CHAPTER- III

LEGISLATIVE BACKGROUND OF THE CRITERIA OF EQUITY FOR THE MARITIME DELIMITATION OF CONTINENTAL SHELF
Introduction:

In this Chapter the legislative background of the criteria of equity for the maritime delimitation of Continental Shelf has been analysed in four different periods.

1) Criteria of Equity for the Maritime Delimitation of Continental Shelf in Pre-International Law Commission period (1945 to 1949)

2) Criteria of Equity for the Maritime Delimitation of Continental Shelf during International Law Commission period (1949 to 1956)


3.1 Criteria of Equity for the Maritime Delimitation of Continental Shelf in Pre-International Law Commission period (1945 to 1949)

It is axiomatic that any study of matters relating to delimitation of continental shelf should emphasize the primacy of the Truman Proclamation of
1945 as the starting point of the positive law on the subject.\textsuperscript{1} By this proclamation, the United States claimed the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.

Concerning the question of delimiting the extension of the Continental shelf between States, the proclamation said: In cases where the continental shelf extends to the shore of another State, or is shared with an adjacent State, the boundary shall be determined by the United States concerned in accordance with equitable principles. That the problem of delimitation between States would arise was clearly foreseen, but the proclamation did not seek to give any specific guidance concerning how such dispute might be resolved. Instead it indicated a process, bilateral agreement, and referred to equitable principles.\textsuperscript{2}

Prior to 1945, the delimitation between States with opposite or adjacent coasts had been restricted to the territorial sea and to straits, gulfs, bays, and lakes, except the Agreement of February 26, 1942, between the United Kingdom and Venezuela concerning the boundary in the Gulf of Paris. In a comprehensive study of the subject between 1648 and 1939, Sang-Myon Rhee has reached the broad conclusions that the boundary in the lakes, straits, gulfs, bays and the territorial sea between States with opposite coasts had generally, but not always, followed the median line, but that between the States with adjacent coasts, the boundary line had been varied and had followed a perpendicular line from the

\textsuperscript{1} North Sea Continental Shelf cases(Federal Republic of Germany(FRG)/Denmark; FRG/Netherlands) 1969 I.C.J Reports, (Judgment of 20 February) para. 47
\textsuperscript{2} Malcolm D Evans, Relevant Circumstances and Maritime Delimitation, Oxford, 1989, p. 7
terminal point of the land boundary at sea, or a perpendicular to the general
direction of the coastline, or a latitude or a longitude, or an equidistance line
modified to remove the distorting effect of small islands or coastal projections. In
the latter case, he concluded that "Indeed, there is no basis to suppose that the
equidistance method should have been adopted as a general rule of delimitation."

The Hague Codification Conference of 1930 had not dealt with the question
of delimitation of maritime boundary between States with opposite or adjacent
coasts. It was concerned mainly with the questions relating to the territorial sea,
including the breadth of the territorial sea and its measurement, and the question
of the contiguous zone.

In the Proclamation concerning the continental shelf issued by the President
of the United States, Harry S. Truman, on September 28, 1945, the delimitation
criteria referred to the equitable principles as follows:

In cases where the continental shelf extends to the shores of another State ,
or is shared with an adjacent States, the boundary shall be determined by the
United States and the State concerned in accordance with equitable principles.

In an article published in 1951, Whittemore Boggs explained at some length
the principles and techniques concerning the median or equidistance line as the
boundary between the States with opposite or adjacent coasts, and expressed the
view that these were of universal applicability and independent of the width of the

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\(^3\) S.P. Jagota, *Maritime Boundary*, Dordrecht, the Netherlands 1985, p. 49
\(^4\) Sang-Myon Rhee, *Sea Boundary Delimitation Between States before World war II*, *American
journal of International Law* Vol.76, No.3 July 1982 pp. 555-588
\(^5\) S.P Jagota, *See note 3 above*, p. 49
belts of waters claimed, including the contiguous zones and the continental shelf.²

3.2 Criteria of Equity for the Maritime Delimitation of Continental Shelf during International Law Commission period (1949 to 1956):

The International Law Commission started its work in 1949 by giving priority to the regime of the High Seas. In 1951, the Commission, pursuant to a recommendation by the United Nations General Assembly, decided to initiate work on the regime of the territorial sea. The Special Rapporteur for both these items was J.P.A Francois of the Netherlands. In the Draft Articles on the Continental Shelf and Related Subjects, adopted by the Commission in 1951, it was suggested that the continental shelf boundary should be established by agreement between the parties, failing which by reference to arbitration ex aequo et bono. Article 7 of these Draft Articles and the commentary there to read as follows.

**Article 7.**

Two or more states to whose territories the same continental shelf is contiguous should establish boundaries in the area of the continental shelf by agreement. Failing agreement, the parties are under the obligation to have the boundaries fixed by arbitration.

1. Where the same continental shelf is contiguous to the territories of two or more adjacent States, the drawing of boundaries may be necessary in the area

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² Majorie M. Whiteman, *Digest of International Law, Vol. 4*, p. 757
of the continental shelf. Such boundaries should be fixed by agreement among the States concerned. It is not feasible to lay down any general rule which States should follow; and it if not unlikely that difficulties may arise. For example, no boundary may have been fixed between the respective territorial waters of the interested states, and no general rule exists for such boundaries. It is proposed therefore that if agreement can not be reached and a prompt solution is needed, the interested States should be under an obligation to submit to arbitration ex aequo et bono. The term Arbitration is used in the widest sense, and includes possible recourse to the international Court of Justice.

2) Where the territories of two States are separated by an arm of the sea, the boundary between their continental shelves would generally coincide with some median line between the two coasts. However, in such cases the configuration of the coast might give rise to difficulties in drawing any median line, and such difficulties should be referred to arbitration. 7

In 1952, the Special Rapporteur in his first report on the regime of the territorial sea drafted an Article on the delimitation of the territorial sea of the two adjacent States which would generally apply the median line. 8 The Commission, however, decided to consult the States about their practice and suggested that the Special Rapporteur might consult some experts for clarification of certain technical aspects of the problem. 9 The Special Rapporteur accordingly reserved

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9 Ibid, p. 68
the provision on the territorial sea delimitation in his second report on the subject.\textsuperscript{10}

It was against this background that the Special Rapporteur J.P.A Francois presided over a meeting of the Committee of Experts held at the Hague between April 14 and 16, 1953, who were consulted in their personal capacity on the technical aspects of territorial sea delimitation between States with opposite or adjacent coasts. The questions asked to the Committee of Experts and their answers thereto as embodied in their Report were as follows:

\textbf{3.2.1 Questions Referred to and Answers given by the Committee of Experts on Maritime Delimitation :}

\textbf{VI}

How should the international boundary be drawn between two countries, the coasts of which are opposite each other at a distance of less than 2 T miles? To what extent have islands and shallow waters to be accounted for?

An International boundary between countries, the coasts of which are opposite each other at a distance of less than 2 T miles should as a general rule be the median line, every point of which is equidistance from the baselines of the States concerned. Unless otherwise agreed between the adjacent States, all islands should be taken into consideration in drawing the median line. Likewise, drying rocks and shoals within T miles of only one State should be taken into account, but similar elevations of undetermined sovereignty, that are within T miles of

\textsuperscript{10} A/CN.4/61, 19 February 1953, Article 13, Yearbook of the International Law Commission 1953, Vol. II p. 70
both States, should be disregarded in laying down the median line. There may, however, be special reasons, such as navigation and fishing rights, which may divert the boundary from the median line. The line should be laid down on charts of the largest scale available, especially if any part of the body of water is narrow and relatively tortuous.

VII

How should the (lateral) boundary line be drawn through the adjoining territorial sea of two adjacent State? Should this be done.

A. by continuing the land frontier?

B. by a perpendicular line on the coast at the interaction of the land frontier and the coast line?

C. by a line drawn vertically on the general direction of the coastline?

D. by a median line? If so, how should this line be drawn? To what extent should islands, shallow waters and navigation channels be accounted for?

1. After thoroughly discussing different methods the Committee decided that the (lateral) boundary through the territorial sea - if not already fixed otherwise - should be drawn according to the principle of equidistance from the respective coastlines.

2. In a number of cases this may not lead to an equitable solution, which should be then arrived at by negotiation.
Remarks Regarding the Answers to VI and VII:

The Committee considered it important to find a formula for drawing the international boundaries in the territorial waters of States, which could also be used for the delimitation of the respective continental shelves of two States bordering the same continental shelf.\textsuperscript{11}

3.2.2 Implementation of Committee's Report by the International Law Commission:

The Commission decided to be guided by the recommendations by the Committee of Experts concerning the territorial sea boundary, but embodied them first in Article 7 on the continental shelf boundary in 1953 in a simpler and elastic manner as follows;

\textbf{Article 7:}

1. Where the same continental shelf in contiguous 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 is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, the median line every point of which is equidistant from the baselines from which the width of the territorial sea of each country is measured.

2. Where the same continental shelf is contiguous to territories of two adjacent States, the boundary of the continental shelf appertaining to such States

is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, determined by application of the principle of equidistance from the base lines from which the width of the territorial sea of each of the two countries is measured.\textsuperscript{12}

3.2.3 Articles of Delimitation Adopted by the International Law Commission:

In 1954, the International Law Commission adopted two separate Articles, namely, Article 15 and 16, on the territorial sea boundary between States with opposite or adjacent coasts, respectively, guided by the recommendations of the Committee of Experts. These articles read as follows:

Article 15 - Delimitation of the Territorial Sea of two States, the coasts of which are opposite each other:

The boundary of the territorial sea between two States, the coasts of which are opposite each other at a distance less than twice the breadth of the territorial sea is, in the absence of agreement of those States, or unless another boundary line justified by special circumstances, the median line every point of which is equidistant from the base lines from which the width of the territorial sea of each country is measured.

Article 16 - Delimitation of the Territorial Sea of two adjacent States:

The boundary of the territorial sea between two adjacent States is drawn, in the absence of agreement between those States or unless another boundary line is

\textsuperscript{12} Yearbook of the International Law Commission 1953, Vol. II p. 213
justified by special circumstances, by application of the principle of equidistance from the base lines from which the width of the territorial sea of each of the two countries is measured.\(^{13}\)

After further consideration, and in the light of the comment of States, the Commission decided to combine the Articles on the boundary in the straits and the territorial sea boundary between States with opposite coasts into a single Article, which thus also dealt with the assimilation of small resulting enclaves. However, two separate Articles on the territorial sea boundary between States with opposite and with adjacent coasts respectively were maintained. The drafting was also similar to the Article on the continental shelf boundary, which stated that the boundary, in the absence of agreement those States or unless another boundary line was justified by special circumstances, is the median line in the case of States with opposite coasts, or is drawn by the application of the principle of equidistance in the case of States with adjacent coasts.

3.2.4 Draft Articles prepared by International Law Commission on maritime delimitation of Continental Shelf (1956)

By 1956, the International Law Commission completed its study of the law of the sea and prepared a set of 73 Articles with commentaries, and recommended that these be now considered by a plenipotentiary international conference. The Articles dealing with the maritime boundary concerning the continental shelf between States with opposite or adjacent coasts read as follows:

\(^{13}\) S.P. Jagota, see note 3 above, p. 53
Article 72:

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.\(^{14}\)

In its commentary to Article 12, the Commission recognised that special circumstances would probably necessitate frequent departures from the mathematical median line, but it thought it advisable to adopt, as a general rule, the system of the median line as the basis for delimitation.\(^{15}\) In its commentary to Article 14, it referred to the other possible lines of delimitation, such as the extension of the land frontier out to the sea as far as the outer limits of the territorial sea, a line at right angles to the coast at the land frontier point, a

\(^{14}\) Yearbook of the International Law Commission 1953, Vol. II p. 213

\(^{15}\) Yearbook of the International Law Commission 1956, Vol. II p. 271
geographical parallel, or a line at right angles to the general direction of the coastline, and agreed with the Committee of Experts of 1953 in disapproving of them, and in upholding the equidistance line. However, it considered that this rule should be very flexibly applied. In its commentary to Article 72, the Commission said that it had adopted the same principle for the continental shelf delimitation as for the territorial sea in Article 12 and 14, and added the following

3.3. Criteria of Equity for the Maritime Delimitation of Continental Shelf under 1958 Geneva Conventions:

The First United Nations Conference on the Law of the Sea, 1958, accepted the Draft articles proposed by the International Law Commission, with small changes. It combined them into a single Article for the territorial sea boundary, deleted the reference to straits and enclaves, drafted the median line negatively as a residual rule, and added a reference to 'historic title' in addition to 'special circumstances' for varying the application of the median line. It also added a separate Article on the delimitation of the contiguous zone boundary. It kept the Article on the continental shelf boundary with separate paragraphs dealing with the States with opposite and those with adjacent coasts.

Among the several amendments proposed as to the continental shelf boundary, Iran’s proposal was to ignore the islands located within an enclosed sea between States with opposite coasts and to delimit the continental shelf boundary with reference to the coastlines of the States concerned. Another proposal was made by Yugoslavia to delete reference to special circumstances, and a third by

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17 S.P. Jagota, see note 3 above, p. 55
Venezuela suggesting that the boundary between the States concerned may be settled by agreement or by another means recognised in International law. None of these amendments was accepted.¹⁸

The following provisions were included in the 1958 Conventions;

Regarding the delimitation of the continental shelf, Article 6 of the Geneva Convention on the Continental Shelf, 1958, provided as follows:-

1. 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 seas of each State 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 the determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

¹⁸ S.P. Jagota, see note 3 above, p. 55
3. In delimiting the boundaries of the continental shelf, any lines which are
drawn in accordance with the principles set out in paragraphs 1 and 2 of this
article should be defined with reference to charts and geographical features as
they exist at a particular date, and reference should be made to fixed permanent
identifiable points on the land.\(^{19}\)

Although there was an element of nuance between the delimitation criteria
for the territorial sea and the continental shelf, and in the latter case separate
paragraphs made reference to States with opposite coasts and States with adjacent
coasts, the basic criterium for the maritime boundary embodied in the 1958
Convention was the median or equidistance line unless another boundary line was
justified by a special circumstances.

There was not much controversy about the general application of the
provisions of the 1958 Convention on the Territorial Sea and the Contiguous Zone
on the delimitation of the territorial sea boundary, and these were by and large
accepted and applied in State practice as well as in UNCLOS and have been
Whether the rule embodied in Article 6 of the 1958 Convention on the
Continental Shelf was a conventional rule, or a rule of customary international
law applicable to all States whether or not parties to the Convention, became a
matter of contention before the International Court of Justice and other tribunals

\(^{19}\) Article 6 of 1958 Geneva Convention on the Continental Shelf Text.
as well as a subject of intensive controversy and negotiations at UNCLOS since December 1973.20

3.4 Criteria of Equity for the Maritime Delimitation of Continental Shelf under Law of the Sea Convention 1982:

The principle aim of Third United Nations Conference on the Law of the Sea (UNCLOS III) was to review and develop the law of the sea concerning the outer limits of national jurisdiction and to establish an international legal regime and machinery for the exploitation of the resources of international seabed area. The question of maritime boundary was considered mainly in relation to the question of limits of national jurisdiction between States with opposite or adjacent coasts.

The UNCLOS III had worked from December 1973 to December 1982, and had eleven sessions. On April 30, 1982 UNCLOS III adopted the United Nations Convention on the Law of the Sea (hereafter called as 1982 Convention). On December 10, 1982, the 1982 Convention was opened for signature at Montego Bay, Jamaica, and was signed by 117 States, apart from the Cook Islands and the Council for Namibia. By the end of 1983 the Convention had been signed by 131 States, including Japan and the Republic of Korea, and ratified by 9 States, including Fiji, Mexico and Jamaica. The deliberations at UNCLOS III on the maritime boundary were concentrated around three main elements or aspects, namely (1) delimitation criteria, (2) interim arrangements pending agreement between parties, and (3) settlement of delimitation disputes. The provisions finally

20 S.P. Jagota, see note 3 above, pp. 56 & 57
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adopted for inclusion in the Convention on the Law of the Sea 1982 would not establish the new conventional rules but might also embody the customary rules of international law on the subject. The discussions at UNCLOS III were influenced by State practice and judicial, arbitral and other decisions. The judgment in the North Sea Continental Shelf cases 1969, triggered the assertion at UNCLOS III that equitable principles should be the basic delimitation criteria; the United Kingdom - France Arbitration, 1977, developed the concept of a single equidistance-cum special circumstances rule which promoted a compromise mood; and the United Kingdom- France Arbitration, 1977, interpreted the delimitation provisions developed at UNCLOS III in 1976 as being in conformity with the afore mentioned single rule

3.5. Conclusions:

The developments at the Third United Nations Conference on the Law of the Sea on the question of the maritime boundary between 1973 and 1982 and leading to the adoption of the UN Convention on the Law of the Sea, 1982 are summed up follows:

1) On the delimitation of the territorial sea, the position of the 1958 Convention on the Territorial sea and the Contiguous Zone and customary international law has been retained in Article 15 of the UN Convention on the Law of the Sea, with minor drafting changes.

2) On the delimitation of the contiguous zone, no provision has been made.
3) On the delimitations of the exclusive economic zone and the continental shelf, identical provisions have been made which make no distinction between the two maritime zones or between States with opposite or adjacent coasts. Only the term 'between adjacent or opposite States' was changed to 'between States with opposite or adjacent coasts' in April 1980 on the advice of the Drafting Committee. The delimitation criteria emphasize the need for an agreement, which is based on applicable international law and which leads to an equitable solution. They are not formulated to apply in the absence of an agreement. Since the Convention itself refers to international law, and identifies it with reference to Article 38 of the Statute of the International Court of Justice, which article itself refers to the source of international law and includes international conventions, whether general or particular, establishing the rules expressly recognised by the contesting States, the standard or delimitation criteria may appear to be circular. In practical application, such reference will imply a greater emphasis on international custom as evidence of a general principle accepted as law, among other sources of international law, but supplemented always by the requirement to achieve an equitable solution. No direct reference has been made either to equitable principles or to equidistance in Article 74 and 83. Again, although no specific reference has been made to islands or other special circumstances, these will be covered by reference to the applicable international law and the need for an equidistance solution. It has also been provided that a rock which cannot support economic life of its own cannot have an economic zone or continental shelf of its own.
4) The provision on interim arrangements is so defined in such a way that it should promote and not prejudice the conclusion of an agreement in accordance with the aforementioned delimitation criteria.

5) Maritime delimitation disputes shall be resolved by negotiations, falling which by making reference to compulsory conciliation. If the dispute still remains unsettled, it shall, by mutual consent, be referred to compulsory third-party settlement procedures set out in the Convention, unless the parties otherwise agree.

Unsettled disputes concerning sovereignty or other rights over continental or insular land territory, disputes already finally settled between the parties, and disputes which are to be settled in accordance with a bilateral or multilateral agreement binding upon the parties have been excluded from the application of the settlement procedures set out in the Convention.

6) No reservations may be made to the maritime delimitation provisions of the Convention by the States parties to the Convention. Now a critical study of the following three cases has been made in the emergence of Regime of Law of the Sea Convention.