CHAPTER- II

HISTORICAL DEVELOPMENT (EVOLUTION) OF LAW OF MARITIME DELIMITATION AND EQUITY IN INTERNATIONAL LAW
CHAPTER II

HISTORICAL DEVELOPMENT (EVOLUTION) OF LAW OF MARITIME DELIMITATION AND EQUITY IN INTERNATIONAL LAW

Introduction:

In this Chapter, the historical development of Law of Maritime Delimitation and Equity in International Law with reference to developments at the Third United Nations Conference on the Law of the Sea are discussed.

2.1. Historical Development of Law of Maritime Delimitation:

The definition of the term "maritime boundary" is comprehensive in nature. The term is a generic term and could be used to denote "territorial sea boundary", "continental shelf boundary", "exclusive economic zone boundary" or boundary delimiting other maritime zones or marine and submarine areas. Further the term maritime boundary is used to denote:

(1) outer limits of maritime zones and

(2) limits of maritime zones between States with opposite or adjacent coasts.¹

Until recently, the subject maritime boundary and its delimitation, had been neglected in international law. The lack of legal concern to delimit the boundaries is mainly attributable to the fact that the seabed and subsoil have no human

population, warranting legal control and they contain valuable resources which
did not come within human control until recent times.

Since 1954, the subject has assumed greater and sensitive importance with
the acquisition by a coastal State of sovereign rights and specific jurisdiction over
its continental shelf, the exclusive economic zone and other maritime zones that
is, in respect of marine and submarine areas beyond a narrow belt of territorial sea
along its coasts. Maritime boundary at present extend to large distances from the
coasts and involve questions of resources namely fisheries, petroleum, gas,
minerals, energy and other aspects of the uses of the sea including marine
scientific research and preservation of marine environment.²

As a result, the subject has grown into prominence. The outer limits of
maritime zones will depend upon the maritime zone concerned namely, the
territorial sea, continental shelf, contiguous zone, exclusive economic zone or any
other zone. Article 24 of the 1958 Convention on the Territorial Sea and
Contiguous Zone provided that the contiguous zone may not extend beyond
twelve miles from the baseline from which the breadth of the territorial sea is
measured.³ According to this, the territorial sea and the contiguous zone together
could not extend beyond 12 nautical miles from the appropriate baseline along its
coasts. The limits of territorial sea was not prescribed in 1958 convention.
Regarding the continental shelf, the outer limits were described by Article 1 of the
Convention on the Continental Shelf 1958 as follows:

² S.P. Jagota, see note 1 above, p. 89
³ Article 24 of 1958 convention on the Territorial Sea and Contiguous Zone Text
For the purpose of these articles the term 'continental shelf' is used referring: (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or beyond that limits, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.\(^4\)

Regarding the outer limits of maritime zones, the Draft Convention on the Law of the Sea provides for a 12-mile territorial sea, 24-miles contiguous zone and 200 mile exclusive economic zone.

According to Draft Convention, every coastal State is entitled to establish an exclusive economic zone extending up to 200 nautical miles measured from the appropriate baseline. The outer limits of the continental shelf have been defined as follows:

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 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental shelf does not extend up to that distance.\(^5\)

---

\(^4\) Article 1 of 1958 Convention on the continental shelf Text
Regarding the territorial sea delimitation between States with opposite or adjacent coasts, Article 12 of 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone provided 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 provisions of this paragraph shall not apply, however where it is necessary by reason of historic title or other special circumstances to delimit the territorial sea of the two States in a way, which is at variance with the provision.\(^6\)

Regarding the contiguous zone delimitation, a similar provision was made in Article 24 of the same Convention. Regarding the continental shelf delimitation, 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 to each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

\(^6\) Article 12 of the *Convention on Territorial Sea and Contiguous Zone* Text
(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 equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.7

Although there was an element of nuance between the delimitation criteria for 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 criteria for maritime boundary embodied in 1958 Conventions was the median or equidistant line unless another boundary line was justified by special circumstances.8

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 and as well as a subject of intensive negotiations at the UNCLOS III since December 1973. Article 15 of the Draft Convention which deals with territorial sea delimitation 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

---

7 Article 6 of 1958 Convention on Continental Shelf Text
8 S.P. Jagota, see note 1 above, p. 97
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 sea 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 circumstance to delimit the territorial seas of the two States in a way which is at variance therewith. 9

This provision is similar to Article 12 of the Convention on the Territorial Sea and Contiguous Zone 1958.

Regarding the exclusive economic zone and the continental shelf, there are identical provisions in the Draft Convention namely 74 and 83. The provisions concerning the delimitation criteria contained in the Draft Convention as prepared in August 1980 read as follows:

**Article 74(1):** 1. The delimitation of the exclusive economic zone 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. 10

**Article 83 (1):** 1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement in conformity with

---


10 Ibid., Article 74(1)
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.\textsuperscript{11}

At the resumed tenth session of UNCLOS III held in Geneva in August 1981, these articles were proposed to be revised on the basis of a proposal from the President of the Conference. They had received broad support from the interest groups emphasising equidistance and equitable principles, respectively. The new text reads as follows:

\textbf{Article 74 (1)}: The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law as referred to in Article 38 of the Statute of International Court of Justice, in order to achieve an equitable solution.

\textbf{Article 83 (1)}: The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.\textsuperscript{12}

It was thus observed that although the criteria of equidistance and special circumstances is maintained in the Draft Convention on the Law of the Sea for the delimitation of the territorial sea, the elements emphasized for the delimitation of the exclusive economic zone and the continental shelf are:

\textsuperscript{11} Draft Convention on the Law of the Sea, see note 9 above, Article 83(1)
\textsuperscript{12} Draft Convention on the Law of the Sea, A/CON.62/L.78, 28 August 1981 Article74(1) and 83(1)
Historical Development (Evolution) of Maritime Delimitation Law and Equity in International Law

Chapter II

(1) agreement between the parties;

(2) on the basis of international law; and

(3) in order to achieve an equitable solution.

Maritime delimitation must, inevitably, be a painful process since, by its very definition, it implies an amputation of the area which each of the States involved could hope to appropriate if it faced the oceans on its own. Unless one appropriation is to be completely sacrificed to the other- and this would conflict not only with the demands of justice, and good sense but also with the principle of equality of States- the sacrifices must be shared equally.\(^{13}\)

A law of delimitation is not necessary when two States try to reach agreement through negotiation on a line of separation. “But it is when governments unable to reach agreement, seek a third-party settlement that a law of maritime delimitation becomes indispensable, for how is the judge or arbitrator to avoid deciding ex aequo et bono - which States generally do not want - if he does not have a body of rules on the basis of which to settle the disputes submitted to him?\(^{14}\)

Scarcely thirty years ago, when the International Law Commission began to study the problems of maritime delimitation, there was hardly a single rule of law to regulate this new chapter in international relations. States had an obligation to

---


\(^{14}\) Ibid, p.6
delimit their maritime jurisdictions - at that time it was a question of the territorial sea and the continental shelf - by means of agreement with a view to reaching an equitable result.\(^{15}\) As there were no substantive norms governing maritime delimitation, States were under a legal obligation to negotiate, failing which judicial or arbitral settlement, applying *ex aequo et bono* was the only way out. The legal norms developed slowly which can now be called, a law of maritime delimitation.

The work of the International Law Commission gave birth to the provisions of the 1958 Geneva Convention relating to the delimitation of the territorial sea and the continental shelf. And the Third United Nations Conference on the Law of Sea produced the provisions of the Convention on the Law of the Sea, signed at Montego Bay in 1982, relating to the delimitation of the territorial sea, the continental shelf and the exclusive economic zone.\(^{16}\)

International tribunals, and in particular the International Court of Justice, in half-a-dozen *causes celebres*, have made a *capitis deminutio* of the treaty source and themselves undertaken the direct definition of the law of maritime delimitation, giving it the appearance and name of general or customary international law. There is probably no other chapter of international law which has been written so exclusively and rapidly by the international Courts. In scarcely fifteen years, the International Court of Justice, through its North Sea (1969), Tunisia/Libya (1982), Gulf of Maine (1984) and Libya/Malta (1985) judgments, and arbitral tribunals in Anglo-French (1977) and Guinea/Guinea

\(^{15}\) Prosper Weil, *see note 13 above*, p. 6
\(^{16}\) Ibid.
Bissau (1985) cases, have managed to build up a normative system sufficiently comprehensive to govern all maritime delimitations, whether of the territorial sea, the continental shelf or the exclusive economic zone, so much so that it is possible today to speak of a single law - a common law - and not of the laws of maritime delimitation.¹⁷

It is made clear from the above analysis that the legal conquest of maritime delimitation is not the work of either treaty or custom but of Courts which, far from being a subsidiary source of international law, here play the role of a primary and direct source of law.

2.2 Origin and Sources of Equity in International Law:

Equity can be identified in many societies and religions even if in different forms. The Greeks called it clemency. The Romans termed it aequitas or equality. Ancient Chinese law described it as compassion and in Hindu philosophy is found the doctrine of righteousness.¹⁸ In some Islamic schools istihsan is employed to avoid undue hardship from the application of the law. Equity as it has been recognised and developed in international law is most closely related to Western legal traditions. The profound influence of Aristotle on the Western legal tradition and his articulation of the universality and completeness of the law which necessarily includes broad concepts of justice and equity and, at the same time, recognition of the need for systemic correction of shortcomings in the law due, in effect, to that very generality or universality provides equity’s roots.

¹⁷ Prosper Weil, see note 13 above, p.8
¹⁸ Surya P Sharma, Delimitation of Land and Sea Boundaries between Neighboring Countries, New Delhi, 1989, p.101
Two great legal theorists of the 17th century who greatly influenced the emerging law of nations, Grotius and Pufendorf, included an important place for equity in dealings between nations. Grotius referred to the Aristotelian idea of equity as twofold – being an understanding of what was right and just as well as in its corrective capacity to moderate the general law.

Both Grotius and Pufendorf and later writers recognised the tension in the judge exercising discretion against the letter of the law. Grotius said that equity must be applied with an abundance of circumspection and Pufendorf – to a standard of prudence – sentiments echoed in modern international law jurisprudence.

Article 38 of the Statue of the International Court of Justice which mandates the sources of law to be applied by the Court had its genesis in Article 35 of the Statute of the Permanent Court of International Justice which was incorporated without relevant change into the Statute of the International Court of Justice. It provides:

1. 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.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

   As is plain, there is no express reference to equity and there is no
   agreement amongst commentators that deciding a case *ex aequo et bono*, as
   Article 38(2) allows, imports principles of equity. A decision *ex aequo et bono*
   would be against the law.

   The words 'law and equity' can not be understood here in the traditional
   sense in which these words are used in Anglo-Saxon jurisprudence. The majority
   of international lawyers seem to agree that these words 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.

   An international tribunal may apply equity within the law. That is, if a law
   can be interpreted in more than one way, then equity may be applied in order to
   ascertain the interpretation that would best serve the purposes of the law. In
   another sense equity may be used where the law is silent to bring the case within
   the law so that the intention of the states can be implemented. This is different
   from equity *contra legem*, that is, where the text of the law goes against what is
said to be its real intention or purpose. It is generally recognised that an international court or tribunal would need explicit powers before it could modify the law in that fashion.

When equity is applied as a 'general principle', judges of the International Court rarely express it in that way. Rather, it seems to be taken for granted that various equitable rules, such as estoppel and the principle that 's/he who comes to equity must come with clean hands' are part of international law and require no further explanation than their relevance to the case at hand. This is consistent with an approach to equity that seeks to draw upon aspects of equitable doctrine common to 'civilised nations' without resorting to technicalities specific to particular legal systems.

Despite evidence that equity is applied broadly, nonetheless its characterisation as a 'general principle' of law places certain constraints on its operation. Professor Rosenne points out that equity does not automatically work to correct a decision where the strict application of law results in an unsatisfactory conclusion. A principle of equity can only come into play when it is recognised generally by the laws of 'civilised nations'. In the Frontier Dispute case, for example, between Mali and Upper Volta, the Court stated that it would be unjustified in resorting to equity to modify an established frontier inherited from the colonial powers. Equity as a legal concept was said by the Court to be a direct emanation of the idea of justice – but it was not simply an arbitrary concept of 'fairness' (something which resonates with Australian lawyers) which could be interposed at will by a court or tribunal. The Court declined to alter the frontier to
reflect some argued concept of equity. Where the boundary did not delimit in any precise manner an important water pool the Court said ‘the [boundary] line should divide the pool in two, in an equitable manner. Although equity does not necessarily imply equality where there are no special circumstances the latter is generally the best expression of the former.

A rather different approach to equity has been taken in the sphere of maritime boundary disputes where a more liberal application has occurred. In the first of the important continental shelf cases decided by the International Court of Justice — North Sea Continental Shelf cases in 1969 — the Court noted that there were two basic legal notions which reflected opinio juris in the area, one being that delimitation must be the subject of agreement between the States concerned and the second, that agreement must be arrived at in accordance with equitable principles. This suggests that, in relation to the delimitation of maritime boundaries, the notion of equity as a guiding principle had been accepted by States as a rule of customary international law. In the same case, the Court also noted that the acceptance of equity rested on a broader basis, namely, that the decisions of a court of justice must be just, and in that sense equitable. However the equitable idea of equality which found its expression and application in the equidistance principle in that case soon ceased to be anything more than one method amongst others for ascertaining a disputed maritime boundary.

In the Continental Shelf (Tunisia/Libya) case, the Court stated, ‘[Equity] was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the
development of international law; the legal concept of equity is a general principle directly applicable as law. The Court added that the result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result which is predominant; the principles are subordinate to the goal.

The proposition came to be widely accepted that each maritime boundary was unique and therefore not susceptible to the development and application of general rules of delimitation. The result has been that many decisions of the Court and arbitral tribunals do not demonstrate any systematic definition of the equitable criteria that may be taken into consideration for an international maritime delimitation. The comment has been well made that aw is valuable only if it guides the behaviour of its subjects in the real world – a task that is particularly delicate in public international law. If the law is so flexible that any result is possible it fails to fulfil that essential function.

To conclude, there is deep unease amongst international scholars both from the common law tradition and the civil law tradition at the unconfined discretion which would repose in judges were they permitted to have recourse to equity as an unstructured concept, so just, so equitable, so universally recognised, that it must be applied in international relations. [It is one of the] general principles of law recognised by civilized nations.
It can not be surprising that the Court has avoided discussing equity as an abstract idea. The discussions in the Advisory Committee demonstrate quite profound differences between the representatives of the different legal systems about the content of equity and the work it can do. Since then the number of independent states has more than doubled and they all wish to join in the economic wealth of the world. The Court has achieved surprising unanimity in cases which have, at heart, an equity issue. It has tended to achieve this by connecting elements of equity with very concrete circumstances. To this extent equity is a general principle of law recognised by civilised nations.

2.3 Development of Equity in International Law:

In the Anglo-Saxon times, as well as in the early days of the Conquest, justice was administered by local Courts, presided over by laymen, who owing to their ignorance of law, had to depend blindly on precedents and thereby incapable of coping with the progress of the nation. The development of equity may be traced from the reign of Edward I at the end of the 13th Century. At that time there were in England three great courts viz- (1) King’s Bench (2) Common Bench or Court of Common Pleas and (3) The Exchequer. The law administered by these Courts was the Common Law, based on the common custom of the country. Of the three Courts, the Exchequer was also an administrative department of the Government and the Chancery formed the secretarial department.

A very important function of the Chancery was the issuing of writs to enable a suitor to bring an action at law. The Common Law had grown up to that
extent that remedies for wrongs were totally dependent upon the existence of writs. The numbers of writs however were limited and if a person’s cause of action could not be brought under any of the recognised writs, the Common Law provided no remedy.

Thus the Common Law was deficient in the following three aspects. 1) Remedy was not available in all cases, for many wrongs remained unredressed for want of proper writs. The number of writs was very small and many claims could not be brought under any of them. 2) The relief granted by the Common Law Courts was not always adequate. 3) Being a reminiscence of feudal period, the procedure in the Common Law Courts was defective and unsatisfactory.

The equitable jurisdiction in England grew up from the deficiencies of the law and inadequacy of remedies provided by the Common Law Courts. These circumstances made the establishment of a new Court which would grant relief in cases where the Common Law Courts granted none. Prior to the Judicature Acts, Common Law and Equity were administered in different Courts. No Court had power to grant completely both legal and equitable remedies. Finally as a result of Judicature Acts of 1873 and 1875, the Courts of Common Law and the Courts of Chancery were amalgamated. The Courts of the Queen's Bench, the Exchequer and Common Pleas and the Court of Chancery together with the Court of Exchequer Chamber were replaced by the Supreme Court of Judicature, established under the acts. This Supreme Court was directed to administer both Law and Equity.
2.4 Provisions of Equity in Maritime Delimitation under UNCLOS I:

The methods and criteria of maritime delimitation between adjacent and opposite States have been laid down in Article 6 of the 1958 Geneva Convention on the Continental Shelf and Article 83 (in respect of the continental shelf) and Article 74 (in respect of exclusive economic zone) of the 1982 Convention on the Law of the Sea. Prior to the above Convention, there was no settled rule of law or established technique that could govern the delimitation of continental shelf boundaries between States with adjacent and opposite coasts. However several States made unilateral proclamations stressing the need for an equitable solution based on mutual agreement.

Of the many techniques employed for determining maritime boundaries, the principle equidistance stood prominent for its convenience, wide-spread applicability, and for the equitable results it generally yielded. Ultimately this principle found its place in 1958 Geneva Convention on the Continental Shelf.

Though the rule of equidistance principle was the central axis of Article 6 of 1958 Geneva Convention on Continental Shelf, it was sandwiched between two limitations; to wit, agreement between the parties and the existence of 'special circumstances'. A departure from the principle of equidistance is justified only on fulfillment of these two conditions.

---

19 Surya P. Sharma, 'Delimitation of Land and Sea Boundaries between Neighbouring Countries' (New Delhi-1989) p. 101
In the 'North Sea Continental Shelf cases' the International Court of Justice was enjoined to decide upon the issue of the applicability of Articles 6, paragraph 2, of the 1958 Continental Shelf Convention and the rule of equidistance and to assess if the latter would lead to equitable results.

Regarding Article 6, paragraph 2, the Court ruled that it was inapplicable in the North Sea cases inasmuch as the Federal Republic of Germany was not a party to it and in consequence it did not pass any judgment on whether this provision had the potentiality of effecting equitable boundary.

On the equidistance line, it unequivocally laid down that in a number of cases this may not lead to an equitable solution, which should be then arrived at by negotiation. This may be taken to mean that unless recourse is made to special circumstances clause even this provision (Article 6) might lead to inequitable results.

In the North Sea cases itself it is significant to note that the International Court of Justice recognised the rule of equidistance as the most equitable solution to the problem, although the equidistance line may not be applicable when it would lead to an inequitable result. The Court held that no other method of delimitation has the same combination of practical convenience and certainty of application than the method equidistance.

---

20 North Sea Continental Shelf cases Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands, 1969 I.C.J Reports, (Judgment of 20 February)

21 Surya P. Sharma, see note 18 above, p.102

22 I.C.J. Reports 1969, see note 19 above, p.34 para 5

23 Surya P. Sharma, see note 18 above, p.102

24 I.C.J. Reports 1969, see note 19 above, p.23 para 23
Thus the Court attached reasonable degree of decisive importance to the role of equidistance in the process of maritime boundary delimitation although it ruled that, for achieving most equitable solution, circumstances other than equidistance line also merited adequate consideration.\(^{25}\)

In the Anglo-French case, the Court of Arbitration gave emphasis on the general objective of the attainment of the delimitation of boundary in accordance with equitable principle. In the opinion of the Court both Article 6 of the 1958 Continental Shelf Convention and customary law were designed to achieve this objective. In effect, Article 6 provides the general norm of customary law that the boundary be determined in accordance with equitable principles.

Pointing to the twin rules of the North Sea cases, that is, natural prolongation and failing agreement, equitable principles are to be applied, the Court observed that they are of general character and were applicable to a delimitation under Article 6 no less than customary law.\(^{26}\) It further ruled that Article 6 provided not two but one combined equidistance - special circumstance rule. This approach over-ruled the earlier one where equidistance was considered to be the rule and 'special circumstances' an exception. Now in each case the decision-makers, while achieving continental shelf delimitation, must apply both the equidistance rule and special circumstances.\(^{27}\)

The Court laid down that equidistance method has no inherent quality as method manifesting a legal norm of delimitation but it is always relative to the

---

\(^{25}\) Surya P. Sharma, see note 18 above, p.102

\(^{26}\) Ibid.

\(^{27}\) Ibid, p.103
particular geographical situation. As a matter of general policy, it declared that appropriateness of the equidistance method or any other method for effecting an equitable delimitation is a function or reflection of geographical and other relevant circumstances of each case.\footnote{Surya P. Sharma, \textit{see note 18 above}, p.102}

Regarding the facts of Anglo French case, there was a dispute between France and the United Kingdom in respect of boundary delimitation in two areas: the Channel Islands area and the Atlantic area. While determining the boundary in the Channel Islands area, the Court ruled that the presence of Islands disturbed the balance of geographical circumstances of equality.\footnote{Ibid., p.103} The Court in its conclusion held that if Channel Islands were given full effect, France would lose; on the contrary, the size, population, economic situation and so on, in the area precluded full acceptance of the French position. Therefore the Court worked out an intermediate solution in terms of the 'primary' boundary and the secondary' boundary. The 'primary' boundary comprised the mid-channel median line drawn disregarding the Channel Islands. The Court ruled that the continental shelf to the north of this line belonged to the United Kingdom and to the south of the line it belonged to the French Republic with the exception of the portion to be carved out by the second stage of the delimitation.\footnote{Ibid.} Further the Court held that the secondary boundary should be drawn at a distance of 12 nautical miles from the established baselines of the territorial Sea of the Channel Islands. By this decision it is clear that the boundary departed from full fledged equidistance line because it regarded the Channel Islands constituting special circumstances, all the same it is
significant that the Court recognised with respect the principle of equidistance and its decisive role.31

In delimiting the boundary in the Atlantic region, the Court declared that it was modifying, though not rejecting, the equidistance principle. In the opinion of the Court, the additional projection of Scilly Isles into Atlantic region constituted ‘special circumstances’ or an element of distortion material enough to justify a method of delimitation other than the strict median line envisaged in Article 6, paragraph 2, of the Geneva Convention. The actual method followed took account of the Scilly Isles as part of the coastline of the United Kingdom but gave them less than their full effect in applying the equidistance method.32 The Court thus applied the combined equidistance - special circumstances rule.

The rationale of this case is that the principal goal of international law regarding maritime boundary delimitation is to achieve equitable solution of the problem and that in determining specific boundary delimitation all relevant factors including equidistance must be taken into account.33


In UNCLOS III, several countries took part in the deliberations on delimitation of the continental shelf and the exclusive economic zone between States with adjacent and opposite coasts against the backdrop of Article 6 of the
Historical Development (Evolution) of Maritime Delimitation Law and Equity in International Law

Chapter II

Geneva Convention on the Continental Shelf and the judgment of the International Court of Justice in North Sea cases.

In the Conference, two groups were formed one supporting the equidistance principle, and other opposing it in a varying degree. But no country rejected equidistance principle in toto. According to the supporters of equidistance, the most important aspect of geographic relationship was proximity; whereas the opposite group desired that all aspects of the geographical relationship should be taken into account in the process of boundary delimitation.34

The delegations of UNCLOS III expressed different views on the efficacy of the criterion of equidistance in general, and in reference to Article 6 of the Geneva Convention on the Continental Shelf. The debate focused attention on three points:

(1) Policy justifications for adopting equidistance rule,

(2) Current status of equidistance rule, and

(3) Nature of Equidistance Rule in UNCLOS III

2.5.1 Policy Justifications for Adopting Equidistance Rule:

The supporters of the equidistance rule put forth several justifications. The Greek delegate emphasized the necessity of devising a rule that would be basic to all situations while allowing room for agreement to suit special situation and which would, in consequence, avoid opening the door to conflicting

34 Surya P. Sharma, see note 18 above, p. 105
interations. He thought that the rule of equidistance fulfilled this test. He also pointed to the observation of the International Court in North Sea cases that no other method of delimitation had the same practical convenience or certainty of application.

Notwithstanding the great variety of geographical situations involved, the Netherlands took the view that there were some objective parameters for determining marine boundaries, which included the median line or equidistance principle.

2.5.2 Current Status of Equidistance Rule:

Referring to its current status, the Greek representative pointed out that the rule of the median line of equidistance was embodied not only in multilateral international instruments but was also followed very widely in bilateral agreements all over the world. According to the view of Denmark, the rule had won general recognition.

2.5.3 Nature of Equidistance Rule in UNCLOS III:

Pointing to the future, a large number of delegations suggested that, the future convention in respect of delimitation of the continental shelf and the exclusive economic zone should provide for the observation of the rule of equidistance, failing agreement and if there were no special circumstances - a provision somewhat similar to Article 6 of the Geneva Convention. Other

---

35 Surya P. Sharma, see note 18 above, p.105
36 Ibid., pp. 105 & 106
37 Ibid.
38 Ibid.
delegates say Japan, the Republic of Korea, Cyprus, Italy, Malta, Portugal, Tonga and Kenya also supported the rule of equidistance, except when there were agreements otherwise or there were special circumstances.

Those who opposed the equidistance rule stated several reasons, especially that this rule was arbitrary, inequitable and discriminatory. According to Thailand this rule frequently resulted in inequity. The Honduras representative contended that equidistance ran counter to the very nature of soil and subsoil. Some delegations expressed the view that equidistance represented just one of the many methods of delimitation and they cited the decision of the International Court of Justice in the North Sea cases, as the authority. Thus a conclusion was drawn that the equidistance rule was not mandatory, citing North Sea cases judgment as authority. 39

2.5.4 Provisions of Equity in UNCLOS III:

Equity was not abstract justice, not did it imply notion of equality. Equitable principles meant, as the International Court of Justice laid down in North Sea cases, that the parties were free to apply a combination of different methods and must take into account all the relevant circumstances. 40

Thus the question of the delimitation of the maritime boundary between States with opposite or adjacent coast became an intensely controversial one at the UNCLOS III between 1974 and 1982, particularly concerning the exclusive economic zone and continental shelf. A large group of delegations supported the

39 Surya P. Sharma, see note 18 above, pp.108-109
40 Ibid.
delimitation criteria as embodied in the 1958 Conventions, giving a pride of place to the principle of the median or the equidistance line. Another large group of delegations supported the view expressed by the International Court of Justice in the North Sea Continental Shelf cases, (1969), and gave a pride of place to the equitable principles in settling the delimitation of the maritime boundary. Various attempts were made to combine the two criteria, particularly in Negotiating Group 7 on maritime boundary between 1978 and 1980, but without much success. Ultimately, a solution was arrived at in August 1981 which was supported by both the equity group and the equidistance group of delegations at UNCLOS and embodied in the Draft Convention on the Law of the Sea, which was adopted at UNCLOS by vote in April 1982 and opened for signature and ratification in December, 1982. Regarding the delimitation of exclusive economic zone {Art. 74(1)} and the continental shelf boundary {Art.83(1)}, no distinction was made between the two concerning the delimitation criteria. Nor was any distinction made between States with opposite or adjacent coasts.

Article 83 (1) runs 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 International Court of Justice, in order to achieve an equitable solution.

2.6 Difference between Law, equity, ex aequo et bono:

41 S.P. Jagota, 'Maritime Boundary', Dordrecht, the Netherlands 1985 p57.
From the very first stumbling of the law of maritime delimitation, equity has occupied a central place in the body of legal norms relating to it. Though not mentioned in the 1958 Conventions, all that went before, from the pre-Second World War work up to the International Law Commission’s discussions and commentaries, by way of Truman Proclamation and the 1953 report of the Committee of Experts, shows that the equidistance / special circumstances rule incorporated in the 1958 Conventions was intended precisely for the purpose of avoiding inequitable solutions and reaching equitable results.43

Equity is defined by the Courts both negatively and positively. Negatively it does not mean a decision ‘ex aequo at bono’ and positively it is a part of the law.

The Courts have been careful to distinguish between equity and ‘ex aequo et bono’. The solution arrived at must certainly be equitable, but that does not mean that it must necessarily be the same as if the Court had been asked by the parties to decide ‘ex aequo et bono’. The Courts obviously attach a good deal of importance to this distinction since they come back to it in case after case.44

If equity is considered by the Courts as different from ‘ex aequo et bono,’ it is because looked at from a positive point of view, it must be seen as being part of the law. There is no clash of opposites between law and equity, but rather an integration of the two.

44 Ibid., p.163
To explain why the law has made equity its own, and perhaps to give it greater force, the judgments emphasize that law and equity are close because they start from and give expression to the same idea, the idea of justice. This is true enough but goes too far. If law and equity are the twin daughters of justice, 'ex aequo et bono' is a third. From law to 'ex aequo et bono' by way of equity is a seamless continuum.

2.7. Views relating to the Role of Equity:

2.7.1 First View - Equity is a rule of substitution:

According to one view, equity is a corrective, intended to remedy the inequity produced in some circumstances, by the application of the rule of law.

From this point of view, equity is a rule of substitution, which, in cases where the application of the general rule leads to an inequity, allows a more flexible rule to be applied, one more appropriate to that particular case.

Interpreted thus, equity comes into play only after the inequity of the result produced by the application of the general law has been established. It does not appear as a primary element, but only at a second stage. One is tempted to say that its role is not so much the positive assurance of an equitable result as the negative avoidance of an inequitable one.

Thus seen in this corrective role, equity tends to have a degree of objectivity. It is not a desire for moral justice which leads to the preference for

---

46 Ibid., p.165
47 Ibid., p.166
the rule of the particular over that of the normal, but the objective finding that, on the face of it, a result is inappropriate. It is manifest, obvious inequity, indisputable by any normally enlightened mind that calls for the correction.  

2.7.2 Second View — Equity is an independent factor:

According to the second view, equity is no longer an alternative norm, but it is an independent factor in delimitation process, in the sense that the Court will derive the solution it deems equitable directly and without intermediary from its apprehension of the facts of the case.

This means that the legal quality of equity hangs by a tenuous thread. In theory, equity plays its role under the law, as its proxy, one might say, rather on the *renvoi* principle, but this connection is more verbal than real. It is a little as if municipal law simply provided that the Courts should apply equitable penalties to the facts which they regard as delictual. Would the principles *nullum crimen sine lege* and *nulla poena sine lege* still be respected? No longer just a corrective to legal norm, but with direct and independent effect, equity, with this approach, ends up replacing the norm and taking the place of the law. It is no use saying that equity remains a legal concept because it is the law which determines when it is to be applied. Equity thus conceived inevitably drifts from the objectivity of the reasonable and the unreasonable into the subjectivity of the just and the unjust. The distinction between this equity which is theoretically legal and the pure equity of *ex aequo et bono* is a fine one.

---

49 Prosper Weil, see note 42 above, pp. 166-167
2.8 Equity - Equality under Islamic and Hindu Laws

The Code of Manu in ancient India - dating before Christ - describes 'Judicial conscience as a vital source of Hindu Law along with the scriptural texts. Judicial conscience ranked higher than the written text of law; that also was the foundation of equity in England, deriving from the function of the Chancellor as the conscience of the King, a role which could entail giving new remedies where none existed in the King's Courts.\(^5^0\)

Equality, as one of the recognised principles of equity, was perceived as early as the existence of the Phoenician - Roman jurisconsults and it is to be found even in the terminology of Islamic law. 'If thou judge, then judge with equality based on fairness and equity', is the essence of the Koranic wisdom of Sura IV, verse 61, and Sura V, verses 42 and 46.\(^5^1\) Again, Hindu law recommends that the individual act should be assessed by the judge according to his own conscience with his eyes set on justice, fair play and स्थायित्व equality. The dictates of one's conscience: स्थायित्व प्रियायत्व based on considerations of justice should take priority over the written text of law. Thus equity was to be the guide particularly when there was no other rule of law applicable.

2.9. Role of Equity in Settlement of International Disputes:

\(^5^0\) Nagendra Singh, see note 49 above, pp.125-126
\(^5^1\) Holy Quran - The meaning of Sura iv & Sura v particularly verse of Sura V runs as follows, 'Listeners for the sake of falsehood; Greedy for illicit gain; if then they have recourse unto thee (Muhammad) judge between them or disclaim jurisdiction, then they cannot harm thee at all. But if thou judgest, judge between them with Equity. Lo' Allah loveth the Equitable.
\(^5^2\) Nagendra Singh, see note 49 above, p. 183
The role of equity in the international context is a difficult and sometimes controversial subject. An examination of the Court's contribution to the peaceful settlement of international disputes would be incomplete without reference to the Court's invocation of equity, it is of the essence of equity as compared with law or as compared with other rules of law, if it is preferred to view equity as a component of law, that equity is more flexible, and functions essentially as an adaptation of the rules of law to the multifarious circumstances of individual cases. It necessarily follows from this that equity is less predictable in its operation.53

Both in the international and the municipal sphere, it is normal and desirable that the majority of disputes should be settled by agreement without recourse to Courts of either law or equity. Any system of law must however have some degree of equity built into it, if only as safety valve. If therefore a dispute is such that its judicial resolution will involve the application of equitable principles, the contribution of the judge to the peaceful settlement of the dispute becomes more of a necessity than an optional alternative.

In any dispute the contribution of a judge can be either based on the text of the law or on considerations of equity. It is the equity, which application is necessary in the fair and just administration of justice, and it is the outcome of a judge's conscience in interpreting the application of the law in the circumstances of the case.

53 Nagendra Singh, 'The Role and Record of the International Court of Justice', New Delhi 1986, p.124
2.10 Conclusions: Thus the role of equity in any administration of justice has to be given a proper place of importance and the International Court of Justice has upheld that aspect in the settlement of disputes. Though the International Court of Justice has recognised that the law of nations may be enriched by considerations of equity, it has never had occasion to go beyond the limits of that law by resorting to adjudication 'ex aequo et bono' under Article, 38 paragraph 2, of the Statute.

It has never invoked that provision which, of course requires the consent of the parties, and furthermore, it has been careful not to fill any gap or lacuna in law by invoking that developmental process which is reflected in 'ex aequo et bono'. Thus, the Court has taken good care to restrict the role of equity to its operation praeter lagem, or infra legem, and avoided involvement in any extra-judicial activity contra legem.54

The Court in North Sea cases, in rejecting the application of the equidistance principle said. In certain geographical circumstances the equidistance method leads unquestionably to inequity.55

The Court in the North Sea cases identified the concept of equity as a role of customary international law to be applied to the delimitation of adjacent and opposite continental shelves; on the following reasons:

54 Nagendra Singh, 'The Role and Record of the International Court of Justice', New Delhi 1986 p. 181
55 I.C.J.Reports 1969, see note 19 above, p.49
There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane and it is not such natural inequalities as these that equity could remedy.  

The question which has been raised in the North Sea Continental Shelf cases as to where exactly was the source of the rule asserted by the Court that ‘equality’ and with its ‘equity’ were to be reckoned with in the same plane. The questions here put have been answered by the Court to some extent in subsequent cases in Continental Shelf (Tunisia /Libyan Arab Jamahiriya) and in Delimitation of the Maritime Boundary in the Gulf of Maine Area.

The question contains two aspects and each one is answered as follows:

**First,** surely equity and equality have been regarded as ‘birds of the same feather’.

**Secondly,** the Court could only take account of those factors of equity which were relevant to the issue and pertinent to the decision-making process in that particular case (North-Sea Continental Shelf cases). If the Court was resorting to equitable apportionment or distribution of resources by resorting to a sharing arrangement system, it should, of course, have given due importance to

---

56 I.C.J. Reports 1969, *see note 19 above, pp.49-50*
factors relating to size of parties, wealth of their population, dependence of each on access to natural resources of its own territory, etc.\textsuperscript{57}

Though the Court has referred to ‘equity within the law’ several times in its decisions, but nowhere defined the concept of equity. In the ‘Fisheries Jurisdiction cases’ the Court also did not explain what equity meant, and why it was deemed relevant to invoke it in the case. It is however perhaps difficult to define varying equitable considerations in the context of the differing nature of the cases that are brought before the Court. Thus the vastly varying aspects of equity involved in the different circumstances of each case do not lend themselves to promote a definition. Would it not, therefore, be better not to freeze the concept of equity by a definition when its wide application can be best utilised to serve the basic interest of justice in a given case? To define would be to render static a valuable principle in the settlement of disputes.\textsuperscript{58}

Thus it has been made clear by the Court in the North Sea Continental Shelf cases and in subsequent cases, that equity is part of international law. This would add to the clarity of the Court’s maintaining its integrity in relation to the law it applied.

\textsuperscript{57} I.C.J. Reports 1969, \textit{see note 19 above.}
\textsuperscript{58} Nagendra Singh, \textit{see note 54 above, p.184}