.
126 That law which is not yet completely formed by way of treaty or custom and accordingly is not binding upon States, but which may in time evolve into ‘hard’ law in the form of a binding treaty or custom. See Rothwell and Stephens, above n 4, 24 nn124.
CHAPTER 8
CONCLUSION

Sitting at a crossroads between politics, law and technical knowledge, maritime delimitation is a multifaceted subject.\(^1\) Having discussed and problematised a number of its aspects, this study has advanced propositions that contribute to furthering the development of the law on maritime delimitation through adopting a legal framework for equitable solution. The focus was an examination of the effective application of the law of maritime delimitation in the BoB cases.

As an academic endeavour that is by nature analytical and investigative, this thesis has \textit{inter alia} attempted to answer questions posed at the very outset as fundamental research questions. The outcomes now offered for consideration resulted from a quest for the reconciling of conventional and customary law and of case law and State practice. Since the negotiated boundaries result from a process characterised by trade-off, in which elements completely unrelated to the boundary might be considered decisive, this thesis, in designing its arguments, relied on case law rather than State practice because the Court or tribunal, in the decision-making process, is under obligation to follow the due course of international law rather than to arrange a trade-off or compromise.

These influences have finally converged into four central arguments. First, the law on maritime delimitation, as developed over the last four decades in maritime jurisprudence, has acquired a holistic approach that comprises the controlling criteria for equitable solution and is applicable \textit{mutatis mutandis} to the delimitation of all maritime zones, whether within or beyond 200 nm, when ensuring the effective application of the rule of maritime delimitation. Second, the delimitation of the continental shelf beyond 200 nm must meet the substantive and procedural requirements of Article 76, which calls for the intermediate involvement of the CLCS in the delimitation through the CPBD. Third, the delimitation result of the BoB cases evidences the effective application of the law of

maritime delimitation within 200 nm and not beyond 200 nm and the decision has, in this regard, given rise to the fragmentation of international law. Fourth, to shape international law, on which any delimitation must be based, for the effective application of the law on maritime delimitation, a framework of equitable solution should be considered by the States under the existing scope of the Convention. The way in which these propositions are to be understood legally and conceptually is the cynosure of these conclusions.

The legal regime of the law of the sea, which has recorded only one major doctrinal debate (between Grotius and Selden) and one substantive change (Van Bynkershoek’s three-mile cannon shot rule) in the last 400 years, has undergone dramatic transformation since World War II. This transformation, especially in respect to maritime boundary delimitation, is not complete and its unresolved status contributes to the sense of uncertainty that now pervades international legal thinking.

In the realm of maritime delimitation law, delimitation has become an uncontested acquis, a customary rule of international law endorsed explicitly in maritime case law and required where the maritime entitlements of two or more States overlap. In other words, the overlapping of entitlements is the object with which maritime delimitation is concerned. It has been argued that this issue of entitlement is related to the extent of the entitlement that and the task of delimitation operates by taking two elements in hand: the precise limit of the maritime zones and the applicable rules and criteria of maritime delimitation. The law on maritime delimitation from its very inception has, in fact, developed on the basis of this notion. To elaborate on this issue, one must first pause to answer a key question: What are the rules and criteria by which judicial decisions must abide? The complete answer to this question entails a total understanding of the effective application of the law of maritime delimitation.

The failed initiative to codify the delimitation law in the 1930 Hague conference demonstrated the problem of accepting a generally applicable law of maritime delimitation.

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2 See discussion in section II of Chapter 2.
4 See section II (A) (2) in chapter 1.
5 See section II (B) (1) in chapter 1.
delimitation when it proposed median line principles only to delimit boundaries between opposite States. The obligatory use of equidistance principles in the 1958 Geneva Convention for delimitation both between opposite and adjacent States reinforced this observation. The rejection of the dominant use of the equidistance principle in the North Sea judgement and, at the same time, the acceptance of the rule of flexibility under the premise of equity and equitable principles, further exacerbated the problem. As has been clarified, this judgment challenged the effectiveness of the 1958 Geneva Convention and resulted in the adoption of the Convention in 1982—the most comprehensive part of international law to date.

Articles 15, 74 and 83 of the Convention describe rules relating to maritime delimitation. However, these rules are not comprehensive. The UNCLOS provisions for the delimitation of EEZ and continental Shelf—as provided by Articles 74 and 83—outlined the ultimate objective of delimitation—‘to achieve an equitable solution’—but made no reference to any applicable rules or criteria to achieve that solution. On the contrary, the concept of equitable solution was rendered vague and complex by allusion to international law as referred to in Article 38 of the ICJ Statute. The ambiguity of these delimitation provisions reveals the incompleteness of this part of international law and its lack of progressive development. This thesis is of the view that delimitation, being an international operation and of particular interest for ensuring an equitable international economic order, should not suffer for insufficient legal framework. Therefore, this thesis investigated whether the reference to Article 38 of the ICJ statute really entails any particular rule or criterion for maritime delimitation at all. It has been argued that Article 38 of the ICJ statute does not refer to any specific method or principle of maritime delimitation. However, this thesis has clarified that the current delimitation method provided by UNCLOS is the ‘rule of equitable solution’, notwithstanding the lack of clarity as to how this rule is applied.

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6 See discussion in section II (A) (3) in Chapter 2.
7 See discussion in section III (B) in Chapter 3.
8 See discussion in section III (D) in Chapter 3.
The concept of equitable solution, although first mentioned in the Convention, was developed by the ICJ in the *North Sea* cases judgement and is thus readily applicable in the context of maritime delimitation. 9 This thesis contends that this concept of equitable solution, as mentioned in the Convention, was borrowed from the *North Sea* cases judgement and, as such, maritime case law provides the best premise for understanding the insightful and conclusive meaning of this concept.

In determining a starting point for applying the current rule of equitable solution, we must draw attention to the concept of equity. As has been observed, equitable solution refers to the functioning of equity in international law in the context of maritime delimitation. 10 The most structured and systemised roles of equity have been conceptualised, developed and applied in the jurisprudence of maritime delimitation under the concept of equitable solution 11 and, thus, equity is at the heart of maritime delimitation. As has been revealed, equity, as enshrined in Aristotle’s *Nicomachean Ethics*, is applicable in specific cases where the generality of law is incapable of producing justice. Over the course of time, the concept of equity has been invoked in judicial activities by the Roman *praetor peregrinus* and, later, applied in both civil and common law courts. 12 This thesis argues that every single maritime boundary has a specific nature and prevailing circumstances that must be considered in the task of delimiting. The specific nature of each maritime boundary has convinced judges to let equity play its role in the operation of maritime delimitation. 13 To neutralise the debate as to whether the usage of equity are against the rule of international law, this thesis, after careful analysis and examination, argued that equity in international law properly acts as law itself through the concept of equitable solution that allows decision makers to resort to any rule, principle or consideration that may be required to reach an equitable solution. 14 The flexibility offered by equity encouraged its use in the course of maritime delimitation. However, at the same time, one should be mindful that

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9 See *North Sea* cases, 34 [52], 50 [92].
10 See discussions in section II (A) of chapter 4.
11 See discussions in section II (A) in chapter 4.
12 See discussions in section II (A) (1) in chapter 4.
13 See discussions in section III A in chapter 4.
14 See discussions in section II (A) in chapter 4.
the application of equity must fall within the scope of law, as *equity infra legem* and cannot go against the law; as such, it must not result in decision *ex aequo et bono*.\(^{15}\)

The Court in the *North Sea* cases applied equity not as a matter of abstract justice, but rather as a ‘rule of law which itself requires the application of equitable principles’.\(^{16}\) The concept of ‘equitable principles’ as used in these cases gave rise to a considerable amount of criticism. As has been argued, the Court used the term ‘equitable principle’ as a general legal term providing flexibility to decision makers to apply any delimitation method capable of producing an equitable solution and, on this basis, rejecting the obligatory use of the equidistance principle.\(^{17}\) The subsequent judicial practices endorsed this principle of flexibility.\(^{18}\) The proposition that, in maritime delimitation, the use of the equidistance method is predictable and preferred over other methods should be quashed. On the contrary, this thesis claims that predictability, not of method but of result in delimitation, is warranted by the rule of equitable delimitation where flexibility of applicable methods of delimitation is a precondition.\(^{19}\)

In the development of the law on maritime delimitation, the implications of the judgement of the *North Sea* cases are multifaceted and enduring. As has been examined, in the *North Sea* cases, the Court was successful in establishing a set of equitable criteria that control the practice of achieving an equitable solution in an equitable manner and that, in effect, constituted a *holistic approach* to equitable solution.\(^{20}\) After a careful and extensive examination and investigation, this thesis pointed out that the fundamental criteria of equitable solution that constitute the *holistic approach* are emanated from equity and according to this approach, any solution to a maritime boundary dispute, whether it is determined by negotiation or by adjudication, would bear a resemblance to the achievement of an equitable solution in an equitable manner if it demonstrates a reasonable degree of proportionality and equally protects the maximum reaches of the coastal States’ entitlements to the maritime zones, as balanced by the ‘no cut-off’ effect.

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\(^{15}\) See discussions in section II (A) (3) of chapter 4.

\(^{16}\) *North Sea* Cases, 46-47, [85].

\(^{17}\) See discussions in section IV (B) of chapter 4.

\(^{18}\) See discussions in section IV (B) (1) - (2) of chapter 4.

\(^{19}\) See discussions in section IV (B) (3) of chapter 4.

\(^{20}\) See discussions in section IV A (1) and V of chapter 4.
and the non-encroachment of the coastal projection of each State.\textsuperscript{21} This approach developed in the \textit{North Sea} cases has been followed in all subsequent cases determining delimitation within 200 nm. Taking this into account, one could speculate that the authors of Articles 74 and 83 accepted this \textit{holistic approach} of equitable solution under the phrase-‘in order to achieve an equitable solution’.

In sum, the achievement of an equitable solution in an \textit{equitable manner} is the fundamental rule of maritime delimitation.\textsuperscript{22} If a maritime boundary dispute, irrespective of the dispute settlement forum, is resolved to achieve an equitable solution by way of ensuring a reasonable degree of proportionality, equally protecting the maritime entitlements of each disputant State and considering the no cut-off effect and the non-encroachment of the coastal projections of each State, this necessarily ensures the equitable manner of the dispute settlement process—which, in essence, constitutes a \textit{holistic approach} of the rule of equitable solution. The accomplishment of this approach in the delimitation process is crucial for reaching an equitable solution, otherwise, the delimitation result, whether it is achieved by negotiations or by CPBD, may reflect equitability, but it could not be seen effectively applied the law on maritime delimitation in an equitable manner and thus any such delimitation decision, absent the express consent or agreement of the Parties, can be rendered as a decision \textit{ex aequo et bono}.\textsuperscript{23} Arguably, this holistic approach of equitable solution is equally applicable in delimitations both within and beyond 200 nm, because the notion ‘equitable solution’ as embedded in Article 83 refers only to the delimitation of continental shelf, no matter whether it is within or beyond 200 nm.\textsuperscript{24}

The three-stage methodology\textsuperscript{25}, as developed in maritime jurisprudence, exemplifies the functional criteria of the rule of equitable solution through which the holistic approach of equitable solution is implemented. The name of the first stage of this methodology, as has already been argued, should be replaced by the term ‘drawing a provisional delimitation

\footnotesize{\textsuperscript{21} For this view see discussions in sections IV and V in Chapter 4.  
\textsuperscript{22} For this view see discussions in section II (A) and V in chapter 4.  
\textsuperscript{23} For this view see discussions in sections IV(A) and V in chapter 4.  
\textsuperscript{24} For this argument see generally sections III, IV and V in Chapter 4 and Section II and III of Chapter 5.  
\textsuperscript{25} See discussions in sections IV(C) in chapter 4.}
This thesis has observed that the second stage, the ‘consideration of relevant circumstances for adjusting the provisional line’, bears a close relation to the third stage, the ‘proportionality test’; where the provisional delimitation line produces a reasonable degree of proportionality, the necessity for considering relevant circumstance becomes otiose.27

The delimitation of LCSs beyond 200 nm is a comparatively a new phenomenon in international law. As has been argued, in terms of establishing the outer limit of an LCS beyond 200 nm, the substantive and procedural requirements of Article 76 must be accomplished to correspond to the essential requirements of delimitation itself and to identify the overlapping of entitlement. Paragraphs 1 of Article 76 of UNCLOS provided two different bases of entitlement to continental shelf: 200 nm distance criterion and natural prolongation criterion. While the former criterion is self defined, the latter lacks it. Paragraph 1 and 3 of Article 76 provide the theoretical basis for entitlement to a continental shelf beyond 200 nm, while paragraph 4 of the same Article provides a functional basis for materialising the natural prolongation criterion. However, one should not be confused by the fact that natural prolongation equates to the outer edge of the continental margin because, while the former refers to a basis of entitlement, the latter refers to a legal basis to measure the extent of that entitlement. However, the different basis of entitlement to a continental shelf creates a point of differentiation between Shelf within and beyond 200 nm that, in true sense, attributes the status of a distinct maritime zone to the LCS beyond 200 nm. This distinction rejects the concept of an ‘SCS’ and thus refuses the extension of the SMB beyond 200 nm.28 For the same reason, the extension of the provisional equidistance line within 200 nm to the shelf beyond 200 nm may not be viable. The three-stage methodology is also applicable to delimitations beyond 200 nm. As has been argued, flexibility in choosing the delimitation method, the identification of separate relevant coasts and relevant areas for drawing provisional delimitation lines and is required, and the equitability of the delimitation resulted from such application should be tested distinctly from that of within 200 nm. This is the requirement of equity as

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26 See discussions in sections IV (C) (1) in chapter 4
27 See discussions in sections IV (C) (3) in chapter 4
28 See generally sections III (B) (1) in chapter 5; section IV (A) (3) in chapter 4.
international law. However, before employing this methodology, the concerned judicial body must comply with the Article 76 process as a necessary precondition of maritime delimitation that presupposes an overlapping of entitlement.\textsuperscript{29} As has been argued, the UNCLOS provisions lend express support to delineation before delimitation. In this process, the CLCS—arguably a watchdog, or safeguard to prevent coastal States from making exaggerated continental shelf claims\textsuperscript{30}—should be involved, not only to ensure the conventional requirements as enshrined in Article 76 paragraph 8 of UNCLOS, but to accomplish the mandate entrusted to it by the international community and to ensure the equitable manner of the delimitation.\textsuperscript{31} The restriction of not making recommendations in matters involving land and maritime disputes as imposed in paragraph 5(a) of the CLCS rules should not be a legal basis for avoiding the engagement of the CLCS in the delimitation process. Rather, to confirm this process, the concerned court or tribunal has the authority to pass an intermediate order requesting that the CLCS make its recommends on the submissions of the disputant parties before deciding the delimitation beyond 200 nm. Any alternative to this procedure will not only amount to prioritising institution-made rules over the constitutional framework of UNCLOS under whose authority that very institution has been established, but also to disregarding the rule of equity that warrants such involvement.\textsuperscript{32}

Again, the concept of the ‘legal regime of grey area’ is evidently absent in the history of the law of the sea. This concept exists neither in the LOS Convention nor in the maritime jurisprudence as well as in any other legal documents related to maritime boundary delimitation. It first evolved in the scholarly writings of Alex G Oude Elferink in 1998.\textsuperscript{33} According to him, grey area refers to an area that lies within 200 nm of the coastline of

\textsuperscript{29} See section III in Chapter 5.
\textsuperscript{30} Erik Franckx, ‘The International Seabed Authority and the Common Heritage of Mankind: The Need For States to Establish the Outer Limits of their Continental Shelf’ (2010) 25 The International Journal of Marine and Coastal Law 559.
\textsuperscript{31} See discussion in section III B (3) in Chapter 5
\textsuperscript{32} See discussion in section III B (2)-(4) of Chapter 5.
one State but beyond the boundary of another State.\textsuperscript{34} It emerges in situations where the entitlements of two States to a continental shelf extend beyond 200 nm and relevant circumstances call for a boundary other than the equidistance line (Figure 12). UNCLOS provides provisions defining EEZ and continental shelf and sets out the manner in which disputed areas in each zone should be delimited; but it provides no provision to deal with the situation where these two maritime zones overlap, creating grey areas.

Although it is possible to see the emergence of the grey area as a practical consequence of achieving an equitable solution in the delimitation of continental Shelf beyond 200 nm,\textsuperscript{35} but this thesis argues that, for several reasons, the concept of grey area goes not only against the holistic approach of equitable solution as well as against the established rules of maritime delimitation, but also instigates threat to regional peace and security. Because, the creation of a ‘grey area’ not only approves the obligatory usage of equidistance method, but also ineffectuates the concept of adjusting the PEL, which goes against the established rule of equitable solution; the location of grey area lacks express projection and linkage between the coast and the grey area which is incompatible with the fundamental principle of delimitation-‘the land dominates the sea’; creation of grey area disregards the principle of SMB or SDL-one of the fundamental criteria of equitable solution; the concept of grey area acts against the rule of equality- comparing like with like manner; it creates a waterzone-locked situation for the State beyond whose 200 nm jurisdiction it is located; and the residual effect of such grey area zone creating delimitation is that it establishes grounds for potential future disputes recalling possible further delimitation which extinguishes the total purpose of delimitation-to settle an inter-State maritime boundary disputes once and for all.\textsuperscript{36} UNCLOS provides little or no guidance as to how to address the problem of exercising shelf rights and EEZ rights over the same area by different coastal States.\textsuperscript{37} The concept of grey area thus creates more problems for the parties now forced to cohabit in the same area than potential benefits.


\textsuperscript{35} For this view, see generally Elferink, ‘The Grey Area Issue’, above n 33; Elferink, ‘The Impact of the Law of the Sea Convention’, above n 34.

\textsuperscript{36} See discussion at section IV in Chapter 5.

\textsuperscript{37} Stuart Kaye, 'The Use of Multiple Boundaries in Maritime Boundary Delimitation: Law and Practice' (1998) 19 Australian Year Book of International Law 49.
And application of this concept in judicial decision making process will render that decision as implementing a purely academic concept which has not been discussed or mandated by the States participating in the LOS Conference. Hence, such judicial decision will be amounted to a decision *ex aequo et bono*.

Taking into account all the findings and arguments set out in the preceding chapters, this thesis investigated the *BoB* cases to examine whether the ITLOS and the Arbitral Tribunal applied the prevailing law on maritime delimitation effectively and in an equitable manner to achieve an equitable solution—in other words, whether the *holistic approach* of equitable solution was accomplished. The judgements of the *BoB* cases evidence novelty in terms of delimitation beyond 200 n.m., consolidation in terms of affirming the three-stage methodology as developed in the *Romania/Ukraine* case and innovation in the assuming as well as exercising of jurisdiction for delimitation beyond 200 nm. However, the extent to which such consolidation and innovation followed the rule of equitable solution remains a question for consideration.

As has been clarified, both judgements created a new dimension in the delimitation of maritime boundaries. They distinguished the delimitation processes for each maritime zone-even for continental shelf beyond 200 nm, adopted the three-stage methodology and thus reinforced the great advantages of judicial consistency, transparency and predictability in the delimitation process and, for the first time, they delimited a continental shelf beyond 200 nm. As has been argued, these judgements demonstrated the effective application of the rule of equitable solution in the delimitation of maritime boundaries *within* 200 nm. The treatment of St. Martin’s island (as giving full effect to the delimitation of the territorial sea and no effect to the delimitation of the EEZ and continental shelf), the attempt to locate the low tide elevation of the South Talpatti Island in the BoB and the non-consideration of this low tide as a circumstance in the delimitation between India and Bangladesh, the determining of the LBT between India and Bangladesh, ensuring access out to the limit of 200 nm for Bangladesh by preventing

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38 If the Arbitral Tribunal would found existence of South Talpatti Island as low tide elevation, this might have deflecting effect to the boundary line of Bangladesh as determined in the territorial sea delimitation. It might have impact in the delimitation of EEZ and continental shelf as well. Bangladesh might have lose a significant area of marine area.
encroachment and cut-off effect of its boundary, considering of concavity as a relevant circumstance, identifying base points instead of baselines—each of these endeavours demonstrate the consistent and effective application of the law of maritime delimitation in an equitable manner and, thus, the holistic approach of equitable solution can be considered to have prevailed.

As has been argued, the delimitation of the continental shelf beyond 200 nm is the most problematic area of these judgements.39 Nevertheless, the separate treatment of the delimitation of the continental shelf beyond 200 nm attributed the status of an individual maritime zone to this area and the separate application of the three-stage methodology confirmed this status, thus advancing the consistency of the delimitation methodology beyond 200 nm. However, as has been argued, the reliance on the principle of an ‘SCS’ in the course of exercising jurisdiction over maritime delimitation beyond 200 nm was more likely a misinterpretation of the law.40 The drawing of an SDL was no less than the drawing of an SMB; the drawing of a generally applicable PEL both within and beyond 200 nm was problematic.41 The definition of the concept of natural prolongation was contradictory and confusing42 and the rejection of this concept as the basis for entitlement was chaotic.43 It is regrettable that none of the judicial organs displayed the minimum intention to comply with the Article 76 process—that is, to meet the substantive and procedural requirements of Article 76. As has been argued, if identifying the overlapping of entitlement is the necessary precondition for delimitation, delineating the outer limits of the continental shelf beyond 200 nm is the necessary precondition for assessing the

39 See section III in Chapter 6.
40 Because, in so doing both the ITLOS and the Arbitral Tribunal failed to differentiate between assuming jurisdiction and exercising of that jurisdiction. See discussion in chapter 5.
41 Because, since the basis of entitlement to a continental shelf beyond 200 nm drew a point of differentiation between areas within and beyond 200 nm which portrayed the shelf beyond 200 nm as a different maritime zone delimitation of that shelf warrants independent consideration of applicable methods of delimitation. Because, in certain cases, the geophysical features of that certain marine area would make equidistance method inappropriate as a provisional starting line. As established in the North Sea cases, a different method that does achieve an equitable result should be chosen as a starting point. See discussions in Chapter 5.
42 For details see discussions in section II of Chapter 5. See also Bangladesh/Myanmar case 34-37 [83]-[91].
43 Because, when ITLOS is found well understood the fact that determination of the extent of the entitlement to the continental shelf beyond 200 nm is linked with the outer edge of the continental margin, it did not take any initiative to identify that outer edge of the continental margin. For details, see discussion in Chapter 5.
overlapping of entitlement and the engagement of the CLCS is expected as an outcome of the Convention. Neither the ITLOS nor the Arbitral Tribunal made any effort to produce such establishment or engagement. Although the non-determination by the ITLOS of the terminus point of the boundary line beyond 200 nm created an opportunity for the Arbitral Tribunal to engage the CLCS to determine the extent of the entitlements of the disputant States on the continental shelf beyond 200 nm with an aim to assessing the overlapping of entitlement beyond 200 nm, the Arbitral Tribunal seemed to disregard this opportunity and, thus, as a conventional institution, avoided its institutional responsibility to show respect to the mandates vested in other conventional institutions. These decisions of the ITLOS and the Arbitral Tribunal established a bad precedent that may create difficulties in future delimitations beyond 200 nm.

As has been argued, this kind of overriding of institutional mandates infers disregard of the CLCS’s intermediate authority, as designated by the international community, to interpret and make recommendations as to the claims of the States regarding the outer limits of their LCSs beyond 200 nm. On the contrary, institutions created under UNCLOS should be ‘complementary to each other so as to ensure coherent and efficient implementation of the convention’.

Such a departure is alarming, not only for the integrity and transparency of the institutions established under the prerogatives of UNCLOS, but also for the sustainability and effective application of the UNCLOS provisions in future delimitation—particularly delimitations that are sensitive for reasons of regional security. More strikingly, such a deviation questions the need for constituting the institution of the CLCS in the first place and for the institutional organogram constructed by UNCLOS that presupposes an international agreement to ensure equitable solutions when achieving the purpose of UNCLOS—to create an equitable international economic order.

As has been clarified, the boundary line beyond 200 nm did not attain the maximum reach of the OCS of Bangladesh as specified in its submission to the CLCS and thus the principle

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44 Bangladesh/Myanmar case, 110 [373].
45 For example, delimitations in the South China Sea, Caribbean Sea, Arctic Sea, and in Antarctica.
46 Preamble of the UNCLOS.
of the no cut-off effect can be seen to have been grossly violated. This is a significant shortcoming in the BoB judgements. The individual decisions of the ITLOS and the Arbitral Tribunal in this regard exemplify the fragmentation of international law. While the ITLOS supported delimitation before delineation and thus refrained from deciding the outer limit of the LCS beyond 200 nm of the disputant States and while it left the terminus of the boundary line beyond 200 nm undetermined, the arbitral tribunal, absent the recommendations from the CLCS, assumed the delineation of the outer limit of Bangladesh’s LCS beyond 200 nm on the basis of the submission made by Bangladesh to the CLCS and paid no attention to reach the boundary line to that limit. Arguably, this has created confusion as to whether the substantive provisions of Article 76 are complementary to each other. Again, the judicial approach in identifying the relevant coasts and relevant areas for the delimitation beyond 200 nm is problematic. The arbitral tribunal’s reliance on the coastline for identifying the relevant coast for delimitation beyond 200 nm, although supported by the geophysical structure of the BoB, might not be suitable in other marine areas as a consequence of its very particularity. It would be more appropriate for the Arbitral Tribunal to consider the 200 nm opening for identifying the relevant coasts and relevant areas for delimitation beyond 200 nm and, thus, it would be more equitable if the disproportionality test for the delimitation beyond 200 nm could be carried out separately from that within 200 nm.

Nonetheless, the creation of grey areas warranting collaboration was unprecedented in maritime jurisprudence and, at the same time, alarming for the CPBD. Both the ITLOS and the Arbitral Tribunal decided to accord the duality of entitlements among the countries as a practical consequence of the arbitrations, thus leading to the Grey Area. In both the cases, they refused to comment on the relative primacy of the EEZ or the continental shelf in the Grey Area. As a result of the decisions, Bangladesh has been accorded continental shelf rights throughout this Grey Area, whereas India and Myanmar have the sovereign rights of the EEZ regime in certain portions. In one isolated situation, there is an overlap between the EEZs of India and Myanmar. As argued before, grey areas are easy to

47 See generally Bangladesh/India arbitration, [498]–[507]; Bangladesh/Myanmar case, [467]–[475].
conceptualise, but very hard to put in practice.\(^{48}\) The decisions as to implement grey areas caused the overlapping of maritime zone rights\(^ {49}\) and thus created uncertainty as to the judicial settlement process, paving the way for potential future disputes and conflicts; whereas, resolving a dispute once and for all is the function of the third-party settlement.\(^ {50}\)

Taking all these into account, it can be argued that, as such the rejection of the obligatory use of the equidistance principle by the ICJ in the North Sea cases challenged the effectiveness of the 1958 Geneva Convention, the non-compliance with the Article 76 process in the BoB cases in delimitations beyond 200 nm has challenged the effectiveness of the legal regime of maritime delimitation as specified in the UNCLOS. The judicial decisions made in the BoB cases in this regards could be seen as decisions preferring apportionment more than delimitation. Again, decisions as to grey area resembles a decision ex aequo et bono which creates uncertainty and raised question as to the effectiveness of the CPBD. To reduce these difficulties and uncertainties and to ensure the effectiveness of the law on maritime delimitation as well as of the CPBD in resolving future disputes, further progress in maritime delimitation is required.

When one refers to the Convention as both strong and resilient, what is meant is the recognition that it is not perfect and complete.\(^ {51}\) The Convention ‘was the product of an unprecedented effort to provide a universally applicable legal framework for the legal ordering of the oceans’.\(^ {52}\) However, it is also noted that the Convention was ‘able to formulate the legal regime only as it had developed, or was in the process of developing’,

\(^{48}\) Because, it is analogous to a situation where you cannot touch the trunk and the branches of a tree, but the leaves you can pluck. This “grey area”, unless managed properly, will generate confusion and disputes regarding the applicable substantial, rational, material and procedural jurisdiction of the coastal States over persons, property and resources. Especially, the management of the ‘suction effect’ of the transboundary oil and gas resources underlying with the seabed and subsoil is vital for bilateral relations of the littoral States. See Arpita Goswami, ‘The Award and its Implications’ Economic & Political Weekly (online journal) <http://www.epw.in/node/129745/pdf>.

\(^{49}\) Because, although coastal States’ right to continental shelf and EEZ legally exist on different planes, but geographically, these rights refer to same marine area.

\(^{50}\) See discussions in section IV of Chapter 5.


\(^{52}\) David D Caron and Harry N Scheiber, ‘Bringing New Law to Ocean Waters’ in David D Caron and Harry N Scheiber (eds), Bringing New Law to Ocean Waters (Martinus Nijhoff Publishers, 2004) 3.
which it ‘does not put an end to a further development of the legal regime’.\textsuperscript{53} UNCLOS has been termed flexible ‘for the further development of roles on subjects’ and it is expected that ‘over time [it] will incorporate new, more modern … standards’ for various subjects.\textsuperscript{54} It is said that ‘[l]aw always develops’\textsuperscript{55} and that this ‘is something to live by’,\textsuperscript{56} since the non-adaptability of law to changing circumstances imperils its continuity.\textsuperscript{57} It is not expected that any law can regulate all possible relations of a given field, but ‘there must be provision for the unexpected and the unforeseen’.\textsuperscript{58} It has been suggested that ‘we are engaged in a constant and haphazard search for better ways to govern ourselves’.\textsuperscript{59} Therefore, the further development of the law of the sea has not been unexpected, even by the Secretary-General of the United Nations.\textsuperscript{60} It is likely that even the president of the Third Conference did not see the provisions for EEZ and continental shelf delimitation adopted in the conference as progressive developments in law.\textsuperscript{61} Because of the lack of normative standards for maritime delimitation, the formation of an external international


\textsuperscript{54} ‘UNCLOS Major Achievements, Bay of Bengal Delimitation Case: The Role of a Judge ad hoc’ (Video lecture of Prof. Oxman recorded at Washington DC, USA, ASIL Annual Meeting, March 2012 as LOS Reports Masterpieces, vol. 2, by Law of the Sea Interest Group, American Society of International Law, and posted at Vimeo by Miguel G Garcia Revillo) 00:06:30-00:14:00< http://vimeo.com/49924358>.


\textsuperscript{57} ‘UNCLOS Major Achievements, Bay of Bengal Delimitation Case: The Role of a Judge ad hoc’ (Video lecture of Prof. Oxman recorded at Washington DC, USA, ASIL Annual Meeting, March 2012 as LOS Reports Masterpieces, vol. 2, by Law of the Sea Interest Group, American Society of International Law, and posted at Vimeo by Miguel G Garcia Revillo) 00:06:30-00:14:00< http://vimeo.com/49924358>.


\textsuperscript{60} The Secretary-General of the United Nations, in his speech delivered while opening the Third United Nations Conference on the Law of the Sea, mentioned that ‘[t]he essential purpose of the Conference was to establish a viable agreed legal basis for international co-operation without conflict and in the interest of all mankind……and …..the task would become substantially more difficult if the world waited for the development of new [issues] and for the inevitable intensification of existing uses.’ That means that he did not ruled out the possibility of further development, what he wanted to establish an immediate legal basis to meet the existing challenges of that time. See Official Records of the Third United Nations Conference on the Law of the Sea, Volume I, UN Doc A/CONF.62/ SR.1 (3 December 1973) 3.

\textsuperscript{61} This view has been held, since the President of the Third Conference, Tommy T B Koh, did not make any remarks regarded to applicable rules of delimitation for delimiting EEZ and Continental Shelf in his Statement at the final session of the Conference. See Koh, ‘Constitution for the Oceans’, above n 2 in Chapter 1.
basis for the application of UNCLOS was also suggested.\textsuperscript{62} It is recommended that a ‘strong mechanism for the settlement’\textsuperscript{63} of disputes and a new mechanism for avoiding divergences of case law be devised.\textsuperscript{64}

Again, the effective and peaceful settlement of disputes concerning the interpretation and application of the provisions of the Convention ‘is not just a requirement of the “just and peaceful legal order” prescribed by the Charter of the United Nations; it is also a necessary prerequisite for the rational and economic use of the energies and resources of nations and individuals’.\textsuperscript{65} The economic importance of the continental shelf and the EEZ have produced an attitude whereby States ‘attempt to acquire the largest maritime spaces possible’, giving rise to international disputes regarding maritime delimitation.\textsuperscript{66} It is predicted that disputes over maritime delimitation will continue since the exploration of sea resources by States will expand, necessitating efforts to delimit maritime spaces.\textsuperscript{67} Therefore, it is emphasised that a set of effective rules of maritime delimitation is necessary for enjoying the legal uses of maritime spaces.\textsuperscript{68} Nonetheless, while it is recognised that UNCLOS is an important tool for the prosperity and sustainable development of all\textsuperscript{69}, at the same time, the need for an agreed legal framework for certain, stable and sustainable dispute settlement procedures is recognised. Given the specific character of maritime delimitation, Judge Fitzmaurice was correct in stating that ‘justice requires … a further rule or body of rules’ for the effective application of the rules of law.\textsuperscript{70}

\textsuperscript{63} Treves, ‘Ten Years After Entry’, above n 51, 353-354.
\textsuperscript{65} Thomas a Mensah, ‘The Role of Peaceful Dispute Settlement in Contemporary Ocean Policy and Law’ in Davor Vidas and Willy Ostreng (eds), \textit{Order for the Oceans at the Turn of the Century} (Kluwer Law International, 1999) 81-82.
\textsuperscript{66} Tanaka, ‘Predictability and Flexibility’, above n 49,2.
\textsuperscript{68} Tanaka, ‘Predictability and Flexibility’, above n 49, 2.
All things considered, it can be concluded that, to settle maritime boundary disputes effectively, efficiently and equitably through either negotiation or adjudication, to avoid overlapping of jurisdiction between the institutions set under UNCLOS and to prevent the possible fragmentation of international law regarded to maritime delimitation and to address new issues affecting delimitation, further development of the international law of maritime delimitation is necessary. As has been examined, it is possible to establish a framework for equitable solution regarding the delimitation of the EEZ and the continental shelf within the scope of existing legal frameworks based on principles of equity and taking into account the approaches of the international courts and tribunals.

Based on the findings and arguments as discussed, this thesis proposed adopting a framework of equitable solution towards completing the unfinished progressive development of the law of the sea. The international case law on maritime delimitation could be the basis for developing such a framework, not only for customary character, but also for their impact on State practices. The features of the proposed framework, as outlined in Chapter 7, should include a definition of maritime delimitation, principles for assessing overlapping areas of entitlements, applicable principles and criteria for equitable solution and separate delimitation methodologies for delimitation within and beyond 200 nm. This thesis has also produced a ‘road map’ for how a framework could be adopted within the scope of the Convention without it requiring any amendment. As has been argued, adopting an ‘implementing agreement’ in this regard could be the first option, which may be facilitated by the international forum of the ‘Meeting of the States Parties’ established under UNCLOS. Article 31 of the VCLT also welcomes such an agreement. Another option for revision could be through the advisory opinion or comprehensive decision of the ICJ, which is yet to decide a case for delimitation beyond 200 nm and has

71 Because, according to Articles 74 and 83, a maritime boundary disputes, whether it is resolved either by bilateral negotiations or compulsory procedures entailing binding decisions, must produce an equitable solution; and the holistic approach of equitable solution is well developed in case law.


The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
an immediate opportunity to do so in the case between Nicaragua and Colombia\textsuperscript{73} that is now pending before it. Further, the current non-accession status of the US may play a catalyst role through the subsequent renewal of US leadership and responsibility for the law of the sea as part of the progressive development of the law of maritime delimitation through a framework for equitable solution.\textsuperscript{74} Koh’s view warrants such US accession, since ‘a State not party to the convention could not invoke the benefits of Article 76 as customary law, as the Article contained new law and was part of a compromise involving Article 82’. \textsuperscript{75}

However, the settlement of the boundary dispute in the BoB has removed all residual difficulties for the CLCS in making recommendations on the submissions made by the littoral States.\textsuperscript{76} As observed by the Judges \textit{ad hoc} Mensah and Oxman, since the CLCS’s recommendation making ‘process is neither adjudicative nor adversarial’, the judgment or award of the \textit{Bay of Bengal} cases do not prejudice the right of of the disputant Parties

\textsuperscript{73} \textit{Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)} < http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nicolb&case=154&k=02>.  
\textsuperscript{76} See section III B (2) in Chapter 5.
under paragraph 8 of article 76 to establish *final and binding* outer limits of its continental shelf on the basis of the CLCLS’s recommendations through the process prescribed by the Convention.\(^77\) If the CLCS approves the submissions made by the disputant parties in the BoB cases, the question remains as to the appropriate response from Bangladesh. Since the decisions of the international courts and tribunals are final and binding in nature, any attempt by Bangladesh to extend its boundary line to the outer limit of its LCS is impractical. However, a coastal State’s right over the continental shelf do not depend upon occupation or an express proclamation,\(^78\) rather on the basis of its entitlement to continental shelf within and beyond 200 nm.\(^79\) What Bangladesh can do to explore its shelf rights beyond the delimitation line, it can propose India and Myanmar to involve in joint development agreement so that marine resources lying in the overlapping area of entitlements of these three States can be managed and developed under joint cooperation. The negotiation of such agreement can take its start with their negotiation regarded to the joint collaboration in the grey area zones. This could be a step forward to the transboundary ocean governance in the BoB in an integrated and sustainable manner.

The conclusion of this thesis is that, in the course of the judicial settlements of the maritime boundary disputes of Bangladesh in the BoB cases—as far as maritime delimitation within 200 nm was concerned—the legal regime of maritime delimitation was effective in producing equitable solutions in an equitable manner; however, in delimitations beyond 200 nm, the legal regime of maritime delimitation was less effective and lacked the appropriate judicial approaches for ensuring the equitable manner of its solutions. The solutions produced in the BoB cases *obviously* reflected equitable solutions, but, as far as the delimitation beyond 200 nm concerns, they could have been more equitable by way of ensuring an equitable manner, if either of the judicial organs could engage the CLCS in the delimitation of the marine areas beyond 200 nm, and the boundary line of the continental shelf beyond 200 nm could have been extended to the maximum reach, ie, to the outer limit of Bangladesh LCS beyond 200 nm after it had been

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\(^78\) UNCLOS, Article 77 (3).

\(^79\) UNCLOS, Article 76.
established on the basis of the recommendation the CLCS; and thus could ensure the holistic approach of equitable solution as established in the maritime jurisprudence. The judicial decisions in the BoB cases, so far they relate to maritime delimitation beyond 200 nm, should not bear any precedential weight in future maritime delimitations beyond this limit. To ensure an equitable solution in equitable manner, whether it is produced through bilateral agreement or CPBD, States should take initiatives to adopt a framework for equitable solution. This will not only shape the international legal regime of maritime delimitation, but also ensure the achievement of the purposes and spirit of the Convention.
APPENDIX I

Article 76 of the UNCLOS

Definition of the continental shelf

1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 [nm] from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.

3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 [nm] from the baselines from which the breadth of the territorial sea is measured, by either:

   (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 percent of the shortest distance from such point to the foot of the continental slope; or

   (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 [nm] from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 [nm] from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 [nm] from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 [nm] from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.

7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 [nm] from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 [nm] in length, connecting fixed points, defined by coordinates of latitude and longitude.
8. Information on the limits of the continental shelf beyond 200 [nm] from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

9. The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto.

10. The provisions of this Article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.
APPENDIX II

Applicable Methods for Maritime Boundary Delimitation

1 Median or Equidistance Principle

The median or equidistance line principle, as described in Article 15 of the Convention and in Article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone, is that line every point of which is mathematically equidistant from the coastlines of each State. Based upon this definition equidistance line can be divided into two types—strict equidistance line and simplified equidistance line. A strict equidistance line would take into account all coastal extremities in calculating the line which would result, in a vast majority of the cases, in a complex and unpractical line made of multiplicity of turning points and short straight lines segments; while a simplified equidistance line (Figure 30) is drawn simply by reducing the number of base points or turning points, and in effect this simplified equidistance line does no result in any significant difference regarding the net area of maritime space attributed to each State involved in the delimitation. Delimitation jurisprudence evidence that the international court or tribunal, in most of the delimitation cases, used the simplified version of equidistance while drawing a PEL.

However, in drawing a delimitation line, the technical notion of the equidistance method is distinct from the legal notion of equidistance. Importantly, the latter regards to the legal aspects relating to the entitlement of States to maritime areas, and the limits that are prescribed by international law. Towards giving effect to this legal notion of maritime entitlement, a third category of equidistance line principles has been evolved which is known as ‘adjusted or modified equidistance line. A modified equidistance line is an equidistance line which becomes rationale to temper the use of equidistance in a concrete case where relevant geographical features have not been accorded their full potential effect

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in accordance with their legal entitlement. The intent of such modification is to allocate to one State areas that would be attributed to another State should strict equidistance would be used. However, it must be noted that the term modified equidistance does not refer to a method per se, rather refers to a line that may be arrived at by various methods and/or ad hoc approaches, for example, by equidistance/special circumstances method. The fact is that such modified or adjusted equidistance line is mostly used in the latter method of delimitation.

Besides the aforementioned equidistance principles, equi-ratio method is another method related to equidistance which is devised by Langeraar, a former Dutch Hydrographer. According to him, an equi-ratio line is a boundary line between either adjacent or opposite coastal States, every point of which is at a distance from the nearest basepoint of one of the States that bears a constant ratio to its distance from the nearest basepoint of the other State. Geometrically, equidistance line is a composite made up of a number of straight lines which are parts of perpendiculars, bisectors of the two nearest base points of each State, and thus equidistance is merely a particular case of equi-ratio where the constant ratio is 1.0 One particular case of the equidistance method is the situation in which the coasts of three States abut on the same oceanic area. The application of the equidistance method leads, then, to the identification of a point that is equidistant from the baselines of the three States, usually known as tri-junction point (or tri-point).

Equidistance principle has mostly been used in the bilateral agreements between States. In some cases, the international courts and tribunals has found its application resulting an equitable solution while in most other cases they preferred modified or adjusted equidistance line which they applied under the banner of equidistance/special circumstances method. As asserted by the ITLOS, the equidistance/relevant circumstances

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4 Ibid.
6 Ibid. See also Antunes, above n 3, 171.
method is adopted by international courts and tribunals ‘in the majority of the delimitation cases that have come before them’.7

![Figure 30 Equidistance Method](image)

2  **Perpendicular Line to the General Direction of the Coast**

This method consists of drawing a perpendicular line to the general direction of the coast. In this method it is presupposed that the sinuosity of the coastlines is represented by lines that have no indentations or protuberances whatsoever and thus a ‘flattened coasts’.8 What it means is that a perpendicular line simplifies the coastal geography to the highest degree, where the location of the baselines plays an important role in determining the general direction (Figure 31).9 In this sense, this method is seen as a very simplified version of the equidistance method that can be used in combination with other methods or on its own.10 Because when direction of the coast is simplified to the point of becoming a straight line, the perpendicular thereto becomes nothing less than an equidistance line.
The use of the perpendicular line is more frequent in the case of adjacent States which present coasts that are more or less straight. Before the application of this method, it is important that the parties agree precisely on the sector of the coasts to be considered in this process. Unless the use of a straight baseline system is accepted by the two adjacent States, application of this method will be difficult to conceive when concave or convex coastlines are at issue, or when the coastlines are not altogether straight, or when various islands are situated in front of the coast of the States. Despite such difficulties, this method had been used by the international courts and tribunals in several cases and has also found its place in State practice. The Grisbadarna arbitration, the Gulf of Maine case, and the Guinea/Guinea–Bissau arbitration are examples of maritime adjudication resorting to this method. Conversely, agreement between Estonia and Latvia, Lithuania and Russia, Latvia and Lithuania, Argentina/Uruguay, Brazil/Uruguay can be named as examples of State practice resorting to this approach.13

12 Source: Antunes, above n 3, Vol 2, 441 (Adapted).
Angle-Bisector Method

Angle-Bisector is, in effect, an approximation of an equidistance line from the flattened coasts (Figure 32). At the same time, it should be noted that ‘while the angle-bisector method can be viewed as a variant of equidistance, it lacks the precision of equidistance’. In this regard, it must be noted that the perpendicular method is a particular case of this bisector method, since a perpendicular is the bisector of an angle of 180 degrees. The precise feature of a bisector line is that it starts from the point of intersection between the straight lines at the very terminus of the land boundary. Nevertheless this condition be met; it is difficult to pursue a bisector line for a very practical reason. Indubitably, it is possible to draw several straight lines in various direction from the same terminus of the land boundary reflecting the general direction of the respective coasts of the parties which will often produce different angles and bisectors. Despite such difficulties, this method has been applied by the international courts and tribunals in several cases successfully.

One interesting point to take account is that though a bisector should start from the very terminus of the land boundary, maritime jurisprudence evidence that such bisector may not always necessarily be started from such terminus point of the land boundary. For instance, the last segment of the delimitation line in the Anglo-French arbitration is a bisector which starts out from the median point between Scilly Isles and Ushant island, and the first segment of the delimitation line in the Gulf of Maine case is a bisector which does not start at the terminus of the land boundary, but from a point agreed between the parties. Again in the Nicaragua/Honduras case, the Court because of the instability of the coasts started the bisector line from a point situated at a distance from the coast.

14 Bangladesh/Myanmar case, 74 [234].
15 Bangladesh/Myanmar case, 3 [6] (Joint declaration of Judges ad hoc Mensah and Oxman)
16 Antunes, above n 3, 167.
17 Bangladesh/Myanmar case, 75 [236].
18 Tunisia/Libya case, 18, 94[133 (C) (3)]; Gulf of Maine case, 246, 333[213]; Guinea and Guinea-Bissau case (Decision of 14 February 1985), ILR, Vol. 77, 635, 683-685[108]-[111]; Nicaragua/Honduras, 659, 741[272], 746[287]
19 The last segment of the delimitation from point M to point N is a bisector line ‘which bisects the area formed by, on its south side, the equidistance line delimited from Ushant and the Scilly Isles and, on its north side, the equidistance line delimited from Ushant and land terminus pont of the United Kingdom (without taking account the Scilly Isles) ’. See Anglo-French arbitration, 118[254].
20 See Gulf of Maine case, 333[213].
21 Nicaragua/Honduras case, 659, 741[272], 746 [287].
Apart from the above mentioned methods, enclaving is another method of delimitation which may be used independently or in conjunction with some other method of delimitation. In this method ‘a maritime belt of a certain breadth is drawn around (a) island by means of a line made of arcs of circles drawn from the most seaward basepoints’ of the island. International practice established this idea that the breadth of such belt cannot exceed 12 nm, the breadth of territorial sea. Generally, this method applies where islands are located either in the vicinity of the equidistance line between mainland coasts, or on the 'wrong side' thereof and when no effect or partial effect is given to an island (Figure 33). In practice, application of this method is inextricably linked and in parallel with the application of equidistance. International courts and tribunals very often use this method in cases where the islands of one State are located either in the close proximity of the coast of other State or in the area of overlapping potential entitlement or entirely isolated within the maritime zone of another State. Based on the location of the island, there developed two types of enclaving: first, ‘full enclave’ where the island is completely isolated and

22 Nicaragua/Honduras Case, 750, 757.
23 DOALOS, above n 2, 59.
24 Antunes, above n 3, 173.
25 DOALOS, above n 2, 59.
located in the maritime jurisdiction of another State; second the ‘semi-enclave’ where the islands are situated close to the delimitation line drawn without taking account of the islands concerned. Until to date Nicaragua/Colombia is the only case where the Court used both full and semi-enclave along with equidistance method. This method has also been used in the Anglo/French, Sharjah/Dubai arbitration, and in the Nicaragua/Honduras and Bangladesh/Myanmar cases. Application of this method is also evident in State practice. For example, Italy and Tunisia used this method in conjunction with the meridians and parallels in delimiting boundaries of the different islands belonging to Italy.

![Figure 33 Enclaving](image)

### 5 Thalweg System

The thalweg is a line drawn to join the lowest points along the entire length of a streambed or valley in its downward slope, defining its deepest channel. It serves historically to secure for each State an equal area of safe navigation, and is usually applied with rivers.

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26 Ibid.
27 *Nicaragua/Colombia* case, 2012, 714
28 Lauterpacht/1960, pp.216-226; Aasen, above n 1, 9 nn 39.
29 Antunes, above n 3, 174.
Thus, its rationale is one of equality where the navigation interests of the two riparian States are the key consideration to weigh. Using the method in maritime delimitation may call for a variety of interpretations as it distinguishes itself from a traditional river or valley’. Despite such view, since ‘thalweg may be transposed to any coastal ‘Navigable channels’, its application may become important in maritime delimitation to protect the navigation interests of the concern coastal States.

6 Parallel Lines

The parallel lines method consists of ‘two parallel straight lines producing a long narrow band of maritime space’ to avoid ‘the cut-off effect produced by the convergence of equidistance lines in front of the coast of one of the parties’. This method is often addressed as ‘corridor’ as well (Figure 34). In the history of maritime jurisprudence, this method has been used once only in the Canada/France arbitration, where the Tribunal after enclaving the Saint-Pierre and Miquelon Islands, established a 10.5 mile wide parallel lines in the southern sector of the delimitation extending up to a distance of 200 nm from the islands. Such method was also adopted in the maritime agreement between France and Monaco. It is worth mentioning that the application of this method is based on the considerations of equity.

30 Aasen, above n 1, 9 nn 39.
31 Antunes, above n 3, 175.
32 DOALOS, above n 2, 61 (emphasis in original).
33 Antunes, above n 3, 180.
34 DOALOS, above n 2, 62.
35 Bilateral Agreement between France and Monaco (Maritime Boundary), 16 February 1984, IMB, 1581-1590.
Canada/France Arbitration (around St. Pierre and Miquelon Islands)

Maritime agreement between France and Monaco

Figure 34 Parallel Lines Method\textsuperscript{36}

\textsuperscript{36} Antunes, Vol 2, 445, 462 (Adapted).
APPENDIX III

SPECIAL OR RELEVANT CIRCUMSTANCES

At the very outset, it should be made clear that there is a legal difference between the two terminologies, special circumstances and relevant circumstances. The concept of special circumstances has been seen as different from that of relevant circumstances. The reason might be that while the rule relating to the territorial sea refers to special circumstances, the rule pertaining to the EEZ and continental shelf refers to relevant circumstances.\(^1\) Another reason might be that the former evolved from treaty law and has a close relation with equidistance principle, while the later evolved from customary law and has a functional relation with the principle of equity.\(^2\) But it is possible that a single circumstance may be treated as special circumstances while determining the territorial sea delimitation and the same circumstances may be treated as relevant circumstances while determining the delimitation of EEZ and continental shelf. This might be the reason, the Court in the Jan Mayen case deduced the difference between these two terminologies by assimilating them and treating them same in effect since both are intended to enable the achievement of an equitable solution.\(^3\)

However, the consideration of special circumstances and relevant circumstances are common to both in judicial and States’ practice on maritime delimitation. But branding such circumstances as delimitation criteria basically developed in the judicial decision-making process which may include any factor or circumstance requiring consideration for effecting a final delimitation line of equitable nature. The law on maritime delimitation as developed in international law does not provide any closed list of special or relevant

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2 The term ‘special circumstances’ used in Article 15 of the Convention regarded to the delimitation of territorial sea. It was also used in Article 12 of the 1958 Convention on the Territorial Sea and in Article 6 of the 1958 Convention on the Continental Shelf. On the other hand, the term ‘relevant circumstances’ evolved from international case law on maritime delimitation, especially from the North Sea cases and its continuous practices in later cases imposed a customary character on it. See Article 15 of the Convention and North Sea cases, 53 [101]. See also SHI Jiuyong, above n 1, 284; Rober Kolb, Case Law on Equitable Maritime Delimitation (Martinus Nijhoff Publishers, 2003) 458.
3 Jan Mayen Case, 62 [56].
circumstances and at the same time it is not fully open ended as well. The reason might be that it is not possible for a court to take account all factors or circumstances as criteria to be applied to delimitation.

So far it is found in maritime jurisprudence as well as in the scholarly writings, the factors or circumstances that have been considered as special or relevant circumstances can be divided into two different groups: one group relates to geographical circumstances and another group relates to non-geographical circumstances. The following discussions may reasonably address various kinds of circumstances that included in these two main groups of special or relevant circumstances.

**A Geographical Circumstances**

It is obvious that geographical factors play an important role in maritime delimitations.\(^4\) It is found that the international courts and tribunals, while determining the delimitation disputes, generally begins their findings with the general description of the area in which the delimitation operation is to be carried out. As such the Court in the *Libya/Malta* case stated that ‘[i]t is appropriate to begin with a general description of the geographical context of the dispute before the Court’.\(^5\) The geographical factors which are mostly attributed as special or relevant circumstances are as follows:

\section*{1 Physical Geography or Configuration of the Coasts}

The coastal geography is at the centre of any maritime delimitation. Its importance is so significant that every judicial decision on maritime delimitation has taken it into account. Particularly in the *Nicaragua/Colombia* case, the overall geographical context considered as relevant circumstances.\(^6\) The most important factors that have been considered under physical geography of the coast includes adjacent or opposite coasts, general direction of the coast, and concavity or convexity of coasts.

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\(^5\) *Libya/Malta* Case, 20 [14].

\(^6\) *Nicaragua/Colombia* case, 714 [236].
Adjacent or Opposite Coasts

The international courts and tribunals always have given great importance to the distinction between adjacent and opposite coasts and have frequently taken the adjacency or oppositeness of the coasts into consideration when evaluating the appropriateness of the equidistance method. The case law evidence the fact that though the international courts and tribunals initially preferred equidistance or median line method for delimitation between opposite States and flexibility of delimitation methods between adjacent States, but later on they started relying on the equidistance method for delimitation between both adjacent and opposite States and thus the distinction between adjacent and opposite coasts has been seemed to be reduced in case law. For example, the Court in the North Sea cases held equidistance or median line method suitable for delimitation between opposite States and this tendency prolonged up to Jan Mayen case. The reason of such distinct view has been detailed in the Court’s dictum ‘[w]hereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other’. But the Qatar/Bahrain judgement made a major breakthrough in this regard by accepting the applicability of the equidistance method in delimitation between adjacent States and in all subsequent cases between the adjacent States, the international courts and tribunals preferred equidistance method as the starting point for effecting delimitation. Sometimes the configuration of the coasts may represent a hybrid character of the coasts by being both adjacent and opposite. For instance, the tribunal in the Anglo-French arbitration regarded the coasts of the two States as opposite while considering delimitation in the English Channel region and as adjacent States, while considering delimitation in the Atlantic region. In recent times, in the Rumania/Ukraine case, the Court considered the

7 North Sea cases 36-37 [57]-[58]; Angolo-French arbitration, 57 [97]; Libya/Malata case, 51 [70].
8 North Sea cases, 37 [58].
9 Tanaka, ‘Predictability and Flexibility’, above n 4,153.
coasts of the States both as adjacent and opposite taking account their physical geography.\textsuperscript{10}

Notwithstanding, the recent practices of the international courts and tribunals is convincingly lead to this view that the provisional use of equidistance method is more appropriate in cases between adjacent States and median line between opposite States. For example, the Court in the \textit{Rumania/Ukraine} case applied equidistance method for adjacent coasts and median line method for opposite coasts.\textsuperscript{11} And in all later cases between the adjacent States, the international courts and tribunals preferred equidistance method as the starting point for effecting a delimitation.

\textit{(b) Concavity or Convexity of Coasts}

Concavity or convexity of the coastal geography is one of the most important relevant circumstances that play its role as one of the most important relevant circumstances regarded to configuration of the coast. In the \textit{North Sea} cases, the Court identified and stressed on this geographical configuration to reject the inequitable application of the equidistance method because of the distorting effect produced by it in an area of the sea fronting a concave or convex coast.\textsuperscript{12} In \textit{Libya/Malta} case concavity or convexity of the coast has been considered as relevant circumstances not only to reject the obligatory character of the equidistance method but also to achieve an equitable result by way of adjusting the cut-off effect of an equidistance line to ensure a proportionate result. As Stated by the Court, the equidistance line ‘may yield a disproportionate result where a coast is markedly irregular or markedly concave or convex’.\textsuperscript{13} In terms of considering concave or convex coast as a relevant circumstance, the international jurisprudence has made two things clear: first, concavity or convexity of the coast cannot be taken into

\textsuperscript{10} According to the Court, ‘[u]krainian coast consists of two portions — one adjacent to the Romanian coast, the other opposite to it’ and the Court accordingly considered the base points separately, ‘according to whether the adjacent or opposite portion is concerned’. See \textit{Rumania/Ukraine} case, 105 [128].

\textsuperscript{11} \textit{Rumania/Ukraine} case, 108 [137].

\textsuperscript{12} According to the Court, ‘where two such lines are drawn at different points on a concave coast, they will, if the curvature is pronounced, inevitably meet at a relatively short distance from the coast, thus causing the continental shelfarea they enclose, to take the form approximately of a triangle with its apex to seaward and, as it was put on behalf of the Federal Republic, “cutting off” the coastal State from the further areas of the continental shelf outside of and beyond this triangle’. See \textit{North Sea} cases, 17 [8].

\textsuperscript{13} \textit{Libya/Malta} case, 44[56], 51[70].
account if it does not lie ‘within the area to be delimited’; \(^1^4\) second, concavity or convexity is not a relevant circumstances in the delimitation of the territorial sea since it does not produce a significant cut-off that warrants adjustment of the equidistance line,\(^1^5\) while it is per se a relevant circumstances in the delimitation of EEZ and continental shelf for their greater extent, nevertheless it is held that concavity per se is not necessarily a relevant circumstance, unless an equidistance line drawn between two States produces a cut-off effect on the maritime entitlement of one of those States, as a result of the concavity of the coast.\(^1^6\)

\((c)\) **General Direction of the Coast**

General Direction of the coast is a notion fluid enough to be susceptible of representation through a straight line on a chart based on coastal projections.\(^1^7\) The general direction of the coast is a relevant circumstance common to all maritime boundaries. It is particularly important in delimitation between adjacent coasts where perpendicular method is being used (Figure 35). The determination of the general direction of the coast was at issue in the *Tunisia/Libya, Gulf of Maine and Guinea/Guinea–Bissau cases.*\(^1^8\) Nevertheless, it has been shown to play an important role in all delimitation cases for several aspects: first, the Court has to follow the general direction of the coasts while determining the relevant coastal length required for assessing the equitability of a delimitation line; Second, decision regarded to the controlling base points for drawing a delimitation line must respect the general direction of the coast;\(^1^9\) third, nevertheless the Courts rejects any sort of activities that refashions the geography, but for the sake of an equitable solution, if decision regarded to general direction of the coast amounts to some refashioning of the coast, it seems reasonable.\(^2^0\) For example, in the *Guinea/Guinea–Bissau* case, the arbitral Tribunal relied on a macro-geographic perspective in determining the general direction of

\(^1^4\) *Cameroon/Nigeria* case, 2002, 445 [297].  
\(^1^5\) *Bangladesh/India* Case, 75 [272].  
\(^1^6\) *Bangladesh/Myanmar* case [292]  
\(^1^8\) *Libya/Tunisia* case 85 [120]; *Gulf of Maine* case, 318-319 [170]-[172]; *Guinea/Guinea–Bissau* case, 297-298 [109]-[111].  
\(^1^9\) *Romania/Ukraine* case, 101 [117], 105 [117]; Antunes, above n 17, 305.  
\(^2^0\) Antunes, above n 17, 305. Tanaka, ‘Predictability and Flexibility’, above n 4,159-160.
the coasts, although this direction refashions the coastal geography by cutting ‘almost all
the coast of Guinea–Bissau for nearly 350 kilometres and runs approximately 70
kilometres inside of the latter’s territory’. It is worth mentioning that such practice found
absent in subsequent cases on delimitation. However, a line directing general direction of
the coast may reasonably be misunderstood as one of the straight baselines. But the case
law provided decisions that are worthy enough to rule out any such misunderstanding. For
instance, the Court in Libya/Malta case disregarded Maltese straight baselines drawn
around Filfla Island. In the Guinea/Guinea–Bissau case, the Tribunal held that the issue
of straight baselines are irrelevant, since ‘these lines depend on the unilateral decision of
the States concerned and do not form art of [delimitation] dispute[s]’. This decision of
the Tribunal was confirmed in the Eritrea/Yemen arbitration when the Tribunal held that
this is ‘hardly a matter that the Tribunal called upon to decide’. Last but not the least,
whether drawing a equidistance line is appropriate in a given circumstances, general
direction of the coast plays an indicative role in so determining.

Figure 35 General Direction of the Coast

21 Tanaka, ‘Predictability and Flexibility’, above n 4,159-160.
22 Libya/Malta case, 48 [64].
24 Eritrea/Yemen arbitration, II. [142].
25 Antnes, Vol 2, 510 (Adapted).
2 Islands

Islands are special circumstances as much in the delimitation of the territorial sea as the relevant circumstances in the delimitation of EEZ and continental shelf.26 According to Article 121 of the Convention, an island is a naturally formed area of land, surrounded by water, but remains above water at high tide, and entitled to claim all maritime zones like a coastal State, except that rocks which cannot sustain human habitation or economic life of their own have no exclusive zone or continental shelf.27 Thus, the capacity of island to generate maritime entitlements automatically attributes a by-default relevancy to the presence of any island within the area to be delimited. But this does not mean that the international courts and tribunals while determining a maritime delimitation has always need to consider them as relevant circumstances to give full effect to their entitlement. It depends upon the size and position of the particular island and all other circumstances involved in the particular case that are considered to reach the final delimitation. In terms of relevancy, Bowett categorised islands into two types based on their capacity to generate maritime entitlement: first type of islands appear as ‘the sole unit of entitlement’, and the second type relates to cases where the entitlement of islands appears ‘in conjunction with the entitlement of a larger territorial unit’.28 He further divided the second type of setting in three sub-categories on the basis of their relative position: (a) lying proximate to a mainland coast under the same sovereignty, (b) Straddling a median or equidistant line between ‘mainland’, or (c) proximate to a mainland coast under a different sovereignty.29 According to Antunes, such categorisation of islands in the context of their relevancy primarily based on the ‘representativeness’ of their basepoints, since the ‘representativeness’ of the basepoints of the islands that appear as the ‘sole units of entitlement’ is greater than that of the islands that appears ‘in conjunction with the entitlement of a larger territorial unit’.30 He further added that basepoints on the larger

26 SHI Jiuyong, above n 1, 280.
27 UNCLOS, Article 121.
29 Ibid, 132.
30 Antunes, above n 17, 300-303.
islands with larger coasts contribute more representativeness that the small islands.\textsuperscript{31} The judicial practice regarded to islands seems to support these scholarly views, but with caution. The caution seems to be guided by two basic ideas: first, the effect that would be given to the presence and size of an island must not distort the normal projection of the coasts and precaution must be taken to eliminate if any such possible distorting effect exists. Second, effect should not be given in a way that the final delimitation line exemplifies a disproporti
\textsuperscript{32}onate outcome,\textsuperscript{32} and third, relevancy of the islands may differ from zone to zone delimitation depending on the how much effect it would be given during the delimitation of the territorial sea and during the delimitation of the EEZ and continental self. The notions of full effect, partial effect or no effect and enclaving have been constructed on this premise.\textsuperscript{33} For example, the Tribunal in the Anglo-French arbitration enclaved the Channel Islands, gave half effect to Schilley isles, full effect to Ushant Island, the Court in the \textit{Tunisia/Libya} case gave no effect to Jerba Island while it gave half effect to Kerkennah Islands, in the \textit{Gulf of Maine} case it gave half effect to the Seal Island, in the \textit{Libya/Malta} case gave no effect to Filfla Island, the Tribunal in the Eritrea/Yemen award gave full effect to Dahlaks, Kamaran, Uqban, Kutama islands while gave no effect to the Zubayr group and Jabal al-Tayr group, the Court in the \textit{Qatar/Bahrain} case gave full effect to Hawar and Janan Islands while gave no effect to Qit’at Jaradah and Fasht al Azm islands, in the \textit{Romania/Ukraine} case the Court did not give any effect to Serpent’s Island, as it did not give any effect to the cays in the \textit{Nicaragua/Honduras} case, in the Nicaragua/Colombia case the Court gave Quitasueño and Serrana islands full effect in the delimitation of their territorial sea by enclaving them with 12 nm envelope of arcs and gave no effect for the delimitation of the EEZ and continental shelf while the Court gave full effect to the Santa Catalina, San Andrés islands and East-Southeast cays for the delimitation of the EEZ and continental shelf. Similarly, in the \textit{Bangladesh/Myanmar} case, the ITLOS gave full effect to the St. Martin’s island during the delimitation of the territorial sea whereas it gave no effect to it while determining the delimitation of the EEZ and continental shelf. All these judgements and awards established one general rule that every island situating in an area of overlapping

\textsuperscript{31} Ibid, 303.
\textsuperscript{32} For details see discussion on proportionality in Chapter 4.
\textsuperscript{33} Antunes, above n 17, 162-165, 173-174, 300.
potential entitlement shall be entitled to a 12 nm territorial sea unless an overlap between the territorial sea entitlements of States involved, and whether it is also entitled to a continental shelf and EEZ would depend upon the size and position of the island.

3 Low Tide Elevation

Low tide elevation is a natural insular formation of land which is surrounded by and above water at low tide but submerged at high tide. Unlike the islands which ‘constitute terra firma, and are subject to the rules and principles of territorial acquisition’, a low tide elevation does not generate the same rights as islands or other territory and it cannot be fully assimilated with islands or other land territory from the viewpoint of the acquisition of sovereignty. But, since the presence of such low tide elevation within the limit of the territorial sea may be used as a base point for measuring the breadth of the territorial sea, it reasonably attracts relevancy in the course of delimitation. It becomes crucial when it is situated more close to the coast and as such claiming States’ argued that the low tide elevation should be considered for the selection of base points as well as for determining the maritime boundary line. But the international courts and tribunals have made it clear in several occasions that if a LTEs is situated within the zone of overlapping claims and be referred as ‘minor geographical features’, it should not be used as the basis for delimiting a maritime boundary. Nonetheless, if a low tide elevation is ‘far too insignificant, and its stability far too suspect’, as the South Talpatty/New Moore Island in the Bangladesh/India arbitration, may be disregarded in determining the maritime boundary. In addition relevancy of such minor geographical features becomes more relevant when the question of sovereignty involves with it. Such question of sovereignty becomes crucial in the Qatar/Bahrain case with respect to islands Fasht al Azm, Fasht ad Dibal, Qit’at Jaradah, Nicaragua/Honduras regarded to Bobel Cay, Savanna Cay, Port

34 Nicaragua/Colombia case, 690-691 [178]-[179].
36 UNCLOS, Article 13.
37 Qatar/Bahrain case, 102 [206], [207].
38 UNCLOS, Article 13.
39 Qatar/Bahrain case, 102 [209].
40 Bangladesh/India case, 58-59 [198]-[200]; Romania/Ukraine, I.C.J Reports 2009, 61 [137]; Gulf of Maine case, 329 [201], 332 [210].
41 Bangladesh/India case, 58 [198].
Royal Cay and South Cay, and *Bangladesh/India* arbitration in relation with the South Talpatty/New Moore Island[^42]

4  **Geomorphological and Geological Circumstances**

Geomorphological or geological factors of the submarine area have been taken into consideration by the international courts and tribunals as relevant circumstances in cases dealing with the continental shelf, although they had no direct bearing on the drawing of the delimitation line. In those cases, the international courts and tribunals developed the principles of natural prolongation and non-encroachment on the basis of geological and geomorphological features of the sea bed and held considered them as relevant to the delimitation of boundaries of continental shelf between adjacent or opposite States, only if it could be proved that there are features interrupting the continuity between the two continental Shelf.[^43] For example, the arbitral Tribunal in the *Anglo-French arbitration*, held that ‘...States abut on a single continuous area of continental shelf’…may be said geographically to constitute a natural prolongation of the territory of each of the States concerned’.[^44] The Court, in the *Tunisia/Libya* case convincingly defined geological and geomorphological circumstances[^45] in detail and in so doing, differentiated the potentiality between geological and geomorphological features of the sea bed area for being relevant to the delimitation of the continental shelf. Since the geological features rely on the continuity of the continental shelf, the Court discouraged to accept geological consideration (both geology as a science and geology in its historical aspect) as relevant circumstances.[^46] The reason as to the Court, ‘what must be taken into account in the delimitation of shelf areas are the physical circumstances as they are today; that just as it is the geographical configuration of the present-day coasts, so also it is the present-day sea bed, which must be considered’.[^47] In contrast, since the ‘geomorphological

[^42]: Qatar/Bahrain case, 98-100 [189]-[200]; Bangladesh/India arbitration, 59 [199]; Nicaragua/Honduras case, 704 [144].
[^43]: North Sea cases, 32 [45]; Anglo-French arbitration, 60 [107]; Tunisia/Libya case, 58 [68]:64 [80].
[^45]: The geological circumstances relate to the solid earth and the rocks of which it is composed of while the geomorphological circumstances relate to the landforms and the processes that shape them. See Bjarni Mar Magnnusson, *The Continental Shelf Beyond 200 nautical miles: Delineation, Delimitation and Dispute Settlement* (Publications on Ocean Development, Brill Nijhoff, 2015) 17 nn 55.
[^46]: Tunisia/Libya case, 53-54 [60]-[61].
[^47]: Tunisia/Libya case, 53-54 [60]-[61].
configuration of the sea bed…. do not amount to an interruption of the natural prolongation of one party with regard to that of the other’ the Court considered geomorphological or geophysical factors as a circumstances relevant for an equitable delimitation, even though it had no relevance in that case.\textsuperscript{48} The judgement of the \textit{Libya/Malta} case clear all that midst of misunderstanding that were still remaining. In that judgement, the Court clearly established a general rule of considering relevancy of this submarine features by stating that geological and geomorphological characters of the corresponding sea bed and subsoil shall be no longer relevant within 200 nm extent of the continental shelf, even where there are distinctive features.\textsuperscript{49} It means that the considerations of geological and geomorphological features are relevant only for the delimitation of the continental shelf beyond 200 nm.

\begin{center}
B Non-geographical Circumstances
\end{center}

It is evident in international case law on maritime delimitation that States have raised a broad range of relevant circumstances other than the geographical circumstances. In fact, there are some non-geographical factors which may constitute relevant circumstances in determining maritime boundary. These non-geographical factors are often interrelated and in effect, some of them may overlap. The following discussion will address some non-geographic circumstances which were mostly brought before the international courts and tribunals for their consideration while determining maritime boundary disputes.

\textbf{1 Economic Circumstances: Equitable Access to the Natural Resources}

Economic circumstances can be divided into two different but interrelated and apparently overlapped categories- first, pure economic circumstances which relates to the existence of natural resources, such as oil, gas and fish; another one is socio-economic circumstances, for example, States’ economic dependency of natural resources and national economic wealth.\textsuperscript{50} These two types of economic circumstances will be considered without making any difference between them.

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\textsuperscript{48} \textit{Tunisia/Libya} case, 58 [68], 64 [80].
\textsuperscript{49} \textit{Libya/Malta} case, 34, 35 [39], 37.
\textsuperscript{50} Tanaka, ‘Predictability and Flexibility’, above n 4., 265.
Because of the potential economic benefits to be derived from living and non-living natural resources, much attention has been placed by the States on the location of the resources in the areas to be delimited and thus the consideration of economic factors plays an important, catalyst role in the maritime negotiation process between States.\textsuperscript{51} Even the socio-economic factors may be considered as relevant circumstances in their negotiation process on maritime delimitation. In fact, during negotiation, States are free to consider relevant circumstances, either or both geographical and non-geographical or ignore both of them. This might be the reason, the Court in the \textit{North Sea} cases ruled that ‘there is no limits to the considerations which States may take account’ in their negotiation process ‘for the purpose of making sure that they apply equitable procedures’.\textsuperscript{52}

But this is not the usual fact in case law. The international courts and tribunals in most of the cases generally considered both economic and socio-economic factors largely as irrelevant and consequently declined to impose any decisive weight to those factors for delimitation. The fundamental reasons working behind such non-consideration is mostly relates to the legal and factual impacts of maritime delimitation. Since permanence and stability of boundaries, maritime as much as land, are prime aspects of Statehood and thus of States’ sovereignty, determination of such boundaries should not be based on transient considerations like pure economic factors. In any case, the resources much in demand today may tomorrow fall into disrepute because of economic, technological and market changes. To draw a boundary on this basis would imply that if these circumstances changed the boundary would need to be reconsidered.\textsuperscript{53} In the same way, the location of natural resources has been disregarded in the course of delimitation. The Court found no reason to adjust the delimitation line simply because an oil deposit or a fishery resource straddled the delimitation line, or because all the resources were to be found on one side.\textsuperscript{54} The Court in the \textit{Cameroon/Nigeria} case Stated that ‘oil concession and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or

\textsuperscript{52} \textit{North Sea} cases, [93].
\textsuperscript{53} Nugzar Dundua, ‘Delimitation of Maritime Boundaries between Adjacent States’ (United Nations-the Nippon Foundarion Fellow, 2006-2007) 68.
\textsuperscript{54} Ibid.
shifting of the provisional delimitation line’. The legal reason of such rejection is that ‘delimitation is not as much a matter of apportionment of resources as not a matter of dividing resources in an equitable, distributive fashion’, rather a matter of dividing an area of overlapping claims in an equitable manner, and international courts and tribunals are to ‘employ solely the principles and rules of international law unless requested to decide ex aequo et bono’. Keeping this view in mind, the Court might have foreseen that through such consideration of such economic interest it may ‘open itself to the charge of effectuating an allocation of resources based on the principle of distributive justice’. As such Charney noted that natural resources may be best addressed on their own merits, in light of, but apart from, the maritime boundary delimitation. Similarly, the Court’s reluctance to consider socio-economic factors is also because of the fact that courts are not concerned with the task of establishing a regime of equitable allocation of resources, for that is a legislative rather than a judicial task. The Court in the Tunisia/Libya case refused to attach legal significance to relative economic position, such as relative poverty claim of Tunisia vis-à-vis absence of natural resources claim of Libya, reasoning that ‘delimitation should not be based on as transient a factor as the relative prosperity or poverty of the States at a particular point in time.’ Because a ‘country might be poor today and become rich tomorrow as a result of an event such as the discovery of valuable economic resource’.

On the contrary, it is interesting enough that despite such formal rejection of economic circumstances, the Court did in fact take such factors into account in the delimitation process. In Fisheries case the Court admitted that economic interest presents ‘realities

55 Cameroon/Nigeria case, 447-448 [304].
56 Antunes, above n 17, 320.
57 Libya/Malta case, [66] (dissenting opinion of Judge Shigeru Oda)
58 Christopher R Rossi, Equity and International Law: A Legal Realist Approach to International Decisionmaking (Transnational Publishers, 1993) 194.
61 Owen McIntyre, ‘Utilization of shared international freshwater resources—the meaning and role of “equity” in international water law’ (2013) 38 (2) Water International 123.
62 Tunisia/Libya case, 77 [107].
which must be borne in mind’.\footnote{Fisheries Case (UK/Norway) 1951, ICJ Rep, 116, 133.} This view of the Court seems to be echoed in the North Sea judgement when the Court, in the course of delimitation, found it reasonable to consider ‘unity of deposit’ not as a special circumstance, but as a factor which is no more than a factual element.\footnote{North Sea cases, 51-52 [97]} But this is mere an observation which got no essence in later cases. In the Gulf of Maine case, the chamber took socio-economic circumstances into account as a relevant circumstance where delimitation would otherwise have ‘catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned’.\footnote{Gulf of Maine case, [75]; See also SHI Jiuyong, ‘Maritime Delimitation in the Jurisprudence of the International Court of Justice’ (2010) 9 Chinese Journal of International Law 289.} Relying on this view of the chamber, the Court in the Jan Mayen case for the first time drew delimitation line taking into account natural resources as relevant circumstances to ensure equitable access to the capelin fishery resources for both the parties.\footnote{Jan Mayen Case [75] (emphasis added) .} Here the term to ensure equitable access to the natural resources is to be noted. One can argue that here the Court’s consideration might necessarily not be the fish stocks, rather ensuring equitable access to that particular natural resources. Bowett might had this in mind when he suggested that ‘delimitation should not be divorced from the interests of the world community in promoting the economic well-being of States which have so far been economically underdeveloped or disadvantaged in terms of their access to resources’.\footnote{Derek W Bowett, ‘The Economic Factor in Maritime Delimitation Cases’ in P Ziccardi (ed), International Law at the Time of its Codification: Essays in Honour Roberto Argo (A. Giuffrè, 1987) 45, 62.}

For decades, scholars have been arguing that economic factors should be classed among the circumstances relevant to sea and continental shelf delimitation.\footnote{See generally, Athene L W Munkman, ‘Adjudication and Adjustment-International Judicial Decision and the Settlement of Territorial and Boundary Disputes’ (1972-1973) 46 British Year Book of International Law 19, 108; Rosalyn Higgins, Problems and Process (Clarendon Press, 1994) 224; Prosper Weil, The Law of Maritime Delimitation-Reflexions (Grotius Publications, 1989) 259, 264.} This appeal still got substance, and in light of this discussion it can rightly be argued that in cases where it is relevant, the international courts and tribunals should take account economic circumstances not in the form of pure economic or socio-economic factors, but under the criteria of ‘equitable access to the natural resources’ to ensure an equitable result. But at
the same time, it must be noted that it has to done keeping conformity with the scope of other equitable criteria of maritime delimitation.

## 2 Pre-existing Agreement

Since the Convention envisages that States, prior to coming before the Court, should first attempt to agree on maritime delimitation, it becomes a factor must to consider in any delimitation case as to whether any agreement, formal or tacit, exists between the parties determining the maritime boundary, partial or full, as well as defining area to be delimited or describing any method of delimitation to be applied to draw the delimitation line.\(^69\)

From a consideration of the case law\(^70\) and relevant international laws\(^71\), it is clear that where a maritime agreement exist between the parties and that determines all or part of the maritime boundary, that agreement will prevail over any other delimitation criteria, and the Court will take that agreement as the basis for the delimitation ‘unless unenforceable by reason of error, fraud and corruption, coercion or because it is contrary to a peremptory norm of international law (jus cogens)’.\(^72\) In the *In Jan Mayen* case where the Court was called upon to interpret as to whether 1958 maritime delimitation treaty applied to the area in question and reached a decision as to their applicability.\(^73\) Most recently, in the *Chile/Peru* case, the Court considered the pre-existing agreement between the parties regarded to the starting point for the delimitation which was seemingly unusual in case law; the starting point for the delimitation in the case was 80 nm from the closest point on the Chilean coast and about 45 nm from the closest point on the Peruvian coast.\(^74\)

## 3 Conduct of the States

In determining relevancy of circumstances, the Court must not only look at formal agreements, but also consider whether there is any tacit or *de facto* agreement between the

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\(^69\) SHI Jiuyong, above n 1, 277.


\(^71\) For example *Vienna Convention on the Law of Treaties 1969*, Articles 48-52; *Convention on the Continental Shelf*, 1958, Article, 6 ; UNCLOS, Article, 74 (1) , 83 (1) . See also *Gulf of Maine* case, 1984, 246, 266, 291-93.

\(^72\) Coyle, above n 35, 175 (citation omitted) . See also SHI Jiuyong, above n 1.

\(^73\) Jan Mayen case, 50-51.

\(^74\) Chile/Peru case, 62 [183].
parties. Most scholars agreed that in the absence of any express or formally agreed maritime boundaries between States, their conduct prior to the delimitation dispute may be a circumstance of considerable relevance to prove the existence of an interim or implied maritime boundary agreement.\(^75\) This conduct of the States, in fact, involves the law of acquiescence and estoppel as well. However, the criteria fixed by the Court in this regard is that such a tacit or interim agreement ‘must be compelling’ and of long standing and without being formally contested by either party that evidence a *modus vivendi*.\(^76\) It means that a State’s knowledge of the public conduct or assertion of rights of the other party in dispute, and failure to protest in the face of that conduct, may involve a tacit acceptance of the legal position represented by the other party’s conduct or assertion of rights.\(^77\) Thus, the State practice, as acknowledged in the *Tunisia/Libya* case, concerning oil exploration concession and *de facto* fisheries jurisdiction limit ‘constituted a circumstances of great relevance for the delimitation’ and evidence a tacit agreement to a particular maritime delimitation or delimitation method for the territorial sea, continental shelf and EEZ.\(^78\) Again, with regard to the maritime delimitation process, the conduct of the States may indicate whether they have a tacit agreement that established a *de facto* boundary.\(^79\) In the *Chile/Peru* case, the Court, for the first time in maritime jurisprudence,\(^80\) recognised the existence of a tacit agreement between the States with regard to their agreement on this point that not the equidistant boundary, rather ‘the maritime boundary along a parallel already existed between the parties’ on the basis of the parties’ express acknowledgement in terms of the existence of the 1954 special maritime frontier zone agreement, which ‘cements the tacit agreement’.\(^81\) On the contrary in the *Bangladesh/Myanmar* case, despite the existence of the Agreed Minutes (signed in 1974 and 2008) between the States that describes agreed coordinates concerning the boundary of the territorial sea, the ITLOS denied to accept there relevancy as tacit or *de facto* agreements due to their lacking of

\(^{75}\) See generally, Coyle, above n 35, 175; SHI Jiuyong, above n 1, 278; Dundua, above n 53, 74.

\(^{76}\) *Tunisia/Libya* case, 70-71 [95]; *Nicaragua /Honduras* case, 735 [253]; *Chilli/Peru* case, 37 [91].

\(^{77}\) Dundua, above n 53, 74.

\(^{78}\) *Tunisia/Libya* case, [70]-[71], [84]-[85], [95], [96], [117]-[118].


\(^{80}\) Cf SHI Jiuyong, above n 1, 278. Until the *Chile/Peru* case, the existence of any tacit agreement has not been recognised in any of the cases decided by the Court.

\(^{81}\) *Chile/Peru* case, 36-37 [91].
being compelling. Notable that a subsequent treaty or formal agreement as well as a tacit or *de facto* agreement possessing all the constituent elements referred to in the preceding discussion will prevail over historic titles or historic rights.

4 **Historic Title and Historic Right**

The mention of historic title in Article 15 of the Convention envisages that delimitation must take into account any established historic title. Historic right is also a relevant consideration but subsequent to historic title. The elements that constitute a historic title are uninterrupted possession over a period of time, a *titre de souverain* with sufficient evidence of the manifestations of State sovereignty appropriate in the circumstances which has achieved a degree of notoriety or publicity and to which the international community as a whole has acquiesced. Thus, it implies that historic titles are exclusive in nature and exclude the existence of any other title over the area to which this title is referred. On the contrary, historic rights, such as historic rites of passage and historic rights of fishing, are of non-exclusive nature and may constitute a form of prescriptive title and are thus reconcilable with a maritime title vested in another State. Unlike historic title which is enforceable and opposable *erga omnes* (against all States), historic right is advanced merely *inter partes*, and lacks sovereignty, an important element required to establish historic title to maritime territory.

It is established principle that a historic title ‘can apply to waters other than bays, i.e., to straits, archipelagos and generally to all those waters which can be included in the maritime domain of a State’. Does it imply that it can exist in any part with the marine area that a State is entitled to claim? Inasmuch as the term historic title has only been mentioned in Article 15 of the Convention and in Article 12 of the 1958 Convention on

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82 Bangladesh/Myanmar case, 43 [117]-[118].
83 Coyle, above n 35, 178.
84 Ibid, 177, 178.
85 See Antunes, above n 17, 36. Historic rights are reconcilable according to Article 51 of the Convention, which prescribes that a State exercising sovereignty over archipelagic waters ‘shall recognize traditional fishing rights’ of other States.
86 Coyle, above n 35. See also Dundua, above n 53, 80.
Territorial Sea and Contiguous Zone with reference to the delimitation of territorial sea, its existence beyond the limit of territorial sea becomes very unlikely and in the same way its existence in the EEZ and the continental shelf is very difficult to conceive in practice.\textsuperscript{88} Historic title or historic rights may turn to relevant circumstance in terms of determining the method of delimitation as well. As historic title and other vested rights have been respected as sea as well as on land, in a delimitation where there exists a historic title, it should prevail over the applicable methods of delimitation.\textsuperscript{89} This is the case in the Grisbadarna award where the PCA deflected the perpendicular line to 19 degree south instead of 20 degree to take account of the historic rights of Sweden over the Grisbadarna bank.\textsuperscript{91} Again the alternative reference to ‘historic title or other special circumstances’ as embodied in Article 15 of the Convention seems to indicate that historical title is just another type of special circumstances which may or may not justify a departure from a equidistance/median line. But it seems hard to support this view because as long as the overlapping of potential entitlement is a condition sine qua non for the delimitation, and because historic titles are exclusive in nature, it may be assumed that the existence of a historic title precludes any delimitation of the area pertaining thereto.\textsuperscript{92} Furthermore, if historic title has a juridical relevance equivalent to or less than that of an formal agreement, the formal equidistance/special rule should not be applied.

5 \textit{Navigation}

Navigation has a very little chance to be considered as relevant in the discourse of delimitation in areas beyond territorial sea. Since the continental shelf legally comprises only the seabed and the subsoil, and international law confers no exclusive jurisdiction upon the States in areas beyond the territorial sea, and the navigation takes place on or in the superjacent waters while the right of the coastal States over the continental shelf do

\textsuperscript{88} Article 15 of the Convention and Article 12 of the 1958 1958 TSC are identical and State that ‘where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith’.
\textsuperscript{89} also Dundua, above n 53, 81.
\textsuperscript{90} Sang Myong Rhee, ‘Sea Boundary Delimitation between States Before World War II’ (1982) 76 American Journal of International Law 553, 586.
\textsuperscript{91} Grisbadarna case (Sweden v. Norway) , (Award) , Permanent Court of Arbitration, (23 October 1909) 6 <http://www.pca-cpa.org/Grisbadarnaaward%20English%20edited9ea3.pdf?fiil_id=166>
\textsuperscript{92} Dundua, above n 53, 81.
not affect the legal status of the superjacent waters or of the air space above those waters,\(^{93}\) it is indeed very hard to conceive relevancy of any navigational interest in the delimitation of continental shelf. Similarly, in the context of EEZ delimitation, the question regarded to the relevancy of navigation is very odd, because the Convention has preserved the freedom of navigation in the EEZ\(^{94}\).

Navigation can be seen as relevant only to the delimitation of the territorial sea. International case law affirmed this view. In the *Guinea/Guinea–Bissau* arbitration, the Tribunal considered navigational interest of Guinea–Bissau in determining the initial section of the boundary that followed the navigable channel (thalweg), from the mouth of the Cajet river through Pilots’ Pass.\(^ {95}\) Again the right of innocent passage through the territorial sea as conferred upon the international community as a whole might be relevant in the delimitation of the territorial sea. For instance, in the *Eritrea/Yemen* arbitration, while the Tribunal was delimiting the territorial seas in the middle stretch of the boundary, it emphasised the need for simplicity in the immediate vicinity of a main international shipping lane.\(^ {96}\)

In conclusion it can be submitted that although the relation of navigational interest is very difficult to speculate as to the delimitation of continental shelf or EEZ, its relevancy cardinal to the territorial sea delimitation.

### 6 Defence and Security

Defence and security may become a dominant relevant circumstances in the operation of delimitation. As revealed in maritime jurisprudence, its relevancy is more likely in the delimitation of the territorial sea than the delimitation of the EEZ and continental shelf. The reason underpinning this view is the difference of exclusiveness that differs with the extent of different maritime zones. Just as it is clear that the relevance of sovereign right to explore natural resources is greater in continental shelf and EEZ than in territorial sea, it is also clear that the relevance of sovereign jurisdiction recalling defence and security

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\(^{93}\) UNCLOS, Article 76, 78.

\(^{94}\) UNCLOS, Articles, 58 (1) , 87.

\(^{95}\) *Guinea/Guinea–Bissau* arbitration, ILM/25/1986, 273[45], 298 [111].

\(^{96}\) *Eritrea/Yemen* case (second phase), [128], [155].
is greater in the latter. Perhaps it is this that explains the different text of Article 15 and Articles 74 and 83 of the Convention. The case law seems to strongly support this view. In terms of the delimitation of the continental shelf, the tribunal, in the Anglo-French case, rejected France’s contention that ‘the security and defence of its territory’ may be ‘put in doubt’ if the intervening area of the continental shelf be allocated to the United Kingdom, on this averment that although they may support and strengthen, but they cannot be regarded as exercising a decisive influence and cannot negative any conclusions drawn from those circumstances which the Court had already identified.\textsuperscript{97} In Guinea/Guinea–Bissau arbitration, the tribunal, emphasising that ‘neither the EEZ nor continental shelf are zones of sovereignty’ it stressed that its prime objective had been to avoid that rights exercised opposite each party’s coast, or in its immediate vicinity, would compromise its security.\textsuperscript{98} In the Libya/Malta case, the Court took a different view on this matter recognising that in certain cases, security may be a relevant consideration, but only in a situation where a delimitation line passes very close to the coast of one State.\textsuperscript{99} In the Jan Mayen case the Court once again considered security issues on the basis of distance from the coast while it rejected Norway’s argument stating that the boundary to be established was not sufficiently near Jan Mayen’s coast to create a security problem.\textsuperscript{100} Most recently, the Court, in the Nicaragua/Colombia case considered legitimate security concerns as relevant and took it in to account ‘in determining what adjustment to make to the provisional median line or in what way that line should be shifted’.\textsuperscript{101} Taking account all the views of the international courts and Tribunal it can be ascribed that security and defence issues are ‘most prominent in dealing with maritime boundaries close to the coast’ \textsuperscript{102} and thus developed its nexus with equidistance principle in territorial sea delimitation since their consideration is much stronger in territorial sea than in EEZ and continental shelf delimitations.\textsuperscript{103}

\textsuperscript{97} Anglo-French arbitration, 18, 90[188].  
\textsuperscript{98} Guinea/Guinea-Bissau arbitration, 302[124].  
\textsuperscript{99} Libya/Malta case, 1985, 42 [51].  
\textsuperscript{100} Jan Mayen case 74-75 [81].  
\textsuperscript{101} Nicaragua/Colombia case, 706 [222].  
\textsuperscript{102} Oxman, 1993, 40  
\textsuperscript{103} Antunes, above n 17, 324-325.
Third State’s Interest

Maritime Delimitation cannot be carried out in a vacuum, cutting off the world around it and being isolated from other delimitation already implemented, or still to be accomplished. The Court in the *Tunisia/Libya* case considered among other relevant circumstances ‘the existence of other States in the area, and the existing or potential delimitation between each of the Parties and such States’.\(^{104}\) In the *Cameroon/Nigeria* case, the Court echoed with its earlier decision stating that the delimitation line cannot be extended beyond a point where it might affect rights of a third State (Equatorial Guinea).\(^{105}\) The Court in the *Rumania/Ukraine* case made it clear that in determining relevant area of delimitation, which in due course will play a part in the final stage testing for disproportionality, third-party entitlements cannot be affected and it would only be relevant if the instant delimitation case were to affect them.\(^{106}\) The Court recalls the Statement in its 2011 Judgement on Costa Rica’s Application to intervene in the present proceedings that, in a maritime dispute, ‘a third State’s interest will, as a matter of principle, be protected by the Court’.\(^{107}\) In *Guinea/Guinea–Bissau* case, the Tribunal relied not only on the third States’ interest, but also on the existing and future delimitation in that region to justify the extension of its investigation beyond the case itself.\(^{108}\) However, to take protect the entitlement or interest of the third State in future delimitations in the concern marine area, the Court left a question mark in the form of an arrow as to where the maritime boundary between two States should terminate using the sentence ‘until it reaches the area where the rights of third States may be affected’.\(^{109}\)

\(^{104}\) *Tunisia/Libya* case, 64 [81].
\(^{105}\) *Cameroon/Nigeria* case, 443 [292].
\(^{106}\) *Rumania/Ukraine* case, 100 [114].
\(^{107}\) *Nicaragua/Colombia* case, I.C.J. Reports 2011 (II ), 372 [86]; see also *Nicaragua/Columbia* Case, 684 [161].
\(^{108}\) *Guinea/Guinea–Bissau* case, [109].
\(^{109}\) *Bangladesh/Myanmar* case, 134 [462].
APPENDIX IV

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