DELIMITATION OF Maritime Boundaries



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FOREWORD

By R. W. Bentham, Emeritus Professor of Petroleum and Mineral Law, Centre for Petroleum and Mineral Law Studies
University of Dundee

3 July 1991

Professor Habibur Rahman has kindly asked me to write a foreword for this book concerning the law of the sea, the first, so far as I am aware, to be written in his country, Bangladesh. Hence, while much of the work concerns issues that have been considered at length elsewhere—baselines, territorial sea, exclusive economic zone, continental shelf and so on—the work has a novel perspective. In particular Chapter VIII on the delimitation of maritime zones between Bangladesh and India contains much that is new and interesting.

The author has carried out most painstaking research into the source material, and the wealth of footnotes will be valuable to future scholars, particularly in his own country. While the implications of the Libya/Malta Case (1985 ICJ Rep 13) for future delimitation cases are not discussed at length, that is a matter which might well be included in a future edition.

R. W. Bentham

PREFACE

This book under the heading of the *Delimitation of Maritime Boundaries* has grown mainly from my research entitled *Delimitation of Maritime Boundaries with Special Reference to the Bangladesh-India Situation* in the University of Wales Institute of Science and Technology (UWIST), UK, 1980-82.

In dealing with different sea zones, the book has made acquaintances with their origins and state practices. It has analysed the phases of developments on the law of the sea by the states individually, regionally and collectively. As time passed, the sea zones ranging from internal waters to 200 n.m EEZ and the continental margin became conventionally formulated and the question of the delimitation of maritime boundaries arose greatly particularly between opposite and adjacent coastal states. Because of the extended sea zones such as the 200 n.m EEZ and the continental margin the delimitation of maritime boundaries between opposite and-adjacent coastal states has been a problem creating topic of international law of the sea. The book has examined the practical aspects of the conventional provisions dealing with the delimitation of maritime boundaries. Furthermore, it has analysed judicial decisions related to the delimitation.

Since its emergence, Bangladesh is facing maritime boundary delimitation problems with the neighbours particularly with India. I have explained state practices, judicial decisions and the law of the sea convention provisions taking into account geo-physical and socio-economic factors, and then suggested equity to be effected to the maritime boundary delimitation between Bangladesh and India.

In spite of all endeavours it was not possible to publish the book free from printing mistakes. I offer my regret for this inconvenience. Readers may kindly refer to the errata so far provided at the end of the book.

As regards acknowledgements, I take the privilege to express indebtedness to my supervisor Professor E. D. Brown and thanks are to Mr. Bernardo Zuleta, Under-Secretary-General of the United Nations for sending me the materials. I wish to extend my thankfulness to His Excellency, Judge Shigeru Oda of the International Court of Justice and Professor Wolfgang Graf Vitzthum of the

Faculty of Law of the University of Tubingen, West Germany (Germany) from whom I received encouragement and valuable guidance through correspondence to work on the law of the sea. My thanks are to the staff of the UWIST library and the University College of Wales library, Cardiff for their assistance in finding the materials.

I am especially thankful to Professor Z. I. Chowdhury of the Faculty of Law of Dhaka University. His advice and admonitions have strengthened my book considerably. I am grateful to Professor R. W. Bentham of the Centre for Petroleum and Mineral Law Studies, University of Dundee for sparing his valuable time to go through this book and for favour of writing a foreword to this humble work.

It is a pleasure to acknowledge the courteous and efficient collaboration in every respect of the publisher. My thanks are due to Ekra Printing Press proprietor Mr. Zoynal Abedin and compositor Md. Shahidul Islam for their copperation in getting the work into print.

Finally a great amount of gratitude goes to my wife and children for putting up with me throughout this exercise.

It is my sincere wish that this book may make a modest contribution to the delimitation of maritime boundaries.

Rajshahi
July 1991

M. Habibur Rahman

LIST OF ABBREVIATIONS

AJIL	American Journal of International Law
AYIL	Australian Yerabook of Internation Law
BILC	British International Law Cases
BYIL	British Year Book of International Law
CJTL	Columbia Journal of Transitional Law
CYIL	Canadian Yearbook of International Law
Doc.	Document
Draft Convention	Third United Nations Conference on the Law of the Sea, Doc. A/CONF. 62/L. 78 (1981)
EEZ	Exclusive Economic Zone
FCHS Convention	Convention on the Fishing and Conservation of the Living Resources of the High Seas (Geneva) 1958
First Conference	United Nations Conference on the Law of the Sea (Geneva), 1958
Fisheries Case	Anglo-Norwegian Fisheries Case, 1951
Fisheries Jurisdiction Case.	*United Kingdom V. Iceland*, 1973; *Federal Republic of Germany V. Iceland*, 1973
Franconia Case	*Queen V. Keyn*, 1876
GCS	States with Special Geographical Characteristics
GAOR	Official Records of the United Nations General Assembly
ICJ	International Court of Justice
ICJ Reports	International Court of Justice. Reports of Judgments, Advisory Opinions and Orders
ICJ Yearbook	Yearbook of the International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICNT	Informal Composite Negotiating Text
IJIL	Indian Journal of International Law
ILC	International Law Commission
ILC Yearbook	Yearbook of the International Law Commmission
IL	International Legal Materials
IS	Informal Single Negotiating Text
JA	Japanese Annual of International Law

JMLC	Journal of Maritime Law and Commerce
JSCL	Journal of the Society of Comparative Law
KCA	Keesing's Contemporary Archives—Record of World Events
LLS	Land-Locked States
LNTS	League of Nations Treaty Series
LOS	Law of the Sea
LOS Convention	Law of the Sea Convention, 1982
New Directions	New Direction in the Law of the Sea
n.	Footnote
n.m	Nautical Mile
NYIL	Netherlands Yearbook of International Law
PASIL	Proceedings of the American Society of International Law
RIAA	United Nations Reports of International Arbitral Awards
Seabed Committee	Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction
Second Conference	Second United Nations Conference on the Law of the Sea (Geneva), 1960
Supp.	Supplement
Third Conference	Third United Nations Conference on the Law of the Sea
TS&CZ Convention	Convention of the Territorial Sea and the Contiguous Zone (Geneva), 1958
UKTS	United Kingdom Treaty Series
UNCLOS I	(First) United Nations Conference on the Law of the Sea (Geneva), 1958
UNCLOS I OR	Official Records of UNCSOS I
UNCLOS II	Second United Nations Conference on the Law of the Sea (Geneva) 1969
UNCLOS II OR	Official Records of UNCLOS II
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNCLOS III OR	Official Records of UNCLOS III
Un. Leg. Ser.	United Nations Legislative Series
UNTS	United Nations Treaty Series
YUN	Yearbook of the United Nations

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CHAPTER I

INTRODUCTION

1. General Reading

It goes without saying that the ocean occupies five-sevenths of the earth's surface. In spite of that we are closely related with its two-sevenths land surface. The land surface has been divided among more than 150 states. The sea is a domain of individual and common interests of these states. All such interests are to be governed by the international law of the sea.

Before the advent of science, people had no acquaintance with the sea as today. The sea inspired tales and legends to the people. As time passed, it was treated as embodying war interests of different nations[1]. With the progress of science and technology together with different discoveries on the universe, the people have found diamond, pearl, manganese, nickel, cobalt, bauxite, oil, gases and food stuffs there.

It is a fact that the ocean receives much the greatest part of the sunlight which is the basic source of energy from which it is possible to derive all sorts of matter—organic and inorganic[2].

The law of the sea is the 'heart' of traditional international law.[3] It has been one of the most dynamic areas of international law in this century[4]. As a matter of fact, many factors—social, economic, commercial, ecological and military have brought the law of the sea into even greater prominence than before and have provoked profound changes in the traditional principles of law applicable here. It can according to Professor Brown rightly be pointed out that;

> The history of the modern international law of the sea can perhaps be best understood by perceiving it as a continual conflict betwaen two opposing, yet complemetary, fundamental principles—territorial sovereignty and the freedom of the high seas[5].

Because of the manifold and complex problems which it confronts, the law of the sea is now of the most interesting and challenging areas of growth in the body of international law. For three centuries—from the beginning of seventeenth century to our time, it was a stable ragime. The rules were established on an open doctrine of freedom of the sea. The doctrine is a good philosophy for nations with strong navies and for the people who have the power and technology and want to exploit it for their own benefit.

But the small, weak, poor and underdeveloped nations cannot take advantage of this freedom to the same degree.

The inter-relation between law and fact has long been recognised. Law is more than a body of norms ; it is a reflection of facts and circumstances. It is, therefore, said that the life of the law is not logic but experience. With the changing needs of society, law changes, if it does not take into account the change in the society or community, law is dead and becomes useless.

Developing Countries have looked upon the present rules of international law with a certain scepticism ; it has been codified, it is alleged, to serve certain interests of the "civilized nations" ; it has been formulated in the context of situations and circumstances which exist no more today. With the changing pattern of political geography of the world since 1960, it is obvious that the developing countries would press for a new set of general principles of law in every sphere of state activity which reflect the changes in international life ; if necessary, they would create law to conform to new conditions. It is the vital perspective of evolving international law which is highly relevant in the future regime of the law of the sea.

The regime of the law of the sea resulted from four 1958 Geneva Conventions[6]. Most of the developing Countries did not and could not participate in the 1958 Law of the Sea Conference and as time went on, felt that the regime of the sea did not protect their interests and it benefited only the developed countries which laid down the law. In fact, since 1960 the general feeling was that the 1958 Law of the Sea Conventions were incomplete and insufficient as to the needs of the states[7].

In view of these considerations, the Third United Nations Conference on the Law of the Sea has adopted a new regime of the sea.

2. The Law of the Sea—Background of its Development

Generally speaking, the League of Nations in its Conference for the Codification of Internaional Law held in the Hague, 1930 had taken first step as to the law of the sea under caption "the Regime of the Territorial Sea". Although the Conference largely owing to the diversity of opinion on the breadth to be attributed to that area of the sea, was unable to reach agreement on any final conclusion, in the long run the results of its deliberations were not entirely negative. Because they brought to light some

of the new aspects of the problem and enabled ideas and concepts hitherto unknown to international law to be defined. In one sense the Conference accomplished certain concepts and principles which were later to become part of the international law of the sea. Unfortunately, the unduly pessmisstic impression left by the Conference did not create a propitious atmosphere for further efforts on the part of the League of Nations in the years followiug 1930. As regards the present international law of the sea, actual progress has become by the United Nations.

2. 1. The United Nations

After world war II, when the United Nations Organisations once more took up the work of developing and codifying international law, a more optimistic and propitious atmosphere prevailed. One thing which greatly contributed to making it so was the fact that, one after another, various states, provoked or encouraged by the two Proclamations of the United States, 1945 on the continental shelf and on the conservation of fisheries, issued declarations or enacted laws on the subject, thereby creating a situation which clamoured for the study of the question by international organisations.

2. 1. 1. International Law Commission (ILC)

This time was the International Law Commission of the United Nations which took the lead. The International law Commission began the study of the regime of the high seas at its first session in 1949. At its second session in 1950 it deliberately decided to deal with the law of the sea in different perspectives. At its third session in 1951, it decided to add to this the regime of the territorinl sea as well, pursuant to General Assembly resolution 374 (IV). Work on these matters continued at its fourth session, 1952 and at its fifth session, 1953 the Commission issued revised drafts of articles dealing with (i) continental shelf, (ii) fisheries resources of the sea, and (iii) the contiguous zone. It also broadened its study once more to deal with other aspects of the law of the sea that it had decided to lay aside its second session.

In pursuance of General Assembly resolution 899 (IX) of 14 December 1954, the International Law Commission at its eighth session, 1956 grouped together systematically in a single report all the rules adopted by it in respect of the high seas, the territorial sea, the continental shelf, contiguous zone, fisheries and protection

of the living resources of the sea, after examining the comments by governments on the existing regulations and on those concerning the territorial sea which left in abeyance.

At its eleventh session the General Assembly considered the final report prepared by the International Law Commission and decided, in accordance with a recommendation of the Commission, "that an international conference of plenipotentiaries should be convened to examine the law of the sea, and to embody the results of its work in one or more international convention or such other instruments as it may deem appropriate" (Resolution 1105 (XI)).

2. 1. 2. First United Nations Conference on the Law of the Sea (UNCLOS I)

The First United Nations Conference on the Law of the Sea met in Geneva from 24 February to 29 April 1958. But during this lapse of time a considerable amount of preparatory work was undertaken.

Eighty six states were represented at the Conference and most of the interested specialized agencies of the United Nations and Inter-governmental bodies sent observers. In accordance with the General Assembly resolution the report of the International Law Commission was adopted as the basis for the consideration of the law of the sea. The Conference also adopted the secretariat's recommendation concerning the allocation of the ILC draft articles, the following four committees being created to this effect : First Committee (Territorial Sea and Contiguous Zone) : Articles 1-25 and 66 ; Second Committee (High Seas : General Regime) : Articles 26 to 48 and 61 to 65 ; Third Committee (Fishing, Conservation of the Living Resources of the High Seas) : Articles 49 to 60 ; Fourth Committee (Continental Shelf) : Articles 67 to 73.

As the outcome of its deliberations, the Conference adopted four conventions[8] and nine resolutions[9] plus an optional protocol of signature concerning the settlement of disputes[10]. However, it was not possible to reach agreement in Geneva on two important questions : namely, the breadth of the territorial sea and certain fishing claims[11]. Recognising the desirability of making further efforts, at an appropriate time, to reach agreement on these questions, the Conference decided to request the General Assembly to study to its thirteenth session, 1958 the advisability of convening a second international conference of plenipotentiaries for further

consideration of the questions left unsettled (Document A/CONF. 13/56).

2. 1. 3 Second United Nations Conference on the Law of the Sea (UNCLOS II)

In pursuance of General Assembly's resolution (XIII)[12] of 10 December 1958, the Second United Nations Conference on the Law of the Sea met in Geneva from 17 March to 26 April 1960. Eighty-eight states attended the Conference. This Conference was regarded as the Territorial Sea Conference[13]. Since its work was far more limited in scope than that of the First Conference, its organisation and structure were simplified. It worked in two stages, the first in Committee of the Whole and the second in Plenary ; the salient difference in the two stages was that for the adoption of a proposal in Committee of the Whole a simple majority was required, whereas in Plenary a two-thirds majority was required[14].

The purpose of this Conference was to attempt to solve two crucial and inter-connected problems : (i) the width of the territorial sea ; and (ii) the breadth of zones in which exclusive fishing rights may be exercised by coastal states outside their territorial waters[15]. However, because of the claims and counterclaims arising out of fishery rights by different states[16], the Conference failed to adopt any proposal on the two questions before it.

Anyway, its Final Act included only two resolutions. The first recommended the General Assembly to approve the budgetary appropriations for the publication of a complete verbatim record of the discussions of the Conference. The second is the technical assistance resolution[17].

2. 1. 4. The Regime of Seabed Towards a Package Deal

It is of interest to state that neither the Continental Shelf Convention nor the High Seas Convention of UNCLOS I can be applicable to regulate the seabed and subsoil beyond the continental shelf. To this end, actual progress began to take place in the years following 1960.

The General Assembly of the United Nations, on the recommendation of the Economic and Social Council passed a resolution regarding the resources of the sea on 6 December 1966 (A/RES) (2172 (XXI) by which the Secretary General was requested to make a survey of existing knowledge concerning exploration and exploitation of the resources.

In 1967, a Maltese initiative, involving a plan for declaring seabed resources beyond the continental shelf to be the common heritage of mankind, and to be developed in the interests of all states, with special regard to developing countries, led to far-reaching action within the framework of the United Nations. The plan was designed not only to avoid an uncontrolled and unregulated gamble by developed states to ravage the mineral wealth of the ocean floor, but also an arms race which might lead ultimately to militarisation of the deep seabed. The General Assembly unanimously adopted a resolution (A/RES) (2340)(XXII) on 18 December 1967 and created an *ad hoc* Committee composing of 35 members to study the "Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction".

The *ad hoc* Committee held three sessions in March, July and August 1968 and its report was discussed at the twenty-third session of the General Assembly (Dec. A/7261 at 4 (1968). In this session the General Assembly adopted four resolutions relating to the matter, the most important of which declared that the exploitation of the seabed and ocean floor beyond the limits of national jurisdiction should be carried out for the benefit of mankind as a whole, with the United Nations system as the focal point of international cooperation in this domain and established a 42 member countries' "Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction"[18] to make recommendations upon the related questions.

After receiving the recommendations of the Seabed Committee, the General Assembly in its twenty-fourth session, 15 December 1969 adopted three resolutions on the "question of the reservation exclusively for peaceful purposes of the seabed and ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind". A resolution was adopted requesting the Secretary General "to ascertain the views of member states on the desirability of convening at an early date a conference on the law of the sea to review the regime of the high seas, the continental shelf, the territorial sea and contiguous zone, fishing and conservation of the living resources of the high seas, particularly to arrive at a precise and internationally accepted definition of the seabed and ocean floor which lies beyond national jurisdiction, in the

light of the international regime to be established for that area".

It was also provided, pending the establishment of the aforementioned international regime : "(a) 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 ; (b) no claim to any part of the area or its resources shall be recognized". The states opposing this (b) resolution included all the leading maritime Powers, including not only the USA, the United Kingdom, the Soviet Union and France but also Australia, Canada, Denmark, Italy, Japan. Netherlands, New Zealand, Norway, Portugal and South Africa.

The General Assembly in its resolution 2750 (XXV) 1970 enlarged the Seabed Committee by 44 members, appointed by the Chairman of the First Committee of the General Assembly. The enlarged Seabed Committee consisting of 86 members was instructed to hold two sessions in Geneva in March and July-August 1971 in order to prepare for the conference on the law of the sea draft treaty articles. The Committee was also authorised to establish such subsidiary organs as it deemed necessary for the efficient performance of its functions.

The Seabed Committee at its Geneva session in March 1971 established three sub-committees[19]. By the resolution of the General Assembly, 2881 (XXVI), 21 December 1971 the membership of the Seabed Committee was raised to 91. The General Assembly instructed the Committee to continue its work and hold two sessions, one in New York during March and April and one at Geneva during July and August 1972.

By resolution 3029A (XXVII) of 18 December 1972, the General Assembly. reaffirmed the mandate of the Seabed Committee and requested it to hold two further sessions in 1973, one of five weeks in New York beginning in early March, and the other of eight weeks at Geneva beginning in early July, with a view to its preparatory work of the conference on the law of the sea[20]. The Committee submitted a report with recommendation to the General Assembly at its twenty-eight session to convene the first session of the Third United Nations Conference on the Law of the Sea in New York for a period of approximately two weeks, in November and December 1973, for the purpose of dealing with organisational matters, including the election of officers, the adoption of the

agenda and the establishment of subsidiary organs and the allocation of work to those organs[21].

By resolution 3067 (XXVIII) the General Assembly in its 2169 plenary meeting held on 16 November 1973 decided that the work of the Seabed Committee had progressed sufficiently to permit the convocation of the conference on the law of the sea which had been decided in principle three year before, and the Seabed Committee was accordingly dissolved.

2. 1. 5. Third United Nations Conference on the Law of the Sea (UNCLOS III)

The basic principle to be followed in the Third United Nations Conference on the Law of the Sea to reach agreement on substantive matters was expressed in a formula which became known as the "gentleman's agreement". At its twenty-eight session (1939th meeting) of the General Assembly on 26 October 1973 the Chairman of the First Committee read out the following "gentleman's agreement" :

> Recognizing that the Third United Nations Conference on the Law of the Sea at its inaugural session will adopt its procedures, including its rules regarding methods of voting and bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole and the desirability of adopting a convention on the law of the sea which will secure the widest possible acceptance, the General Assembly expreeses the view that the Conference should make every effort to reach agreement on substantive matters by way of consensus ; that there should be no voting on such matters until all efforts at consensus have been exhausted and further expresses the view that the Conference at its inaugural session will consider devising appropriate means to that end[22].

The first session of the UNCLOS III met in New York between 3-15 December 1973. The session was intended to be organisational nature. The Conference elected its President, Chairmen and officers of the committee of the Whole and a Rapporteur-General. The Conference constituted a General Committee, a Drafting Committee and a Credential Committee[23].

The second session was held in Caracas from 20 June to 29 August 1974. It was one of the largest inter-governmental meeting ever held with 2000 delegates from more than 140 nations, plus 12 ,li,beration groups" from Palestine and various African countries.

Beginning with this session the Conference was structured on the basis of three Main Committees of the Whole ; a First Committee, concerned with the international machinery governing the use of the seabed beyond the limits of national jurisdiction ; a Second Committee, embracing all the traditional law of the sea topics, including the territorial sea, the economic zone, the continental shelf, the high seas, straits, archipelagos, and fishing ; and a Third Committee, dealing with the problems of marine pollution, conservation, scientific research, and technology transfer.

There arose two procedural issues in the Conference. First, the Conference had not before it any text on which to work. Instead there existed a vast mass of conflicting proposals, amendments and texts of differing states. Secondly, the General Assembly had adopted a "gentleman's agreement" of the effect that the Conference had to proceed by consensus of substantive matters, and there was no voting on such matters until all efforts at consensus had failed. A major problem was what procedure should be used if the delegates were incapable of reaching consensus. To this end, it was however, decided that the mechanism would be a two-thirds majority for substantive questions in Plenary session and a simple majority in Committee, provided that the majority in Plenary included at least a majority of those states attending the Conference.

The third session was held in Geneva from 26 March to 26 May 1975. This was in fact the first true negotiating session of the Conference, although no convention was adopted. Instead, the principal result was the preperation—near the end of the session of a three-part document titled *Informal Single Negotiating Text* (ISNT)[24].

At the President's suggestion (approved by the Conference), the Chairman of each Main Committee had been instructed to prepare a negotiating text taking into account the formal and informal discussions held in this Committee. This text to be informal in character and was not to prejudice the position of any delegation, nor was it to represent any negotiating text.

The fourth session was held in New York from 15 March to 7 May 1976. At its opening meeting, at the suggestion of the Conference President, it was agreed that each of the three Main Committees would utilize the respective part of the ISNT as a basis for informal negotiations, and the Chairman of each Committee would then prepare a revision of the Negotiating Text on the basis

of amendments. The chairmen of the three committees accordingly prepared revised single negotiating texts. These texts were prepared entirely on their own responsibility and would have no other status than that of serving as a basis for continued negotiation without prejudice to the right of any delegation to move any amendments or to introduce any new proposals. It was also agreed that the texts would not be regarded as committing any delegation or delegations to any of their provisions. On the last day of the eight-week negotiating sessions the *Revised Single Negotiating Text* (RSNT)[25] was distributed by the three committees chairmen as a basis for continued negotiation.

As a practical consideration, the ISNT presented by the Chairman of the First Commiitee (Doc. A/CONF. 62/WP. 8/Part I) in its Article 24 (1) laid emphasis on the establishment of a tribunal as one of the principal organs of the proposed International Seabed Authority and dealt in Article 32 with jurisdiction, power and functions, and composition of the tribunal and other related matters.

The provisions relating to the jurisdiction of the tribunal contained in Article 32, paragraph 1 (a) appeared to be in conformity with paragraph 15 of General Assembly resolution 2749 (XXV) concerning the "Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof Beyond the Limits of National Jurisdiction"[26].

The Chairman of the Second Committee, in Article 137 of his ISNT (Doc. A/CONF. 62/WP. 8/Part II) and the Chairman of the Third Committee, in Article 37 of his text /Doc. A/CONF. 62/WP. 8/Part III), made no special provisions for settlement of disputes.

As the subject of settlement of disputes would be an essential and vitally important element in the proposed convention, the President deemed fit to present the attached *Informal Single Negotiating Text*[27] in order to facilitate the process of negotiation.

The fifth session met in New York between 2 August and 17 September 1976. The First Committee held 13 formal meetings during this session. Most of the Committee's time was spent in informal meetings, either in the workshop set up by the Committee, or in the *ad hoc* Group created by the workshop to conduct negotiations on the system of exploitation of the international seabed area[28].

The Second Committee held no formal meetings. All its activities were conducted through informal meetings of the Committee itself and of negotiating and consultative groups[29].

The RSNT part III was considered as relatively well-balanced document as the starting point for the negotiations conducted in the Third Committee[30].

The sixth session was held in New York from 15 may to 15 July 1977, with tasks centring primarily on the issue of exploitation of the seabed. The President of the Conference drafted an informal text for a treaty which was released on the last day of the session, and which would serve as the basis for negotiation at the next session. This text was known as the *Informal Composite Negctiating Text* (ICNT)[31]. The ICNT combined the work of the main committees into one negotiating text.

The seventh session of the Conference met in Geneva from 24 March to 19 May and resumed in New York from 21 August to 15 September 1978.

Seven negotiating groups established in consultation with the Chairman of the First Committee, the Chairman of the Second Committee, the Chairman of the groups of African States, Asian States, Arab States, Latin American States, Eastern European States, and the Western European and other States, the Chairman of the group of coastal States, the Chairman of the group of land-locked and geographically disadvantaged States and the representative of the United States[32]. The groups were aimed at dealing with the outstanding hard-core issues. Three of these groups dealt with deep seabed matters ; the first with the system of exploration and exploitation and resource policy, including production limitations ; the second, with financial arrangements ; and the third, with organs of the Seabed Authority, their composition, powers and functions. The fourth negotiating group dealt with access to living resources of the economic zone by land-locked and geographically disadvantaged States ; the fifth, with the settlement of disputes over fisheries in the economic zone ; the sixth, with the definition of the outer limits of the continental shelf and revenue sharing ; and the seventh, with the delimitation of maritime boundaries between adjacent and opposite states, and settlement of delimitation disputes[33].

The eighth session met in Geneva from 17 March to 27 April and resumed in New York from 19 July to 24 August 1979. The session dealt intensively with the outstanding issues. Since its first day, work on those issues started effectively and continued throughout both parts of the session. The fruits of these labours are recorded in a revision of the *Informal Composite Negotiating Text* (ICNT/REV. 1)[34] issued following the last Plenary meeting in Geneva and in texts contained in reports of the relevant chairman presented at the close of the session in New York[35].

The ninth sesion met in New York from 27 February to 4 April and in Geneva from 28 July to 29 August 1980. Furthermore, the Drafting Committee met in New York for three weeks in June. At the end of the New York session the ICNT/REV. 1 was revised and the revised ICNT is found in document A/CONF. 62/WP. 10/REV. 2 dated 11 April 1980. At the resumed session the text was revised again and the text so revised was issued as the Draft Convention on the Law of the Sea (Informal Text) (Doc. A/CONF. 62/WP. 10/REV. 3 of 27 August 1980).

The tenth session met in New York from 9 March to 24 April and resumed in Geneva from 3 to 26 August 1981. The New York part of the session was attended by 154 states-the largest number ever. The aim of the session was to reach consensus on the informal text. But there was no success in New York[36]. In Geneva some minor additions were made to the informal text and the text came into being as the *Draft Convention* (Doc. A/CONF. 62/L. 78 dated 28 August 1981).

The eleventh session was held in New York from 8 March to 30 April 1982. The Draft Convention was adopted in this session. There were 130 votes in favour. The USA was among 4 countries that voted against, and Britain, West Germany and the Soviet Union were among 17 abstentions.

The resumed eleventh session (Doc. A/CONF. 62/SR. 182) was held in New York from 22 to 24 September 1982[37].The Conference held the final part of its eleventh session at Montego Bay from 6 to 10 December 1982 to hear statements of position on the Convention and then open it for signature. The nine-year United Nations Conference on the Law of the Sea ended with signing of Convention by 119 delegations[38]

The Convention[39] remained open for signature for two years, until 9 December 1984, at the Ministry of Foreign Affairs in Kingston, Jamaica. It was also open for signature from 1 July 1983, at the United Nations Headquarters in New York. States may accede to the Convention at any time, with no time limit. The Treaty will become binding on states which formally adhere to it through ratification or accession, as soon as enters into force. This will happen one year after it is ratified or acceded to by 60 states.

Fiji became the first state to ratify. Until now 43 states have ratified the Convention[40].

Adopted along with the Convention, and contained in the Final Act, are four resolutions. The first establishes the Preparatory Commission for the Seabed Authority and for the International Tribunal for the Law of the Sea. The second governs preparatory investments in pioneer activities by states and private consortia relating to polymetallic nodules on the deep seabed. The third resolution deals with the rights and interests of territories which have not attained independence or self-government. The fourth accords to recognised national liberation movement the right to sign the Final Act.

The first session of the Preparatory Commission was held in two parts in 15 March—18 April (Kingston) and 15 August—12 September 1983 and the second likewise in two parts in 19 March—13 April 1934 (Geneva) and 13 August—5 September 1984 (Geneva). Its work was conducted through four special commissions, two dealing with the proposed Authority and Tribunal respectively and the other two with (i) the possible effect of seabed exploitation of minerals on those developing countries already producing them and (ii) the drafting of regulations governing exploration for and exploitation of seabed minerals.

The first part of the third session of the new Law of the Sea Preparatory Commission convened in Kingston on 11 March—4 April 1985 devoted its main endeavours to seeking agreement on the creation of the International Seabed Authority and the Internatinal Tribunal for the Law of the Sea. However, little substantive progress was made against the reservations on the part of the United States, the United Kingdom and West Germany as the three major developed countries which had refused to sign the Conference. The second part of the Preparatory Commission's third session took in Geneva on 12 Aug-

ust—4 September 1985 and expressed deep concern that some states have undertaken certain actions which undermine the Law of the Sea Convention. During the third session the Preparatoy Commission continued work on (i) rules of procedure for the Assembly and Council of the proposed International Seabed Authority and for the proposed International Tribunal ; (ii) ways to alleviate the problems which seabed mining pose for developing country economy dependent on land based production of copper, nickel, cobalt and manganese ; (iii) the operational options of Enterprise/ the Seabed Mining Arm of the Authority ; and (iv) a draft mining code. The fourth session of the Preparatory Commission was held in New York, 11 August—5 September 1986. It adopted unanimously understanding on new procedures and mechanisms for registration and the first four applicants for mine sites (France, India, Japan, and the USSR)[41]. The fifth session of the Commission took place on 27 July—21 August 1987 in New York. In the session the first step towards implementation of the second mining regime by registering India as the first pioneer investor was taken. Each pioneer investor is guaranteed one site of no more than 150000 square kilometres (about 57000 square miles) for exercising exclusive right of exploration. The Preparatory Commission also agreed to a time table by which the three other applicants for pioneer states—France, Japan and the Soviet Union to be registered. The registration of India gives that country exclusive right to explore an area of 150000 square kilometres in the Indian Ocean. The decision also reserves for the Enterprise (the Mining Arm of the Seabed Authority) an area of equal commercial value in the same region[42].

The sixth session of the Commission was convened in Kingston on 14 March—8 April 1988. In the session implementation of obligations of the four registerd pioneer investors—France, India, Iapan and the Soviet Union was discussed. Among those obligations is the payment of 1 million US dollar beginning from these date of the allocation of the pioneer area allocated to it[43].

The seventh session ended in New York on 14 August—1 September 1989. The developing countries said that they would support efficient cost-effecting Sea-Law Convention and would discuss issues with signatories and non-signatories[44]. The first part of the eighth session was convened at Kingston on 5—30 March 1990 and

the session ended at the second part in New York on 13—31 August 1990. The Preparatony Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea adopted an Understanding on the implementation of registered pioneer investors[45].

3. Delimitation of Maritime Boundaries—General Approach

Delimitation means the determination of a boundary line by treaty or otherwise, whereas demarcation means the actual laying down of a boundary line on the ground[46]. Ian Brownlie states :

> ((It is common practice to distinguish delimitation and demarcation of a boundary. The former denotes description of the alignment in a treaty or other written source, or by means of a line marked on a map or chart. Demarcation denotes the means by which the described alignment is marked, or evidenced, on the ground, by means of cairns of stones, concrete pillars, beacons of various kinds, cleared roads in scrub, and so on. The principle of the distinction is clear enough, but the usage of the draftsman of the particular international agreement or political spokesman may not be consistent. In fact the terms are sometimes used to mean the same thing[47].))

It is a fact that every coastal state is entitled to prescribe maritime zones. But the breadth of the zones is a concern of international law. That is to say, the coastal state has a right to extend maritime zones up to the limits permitted in international law. According to the LOS Convention the coastal state is entitled to extend 12 n. m[48] territorial sea[49], 24 n.m contiguous zone[50] 200 n.m exclusive economic zone[51] (EEZ) and the continental shelf up to 200 n.m or to the natural prolongation[52] reckoning from the baselines,

One of the fundamental starting points of the various zones of maritime jurisdiction relates to the delineation of baselines. Article 3 of the 1958 TS&CZ Convention deals with the normal baseline. Artical 4 of the Convention indicates broadly the guideline in determining the straight baselines. We are all aware of the history and background leading to the formulation of this article. In the *Fisheries Case*[53], the International Court of Justice laid down its judgment relating to the baselines. A close analysis of the judgment of the Court establishes certain factors of importance. First, the Court underscored one major precept, viz, that any solution was to be dictated by geographic realities and that the coastal state would seem to be in the position to appraise the local conditions dictating the solution of its baselines. Secondly, the Court

to some extent recognised the Norwegian contention that rules of international law ought to take into account the diversity of facts and therefore, concede that the drawing of baselines must be adopted to the special conditions obtaining in different regions—Norway's method of drawing straight baselines was an adaptation rendered necessary by local conditions. The Court, therefore, pointed out that in its opinion all it could see was the application of general international law to a specific case.

Thus, the Court also gave effect to Norway's claim that its case was based on consideration which, *inter alia*, related to : (a) geographical conditions prevailing on the Norwegian coast ; (b) safeguard of the vital interests of inhabitants of the northernmost parts of the country.

It is important to note that though the judgment of the Court was initially subject to severe criticism, the International Law Commission only a few years later recommended its incorporation in 1958 Geneva Convention and Article 4 was adopted.

Under general international law, the determination of the boundary is left to the agreement of the parties concerned. As a practical consideration, the purpose of this is to facilitate a mutually acceptable solution. But if the provision is not precise and certain, it will be a source of further conflict and care must be taken to avoid such situation.

The subject-matter has assumed a great importance for various reasons. One obvious fact is that since late forties the exploration and exploitation of maritime resources has grown at an accelerating rate and consequently there has been increasing national claims to areas of the seabed previously held to have been either common property or the property of no man. Another factor is the conceptual change in claims to national jurisdiction.

In the past, national jurisdiction generally embraced a whole region ; now-a-days the situation is different. A state may wish to exercise control over a number of national jurisdiction with varying legal regimes. In addition to this, the 200 n.m claim of EEZ and the continental shelf as being the natural prolongation of boundaries have introduced a new dimension on the subject. The complex issue has been made more difficult as the world becomes increasingly conscious of the importance of national resources and development, especially after the spiral price of petroleum.

It is significant to note that the physical factors often make delimitation of maritime boundaries, in particular of continental shelf, a difficult undertaking. First, the coastline of a country may be irregular ; second, it may either be convex or concave ; third, there may be uninhabited off-shore island which may not really deserve to be given full effect as basepoints for the measurement of distance ; fourth, there may be a trench or canyon.

The 1958 Geneva Conventions are of very limited help to the parties that confront the delimitation issue (Article 12 of the TS&CZ and Article 6 of Continental Shelf Convention). During the Geneva Conference, delimitation was discussed in the context of narrow belt of territorial sea or of continental shelf of 200 metres. It was in this perspective that the equidistance method was concerned. The use of this method could not even remotely be applied for all situations, in particular when greater distance like 200 n.m EEZ or continental shelf up to the outer edge of the continental margin are involved. The short comings are insignificant near the coast and can become monumental far off-shore.

The present international legal disputes over the delimitation of territorial sea and continental shelf originate in large part from the ambiguities of the Geneva Conventions and have been further complicated by the varying interpretations sought to be made on judgment of the International Court of Justice of 1969.

In order to approach the problem of delimitation, the judgment of 1969 in the *North Sea Continental Shelf Cases*[54] is very helpful, though there is a tendency to misinterpret certain portions of the judgment.

There are several contentions in the judgment which are appropriate and relevant for the purpose of delimitation. A close analysis of the judgment of the Court establishes certain factors of particular importance. First, the Court regarded the equidistance method as one of the several methods of drawing a boundary under certain geographical configuration. Second, the Court held that equidistance method is not a customary rule of international law. Third, the Court distinguished the principle of delimitation between opposite states and adjacent states. Fourth, the Court emphasised the application of principles of equity for delimitation of shelf boundary. Fifth, the Court recommended that in order to achieve a fair and equitable boundary, various combination of methods

could be applicable; no rigid application of any method was permissible.

The subject-matter was discussed, debated and negotiated at the past sessions of the UNCLOS III. Ireland, Turkey, Algeria, Romania, France, New Zealand, Libya, Federal Republic of Germany, Iran, Morocco, Saudi Arabia, Thailand, United Arab Emirate, China, Ghana, Peru, Afganistan, Senegal and the Republic of Korea supported the principle of equity and Ireland presented a proposal[55] on the delimitation of sea boundaries at the Conference.

A consensus emerged during the 1975 March session in favour of equity, discarding the method of equidistance as the sole method and accordingly a formulation had been adopted and found a place in the RSNT in Article 71 with regard to EEZ and continental shelf. During the discussion, it was argued that the principles of equity were vague and such formulation would give rise to disputes. However, the consensus was against the above view in matters of delimitation. It was contended that the rigid application of the method of equidistance in the delimitation of maritime boundaries might not lead to an equitable solution.

Furthermore, efforts were made for the provisions of the delimitation of the EEZ and the continental shelf. The outcome came into being as the ICNT (Articles 74, 83) and the Draft Convention (Articles 74, 83). Articles 74 and 83 of the LOS Convention deal with the delimitation of the EEZ and the continental shelf between two states whose coasts are opposite or adjacent to each other.

As regards the law of the sea, delimitation deals with the extending of the sea zones by the coastal state up to the breadth of the zones from the baselines from which the breadth of the territorial sea is measured and with the determining of the boundary of the sea zones between two coastal states whose coasts are opposite or adjacent to each other. The coastal state as of right can extend the sea zones up to the breadth of the zones from the baselines. Practically, if the distance of the two opposite coastal states from their baselines is less than double the breadth of the sea zones, the coastal states shall have to delimit the same between them. But in the case of two adjacent coastal states every sea zone

extending from the baselines to the extent of its breadth is to be delimited between them.

It gose without saying that the 200 n.m EEZ and the continental shelf have enclosed a large part of the world ocean within national jurisdiction. In respect of the sea matters many states have been neighbour to each other. Consequently, the importance of sea zones between opposite or adjacent states is unquestioned,

Delimitation of sea zones between two opposite or adjacent states gives rise to different issues. Question arises whether the equidistance method or the principle of equity will be applicable to the delimitation. It seems that there is the necessity of taking into account the physical features of maritim zones and the coastline in order to make the delimitation between two opposite or adjacent states effective. Then, it is fair to conclude whether the method of equidistance or the principle of equity will be applicable to the delimitation.

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6 *Infra*, n. 8.

7 See chapter viii

8 Convention on the "Territorial Sea and the Contiguous Zone" (Doc. A/CONF. 13/L.52), hereafter cited as TS&CZ Convention ; Convention on the "High Seas" (Doc. A/CONF. 13/L.53) ; Convention on "Fishing and Conservation of the Living Resources of the High Seas" (Doc. A/CONF. 13/L.54), hereafter cited as FCHS Convention ; Convention on the "Continental Shelf" (Doc. A/CONF. 13/L.55).

9 Doc. A/CONF. 13/L. 56. See 2(1958) UNCLOS I OR 143-145.

10 Doc. A/CONF. 13/L.57.
11 See chapter iii & iv
12 783 rd Plenary Meeting, Agenda item 59, pp. 469-478.
13 See 6/10(1960) *United Natians Review* 40.
14 See Rules of Procedure adopted by the Conference (Doc. A/CONF. 19/7, Rules 35 and 49.
15 See 6/11 (1960) *United Nations Review* 45.
16 D. W. Bowett, "The Second United Nations Conference on the Law of the Sea", 9(1960) ICLQ 421-432.
17 UNCLOS II OR (Doc. A/CONF. 19/8) 176.
18 Hereafter cited as Seabed Committee.
19 The following subjects and functions were allocated to the Sub-Committees : Sub-Commitiee I : To prepare draft treaty articles embodying the international regime—including an international machinery—for the area and the resources of the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, taking into account the equitable sharing by all states in the benefits to be derived therefrom, bearing in mind the special interests and needs of developing countries, whether coastal or land-locked, on the basis of the Declartion of Principles. Governing the Seabed and the Ocean Floor and the Subsoil thereof Beyond the Limits of National Jurisdiction, economic implications resulting from the exploitation of the resources of the area (Resolution 2750A (XXV) as well as the particular needs and problems of land-locked countries (Resolution 2750B (XXV). Sub-Committee II : To prepare a comprehensive list of the subjects and issues relating to the law of the sea, including those concerning the regime of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the questions of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal States) and to prepare draft treaty articles thereon. Sub-Committee III : To deal with the preservation of the marine environment (including *inter alia* the preservation of pollution) and scientific research and to prepare draft treaty articles thereon. See 10(1971) ILM 973-981.
20 See 26(1972) YUN 31-37.

21 See *Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction, vol. 1, General Assembly Official Recodrs : Twenty-Eighth Session Supplement* No. 21 (A/9021).

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23 27 (1973) YUN 44-46.

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25 Doc. A/CONF. 62/WP. 8/REV. I/Parts I, II, III, 6 May 1976. See 5(1976) UNCLOS III OR 125-185 ; 30(1976) YUN 77-81.

26 *Supra.*, n. 21.

27 Doc. A/CONF. 62/WP. 9. This is regarded as Part IV of the ISNT. Parts I, II and III appear in Doc. A/CONF. 62/WP. 8). See 5(1976) UNLOS III OR 111-122 ; 29(1975) YUN 127-132.

28 Doc. A/CONF. 62/L. 16, 6 September 1976. See 6(1976) UNCLOS III OR 130-145.

29 The negotiating groups were entrusted to work as follows : Negotiationg Group 1 : to consider the legal status of the exclusive economic zone and the rights and duties of rhe coastal state and other states in the exclusive economic zone ; Negotiating Group 2 : to consider rights of access of land-locked states to and from the sea and freedom of transit ; Negotiating Group 3 : to consider payments and contribution in respect of the exploitation of the continental shelf beyond 200 miles ; Negotiating Group 4 : to consider straits used for international navigation ; Negotiation Group 5 : to consider delimitation of the territorial sea, the exclusive economic zone and the continental shelf, between adjacent or opposite states. See Doc. A/CONF. 62/L. 17, 16 September 1976. 6(1976) UNCLOS III OR 135, 136.

30 Doc. A/CONF. 62 L. 18, 16 September 1976. *Ibid.*, 139-143.

31 Doc. A/CONF. 62 WP. 10 And Add 1, 15 July 1977. 8(1977) UNCLOS III OR.

32 Doc. A/CONF. 62/62, 13/April 1978 ; Doc. A/CONF. 62/63, 18 April 1978. 9(1978) UNCLOS III OR 173 ; 10(1978) UNCLOS III OR 6-10.

33 Doc. A/CONF. 62 62, 13 April 1978. 10(1978) OR 6-10, 32(1978) YUN 143-153.

34 Doc. A/CONF. 62/WP. 10 REV. 1, 28 April 1979. 8(1979) ILM 686-816.

35 See 11(1980) UNCLOS III OR 77-126, 12(1980) UNCLOS III OR 55-125.

36 See *United Nations Press Release* SEA/445, 16 April 1981.

37 See *Draft Final Act of the Third United Nations Conference on the Law of the Sea*, Doc. A/CONF. 62/121 dated 21 October 1982.

38 *United Nations Press Release*, Department of Public Information Press Section, Round-up of Session, United Nations, New York, Dec. SEA/514 dated 10 December 1982 The following *119* states have signed the United Nations Convention on the Law of the Sea (Doc. A/CONF. 62/122 dated 7 October 1982) on 10 December 1982 : Algeria, Angola, Australia, Austria, Bahamas,Bahrain, Bangladesh, Barbados, Belize, Bhutan, Brazil, Bulgaria, Burma, Burundi, Byelorussia, Canada, Cape Verde, Chad, Chile, China, Colombia, Congo, Costa Rica, Cuba. Cyprus, Czechoslavakia, Democratic People's Republic of Korea. Democratic Yemen, Denmark, Djibouti. Dominican Republic, Egypt, Ethiopia. Fiji, Finland, France, Gabon, Gambia, German Democratic Republic, Ghana, Greece, Grenada, Guinea—Bissau, Guyana, Haiti, Hondras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Ivory Coast. Jamaica, Kenya, Kuwait, Lao People's Democratic Republic, Lesotho, Liberia, Malaysia, Maldives, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia. Morocco, Mozambique, Nauru, Nepal, Netherlands, New Zealand. Niger, Nigeria; Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Philippines, Poland, Portugal, Romania. Rwanda, Saint Lucia, Saint Vincent and Grenadines, Senegal, Seychelles, Sierra Leone, Singapore, Solomon Islands, Somalia, Sri Lanka, Sudan, Suriname, Sweden, Thailand, Togo, Trinidad and Tobago, Tunisia, Tuvalu, Uganda, Ukraine, USSR, United Arab Emirates, United Republic of Cameroon, United, Republic of Tanzania, Upper Volta, Uruguay, Vanuatu, Vietnam, Yemen, Yugoslavia, Zambia and Zimbabwe.

39 See *United Nations Press Release* SEA/514, 10 December 1982,2.

40 As of 2 May 1990 out of 159 sigratories 43 states have ratified the LOS Convention. The ratifiers are as follows : Antigua and Barbuda, Bahamas, Bahrain, Belize, Brazil, Botswana, Cameroon, Cape Verde, Cote d Ivoire, Cuba, Cyprus, Democratic Yemen, Egypt, Fiji, Gambia, Ghana, Guinea, Guinea-Bissau,

Iceland, Indonesia, Iraq, Jamaica, Kneya, Kuwait, Mali, Mexico, Oman, Namibia, Nigeria, Paraguay, Philippines, Somalia, Sao Tomb and Principe, Senegal, St Lucia, Sudan, Togo, Trinidad, and Tobago, Tunisia, United Arab of Tanzania, Yugoslavia, Zaire, and Zambia.

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53 *United Kingdom* v. *Norway*, ICJ, General List : No 5, 18 December 1951.

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CHAPTER II

BASELINES

1. Introductory Approach

It is a fact that all the sea zones are measured from baselines. In other words, the regime of baselines deals with the regime of internal waters. As such, coastal states take interests greatly in delineating baselines. At present different techniques have come into being as to the delineation of baselines. The present approach is to be aware of historical background, nature and characteristics of baselines and the trends of the coastal states in delineating the same.

2. Concept and Background

Baselines determine the seaward extent of the coastal state's internal or inland waters. Establishing baselines is of importance because all subsequent international sea zones are determined by reference to these baselines[1]. In the words of Sir Gerald Fitzmaurice :

> A baseline is simply the line (whatever it may be, and whether straight, curved or indented) which is properly to be taken as the inner line of the coastal belt of the territorial sea. It may be, and normally is, the coast itself, and in such cases the line of the coast is just as much a 'baseline' as any other. It is merely not a straight one, and has no end-points except where it abuts on the frontier of another State—in the case of an island there would be no end-points at all[2].

Much of the difficulty in agreeing upon principles and techniques of delimitation of the territorial sea derives from the eagerness of some people to begin by drawing a series of artificial baselines, as if nature were niggardly in proving what men require in this regard. "Many officials, in their patriotic efforts to fence off maximum areas of waters which they hope will go unchallenged, begin by drawing artifical baselines along concave coasts, between islands, and across bays, gulfs and estuaries"[3].

In earlier days, for instance, in the days of "cannon-shot" theory[4] the maritime belt was measured from the coast. The term 'coast' includes the natural appendages of the territory which rise out of water[5]. It is the limit of the land jurisdiction. This limit, however, varies according to the state of the tide ; when the tide is in, and covers the land, it is sea. When the tide is out, it is land

as far as low-water mark. Between high and low-water mark it must, therefore, be considered as *divisium imperium*. This principle applies to the limit between the jurisdiction of the admiralty and municipal courts[6]. Whatever it may be, it should bear in mind that the coast is the margin of the land next to the sea.

Generally speaking, the coastline is treated as the baseline of the coastal state. If the coastline is fairly regular, in the sense that it is neither indented nor fringed with islands, there is general agreement that the territorial belt must be measured from the low-water mark of spring tides. No coastline is absolutely straight, but on many coasts the indentations are very shallow in proportion to their width. These cases present no difficulty, and it is agreed that the baseline is that of low-water mark along the whole shore[7].

But in certain cases, actual coastlines are not well suited for baselines. As such, only the coastlines are not treated as the baselines. Difficulties arise when the coastline is irregular. If the coastline is deeply indented or cut into or, there is a fringe of islands in its immediate vicinity, straight baselines joining appropriate points may be drawn. However, the drawing of such baselines must not depart to any appreciable extent from the general direction of the coast. It is obvious that there would be a strip of water within the straight baselines and the coastline. This water is regarded as the internal waters of the coastal state. The sovereignty of the coastal state extends to such waters[8]. Unquestionably the coastal state can be benefited from these waters.

In order to secure its interests, a coastal state usually wants unquestioned authority over the waters adjacent to the coast. That is why every coastal state wishes to enclose a large area of water by baselines. There is a complex body of law concerning the location of baselines and it constitutes an important element of the law of the sea, because it is from such baselines that all zones of ocean space based on a fixed distance from the shores are measured[9]. The baseline of the territorial sea is certainly in principle conclusively defined, but in practice it does not always work out in that way. In many cases it is not completely clear where the boundary between internal waters and the territoral sea runs[10].

Actually the topic 'baseline' has become important since the *Anglo-Norwegian Fisheries Case* (1951). With regard to the provisions for baselines the UNCLOS I appeares to have been in-

fluenced by the decision of the International Court of Justice in this case. In addition to the UNCLOS I provisions, the UNCLOS III has formulated several provisions on baselines. Still there is no uniformity in the practices over the baselines among the states. Practically delimitation of baselines seems to be effected by the coastal state in question.

3. Different Circumstances and Subsequent Practices

There are a great many variations in the configuration of the coasts and in the shape and area of the coastal sea. Such variations have caused the coastal states to assert different claims for fixing the baselines. The indentations existing in the coastal sea are variously described. Categorically, they are regarded as bays[11], gulfs[12], firths[13] or fjords[14]. The off-shore boundary is a complex one, involving major policy decision on the allocation of marine areas, and specific delimitation procedure for laying down baselines along the shore and determining the outer limits of national control[15]. As a matter of fact, practices on baselines among the states were not uniform. To date the regime of baselines has been developed. It would be better to be acquainted with the baselines as will be seen below.

3. 1. Normal Baseline

The normal baseline from which the breadth of the territorial sea is measured is the low-water line along the coast. The traditional view was that the low-water mark on the coast should be used as the baseline[16]. It recedes abruptly particularly at the spring tides. "The books on International Law are understandably somewhat imprecise when dealing with the baseline of the territorial sea of a 'normal' coastline. They are clear in specifying that it is the low-water line rather than the high water line which is used and a few specify further that it is the low-water mark or mean low-water mark at spring tides"[17]. In the interest of the coastal state such low-water mark is assumed to be taken as the baseline. If in all cases the low-water mark line is taken as the baseline and the maritime zones are measured from this baseline, then the outer boundary of the maritime zone concerned would be the replica of the coastline.

As regards baselines, the low-water mark line has been in practice among the states. To this end, there was no protest. That is

to say, if a state adopted the low-water mark line as the baseline, no state made protests.

3. 2. Straight Baseline

In certain parts of the world where special geological, morphological or historical circumstances necessitate a special regime because the coast is deeply indented or cut into or fringed with islands in its immediate vicinity, the baseline is regarded to be independent of low-water mark. In this special cases, the method of baselines joining appropriate points on the coast is employed. These sort of baselines are known as straight baselines. The straight baseline first was actually in practice in England. According to H. A. Smith :

> In 1604 King James I issued a proclamation stating that certain defined areas—"King's Chambers"—round the English coast were cut of bounds, when England was neutral, for acts of war on the part of the foreign ships. These areas were defined by a continuous series of 26 straight lines drawn from headland to headland and extending from the Northumbrian coast to the Isle of Man, the longest of these lines, which enclosed the Bristol Channel from Land's End to Milford Haven was 94 miles in length. To describe these lines as "baselines" would be an anachronism, since the notion of a contiguous zone of uniform width did not begin to take shape until the eighteenth century[18].

The Norwegian decree of 1869 made use of the straigat baselines relating to the coast of Sondmore[19]. As time passed, straight baselines were used particularly of measuring territorial waters in relation to bays. It was generally agreed that where the configuration and dimension of the bay were such as to show that the nation occupying the adjoining coasts also occupied the bay, it was part of the territory ; and most of the writers on the subject refer to defensibility from the shore as the test of occupation. Some suggest a width of one cannon shot from shore to shore, or three miles ; some a cannon shot from each shore or six miles ; some an arbitrary distance of ten miles[20]. An inlet at the mouth of which one can see clearly from shore to shore was presumed to have been appropriated as part of the national territory and would therefore, constitute a bay. For working purposes this distance was taken as ten miles and the line was assumed from headland to headland[21].

Since the early half of the nineteenth century, international conventions and judicial bodies have come to express in miles the maximum allowable width of a bay other than a "historic bay"[22]. The ten-mile line for bays had been adopted in the Anglo-French

Fishery Convention of 1839, and in the regulation of 1843 between the same countries. It was reproduced in the subsequent unratified Anglo-French Convention of 1859 and the Convention of 1867. The ten-mile rule on bays was accepted in the North Sea Convention of 1882, Article 2 of the Convention provided that in the case of bays, "the distance of three miles be measured from a straight line drawing across the bay in the part nearest the entrance the first point where the width does not exceed ten miles". This rule was reproduced *verbatim* in the Anglo-Danish Fishery Convention of 1901.

In order to clarify the notion 'bays', the Tribunal in the *North Atlantic Coast Fisheries Case* (1910) took into account different circumstances. Accordingly :

> The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the lenght of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented ; the special value which it has for the Industry of the inhabitants of its shores ; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general[23].

For these reasons the Tribunal decided that :

> In case of bays the three miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and charcteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast[24].

It signifies that as regards the bays no rule concerning the distance between promontories was taken into account. That is to say, the coastal state was treated as independent of determining the baselines simply connecting straight line between the promontories. Clearly it is not possible to reach a conclusion about a fixed limit which can generally be applicable to the bays as to the distance between the promontories. To this end, the learned judge Dr. Drago's opinion of dissent stated :

> But no rule is laid out or general principle evolved for the parties to know what the nature of such configuration is or by what methods the points should be ascertained from which the bay should lose the characteristics of such[25].

That means, it was generally recognised that the right of a state to control a particular bay depends, not upon the distance

between headlands at the entrance, but rather upon the geographical configuration of the coast of which the inlet or bay forms an indentation, and over which the state exercises solitary dominion.

In 1894 the International Law provided that "In the case of bays the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the bay at the place nearest the opening towards the sea where the distance between the two shores of the bay is twelve nautical miles, unless a continued usage of long standing has sanctioned a greater width" (Article 3)[26]. In the *Lokken Case* (1920) some attention was given to the provision for bays. Accordingly :

> —there was a good deal of difference of opinion as to what constitute a bay, and it has been suggested that if the headlands were more than six miles apart, then one ought not to treat them as joined by a line In this case the line was about fifteen miles long[27].

A draft codification adopted in 1926 by the Japanese International Law Society provided that :

> In the case of bays, and gulfs, the coasts of which belong to the same State, the littoral waters extend seawards at right angles from a straight line drawn across the bay or gulf at the first point nearest the open sea where the width does not exceed ten marine miles, unless a greater width has been established by immemorial usage[28].

The Institute of International Law in 1928 suggested that the baselines should not be more than twice the breadth limit of the territorial sea. In reply to the 'questionnaire', several states made similar suggestions to the Preparatory Committee of the 1930 Hague Codification Conference. But as an analogical point of view, the ten-mile rule for bays was assumed to be applicable[29]. In reply to the 'questionnaire' Australia, Belgium, Canada, Great Britain, India, Italy, Japan, New Zealand, South Africa, and the United States suggested that the use of straight baselines between points on the mainland except in the traditional cases such as bays, river mouths, roadstead and straits should be ruled out. Germany's reply claimed the coastal state's right to ignore certain sandbanks and make slight adjustments in the baselines for 'uniformity', 'clearness' and "practical purposes" but it limited such straight baselines to six nautical miles in lenght. Finland, Poland, Spain and Sweden expressed the view that the straight baselines should be drawn joining the outermost points of the coast.

The Preparatory Committee rejected straight baselines connecting salient points of the coast in favour of the line following the

sinuousities of the coast, as did the Second Sub-Committee of the Conference in its report. Decrees of Iran 1934, Yugoslavia 1948, Saudi Arabia 1949, Egypt 1951 established straight baselines between outer point of mainland and since the *Fisheries Case* (1951), similar decrees have been promulgated by Iceland in 1952, Cuba, 1955 and Finland and Venezuela in 1956

The International Court of Justice in its judgment in the *Fisheries Case* said that the ten mile rule on bays had not "acquired the authority of a general rule of international law"[30]. There was in fact no uniformity in the extent of straight baselines.

In July 1935, the Norwegian Government promulgated a Royal Decree defining the provisions for the extent of the zone to be reserved for Norwegian fishermen on that part of the coast which extends from the Finnish (now Russian) frontier to point on the southern side of the opening of Vestfjord (66.28'N by 11.56'E)[31]. Within this area the decree specified 48 basepoints connected by 47 straight lines covering the whole lenght of the coast. The fishing to be reserved for Norwegians comprised all waters within these baselines and a parallel zone four miles wide on the seaward side. Of the baselins 25 were more that ten miles in lenght, and some of them much more, the three longest being 45, 40 and 39 miles respectively[32].

Great Britain was not against four miles for the limit of the territorial belt prescribed by Norway and had no objection to the ten-mile rule for areas of water having the characteristics of a bay. Great Britain actually raised protests against Norwegian claims over the water regions outside ten-mile closing line. The dispute was settled by the International Court of Justice, 1951. The Court upheld the validity of these lines not only on the historic grounds claimed by Norway but also as not being "contrary to international law"[33].

The Court emphasised the special circumstances of the case, such as the exceptional configuration of the coast of Norway, her economic interests, and her historic claims. Moreover, the Court said that baselines must not depart from the general direction of the coast. That is to say, baselines may not require to strictly follow the actual direction of the coast. To some extent they may change the actual direction. But they should not change the direction of the coast abruptly. Thus, nothing can be concluded about

the lenght of the baselines applicable to the bays and to other indentations. However, the decision of the ICJ in the *Fisheries Case* gave impetus to the states to clarify provisions for the baselines.

The ILC in its fourth session 1952, formulated a ten-mile rule for bays[34]. The ILC in its fifth session 1953 also formulated the ten-mile closing line for bays[35]. Furthermore, this limit was adoptep by the ILC in the sixth session 1954[36]. But in the seventh session the ILC formulated twenty five miles closing lines for bays[37] The ILC in its sixth session 1954 formulated an indentation to be a bay if its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation[38]. The subsequent sessions of the ILC maintained this definition for bays. In its eighth session 1956 the ILC adopted fifteen mile closing line for bays[39]. Different states made comments on the law of the sea draft articles prepared by the ILC.

The Danish Government by her Permanent Mission (5 August 1957) to the United Nations mentioned that several conditions for drawing baselines might not be applicable for bays. Objection was raised against the provisions for the bay the mouth of which extends not more than fifteen miles. She propounded that in certain circumstances, it would not be justified to draw a closing line, for instance, where geographical conditions are such that no other baselines would be easily recognisable by the navigator on the spot. Furthermore, economic and defence factors, which may legitimately be taken into consideration, may in certain cases require the application of a baseline exceeding fifteen miles[40]. The Law Commission provided that "baselines shall not be drawn to and from drying rocks and drying shoals". In this regard Denmark concluded—"it will be very difficult to implement a provision of this nature on coasts where the range of the tide is considerable".

At least in Danish theory and practice such rocks and shoals are used in several cases—and this is believed to be in full conformity with international law as basis for the calculation of limits of fishing zones etc[41]. Finally Denmark suggested that the Law Commission should delete the provisions concerned with the drying rocks and drying shoals. The Note Verbale of the Government of India (12 Augurt 1957) suggested to the Law Commission that, if there is a port located near the mouth of a river or the estuary

into which river flows, the baseline requires to be fixed along the outermost limits as notified by the Government or the port authority[42]. Actually such suggestion for fixing baselines was made in the interest of pilotage and safe navigation to and from the ports.

Norway through her Permanent Mission (12 August 1951) suggested that baselines should be drawn in conformity with the decision of the *Fisheries Case*. Moreover, she laid stress on the necessity of drawing baseline in consideration of the natural configuration of the coasts. The United Kingdom of Great Britain and Northern Ireland by her Note Verbale (20 September 1957) proposed to the Law Commission "—that straight baselines should only enclose waters strictly *inter fauces terranum*" and this should be introduced "—to ensure that baselines are not automatically joined from headland to headland, and that, when dealing with strings of island, the lines are not invariably used to join the outermost point of one island to that of another—"[43]. She also expressed the view that the basepoint should be fixed so that it was not isolated from the true coastline.

The Permanent Mission of Netherlands (17 October 1967) mentioned that a state should take chance of drawing baselines "so that any drying rocks or drying shoals lying within this extension shall not again be taken as basepoints of departure for fresh extensions[44]. The Permanent Mission of China (27 January 1958) mentioned that "there seems to be no precise way to describe the configuration of a coast which shall justify the straight baseline method, the only way possible for these purposes seems to be to set in figures a maximum permissible length of the straight baseline". It was also mentioned that "—the rules for bays would be apparently insignificant if there is no limit for the length of baselines"[45].

3. 2. 1. "Semi-circle" and "24-Mile" Closing Line Criteria

In point of fact, there is no uniformity in the dimension of the indentations such as bays, gulfs and the like. As such, it is difficult to derive a formula concerning the distance between headlands at the entrance of bays. However, the UNCLOS I adopted "well-marked indentation"[46], "semi-circle", and "twenty-four mile" closing line criteria as to the regime of bays. The UNCLOS III has equally provided these criteria for the bays. According to Article 7(2) of the TS&CZ Convention :

> An indentation shall not ... be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation[47].

The first criterion for the determination of a bay is that it constitutes a well-marked indentation of the coast. A major change in direction will not suffice ; the bay must "constitute more than a mere curvature of the coast". A minimum objective test of the status is essential and is furnished with the Convention's semi-cricle rule which determines the point.

The semi-circle formula appears to have imposed some restrictions on the coastal state so that it cannot regard simply any indentation as a bay. As regards the bay whose entrance does not exceed twenty-four miles, the coastal state is free to enclose it. But the coastal state cannot freely enclose the bay whose entrance exceeds twenty-four miles. To this end, the coastal state is entitled to enclose by a straight baseline of twenty-four miles drawn "within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length". That is to say, the twenty-four mile closing line is applicable to the bay having an entrance equal to or exceeding this limit. In other words, this line can be treated as a limitation imposed on the coastal state bordering a bay whose entrance exceeds twenty-four miles.

3. 2. 2. Baselines Resulting from Coastal Archipelagos

Islands present complication in the delimitation of maritime boundaries. As regards the baselines, the complications arise equally. Islands may be situated in all manners. They may perch immediately adjacent to the continental masses or be dispersed in mid-ocean. They may be found in singular isolation or grouped by dozens, hundreds or even thousands. They may be arranged in quasigeometric patterns-arc, quadrangles, triangles, polyhedrons, etc. or randomly strewn across the water surface[48].

In delineating the baselines the LOS Conferences have taken into account the coastal archipelagos. Every coastal state can accordingly prescribe the baselines. Regarding the coastal archipelagos, the First and the Third Conferences have provided similar provisions applicable to the delineation of basslines. According to Article 4(1) (2) of the TS&CZ Convention :

> In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity,

the method of straight baselines joining appropriate points may be employed in drawing the baselines from which the breadth of the territorial sea is measured.

The drawing of such baselines must not depart to any applicable extent from the general direction of the coast, and sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters[49].

It is apparent that the provisions are applicable for determining baselines of the coastal state having a fringe of islands in its "immediate vicinity" of the coast, the coastal state can draw straight baselines joining "appropriate points". To this end, the coastal state is required to comply with the principle that the baselines should not depart to any "applicable extent from the general direction" of the coast,

In essence, the notion "immediate vicinity" or "general direction" is not specific[50]. However, it signifies that the islands which are not in the "immediate vicinity" of the coast cannot be enclosed within the baselines.

3. 2. 3. Historic Baselines

While the baselines are regarded as the outer boundary of the internal waters, in case of historic waters the outer boundary may be regarded as the base line of such waters That is to say, "where certain waters are recognised as possessing the status of historic bay or other historic waters the baseline or the territorial sea will be extended to encompass these waters"[51].

The theory of "historic waters" whatever name it is given, is a necessary theory. In the delimitation of maritime areas, it acts as safety valve ; its rejection would mean the end of all possibility of devising general rules concerning this branch of public international law[52]. "On the state and inter-state level alike the existing legal orders are, in exceptional circumstances, willing to lend their sanction—for the sake of preserving peace and stability—to certain situations of fact, even if the origins of such situations are not free from doubt"[53].

The protagonists of the codification of international law in this field understood that, as a practical matter a long standing exercise of sovereignty over an area of the sea could not suddenly be invalidated because it would not be in conformity with the general rules being formulated. On the other hand, as the purpose

of the codification was the establishment of general rules it was natural to look upon historic cases as exceptions from the rule.

The theory of "historic waters" is not used to decide whether a maritime area belongs to one state or another. "Historic waters" are not waters originally belonged to one state but now are claimed by another state on the basis of long possession. They are waters which one state claims to be part of its maritime territory while one or more other states may contend that they are part of the high seas.

The "historic bays" present the classic example of historic title to maritime areas. Therefore, there seems to be no donbt that, in principle a historic title may exist also to other waters than bays, such as straits or archipelagos or in general to all those waters which can form part of the maritime domain of a state.

The legal status of "historic waters", that is to say, the question whether they are to be considered as internal waters or as part of the territorial sea, would in principle depend on whether the sovereignty exercised in the particular case over the area by the claming state and forming a basis for the claim, was sovereignty as over internal waters or sovereignty as over the territorial sea.

It is generally assumed that historic title of a state over any waters areas should not be affected by other states. The criteria for proving "historic title" are related to the requisite element being an exercise of sovereign rights by a coastal state over a period which is acquiesced in by other nations. It would appear that the number of such claims are few and that the burden of proof on a claimant state is a difficult one[54].

The Law of the Sea Conferences have recognised the historic title, According to the TS&CZ Convention (Article 4(4) :

> Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken in determining particular baselines of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage[55].

It seems that, in determining the straight baselines, the coastal state take account of its economic interests. In so doing, the coastal state requires to show that the importance and reality of such interests have historically been established. That is to say, under these circumstances, there is no bar for the coastal state to deviate from paragraph 1 for fixing the straight baselines The

Convention has also regarded the "historic bays" as exception to the "semi-circle" and "twenty-four mile" closing line criteria. To this end, Article 7(6) says :

> The foregoing provision shall not apply to so-called 'historic bay', or in any case where the straight baseline system provided for article 4 is applied[56].

Whatever boundary for the "historic waters" has been adopted by the coastal state, it would be treated as independent of the conventional provisions. That is to say, the boundary would be as the baseline for such waters. Anyway, the historic titles do not constitute the rule ; they can be regarded as "—a deviation and departure from the general rules of customary international law and being basically founded on adverse holding, they find their legal justification in the fact that the state or states faced with such an exceptional claim have acquiesced in a situation which is customary to, and derogatory of, the normally applicable rules of international law[57].

The purpose of recognising "historic title" is to acquiesce in the state of things which exists and has existed. The principle was made effective in the *Grisbadarna Arbitration* (1901). It is in this context that one should analyse the tribunal's statement. That is to say :

> —it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible[58].

In the *Fisheries Case* the Court did not expressly indicate whether or not it approved the "historic title" of Norway over the waters areas enclosed by the so called baselines. "But, having regard to the general tenor of the judgment, it seems reasonable to conclude that the Court approved"[59]. In examining the legal validity of the Norwegian system of delimiting territorial waters the Court considered : "whether the application of the Norwegian system encountered any opposition from foreign States"[60]. The Court found that :

> Norway has been in a position to argue without contradiction that neither the promulgation of her Delimitation Decrees in 1869 and 1889, nor their application, gave rise to any opposition on the part of foreign States—'The general toleration of foreign States' with regard to the Norwegian practice is an unchallenged fact. For a period

> more than sixty years the United Kingdom Government ... in no way contested it[61].

The Court apparently accepted the basic United Kingdom contention with regard to historic waters. By "historic waters", it said, "are usually meant waters which are treated as internal waters, but which would not have that character, were it not for the existence of an historic title"[62].

The judgment delivered in the *Fisheries Case* is not a "precedent in the strict sense for the reason that the Court went out of its way to stress the exceptional features of the case, even to the extent of making those exceptional features one of the bases of its decision"[63]. But it may not be unusual that in some cases the existing provisions concerning the baselines may not enable the coastal state to suit its "local requirements". As such, it may not be possible on the part of the state to avoid asserting exceptional claims for the baselines. To this end, some reference of this case may automatically arise.

At present there is no doubt about the "historic waters" to be accepted as exception to the general principles of international law. Despite the area of the "historic waters" the boundary would be treated as the baselines for such waters. Though the historic waters require to be treated as exception to general principles, theoretically these waters appear to have inspired the coastal states to assert clains to an extended area af the sea.

3. 2 4. Deltaic Baselines

Still this system of baselines is not well-known. The UNCLOS III has introduced this system of baselines. That is to say, the deltaic baselines are of recent origin.

For the presence of delta and other natural conditions if the coastline is highly unstable, neither the low-water line nor the straight baselines are properly applicable to the state concerned. To this end, the appropriate points for the baselines are assumed to be located along the furthest seaward extent of the low-water line. Actually the provisions for this system of baselines came into being in the UNCLOS III as an advance on the existing TS&CZ Convention (Article 4) on straight baselines and this is a major innovation in existing international law. According to Article 7(2) of the LOS Convention :

> Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be

> located along the furthest seaward extent of the low-water line and, notwithstanding subesquent regression of the low-water line, such baselines shall remain effective until changed by the coastal State in accordance with this Convention.

It is difficult to say whether this provision would be applicable to the coastal state as regards its alluvial deposits and formation of mudflats in the coastal sea. The large deltaic fans such as those of the Ganges and Indus deltas in the Bay of Bengal and the Arabian Sea are very expansive and represent natural prolongation of the continental sediment of greatest depth. In this regard, claims for fixing the baselines along the outermost points of the alluvial deposits would not be practicable. The "existence of extensive sedimentary mud flats which may make the detrmination of the low-water line difficult and thus justify the use of the high-water mark as the territorial sea baseline"[64].

As a matter of fact, the coastal state may be benefited from the low-water line more than the high-water line. Consequently it is difficult to impose on the coastal state the high-water line as base-line in lieu of the low-water line. If a formula can give benefit more than or similar to the low-water line, then the formula for baselines may be applicable to the coastal state.

It is apparent that Article 7(2) above has not specified the term 'mudflats'. There may arise question whether the mudflats should be taken into consideration for fixing baselines. However, the vague clause "other natutal conditions" of the article enables the coastal state to fix the baselines subject to this article. According to this article how far it would be possible to fix the baselines by depth method[65], it is difficult to consider. Though there is no express indication in the article but there is no restriction in international law to draw baselines as to suit "local requirements" of the coastal state,

It is needless to say that with the passage of time the regime of baselines is diverging. However, there is no doubt to say that it is difficult to apply the LOS provisions uniformly. As regards the baselines, it is equally true. Politically states are assumed equal one with another although they differ economically, geographically, geologically, eocologically, geomorphologically and the like. Of all the issues—issues concerning survival of the people are the main which cannot be ignored.

Showing peculiar geographical configuration of the coast and overall economic dependence on the coastal fisheries, Norway defended herself in the *Fisheries Case* against Great Britain. The International Court of Justice in this case came to the conclusion that the straight baselines drawn by Norway were not contrary to international law. In fact, as time passed, the judgment was treated by the coastal state as a precedent of assering claims to the adjoining seas. That is to say, the judgment gave rise to the coastal state to prescribe baselines subject to its local requirements,

It goes without saying that the very purpose of law is to deal with and settle issues that arise in a given situation. A decision on the same but in different context and circumstances may not serve as a perpetual precedent. An existing situation if dealt with by such a precedent without considering the peculiaritles of the situation will not only be unwelcome but also will result in stagnation in the advancement of law. In dealing with a particular case, a precedent as far as possible should be applied. But application of specific provisions suitable to that particular case should not be discouraged. In the latter case, however, there is a danger of coming into existence of different standards applicable to the same aspect of the law discarding the uniformity which is desired.

But if the factors regarding economic and soclal interests of the shore state are assumed to be the basis of designing maritime zones, in this age of flux and competition no state will hesitate to claim broader zones. Consequently every case requires to be studied according to its own merits. While it is desirable that uniform rule for designing maritime zones should be prescribed which may be applicable to most cases, the scope for application of particular provision in conformity with peculiar circumstances obtaining in a particular case must also be recognised.

3. 2. 5. Baselines for Low-tide Elevations, River Mouths, Ports and Reefs

As regards the baselines the Law of the Sea Conferences have taken into account low-tide elevations, river mouth, ports and reefs. In fact, there is no difference between the First and Third Conferences dealing with the delineation of baselines concerning low-tide elevations and river mouths The TS&CZ Convention made no provisions for reefs. The LOS Convention has made provision for reefs. According to Artiole 13 (1) of this Convention :

> A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high tide--66.

Actually the low-tide elevations have been regarded as the areas of land which are at some part of the day covered by waters of the ocean. In consideration of the baselines for low-tide elevations Article 7(4) of the LOS Convention says :

> Straight baselines shall not be drawn to and from low-tide elevations, unless light houses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition67.

It seems that in order to draw straight baselines regarding low-tide elevations the coastal state is required to build on them light houses or similar intallations which are permanently above sea level. Otherwise, such baselines would be applicable provided that they have received "general international recognition". But from a practical point of view, it is significant to sate that :

> This, however, would not necessarily prevent a state from erecting permanently emerging structures on low-tide elevations and thereafter promulgating a system of straight baselines to link them together; whether a concept of bad faith in the light of the Convention's object and purpose could be applied to invalidate such a delimitation remains uncertain68.

Because, Article 13(1) of the LOS Convention says :

> —Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

It is significant that the distance of the low-tide elevations is to be reckoned from the "mainland or an island". That is to say, the straight baselines drawn in relation to the "mainland or an island" should not be taken into account. Straight baselines can be drawn in consideration of the low-tide elevationt if they are situated at a distance not exceeding the breadth of the territorial sea measured from the "mainland or an island",

Furthermore, from an analytical point of view, the effect of the provisions is a matter of some doubt. In essence, it can be treated as an exception to Article 7(4) of the LOS Convention stated above. That means, Article 13(1) can be interpreted as authorising the use of a straight baseline system where such low-

tide elevations are within the territorial sea of the mainland or an island.

It would not therefore, be used as a basis for claiming the area of waters lying between it and the mainland or island as internal waters but would only extend the territorial sea of these land areas measured from their own-water lines. Its legal status was described as follows at a meeting of the International Law Commission which discussed the nature of low-tide elevations :

> The basic principle is that drying rocks and drying shoals are not points of departure for measuring the territorial sea. However, if a drying rock or a drying shoal were to be found within the territorial sea (such territorial sea being measured as if the drying rock were not there at all), then the drying rock or shoal in question could be used in order to extend the territorial sea and project seawards its limit[69].

The low-tide elevation within the range of the territorial sea practically has a role of island. That is to say, if an island rises within the territorial sea of a coastal state, the waters between the mainland and the island would be internal[70], and the territorial sea to this end would be measured from the outermost points of the island. This principle is equally applicable to the low-tide elevation existing within the range of the territorial sea from the mainland or island. If the breadth limit of the territorial sea is uniform, then the principle will be applicable uniformly.

In connection with different breadth limits of the territorial sea, it is to be noted that if the low-tide elevation is situated for example at the 200 n.m limit, the coastal state exercising 200 n.m territorial sea will be entitled to extend the territorial sea from the low-tide elevation. Obviously this state will be benefited more than the state exercising a narrow territorial sea.

According to the Law of the Sea Conferences, the baselines should be drawn "across the mouth of the river between the points on the low-tide line of its banks"[71]. The nature and structure of the water of the river mouth is influenced by the sea. That means, the navigability of the waters areas depends primarily upon the action of the sea. Consequently the river mouth by its nature and structure requires to be considered as a part of the sea. Moreover, the nature and structure of the waters areas can be influenced by the action of the river itself. To this end, river mouth appears as a part of the river itself. The coastal state usually wants to assert

claims to the waters areas which are influenced by the river action as its internal waters.

The UNCLOS I has regarded the outermost permanent works which form an integral part of the harbour as forming part of the coast[72]. Furthermore, the UNCLOS III has formulated off-shore installations and artificial islands not to be considered as permanent harbour works[73]. This provision can be regarded as a limitation imposed on the coastal state. The impact of this provision is to restrict the coastal state so that in the name of "harbour system" it cannot extend the jurisdiction to a larger part of the coastal sea.

Both the First and the Third Conferences have regarded the ports as the part of the coast. That is to say, in the case of a port, the baseline will pass from point to point of the "outermost works" forming the port.

Because of the alluvial deposits or other natural action if the coastal sea is not navigable, then it will not be irrational if the coastal state erects artificial installations in order to keep the port running. From the strict point of view, it is difficult to exercise the limitation on the coastal state.

A reef is regarded as a narrow ridge or chain of rocks, shingle or sand lying at or near the surface of waters[74]. The ring-shaped coral reef enclosing lagoon is known as an atoll. That is to say :

> Atolls are composed primarily of a chain of tiny, low limestone islets (motus) which partially crown a circular or oval coral reef. The reef normally is completely submerged at high tide but heads may dry at low water. Geomorphically, an atoll may represent several external forms dependent on its stage of development or genesis. They may be characterized as true atolls, almost atolls, part-raised atolls and raised atolls. Basically, the major difference in the external character of the lagoon contained within the reef. In a true atoll, the lagoon is expansive and completely marine. In the raised atoll, the lagoon has become a saucer-like depression in an island completely above sea level. The two remaining categories form intermediate steps[75].

It may be noted that neither the Codification Conference nor the UNCLOS I dealt with the delineation of baselines in relation to the fringing reefs. However, it is possible to be aware of the presumption that the regime of baselines in relation to the fringing reefs was subsumed in the regime of the fringing islands. As such, Article 4(1) of the TS&CZ Convention appears to be dealing with

the fringing reefs. But from the strict point of view, the definition of reefs stated above cannot be treated as similar to that of islands. Therefore, it is necessary to formulate precise provisions concerning the delineation of baselines as regards the fringing reefs. To this end, the UNCLOS III has provided provisions. According to the LOS Convention (Article 6) :

> In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on official charts.

4. Nature, Characteristics and Present Approach

It is usually known that the territorial jurisdiction of a coastal state extends to its internal waters. "Waters on the landward side of the baseline of the territorial sea forms part of the internal waters of the State"[76]. But the regime of internal waters on the landward side of baselines is not uniform. The territorial jurisdiction of a coastal state had long before been in practice up to low-water line. There was no doubt as to the state's sovereignty to this line. "Internal waters are, of course, under the absolute sovereignty of the coastal State and, in the absence of treaty commitments to the contrary, may be utilized by it in any way whatsoever"[77].

In some cases the waters on the landward side are treated as internal and in some cases not as such. Whatever be the area of the historic waters, they fall entirely under the jurisdiction of the coastal state. In the case of bays, the regime of internal waters extends to the waters on the landward side of the baselines. That means, it extends up to the twenty-four nautical mile closing line. Actually the coastal state can regard a considerable part of the waters areas such as, bays. gulfs, etc as internal waters. To this end, neither the TS&CZ Convention nor the LOS Convention has imposed any limitations on the coastal state. In other cases the LOS Conferences have provided different provisions. In this regard Article 8(2) of the LOS Convention says :

> Where the establishment of a straight baseline in accordance with article 7 has the effect enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters[78].

Generally speaking, the waters areas within the baselines are internal. But according to this provision the waters areas within

straight baselines cannot be treated as internal waters unless the waters areas in question had previously been treated as such.

The article stated above appears to have imposed a limitation on the coastal state so that in the name of baselines this state cannot exercise the regime of internal waters. As a matter of fact, the article can be treated as a limitation imposed on the coastal state which had not treated the waters concerned as internal waters. That means, this state appears as lacking in the regime of internal waters. But the question may arise, how far this state would concede to such provisions.

If the coastal state had not treated these waters as internal, then the foreign vessels subject to the innocent passage would be able to navigate upon these waters. It signifies that though the waters areas situate on the landward side of the baselines, practically the regime of territorial sea is applicable. That is to say, though the waters areas on the landward side of the baselines are known as internal waters, conventionally these waters are receiving the status not only of internal waters but also the territorial sea. It is needless to mention that LOS Conferences have provided a number of provisions as regards the delimitation of baselines. But it is not easy to conclude that there will exist uniform practice among the states.

As regards the baselines, it is only natural that the coastal state will make effort to enclose a larger part of the coastal sea. The purpose of this is to exercise its jurisdiction over such waters areas and to measure different maritime zones from these baselines. According to the UNCLOS III provisions, the length of baselines are 24 nautical miles for the bays and 100 and 125 nautical miles for the archipelagic waters[79]. But practices show that more larger limits of the baselines were existing among the states.

The maximum length for baselines is being exercised by Burma. It adopted a line segment measuring over 222 nautical miles in length. Moreover, by 1973 a large number of states employed one or more line in excess of 40 nautical miles. The table can clarify the practices of several states about the baselines[80].

States	Nautical Miles
Dominican Republic	45.0
Faroes	60.0
Burma	222.3
Madagascar	123.0
Venezuela	98.9
United Kingdom	40.25
Mozambique	60.4
Portuguese Guinea	79.0
Thailand	59.15
Philippines	140.05
Iceland	74.0
Indonesia	124.0
Guinea	120.0
Ecuador	136.0
Haiti	89.0

If the conventional provisions are strictly followed, then it is obvious that the archipelagic state like Philippines requires to cut off the length of the baselines which exceed the conventional limits. It may be questioned how far it would be practicable. There arises nothing to be surprising that the countries which are practicing the baselines exceeding the conventional limits will raise the plea that they should delineate the baselines subject to their geographical, geological, geomorphological and economic considerations. As time passes, the coastal states are adopting different techniques in fixing baselines. To this end, R. D. Eckert states :

> Enthusiasms for enclosure has led few states to draw base lines that ignore land altogether : Bangladesh. for example, has delimited straight base lines according to the criterion of water depth, and the Maldive Islands have defined their internal waters according to geographical coordinates rather than to points on land. By December 23, 1975, about 50 of the 128 independent coastal states in the United Nations had drawn straight base lines to enclose bays, river mouths, or other coastal areas[81].

From these observations, there arises no doubt about the difficulties exercising uniformity in the practices among the states.

Taking into account the variations in the configuration of the coast, the presence of islands and different formations in the coastal sea, the Law of the Sea Conferences have provided different provisions as far as practicable to the delineation of baselinse.

Except the binding force, if it is desired that the LOS provisions should be applicable, then without the goodwill of the coastal states and without their allegiance to these provisions, it is not possible to make them practicable.

As regards the states exercising excessive claim to the baselines[82], it is assumed that in the days to come conflicts will arise between these states and the states claiming navigation through waters areas enclosed by the baselines. This may particularly be applicable to the "archipelagic waters". In the view of Stevenson and Oxman it can be pointed out that :

> The question of archipelago is a good example of the delicate problem of promoting a widely acceptable treaty. Inclusion of the concept is of overriding concern to a limited number of states. However, unless the definition is carefully circumscribed and adequate navigation and overflight rights are guaranteed, inclusion of the concept would seriously reduce the chance of a widely acceptable treaty[83].

UNCLOS III[84] has established certain criteria for archipelagic states, such as the ratio of the area of water to land and the length of straight baselines. The archipelagic states are entitled not only to join the outermost points of the outermost islands by straight archipelagic baselines but also to enclose drying reefs of the archipelago. The heart of the Convention to the archipelagic dispute, however, is the provisions relating to sealanes and air routes which traverse the archipelago.

The extreme claim for the archipelagic states is to exercise full control over the "archipelagic waters" whereas other states, particularly the marine powers, want free navigation and overflight through such waters. From the international point of view, it is clearly advantageous to have freedom of navigation and overflight through "archipelagic waters". This proposition is highly acceptable to the marine powers. But "the archipelagic States are in the main to be found among the developing States, and have the sympathy of a large part of the Third World—a sympathy which buffers them against the force of protest from the developed maritime Powers"[85].

As a matter of fact, an archipelagic state can enclose a large area of water within the archipelagic baselines. From the definition of the "archiplagic State"[86] it is noticeable that a coastal state having a group of islands cannot be regarded as an archipelagic state. As such, the group of islands appears not entitled to pres-

cribe archipelagic baselines. But if the group of islands is an independent state, it would be regarded as an archipelagic state. Ultimately it will be entitled to prescribe archipelagic baselines. That is to say, if the archipelagic baselines are only applicable to the "archipelagic State", then it is submitted that the group of islands which is a part of the coastal state, would press for independence. The fact to bear in mind is that the UNCLOS III provisions regarding the "archipelagic States" will encourage the group of islands to be independent from the coastal state concerned.

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12 A gulf is a part of the sea which advances into the lands, and whose opening on the side toward the sea is generally large, so as to give it upon a map the shape of a woman's breast···, from whence comes its name. See Chandler P. Anderson, "The Final Outcome of the Fisheries Question", 7(1913) AJIL 1-16, 13.

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36 2(1954) *ILC Yearbook* 4, Article 8. UNDoc. A/CN. 4/SER. A/1954/Add. 1.

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65 Taking into account the geological peculiarities of the coast and the peculiar topographical features of the coastal Bay Bangladesh has drawn baselines on the basis of depth-method that is, geographical coordinates which in certain depth of coastal waters have been linked by straight lines to delineate the baselines. The baselines so formulated have been fixed at ten fathoms extending to 16—30 miles from the coastline.

66 Article 13 of the LOS Convention is same as Article 11 of the TS&CZ Convention.

67 It is almost similar to Article 4(3) of the TS&CZ Convention. But the last part "or except in instances where the drawing of baselines to and from such elevation has received general international recognition" is a new addition.

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CHAPTER III

TERRITORIAL SEA AND CONTIGUOUS ZONE

1. Introductory Approach

The regime of the territorial sea has practically come into being since the eighteenth century. But the limit of its breadth remained unsettled. The First and the Second Conferences even were not able to prescribe the breadth of the territorial sea. The UNCLOS III has provided a 12 n.m limit for its breadth. Though the 12 n.m limit has a large practice, but still there is a lacking in its practice among the coastal states uniformly.

The present approach is to be acquainted with the historical background of the territorial sea and the contiguous zone. Attempts will be made in regard to different breadth limits put into practice among the states. An analysis will be made as to the delimitation of the territorial sea and the contiguous zone between the states whose coasts are opposite or adjacent to each other.

2. Territorial Sea

2. 1. Concept and Background

At present the term "territorial sea" is used to indicate that part of the sea which extends to a distance not exceeding 12 n.m measured from the baselines[1].

Since ancient times[2] man looked to the seas with the profound curiosity and with the organisation of states began the appropriation of the sea resources. It had been the practice to lay claims to parts of the seas varying the aptitude and ability of individual coastal state[3]. As time went on, two theories regarding claims over the seas began to arise among the publicists of different nations. One group of publicists claimed a right of sovereignty over the seas, and another group, a liberty of seas[4]. According to Sanford D. Cole :

> In early days the balance of convenience was in favour of the appropriation of the sea by nations engaged in maritime trade, and no question was raised as to principle. But when trade became world-wide the pretensions of Spain and Portugal to a monopoly of the great oceans conflicted with the interests of other nations[5].

This conflict between the sea-faring nations gave birth to the questions of the manner in which the sea was to be used. Whether the sea was to be used freely by individual nation without consideration of any right of others produced different issues on the

subject. Varying limits were put forward for the coastal state to exercise its authority over the area of the sea adjoining the coast. Bartolous (1314-1357) suggested that the coastal state should exercise the jurisdiction over the sea and over the islands in it for a distance equal to two days' sailing, or approximately one hundred miles[6]. Gentilis (1562-1608) said that the coastal state should be entitled to exercise the jurisdiction up to one hundred miles from shore[7]. Baldus (1327-1406) and Bodin (1530-1596) spoke of sixty miles from the shore. This distance was accepted by the majority of fifteenth century jurists. Angelo do Perusia expressed the view that the coastal state should be empowered to extend the jurisdiction to any part of the sea not in the immediate neighbourhood of some other state and Guillermo de Perno advocated a distance as far as the eye could reach[8].

During the sixteenth and seventeenth centuries the concept of of the "high seas" was implicit in the principle of the freedom of the seas enunciated in opposition to the exaggerated claims to maritime jurisdiction. It was formulated by Francisco de Castro, Fernando Vasquez and de Menchaca. Francisco de Vitoria in his *Relictio de Indis*, challenged the rights of Popes to grant maritime privileges to certain peoples in a way contrary to the *jus communicationis*. Vasquez and Castro denied the legal validity of the claims of Venice and Genoa as well as those of Spain and Portugal. Both argued that it was contrary to natural law and elemental principles of international relations to claim the sea and its waters as the private property of one nation. The use of the sea should be common to all nations[9]. The difference of opinions among the nations practically led to the Anglo-Dutch conflict over the East Indies[10].

Hugo Grotius (1563-1645) through his short treatise *Mare Liberum*[11] had tried to advance the interest of the Dutch in the East Indies and formulated provisions for the freedom of the seas. In his treatise *Mare Liberum* written in 1604 but published in 1609 Grotius enriched the concept of the sea in different perspectives. According to him, the sea could not be taken into possession through occupation and as such, the sea by nature was free from the sovereign control of any state. But the idea of Grotius was challenged by several authors of different nations[12].

As a matter of fact, two issues about the manner of dealing

with the seas arose at that time. Grotius and his allies propagated freedom of action on the part of any state in dealing with the seas. On the other hand, the opposite group favoured the notion of sovereign authority. The notion of the freedom of the seas particularly gained importance with the growth of the navies of different states. And simultaneously, the idea of extending state's sovereign authority over a part of the sea adjacent to the coast was advocated by Cornelius Bynkershoek (1673-1743) in his book *De Dominio Maris Dissertatio* (1702)[13]. This Dutch jurist became renowned for hisw ritings on the concept of the territorial sea and particularly for the famous "cannon-shot" theory about the extent of such seas.

It may be mentioned that the regime of territorial sea was linked with the laws of war and peace. To this end, Sanford D. Cole observes :

> It is interesting to note that, though Grotius made no mention of territorial waters in the book in which he advocated the freedom of the sea, he laid down in his great work on the law of war and peace the principle upon which the law of the territorial waters has since developed. The origin of the idea that power over the sea extends as far as control can be exercised from the shore is frequently ascribed to a later Dutch Jurist, but a statement to that effect was in fact made by Grotius. He did not define the kind of compulsion, but he stated the principle that the limit of territorial waters is determined by the extent to which compulsion can be exercised from the land. The principle was not explicitly adopted for a considerable time. Varying claims extending to one or two days' journey, or in some instances, the range of vision over the sea were put forward[14].

It would, therefore, seem that Grotius maintained that the coastal states were free and entitled to control a region of the sea from their coasts. In view of De Cussy, "Grotius, among the publicists previous to the eighteenth century, is the one who arrives at the truth by saying that the limit of sovereignty of the territorial sea is that which may be defined from the shore"[15].

While the "cannon-shot" theory became familiar, other theories as regards the breadth of the territorial sea were also put forward by different publicists. Valin (1695-1765) propounded that waters were territorial as long as they could be sounded[16]. Rayneval (1746-1812) spoke of such waters to be extending up to the actual horizon[17]. The extent of journey, the range of vision or the extent, covered by depth of waters was variable. For this reason, none of the

criteria enabled to evolve a uniform rule regarding the limit of the region which later came to be termed as the territorial sea. But the idea that the littoral state should have a sort of sovereign control over a portion of the sea adjacent to its coast was already accepted by the leading jurists.

Bynkershoek by the "cannon-shot" theory innovated the exact limit of compulsion to be effected from the shore, and thenceforth, the limit of territorial sea became formulated[18]. According to him it would be possible for a coastal state to protect herself from any external invasion through the sea by means of the cannon batteries from her own shore. A number of authors accepted and supported the views of Bynkershoek on territorial sea[19]. In connection with the "cannon-shot" theory, Chief Justice Marshall regarded that the seizure of a vessel with the range of cannons by a force was an invasion of the territory of the coastal state concerned[20].

The "cannon-shot" theory came into being in consideration of defence of the coastal state. But only the shore batteries cannot be given effect to the defence. In this regard Temple Grey states :

> Shore batteries are not, and have never been, competent to ensure the integrity of territorial waters, for it is precisely inside their range that the intruder, were it not for the fleet, would be safe[21].

From a practical point of view, the security of a state depends on the strength of her defence machinery. Nevertheless, by the "cannon-shot" formula Bynkershoek made a valuable contribution to the development of the concept of territorial sea.

The notion "territorial sea" is expressed by different terms[22]. Whatever may be, it has an intrinsic relation with the sovereignty of the coastal state[23]. But sovereignty does not bear a clear and definite meaning in international law. It has been observed that there is no more confusing concept in international law than sovereignty which has been used indiscriminately in a number of different meanings by decision makers and scholars[24].

Eanly writers regarded the territorial sea as subject to the sovereign control of the littoral state. In that context territorial sea was as good as inland waters. However, with the passage of time, the territorial sea has emerged as an area of the sea adjacent to the littoral state having the right of an over-all control over the area ; and along with it, others have certain conditional rights[25].

In all circumstances, the territorial sea is measured from the baselines of the coastal state. That is to say, the outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea. In the Hague Codification Conference different methods[26] were suggested for measuring the territorial sea. But those methods were not accepted. Anyway, the agreed principle appears to be that the territorial sea must extend parallel to the baselines.

2. 2. Breadth-Limit

What has been said, it seems that by the end of the seventeenth century, a coastal state had territorial jurisdiction over a limited area of the sea along its coast. But the fact that the breadth of the territorial sea has recently become a settled question[27]. Though the LOS Convention has adopted a twelve nautical mile territorial sea, nevertheless, states are exercising different limits. States seem to have an untiring zeal for adopting various limits beginning with a minimum of three miles to the maximum of two hundred miles. In the following pages an attempt has been made to systematically deal with different breadth limits of the territorial sea.

2. 2. 1. Cannon-Shot etc. Limit

In connection with the cannon-shot theory Bynkershoek is well-known. Actually for the purpose of maritime neutrality in time of war, the cannon-shot rule was in practice in France and most countries in the Mediterranean area, and probably in Holland many years before the time of Byekershoek[28]. In regard to prizes, which in time of peace frequently mean pirate and corsair vessels, on 23 may 1667 Spain and England agreed upon the distance of cannon range as the forbidden zone[29]. Though Bynkershoek cannot be regarded to have invented the "cannon-shot"rule, nevertheless, he generated the rule for the breadth of the territorial sea. Bynkershoek was the earliest recorded writer to import it distinctly into the literature of international law[30]. As a matter of fact, the range of cannon in Bynkershoek's time and for a century thereafter was subsequently less than three miles. In fact, the seventeenth and eighteenth century practice of the "cannon-shot" rule had nothing to do with territorial jurisdiction or sovereignty in the modern sense[31].

The French archives show that the French treated the cannon-shot rule as established law at least by 1685 and continued to treat it as such and were still pressing for its acceptance at the time of the American Revolution. The French archives also show that during this period (both before and after Bynkershoek), the doctrine was put into practice in the Mediterranean area by neutrals and by the governments of both captor and captured ships[32].

Moreover, before Bynkershoek's time the breadth of territorial waters was measured by two days' sailing distance. This distance approximately was assumed to be one hundred miles. The breadth was also measured by the range of vision[33]. The waters were regarded as territorial as far as they could be sounded[34]. Most of these limits were in practice after Bynkershoek's time as well.

The basis of each of the claims was variable—variable from man to man and circumstances to circumstances. That means, none of the claims was able to exert a rational basis for measuring the breadth of the territorial sea. There was no uniform practice nor any common principle on which the coastal state could prescribe the breadth.

In this context Bynkershoek was the first to solve the problem, or at least to offer an acceptable definition of territorial sea[35]. The Dutch Jurist accepted the concept of the sovereign sea zone existed in his time for the coastal state. Further, he came into view that the coastal state should have a part of the sea for the purpose of safeguarding her legitimate interests. In solving the problem he relied upon the concept of sovereignty. Sovereignty of a state as regards its land territory is immaterial. From any part of the land territory a state can protect herself up to the extent of its territory. From this point of view, Bynkershoek concluded that sea area which could be controlled from the coast—the end point of land would be the extent of the zone of her territory.

During the eigteenth century cannon was the powerful weapon. That was why it might be possible on the part of a state to protect the sea zone up to the range of the cannon from her coast. The phenomenon occured to the mind of Bynkershoek and influenced him to formulate the cannon range for the breadth of the sea zone which later came to be known as the "territorial sea". It is needless to say that effective protection, depending on the force of arms, was

made the criterion of territorial sovereignty. The marine league, as being originally the distance from the shore, measured by a cannon shot, was thenceforth accepted as the limit of territorial sea[36].

If the range of weapons is the basis of the breadth now-a-days it would not be difficult for a state particularly for a scientifically and technological developed state to control any part of the oceans by the high powered weapons from the coasts. From this point of view, the cannon-shot theory at present cannot be practicable for the breadth of the territorial sea.

2. 2. 2. Three-Mile Limit

During Bynkershoek's time though the range of cannon was less than three miles, nevertheless, the cannon-shot range can actually be regarded as the basis of the three-mile breadth limit for the territorial sea. The three-mile cannon ball range may be considered as an example for formulating breadth of the territorial sea. Different states adopted this limit for different purposes. Some of them accepted the three-mile limit for the purpose of "territorial sea", some for "neutrality zone", and some for "fishing zone".

As far as it appears, the three-mile limit had been in practice in Great Britain since 1736, when she provided statutes for special jurisdiction or control, mainly in customs and excise regulations (Hovering Acts)[37]. Just affer the *Franconia Case*[38] Great Britain enacted the Territorial Waters Jurisdiction Act, 1878, in which she prescribed the three-mile limit for territorial waters to be measured from the low water mark.

On 31 December 1787 Soviet Russia adopted the three mile limit for regulating privateering after concludiug treaties with other states. During the Napolionic wars the practice grew up of regarding the territorial waters as being of three miles width[39]. The Netherlands incorporated this limit in the legislation in 1889[40].

Different states adopted the three mile limit not only through individual statutes but also through different treaties. Great Britain made treaties with Algiers on 14 May 1784, with France on 26 September 1786 in which this formula was adopted[41]. Soviet Russia enacted this limit in her treaties with France on 31 December 1786, the United Kingdom of the two Sicillies on 6 January

1787, and Portugal on 6 January 1787[42]. The Suez Canal Convention of 29 October 1889 and the Convention of 20 October 1021 regarding the statutes of the Aaland Island declared the three-mile cannon ball range to be the extent of territorial waters[43]. This limit was adopted in the "Liquor Treaties" made in the years between 1924 and 1928 by the USA, Great Britain, Germany, Panama, the Netherlands, Cuba and Japan[44].

During the conflict between France and Great Britain the new born United States was forced to declare her neutral waters. And as such in the year 1793 she declared three-mile limit as the extent of her neutral waters. The two belligerents recognised this limit as the minimun limit of "neutral waters" for the United States[45]. At the outbreak of Franco-Prussian war Japan declared three-mile neutrality zone in 1870[46].

In fisheries the three-mile limit first appeared in the Anglo-American Convention of Commerce of 20 October 1818[47]. This is the first treaty which commuted the "cannon-shot" rule into the three-mile rule for the coastal jurisdiction. The Anglo-French Fisheries Convention of 1839 adopted the three-mile limit exclusively for fisheries[48]. This limit was also adopted in the great international document viz., the North Sea Fisheries Convention of 1882[49]. In other treaties the three-mile cannon-ball limit was accepted as the breadth of the fishing zone[50]. But after the nineteenth century the three-mile limit was mainly concerned with "territorial sea" and little with "neutrality zone" or "fishing zone" for the coastal state.

The Hague Codification Conference of 1930 attended by forty-two states for the first time, made an attempt to deal with different aspects of territorial sea. In the Conference it was recognised that international law attributed to each coastal state sovereignty over a belt of sea round its coasts. This was essential for the protection of the legitimate interests of the state[51]. Twenty states of the Conference favoured the three-mile extent for the breadth of the territorial sea[52]. Though the Codification Conference for the first time recognised internationally the concept of territorial sea, it failed to prescribe any fixed limit.

The UNCLOS I adopted provisions on different issues of the territorial sea. In this Conference, out of eighty six states, twenty

one supported the three-mile limit[53]. But the Conference failed to reach agreement on the breadth limit of the territorial sea.

In the UNCLOS III, different states stated that the three mile limit was not adequate for the breadth of the territorial sea. As such the UNCLOS III recognised the necessity of a wider limit for the coastal state. But the Conference failed to bring unanimity on the breadth of the territorial sea. Since this Conference the number of three-milers were not on the increase to the number of the new states. In the year 1968, 29 states (including major maritime powers) claimed the three-mile limit[54]. Thereafter, this limit was in practice among a limited number of states particularly among the major maritime powers.

Except a few important maritime powers, the countries attending the Caracas session (1974) of the UNCLOS III were not in favour of the three-mile limit. They claimed, and the important maritime powers agreed, a wider limit[55]. Finally in the UNCLOS III the eighteenth century three-mile "cannon-shot" limit bade goodbye from the scene of the law of the sea.

Though the Codification Conference, the First and the Second LOS Conferences failed to specify the breadth limit, nevertheless, they recognised the regime of the territorial sea. Virtually this success was possible because of the emergence and existence of the "cannon-shot" theory in the law of the sea. The criteria as well as the bases for prescribing three-mile limit have inspired states to propose and lay claims on wider sea areas as their territorial sea. Despite recent attempts for extending the limit of the territorial sea, it must be emphasised that the rule of the three-mile limit would remain an important phenomenon in the development of international law of the sea.

2. 2. 3. Four-Mile Limit

The four-mile limit was in practice among a few continental countries. This limit had a direct connection with the scale applicable to a "maritime league". A league of four miles was applied especially for the extent of "fishing zone". It was also used for the extent of "neutrality zone". As time passed, the four-mile league came into being as the breadth limit of the territorial sea. In regard to the maritime jurisdiction, the four-mile limit has a good practice of old standing. That is to say :

> The claims of Sweden and Norway to a four-mile zone go back as far as the middle of the eighteenth century, and are perhaps the oldest assertions of a definite territorial belt. In the event of a question being clearly put to an international tribunal it seems highly probable that those claims would be considered to have been established by prescription[56].

The four-mile league actually originated from Denmark which while being driven to abandon her claim to all the northern seas, first reduced her neutral zone to all waters within range of vision from her shores, then to four leagues and finally to one four-mile league[57]. According to C. H. M. Waldock :

> The four-mile league entered Danish-Norwegian practice in 1745, about half a century before the three-mile league entered in international practice as the neutrality limit of the United States. The one-mile difference between the Scandinavian league and the generally accepted marine league was little appreciated by non-Scandinavian States until the end of the eighteenth century. By then the three-mile limit appeared to be generally accepted and Great Britain opposed the larger Scandinavian claim[58].

It can be noted that Denmark claimed four miles as against the three miles afterwards accepted by other powers on account of the superior range of Danish cannon. The Scandinavian league was scaled at four miles as against the three-mile league in general use elsewhere[59]. A little later than the Danish-Norwegian practice, Sweden adopted the four-mile league[60]. In the seven years (1756-63) war Denmark regarded this limit as the neutral zone. But France did not accept it. She complied with her own cannon ball range. The difference arose out of the scaling of a marine league. The Scandinavian states adopted four miles, whereas the rest of Europe inclined to the "cannon-ball" range for scaling a league[61]. Though Denmark was one of the expounders of the four-mile league, she accepted the three-mile limit when entered into the North Sea Fisheries Convention of 1882[62].

In the Codification Conference Finland, Iceland[63], Norway and Swenden claimed four-mile width of the territorial waters. Norway was adamant to her claim. She refused to recognise any limit larger than her own four-mile limit unless supported by a continuous and ancient usage. Though Great Britain was an upholder of the three-mile limit, in the *Fisheries Case* she acquiesced in Norway's four-mile limit, but only in that particular case as historic limit older than the customary three-mile limit.

The First Conference faced among many other groups the group of the Scandinavian countries which claimed a four-mile limit for the territorial sea[64]. After the failure of the Conference to prescribe uniform breadth, the Scandinavian countries went on with their four-mile limit. Finally, in the UNCLOS III this limit has gone for ever from the arena of the law of the sea.

2. 2. 4. Six-Mile Limit

The six-mile limit is concerned with a limited historical background. As a matter of fact, it developed by the increasing claim of different states for the extent of the maritime belt[65].

The Institute of International Law in its annual meeting of 1894 recommended, a marginal belt of six miles wide[66]. The draft of the Institute adopted in 1927, provided for a zone of six marine miles for the territorial sea[67]. This led different states to extend their territorial sea up to six miles.

In the Codification Conference twelve states expressed their views in favonr of six miles extent[68]. Among the various limits six-mile limit was put forward by a group of twelve countries in the UNCLOS I[69]. The countries such as, Greece, India, Israel, Sri Lanka (Ceylon) and Thailand were new comers to the group of twelve countries. But Brazil, Cuba, Italy, Romania and Turkey who favoured the six-mile limit at the Codification Conference did not support this limit in the UNCLOS I.

In the UNCLOS I the United States and the United Kingdom favoured a three-mile limit as the only limit in international law. But this was in vain. The United Kingdom eventually offered to abandon her traditional support of the three mile limit, and was followed by the United States and Canada. The delegation proposed a maximum of six miles, with the United Kingdom calling for preservation of existing navigation and overflight rules outside the three-mile zone.

An essential difference between the United Kingdom and Canadian positions involved the question of exclusive fishing rights, the United Kingdom favouring exclusive rights to each state within a total of six miles, the Canadian within a total of twelve miles.

The United States proposed a compromise, providing for six miles of territorial seas and six more miles of exclusive fishing rights. Under this plan, no country would have been barred from

fishing in another nation's 6-12 mile zone if it had regularly fished for the previous five years. This proposal eventually received the largest number of votes (45 to 33, with 7 abstentions) but it, too, fell short of the required two-thirds majority[70].

As regards the breadth limit the UNCLOS II was more concerned with the six-mile limit. The United States proposed a maximum breadth of the territorial sea of six miles, with exclusive fishing rights for the coastal state in a further six mile zone. Other state with acuired fishing rights in this outer fishing zone would be allowed to continue to fish for the same species and in the same quantity during any five years prior to January 1958.

Canada was also in favour of a six-mile limit, with a fishing zone up to a twelve-mile from the baseline, but the coastal state was entitled in that zone to the same rights in respect of fishing and exploitation of the living resources of the sea as it had in its territorial sea.

The United States and Canada subsequently withdrew their respective proposals and submitted a new joint text, which would fix a maximum six-mile territorial sea and grant each state a total of twelve miles of exclusive fishing rights. Countries which had been regularly fishing in the outer six-mile zone so established for five years prior to 1958 could continue to do so for a period of ten years. The joint Canadian-United States proposal relating to the breadth of the territorial sea, received, in a roll-call, 54 votes in favour and 28 against, with 5 abstentions ; it therefore failed to receive the required two-thirds majority[71]. This failure for want of a single vote out of eighty-eight states attendimg the thirteenth meeting of the UNCLOS II was an unfortunate phenomenon as well as a mishap to the community of nations for settling a long standing issue.

Anyway, if the proposal could be adopted, the six-mile limit would become an established limit in international law. Therefore, it could survive for sometime. But in the long run, in the context of the ambitious claims of interested states, it would have to bid goodbye from the venue of the law of the sea.

2. 2. 5. Twelve-Mile Limit

At present the twelve-mile limit is unquestioned for the breadth of the territorial sea. The twelve-mile limit came into being

primarily through the claims regarding customs and fishing rights of different states. Later it evolved out of the claims for a larger limit.

The Soviet Russia is regarded as the pioneer of the twelve-mile limit. By the law of 11 December 1909 she established a custom belt of twelve-mile extent. On 28 December 1909 she enacted the same and prescribed the belt to be measured from the low-water mark[72]. A later law of 29 May 1911, on the fisheries extended the territorial seas of Russia to twelve miles. The same claim was asserted in May 1913. The decree of 24 June 1924 adopted the twelve-mile zone for the protection of fisheries in the Arctic Ocean and in the White Sea. In a general manner the twelve-mile principle was applied in the decree of 15 June 1927, on the Protection of the USSR and confirmed in the law of 5 August 1960 on the protection of the USSR State Frontier[73].

In the Codification Conference no specific proposal for the twelve-mile limit was put forward. The Soviet Russia mentioned no definite limit for territorial sea. She expressed her views in favour of a maximum freedom of navigation[74]. In effect, the twelve-mile limit is a recent development in the law of the sea.

In the UNCLOS I the USSR proposed that each state be allowed to fix its own limit at, as a rule, from three to twelve miles, taking into account a variety of local conditions ; it was wrong and unrealistic, in the view of the USSR, to expect states to give up what they had established to safeguard their own legitimate national interests.

Eleven states of different parts of the world favoured the twelve-mile limit[75]. The issues arising out of fishing rights in this zone made the First and the Second Conferences unsuccessful to adopt a common breadth-limit. But it goes without saying that after the Conference it became a practice of the states to enlarge the maritime zones.

Till 1960 the number of states claiming territorial sea for a distance of twelve miles was thirteen[76]. But as time went on, the number began to increase repidly with the emergence of new states in Africa and Asia[77]. In the relatively short period of 12 years since the UNCLOS II there has been no less than a 25 percent increase in the number of states claiming a twelve-mile territorial sea, an increase from 22 to 47 percent of all recorded claims[78].

It may be mentioned that on the eve of the Caracas session of the UNCLOS III, 1974 the number of twelve-milers rose to fifty-two[79]. In spite of its impact involved in the control of customs and fishing of the coastal states, the twelve-mile limit gained importance in the UNCLOS III to have been accepted as the limit of the territorial sea.

The UNCLOS III deserves credit for prescribing the breadth —the twelve-mile limit for the territorial sea. It has settled a long standing issue. At present every state as of right can establish a twelve nautical mile territorial sea from its baselines[80]. In spite of such internationally accepted limit, various states—some arbitrarily and some circumstantially are applying different limits.

2. 2. 6. Two Hundred-Mile Limit

To date the largest so far claimed by the countries as their territorial sea is the two hundred mile limit. The limit was generally known as the Latin American limit in the law of the sea. As regards its evolution, the two hundred mile limit is linked with the customary and possibly treaty law of the sea. It is also linked with the claim of natural resources underneath offshore seas. The origin of this concept is of special interest. In the Hague Codification Conference there was no proposal of the two hundred mile limit for the breadth of territorial sea[81].

A larger sea zone was practically an outcome of the "Declaration of Neutrality" of the United States and of the American Republics. From a reported precedent it can be stated that for maintaining neutrality President Roosvelt of the United States declared on 3 September 1939, a 200 mile "patrol zone". Pursuant to the darkening war clouds in Europe, all the twenty one Ametican Republics in the "Panama Declaration"[82] held from 23 September to 3 October 1939, formulated a "security zone" ranging from 50 to 300 miles. This Declaration was considered later to be one of the entities of certain Latin American countries to adopt the 200 mile limit for the breadth of territorial waters[83]. By the Truman proclamation of 28 September 1945 the United States asserted claims to the continental shelf existing up to 250 miles from the coast. This gave rise to several Latin American countries to prescribe a wider sea zone.

The reasons which led to the Latin American countries to adopt the 200 mile sea zone appear to be indentical as well as unique in the context of each country's peculiar situation. The underwater situation of these countries is extemely peculiar. Along the Atlantic coasts—Brazil, Argentina and Uruguay have a vast extent of continental shelves, whereas their neighbours to west, such as Ecuador, Chile and Peru in the Pacific coast are lacking in the same. Existence of the shelves thus caused the Atlantic coast countries to extend their jurisdiction over a vast expanse of the shallow seas[84]. The offshore seas of the Pacific coast countries drop sharply down the great ocean depth. They are rich in nitrates, phosphates and other resources. But these seas geologically have no shelf. Anyway, in order to lay claims to these resources those countries adopted the 200 mile sea zone[85].

Out of the essence of the Panama Declaration of 1939 Chile proclaimed her national sovereignty over 200 mile sea zone through the Presidential Declaration of 23 June 1947[86]. She was the first country to adopt the 200 mile sea zone under national jurisdiction. Moreover, she sent different missions to her neighbours with a view to organising them in favour of the 200 mile sea zone.

Peru depends largely on fisheries. The fishing-grounds are abundant in her offshore sea. All this as well as the extent of the "Humboldt Current"[87] led Peru to adopt the two hundred mile sea zone through her proclamation of 1 August 1947. In the Pacific coast Costa Rica by Decree-Law No. 116 of 27 July 1948 and Decree-Law No. 803 of 2 November 1949, and El Salvador under Article 7 of her Constitution of 1950 for the purpose of protecting and control of the seas adjacent to their coasts adopted 200 mile zone[88]. Honduras through the Legislation-Decree No. 25 of 17 January 1951 declared the protection and control of the state over the 200 mile zone[89].

Three Latin American countries such as Chile, Ecuador and Peru adopted the 200 mile limit as the extent of sovereign maritime zone in the Santiago Declaration of 18 August 1952[90]. In the UNCLOS I the countries such as, Chile, Costa Rica, Ecuador, El Salvador and Peru expressed the views in favour of the 200 mile zone for control especially of fisheries[91]. After this Conference the 200 mile zone began to spread not only among the Latin American countries but also among several other countries of the

world. Except the breadth of the territorial sea the 200 mile limit came forward for measuring the extent of the "continental shelf", "patrimonial sea" and popularly for the "economic zone" by different countries through proclamations and treaties.

Ecuador by her Decree No. 1542 of 10 November 1966, Panama, Law No. 31 of 2 February 1967 and Brazil by Decree-Law No. 1.098 of 25 March 1970 declared the 200 mile limit for the breadth of the *stricto sensu* territorial sea[92]. Other countries formulated this zone for *lato sensu* territorial sea[93]. The UNCLOS III has prescribed the 200 mile limit for the extent of the economic zone and the continental shelf.

In the context of the 200 milers it can be stated that the emergence of the 200 mile EEZ and the continental shelf in this Conference is an implicit acquiescence in the Latin American limit. And this has conversely caused different countries to adopt the 200 mile as well as other limits for the territorial sea despite the common twelve-mile limit of the Third Conference[94].

2. 2. 7. Breadth Limits—A Case-Study

At present the long standing problem of the breadth of the territorial sea seems to have been solved. The UNCLOS III deserves credit for having established the 12 n.m limit for the breadth of the territorial sea. Actually the 12 n.m limit became popular after the UNCLOS III. With the passage of time, the states began to adopt this limit for the territorial sea.

In the Caracas session, 1974 while the UNCLOS III began formulating the LOS provisions, the 12 n.m limit was predominantly in practice among the states. Furthermore, while the UNCLOS III[95] prescribed this limit, the limit appeared possible as acceptable and practicable for the territorial sea. From this point of view, it is fair to say that states should accept the 12 n.m limit wholeheartedly. In fact, this limit has been spreading among the states. Since the year 1974, forty four states[96] became new comers to the 12 n.m territorial sea.

These states may be regarded to have adopted the limit in conformity with the UNCLOS III provisions. Any state which now adopts the 12 n m territorial sea may be regarded to be complying with the UNCLOS III provisions. But the states have not only been adopting the 12 n.m limit. Since 1974 twelve states

appear to have joined the group of states claiming a territorial sea in excess of 12 miles[97].

From this observation, it is difficult to conclude that the states will comply with the UNCLOS III provisions to their entirety. Until the LOS treaty is ratified by these states, little or no effective action can be taken against the states infringing the LOS provisions. But if the territorial sea exceeding 12 n.m limit can exist, then it may be assumed that the states exercising such limits may ratify the treaty. If so, then other states not exceeding 12 n.m territorial sea may not be content all time with this limit. With the passage of time, they may claim the territorial sea exceeding 12 n.m limit. The ultimate effect will be that the 12 n.m limit in practice may exist as a minimum limit for the territorial sea.

It is to be observed that while a state asserts claims for example, to the 200 n.m sea zone, the neighbours to this state also assert claims equally. The states which are exercising the 200 n.m territorial sea are more or less neighbours to each other. If the breadth of the territorial sea of two adjacent states is not uniform, problem may arise as to the delimitation of the zone between them. Problems also may arise out of the navigation of foreign ships through this zone. The phenomenon can be illustrated as regards two adjacent states, one having a 12 n.m territorial sea and 200 n.m EEZ but the other, 200 n.m territorial sea. Beyond the 12 n.m sea zone, the former will have to delimit the EEZ against the territorial sea of the latter.

Subject to the freedom of navigation, a foreign ship can traverse the sea zone contiguous to but outside the 12 n.m territorial sea and can reach the boundary of their territorial seas. Therafter, it will have to change the direction of its course. That means, it will have to navigate the 200 n.m territorial sea. If the two states have uniform territorial sea, this phenomenon will not take place.

At present every state is free to prescribe a 12 n.m territorial sea and 200 n.m EEZ measuring from the baselines. There is no doubt to say that the coastal state can exercise jurisdiction in the territorial sea in a degree greater than in the EEZ. Anyway, from the economic point of view, it is all the same whether the 200 n.m sea zone is regarded as the territorial sea or the EEZ. In fact, the states exercising the 12 n.m territorial sea and the 200 n.m EEZ can be regarded to be promoting the new regime of the sea.

But as has been seen, some states are also extending the territorial sea to 200 n m. It is feared that many states may feel encouraged extending their territorial sea to 200 n.m. As regards states like Ivory Coast, the position can be clarified. Geographically both Ghana and Liberia are adjacent to Ivory Coast. These two states claim 200 n m territorial seas. It is doubted how long Ivory Coast will be satisfied with the 12 n.m territorial sea. To this end, there arises no difficulties to speculate that Ivory Coast may take an interest in following the neighbours. In this way other states whose neighbours are claiming the 200 n.m territorial sea come forward to adopt the 200 n.m territorial sea. Speaking specifically, for example, Ethiopia, Guatemala, Honduras, Kenya. Nicaragua and Togo are in this position.

Again, the states who are neighbours to states, that means, the American and African states may gradually proceed to the 200 n.m territorial sea. Moreover, it may be assumed that such practice may enable other states to extend the territorial sea to 200 n.m. The states who have some geographical contraints may only appear not to prescribe the 200 n.m territorial sea[98]. In other cases, the states may be going on with the 200 n.m territorial sea. It signifies that the efforts of the UNCLOS III for 12 n.m territorial sea and 200 n.m EEZ will then be in vain.

Nearly 40 states, that is more than 25% out of 136 coastal states at present have adopted the territorial sea extending to 12 n.m[99]. If the 12 n.m territorial sea is adopted, then it is required to treat 25% of the coastal states as exception to the UNCLOS III provisions[100]. But there is nothing mentioned about exception as to the breadth of the territorial sea[101].

2. 3. Delimitation Provisions—Impact and Practical Approach

As has been stated, the Hague Codification Conference, 1930 dealt with the "regime of the territorial sea". The Conference was not able to reach an agreement on the breadth limit of the territorial sea. But it was able to create an impetus on the necessity of the law of the sea. It was not until 1958 the law of the sea drew the serious attention of all concerned. With the pasage of time, the law of the sea is developing. The UNCLOS III has made a lot of contributions on the subject. But, as regards the delimitation of the territorial sea between two opposite or adjacent states the UNCLOS III does no tdiffer from the TS&CZ Convention.

2. 3. 1. UNCLOS I

Though the TS&CZ Convention failed to prescribe the breadth limit for the territorial sea, nevertheless, it dealt with different issues of the territorial sea and the contiguous zone. According to this Convention[102] no breadth limit for the territorial sea was obligatory to a coastal state. Every coastal state as of right was able to design a reasonable limit for the territorial sea. However, practice over the centuries indicates that a minimum of three-mile limit of the territorial sea would not meet any objection from any quarter. As regards the resonable limit, C. H. M. Waldock says :

> The State has the right to prescribe provisions concerning the breadth of its maritime territory within 'reasonable limits'. It is a matter of appreciation what is reasonable, given that one must take into account topographical and hydrographical considerations, economic conditions and the vital interests of the population, long usage and the rules of law which have been developed in the century in question[103].

That is to say, in order to evolve a "reasonable limit" certain factors related to the territorial sea as well as the coastal state must be taken into account. To this end, question may arise as to the underwater situation of the coastal sea, configuration of the coast and the economic dependence of the coastal state on this sea,

But the International Law Commission regarded the three mile limit as the fundamental limit, though it was not obligatory to the coastal state. The TS&CZ Convention did not impose any limit as obligatory on the coastal state. However, the fact that every coastal state as of right can design the maritime zones. There are certain factors which the coastal state requires to take into account for designing the territorial sea. In this regard two American scholars state :

> Other especially significant factors include such varying characteristics of the claimant states, viz, their special configuration of coasts, relative population growth and decline, military requirements, patterns of resource distribution, consumption and production, capital assets and structure, distribution of scientific and technical knowledge concerning the oceans and its resources, adjacent waters and marine life and local customs and traditions of living[104].

Whatever interests the coastal states can have, the delimitation of maritime boundaries has an international aspect. To this end, Professor Johnson says :

> It is...an accepted part of the juridical process in international law as well as in municipal law, that if a court cannot find immediately to hand a specific law or legal principle applicable to the particular case which it has to decide, it should deduce such a principle from some more general principle of law. The Court in this case seems to have followed this course and to have discovered as a general principle of law 'the principle that the belt of territorial waters must follow the general direction of the coast'. This principle in turn derives from the basic fact that 'delimitation of the sea areas has always an international aspect105.

In fact, to deal internationally a common breadth limit for the territoral sea is essential. The coastal states should comply with this limit. No state should extend the territorial sea exceeding such a common limit. But in certain circumstances a state may be in need of a larger extent than this limit. In order to delimit the territorial sea it is required to take into consideration : (a) wherefrom the territorial sea would be measured ; (b) to what limit it would be extended ; and (c) how it would be delimited between two states opposite or adjacent to each other.

In respect of (a) the solution is simple. The seaward extent of the baseline is the interior extent of the territorial sea. In plain words, the territorial sea would be measured from the baselines. The issue relating to (b) is concerned with the breadth of the territorial sea. It proved to be the difficult than any issues. Despite its utmost efforts the TS&CZ Convention could not reach an unanimity. The issues regarding (c) is concerned with the delimitation of the territorial sea between two states opposite or adjacent to each other.

Delimitation of the sea zones is a difficult phenomenon. In delimiting territorial sea the peculiar features that particular state may have should not be ignored. As a matter of fact, every state knows herself and her adjacent sea best. Therefore, due attention must be given to the interests of the coastal states in delimiting the maritime boundaries. Sir Arnold McNair in this respect observes :

> While the actual delimitation of the frontiers of territorial waters lies within the competence of each State because each State knows its coast best, yet the principles followed in carrying out this delimitation are within the domain of law and not within the discretion of each State106.

In spite of these circumstances, the coastal state cannot be considered to be the sole authority of determining the boundaries of different sea zones. Because other states have certain interests in the sea zones concerned. However, priority should be given to the interests of the coastal state. Generally it is assumed that the rules of law should be applicable to all equally. But in certain peculiar case if the rules are applied equally, the consequences would result in differenc and hatred instead of respect and goodwill to the rules.

It is a fact that no two coastal states are identical. As such, on rules can uniformly be applicable to the coastal states for delimiting the sea zones. In spite of that it would be better if they comply with the conventional provisions as far as practicable. But the peculiar situations existing geographically, geologically and geomorphologically should be taken into consideration in the delimitation of the sea zones.

2. 3. 2. UNCLOS II

Though the UNCLOS I failed to formulate a uniform breadth of the territorial sea, nevertheless, it promoted the necessity of prescribing a common limit. Like the 1958 Conference, the 1960 Conference faced different proposals regarding the breadth of the territorial sea. According to C. J. Colombos :

> Among several proposals which attracted the greatest attention at the Conference was the one put forward by Canada and the United States recommending the adoption of a six mile territorial sea and a twelve-mile fishery limit, subject to a ten-year period of phasing out. The proposal failed by one vote to secure the necessary two-third and accordingly all those Nations which base their territorial waters on the three-mile limit, will continue to do so[107].

The UNCLOS II also failed to arrive at a common formula over the breadth. But it cannot be regarded as completely unsuccessful. According to D. W. Bowett :

> It is most earnestly hoped that this failure by the Conference will not be regarded as a set-back to the movement for codification and progressive development of international law. In one sense it brings home the obvious truth that no movement of this kind can take place, at least via international agreement, unless States are willing to view their own interests in the larger context of the interests of international society as a whole is the essence of the compromise which will invariably be needed to secure general acceptance of a rule on any controversial issue[108].

In this Conference the three-mile limit appeared as inadequate in regard to the coastal states. Actually in the Conference it was expressed that the breadth of the territorial sea should be specified to an extent exceeding three miles. Since the UNCLOS II, claims for a larger sea zone were put forward by different states.

2. 3. 3. UNCLOS III

The Third Conference is regarded as comprehensive Conference on the law of the sea. The work of this Conference—is to adopt by consensus of possible, one gigantic "package deal", covering the whole area under discussion which will have sufficient support to be ratified and come into force on a substantially world-wide basis[109].

As regards the delimitation of the territorial sea between two opposite or adjacent states the LOS Convention (Article 15)[110] has no difference with the TS&CZ Convention (Article 12). According to this Article :

> 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 the 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.

It signifies that the states are entitled to delimit the territorial sea by "agreement". Actually in the delimitation priority has been given to the principle adopted in the 'agreement'. It seems that the principle adopted in the 'argeement' should be treated as unquestioned. As a matter of fact, the article cannot specify a principle except the equidistance principle. That is to say, the equidistance principle may be given to the 'agreement'. However, it should bear in mind that there arises no obligation to give effect to this principle in the 'agreement'. As a practical consideration, it can be noted that there is no specification about the principle that should be followed in the 'agreement'. In these circumstances, it is possible to state that the states are all in all to accomplish the delimitation.

But where there is no agreement or the states fail to reach an agreement, then neither of them is entitled to delimit the territorial

sea exceeding the median/equidistance line[111]. To this end, the equidistance principle may be regarded as predominant principle applicable to the delimitation of the territorial sea.

Furthermore, in the case of "historic title" or other "special circumstances"[112] it cannot be specified—what kind of boundary would be applicable. It can only be stated that in these circumstances there is the justification of departure from the equidistance line. That is to say, if there exists "historic title" or other "special circumstances" the delimitation of the territorial sea between two opposite or adjacent states cannot be effected by the equidistance principle.

In order to determine the boundary there may arise a question v heter the "historic title" or other "special circumstances" justifies the deviation from the equistance line completely or partially. In the case of pecial circumstances" if the equidistance line is not applied, the delimitation of the sea zones in certain cases may not be equitable. As such, there should be a feeling that in order to do justice it would not be improper to apply the equidistance line in part in the delimitation of the territorial sea between the states even in presence of the "special circumstances".

3. Contiguous Zone

3. 1. Background Information

Rights in the waters beyond the limit of the territorial sea have been asserted by a great many states. These waters are commonly called an "adjacent zone" or "contiguous zone"[113]. The contiguous zone initially was concerned with the control necessary to prevent smuggling. Now-a-days the zone deals with customs, fiscal, immigration and sanitary matters of the coastal state. The contiguous zone first was in practice in Great Britain. As time passed, it spread among different states. According to W. E. Masterson :

> Smuggling to and from sea was a serious problem in England for many centuries. From the thirteenth century on, growers of wool looked longingly toward France and Holland and Sweden for markets for their surplus produce, whose exportation, however, was forbidden. From the seventeenth century on, the importation of many other articles was either highly taxed or prohibited. Smugglers, as a result, arose in vast hordes both on sea and on land. From the earliest time, drastic action was taken by tne English Government to put an end to this illicit trade[114].

Regarding the basic needs, the territorial sea is directly related with the coastal state. But the contiguous zone cannot be regarded to the same degree. The zone came into being on the basis of special needs of the coastal states. In view of such needs Great Britain and the United States adopted this zone through different acts[115]. Apart from their acts the contiguous zone was adopted in different treaties.

For two centuries or more it has been everywhere recognised that a coastal state should not tolerate an offence to be committed against its laws by ship lying conveniently just outside its territorial limits ; the "Hovering Laws" of the eighteenth century were aimed against such devices. Since then a rule came forward that the coastal state should exercise some control of all shipping for the purpose described on the high seas outside territorial limits in an area that has come to be known as the contiguous zone.

Naturally it would be an annoying phenomenon for a state if any intrusion is made in the immediate vicinity of its territory. To this end, it is relevant to state that the coastal state should have authority for taking preventive measures outside its territorial waters. Before the twentieth century the three-mile extent of the territorial sea was also felt inadequate by the littoral state for the purpose of customs and revenues. In 1929 the Harvard Research in International Law emphasised the necessity of contiguous zone. It was laid down that :

> ...the navigation of the high seas is free to all states. On the high seas adjacent to the marginal sea, —a State may take such measures as may be necessary for the enforcement within its territory or territorial waters of its customs, navigation, sanitation or police law or regulations for its immediate protection[116].

It is significant to note that as regards the "immediate protection" of the coastal state, it is necessary to substantiate the authority of this state regarding 'custom', 'navigation', 'sanitation' or "police laws or regulations" to be exercised in the area beyond its territory or territorial sea.

In the Hague Codification Conference the contiguous zone was dealt with as an addendum to the territorial sea. The concept of contiguous zone internationally emerged in this Conference. The difference among the states over the issues of the zone was one of the reasons for the failure of the participating states to the

Conference to reach unanimity as to the breadth of the territorial sea[117]. The need of the contiguous zone for the coastal state was reiterated by different states. For different purposes of the coastal state the contiguous zone was practiced in the name of different sea zones. The zone came into being through the Anti-Sumggling Act of 1935 of the United States. Under different headings the Act adopted several sea zones for safeguarding various interests of the United States[118]. One of these zones beyond territorial sea was aimed at dealing with the preventive measures to be taken by the coastal state. This zone, later came out as the contiguous zone.

The UNCLOS I adopted the contiguous zone to extend not exceeding twelve miles from the baselines of the coastal state. The purpose of this zone was to enable the coastal state to exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea[119]. For the same purpose of the coastal state the UNCLOS III has prescribed the contiguous zone to extend not exceeding 24 nautical miles from the baselines from which the breadth of the territorial sea is measured[120].

3. 2. Impact and Characteristics

As time went on different views were put forward in favour of the exercise of jurisdiction of the coastal states over the sea zones beyond territorial sea. According to these views the coastal state should have extra-territorial jurisdiction so that the flag state cannot create unscrupulous atmosphere by violating laws beyond the immediate vicinity of the territorial sea E. D. Dickinson observes :

> Suppose that a foreign ship violates the local laws from a point outside territorial waters, remaining at all times outside territorial waters May it be seized extra-territorially by the local authorities? It is submitted that jurisdiction to make such a seizure is generally indispensable to efficient law enforcement and that it should not be necessary to talk of 'constructive' presence within territorial waters in order to justify it. No assistance is to be derived from the flag States. And surely the flag State has no interest in securing immunity for its ships from the consequence of their own misconduct[121].

That means, in order to face the flag state beyond territorial waters it would not be unjustified if a zone is provided for the coastal state. L. Oppenheim views the contiguous zone in favour of the littoral state beyond its maritime belt particularly for self-

preservation[122]. Shigeru Oda, a Japanese scholar favours the contiguous zone owing to the fact that it would better serve the needs and exigencies of the current world. He states :

> The advantage which the coastal State may obtain by the extension of its jurisdiction over a wide area for the purpose of preventing smuggling or insanitary action in incomparably greater than any expected disadvantage that other States may suffer therefrom[123].

If a provision can give some advantage to a number of bodies causing less disadvantage to others, then the provision cannot be regarded as illogical. The contiguous zone safegurads certain interests of the coastal state but resricts the flag state not to infringe the provisions concerned. The flag state is comparatively little affected by such provisions.

Taking into account the different views, the International Law Commission aptly arranged the criteria for the contiguous zone in its different sessions. The 1950 and 1951 sessions took the view that a coastal state might exercise such control as was required for the application of its fiscal, customs and sanitary regulations over a zone of the high seas adjacent to the territorial waters[124]. The 1951 session of the Commission proposed that the contiguous zone should not extend more than twelve miles from the coast. The 1953 session formulated the contiguous zone for the coastal state for exercising jurisdiction over customs, fiscal, sanitation and immigration matter[125].

The provisions of the 1956 session of the Law Commission on the contiguous zone were discussed in different committees of the UNCLOS I. Philippines and Ceylon presented a proposal in the First Committee for including their item concerning 'immigration' in the resolution of the 1956 session of the Commission.

In spite of claims and counter-claims over the resolution the 1956 session set up the contiguous zone to be dealing with custom, fiiscal and sanitary regulations. That is to say, the Law Commission had empowered the coastal state to adopt contiguous zone for exercising jurisdiction relating to customs, fiscal and sanitation over a zone adjacent to the territorial sea. As regards the breadth, the Commission provided that the contiguous zone would not extend beyond twelve miles from the baselines from which the breadth of the territorisl sea would be measured[126].

The TS&CZ Convention adopted the twelve-mile contiguous zone for the coastal state to deal with the prevention of its customs,

fiscal, immigration or sanitary regulation[127]. Due to inadequacy of the three-mile territorial sea Canada raised a proposal suggesting fishing rights in the contiguous zone before the Convention. But it faced confrontation with the United States and Great Britain. From the Canadian point of view, the twelve-mile contiguous zone as adopted in the TS&CZ Convention would be regarded as fishing zone of the coastal state.

As a matter of fact, a number of coastal states had already adopted twelve miles and more as the breadth of the territorial sea. The contiguous zone appears indirectly to have inspired several states which had territorial sea less than twelve miles to prescribe a twelve-mile territorial sea. In this respect Michael Akehurst says :

> ...the contiguous zone cannot *extend* more than twelve miles from the baelines from which the territorial sea is measured; since the contiguous zone is an area of the high seas stretching beyond the territorial sea, it follows a *fortiori* that the territorial sea itself cannot extend more than twelve miles[128].

The twelve-mile territorial sea as provided in the UNCLOS III may accordingly be regarded as an outcome of the twelve-mile contiguous zone. From an imperative point of view, the contiguous zone cannot give better title to the coastal state than the territorial sea. Practically, it is a zone of limited jurisdiction for the coastal state. If the breadth of the territorial sea is less than that of the contiguous zone, then the latter extends beyond the territorial sea. In the context of twelve-mile territorial sea the concept of the twelve-mile contiguous zone would be meaningless. As a result, the contiguous zone should have an extent exceeding twelve miles.

The UNCLOS III has prescribed 24 n.m limit for the contiguous zone. If the 12 mile contiguous zone is regarded to have inspired the coastal states to adopt 12 n.m territorial sea, then the 24 n.m contiguous zone will give rise to conflicts as to the breadth of the territorial sea less than contiguous zone. Had it been so, it should not recur again. That is to say, if the 12 n.m territorial sea is assumed to exist on this basis, in the days to come the 24 n.m contiguous zone of the III will be the limit for the territorial sea. This may bring untold conflicts in the domain of the law of the sea. In the words of Michael Akehurst, such principles can be regarded as a surreptitious means of extending the territorial sea[129].

Juridically the contiguous zone is a part of the high seas. The contiguous zone is not merely a separate and different thing from the territorial sea, it is part of the high seas, and its basic juridical status is that of the high seas[130]. It must follow and this is the important point—that foreign vessels in the contiguous zone are not basically subject to the laws of the coastal state, or bound to conform to them, as they would be in the territorial sea[131]. It is said that the contiguous zone extends beyond territorial sea. It does not mean that irrespective of any breadth limit of the territorial sea the zone will extend beyond it. The contiguous zone in fact is independent of the breadth limit of the territorial sea.

3. 3 Delimitation Provision—Practical Approach

Article 24 (3) of the TS&CZ Convention deals with the delimitation of the contiguous zone between two opposite or adjacent states. According to this Aritcle :

> 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 contiguous zone 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 the two States is measured.

It is clear that the delimitation of the contiguous zone between two opposite or adjacent states is to be effected by 'agreement'. If there is no 'agreement' or it is not possible to reach an 'agreement', the equidistance line can be applied for the delimitation of the zone between the states concerned. Actually the equidistance line cannot be freely applied for the delimitation of the contiguous zone. It can be pointed out that in delimiting the territorial sea between two states, "historic title" or "other special circumstances" require to be considered. But nothing of these has been mentioned to be considered in the delimitation of the contiguous zone between the states. Since the contiguous zone does not concern with underwater situations, there arises no technical issues for its delimitation. As a result, the equidistance line appears suitable to the delimitation of the contiguous zone between two states.

Actually the regime of the contiguons zone deals with the sea zone lying between the outer boundaries of the territorial sea and the contiguous zone. From this point of view, the delimitation of the contiguous zone appears to be concerned with the sea zone lying outside the territorial sea.

It is a fact that the UNCLOS III has evolved wider sea zones such as the 200 n.m EEZ and the continental shelf. The UNCLOS III has formulated provisions for delimiting the 12 n m territorial sea and the 200 n.m EEZ between two states opposite or adjacent to each other. But it has not provided any provisions for delimiting the contiguous zone between two opposite or adjacent states[132].

It seems that the provisions which are applied to the delimitation of the territorial sea or the EEZ between two opposite or adjacent states should be applicable to the contiguous zone. If so, then the delimitation of the contiguous zone should be effected either by 'agreement' between the states concerned or by drawing "equidistane line" from their baselines provided there exists no "special circumstances". But if there exists "special cirumstances", it ought to be noted that the delimitation should be effected by "equitable principles". Anyway, because of having no provisions specified, it is really difficult to ascertain what principle would be applicable to the delimitation of the contiguous zone between opposite or adjacent states.[133].

There arise issues of delimitation of the 200 n.m sea zone than any other smaller zone. As regards the 200 n.m EEZ the 24 n.m contiguous zone appears to be a fading zone. To this end, in the Caracas session, 1974 it was argued by Mexico that if the UNCLOS III established the concept of an EEZ where the coastal state had certain rights beyond its territo rial sea the concept of the contiguous zone would have to be dropped[134].

It is feared that in the near future the 24 n.m contiguous zone may not survive in the face of the importance that is being gained by the 200 n.m EEZ in the law of the sea.

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1 See LOS Convention, Articles 1, 3. In order lo be acquainted with the notion "territorial sea", see John Westlake, *International Law* 1(1910), University Press (Cambridge) 164 ; H. Lauterpacht (ed), *Oppenheim's International Law*—A Treatise 1(1963), Seventh Impression, Longmans 487 ; C. J. Colombos, *The International Law of the Sea* (1972), Sixth edition, Longmans 83.

2 The ancient writers sometimes affirmed and sometimes denied the sovereignty of the seas Gaius (130-180 A. D) described the sea as *res nullius* asserting that it belonged to the first occupant. Ulpian (murdered 228) advocated the free use of the sea : *Mare Communem Usuam Omnibus Hominibus*. The text of the Jurist Marcianus (391-457) preserved in the Digest of Justinian, is the first formal pronouncement in recorded legal theory in the right of men to use the sea and its products. The sea and its coast are common to all men. This doctrine of the common right of all men to a free use of the sea was a law of Roman Empire at the beginning of the second century, although this law was not put in a codified form until the sixth century. Justinian (527-565) in his Institute asserted the thesis that the sea and its shores rank among the things common to all men that the sea is open to public use and is nobody's property (*res communis*). See James Brown Scott (ed), *The Classics of International Law* (1923), A Translation of the text of Cornelius Van Bynkershek's *De Dominio Mares Dissertatio* (1702), Oxford University Press 82 ; Percy Thomas Fenn, Jr., "Justinian and Freedom of the Sea", 19(1925) AJIL 716-727, 716 ; Harrop A. Freeman, "Law of the Continental Shelf and Ocean Resources—An Overview", 3(1970) *Cornell International Law Journal* 105-140, 107 ; James Crawford Ladlie, "The Great Jurist of the World—Ulpian", 5(1903) JSCL 14-24 ; H. Lauterpacht (ed), *op. cit*, 582.

3 The idea of a maritime area, zone, or belt of sea over which a coastal state might exercise sovereign power engaged when certain medieval sovereigns and cities to lay claims for specific purposes to certain parts of the sea adjacent to their territories. The first recorded claim was for rights to fishing and salt extracting made by Byzantium under Emperor Leo (889-911). In early days a number of nations became masters of the sea, for instance, Cretan, Lydians, Pelasgi, Thracians, Rhodians, Phrygians, Cyprians, Phoanicians, Egyptians, Milesians, Carians, Lesbians. Phocaeans, Corinthians, Ionians, Naxians, Ereterians, and Aegmetans. See James Brown Scott(ed), *op. cit.*, 87 ; Harrop A. Freeman, *op. cit.*, 107.

4 Those who maintained a right of sovereignty over the great seas were ; Gentilis, Pacius (Julius), Gotofredus. Paolo Sarpi, Bargus, Rivius, Marisoltus, Schookius, Coringius, Jenkinson (Lord

Liverpool), Selden, de Fretas, Heineccius, Borough, and those who defended the liberty of the seas were : Grotius, Pufendorf, Graswinkell, Huberus, Graverus, Groeningius, Pontanus, Bynkershoek, Lucches-palli, Hubner, Azuni, Galliani, Hautefeuille, Kluber, Martens, Wheaton and all recent writers on International Law. See Caranzza-Amari, *Traite de Droit International Public en Tempsode Paix* 2(1880) 41. Translation into French from the Italian (1882) by Montanari—Reves, cited in Henry G. Crocker (ed), *The Extent of the Marginal Sea* (1919), Government Printing Press (Wasgington) 35.

5 Sanford D. Cole, "Neutrals and Belligerents in Territorial Waters", 2(1916) *Grotius Transactions* 87-92, 88.

6 Harrop A. Freeman, *op. cit.*, 108.

7 Coleman Phillipson (ed), *Sir Frederick Smith's International Law* (1918), Fifth edition, McVill (London) 112.

8 De Cussy, *Phases et Causes Celebres du Droit Maritime des Nations* 1(1856) S. 40, p. 91, cited in Henty G. Crocker (ed), *op. cit.*, 49.

9 See C. J. Colombos, *op. cit.*, 62-65 ; H. Lauterpacht (ed), *op. cit.*, 582.

10 Sanford D. Cole, "The Highway of the Sea", 4(1918) *Grotius Transactions* 15-25, 16.

11 English Translation : *The Freedom of the Seas* (1916) with a revision of the Latin Text of 1633 by Ralph Van Magoffin and edited by James Brown Scott.

12 E. G. Alberico Gentili (1562-1608), Paolo Sarpi (1552-1623), John Selden (1584-1654). See Richard B. McNees, "Freedom of Transit through International Straits", 6(1974-75) JMLC 175-211, 177.

13 English Translation (1923) by Ralph Van Demon Magoffin and an introduction by James Brown Scott.

14 Sanford D. Cole, "Neutrals and Belligerents in Territorial Waters", *op. cit.*, 88

15 De Cussy, *op. cit*,. 91.

16 Latour, La Mer Territorial au Point de Vue Theorique et Pratique (1889) S. 11, p. 29, cited in Henry G. Crocker (ed) *op cit.*. 250.

17 Bonfils, *Manuel de Droit International Public* (1914) Seventh edition, S. 491, p. 322, cited in Henry G. Crock (ed). *op. cit.*, 11.

18 Bynkershock laid down that a state's sovereignty extended as far out to sea as cannon would reach ; and the three-mile limit has traditionally been represented as simply the range of cannon in the eighteenth century. See Sir Humphrey Waldock (ed), J. L. Brierly's *The Law of Nations* (1963), Sixth edition, Clarendon Press (Oxford) 202.

19 E. g. Emmerich de Vattel (1714-1767), Ferdinando Galiani (1720-1787), George Freiderick Van Martens (1734-1821), Dominico Alberto Azuni (1749-1843). Vattel laid down that the domain of the state over the adjacent sea should extend as far as necessary for its safety, and as such, he supported the cannon range for the extent of the maritime belt. According to Galiani the cannon ball rule was the most just and the only rule for fixing the extent of the territorial sea, a point always contested and not decided, at least not fixed, as it ought to be, on the basis of solemn treaty, between the maritime powers. Martens and Azuni expressed the views similar to Galiani over the cannon-shot theory. Fulton justified the cannon range saying that it was the rule that the sea shoutd salute the land the range of guns determined the limit within which the salute ought to be rendered. Wheaton observed that by the generally accepted usage of nations, which forms the basis of international law, the maritime territory of every state extends (among other things) to the distance of a maritime league, or as far as cannon-shot will reach from the shore, all along the coast of the state.

20 *Church* v. *Hubbart* 6 U. S. (2 Cranch 187), 2 L. Ed. 186(1804). Herbert W. Briggs (ed), *The Law of Nations, Cases Documents and Notes* (1966), Second edition, Appleton-Century-Crofts, Inc. (New York) 356.

21 M. B. Temple Grey, "Territorial Waters", 42(1926) *The Law Quarterly Review* 35.

22 According to Bustamente there are adjective galore to describe such waters. It has been called contiguous, adjacent, coastal, maritime, marginal, littoral, jurisdictional and territorial. See Y. Bustamente, *The Territoriat Sea* (1930), University Microfilm International (London) Ss. 214-217, pp. 138-139. Taking the use of the adjective galore the expounders have frequently regarded these as "territorial waters", terrtorial sea", "marginal waters", "marginal sea" and "maritime belt". The expression

"territorial sea" has been designed conventionally to clarify "territorial waters". In 1952 the International Law Commission has incorporated the use of the term "territorial sea" instead of "territorial waters" as the latter expression had sometimes been taken to include also inland waters. See 2(1971) ILC *Yearbook* 64.

23 Article 1(1) of the Codification Conference (1930) says : "The territory of a State includes a belt of sea describing in this Convention as the territorial sea". According to Article 1(1) of the TS&CZ Convention : "The sovereignty of a state extends beyond its land territory and its inland waters, to a belt of sea adjacent to its coast described as the territoriol sea". The LOS Convention in its Article 2 provides : "The soverignty of a coastal State extends beyond its land territory and internal waters, and in the case of an archipelagic State, its archipelagic waters, over an adjacent belt of sea described as the territorial sea".

24 Morton A. Kaplan and Nicholas De. B. Katzenbach, *The Political Foundation of International Law* (1861), John Wiley & Sons Inc., Printed in the U. S. A, 135.

25 Subject to the "innocent passage" a State has right of traversing territorial sea of another state.

26 The "arcs of circle" method and the common tangent" rule were proposed in the Codification Conference. In this regard, the United States took the initiative but the proposal was not accepted in the Conference. Professor D. H. N. Johnson spoke highly about the "arcs of circle" method. But it has no use in measuring territorial waters' See H. A. Smith, *The Law and Custom of the Sea* (1959), Third edition, Stevens, 10-11 ; D. H. N. Johnson, "The Anglo-Norwegian Fisheries Case", 1/2(1952) ICLQ 145-180, 155.

27 Though by the mid-eighteenth century a fixed three-limit had been accepted by important maritime states, but the limit had not attained universal acceptance as a principle of international law. See Charles G. Fenwich, *International Law* (1971), Third edition, Reprint, Fiffer and Simons Private Ltd. (Bombay) 443.

28 Wyndhan L. Walker, "The Territorial Waters : The Cannon-Shot Rule", 22(1945) BYIL 210-231, 210.

29 See Treaty of Peace and Friendship between Great Britain and Spain, signed at Madrid, 13-23 May 1667. Clive Parry (ed), 10(1667-68) *The Consolidated Treaty Series* 63, XIV, 122. Hereafter cited as the *Consolidated Treaty Series*.

30 W. L. Walker, 224.

31 H S. K. Kent, "The Historical Origins of the Three-Mile Limit" 48(1954) AJIL 537-553, 537.

32 See Bernard G. Heinzen, "The Three-mile Limit Prescribing the Freedom of the Seas", 11(1958-59) *Stanford Law Review* 597-664, 608.

33 *Supra*,, 51. See also Y. Bustamente, *The Territorial Sea* (1930) S. 37, p. 17.

34 *Supra*., 51.

35 Coleman Phillipson, "The Great Jurist of the World—Cornelius Van Bynkershoek", 9(1909) JSCL 36.

36 *Ibid.*

37 C. J. Colombos, *op. cit.*, 94 ; H. A. Smith, *op. cit.*, 27.

38 E. g. The Queen v. Keyn (1876) L. R. 2. Exch. Div. 63. 2(1965) BILC 701-801.

39 See Michael Akehurst, *A Modern Introduction to International Law* (1971), Second edition, George Allen and Unwin Ltd. (London) 212.

40 See H. A. Smith, *op. cit.*, 281.

41 See C. J. Colombos, *op. cit.*, 94.

42 William E. Butler, "The Legal Regime of Russian Territorial Waters", 62(1968) AJIL 51-77, 53.

43 See C. J. Colombos, *op. cit.*, 95, 202.

44 In this respect the "Liquor Treaties" states : "The High Contracting Parties declare that it is their firm intention to uphold the principle that three miles extending from the coastline outwards and measured from low water mark constitute the proper limits of territorial waters". See William W. Bishop, Jr., *International Law, Cases and Materials* (1971), Third edition 591.

45 Sir Humphrey Waldock (ed), *op. cit.*, 203.

46 Zengo Ohira, "Fishery Problem between Soviet Union and Japan", 2(1958) JAIL 1-18, 5.

47 See chapter I, 3.

48 Sir Humphrey Waldock (ed), *op. cit.*, 293.

49 In the North Sea Convention it was adopted that : "The fishermen of each country shall enjoy the exclusive right of fishery within the distance of three-miles from low water mark along the whole extent of the coasts of respective countries as well as of the dependent islands and banks". The signatories to this Convention e.g. Great Britain, Germany, Belgium, Denmark and the Netherlands. Sweden and Norway though took part in the Conference, were unable to sign the Convention as they could not accept the definition of the North Sea, contained in the Convention i. e. the three-mile limit for territorial waters. Great Britain denounced the Convention in 1964 with the intention that it should be replaced by a new international agreement. See Temple Grey, *op. cit.*, 354 ; (1963) KCA 19412.

50 C. J. Colombos, *op. cit.*, 95.

51 Green Haywood Hackworth, *Digest of International Law* 1(1940), Government Printing Press (Washington) 623.

52 A direct vote was avoided, but each state represented was permitted to set forth its views. The following twenty states expressed their views in favour of the three.mile limit : Australia, Belgium, Canada, Chile, China, Denmark, Egypt, Estonia, Finland, France, Germany, Great Brit ain, Greece, India, Irish Free State, Japan, the Netherlands, Poland, South Africa, and the United States. See Llewellyn Pfankuchen, *A Documentary Text Book in International Law* (1940), Rinehart & Company Inc. (New York) 227.

53 The following twenty-one states voted for the three-mile limit : Australia, Belgium, Brazil, Canada, China, Cuba, Denmark, Dominican Republic, France, Japan, Jordan, Liberia, Malaya, the Netherlands, New Zealand, Pakistan, Poland, South Africa, Tunisia, the United Kingdom, and the United States. See William W. Bishop, *op. cit.*, 594.

54 See Michael Akehurst, *op. cit.*, 213.

55 David L. Ganz, "The United Nations and the Law of the Sea", 26/1(1977) ICLQ 1-53, 19, 20.

56 H. A. Smith, *op· cit* , 25.

57 Sir Humphrey Waldock (ed), *op. cit.*, 202.

58 C. H. M. Waldock, "The Anglo-Norwegian Fisheries Case", 28(1951) BYIL 114-171, 126.

59 Wyndham L. Walker, *op. cit.* 228.

60 Tao Cheng, "Communist China and the Law of the Sea", 63(1969) AJIL 47-73, 55.

61 Sir Humphrey Waldock (ed). *op. cit.*, 203.

62 See n. 49.

63 Iceland actually was a supporter of the three-mile limit. She complied with the Anglo-Danish Convention of 1901, which applied to the fisheries in the waters around Iceland and established the three-mile limit for the exclusive right of fishery. See *Fisheries Jurisdiction Case (United Kingdom and Northern Ireland* v. *Iceland* ICJ, General List 55, 25 July 1974, ICJ Reports para. 21, p. 11.

64 Norway, Sweden, and Finland are regarped as the Scandinavian countries. Along with these countries Iceland claimed a four-mile limit for thd territorial sea in the UNCLOS I.

65 See John Bassett Moore, *A Digest of International Law* 1(1906), Goverment Printing Press (Washington) 752.

66 See Henry G. Crocker (ed), *op. cit.*, 688.

67 William Edward Masterson, "Territorial Waters and International Legislation", 14(1928) *Grotius Transactions* 45-58, 68.

68 The twelve states were : Brazil, Colombia, Cuba, Italy, Latvia, Persia, Portugal, Romania, Spain, Turkey, Uruguay and Yugoslavia. See Llewellyn Pfankuchen, *op. cit.*, 594.

69 The six-miler twelve countries were : Colombia, Greece, India, Iran, Israel, Italy, Portugal, Spain, Sri, Lanka, Thailand, Uruguay, and Yugoslavia. See William W. *op. cit.*, 594,

70 See 2(1958) UNCLOS I OR 39.

71 See (1960) UNCLOS II, Doc. A/CONF. 19/8, 30.

72 See C. J. Colombos, *op. cit.*, 100 ; William E. Butler, ',The Legal Regime of Russian Territorial Waters", 62(1968) AJIL 51-77, 53 ; Zengo Ohira, "Fishery Problems between Soviet Union and Japan", 2(1958) JAIL 1-18, 6.

74 Kazimierz Grzybowski, *Soviet Public International Law, Doctrines* and Practice (1970), A. W Sijthoff 49, 150.

74 Llewellyn Pfankuchen, *op. cit.*, 222.

75 The following eleven states claimed 12 n.m limit in the UNCLOS I : Bulgaria (1950), Ecuador (1950), Ethiopia (1953), Guatemala (1934), Indonesia (1957), Libya (1954), Romania (1956), Saudi Arabia (1958), the Soviet Union (1909), the United Arab Republic (1958), and Venezuela (1956). See William W. Bishop, *op.*

cit., 594.

76 See R. P. Anand, "Winds of Change in the Law of the Sea", 16/2(1977) *International Studies* (New Delhi) 202-226, 216; Panama through the Law No. 58 in 1948 and the Communist China extended their territorial sea to twelve miles. See Tao Cheng, "Communist China and the Law of the Sea", 63(1969) AJIL 53.

77 See E. D. Brown, "Maritime Zones: A Survey of Claims" in *New Directions* 3(1973) 157-192, 161.

78 *Ibid.*

79 R. P. Anand, *op. cit.*, 216.

80 LOS Convention, Article 3.

81 See Ann L. Hollick, "The Origins of 200 Mile Offshore Zones", 71(1977) AJIL 494-500, 494, 495, n. 5.

82 The Panama Declaration was mainly formulated for the purpose of protecting the American continent from the scourge of war prevailed in Europe. According to the Declaration "waters adjacent to the American continent" must be "free from the commission of any hostile act by any non-American belligerent nation". See C. J. Colombos, *op. cit.*, 669.

83 See William W. Bishop, *op. cit.*, 631, 652.

84 See John D. Hicks, George E. Mowry and Robert E. Burke, *The American Nation* (1965), Fourth edition, Houghton Mifflin Company (Boston) 634.

85 M. A. Kaplan and Katzenback, *op. cit.*, 151, 152.

86 See chapter IV, 3. 2.

87 One argument is that the 200-mile limit represents the width of the "Humboldt Current". The oceanic current about 200 miles wide flowing along the Peruvian and Chilean coasts is known as the "Humboldt Current". See n. 81. See also Rhodes W. Fairbridge (ed), *The Encyclopedia of Oceanography* 1(1966), Van Nostrand Reinhold Company (New York) 540, 541; David C. Loring, "The United States—Peruvian Fisheries Dispute", 23(1970-71) *Stanford Law Review* 391-453, 416.

88 F. V. Garcia Amador, "The Latin American Contribution to the Development of the Law of the Sea", 68(1974) AJIL 33-50, 36.

89 *Ibid*,. 37.

90 See chapter IV, 3, 2.

91 See William W. Bishop, *op. cit.*, 594.

92 In case of *stricto sensu* territorial sea the right of innocent passage is recognised either expressly or tacitly. But in case of *lato sensu* territorial sea freedom of navigation for foreign ships and of overflight for foreign aircraft is not affected. See L. D. M. Nelson, "The Patrimonial Sea", 22(1973) ICLQ 663-686, 678, 679.

93 *Ibid.*

94 See Gerald Moore, "National Legislation for the Management of Fisheries under Extended Coastal State Jurisdiction", 11(1980) JMLC 178-182.

95 ISNT, Article 2. 4(1975) UNCLOS III OR 153.

96 E. g. Bahamas (1977), Bangladesh (1977), Barbados (1978), Bermuda (1977), Burma (1977), Canada (1977), Comoro Island (1976), Cook Islands (1977), Costa Rica (1977), Cuba (1977), Democratic Kampuchea (1977), Dominican Republic (1979), Fiji (1978), France (1976), Grenada (1978), Guatemaja (1976), Guyana (1977), Haiti (1977), India (1976), Italy (1974), Ivory Coast (1977), Japan (1977), Korea Democatic Republic (1977), Korea Republic of (1977), Mauritius (1977), Mexico (1976), New Zealand (1977), Oman (1977), Pakistan (1977), Papua New Guinea (1977), Poland (1977), Portugal (1977), Seychelles Island (1978), Spain (1978), Sri Lanka (1975), Surinam (1978), Togo (1977), Tokelau (N. Z, 1977), United Kingdm (1976), Vietnam (1977), USSR (1977), Western Samoa (1977), Yemen (Aden, 1977), Zaire (1977). See Robert B. Krueger, Myron H. Nordquist, "The Evolution of the 200-Mile Exclusive Economic Zone : State Practice in the Pacific Basin", 19(1978-79) *Virginia Journal of International Law* 321-400.

97 E. g. Angola (20 : 1975), Argentina (200 : 1977), Benin (200 : 1976), Cameroon (200 : 1974), Cape Verde (100 : 1977), Congo (200 : 1977), Ghana (200 : 1977), Guinea Bissau (150 : 1974), Liberia (200 : 1977), Senegal (150 : 1976), Colombia (200 : 1975,) El Salvador (200 : 1976). *Ibid.*

98 See chapter IV, 3. 7.

99 See Robet B. Krueger, Myron H. Nordquist, *op. cit.*, 390-297.

100 See LOS Convention, Article 3.

101 *Ibid.*

102 According to Article 6 of the TS&CZ Convention : "The outer

limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea".

103 C. H. M. Waldock, "The Anglo-Norwegian Fisheries Case", 28(1951) BYIL 128.

104 Myres S. McDougal and William T. Burke, "Crisis in the Law of the Sea : Community Perspective Versus National Egoism", 67/4(1958) *The Yale Law Journal* 539-589, 557.

105 D. H. N. Johnson, *op. cit.*, 161.

106 Dissenting Opinion of Sir Arnold McNair in the *Fisherigs Case* (1951), *ICJ Reports* 160.

107 C. J. Colombos, *op. cit.*, 109.

108 D. W. Powett, "The Second United Nations Conference on the Law of the Sea", 9(1960) ICLQ 435.

109 Constantin A. Stavropoulos, "Procedural Problems of the Third Conference on the Law of the Sea", 6/1(1974) *UN and the Sea—Unitar News* 16-20, 16.

110 The ISNT, RSNT and the ICNT suggested this article equally.

111 For a geometrical construction of the median/equidistance line, See Aaron L. Shalowitz, *Shore and Sea Boundaries* 1(1962), Department of Commerce (Washington) 159-172.

112 In order to be aware of the "special circumstances", see pp. 164-165.

113 S. Whittemore Boggs, "National Claims in Adjacent Seas", 41(1951) *Geographical Review* 185-209, 191.

114 William E. Masterson, *Jurisdiction in Margial Seas with Special Reference to Smuggling* (1970), Kannikat Press (Port Washington).

115 See C. J. Colombos, *The International Law of the Sea* (1967), Sixth edition 136-137 ; William W. Bishop, *International Law, Cases and Materials* (1971), Third edition 622-623.

116 See William W. Bishop, *op. cit*, 623-624.

117 See Llewllyn Pfankuchen, *A Documentary Text Book in International Law* (1940) 223 ; 2(1953) ILC Yearbook 220, para. 107.

118 The United States through her Anti-Smuggling Act of 1935 had asserted jurisdiction over foreign vessels in four different zones adjacent to its coasts : (a) the thres-mile limit of territorial sea, (b) the four-league customs zone, (c) the Liquor Treaty Zone of one hour's sailing distance from the coast, and (d) the customs

enforcing area. See Herbert W. Briggs (ed), *The Law of Nations; Cases, Documents, and Notes* (1966), Second edition, 375.

119 See TS&CZ Convention, Article 24.

120 LOS Convention, Article 33.

121 Edward D. Dickinson, "Jurisdiction at the Maritme Frontier", 40/1(1926) *Harvard Law Review* 1-29, 21,

122 E. Lauterpacht (ed), *Oppenheim's International Law—A Treatise* 1(1955), Seventh Impression, Longmans 497.

123 Shigeru Oda, "The Concept of the Contiguous Zone", 11/1-2 (1962) ICLQ 131-153, 136,

124 2(1950) *ILC Yearbook* 384, para. 195, 196; 2(1951) *ILC Yearbook* 144, Article 4.

125 See 2(1953) *ILC Yearbook* 219, 220.

126 See 2(1956) *ILC Yearbook* 214, Article 66.

127 Article 24.

128 Michael Akehurst, *A Modern Introduction to International Law* (1971), Second edition 215.

129 *Ibid.*, 220.

130 Sir Gerald Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea", 8(1959) ICLQ 73-121, 111.

131 Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54 : Points of Substantive Law", 31(1954) BYIL 371-429, 377.

132 See LOS Convention, Article 33.

133 E. D. Brown, "Delimitatton of Offshore Areas : Hard Labour and Bitter Fruits at UNCLOS III", 5/3(1981) *Marine Policy* 172-184, 175. 184; 28(1974) YUN 79.

CHAPTER IV

FISHING ZONE AND EXCLUSIVE ECONOMIC ZONE

1. Fishing Zone

1. 1. Background History

In the centuries before the question of *Mare Clausum* (1635) was raised, important fisheries were established along the east coast of England and Scotland. So far as the fishing was concerned, foreign fishermen were given effect to take part in them[1]. By the sixteenth century Portuguese, Spanish and French fishermen were making yearly trips to the Great Banks off Newfoundland to seek the tremendous fish resource there[2].

From the end of the seventeenth century arises the idea that fishing only be reserved within the most narrow limits ; that is within the extent of the territorial waters only[3]. Thus through the ensuing centuries fishing in Europe, America and Asia intensified. According to H. A. Smith :

> In medieval times coastal fisheries seem to have been usually free to all comers, and in England foreign fishermen were even encouraged to visit English waters by various treaties made in their favour. Scotland and the Scandinavian Kingdoms early developed a more exclusive policy, and the Scottish policy was adopted in England after the union of the crowns. It will be remembered that competition in fisheries played an important part in the Anglo-Dutch disputes and wars of the seventeenth century. But the interest of these matters is now more historical than legal, and it is sufficient here to say that by the middle of the nineteenth century it was generally recognized that every state was entitled, if it is so wished, to reserve to its own nationals the exclusive right of fishing in its own territorial waters. In modern times the desire to extend this monopoly to the largest possible area has been the dominant motive behind many of the demands for the extension of territorial waters[4].

When war broke out between Great Britain and France during the reign of Queen Anne, the New England settlers contributed substantially to the successful British effort. By the Treaty of Utrecht, 1913[5] the victors obtained all of Nova Scotia, Newfoundland and the adjacent islands, and Hudson Bay and its borders. France retained possession of Cape Breton Island, as well as all other islands in the Gulf of St. Lawrence. French fishermen were excluded from fishing within three leagues extending from Sable Island to the southwest of Nova Scotia. They were also restricted

to catch fish off the coast of Newfoundland and dry them ashore from Cape Bona Vista to the northern part of the island and thence down the western coast as far as Point Riche.

But in 1744 when war broke out, in the British cause, the New England settlers captured Breton Island from the French, who were theatening to capture Nova Scotia. But to the New Englanders' chagrin the British government at the peace Treaty of Aix-la-Cahppelle, 1948[6] yielded Nova Scotia (Acadia) to the French in exchange of Madras in India. When warfare was resumed in 1756 the fall of French strongholds enabled British North American colonies to fish in the Gulf of St. Lawrence and made it safer for them to operate on the distant banks of Newfoundland[7]. By the 1763 Treaty of Paris[8] France lost almost all her territories in the region includiug Acadia, and her privileges were seriously curtailed.

By this time civil war broke out in the United States. However, fishing rights for American citizens were concerned to the United States by the Treaty of Peace of 1783[9].

Although the fishery question was only a minor factor in the outbreak of the war of 1612 between Great Britain and the United States, it was much discussed during the peace negotiations. In the negotiations the British argued that the American rights of fishing under the 1783 Treaty of Independence had been abrogated by the American declaration of war on Great Britain in 1812. The American delegation agrued that American fishermen had acquired immemorial and prescriptive rights, but this view was contested by the British on the gronnd that America had, until the revolution been British subjects and that the rights which they had possessed formally as such could not be continued to them after they had become citizens of an independent state. In the Treaty of Ghent, 1814[10] the two countries determined the boundaries of their respective areas in the seas.

The 1818 Convention of Commerce[11] is a remarkable document from many points of view, not least in that it is the first treaty which commuted the cannon-shot rule into the three-mile rule for the coastal jurisdiction. The fact that in the Convention of 1818 Americans were permitted to take fish within a marine league of certain specified portions of the coast ; and that they were to enjoy the liberty in "common with the subject" of His Britannic Majesty[12].

Despite this Convention, fishing controversies between Great Britain and the United States did not come to an end. The consequent effects of the controversies led these countries to conclude the Reciprocity Treaty of 1845[13] and the Treaty of Washington of 1871[14]. By these treaties the American fishermen were provided with some new and more extensive fisheries privileges in the territorial waters of Canada and Newfoundland in exchange for trade and other concessions granted by the United States to those colonies. Both of these arrangements, however, served only a temporary purpose, neither of them proved satisfactory to the United States[15].

Paul I of Russia issued on 8 July 1799 an ukase granting the Russia-American Company, its first character, with exclusive rights and trading in the northeastern seas and along the coast of America (i. e. in the Bering Seas and adjacent waters). By a ukase of Emperor Alexander, of 7 September 1821, the aforesaid right and privileges were exclusively granted to Russian subjects, and all foreign vessels were forbidden, except in case of distress—not only to land on the coasts and islands belonging to Russia—but also to approach them within less than a hundred Italian miles[16].

Both Great Britain and the United States protested against this ukase, and on 17 April 1824 the latter concluded a treaty with Russia agreeing on a dividing line between their respective spheres of influence, so that each was left by the other to compete with Great Britain in a separate areas. A year later a treaty was negotiated between Great Britain and Russia under which the former was granted trade privileges similar to those accorded to the United States in the 1824 treaty. In addition to this, another line was drawn by which the British Government recognised the easternmost limits of Russian territory on the American continent.

The oyster fisheries in the English Channel lying more than three and less than six miles from French coast were for many years the subject of a controversy between Great Britain and France. From the viewpoint of a searcher for legal material the controversy does not yield much, and it was to some extent settled by a treaty in 1839[17].

On 24 May 1839 Great Britain and France agreed the general right of fishing to be exclusively reserved to the subjects within the three-mile zone (with the exception of those in Grandville Bay) from low-water mark[18]. By the Treaty of 11 November 1867

between the two countries Britis fishermen were entitled to enjoy the exclusive right of fishery within the distance of three miles from low-water mark, along the whole extent of the coasts of British Islands[19].

Fishery conflict between Great Britain and the United States began to take place seriously since 1867 while Russia ceded 'Alaska' to the United States[20]. Whatever claims and counter-claims arose during this and the period onward, fishing began to be recognised among the states through multistate treaties. On 6 may 1882 the Convention among Denmark, France, Germany, Great Britain and the Netherlands for regulating the police of the North Sea outside the territorial waters was concluded at the Hague. This Convention provided that the nationals of the parties enjoyed the exclusive rights to fish in a zone of three miles from the low-water line[21].

In spite of unshared claims made by the United States, foreign vessels began to violate the regulation and in 1886 and 1887 a number of British Columbia schooners were seized by the American officials. The seizures were upheld by the United States Courts, which relied upon the theory that the waters of Bering Sea were a closed territorial sea[22].

The plea for the British Government (on behalf of Canada) was that all vessels were seized beyond the three mile zone and therefore outside American jurisdiction under international law. However, by 1837 the United States submitted a draft proposal to France, Great Britain, Germany, Japan, Russia, and Sweden and Norway for better protection of the fur seal fishing in the Bering Sea[23].

The Goverments of France, Great Britain, Japan and Russia made favourable response and negotiations with Britain and Russian Governments were entered but the result was in vain In the year 1887 there were more seizures of British Columbian vessels outside the three-mile zone, negtoiations were resumed, and in 1890 the British Government submitted a draft convention which provided for a closed season in the Bering Sea. But this offer was rejected by the United States[24].

The dispute was submitted to an arbitral tribunal[25] by a treaty of 1892 which called upon the arbitrators not only to render an award on the merits of the case but to frame regulations which might be concurrently adopted for the protection of the seals. In

presenting its case the United States, while not claiming exclusive jurisdiction over Bering Sea relied upon rights inherited from Russia by which jurisdiction might be exercised to the extent of protecting the seals when absent from their breeding places on American territory in search of food on the high seas.

But the tribunal held that the United States under right of protection of property in the fur seals (i. e unshared authority to exploit or conserve) outside the three-mile zone cauld not be enforced against the nationals or foreign states[26].

Thereafter, a number of American schooners when catching fur seals in the region of the sea about 30 miles from the nearest Russian land were seized by Russian cruisers. Such dispute was settled by the Arbitration Tribunal of 1902 between Russia and the United States. As above. the Tribunal rejected the idea that a coastal state has a right to apply conservation meaures upon the foreign vessels in the areas of the high seas adjacent to its coast. Moreover, the Tribunal confirmed that in the absence of a treaty, a coastal state could only apply conservation measures to vessels of its own flag[27].

Despite various arrangements. fishing controversy prolonged between Great Britain and the United States. On 27 January 1909 a *compromis* was signed for submitting the North Atlantic Coast Fisheries controversy to the Permanent Court of Arbitration at the Hague. In this arbitration the United States claimed that Great Britain had no right to make regulations for a fishing in which American citizens had been granted a liberty by a convention of 1818. The tribunal decided that regulations could be made if they were bona fide and not in violation of the treaty and also : (i) appropriate or necessary for the protection and preservation of such fisheries, or (ii) desirable or necessary on grounds of public order or morals without unnecessary inferring with the fishery itself ; and in both cases equitable and fair as between local and American fishermen[28].

Without doubt fishing was already considered to be reserved for the nationals of coastal state within territorial waters. But in pursuance of Article XI of the Treaty of Portsmouth, Russia in July 1907 reached an understanding with Japan, granting to the subjects of the latter state fishing rights along the coast of Russian possession in the seas of Japan. Okhotsk, and Bering[29]. Later in the year

1928 the Union of Soviet Socialist Republics granted to Japanese subjects, in conformity with the situations of the fishery convention, the right to catch, to take and to prepare all kinds of fish and aquatic products, except fur seals and sea otters along the coasts of the possessions of the Union of Soviet Socialist Republics in the Japan, Okhotsk and Bering Seas, with the exception of rivers and inlets[30].

From the above discussion, it can be concluded that there was a number of arrangements for fishing but no arrangement was able to substantiate the right of fishing in favour of the coastal state beyond the territorial waters. The coastal state was able to exercise exclusive right to fish outside such waters only by means of historic title.

As a matter of fact, the claims to the resources for example, the fishery resources in the coastal seas contiguous to the territorial waters came into being soon after the 1945 two American (Truman) proclamations[31]. Regarding coastal fisheries the Truman proclamation says ;

> In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulations and control of the United States.

Before this proclamation the United States had no right to conduct fisheries exclusively outside its three-mile territorial waters. Actually the main-purpose of the proclamation was to substantiate the right of fiising for the country in the high seas contiguous to the territorial waters. The Truman proclamations were followed by different nations. According to H. G. Knight :

> Issuance of the two proclamations at the same time created some confusion. however, as to precisely what was being claimed in terms of mineral and living resources. Further, several Latin American nations with little or no physical continental shelf argued that if an industrialized nation such as the United States, heavily dependent on petroleum, were entitled to claim exclusive rights to the oil and gas and submerged lands off its coats to substantial distances, then the underdeveloped

countries with a need to feed their populations should likewise be entitled to assert jurisdiction over living resources to substantial distances from their coasts[32].

In essence, the Truman proclamations appeard as precedent to different states for asserting claims to the resources beyond territorial waters. But in so doing, several Latin American states extended exclusive fishing zones[33] or what were in some instances chatacterised as "territorial seas", to 200 miles from their coasts.

1. 2. Conventional Aspect

As has been stated, the fishery issues became important in the 1958 and 1960 LOS Conferences. Because of these issues, the Conferences failed to reach agreement on the breadth limit of the territorial sea. At the UNCLOS I Canada presented a proposal of a three plus-nine arrangement, that is, a three mile territorial sea and nine-mile contiguous zone subject to fishing right of the coastal state in the contiguous zone. At the UNCLOS II Canada also campaigned actively for the six-plus six formula that is to say a six-mile territorial sea measured from the applicable baselines and a six-mile fishing zone contiguous to the territorial sea[34]. In spite of an active effort to broaden the base of support, the six-plus six formula failed. At any rate, "...fisheries assumed a far larger importance in the 1958 and 1960 Geneva Conferences than they had done in 1930 and it was fisheries, together with some purely political cross-currents, not the contiguous zone, that prevented any agreement being reached at Geneva on the width of the territorial sea"[35].

The FCHS Convention provided for the coastal state some special interests in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea. The Convention did not specify the limit of this area. Nevertheless, it enabled the coastal state to safeguard interests in the high sea adjacent to the territorial sea.

Since this Convention several states[36] adopted the conservation zones adjacent to the territorial sea. These zones were mainly concerned with the rights of fisheries. It is worthy to mention that the European Fisheries Convention, 1964 formulated provisions for fisheries applicable within a certain area[37]. The Fisheries Convention, although limiting its effect to the parties, represents the

first multilateral agreement which recognised that a state is entitled to fix the limits of its exclusive fisheries zone up to a maximum of six nautical miles with an adjacent zone in which other states may be granted fishing in this area. The two zones should not extend further than twelve nautical miles from the baseline from which territorial sea is measured[38].

After this Convention the countries which were signatories to it prescribed the twelve-mile fishing zone[39]. But countries like Canada, Colombia, Faroe Islands, Greenland, Iceland, Norway, Senegal, South Africa and Tunisia already enacted legislations on fisheries. Accordingly fisheries were put into practice in a twelve-mile zone and in a zone exceeding twelve miles. These measures were brought into effect throughout the period while the Fisheries Convention came into being[40]. Moreover, while the twelve nautical mile zone emerged as the breadth of the territorial sea, the Fisheries Convention's twelve nautical mile fishing zone became useless. In other words, after the emergence of the twelve nautical mile territorial sea the twelve nautical mile fishing zone has fallen under the sway of the coastal state.

At present the regime of fisheries appears to be subsumed in the 200 n.m EEZ. But some states are exercising the exclusive fisheries zone beyond territorial sea[41]. That is to say, the states particularly the developed states are taking an interest in exercising the exclusive fisheries zone beyond territorial sea,

2 Exclusive Economic Zone

2. 1 Evolutionary Background

The 200 n.m EEZ is a new device of the UNCLOS III. Actually its innovation is the outcome of state practices developed step by step individually and collectively.

2. 2. Individual State Practices

The two 1955 Truman proclamations embodied the claims of the United States over the "natural resources of the subsoil and the seabed of the continental shelf" and the "fishery resources" of the high seas adjacent to the territorial waters. In effect, the two proclamations ensured claims for the country over all the resources in the high seas contiguous to the territorial waters. It was not difficult for a technologically developed nation like the United States to take effect of such proclamations.

However, the less developed nations were not behind in safeguarding interests. It was felt that an appropriation of marine areas for exclusive use would better secure the interests of the less developed industrialised nations. Such an attempt, it was thought, would protect off-shore resources from the exploitation of technologically advanced nations. On this assumption, the less developed nations began to assert claims to the resources of the coastal seas.

Chile through its Presidential Declaration, 1947[42] asserted "national sovereignty" over the coastal sea. In this regard Article 6(2) says :

> The Government of Chile confirms and proclaims its national sovereignty over the seas adjacent to its coasts whatever may be their depths, and within those limits necessary in order to reserve, protect, preserve and exploit the natural resources of whatever nature found on, within and below the said seas, placing within the control of the government especially all fisheries and whaling activities whih the object of preventing the exploitaon of natural riches of this kind to the detriment of the inhabitants of Chile and to prevent the spoiling or destruction of the said riches to the detriment of the country and the American continent.

Soon after three months of this Declaration, Peru asserted similar rights over the coastal sea. Each of these countries extended its "national sovereignty" to 200 nautical miles measured from the applicable baselines. There was an opening for other states the right of "free navigation" through the proclaimed zone. In the year 1948 Costa Rica [43] extended a distance of 200 miles measuring from its coast for the conservation and utilization of the resources and wealth of the adjacent seas.

Korea proclaimed its "national sovereignty", 1952, for the purpose as "deemed necessary to reserve, protect, conserve and utilise the resources and natural wealth of all kinds" in the coastal seas[44]. It provided no restriction for other states for their "right of free navigation" through the zone proclaimed. In the year 1956 the Presidential proclamation of India[45] expressed that from time to time the country would :

> Establish, in accordance with laws enacted for the purpose, conservation zones in areas of the high seas adjacent to the territorial waters of India, but within a distance of one hundred nautical miles from the outer limits of these waters.

The conservation zone was established in order to protect fisheries and other living resources of the sea from indiscriminate exploitation, depletion or destruction. In 1957, Sri Lanka adopted

measures similar to India for a hundred nautical miles conservation zone extending from the outer limits of the territorial sea[46]. In 1963 Ghana proclaimed a hundred mile fishery conservation zone and Pakistan in 1966 claimed one of one hundred and twelve miles measured from applicable baselines[47].

From the above observations it can safely be concluded that all the measures were taken by the countries individually in order to safeguard their respective interests in the resources of the coastal seas.

2. 3. Collective Practice

After the Truman proclamations a number of coastal states asserted claims individually to the resources in the coastal seas. As time went on, several states took steps collectively to assert claims to the resources in the coastal seas. In the Santiago Declaration, 1952 Chile, Ecuador and Peru adopted :

> (i) Owing to the geological and biological factors affecting the existence, conservation and development of the marine fauna and flora of the waters adjacent to the coasts of the declarant countries, the former extent of the territorial sea and contiguous zone is insufficient to permit of the conservation, development and use of these resources, to which the coastal countries are entitled,
> (ii) The Government of Chile, Ecuador and Peru therefore proclaimed as a principle of their international maritime policy that each of them possesses sole sovereignty and jurisdiction over the area of the sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the sea coast.
> (iii) Their sole jurisdiction and sovereignty over the zone thus described includes sole sovereignty and jurisdiction over the sea floor and seabed thereof[48].

As the former extent of the territorial sea of Chile, Ecuador and Peru was "insufficient to permit of conservation, development and use of the marine fauna and flora" in the coastal seas, the declaration provided 200 n.m territorial sea for these countries. In any case, the declaration gave impetus to the coastal states to assert claims to the resources in the 200 n.m sea zone.

As a matter of fact, it became a common practice among the states to establish claims to the resources in the adjoining coastal seas for control and jurisdiction necessary to secure all kinds of resources in the bed, subsoil and waters of such seas. This trend prevailed to a great extent in the claims entailed in the Inter-American practice[49].

The Inter-American Juridical Committee (i. e. Permanent Committee of the Inter-American Council of Jurists) made a suggestion of 200 n.m zone for the coastal state under its exclusive sovereignty. In fact, the Council did not endorse it, but in its Second Meeting held in Buenos Aires in 1953, the Council recognised this zone in order to "protect, conserve and promote" its riches for the coastal state[50]. The Tenth Inter-American Conference of the Organisation of American States held in Caracas in 1954 in its Resolution LXXXIV proclaimed "sovereignty and control..." over "the submarine shelf and oceanic water and the natural resources which any exist therein[51].

The Third Meeting of the Inter-American Council of Jurists which met in Mexico City in January 1956 was remarkable particulary for the resolution adopted on territorial waters, continental shelf, and conservation of the living resources of the high seas. The resolution expressed that the extent of the territorial waters was insufficient as regards the interests of the coastal states. In the context of the continental shelf the resolution regarded the natural resources—both mineral and biological, which live in a constant biological and physical relationship with the shelf as belonging to the coastal state. In connection with the conservation of the living resources of the high seas, the resolution recognised for the coastal state the "right of exclusive exploitation of the species" in the high seas contiguous to the territorial waters[52].

The Inter-American Technical Conference[53] on the "Conservation of the Living Resources of the Sea" held in Rome from 18 April to 10 May 1953 can be treated as a reference for the objectives of conservation. The Cuban and Mexican draft submitted to the Conference after a long debate in the Sub-Committee, the General Committee and in Plenary was accepted in the Conference. The report of the Conference in its third paragraph (Chapter 2) states :

> The principal objective of conservation of the living resources of the sea is to obtain the optimum sustainable yield so as to secure a mximum supply of food and other marine products. When formulating conservation programmes, account should be taken of the special interests of the coastal State in maintaining the productivity of the resources of the high seas near to its coast[54].

Obviously it can safely be concluded that the 1953 Rome Conference gave rise to the coastal states to exercise "special interests"

in the living resources of the high seas nearing to their coasts.

After this Conference, the UNCLOS I actually has given impetus to the coastal states to put forward the claims over the coastal sea and its resources. Three Conventions of the UNCLOS I have provided the coastal state with some rights over the sea and its resources near to the coast. The TS&CZ Convention has provided for the coastal states to exercise sovereign right over the territorial sea. But other states subject to the innocent passage would be entitled to traverse the territorial sea. The Convention specified no limit for the breadth of the territorial sea. The ultimate effect was that the state having a wider limit was more benefited than the state having a lesser limit. That is to say, the coastal state with 200 n.m territorial sea gained remarkably.

The Continental Shelf Convention enabled the coastal state to exercise "sovereign rights" over "the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile in constant physical contact with the seabed or the subsoil"[55].

Whatever be the extent of the continental shelf, the extent of jurisdiction for exercising the shelf and exploiting its resources is to be determined by the 200 metre depth rule or by exploitability criterion[56]. It is obvious that the coastal state is entitled to exercise "sovereign rights" over the limited resources, that means, over the mineral and other non-living resources but not the living such as the fisheries resources.

The FCHS Convention provided "special interest" for the coastal state over the living resources of the high seas contiguous to the territorial sea. According to Article 8(1) of the Convention :

> A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.

By the term "special interest" the coastal state can be assumed to have been given some priority in the claims to the living resources of the areas of the high seas contiguous to the territorial sea. Though the Convention appears to have recognised "special interest", it cannot be concluded that it has substantiated the rights exclusively in favour of the coastal state over such resources. For this reason, it can be pointed out that the Convention could not

become popular among the coastal states. In this regard it may be mentioned that until 1969 after this Convention only two coastal states such as, Ghana, 1963 and Pakistan, 1966 adopted the fishery conservation zones beyond territorial sea[57].

The UNCLOS I in its Committee of the Whole took into account a proposal of Iceland by 31 votes to 11 with 46 abstentions. The proposal reads as follows :

> Where a people is overwhelmingly dependent upon its coastal fisheries for its livelihood or economic development and it becomes necessary to limit the total catch of a stock or stocks of fish in areas adjacent to the coastal fisheries zone, the coastal state shall have preferential rights under such limitations to the extent rendered necessary by its dependence on the fishery[58].

Actually the notion "preferential rights" cannot be regarded to have enabled the coastal state to exercise the rights exclusively over the "stock of fish" in the areas adjacent to the coastal fisheries zone. The coastal state is entitled to the "preferential rights" subject to its dependence upon the "coastal fisheries", However. the notion "preferential reights" appears to have enabled the coastal state to take into account its economy in asserting claims to the fisheries resources in the high seas contiguous to the territorial sea.

The claims for the resources in the coastal sea received impetus soon after the "common heritage of mankind" resolution[59]. In the view of Choon-Ho-Park the year 1967 marks the beginning of a new phase in the evolution of the economic zone concept[60].

While the Seabed Committee[61] started working, different states began to put forward their views to exercise claims over the resources in the coastal sea. Such claims were being made by the states under different captions in different declarations during 1970s onward. It is a feeling that actual claims for the economic zone arose from such declarations. As regards such claims the Montevideo Declaration of 8 May 1970 adopted :

> 1. The right of littoral States to avail themselves of the natural resources of the sea adjacent to their coasts and of the seabed and subsoil thereof in order to achieve the maximum development of their economies and to raise the levels of living standards of their peoples ;
> 2. the right to establish the limits of their maritime sovereignty and jurisdiction in accordance with their geographical and geological characteristics and with the factors governing the existence

of maritime resources and the need for their rational utilization ;
3. the right to explore, conserve and expliot the living resources of the sea adjacent to their territories, and to control fishing and aquatic game hunting operations[62].

There arises no doubt to say that the impact of the Declaration as regards "maritime sovereignty and jurisdiction" was to safeguard the economy of the coastal states. In view of this, the Declaration adopted the 200-mile sea zone measuring from the baselines for the coastal state so that it can exercise "sovereignty and jurisdiction" over all the resources. The Lima Declaration of 8 August 1970 did not specify the exact limit of the sea zone but adopted :

2. The right of the coastal State to establish the limits of its maritime sovereignty or jurisdiction in accordance with reasonable criteria, having regard to its geographical, geological and biological characteristics, and the need to make rational use of its resources[63].

Actually the Lima Declaration appears to have been formulated in conformity with the Montevideo Declaration. It, then, can be assumed that the objectives of both these Declarations were to substantiate the coastal state to exercise "sovereignty and jurisdiction" in the coastal sea for achieving all the resources there. The Santo Domingo Declaration of 9 June 1972 approved that :

1. The coastal State has sovereign rights over the renewable and non-renewable natural resources, which are found in the waters, in the seabed and in the subsoil of an area adjacent to the territorial sea called the patrimonial sea[64].

The Declaration specified 200 n.m sea zone measuring from the baselines as the "patrimonial sea". The impact of the sea zone to be prescribed under the caption "patrimonial sea" beyond territorial waters is to secure coastal state's sovereign rights over all the resources. In fact, as time passed, the claims of the coastal state over the resources of the high seas adjacent to the territorial sea were advancing as if permitted in law. The economic zone claim is a sequel of such claims and its necessity was intensified in the Seabed Committee through proposals of different states[65]. In the Regional Seminar on the law of the sea held in Yaounde, 30 June 1972 it was provided that :

3) The African States have equally the right to establish beyond the territorial sea an Economic Zone over which they will have an exclusive jurisdiction for the purpose of control, regulation and national exploitation of the living resources of the sea and their reservation for the primary benefit of their peoples and their respective

economics, and for the purpose of the prevention and control of pollution[66].

It is a fact that Yaounde Seminar did not mention the breadth of the "Economic Zone". But the Seminar appears to have incorpo ated first time the term "Economic Zone" for the coastal states to exe cise rights over the resources in the zone.

The Council of Ministers of the Organisation of African Unity at the meeting in its twenty-first ordinary session in Mogadiscio, Somalia from 6 to 11 June 1974 adopted :

> That the African States recognize that right of each coastal State to establish an exclusive economic zone beyond their territorial seas whose limits shall not exceed 200 nautical miles, measured from the baselines establishing their territorial seas[67].

The fact that this extract appears to be unambiguous and specific in regard to the expression "exclusive economic zone" and its breadth as well. At the initial stage, the UNCLOS III formulated the EEZ but did not specify the breadth of this zone. The UNCLOS III in its Caracas session, 1974 (Part V, provision 88) stated that :

> Coastal States have the right to establish beyond their territorial sea an exclusive economic zone--for the benefit of their peoples and their respective economies--[68].

Practically the ISNT[69] of the UNCLOS III has recognised the 200 n.m EEZ in the third session of the Conference.

2.4. Bases and Genesis of Claims

Generally speaking, the territorial sea was in practice among the coastal states ranging from three to two hundred miles. Except the breadth, the regime of the territorial sea was more or less uniform. Actually it was possible for the coastal state with a wider territorial sea to achieve resultant benefit.

However, it was not necessary for the developed states to claim a wider territorial sea for securing benefit from the coastal sea. For them the traditional freedom of the seas doctrine was enough for securing benefit from the seas. But this doctrine was not practicable to the developing states. It was felt that their interests would be secured if they would regard the coastal sea concerned as the territorial sea or would exercise an exclusive right over the resources in this sea.

The claims for a wider territorial sea began to come forward since the emergence of new states, 1960 onward. Though the twelve-

mile territorial sea had been the regular practice, the claims for exclusive right over the resources beyond this sea did not come to an end. The 200-mile sea zone was assumed as the precedent for asserting claims to the resources beyond the twelve-mile territorial sea. According to Dr. Anguilar, the 200 n.m patrimonial sea or EEZ is a political compromise among the twelve and two hundred mile territorial sea[70].

Regarding the continental shelf, it is true to say that the coastal states cannot be equally benefited. The phenomenon takes place of its unequal physical existence and the unequal capacity of the coastal states to explore the shelf and exploit its resources. The continental shelf doctrine was favourable for the scientifically and technologically developed nations. Nevertheless, the developing nations were not behind in exercising jurisdiction over the shelf so that no other nations overlap the claim.

As a matter of fact, fishery banks exist abundantly in the continental shelf. Practically it is easy to obtain the fishery resources than the "natural resources[71]. That is to say, what scientific and technological skills are required for exploiting "natural resources", the less are required for achieving the living resources. Such an impact perhaps gave rise to the developing nations to raise claims over the living resources beyond territorial sea.

Furthermore, both the living and the non-living resources are related integrally with the continental shelf. From this point of view, if the jurisdiction of the coastal state is to be concerned with the resources of the continental shelf, it should be concerned with all the resources. That is to say, according to Professor Brown, "the basic principle should be that the coastal fisheries formed part of the natural resources of the coastal state[72].

But the 1958 Continental Shelf Convention has provided the coastal state to exercise rights" only over the "natural resources". The living resources, according to this Convention, cannot be regarded as part of the shelf. That is why, the Convention has not made the coastal state entitled to exercise "sovereign rights" over these resources. As regards the 'mineral, 'non-living' and the fishery resources of the continental shelf the "sovereign rights" for the coastal state are in fact partially effective. According to Professor Brown :

> The first starts from the respectable premise that the continental shelf is the natural prolongation of the land territory ; the next step is already suspect—the statement that 'the right of exploiting the continental seabed by the coastal State has achieved recognition'. This is only a half-truth because, of course, such recognition is limited to the natural resources of the continental shelf which the great majority of States, including the fifty-one parties to the Continental Shelf Convention (1958), do not interpret to include the living resources of the superjacent waters. The third step is to state that the country, the seabed of the continental shelf, and the superjacent waters are one unit and it is 'unnatural' that others should fish those waters. The failure to claim that it would be not only 'unnatural' but actually 'illegal' is significant[73].

As a matter of fact, the "sovereign rights" arising out of the 1958 Continental Shelf Convention do not enable the coastal state to secure its interests in the living resources beyond the territorial sea. In the context of the coastal state's desire to exercise rights over all the resources beyond territorial sea, the Continental shelf Convention is defective. Anyway, with the passage of time, claims to all the resources in the coastal sea began to come forward as part of the coastal state.

Furthermore, from a practical point of view, the right by which the coastal state was entitled to fish adjacent to its territorial sea arose generally from the freedom of the seas doctrine[74]. Clearly the position of the coastal state was not stronger than any other state.

Though the FCHS Convention provided "special interest", it was not possible for the coastal state to safeguard its fishing interests exclusively in the areas of the high seas beyond territorial sea. Because, by means of the "special interest" the coastal state was not able to overlap other state's historic fishing interest. According to F. V. Amador :

> This is in fact an instance of title by prescription, a State having legitimately acquired a right which the coastal States must respect if it decides to extend its territorial sea or its exclusive fishing rights. Or, to put things another way, if the new 'special interest' of the coastal State in an area traditionally part of the high seas constitutes a legitimate title for widening its territorial sea or extending its exclusive fishing rights, the right invoked by a third State whose nationals were exploiting the resources of that area consistently and far earlier must be equally legitimate[75].

The impact of "preferential rights" as adopted in the UNCLOS II practically was not different from that of the "special interest" as adopted in the UNCLOS I. Both of these gave rise to substantiate the claims of the coastal state for overcoming its economic dependence on the living resources in the coastal sea. Since the UNCLOS II the pace of development concerning the claims of the coastal state over the living resources beyond territorial sea has been fast and furious[76]. As has been stated, the 1964 European Fisheries Convention recognised an exclusive fishing zone beyond territorial sea. That is to say, this Convention substantiated fishery rights for the coastal states up to 12 n.m limit from baselines[77].

By this time, a number of new-born states came into being for example, in Asia and Africa. It was their feeling that from an economic point of view they should support the claims of the coastal states over the resources in the coastal sea. As time passed, the number of supporters for the twelve-mile territorial sea and for the claims over the resources beyond this sea increased rapidly. It can be pointed out that the claims over the resources of the seas beyond territorial sea arose for the economic development of the coastal state.

Moreover, the development of science and technology took place rapidly among the developed nations. Because of this development the developing nations were afraid of access to the resources of the seas beyond national jurisdiction. The concern of the Maltese ambassador, Arvid Pardo was directly related to the preservation of the seabed and subsoil of the high seas beyond national jurisdiction and of its resources from the territorial ambitions of states. Nevertheless, the articulation of this preoccupation had immediate implication for the question of definining the precise outer limits of national jurisdiction, an issue which had, during the period following the two Conferences, remained subject to considerable doubt. The ambassador in his representation stated :

> In view of the rapid progress on the development of new techniques by the technologically advanced countries, it feared that the situation will change and that the seabed and the ocean floor underlying the high seas beyond national jurisdiction will become progressively and competetatively subject to national appropriation and use. This is likely to result in the militarization of the accessible installation, and

in the exploitation and depletion of resources of immense potential benefit to the world, for the national advantage of technologically developed countries[78].

While the "common heritage of mankind" resolution[79] was adopted, there was a feeling that it was possible for a state to achieve sea riches within national jurisdiction exclusively, and beyond national jurisdiction by the "common heritage" principle. The consequent effect was that soon after this resolution the states particularly the developing states began to apply economic issues in order to press claims over the resources beyond territorial sea.

The Montevideo Declaration, 1970 provided "exclusive right and jurisdiction" for the participating states over the resources in the coastal sea. The impact of such a provision for the coastal states was to help meet its "social and economic" needs from the resources in the 200 n.m sea. The Lima Declaration, 1970 adopted "maritime sovereignty" which appears similar to "exclusive right and jurisdiction" as provided in the Montevideo Declaration. The Santo Domingo Declaration, 1972 provided "sovereign rights" over the resources in the 200 n.m patrimonial sea. The patrimonial sea can be briefly defined as an economic zone beyond twelve-mile territorial sea[80]. Thus, the Latin American states formulated claims for the coastal state over the resources in the coastal sea.

In the Regional Seminar at Yaounde[81], 1972 and in the meetings of the Council of Ministers at Addis Ababa, 1973 at Mogadiscio, the African States laid stress on the claims of the coastal state. The purpose of the claims was to help develop the economy of the coastal state out of the resources in the coastal sea. Actually the African Staies appear to have copied the text of the Latin American claims. It is obvious that the bases for such claims of all the states were aimed at developing respective economies from the resources in the 200 n.m coastal sea. But from a practical point of view, the genesis of thes claims was to substantiate the right of the coastal state to the resources in this sea.

2. 5. Concept, Characteristics and Practical Approach

It is apparent that the impact of the 200 n.m EEZ is to provide the coastal state exclusive right over all the resources in this zone. But the 1958 Continental shelf Convention already provided "sovereign rights" for the coastal state over the "non-living" resources[82]. In spite of that the Latin American, Caribbean and

the African States in their declarations and meetings[83] formulated sovereign right for the coastal state to claim all the resources such as the living and non-living beyond territorial sea. Actually the formulation of the right for the coastal state over the non-living resources appears to be copying or rehearsing the conventional provisions. That is to say, if the regime of the continental shelf is assumed to prevail, then the EEZ appears to be concerned with the living resources only.

The impact of the 200 n.m EEZ as regards the claims of the coastal state over its resources can be clarified through the proposals submitted by different states to the Seabed Committee. Some of the states in their proposals suggested for the coastal state exclusive right over all the resources, and some only over the living resources. Kenya at first in its draft articles provided that :

> 4. The exercise of jurisdiction over the (EEZ) shall encompass all the economic resources of the area, living and non-living, either on the water surface or within the water column, or on the soil or subsoil of the seabed and ocean floor below.

Actually the Kenyan draft[84] can be regarded as a sequel of the Yaounde recommendation on the economic zone. Anyway, it expresses the views of the country as regards the regime of the EEZ.

Fourteen countries[85] in their draft articles suggested that the coastal state should be entitled to exercise the right of sovereignty over the "living and non-living resources" in the EEZ. The draft articles of six countries[86] spoke of a zone for the coastal state to exercise jurisdiction and right to explore and exploit the living and non-living resources beyond territortal sea. Though the six countries are "geographically disadvantaged states", nevertheless, they expressed no views against the jurisdiction and right of the coastal state over such resources[87]. What to see is that the aspect of all these proposals was to provide for the coastal state the exclusive right over all the resources in the EEZ.

The working paper[88] of Australia and New Zealand specified for the coastal state the exclusive jurisdiction over the living resources of the sea in an adequate wide zone of the high seas adjacent to its territorial sea. Canada, India, Kenya and Sri Lanka in their draft articles expressed that the coastal state should have an exclusive fishing zone to exercise sovereign rights over the living resources[89].

The draft articles of Uganda and Zambia regarded the economic zone as the "regional or sub-regional economic zone" extending beyond territorial sea[90]. According to the draft articles, "fisheries and non-living" resources in this zone were provided for the states belonging to the sub-region or region concerned[91]. That is to say, the coastal state was not provided with the exclusive right over the fisheries and non-living resources in the economic zone so proposed.

Two land-locked American States such as, Bolivia and Paraguay presented their draft articles on the "regional economic zone" for consideration in the debate on that item at the UNCLOS III[92]. According to the draft articles the coastal states and the neighbouring land-locked states should have the right to establish jointly "regional economic zone" between the 12-mile territorial sea and up to a maximum distance of 200 n.m from the applicable baselines.

It was provided that all the states concerned should participate fully in the "regional economic zone" and should be entitled to use and benefits of all renewable and non-renewable resources, therein, with equal rights and obligations. In essence, the draft articles are similar to those of the 1973 proposal of Uganda and Zambia on the economic zone.

It is apparent that the purpose of these proposals was to secure intersts in the EEZ for the states of the sub-region or region concerned. Whatever was provided in the proposals of these land-locked states, the impact was to ensure their own interests in the so called regional or sub-regional economic zone. As regards the non-living resources, the 1958 Continental Shelf Convention already provided "sovereign rights" for the coastal state. But the proposals of these land-locked states did not provide such rights. Anyway, their proposals dealt with the provisions for the EEZ on behalf of the geographically disadvantaged states.

As a matter of fact, the 200 n.m EEZ is a multipurpose zone[93]. It is a zone of critical importance[94]. Different instruments of the UNCLOS III such as the ISNT, RSNT, ICNT, Draft Convention and the LOS Convention have formulated provisions for the EEZ[95]. Basically they do not differ. According to Article 55 of the LOS Convention :

> The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime establis-

hed in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedom of other States are governed by the relevant provisions of this Convention.

The basic nature of the EEZ is that it is a zone subject to the "specific legal regime". That means, it is a zone having *sui generis* status but not the high seas[96]. The regime of the EEZ is a phenomenon which has been formulated to be dealing with the resources of the zone mainly for the coastal state concerned, and for other states as well. But the regime of the continental shelf has already established "sovereign rights" for the coastal state over the non-living resources[97]. From this point of view, the regime of the EEZ can be appiicable to the "living resources"

2. 6. The Living Resources : Rights of Other States Criticised

As regards the EEZ different states are concerned with the exploitation of its living resources. Exploitation should be carrid into effect so that the "maintenance of the living resources in the EEZ is not endangered by over-exploitation[98]. As a result, it is necessary to determine "allowable catch" of the living resources. In determining the "allowable catch", "the coastal state and competent international organizations whether sub-regional, regional or global" need to cooperate. But the coastal state is free to harvest the "allowable catch". The difference between the "allowable catch" and the catch subject to the harvesting capacity of the coastal state is the "surplus of the allowable catch"[99]. As the coastal state is free to determine its "capacity to harvest", the "surplus of the allowable catch" certainly depends on the harvesting capacity of this state.

Where there is any surplus of the "allowable catch", there is a chance for other states particularly the developing states to participate in the exploitation of the living resources in the EEZ. But in the case of a coastal state whose economy is overwhelmingly dependent on the exploitation of the living resources of its EEZ, those states cannot participate although there is any surplus of the allowable catch[100]. That means, the economic criterion can be treated as the deciding factor for the coastal state to exclude other states to participate in the exploitation of the living resources.

It appears that such a criterion enables the poor developing coastal state to strengthen its economy from the resources of the EEZ. It can be pointed out that by such a criterion only the poor

developing coastal state can exclude all other states even the "land-locked states" (LLS) and the "states with special geographical characteristics" (GCS) to participate in the exploitation of these resources[101]. That is to say, the "surplus of the allowable catch" can only enable other states to take part in the exploitation of the living resources provided that the economy of the coastal state concerned does not overwhelmingly depend on the resources of its EEZ.

Again, if the coastal state have capacity of harvesting the entire allowable catch but this state ought to facilitate the LLS and the GCS in the exploitation[102]. It is difficult to fix up the share of the "allowable catch" which these states are entitled to exploit. To this end, the coastal state and those states of the same sub-region or region will have "to cooperate in the establishment of equitable arrangements on a bilateral, sub-regional or regional basis"[103]. That is to say, the chance of other states to participate in the exploitation is subject to the "equitable arrangements".

But equity is not a term of uniform meaning[104]. On the basis of equity the LLS and the GCS can present their plea for a portion of the allowable catch. Anyway, the coastal state will have no difficulties to oppose their plea and to establish its own plea. Actually such an attempt of the coastal state will be made to preclude the LLS and the GCS from exercising any claim of exploiting the living resources in its EEZ.

At present it is not difficult for a developed coastal state to harvest the "entire allowable catch". Therefore, it is doubted whether such a coastal state would comply with the "equitable arrangements" in order to accomodate other states in its EEZ. Furthermore, it is quite possible to raise a plea for taking into consideration "the need to avoid effects detrimental to fishing communities or fishing industries of the coastal state"[105].

The "fisheries industries" of the developed coastal state can consume the entire allowable catch. As such, any plea of other states based on "the nutritional needs"[106] of their populations may not be effective against that coastal state.

It is also possible for the coastal state which cannot harvest the entire allowable catch of the living resources to take interests in establishing its standpoint. To this end, this state would raise the plea that its economy is overwhelmingly dependent on these

resources. Its purpose is to exclude other states so that the coastal state can get the entire allowable catch. If it is not possible, the coastal state may not hesitate to keep an insignificant portion as "surplus of the allowable catch". Accordingly other states will have to participate in this insignificant surplus of the allowable catch.

The regime of the EEZ has also been concerned with the states having historic fishing right and the states which are assumed to have made "substantial efforts in research and identification of stocks"[107]. If the coastal state have historic right or have made substantial efforts in research and identification of stocks", then there arises no conflict over such issues. Because, such issues would automatically be subsumed in the rights of the coastal state. If these have been effected by other states, the phenomenon should be dealt subject to the interests between the coastal state and those states concerned[108].

In order to minimize "detrimental effects on fishing communities and economic dislocation"[109], the states with historic right should be provided in the exploitation of the living resources in the EEZ, But if the economy of the coastal state is overwhelmingly dependent on these resources, those states cannot be provided in the exploitation. That is to say, these states cannot claim their historic fishing right in the EEZ of the poor developing coastal state. Actually those states appear to be facilitated in the EEZ of the developed coastal states But, it is feared, how far those states would be able to take part in the exploitation of the resources in the EEZ of the developed coastal states.

What then will be the fate of other states—it is difficult to defend the same. In all cases, it is submitted that the right of other states to exploit the living resources in the EEZ depends on the goodwill of the coastal state. Therefore, the EEZ appears to be prejudicial to the rights aud interests of other states[110].

It is clear that the regime of the EEZ cannot assure rights of other states in the exploitation of the living resources. That means, other states cannot be sure of overcoming the coastal state's unscrupulous attempt unless a portion of the "allowable catch" is reserved for them. As such, it is feared that in the days to come the LLS and the GCS will not keep themselves aloof from raising

claims over the fish stocks to be equally shared with the coastal state[111].

2. 7. The 200 n.m. Limit : Some Criticism

Untill 1981 nearly eighty-six coastal states were in favour of the 200 n.m EEZ[112]. But at present almost all the states are complying with the regime of the EEZ. According to Article 57 of the LOS Convention :

> The exclusive economic zone shall not extend beyond 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.

It is a fact that the 200 n.m limit was claimed by some states as the breadth of the territorial sea[113]. Consequently the 200 n.m limit for the breadth of the EEZ cannot be regarded purely new in the law of the sea. As there was no uniform practice on the breadth of the territorial sea, therefore, it was not difficult for the coastal states to take effect of different limits. While a coastal state adopted a larger limit for the territorial sea, other state raised protest. For example, while Chile, Peru and Ecuador adopted the 200 n.m territorial sea, the United States raised protest. In the protest it was stated that the United States was affected in its fishing interests in the area which was a part of the high seas[114].

Practically it can be stated that there is no geographical barrier to extend the 200 n.m zone from the coast of Chile, Ecuador and Peru. The 200 n.m zone does not overlap maritime zones of other states situating opposite to each of these states. But unfavourable geographical situations[115] in the coastal sea, non-acceptance by other states particularly by the maritime states discouraged different states to adopt the 200 n.m zone for the territorial sea.

By now it is not difficult for a coastal state to adopt 200 n m EEZ. That is to say, every coastal state is entitled to adopt this zone. The consequent effect is that where two opposite coastal states situate within a distance less than 400 n.m, neither of them is free to extend the EEZ up to 200 n.m. As a practical consideration, it is not possible to extend the 200 n.m zone in different coastal seas. According to L. M Alexander and R. D, Hodgson :

> --the 200 mile zone 'encloses' not only a significant portion of the global ocean, but also totally encompasses certain areas, particularly the world's enclosed and semi-enclosed seas. These areas of oceans, being important for the economic, political, and social activities of the bordering States, will all fall under some form of national jurisdiction.

Seas as the Baltic, North, Mediterranean, Black, Red, Persian, South China, East China, Japan, Java, Celebes, Sulu and Caribbean will be under the jurisdiction of their littoral States if a universal 200-mile zone is established. Moreover, other semi-enclosed water bodies would be almost completely enclosed by such jurisdictional claims i. e., the Gulf of Mexico, Norwegian, Arabian and Okhotsk Seas and Bay of Bengal. Even some of the Oceans, particularly the Arctic, would have their non-national areas drastically reduced in scope. The configuration of the Arctic plus the locations of the Canadian Arctic Archipelago, Greenland, Svalbard, Franz Josepland, and other Soviet Island Groups extend national jurisdiction nearly to the Pole itself. Such zones, based on these islands and the mainland, would close off a large proportion of the ocean within national limits[116].

A large proportion of the oceans such as 35.86% of their area is closed off by the 200-mile limit[117]. That is to say, in the words of P. C. Irwin, "everyone has a neighbour may now be strictly and universally true with respect to states with sea coasts"[118]. The 200 n.m EEZ has made nearly sixty-six coastal states totally or partially zone locked[119]. That means, these states cannot freely extend the 200 n.m EEZ from the coast. It seems that these states should not support the n.m EEZ. But the actual phenomenon was very peculiar. In spite of geographical constraints, twenty-four[120] out of these sixty-six coastal states were in favour of the EEZ.

Neither the geographical constraints nor the adverse attitude of the maritime states was effective to stop emerging the 200 n.m EEZ. As time passed, the maritime states such as the United States, United Kingdom, and Soviet Russia conceded to the regime of the EEZ.

Initially it was assumed that the 200 n.m EEZ would assure economic development of the developing states. But the zone generally is favourable for the coastal states whose geographical location permits a resultant benefit[121]. That is to say, the 200 n.m EEZ can assure benefit for the state having long coastlines. The states like the United States, Australia, Indonesia, New Zealand, Canada, Soviet Union, Japan, Brazil, Mexico, Chile, Norway, India, Philippines, Portugal, and Madagascar can secure a resultant benefit[122]. Actually a state who is technologically and scientifically developed will be more and more benefited from the 200 n.m EEZ[123]. With respect to the EEZ concept, it can be concluded that the emerging new law of the sea will only make the rich richer and the poor poorer[124].

Furthermore, the 200 n.m EEZ has the *sui generis* status but not the high seas[125]. Virtually it has given effect to the *mare clausum* regime. That is to say, the regime of the 200 n.m EEZ is an assault on the regime of the high seas.

If it is suggested that the seas should be protected from the appropriation by the coastal states, then, it would be better to prescribe some smaller zone for these states. It is only possible if the states of the world take steps collectively. But at present the states have together adopted the 200 n.m EEZ. At this stage, it would not be wise to stick to the view for some smaller zone.

The enthusiasms among the states know no bounds for recognising the 200 n.m EEZ. But in most cases while this zone will be a subject of delimitation between the states, the enthusiasms may not prevail in the same degree. Thus, it can be concluded that the states concerned and the world community as well will be required to take part in settling the delimitation differences.

2. 8. Delimitation Provisions : Issues and Practical Approach

Where the coastal sea between two opposite states is less than 400 n.m, the EEZ for each of these states would be subject to the delimitation between them. If this sea is equal to or greater than 400 n.m then, each of the states can extend the EEZ up to 200 n.m. To this end, no question of delimitation of the zone between the states would arise. But in all circumstances, any sea zone is to be delimited between two adjacent states. As regards the delimitation of the EEZ and the continental shelf between two opposite or adjacent states, the LOS Convention has provided similar provisions[126]. According to Article 74(1) of this Convention :

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

If the EEZ deals with the living resources only, and the EEZ and the continental shelf have different boundaries, the effect will be an overlapping phenomenon. Where in some area of the coastal sea a state by the continental shelf boundary can exercise sovereign rights but other state by the EEZ boundary can exercise same rights over the living resources. That is to say, while a state is entitled to exercise jurisdiction in the seabed, the other can exercise

it over the superjacent waters. In order to avoid such an overlapping, a common boundary for both the EEZ and the continental shelf is essential.

The common means for delimiting the EEZ as has been provided in the article is 'agreement'. What has already been adopted in an agreement for the boundary, the Convention feels, should be undisturbed. There arises no question as to an agreement which has been in force between the states for the delimitation[127]. To this end, there is no difference of the LOS Convention (Article 74(1) and the 1958 Continental Shelf Convention (Article 6).

In the case where there is no agreement, the states are not restricted to formulate the same. The states concerned are free to formulate an agreement for determining boundary of the EEZ. It seems that the best boundary between the states is one that both the states accept peacefully[128].

According to Article 74(1) the impact of delimitation is to achieve an "equitable solution". It seems that the median/equidistance line cannot be automatically applied. This line can be applied if the delimitation is equitable. That is to say, the application of the median/equidistance line for the boundary is subject to the equitable apportionment of the EEZ between the states. In point of fact, the 200 n.m EEZ is less complicated than the continental shelf. It can be laid down that :

> The basic fact is that the EEZ is an entirely artificial, man-made zone in the sense that it bears no relation to natural features such as the continental margin. It would surely have been much more appropriate to such a zone to have adopted the formula in Article 6 of the Geneva Convention on the Continental Shelf. Thus, failing agreement by the parties on a boundary, the residual equidistance principle would have applied in the absence of any special circumstances. This equidistance principle seems to be much more in keeping with a zone, the outer limits of which are determined solely by reference to a quantitative formula rather than a natural submarine features[129].

Actually if the median/equistance line is to be applied for the boundary, it would be convenient to give effect to the EEZ rather than to the continental shelf. As regards the delimitation, Article 6 seems to have provided the application of median/equidistance line more than Article 74(1). Article 74(1) has made the application of this line more dependent.

Generally speaking, the rule of law is to comply with the notion 'equality'. This notion is put into practice if it results in equity. In varied situations the notion 'equality' cannot work well. In the situations with minor variations equity can be effected by the notion 'equality'. However, where there is law, there is no application of equity. If there is no law or the law exhausts, then equity can be effective to govern the situations. As a matter of fact, equity has no independent approach. Its approach is ancillary to law.

If the principle of law cannot be applicable, then, it is fair to apply equitable principles. Actually priority should be given to the principles of law. But the article appears to have specified no principle to give effect to the delimitation. That is to say, the article has no specific approach. What kind of boundary should be applicable to the delimitation—the article cannot specify. As regards the delimitation, question may arise to take account of different circumstances prevailihg in the coastal sea and the coastal states concerned. In this context, an attempt can be made as follows.

2. 8. 1. Configuration of Coastlines

In all cases the configuration of coastlines should be given effect to the delimitation of the sea zones. Owing to varied situations in the configuration, it is not possible to apply a principle such as the equidistance principle uniformly. In this regard it was put forward in the *North Sea Continental Shelf Cases* (1969):

> 89. It must next be observed that, in certain geographical circumstances which are quite frequently met with, the equidistance method, despite its known advantages, leads unquestionably to inequity, in the following sense :
>
> (a) The slightest irregularity in a costline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geograhical features must be remedied or compensated for as far as possible, being of itself creative of inequity.

If the configuration of the coastlines of the states is similar, then it is convenient to apply the equidistance principle to delimit the sea zone between them. But it would not be convenient to apply this principle where one of the coasts is concave and the other—convex. To this end, if the equisdistance principle is applied,

the state with covex coast would be more benefited than the state with concave coast. The effect of this principle would be that the apportionment of the sea zone will not be in proportion to the length of the coasts concerned. That means, the equidistance principle cannot effect the apportionments equitable between the states—one with concave and the other with convex coasts.

2. 8. 2. Existence of Islands

Islands present difficulties in the delimitation of sea zones between two opposite or adjacent states. Small islands and islets may exist offshore from a state claiming a part of a common sea zone. They may lie out in the centre of a sea zone or beyond a median/equidistance line between state. They may even be located in places to a state whose coast is opposite, on a common sea zone, the state to which the islets belong[130].

As regards the definition of islands and the regime of the territorial sea and the continental shelf the LOS Convention (Article 121) has complied with the TS&CZ Convention (Article 10) and the Continental Shelf Convention (Article 1(b) as well. Accordingly, an island is regarded as "a naturally formed area of land, surrounded by water, which is above water at high tide". Furthermore, the LOS Convention has provided the regime of the EEZ for an island. That is to say, there is no restriction for an island to extend the EEZ and the continental shelf[131].

The restriction has been imposed on 'rocks'. In order to extend the EEZ and the continental shelf the 'rocks' require to "sustain human habitation or economic life of their own"[132]. But in different regions of the oceans there are many islands which still are not habitable[133]. A state can assert claims to such islands. If so, then this state cannot be obstructed to claim the EEZ and the contiental shelf in relation to these islands.

As a practical consideration, the area of an island may be negligible. But it can have a considerable area of the EEZ and the continental shelf. A circle shaped island, for instance, having a 7-mile radius will have 154 square miles as area. But it can claim 133533 square miles as the EEZ, and more seabed and subsoil if the continental shelf extends beyond 200 miles[134].

As far as the development of science and technology is concerned, it would not be difficult for a state particularly for a developed state to make any 'island' or rocks' habitable. If the

resources of the EEZ and the continental shelf are attractive, it may not be surprising that such a state would be serious to assert claims to the unclaimed or emerging islands and rocks. The purpose of such attempts will be to obtain the resources. The regime of islands as provided in Article 121 appears as a recipe of confusion and conflict.

2. 8. 3. Existence of Continental Shelf

The continental shelf may extend beyond 200 n m from the baselines of a coastal state. The shelf may extend less than 200 n m from the baselines of another state, say opposite to the former. In these circumstances, different pleas may arise out of the delimitation of the EEZ. The former state will take interests in delimiting the EEZ subject to the physical features of the continental shelf. Despite the extent of the continental shelf, the latter state will speak for equal treatment. This state will lay stress on the point that within the 200 n.m sea zone it is all the same whether there exists or does not exist the continental shelf. This phenomenon may arise equally in relation to the adjacent states.

2. 8. 4. Existence of Fish Stocks

It is a fact that the larger part of the fish resources is concentrated on the continental shelf[135]. If there exists fish stocks in the EEZ contiguous to a state, then this state will prefer the delimitation of this zone snbject to the fish stocks But the counter-part will raise the plea that the EEZ is an artificial, man-made zone. As such, the delimitation should be effected on the basis of equa l treatment.

In some cases the fish resources cannot be regarded to be cocentrated purely on a particular area of the sea. Certain travelling schools of fish originating in the EEZ of one coastal state may migrate to the EEZ of another state. From this point of view, it is difficult to delimit the zone depending only on the existence of tho fish stock. It signifies that the EEZ concept increases the risk of rivalries[136].

As regards the delimitation of the EEZ, there may arise different circumstances prevailing in the coastal states concerened. In this regard, it is relevant to speak of the economic and social issues of the coastal states. If the economy of one of the coastal states is dislocated then, it may not be unusual for this state to raise such issues in the delimitation.

As a matter of fact, the LOS Convention has taken into account the economy of the coastal state[137]. That is to say. if the coastal state is overwhelmingly dependent on the living resources of the EEZ, then it can exclude other states to take part in the exploitation of these resources. If so, then it would not be unfair for the coastal state which is economically dislocated to raise the plea that the delimitation of the EEZ should be effected in consideration of its economic and social needs.

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120 Algeria, Colombia, Congo, Costa Rica, Denmark, Egypt, Equatorial Guinea, Ethiopia, Fiji, Guatemala, Honduras, Malaysia, Malta, Mauritania, Mexico, Nicaragua, Panama,

Sudan, Togo, Trinidad and Tobago, Tunisia, West Germany, Yugoslavia, and Zaire. *Ibid.*

121 Carolyn Hudson, "Fishery and Economic Zones as Customary International Law", 17/3(1980) *The San Diego Law Review* 661-689, 689.

122 See Lewis M. Alexander and Robert D. Hodgson, "The Impact of the 200-Mile Economic Zone on the Law of the Sea", 12/3 (1975) *The San Diego Law Review* 573.

123 Wolfgang Graf Vitzthum, "The Search for Sectoral World Orders Parallels between Attempts to Build Maritime and Economic World Orders" (1980) *Aspekte der Seerechtsentwicklung* (Munchen) 273-325. 284.

124 Wolfgang Graf Vitzthum, "Peaceful Change through International Lawmaking", 23(1981) *Law and State* 8-30, n. 19.

125 E. D. Brown, "The Exclusive Economic Zone : Criteria and Machinery for the Resolution of International Conflicts between different Users of the EEZ", 4(1977) *Maritime Policy and Management* 325-350, 339.

126 See Articles 74, 85.

127 Article 74(4).

128 John King Gamble, Jr., and Giulio Pontecorvo (eds), *Law of the Sea : The Emerging Regime of the Oceans* (1974), Ballinger Publishing Company (Massachussetts) 18.

129 E. D. Brown, "The Continental Shelf and the Exclusive Economic Zone : The Problem of Delimitation at UNCLOS III", 4(1977) *Maritime Policy and Management* 402.

130 See L. F. E. Goldie, "The International Court of Justice's 'Natural Prolongation' and the Continental Shelf Problems of Islands", 4(1973) NYIL 237-261, 246. See Robert D. Hodgson, "Islands : Normal and Special Circumstances" in John King Gamble, Jr,. and Giulio Pontecorvo (eds), *Law of the Sea : The Emerging Regime of Oceans* (1974) 139, 142.

131 See Article 121(2).

132 See Artcile 121(3).

133 See E. D. Brown, "The Continental Shelf and the Exclusive Economic Zone : The Problem of Delimitation at UNCLNS III", 4(1977) *Maritime Policy and Management* 391.

134 Mathematically it is known that the area of a circle is πr^2 where π stands for 22/7 and r, radius of the circle concerned. Therefore, the area of the island with 7 miles radius will be $22/7 \times 7^2 = 154$ square miles. The area of the circle with 12-mile territorial sea will be $22/7 \times 19^2 = 1135$ square miles. The area of the territorial sea will be 1135-154=981 square miles The area of the circle with 200-mile EEZ will be $22/7 \times 207^2 = 134668$ square miles. The area of the EEZ will be 134668−1135=133533 square miles.

135 See *Atlas of the Living Resources of the Seas Prepared by the FAO Department of Fisheries*, (1972) 9, 10.

136 See Wolfgang Graf Vitzthum, "Peaceful Change through International Lawmaking", 23(1981) *Law and State* 23; R. E. Kearney, "The Law of the Sea and Regional Fisheries Policy", 5(1978) *Ocean Development and International Law* 271.

137 See Articles 69, 70, 71.

CHAPTER V

CONTINENTAL SHELF

1. General Reading

1. 1. Terminology

The existence of the continental shelves appurtenant to the continents is a natural phenomenon. Definition of the continental shelf will not be simple, though as a concept it is not difficult of comprehension[1]. Basically the concept of the continental shelf stems from geography and oceanography. In the view of M. W. Mouton :

> The notion 'continental shelf' is of purely geological, geographical and oceanographical origin. What do geologists and other scientists mean when they speak of the continental shelf (*le plateau continental, der kontinentalsocket*) ? From the middle of the last century onwards an increasing number of soundings in the seas and oceans have been carried out for scientific as well as practical purpose (shipping and telegraph cables)[2].

The fact that the continental shelf notion is an achievement of scientific and technological undersea investigation. According to the geological investigation most of the present land surface of the earth has, in the past, been covered by sea. Almost all sedimentary rocks testify to this fact by the marine fossils they contain[3].

The term "continental shelf"[4] is used by geographers to denote the kind of pedestal on which the continents seem to rest in the ocean. It slopes steadily and very gently down towards the sea. The continental shelf is called in French : *plateau continental*, or *plate forme continental*, or rarely *seuil continental*, in Spanish : *plataforma, cornisa, zocalo* ; in German : *sockel*.[5]

Geologists claim that the continents do not end at the beach. The true end of the continents lies at the outer edge of the continental shelf, along a line referred to as the continental edge[6]. The shelf is regarded as the submarine continuation of the land mass under the sea to where the sea floor begins to fall off more steeply into oceanic depth[7]. It is covered by relatively shallow waters ; beyond it the real ocean depths are encountered[8]. The undersea investigation reveals that the seabed falls off more or less gradually from the coast to the vastly greater ocean depths. From a practical

point of view, the continental shelf is a topic related to the study of the sea floor. According to C. H. Cotter :

> Close study of a bathymetric chart discloses two significant isobaths each corresponding to a change of slope of the general form of the sea floor. These two significant breaks of slope divide the floor of the ocean, in a broad fashion, into three major facets. These surfaces are named ; the continental shelf, the continental slope, and the abyssal floor. Each of those major surfaces was initially thought to be relatively flat. Especially was this thought to be true of the abyssal floor, which was regarded as being a monotonously flat plain[9].

The first facet rather shallower than the other two is the continental shelf[10]. The depth of water on the seaward side of the continental shelf edge increases relatively rapidly away from the boundary. The continental slope[11] is locally quite steep and shares some of the features of an escarpment[12]. It begins where the continental shelf ends. In between the continental slope and the abyssal floor there exists the continental rise where fall-off to abyssal floor is less steep[13]. The continental shelf, slope and rise constitute two geographical entities : the "continental terrace", and the "continental margin"[14]. The "continental margin" includes the 'terrace' and the continental 'rise'[15]. At this rise the geological nature of the seabed changes from being solely maritime, constituted by the special muds of the deep sea floor, into the rocks and the geological structure of the continental pedestal upon which the continental land mass itself stands, this is where geological change takes place[16].

In some localities, the continental shelf as shallow platform does not exist, the seabed being broken up into a series of deep troughs and ridges, similar to the continental land forms. This is known as a "continental borderland". It is almost made up of the same kind of materials as the continental shelf and slope[17].

Anyway, the meaning of the term "continental shelf" has been modified in international law. The UNCLOS I considered the continental shelf as the "seabed and subsoil" extending up to 200 metres depth beyond territorial sea. But beyond this depth, the continental shelf was considered to extend to "where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas"[18]. The UNCLOS III has regarded the

terms "continental shelf" and the "continental margin" as the "natural prologation of the land territory" of the coastal state. Both the terms have been referred to the "seabed and subsoil" beyond territorial sea. The "seabed and subsoil" has been prescribed to generally be extending up to 200 n.m from the baselines from which the territorial sea of the coastal state is measured[19].

1. 2. Formation

The continental shelf is formed of erosional or dipositional rise. In the classical sense, erosion refers to the disruption and transportation of rock debris from one place to another by a variety of surficial process. The main agents of erosion are water, ice, wind and mass wastage. Some processes operate predominantly within the realm of the continent itself. These tend not to destroy a continent but merely to alter its surficial expression by redistributing its mass[20].

The concept that the shelf is a dipositional feature appears to have been developed from sedimentation, accretion, encroachment and from much deductive reasoning and too few facts[21]. Sedimentation accrues when particles drop usually from suspension, with insufficient force to induce either siltation or surface creep. Most dust, because of its low terminal velocity of fall, settles in this fashion. As a matter of fact, "...under the action of waves in shallow water both the major acceleration of the water particles and the transport of sediment is predominantly in a landward direction outside the break-point. There is thus a general tendency for accretion to take place[22]. Encroachment takes place when a barrier obsructs the movement of some particles. It occurs on dunes where particles roll to rest in the lee of the dune crest[23]. Wave abrasion and river sedimentary discharge have equally a role to the formation of the continental shelf[24].

1. 3. Physical Feature

Oceanographic studies have shown that there is no uniformity as regards the width, depth or physical formation of the continental shelf. The division of the continental shelf among the states in different regions of the world is very unequal and disproportionate.

The widest shelves are commonly formed adjacent to low-lying plains on the continents[25]. The shelves around the Arctic Basin are generally very wide and occupy more than half of the total area of the Arctic Ocean. The widest shelf by far is found off the coast of the Soviet Union, which indeed, is the largest in the world. All of the peripheral seas on the Soviet side : Barents, Kara, Lapter, East Siberia and Chuckhi, rest on the continental shelf and are characterized as 'epicontinental' seas[26]. The widest shelf of all is formed in the Barents Sea and it is shared with Norway[27]. In these regions the shelf extends up to 800 miles[28]. Off the coasts of north-west Europe the continental edge swings westwards to the north of the Bay of Biscay and the shelf width increases considerably. The North Sea is a domain of the continental shelf. The British Isles lie wholly on the continental shelf, and the width in this locality is about 500 miles[29].

The eastern margin of North and South America had wide shelves. The shelf extends about 150 miles of Florida, and 350 miles off the coast of South America of the Rio de La Plata[30]. The eastern coast of Asian and Australian continents have vast areas of the continental shelf[31]. The shelves surrounding very large islands lie in the deep sea as Madagascar, are true continental shelves, because these islands are small continent[32]. In the Persian Gulf there exists neither the continental slope nor the continental rise. The geological structure of the soil beneath the gulf is the same as that of the adjacent territory[33].

Mountainous coasts are bordered by narrow shelves or by none at all. Continental shelves are narrow all round the African coasts and along the western coasts of North and South America[34]. The shelf is lacking in the western coast of Corsica and off Alpas Maritinęs on the south easth east coast of France. The continental shelf off the west coast of Norway is separated from the mainland by troughs of greater depth[35].

1.4. Resources

It goes without saying that the oceans are rich in different resources. It is a natural law that apart from water from immediate vicinity of beach the intensity and variety of marine life is inversely proportional to the depth of the water[36].

The continental shelf frequently provides sediments of sufficient depth, and reservoir structures, such as salt domes, which are favourable to retention of oil and gas[37]. The bed and subsoil referring to the continental shelf is the continental land mass but the waters above are actually the part of the high seas. It is therefore, not surprising that the resources which are found on land and in water are found in the continental shelf[38]. Extensive deposits of petroleum, gas, oil, metalliferous mud rich in copper, zinc and other metals, manganese nodules that also contain cobalt, nickel, and other nemerous minerals ; coal, sulphur, iron and limestone, and sand gravel can modestly be tapped. More lie in wait, on and beyond the continental shelf[39].

The continental shelf is a refuge of the living resources[40]. Sedentary species such as oysters and coral usually rest in shallow waters contiguous to the coast[41]. It is common knowledge that the coastal waters of the world are richest in nutrients and support the most abundant fish population. Rich plankton pastures exist in the waters above the continental shelves. This results from the supply of nutrients from the land, the shallowness of the waters which allows sunlight to penetrate to the seabed in places, the mixing of matter due to tidal effects, the breaking of existing waves in the shallow seas. and varied sedimentary spawning available to a variety of fish. Most of the balance of the world's fish catches are obtained from these waters[42]. Indeed, over 80 percent of the world's fishing production is made up of species which for all practical practices reside in the near-shore water above the continental margin[43].

"The prospect of rich offshore resources has forced states to show a growing interest in and stake competing claims to areas of ocean which previously might have been the subject of little economic or scientific interest"[44]. As time went on, the coastal states began to enact provisions one after another for achieving the resources. The impact of such attempts was to substantiate the claim of the coastal state over the resources in the coastal sea. The consequent effect actually led to the innovation of the continental shelf theory.

2. Background Information and the Aspect of Pre-1958 Practices

2. 1. Early Practices

It is a fact that with the development of science and technology the coastal states began to explore the riches in the seas. For lack of such development it was not possible for the early people to achieve the riches as to date[45]. However, the appropriation of the riches in the coastal sea was in practice among different coastal states[46].

To this end, the claims of Sri Lanks[47], Bahrain, Tunisia[48], Ireland and Mexico[49] appear similar to one another. All these claims can present the evidence that the coastal states exercised jurisdiction over off-shore resource zone. According to Sir Cecil Hurst :

> Wherever, it can be shown that particular oyster beds, pearl banks, chank fisheries, sponge fisheries or whatever may be the particular form of sedentary fishery in question outside the three-mile limit have always been kept in occupation the sovereign of the adjacent land, ownership of the soil of the bed of the sea where fishery was situated may be presumed, and exclusive right to the produce to be obtained from these fisheries may be based on their being produce of the soil. Ownership of the soil by the sovereign of the country under such circumstances must carry with it the rights to legislate for the soil so owned and for the protection of the wealth to be derived from it, and no doubt need be felt as to the binding force of various enactments which have been issued for the protection of these sedentary fisheries outside the three-mile limit[50].

Oyster, pearl oyster, coral and such other sedentary animal are found in shollow water, as a rule and usually near the coast[51]. They are considered to be different from swimming fish, and assumed to be valuable in particular of the needs of the local population[52]. The pearl banks, oyster beds, chank and other form of fisheries in the Palk's Bay and the Gulf of Manaar near the northern coast of Sri Lanks and southern coast of India outside territorial waters were claimed to be under jurisdiction of these countries[53].

The judgment of the High Court of Madras in the *Annakumaru Pillai's Case*[54] appears in retrospect to be one of the most historic judgment ever delivered by a municipal court. The principle laid down in this case holds good even after three quarters of a century.

The central question considered by the High Court of Madras in this case was whether the species of sedentary fisheries, the chanks, in the seabed of the Palk's Bay and the Gulf of Manaar were the object of theft. It was the argument of the petitioner that he possessed the title to the stolen chanks by virtue of a lease granted to him by the Rajah of Rammand who by continuous and effective occupation from time immemorial had acquired title to the resources. The argument of the petitioner was opposed by the respondent on the grounds that chank fishery was fishery in fact, and that in any case, and as such, could not be the object of theft. Referring to the chanks, the Court pointed out :

> --they would belong to him on whose land they exist so long they do not migrate therefrom and pass away elsewhere, even supposing they are likely to do so. Apart, too, from this view it would be impossible to ignore the fact that for ages in the country, chanks and pearl oysters have been owned and enjoyed by the sovereign as belonging by prerogative right exclusively to him—a fact from which it must, with reference to the crown and persons having similar right, be held that they *ratione privilegii* are the subject of property absolute or qualified according to the view to be taken with reference to nature and capacity of the animals themselves[55].

The Court ruled that the species of sedentary fisheries on the seabed are subject of property.

In fact, the claims over the off-shore resource zones came into being by the acts of the states concerned. The Cornwall Submarine Mines Act of 2 August 1858 of the United Kingdom referring to the claims over the resources beyond low-water mark under the open sea was an old Act. The Act declared the resources as part of the soil and as such they belonged to the territorial possession of the crown[56].

Tunisia's claim of the exclusive right to sponges on a bank outside the three-mile limit of her coast was derived from the continuous and unquestioned enjoyment of the *fructus* of these banks. Mexico enacted regulations to exercise her jurisdiction over pearl fisheries in the coastal sea outside the three-mile limit. By the Fisheries Act of 1818 she asserted jurisdiction over the oyster beds extending ten to twenty miles beyond the three-mile limit[57].

The Acts of Queensland, 1838 and Western Australia, 1889 regarding pearl fisheries, declared those areas beyond the three-mile limit to lie under the control of the respective adjoining territory[58]. It is true that claims to resources of the seabed were made by coastal states but they were justified as acts of occupation, not as the natural rights of the coastal states[59].

In the period while all such acts emerged, a coastal state was able to exercise her sovereign authority over any resources in the territorial waters. Except this, there was no established theory that enabled the coastal state to assert jurisdiction over the seas. In one view, the seas beyond territorial waters was regarded as *res nullius* and in another view as *res communis*. According to the *res nullius* theory the sea belonged to nobody. As a result, it was susceptible to occupation. And according to the *res communis* theory the sea was common property, nobody could own it.

As a matter of fact, both of these Latin terms drawn from the Roman Law are susceptible to criticisms. If the sea is a *res nullius*, this in Roman Law signified that the thing though unowned was capable of ownership, which is not the case with the high seas. The whole history of the past three centuries was against such a conclusion. If the sea be regarded as a *res communis*, that is to say, all the states are owner in common, that the sea is the property of the collectivity of states. But community of ownership means the possibility of partition and so of separate ownership[60].

Anyway, it is possible to conclude that these acts came into being as an outcome of the freedom of the seas doctrine. As a practical consideration, such practices over the bed and subsoil of the coastal sea later substantiated the coastal state to assert claims to the resources for example, sedentary fisheries. In essence, all such practices can be assumed as precedent for the continental shelf doctrine.

2. 2. Modern Practices Until Truman Proclamation

Scientific and technological know-how is directly involved in extracting sea resources Such skills when acquired, encouraged the people to obtain the resources existing off shore and in the high seas. The increased petroleum needs of industrialised societies, the discovery by geologists of a significant, recoverable quantity of oil in the continental hself, and the development of technological

capability to extract the valuable mineral resources, provided the impetus to focus attention on this area[61]. As early as the nineteenth century, enterprising individuals gained access to the adjacent ocean floor by means of lateral tunnels extending from the land mass. The greater emphasis in this type of exploitation came however, only in the twentieth century[62].

Portugal by a decree of 1910 procured her interests in fishing on the continental shelf down to the 100-fathom isobath[63]. Spain took similar steps in the National Congress of 1910 held in Madrid. Professor Odon de Buen[64] suggested that the territorial waters should include the continental shelf as being the main habitat of the important edibe species of fish. These facts appear to have exercised the idea of biological continental shelf. In 1916 the Imperial Russian Government by a decree proclaimed certain Arctic Islands as forming a northern extension of the Siberian continental upland. Also by a Note of 1924 she declared her claims over this area equally[65]. The vast extent of the continental shelf enabled the Government to make use of a geological argument, a variant contiguity of islands to support a claim to all the islands lying to the north of Russia[66].

In Latin America the continental shelf claims were made in a sense similar to Portugal and Spain. This idea came from Argentine scholar like Segudo Storni, Jose Leon Surray and Nageres. Their book and lectures delivered on different occasions gave impetus to assert claims over the resources of the shelf areas. As early as 1925, Suarez called upon the maritime nations of the world to enact conservation measures in the epicontinental sea, down to the 200-metre isobath. In 1927, Negeres, publicly advocated the adoption of a double geological criterion in order to include the continental margin within a nation's full sovereignty[67].

From this period onward, the United States was not behind to protect her interests over the continental shelf. Her steps to this effect date back to the "Diamond Bill" of 1935 which arose throughout the conflict with Japan on question of catching salmon being hatched in Alaskan rivers. This led to the "Copland Bill". The purpose of the Bill was to declare the shallow depth of the Bering Sea a slightly submerged margin of the American continent and to recite a need to protect marine deposits, fisheries and animal

life[68]. Practically the Bill was not enforced. However, it can be assumed that the Bill gave inspiration to the country to formulate in the future some theory on the continental shelf.

The claims over the coastal seas were not exercised only by individual practices. They were theorized by the scholars and as time passed, the same were upheld in the agreements among the states. The treatment of the submarine areas of the Gulf of Paria by treaty between the United Kingdom and Venezuela dated 26 February 1942 appears to have been effected in accordance with the *res nullius* theory[69]. By that treaty provision was made for the division between the United Kingdom and Venezuela of the seabed and subsoil of the submarine areas of the Gulf of Paria outside territorial waters[70]. By the Order-in-Council of 6 August 1940 the submarine areas renounced by Venezuela were attached to Her Majesty's Dominion for administrative purposes to Trinidad and Tobago[71]. In the view of Rainer Lagoni :

> Although the treaty regarding delimitation of the Gulf did not entail a mineral clause, their administrative jurisdiction extended beyond the limit to the territorial waters[72].

The Gulf of Paria embodies a wide continental shelf. The shelf usually is rich in different resources. As such, it is difficult to conclude that the administrative jurisdiction had no choice over such resources. Practical considerations thus led to the conclusion that the state must be permitted to exercise jurisdiction over the submarine soil beyond the marginal sea on the continental shelf[73].

The Gulf of Paria Treaty constituted an important precedent in the process of the development of the law on coastal resource jurisdiction beyond the territorial sea[74]. Drilling for oil in adjacent submarine areas began on a large scale after World War II and is now a productive activity in many parts of the world[75]. The continental shelf doctrine began to occupy a place in different state practices particularly since the last Great War.

2. 3. Truman Proclamation

From the foregoing discussion it has to be noted that there were sufficient precedents concerning the continental shelf near to and far from the United States[76]. The United States enacted her claims by a proclamation on 28 September 1945 over the natural resources of the subsoil and seabed of the continental shelf. Popu-

larly, the proclamation is known as the Truman proclamation[77]. Regarding the natural resources of the subsoil and seabed of the continental shelf the Truman proclamation states :

> Whereas it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and the seabed of the continental shelf by the contigous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contigent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources--Having concern for the urgency of conserving and prudently utilizing its natural resources, the--United States regards 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. In 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 United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

Along with the proclamation a press release was issued[78]. It defined the term "continental shelf" and specified outer edge of the shelf. Accordingly, the continental shelf was stated to be the "submerged land" being covered by no more than 100 fathoms (600 feet) of water. By such a formulation it was possible for the country to exercise jurisdiction over the natural resources in a vast area of the adjoining sea[79]. The proclamation totally rejected the concept of the continental shelf as *res omnium* or *res communis* and avoided founding assertion of jurisdiction on the *res nullius* theory, preferring instead to justify the action taken on the assumption that since the continental shelf is the submerged extension of the littoral state, the latter has a reasonable right to exercise jurisdiction thereon[80]. However, the proclamation was similar to the treaty between the United Kingdom and Venezuela of 1942 on the Gulf of Paria[81]. It did not deviate from the then concept as existing

concerning the subsoil, bed of the sea and their resources. In fact, it kept pace with the existing concepts on the continental shelf arising out of the physical feature of the earth's surface. As such the proclamation was a modest enactment on the issue regarding the continental shelf[82].

There was no specific principle formulated in the proclamtion for delimitation of the shelf with other states. The only principle formulated was the "equitable principles"—the meaning of which is not clear. Regarding the incorporation of the term "equitable principles", the proclamation appears to have enabled the country to follow any principle that would effect the delimitation equitable.

The Truman proclamation is generally considered to be the starting point of the contemporary developments in the law of the sea. The proclamation was issued at a time when the petroleum resources in the shallow areas of the geological continental shelf of the United States were beginning to become exploitable[83]. In the view of Professor Brown :

> The Truman Proclamation of 1945 has been described as one of the decisive acts in history, ranking with the discoveries of Columbos as a turnicg point in human destiny. Certainly, it marked the beginning of a new epoch in both law and technology and gave birth to a new legal doctrine under which States become entitled to push their frontiers seawards and enjoy exclusive rights to explore and exploit the natural resources of a vast new area of submarine territory contiguous to their coasts[85].

Though it was not the first national claim to seabed resources beyond the territorial limits in the twentieth century, it was the first claim by a major maritime power[85] causing the first major assault upon the seabed commons[86]. The impact of the proclamation was to substantiate the claims of the country over the natural resources in the subsoil and bed of the adjoining seas[87].

2.4. Subsequent Enactments

The Truman proclamation was followed by a spate of unilateral acts promulgated by other states anxious to take advantage of the new doctrine enunciated by the United States Government[88]. There was no protest against the Truman doctrine on the continental shelf. The doctrine actually substantiated the right of appropriation of the resources in the continental shelf for the country. Since the

doctrine has been effected by a major power for example, the United States, other States assumed the Truman proclamation as precedent established for asserting claims over the resources in the coastal sea.

A month later, the Truman proclamation was followed first by her neighbour, Mexico through its Presidential declaration[89]. The declaration embodied the claims for the country over the seabed and subsoil of the continental shelf and over epicontinental sea. Thenceforth, other states followed one after another.

Argentina[90], Guatemala[91] Philippines[92] and Saudi Arabia[93] in their decrees enshrined jurisdiction and control over the actual mineral resources of the seabed and subsoil of the continental shelf, perhaps intended to be analogous to the contiguous zones doctrine. Claims of these countries appear to be similar to those of the United States Truman proclamation on the continental shelf.

Australia[94], Brazil[95], Ecuador[96], Honduras[97], Nicaragua[98], Pakistan[99], Panama[100], British Protected Arab Sheikhdoms[101] and the Territories of Her Majesty's Dominion in their enactments[102] embodied claims for sovereignty over the whole seabed and subsoil of the continental shelf, but not over the epicontinental sea, which remained subject to the regime of the high seas. Proclamations and instruments of all the states mentioned above have brought upon themselves no protests from maritime or interested states.

The proclamation of Argentina[103] Costa Rica[104], Cuba[105] Ecuador[106], Mexico[107] and Panama[108] claimed sovereignty over the seabed and subsoil of the continental shelf and further, over the epicontinental sea and superambient air. The claim of Chile[109], Costa Rica[110], Ecuador[111], El Salvador[112] and Peru[113] enshrined sovereignty over the subsoil, seabed, seas and air of a belt extending a proclaimed distance (usually, but not invariably 200 sea miles) from the continental and island coasts of the proclaiming states[114] . The instruments of the claims of these states differed from the Truman proclamation. Furthermore, these claims resulted in diplomatic protests[115].

With the passage of time, these claims became widely known. The states from different regions of the world began to assert such

claims and previous claims were revised by subsequent claim, one claim appeared to be a precedent for the other.

At first after the Truman proclamation, Mexico, on 29 October 1945 claimed the whole continental shelf adjacent to its coast and all the natural riches were found in it[116]. The proclamation disclaimed any intention to interfere with the freedom of navigation on the high seas. That is to say, it did not regard the epicontinental sea as territorial waters. But by an amendment to the Mexican Constitution introduced in 1949, the epicontinental sea was declared as the Mexican national property to the extent laid down in international law[117]. The extent of the continental shelf so declared was limited within the 200-metre depth.

Argentina by its decree[118] of 1944 categorically asserted sovereignty over the continental shelf and the epicontinental sea declaring them to be the transitory zones of mineral reserves. After the Truman proclamation the country by its decree of 1946 affirmed sovereignty over the shelf and the sea as well. The decree clearly referred to the continental shelf in the geomorphological and geological sense[119]. In addition, it embodied free navigation as to the character of the waters of the epicontinental sea and the continental shelf. Inclusion of the epicontinental sea under the Argentine sovereignty affected the United States fishing interests in the area of the sea[120]. Actually Mexico and Argentina formulated their claims subject to the physical feature of the shelf in their epicontinental seas[121].

If physical feature is the basis of asserting continental shelf claims, then, the countries along the Atlantic coast can gain remarkably. But the countries along the Pacific coast seems to be lacking in the same. Because their offshore seas drop sharply down the great ocean depth. The offshore seas geologically have hardly forty miles continental shelf[122]. So these countries saw no justice in this foible of nature[123] However, these seas particulary at 800 metre depth are rich in nitrates and phosphates which provide nourishment to the biological life[124]. This inspired the Pacific coast countries to establish claims over the resources in the offshore seas.

Chile by its decree of 23 March 1947 at first specified 200-mile sea zone under national jurisdiction. But it was clear that the decree would not affect the rights of free navigation on the high seas. Peru by its decree of 1 August 1947 followed the Chilean form of proclamation and claimed sovereignty over the sea adjacent to a distance of 200 miles. Ecuador by the decree of 21 February 1951 declared the continental shelf for the control of the exploitation of its resources up to 200 metres depth. Costa Rica on 7 November 1940 provided the right to exercise complete and exclusive sovereignty over the continental shelf in accordance with the principle of international law and with treaties in effect. El Salvador on 7 September 1950 embodied 200 miles extent for the continental shelf not affecting freedom of navigation in accordance with principles accepted by international law. Guatemala[125] on 1 March 1956 asserted its sovereign authority over the continental shelf according to the principle of inteinalional law but the claims of Honduras were clear about her sovereignty over the extent of the continental shelf. Article 5 of the 1950 Constitution of Nicaragua provided that the national territory of the country includes the continental shelf and the marine and island shelves.

The countries adjoining the shallow and resourceful Persian Gulf were not behind to secure their interests. Throughout 1945, Saudi Arabia and nine Sheikhdoms asserted claims to the subsoil and bed of the adjoining Gulf. Saudi Arabia moreover, included equitable principles clause for delimiting the area concerned with other states. The Iranian Bill of 19 May 1949 laid down that the natural resources of the sea or under the bottom of the sea up to the limit of the continental shelf of her coasts would belong to the country[126].

Pakistan on 9 March 1950 declared that the seabed along the coast of the country extending to one hundred fathom contour into the open sea should be included in her territory. South Korea on 18 January 1952 proclaimed sovereignty over the continental shelf and over the adjacent sea to a distance of 170 miles at one point, indicated by a demarcation line, preserving and utilizing natural resources, although it denied that it amounted to an extension of its territorial waters[127].

Despite the Truman proclamation, the United States renewed measures for safeguarding her interests in the continental shelf, The decisions of the Supreme Court in the California[128], Louisiana[129] and Texas[130] cases actually caused the country to bring forth the Submerged Lands Act[131], in 1953. By this Act her States were given rights over the resources of the subsoil and seabed in the territorial waters Again, after three months of this Act, the Outer Continental Shelf Lands Act[132], 1953 affirmed jurisdiction and power of disposition of the seabed and subsoil of the continental shelf to be lying with the United States.

India by her proclamation, 30 August 1955 asserted full and sovereign right over the seabed and subsoil of the continental shelf for the purpose of exploring and exploiting the "valuable natural resources in the area"[133]. In the same year Iran asserted an equal claim showing respect to free navigation and the installation of submarine cables[134]. In the year 1956 Portugal proclaimed her claims for exploration of the continental shelf prescribing the regime of the high seas in the area[135].

From all these proclamations, there is no doubt to say that after the Truman proclamation the continental shelf doctrine spread rapidly among the states of the world. Though the continental shelf doctrine was not internationally established until UNCLOS I, but it had a large practice.

2. 5 Collective Approach

The individual enactments were not the end of states efforts to secure their respective interests in the adjoining seas. As time passed, different states took steps to safeguard their interests jointly through declarations, conferences and meetings.

The Declaration (Santiago, 18 August 1952) of Chile, Ecuador and Peru included their sole sovereignty and jurisdiction over the floor and subsoil of the sea extending up to 200 n.m from their coasts[136]. The resolution of the tenth Inter-American Conference (Caracas, 1954) embodied an item under heading "Conservation of Natural Resources : Continental and Insular Submarine Shelf and the Waters". According to this resolution :

> The sovereignty and jurisdiction of each of the American riparian states should extend to the submarine continental and insular shelf off the continental and insular coasts of their territories, regardless of the depth of the ocean above the said shelf, and to

the existing natural resources or those that may be discovered therein and in the waters above it[137].

The extent of the shelf was adopted up to 200 n m, reckoned from the outermost points of the coast[138]. The third meeting of the Inter-America Council of Jurists (Mexico City, 17 January—4 February 1956) adopted that :

> The rights of the coastal State with respect to the seabed and subsoil of its continental shelf extend to the natural resources found there, such as petroleum, hydrocarbons, mineral substances, and all marine, animal and vegetable species that live in a constant physical and biological relationship with the shelf, not excluding the benthonic species[139].

The Inter-American Specialized Conference (Ciudad Trujilo, 16-28 March 1956) made some contributions to the topic of the continental shelf, It was resolved that :

> The seabed and subsoil of the continental shelf, continental and insular terrace, or other submarine areas. adjacent to the coastal State outside the area ot the territorial sea, and to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and snbsoil, appertain exclusively to that State are subject to its jurisdiction and control[140].

From these observations, it can be concluded that with the passage of time the continental shelf doctrine was accepted individually and collectively. But the doctrine had no customary force of the law of nations[141].

1. 6. ILC's Formulation

The International Law Commission started working on the continental shelf as a part of the general topic of the high seas. In 1950 the problem of defining the continental shelf was already beginning to draw the Commission's attention. The Law Commission in its third session, 1951 prepared a draft which was submitted to different governments for their comments.

In this draft the Law Commission formulated the continental shelf concept in favour of the coastal state to exercise control and jurisdiction for the purpose of exploring and exploiting its natural resources[142]. But this formulation had been criticised by the government of Chile, France, Iceland, the Union of South Africa and the United Kingdom, all of which considered that the coastal state should exercise 'sovereignty' over the continental shelf, though

with the exception of Chile, they did not claim sovereignty over the superjacent waters and the air above[143].

A number of states made comments on the topic "continental shelf"[144]. For instance, Norway referred the term "continental shelf" as "the seabed and subsoil of the submarine areas lying off the coast, even if these submarine areas are separated from the coast by stretches of deep water"[145]. Moreover, she proposed the seabed and subsoil to be measured by fixed breadth[146]. Sweden in her suggestion added that it might be preferable to use some term other than "continental shelf", for instance "submarine area"[147]. The Union of South Africa regarded that the definition of the continental shelf as "the seabed and subsoil of the submarine areas contiguous to the coast, but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil" is too elastic. If the test is to be the 'exploitability' of the seabed and subsoil then it seems clear that with the advance of technical proficiency in working at increasing depths, the boundaries of the continental shelf must be subject to continual revision[148].

According to the comments made by the United Kingdom of Great Britain the formula "where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil" might easily provoke international disputes. Just as in the case of superjacent waters it became necessary to establish a fixed limit of distance for the extent of the territorial sea, so in the case of the seabed and subsoil it is essential from the practical point of view to establish a fixed limit of depth for the extent of the continental shelf under the sovereignty of the coastal state[149]. Yugoslavia suggested that the boundary of the continental shelf should be determined by some distance cum depth formula[150].

In the meeting of the Law Commission, suggestion was made to adopt the simple and easily comprehensible term "submarine areas" in place of the term "continental shelf"[151]. But there arose objection to it in order to restrict the coastal state a tendency to encroach upon the rules governing the regime of the high seas and to extend territorial waters[152]. It was also expressed that the term "submarine areas" did not offer a solution, as they had a far

wider connotation than the continental shelf. Moreover, the term failed to convey the element of proximity to the coastal state[153]. The term "submarine plateau" or "submarine platform" was suggested to replace the term "continental shelf"[154]. In this regard it was viewed that it would be useless for the Commission to embark upon interminable discussion on the respective merits of the sociological and juridical definition[155].

The term "submarine shelf" was regarded to be ideal than the term "continental shelf"[156]. But it was interpreted that the term "submarine shelf" was not self explanatoy in English[157]. The term "submarine shelf" to be substituted for the term "continental shelf" was rejected by 5 votes to 3 with 4 abstentions[158].

It is significant to express the view that the term "continental shelf" gives a sense to be the shelf of the continent. That is to say, it bears a proximity to the land mass of the coastal state which is a part of the continent. But the term 'submarine shelf" gives the sense to be the shelf of the submarines, That means, it has a proximity mainly to the under-water surfaces.

As regards the delimitation of the boundaries of the continental shelf, the Commission was in the position to derive some guidance from the proposals made by the Committee of Experts on the definition of territorial waters[159]. In its provisional draft, the Commission, which at the time was not in possession of requisite technical and expert information on the matter, merely proposed that the boundaries of the continental shelf contiguous to the territories of adjacent states should be settled by agreement. In the case of not reaching an agreement the boundray should be determined by *ex aequo et bono*.

In regard to the boundaries of the continental shelf of states whose coasts are oppoite to each other, the Commission proposed the median line—subject to reference to arbitration in cases in which the configuration of the coast might give rise to difficulties in drawing the median line[160].

Having regard to the conclusions of the Committee of Experts, referred to above, the Commission was in a position to formulate a general rule, based on the principle of equidistance, applicable to the boundaries of the continental shelf both of adjacent states and of states whose coasts are opposite to each other. The rule thus

proposed is subject to such modifications as may be agreed upon by the parties. Moreover, while in the case of both kinds of boundaries the rule of equidistance is the general rule, it is subject to modification in case in which another boundary line is justified by special circumstances. As in the case of the boundaries of coastal waters, provision must be made for departures necessiated by any exceptional configuration of the coast, as well as the presence of island, or navigable channels. To that extent, the rule adopted partakes of some elasticity[161].

The ILC prepared a new draft at its fifth session, 1953. In this draft the Commission entailed the continental shelf as subject to the sovereignty of the coastal state[162]. But at the later meeting of this session this clause was revised[163]. Accordingly, the coastal state was empowered to exercise "sovereign rights" over the continental shelf for the purpose of exploring and exploiting its natural resources[164]. At its eighth session, 1956, when preparing the final report to the General Assembly pursuant to resolution 899 (ix), it considered the question once again and made changes in the text approved in 1953.

Since the continental shelf topic had been considered as a part of the high seas, there was some question as to the region of the shelf beyond the territorial sea whether to be under national or international jurisdiction. This dilemma was resolved in favour of the coastal states but only on consideration that coastal state's power be limited to control and jurisdiction over resources, and not involve sovereignty over the area itself. The ILC's draft as prepared in the eighth session, 1956 being modified was accepted in the UNCLOS I.

3. 4. Analysis of 1958 Conventional Provision Concering Concept and Outer Limit

The UNCLOS I adopted provisions for the continental shelf at its 18th plenary meeting in the "Convention on the Continental Shelf"[165]. The Convention formulated certain criteria for reckoning the outer edge of the continental shelf. It provided no specific limit for the shelf to be extended horizontally from the baselines from which the territorial sea of the coastal state is measured. According to Article 1 of the Convention :

> --the term 'continental shelf' is used as 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 limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas ; (b) to the sea-bed and subsoil of similar areas adjacent to coasts of islands.

It is obvious that the provision stated above are equally applicable to all coastal states—continental or insular.

3. 1. Bases of Claims

The claims of the coastal state over the continental shelf do not derive from mere opinion or random choice. It is a fact that every coastal state has some dependence on the resources of its coastal seas. The economy of such a state is rather related with their resources. Consequently common sense calls for the authority of the coastal state over the continental shelf existing in the coastal sea. According to Richard Young :

> In the economic field the theory allows for the fact that resources in submarine areas ordinarily be best developed from the adjacent shore, and that processing and use of such resources must be in most cases intimately associated with the economic life of the coastal state. It also takes account of the fact that there is often an economic as well as a geological relationship between offshore resources and similar resources on the contiguous land. Improper use may adversely affect the other, and common sense calls for a single authority to control both[166].

From a practical point of view, it is more convenient for the coastal state than for any state to explore continental shelf and exploit its resources. Again, if the geological proximity is considered, no state other than the coastal state can claim authority over the continental shelf.

Since the territorial sea is a part of the coastal state, the regime of the continental shelf in this sea is subsumed in the regime of the territorial sea. That is to say, the regime of the continental shelf is to be concerned with the shelf beyond territorial sea. If the coastal state is not legally considered to exercise right in the continental shelf beyond territorial sea, it would not be rational to substantiate the shelf in favour of any other state. According to C. H. M. Waldock :

> If the continental shelf is not attached, *ipso jure*, to the coastal State, it would be exposed to 'grab' tactics by other States and embarassing and dangerous activities near its shores. It is conceded that the coastal States feel some uneasiness about off-shore exploitation of the seabed by foreigners[176].

Considering all these arguments, it seems rational to say that the continental shelf should *ipso jure* be attached to the coastal state.

3. 2. Continenlat Shelf V. Seabed and Subsoil

As a matter of fact, Article 1 of the 1958 Convention has dealt with the term "continental shelf". But the artcle has made no link either with geology or geography. It has regarded the shelf simply as the "seabed and subsoil" of the submarine areas. It seems that the "continental shelf" has been denoted to be any undersea areas adjacent to but beyond the territorial sea. The "continental shelf" referred to the "seabed and subsoil" does not carry the sense to be the "shelf proper"—the "geological shelf". That is to say, any undersea area adjacent to the coastal state can be regarded as its continental shelf.

3. 3. Adjacency Criterion

If the regime of the continental shelf is concerned with the geological shelf, then the interest of the coastal state in this shelf would arise if it is adjacent to this state. According to Article 1 of the 1958 Convention, the continental shelf adjacent to but outside the area of the territorital sea would appertain to the coastal state. But it gives rise to different arguments. It can rightly be pointed out that :

> Article 1 refers to areas adjacent to the coast, not arbitrarily selected points within an area. Moreover, any argument which seeks to stress the element of 'nearness' has to contend with realities such as, for example, the submarine areas off the east coast of Argentina, the north Russian coast and the coast of Vietnam which are less than 200 metres in depth out to a distance of over 200 miles. Is this 'near' or 'far' ? It could be answered that these areas fall under the first part of the definition (to a depth of 200 metres) but this is unlikely to satisfy these states with deeper but still exploitable submarine areas at comparable distance from the coast. It does, however, follow from the ordinary meaning of 'adjacent' that, where an off-shore exploitable area is separated from another more seaward exploitable area by a deep area which is not exploitable, the more seaward area will not fall within the definition of the Continental Shelf[168].

Taking into account the adjacency criterion, it is to be noted that the continental shelf if separated, for example, by any deep, tunnel or anything else should not be attached to the coastal state. That is to say, the adjacency criterion speaks of the notion of

geophysical, geological and geographical dependence which *ipso facto* rules out unlimited extension of the continental shelf[169].

Mere presence of an irregularity may not preclude the coastal state to assert claims to the region so separated. If two parts are separated by a narrow deep channel, the principle of adjacency may be applied[170]. Again, if the continental shelf is simply assumed as the seabed and subsoil of the submarine areas in the adjoining sea, then the coastal state would be entitled to exercise its rights extensively. Whether or not there exists the shelf being separated or not by any deep, tunnel or anything else, the question would be immaterial for this state to assert claims to the same. It seems that it is easy for the coastal state to secure her interests simply over the "seabed and subsoil" in the adjoining seas by adjacency criterion.

The concept of adjacency is an undefined criterion indirectly and loosely referred to in some, particularly South American legislations[171]. The adjacency criterion cannot restrict the coastal state to exercise an unscrupulous attempt to extend its interests in the seabed and subsoil of the coastal sea. From this point of view, adjacency is a vague term, but it still conveys a sense of nearness[172]

Thus, as regards the adjacency criterion, it is p ossible to be aware of different arguments. From the strict point of view, the adjacency criterion cannot be uniformly applicable. In the context of the coastal states it can be uniformly applicable if the continental shelf in the coastal seas exists uniformly. But it should bear in mind that the adjacency crterion can be applicable at least to reckon the shelf or the seabed and subsoil for the coastal state.

3. 4. Outer Limit

Article 1 enables to state that the outer limit of the continental shelf extends to the 200-metre depth or, beyond this, to the depth of the superjacent waters at which the exploitation of its natural resources is admissible.

3. 4. 1. 200-Metre Depth Criterion

It is assumed that 100-fathom (e. g. 200-metre) line was quite arbitrarily selected as the critical point for many years[173]. There may arise some curiosity as to the basis of its innovation. In the view of C. H. Cotter :

> It was in the bast, commonly believed that the longest waves possibly at sea have wavelengths of abouf 600 feet, and so it was that the

> 100-fathom line came to be regarded as making the break of slope between the continental shelf and the continental slope. Recent investigation has revealed that the marked break of slope between the continental shelf and the continental slope does not follow the 100-fathom isobath. The variation in depth of the continental edge is possibly due to waves of varying maximum wavelengths at different places or to local subsidence or elevation of the sea bed[174].

The 200-metre depth came into being almost while the continental shelf was enacted by different states. For instance, Portugal in 1910 used 100-fathom isobath to measure the continental shelf[175]. A scholar like Suarez in 1925 suggested the 200-metre isobath for the maritime nations to take conservation measures in the epicontinental sea[176]. The Truman proclamation through a press release considered the 100-fathom depth for the extent of the continental shelf[177]. There was little protest against the 200.metre depth for the outer limit of the continental shelf. Practically this limit was treated as if acquiesced by the states in measuring the shelf. According to L. F. E. Goldie :

> --the outer limit of the continental shelf, that is, the 'continental edge', should for legal purpose be regarded as if it were at a uniform depth—namely, at the 200 metre bathymetric contour line. Since the continental slopes will not always, nor of necessity, coincide with the 'continental edge'---the choice of the 200 metre isobath admittedly involves an abstraction from the conditions of geography. However, such a concept has the advantages of reasonableness, uniformity and certainty[178].

Roughly speaking, the 200 metre isobath was regarded as the depth approximately at which the rim of the continental shelf might commonly be found[179]. Physical feature of the continental shelf at 200 metre depth in the oceans led the states to accept the 200 metre bathymetric contour line as the outer limit of the continental shelf[180]. In order to be aware of the situations, attempts have been made through the following table. The table can explain the area of the seabed at different depths.

Table of seabed at different depths[181]

Depth (in metres)	Percentage of Oceans	Cumulative Percentage
0— 200	7.6	7.6
200—1000	4.3	11.9
1000—2000	4.2	16.1

2000—3000	6.8	22.9
3000—4000	19.6	42.5
4000—5000	33.0	75 5
5000—6000	23 3	98.8
6000—7000	1.1	99.9
More than 7000	0·1	100.0

From this table it can be concluded that if a minimum depth range for maximum benefit of the coastal states is to be formulated then, the 200 metre depth range should be adopted for the outer limit of the continental shelf[182]. Actually the 200 metre depth criterion can give resultant benefit to the shallow seas bordering coastal states. Though it cannot be practiced uniformly, nevertheless, it can be assumed to have maintained the geological impact of the continental shelf. The rationale of the 200 metre depth has always rested on the fact that the continental shelf (in the geographical sense) generally comes to an end at that point, and it is there that the continental slope begins with a steep drop to a great depth[183].

3. 4. 2. Exploitability Criterion

According to Article 1 the coastal state is entitled to extend the continental shelf referring to the seabed and subsoil beyond 200 metre depth up to the extent "where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas". Where the coastal sea is steep—jumps rapidly towards the Great Ocean, the 200 metre depth formula stands inapplicable for the coastal state to determine the bed and subsoil of this sea. This phenomenon takes place particularly with the Pacific coast countries. As a result, the countries in this situation advocated the exploitability criterion to reckone the limit of the seabed and subsoil in the coastal sea. In this regard Evan Luard says :

> The exploitability criterion was added partly because of political pressures mainly from Latin American Governments (most of which did not eventually ratify the Convention), and partly because it was recognized that exploitation beyond the 200 metre line would shortly be possible and should in some way be realized [184].

The limit by way of the exploitability criterion under the article is based on admissibility of exploitation of the natural resources of

the areas on the part of the coastal state. The rationale for including the exploitability criterion is evidently that the 200 metre isobath or depth criterion is rather conservative[185].

As a matter of fact, the 200 metre depth criterion can give resultant benefit to the shallow seas bordering coastal states. Therefore, it was necessary for the convention to make an adjustment between the states facing the shallow and the steep seas. Consequently the convention adopted the exploitablity criterion.

Whether there exists or does not exist the continental shelf, every coastal state is entitled to determine the outer edge of the seabed and subsoil by any or both of these criteria. Usually the shallow seas bordering coastal states appear to be benefited by the 200 metre depth criterion. Moreover, this state is not restricted to fix the outer edge beyond the 200 metre depth by the exploitability criterion. The steep seas bordering coastal states would have to fix the outer edge by exploitability criterion. But it is difficult to apply this criterion uniformly. That is to say :

> A further difficulty arises over the meaning of the clause 'where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas'. Does exploitation mean economically feasible exploitation or any exploitation irrespective of cost[186].

If the exploitation is not economically feasible, then the coastal state should not come in for the exploitability criterion. But, if the exploitation is economically feasible, then the coastal state can use this criterion. To this end, questions arise whether the coastal state would be able to exploit the seabed and subsoil.

By the development of science and technology it is not difficult for a developed state to exploit the riches of sea at any depth. That means, by the exploitablity criterion a coastal state particularly a developed coastal state can fix the outer edge of the seabed and subsoil as she pleases. What then the actual border either in depth or horizontal limit is to restrict the coastal state—the article fails to specify[187]. If the coastal state is considered geologically and the coastal state is required to comply with the adjacency criterion, then this state can be more or less restricted. But, practically it is difficult to impose restrictions on the coastal state. In the words of Professor Brown :

> Looking merely at the ordinary meaning of the language used in

> Article I, it would seem therefore, that a coastal State may claim that its Continental Shelf extends as far as it has the capacity to exploit the submarine areas, provided that there is contiguity of exploitability. The existence of irregularities in the shelf and the meaning of 'exploitation' may however, give rise to difficulties[188].

If the continental shelf is simply assumed as the "seabed and subsoil", then any irregularity cannot be treated as a constraint for the coastal state to exploit the natural resources in and beyond the irregularity. As a result, the exploitability criterion of the continental shelf can be regarded as the "rubber boundary"[189] which for the practical purposes can be termed as "functus officio"[190] for the shelf. The open ended exploitablity criterion[191] practically is favourable for the rich and advanced countries.

Finally it can be concluded that the definition of the continental shelf as provided in Article 1 is vague and ambiguous. The article leaves the matter of the seaward limit of the shelf completely undetermined, using both the geographical criterion and the exploitablity criterion

4. **Trends in Post-1958 Practice**

The regime of the continental shelf was established internationally first in the 1958 Geneva Convention. Though the Convention seems defective to define the term "continental shelf" and specify its outer limit, nevertheless, it has created impetus among the states on the subject. As time went on, the states began to assert claims in the light of the conventional prvisions.

4. 1. **Individual State Practice**

Argentina in her decree[192] provided that "the sovereignty of Argentine Nation---extends to the subsoil of the submarine zones contiguous to its territory down to a depth of two hundred metres, or deeper than this limit, in so far as the depth of the overlying waters permits the exploitation of the natural resources of the said zones"[193]. This trend in the rights of the exploitation of the natural resources of the seabed and subsoil of this seas contiguous to the country was also maintained in her Act of 1973[194]. She did not adopt the term "continental shelf" but upheld the conventional 200 metre depth as well as exploitation criterion to exercise her national sovereignty in the seabed and subsoil adjacent to her territory.

The Acts of Australia[195] complied with the conventional meaning of the term "continental shelf". But the meaning of "natural resources" was not conventionally followed. It was recalled as the "living resources". From the Note Verbale of Cyprus. 31 May 1972,[196] it can be stated that the country adopted 200-metre depth for the outer limit of the continental shelf. In case of the shelf extending beyond this depth, the country adopted the outer limit up to the end of the natural prolongation of the land territory. The natural prolongation concept was influenced by the judgment of the International Court of Justice in the *North Sea Continental Shelf Cases*[197].

Denmark[198] proclaimed a continental shelf in conformity with the 1958 Geneva Convention on the Continental Shelf. But in the year 1971 she[199] applied the expression "natural resources" in a sense different from that used in the Convention. She regarded "natural resources" as "mineral and other non-living resources of the seabed and subsoil".

Fiji[200] acted upon the conventional provisions for her continental shelf. But she substituted "mineral and other non-living resources" for the conventional expression "natural resources".

Iran proclaimed her sovereignty over the submarine areas as well as over the natural resources of the seabed and subsoil thereof up to the limit of the continental shelf adjacent to her territories[201]. Ecuador by her Civil Code[202] regarded the term "continental or insular shelf" as the "submarine areas adjacent to the national territory to a depth of 200 metres". The Federal Republic of Germany[203] asserted claims to the mineral resources of the continental shelf.

The German Democratic Republic[204] did not use the expression "continental shelf". But she declared exploration and utilization of the natural resources of the seabed and the subsoil of the submarine areas adjacent to the Baltic coast of the Republic outsite the territorial sea to be exercised under generally recognised principle of international law. To this end, she regarded the 1958 Geneva Convention on the Continental Shelf as based on such principles.

Ghana in its enactment regarded the continental shelf as seabed and subsoil of marine areas to a depth of 100 fathoms

contiguous to the coast and seaward of the area of land beneath the territorial waters[205]. In 1973 she provided the 100 fathom depth and the exploitability criterion as applicable under the Convention to determine the outer edge of the seabed and subsoil of the submarine areas[206].

France asserted sovereign rights in conformity with the 1958 Geneva Convention in the matters of exploring the continental shelf adjacent to its territory and of exploiting its natural resources[207].

Finland[208], Italy[209], Malaysia[210], Malta[211] Nigeria[212], Oman[213], People's Democratic Republic of Yemen[214], Sudan[215], Bahamas[216], Cayman Islands[217], British Soloman Island Protectorate[218], conformed with the conventional provisions in connection with the meaning of the term "continental shelf" and its outer limit. Norway[219] enacted her claims using "mineral and other non-living resources" in place of the conventional expression "natural resources". Spain[220] did not specify the term "continental shelf" but adopted exploitation criterion as used in the Convention for the outer limit of the bed and subsoil of the adjacent waters beyond the territorial sea. She regarded this area as "public property" of the country.

Regarding the continental shelf, Thailand[221] in its Act expressed that she would comply with the generally recognised principle of international law subject to compacts made with foreign governments[222]. The Soviet Union[223] enacted provisions as to the term "continental shelf" and its outer limit in conformity with the Convention. Later she enacted provisions for research activities in this area[224] and took steps to facilitate the research. As such, she made a comprehensive list of the species of living organisms and regarded them as the natural resources of the continental shelf[225].

The United Kingdom enacted the Continental Shelf Act, 1964 in harmony with the conventional provisions[226]. Since this Act, different instruments concerning "Designation of Areas"[227], and "Protection of Installation"[228] were promulgated one after another. The Continental Shelf Act was amended by a subsequent Act[229] in 1971. Apart from this, more steps were taken by the United Kingdom[230]. The impact of all such measures appear to have ensured rights for the Kingdom in the resources of the seabed

and subsoil beyond territorial sea. The United States adopted regulations in compliance with the conventional provisions[231].

From the individual practice it is to be observed that the states adopted the "exploitability criterion" to help explore the seabed and exploit their resources beyond territorial sea. The "200 metre depth criterion" appears to have been adopted by the states bordering shallow seas. Moreover, they maintained the "exploitability criterion" for the outer edge beyond this depth of the seabed and subsoil as well. The states bordering steep seas mainly adopted the "exploitability criterion" for determining the outer edge of the seabed and subsoil.

Though the states appear to have been following the conventional provisions, from a practical viewpoint they cannot be regarded to have followed the provisions in *toto*. Regarding the outer edge of the seabed and subsoil, there was a feeling that it was possible for a coastal state to fix the edge until it overlapped other. The claims of the states did not concern only with the natural resources of the continental shelf. In order to meet the needs, states from different corners began to extend their claims basing not only on the natural resources of the continental shelf but also on other resources[232].

4. 2. Collective Practice

It has been mentioned that different states started extending jurisdiction over the resources of the seas especially after the common heritage of mankind resolution[233]. By this time the states, particulary the developing states began to exercise claims collectively over all the resources of the coastal sea. The declarations, seminar and all such collective steps of the states which led to the emergence of the EEZ were also concerned with the regime of continental shelf.

The Montevideo Declaration[234], 1970 provided 200 n.m sea zone for exercising "maritime sovereignty and jurisdiction". But the Declaration adopted the continental shelves to be extending "to where the depth of superjacent waters admits of the exploitation" of the natural resources. Regarding the state-parties to the Declaration, it is to be noted that the continental shelves in the coastal seas bordering Argentina, Brazil and Uruguay exist extensively. But the shelves in the coastal seas bordering Chile, Ecuador,

El Salvador, Panama, Peru, and Nicaragua exist narrowly. To this end, neither the 200 metre depth criterion nor any other depth criterion can be uniformly treated for the extent of the continental shelves. As a result, the Declaration adopted the "exploitablity criterion" for the outer limit of the continental shelf. The impact of adoptiong this criterion appears to have ensured the participating states right to explore the seabed and subsoil and exploit the natural resources in the adjoining seas.

The Lima Declaration[235], 1970 specified no limit for exploring and conserving the natural resources in the coastal sea. Virtually the Declaration appears to have complied with the "exploitability criterion" for the extent of the continental shelf. The Santo Domingo Declaration[236], 1972 adopted the provisions in conformity with Article I of the Geneva Convention. Furthermore, the Declaration adopted :

> The seabed and its resources, beyond the patrimonial sea and continental shelf not covered by the former, are the common heritage of mankind[237].

It envisages that where the continental shelf is less than 200 n.m patrimonial sea[238], the coastal state can extend the shelf up to this limit. But where the s helf exceeds the patrimonial sea, the coastal state is entitled to extend the shelf to its end. Again, by virtue of the "exploitability criterion" the coastal state appears to have been provided with the right to explore the seabed and exploit the resources subject to its capacity.

The Yaounde Regional Seminar of African States[239], 1972 regarded the term "natural resources" to include living and non-living resources. Compared to this, the term "natural resources" as meant by Article 2(4) of the 1958 Convention appears to be limited. Actually the declarations, seminar and all such collective practices which led to the emergence of the 200 n.m EEZ considered the continental shelf subject to the regime of the EEZ. Besides this, in most cases the "exploitability criterion" was adopted individually and collectively. The purpose of this was to enable the exploration of the seabed and subsoil and exploitation of their resources to the capacity of the state concerned.

In presence of the regime of the 200 n.m EEZ the continental shelf beyond 200 n.m can be treated absolutely subject to its own

regime. To this end, the regime of the continental shelf is to be concerned with the physical feature of the shelf beyond 200 n.m EEZ. But, if the 1958 conventional "exploitability criterion" is applicable, then it is not difficult for the coastal state to exercise the regime beyond 200 n.m EEZ. That means, there is no difficulty by way of technology to explore the vast oceans and exploit their resources.

If the "exploitability criterion" is interpreted in terms of the most advanced standards of technology in the world, and if the states have exclusive right to the "natural resources" of the continental shelf. it logically follows that the only limits to a division of the ocean resources by the coastal states will be imposed by economic and the technological considerations. Consequently the expression 'adjacent' places no meaningful constraints on a coastal state's inclusive claims in the ocean floor. This automatically restricts the freedom of the seas[240]. Furthermore, if the principle of the "common heritage of mankind" is forcible, the exploitability criterion would be a constraint to it.

Practical considerations of different states have exposed, in addition, the needs of modern technology and the concerns of the international community affirmed that the "200 metre depth criterion" is inadequaet for the outer-limit of the continental shelf[241]. Neither the 200 metre formula nor the exploitability criterion can rationally and equitably serve for the outer limit of the continental shelf [242]. Again, it is difficult to fix basepoints at the outer extent of the continental shelf on the basis of depth criterion.

As time passed, the states began to put forward their views in favour of the mileage limit for the continental shelf[243]. It was also felt that the regime of the submarine areas should be concerned not only with the continental shelf but also with the continental slope and the rise[244]. Colombia, Mexico and Venezuela expressed that the the seabed and subsoil should extend to the 'continental rise"[245]. The states like Soviet Union[246], China[247] and the Neterlands[248] favoured a wider limit for the continental shelf, The United States[251] regarded the continental margin beyond the 200 n.m EEZ subject to the regime of the continental shelf. Bangladesh[250] and India[251] enacted the outer limit of the

continental shelf referring to the seabed and subsoil of their coastal seas up to the edge of the continental margin.

From the above discussion, it can be laid down that the individual and the collective practices more or less complied with the provisions of the 1958 Continental Shelf Convention. But with the passage of time, the states began to take different courses one from another for exercising the regime of the continental shelf. Finally the regime of the continental shelf has been reformulated in the UNCLOS III.

5. LOS Convention's Provisions Concerning Concept and Outer Limit—Their Impacts and Relations with Those of the 1958 Convention

THe ISNT [252], RSNT [253] and the ICNT [254] formulated the definition and extent of the continental shelf as provided in paragraph 1 of Article 76 of the LOS Convention [255]. According to this paragraph :

> The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout 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 margin does not extend up to that distance.

If signifies that the coastal state is entitled to assert claims not only to the "geological shelf" but also the "continental margin". In any case, the coastal state is entitled to extend the outer limit of the "seabed and subsoil of the submarine areas" to a 200 n m limit measured from the baselines. But where the "continental margin" or the "continental shelf" extends outside 200 n.m limit, the coastal state is not limited to assert its claim within the 200 n.m limit. That is to say, the coastal state can assert claims outside the 200 n.m limit. But the extent beyond 200 n.m of the continental margin or the continental shelf is to be determined subject to the paragraphs 4-8 [256]. Regarding the continental margin paragraph 3 states :

> The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed 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.

As a matter of fact, it is not difficult to be aware of the term "continental margin". But it is not easy to determine the outer limit of the margin. That is to say :

> --it is revealed in Paragraphs 2 and 4-6 that the reference to the 'outer edge' of the continental margin is not in fact a reference to the outer edge of the continental margin as it would be understood by the geomorphologist but to a legal 'outer edge' established by reference to a highly complex formula. Thus, on this occasion, the legal continental shelf not only bears no resemblance whatever to the geomorphological continental shelf, but is also very substantially different from even the geomorphological continental margin 257.

Actually neither the continental shelf nor the continental margin can be applicable to the states uniformly. If the states bordering with shallow seas and the states with steep seas adopt the continental shelf and the continental margin respectively, then in some cases the division of the seabed among the states may be reasonable. But such an assumption amounts to criticisms.

5. 1. The Notion "Continental Shelf" and "Natural Prolongation

According to the judgment in the *North Sea Cases*—the continental shelf constitutes a "natural prolongation" of the land territory of the coastal state. Obviously the text of the paragraph appears to have been influenced by the judgment in the *North Sea Cases*. Under the paragraph the continental shelf comprises the seabed and subsoil of the submarine areas beyond the territorial sea. But the seabed and subsoil should be the natural prolongation of the land territory of the coastal state. As a result, the seabed and subsoil which are not the "natural prolongation" of the land territory do not fall under the definition of the continental shelf.

The notion "throughout the natural prolongation" of the land territory makes known the fact that the continental shelf extends from the submerged land territory starting from the outer limit of the territorial sea to the outer edge of the continental margin. It is clear that the seabed and subsoil so prolongated should either be the shelf proper or slope or rise.

Again, the paragraph has embodied no term such as 'adjacent'. The notion "natural prolongation" represents the geological shelf" existing in the adjoinining seas, That means, it represents the shelf which is a prolongation of the land territoyr of the coastal state. Moreover, the extract "throughout natural prolongation" signifies the shelf to be extending from one end to another. The coastal state is entitled to the entire shelf as a 'prolongation' of its land territory.

If the continental shelf is adjacent and contiguous to the coastal state, then this state is entitled to the entire continental shelf by virtue of the "adjacency criterion". There seems to be no doubt that the "natural prolongation" and the 'adjacency' criterion appear to be equally effective to the coastal state. That is to say, whatever is meant by the notion 'adjacency' the same may be meant by the expression "throughout the natural prolongation" of the land territory of the coastal state.

From a practical viewpoint, the approach of the term ' natural prolongation" is conservative compared to Article 1 of 1958 Geneva Convention concerning the term "continental shelf as referring simply to the "seabed and subsoil of the submarine areas" beyond the territorial sea.

5. 2. Outer Limit

5. 2. 1. Where the Continental Margin Does Not Exceed 200 n.m

Where the continental margin does not exceed 200 n.m, its outer limit is to be fixed at 200 n.m. It is needless to mention that in any circumstances the coastal state has liberty to prescribe the 200 n.m limit for the seabed and subsoil measuring from the baselines. That means, paragraph 1 of Article 76 has made the 200 n.m limit generally applicable for measuring the outer edge of the continental margin.

Peculiarity in the configuration of the bed of the sea is not unusual. It is true with each of the regions—shelf, slope and rise of the continental margin. That means, any of these regions existing in the adjoining sea may be zigzag, indented or broken. Where the continental margin does not exceed 200 n m, from the legal point of view, there is no bar for the coastal state to extend the margin up to this limit measured from the baselines[258]. That is to say, in all circumstances, the coastal state is entitled to extend the margin up to 200 n.m limit. In other words, the coastal state cannot be called in question unless the 200 n.m limit overlaps the other.

5. 2. 2. Where the Continental Margin Extends Beyond 200 n.m

The continental margin beyond 200 n.m may comprise of the shelf, slope and rise. If the continental margin beyond 200 n.m comprises of the slope or rise, then it is necessary to delineate "fixed points" on the foot of the continental slope. Therefrom, the location of the outer edge of the margin is to be determined.

5. 2. 2. 1. Delineation of Fixed Points

Regarding delineation of the fixed points, paragraph 4 of the article says :

> (a) For the purpose of this Convention, the coastal State shall establish the outer edge of the continental margin where the margin extends beyond 200 nautical miles 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 rock 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 nautical miles 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.

It signifies that the coastal state should delineate the seaward point of the margin on the basis either of the 'thickness' or the 'distance' criterion under paragraph 4(a) (*i*) (*ii*). Each of the criterion actually renders some limitation so that the coastal state cannot unscrupulosly delinenate the seaward fixed point for the extent of the continental margin. Moreover, paragraph 7 attributes some limitation which the coastal state should observe for determining the distance between the fixed points delineated under paragraph 4(a) (i) (ii). According to this paragraph :

> The coastal State shall delineate the seaward boundary of the continental shelf where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured by straight lines not exceeding 60 nautical miles in length, connceting fixed points, such points to be defined by co-ordinates of latitude and longitude.

That means, the prescription of this 60-mile maximum for the straight line system imposes an onerous burden upon the coastal state's resources, requiring as it does the identification of a series of fixed points[259].

It is a fact that determination of the foot of the "continental slope" presents some interpretational difficulty. Paragraph 4(b) allows considerable flexibility in the positioning of the line based on the nature of the 'evidence'. This 'evidence' could be morphological or geological. The definition of the continental slope appears to be

purely morphological and is based on geometrical concept associated with a margin profile, and this is the only aspect that has been considered in this study. The maximum change of gradient at its base (a word which is synonymous with foot) should be chosen to determine the foot of the continental slope. The drafting of foot of slope lines beyond 200 nautical miles on a world map at any scale thus raises a variety of defficulties[260].

The "1% percent thickness" and the "60 n.m distance" criteria cannot freely be applied for determining the outer edge of the continental margin. In this regard paragraph 5 says :

> 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 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2500 metres isobath, which is a line connecting the depth of 2500 metres.

Subject to paragraph 4(a) (i) the coastal state is entitled to extend the "continental margin" up to 350 n.m from the baselines or 100 n.m from the 2500 metre isobath. Actually the "360 n.m", "100 n.m cum 2500 meter", "1 percent thickness" and the "60 n.m" distance criteria can be treated as limitations imposed one upon another.

Regarding the "100 n.m cum 2500 metre" criterion, it can be stated that the countries bordering shallow seas may be more benefited than the countries bordering steep seas. It may not be surprising that the 2500 metre isobath may lie at a distance beyond 350 n.m. In addition, the coastal state is entitled to fix 100 n.m limit beyond this depth for the extent of the continental margin. Nevertheless, the criterion appears to be a limitation imposed on the coastal state adjoining a wide continental margin beyond 200 n.m.

If the continental margin beyond 200 n.m comprises of the continental shelf, the outer limit is to be determined subject to paragraph 8. According to this paragarph :

> Information on the limits of the continental shelf beyond the 200 nautical miles exclusive economic zone 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 geograpical 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.

The geological shelf beyond 200 n.m may be narrow or wide. Where the shelf is narrow, it would not be unreasonable if the coastal state takes interests in determining the outer limit subject to paragraphs 4—6. But where the shelf is wide say, it extends up to or beyond 350 n.m, then it may not be surprising that the coastal state will raise plea for the outer limit up to the continental margin or up to the end of the geological shelf.

In the circumstances, there is no doubt that the phenomenon of determining the outer limit is not an easy task for the "Commission on the Limits of the Continental Shelf.

5. 2. 2. 2. "350 n.m", "Thickness cum 60 n.m" and "100 n.m cum 2500 Metre" Criteria—Background and Practical Approach

The informal suggestion of different countries[261] have enabled the UNCLOS III to incorporate the "350 n.m", "thickness cum 60 n.m and the "100 n.m cum 2500 metre" criteria for the outer limit of the continental margin. The 350 n.m limit for the out edge of the continental margin measuring from the baselines practically represents a 150 n.m limit beyond 200 n.m. The Informal Suggestion by the Union of Soviet Socialist Republics[362] said of a 100 n.m limit for the outer edge of the continental margin extending beyond the 200 n.m EEZ.

The Informal Suggestion by Ireland[263] mentioned no specific mileage limit for measuring the outer edge of the continental margin beyond 200 n.m. It was mentioned that the outer edge of the margin should be measured either by 'thickness' or by "60 n.m" distance criteria as provided in paragraph 4(a) (i) and (ii) of Article 76 of the LOS Convention. The 350 n.m limit of Anguilar's compromise formula[264] as accomplished in the LOS Convention[265] shows that the Soviet Suggestion is not affected. Moreover, her 100-mile limit beyond the 200 mile economic zone has been enhanced by an extent of 50 n.m.

The 2500 metre isobath is related with some geological boundary of the seabed and subsoil of the submarine areas. In this context L. F. E. Goldie says :

Some writers who favour the narrow continental shelf have suggested what would appear to be a compromise between their position

and that of the broad-shelf advocates. Following these writers, the Commission on Marine Science, Engineering, and Resources, and its International Panel have proposed the definition and demarcation of an 'Intermediate Zone'. In brief, this is to be defined as a zone engrossing the areas beyond the two hundred metre isobath which the broad-shelf advocates claim should be included in the coastal state's zone of exclusive rights under the continental shelf regime. It should perhaps include the 'Continental Borderland' or 'Continental Terraces' of the seabed. In order to assure it a relatively fixed and certain definition, the International Panel has suggested the following lines of demarcation--it is recommended that the outer limits of the intermediate zone be defined in terms of the 2500 metre isobath or 100 nautical miles from the baselines for measuring the breadth of the territorial sea, whichever alternative give the coastal state the greater submarine area for the purposes for which the intermediate zone is created[266].

The work of Dr. Pecora of the United States Geological Survey showed that there is so "marked change of structure between the continental mass and the crust of the deep ocean basins---generally to be found at a depth of from between 2000 to 3000 metres---, that only here is there a "true geological" or "topographical boundary[267]. For this reason the Committee on Deep Sea Mineral Resources of the American Branch of International Law Association expressed to designate the 2500 metre isobath as a legal boundary for the outer limit of the continental shelf.

The 2500 metre isobath represents average depth of the continental terrace[268]. This suggests that the 2500 metre isobath may be treated as empirical fact for delineating the outer limit of the seabed and subsoil of the submarine areas for the coastal state.

But it may not be possible to ascertain that this depth line would enable one to deal with the outer edge of the continental margin uniformly. Goldie views that the geological boundary is said to exist as an empirical fact, one may be confined, therefore, that it does not exist in all places exactly at the 2500 metre isobath[269].

The LOS Convention has provided provisions for submarine oceanic ridges. According to paragraph 6 of Article 76 :

> Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles 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.

The extract is a product of several proposals put forward to limit the extension of the continental shelf in areas where there are submarine oceanic ridges[270]. The fact that submarine ridges may exist in any region of the oceans. If the submarine ridges exist beyond the 200 n.m continental margin, the coastal state would be entitled to exercise the regime of the continental shelf up to 350 n.m subject to paragraphs 4(a) (i) (ii) and 4. That means, the "submarine ridges" have been treated as if a component of the continental margin. Though "submarine elevations" are the "natural components" of the continental margin, the coastal state is not entitled to fix the outer limit. In fact, paragraph 6 also appears as a limitation to be observed by the coastal state for determining the outer limit of the continental margin.

The "350 n.m" and the "100 n.m cum 2500 metre" criteria can be regarded as maintaining a balance between the narrow and the broad shelf countries. But if the criterion "natural prolongation" is strictly followed, it would be difficult to restrict the coastal states to assert claims to the continental shelf exceeding 350 n m or 100 n.m from 2500 metre depth. The continental shelf beyond 200 n.m is assumed to be small[271]. A limited number of states may be concerned with the delimitation of the continental shelf beyond 200 n m. As a matter of fact, there is a total of 44 states having continental margins exceeding a width of 200 n.m but only six margins (including those of Australia, Canada, USA and USSR) exceed 350 n.m[272].

There is no doubt that the regime of the continental shelf has empowered the coastal states to exercise jurisdiction over a large part of the seabed. The consequent effect has led to the delimitation of the seabed between the coastal states.

6. Delimitation Provisions Concerning Opposite and Adjacent States : Practices and Applications

The topic "delimitation of continental shelf" received importance among the states, in particular, since the 1958 Geneva Convention. Soon after the Convention, agreements one after another came into being on delimitation of the continental shelf between to opposite or adjacent states.

6. 1. 1958 Geneva Provisions

According to Article 6 of the Geneva Convention :

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 appurtaining to such States shall be determined by 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.

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 nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

The term 'adjacent' here signifies the location of the state with the continental shelf. The shelf which is to be delimited between two states should be adjacent to each of the states. But the two states may either be opposite or adjacent to each other. The delimitation of the continental shelf between two states is to be effected by (i) agreement, (ii) median line/equidistance principle, and by the principle subject to (iii) special circumstances.

6. 1 1. Agreement

From Article 6 'agreement' can be treated as the means generally applicable to the delimitation of the continental shelf between opposite or adjacent states. But what principle should be given effect to the delimitation of the shelf between the states cannot be specified. There is no restriction to adopt any principle in the agreement on the delimitation. The median/equidistance or any arbitrary boundary line which was adopted in the agreement before or to be adopted at present or in the future would be unquestioned as to the delimitation. That means, the states concerned appear to be the master of delimiting the shelf by agreement between them. The impact of agreement is to help settle the boundary of the continental shelf between the states peacefully.

6. 1. 2. Median/Equidistance Line

In paragraph 1 the article has specified the "median line" for the boundrry of the continental shelf between two opposite states.

But in paragraph 2 it has said of the "principle of equidistance" to give effect to the boundary of the shelf between two adjacent states. This is applicable in the absence of 'agreement' and "special circumstances".

The "median line" and the line drawn on the principle of equidistance virtually do not make a difference between them. The fact is that every point on such a line situates at equal distance from the nearest points on the baselines of the coastal states. Actually the line fixed under the "principle of equidistance" may be regarded as one which leaves to each of the parties concerned all those portions of the continental shelf that are nearer to a point on its own coasts than they are to any point on the coast of the other party. An equidistance line may consist either of a "median line" between "opposite states" or of a "lateral line" between "adjacent states".

In considering a true median line boundary, it is essential to keep in mind that every point on each boundary must always be equidistant from the nearest points on the baselines from which the territorial sea is drawn. Unless this geometric principle is satisfied the resulting boundary will not be a true median line. And for purposes of drawing median lines, the baselines from which equal distances are measured may be the low-water lines, closing lines of bays, or straight baselines [273]. The technical construction for the boundary between two opposite or adjacent states is somewhat different [274].

The median/equidistance line cannot freely be applied for determining the boundary of the continental shelf between two states. In absence of 'agreement' and "special circumstances", the median/equidistance line can be made applicable to the delimitation. That is to say, under these circumstances the median/equidistance line can be effected as a residual means for the delimitation [275].

6. 1. 3. Special Circumstances

Article 6 as stated cannot specify the meaning of "special circumstances". It is difficult to determine what the 'special circumstances" exception means. A clue may be derived from the words "special and justify". These words imply that the exception should not be invoked unless the area in question has such a higher degree of unusual geographical configuration that one of the

adjacent states would suffer great injustice if its portion of the continental shelf were delimited according to the principles of equidistance.

But from the record it can be stated that exceptional geographical circumstances constitute the main category of "special circumstances"[276]. Even before the term had been introduced in the ILC, Professor Hudson quoted in an International Law Association (ILA) report, 1950, as having suggested that "factors such as the configuration of the coastline" should be taken into consideration[277]. Similarly the comments on draft Article 7 in 1953 ILC report referred to the need to make provision for "departures necessitated by any exceptional configuration of the coast[278].

Furthermore, at the 1958 Geneva Conference, the Venezuelan delegate referred to "special circumstances" such as were frequently imposed by geography[279]. Miss Whiteman (United States) spoke of the need to retain the special circumstances provision because of the "great variety of complex geographical situations[230]."

The most frequent cause of such an exceptional configuration is the presence of islands on the continental shelf. Professor Francois had already acknowledged in 1953[281] that a departure from the general rule would be necessary, for instance, when a small island opposite one state's coast belonged to another state. Accordingly, the commentary to draft Article 7 of the 1953 ILC report referred specifically to the "presence of islands" as a possible cause of special circumstances[232].

Commander Kennedy (United Kingdom)[283], supported by Miss Whiteman[284], proposed in the Geneva Conference that islands should be treated on their merits. Very small islands or sand cays on a continuous continental shelf and outside the belt of territorial sea might be neglected as basepoints for measurement and have only their own appropriate territorial sea. Iran[285] and Italy[286] favoured ignoring all islands on the continental shelf, but Miss Whiteman found this proposal too extreme "in view of the great variety of size, grouping and position of islands[287]."

Moreover, the proposal was that islands should be treated like enclaves, with separate continental shelf areas proportional to their size, thereby leaving unaffected the division of the areas between opposite coasts into equal parts by means of the median line[288].

But state practice provides a number of examples of the way in which deviations from a median line delimitation have been made to allow for special circumstances created by islands [289].

It is significant to mention that the existence of extensive sedimentary mud-flats apparently makes identification of the low-water line very difficult[290]. That means. in such cases it is difficult not only to fix the baselines for measuring different maritime zones but also to delimit the zones between the states concerned. The fact is that such cases in any event are described to have fully covered the reference to "special circumstances[291].

Where a state possesses special mineral exploitation right over some mineral deposit, the phenomenon may be subject to "special circumstances". To this end Professor Hudson alluded in thh ILC to "the economic value of proven deposits of minerals" as another factor suggested in the ILA Committee's 1950 report as being relevant to the issue of delimitation[292]. It is noticeable however, that no reference to mineral deposits was incorporated in the commentary to the ILC report in either its 1953 or its 1956 versions.

Where mineral deposits do not exist uniformly reference to equitable solution for delimiting the sea zones may arise. According ro Professor Brown :

> The existence of the deposit would scarcely seem to constitute a 'special circumstances', however, entitling coastal state to demand a deviation from the equidistance line. The only situation that would seem to justify reference to natural resources as constituting special circumstances is that where a coastal state had acquired exclusive rights to such resources independently of, and prior to, the development of the continental shelf doctrine. For example, if a state's exclusive right to exploit a sedentary fishery (falling within the definition of natural resources in the Geneva Convention) on the bed of the geological continental shelf had been established prior to 1945, there might be an argument for saying with Jessup, that it would be right to apply the *Grisbadarna* principle of refraining from modifying a settled state of things—or of regarding the existence of the sedentary fishery as a historical special circumstances[293].

If some right arising out of any situation has been the regular practice, then this right should be regarded as established in law, That is to say, it is better not to modify a "settled state of things".

It is rather better to regard this right as the "historic right". If this right is modified, there may arise friction between the claimants concerned. From this point of view, the "historic right" is considered as constituting "special circumstances". Judge Padilla Nervo said :

> In addition to special circumstances of a technical nature—navigable channels, cables, safety or defence requirements, protection of fisheries (fish banks), indivisible deposits of mineral oil, natural gas, etc, special geographical situations such as special coastal configurations have been regarded as 'special circumstances'[294].

As a matter of fact, in the *North Sea Continental Shelf Cases* the concave coast of the Federal Republic of Germany against the convex coasts of Denmark and the Netherlands enabled the Court to say that the delimitation should be effected subject to "special circumstances". The Court of Arbitration in the *Anglo-French Continental Shelf Case*[295] took note of the islands existing in the sea zones between the countries as constituting "special circumstances".

From these observations, it can be concluded that (i) the concave configuration of the coast of one country against the convex coast of its counterpart. (ii) the presence of islands, (iii) the peculiar underwater situations, and (iv) the geological, geomorphological and socio-economic issues[296] have references as constituting "special circumstances".

6. 2. 1982 LOS Convention

Article 83 of the LOS Convention deals with the delimitation of the continental shelf between two opposite or adjacent states. According to paragraphs 1 and 4 of the article :

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

It is clear from paragraph 4 that the 'agreement' in force between the states concerned should be given effect to the delimitation. In this regard, the article corresponds to Article 6 of the 1958 Continental Shelf Convention.

Generally according to paragraph 1 above, the delimitation of the continental shelf between two states should be effected by 'agreement'. As regards the 'agreement' it is necessary to take into account the (a) international convention, (b) international customs, (c) general principles of law, (d) judicial decisions and teachings of the publicists, and (e) *ex aequo et bono*. It seems that the article cannot specify what kind of the boundary line should be effective to the delimitation.

Actually it shows that no principle can be regarded as a predominant principle applicable to the delimitation. That is to say, the equidistance principle cannot be treated as a predominant principle to give effect to the delimitaton. The equidistance principle can be applicable if the delimitation of the continental shelf between the states is equitable.

As a matter of fact, the equidistance principle can lead to an "equitable solution" in the case of simple geographical configuration. According to Shigeru Oda :

> The equidistance line certainly offers one practical solution, but only where drawing this line actually results in an equitable apportionment of the continental shelf among the States concerned. The equidistance line, as such, hardly represents a workable principle for determining boundaries. It is simply a formula based upon fundamental concept of equitable apportionment, and it is successful only where an extremely simple geographical configuration exists [297].

It is a fact that equity is meant to serve as a catalytic force employed to keep rules in harmony with the dictates of justice[298]. As such, equitable delimitation by the equidistance line would lead to a justified delimitation. That is to say, the application of this line is aimed at leading to a justified delimitation. If the equidistance line cannot give effect to an "equitable solution", then this line cannot be applicable to the delimitation.

6. 2. 1. Special Circumstances V. Equitable Principles

A special circumstances calling for or warranting a departure from the equidistance method of delimitation : only the presence of some special feature, minor in itself—such as, an islet or small protuberance—but so placed as to procure a disprortionality distorting effect on an otherwise acceptable boundary would, so it was claimed, possesses this character[299].

In short, the role of the "special circumstances" condition in Article 6 of the 1958 Continental Shelf Convention is to ensure an equitable delimitation; and the combined "equidistance—special circumstances" rule, in effect, gives particular expression to the general norm that, failing agreement, the boundary between states abutting on the same continental shelf is to be determined on equitable principles[300].

The term "equitable principles" may generally be perceived but in practice it is difficult to apply[301]. In the view of Professor Brown, equity is a term which has used to convey many different meanings and there is therefore, considerable scope for argument as to the exact content of the term "equitable principles"[302].

As far as Article 83 is concerned, the impact of the delimitation of the continental shelf between two states is to make the apportionments equitable. But the "equitable solution" does not mean that the apportionments between the states should be equal. To this end, it can be mentioned that :

> Equity does not necessarily imply equality. 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 alloted an area of the 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. But in the present case there are three states whose North Sea coastlines are in fact, comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these states treatment equal or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of equality within the same order, an inequality is created[303].

Actually equitiy is associated with flexibility rather than rigidity, which tends to be associated with law[304]. However, principle such as equidistance or proportionality tend to be regarded as equitable principles, although they are also legal principles inasmuch as equity is a part of the law[305]. As a general rule, it is not convenient to apply equity to any situation. But its role in settling disputes is significant. According to Ian Brownlie :

> The focus is upon equitable principle, that is to say, principles which, in spite of designation of equity, have, or are intended to

> have, the same form and purpose as other principles applicable—in a legal context. The role of equitable principles in international law is undoubted. In the first place, concepts of equity and consistency appear as a natural part of legal and therefore of juridical meaning[306].

According to Article 6 of the 1958 Convention, the delimitation of the continental shelf in the case of "special circumstances" is to be effected by equitable principle. In so doing, the boundary should be the line other than the equidistance line. But in all circumstances, Article 83 of the LOS Convention suggests that the delimitation should result in an "equitable solution". In the light of this, any kind of boundary can be taken into effect.

If the equidistance line does not result in an equitable apportionment, then the state suffering would raise the plea that the delimitation should be effected subject to the "special circumstances". The Feperal Republtc of Germany in the *North Sea Cases*[307] raised pleas against the application of equidistance line for the delimitation of the continental shelf with Dermark and the Netherlands. The Federal Republic's most cogent argument against applying this method was that it would not result in an equitable apportionment because of the particular configuration of the sea areas under dispute. It was pointed out that the German sea coast is recessed but the coasts of Denmark and the Netherlands curve outward. As a result, a disproportionately small part of the North Sea continental shelf would come under German jurisdiction if the equidistance method was applied[308].

From a practical point of view, the German plea was taken into consideration. Because the Court regarded the equidistance method not as obligatory to the states However, the Court rejected the German approach of just and equitable apportionment. The Court also rejected the Danish-Netherlands contention that the equidistance principle—special circumstances rule was to be considered part of the customary international law[309].

The Court in the *Anglo-French Continental Shelf Arbitration* (1977) assumed equidistance to be the applicable rule in the non-controversial areas, and also in the narrow waters between the Channel Isles and the French mainland, the Court modified rather than rejected equidistance[310]. As far as the Islands' region was

concerned, the Arbitration Court's decision involved an interesting equitable solution which neither party entirely had asked for [314].

To date there has come into being a number of agreements on the delimitation of continental shelf between opposite and adjacent coastal states. From these agreements it will be known that no rule has been practiced uniformly. The delimitation has been effected by different types of boundary lines.

6. 2. 2. Achievements from Agreements

It is worth noting that the treaty between the United Kingdom and Venezuela on the Gulf of Paria, 1942 is one of the first of its kind regarding delimitation of the submarine areas between two states. The treaty referred solely to the Gulf. Nothing in regard to the status of islands, islets or rocks above the surface of the sea was considered in the delimitation. The delimitation was effected simply by "mathematical half" formula [312]. Argentina and Chile have settled Beagle Channel dispute by agreement on 18 October 1984 [313].

The agreement between Bahrain and Saudi Arabia is of interest as representing the first attempt in the Persian Gulf with the proposal of the International Law Commission, later incorporated into Article 6 of the Convention on the Continental Shelf for the delimitation by agreement of the continental shelf of states whose coasts are oposite to each other [314]. The delimitation of the continental shelf boundary between the two countries employ a variation of the equidistance principle. The boundary line is not a median line based on the configuration of the coastline, but rather a line midway between predetermined landmarks on both Bahrain and Saudi Arabian territory.

Kuwait and Saudi Arabia by agreement divided the neutral zone into equal parts [315]. In delimiting the off shore zone Abu Dhabi and Dubai did not depend on any principle. The delineation was effected by their own agreement [316]. The 1960 agreement on the continental shelf boundary between Iran and Saudi Arabia made some modification of the media line agreement initiated by the two countries on 13 December 1965 but never ratified. The 1965 agreement was never ratified because of the reluctance of the Iranians, who apparently felt that the agreement did not provide an equal

division of the seabed resources ; this view predominated after new mineral resources were discovered in the northern zone of the continental shelf boundary[317]. Although the continental shelf boundary is not precisely a median line in its entirety, there is an effort to approach such a line wherever feasible[318].

From the subject matter, the agreement appears to have deviated from the stringency of equidistance principle. As a matter of fact, there is no doubt to say that delimitation of the submarine areas between the countries took place in harmony with the judgment of the International Court of Justice in the *North Sea Cases*[319].

The agreement regarding delimitation of the continental shelf boundary between Abu Dhabi and Qatar does not contain a specific treatment of an island problem. The two terminal points of the boundary are equidistance points, but one point coincides with an oil-well and there is a special treatment of the island of Dyyinah, which the agreement aknowledges to be under the sovereignty of Abu Dhabi. This treatment is to distort the straight line by an arc of 3-mile territorial sea round the island. However, the Qatar Island of Sharaiwah is about 6 miles from Dyyinah so that this is really another version of a local median line between two opposite islands[320].

The Iran-Qatar continental shelf boundary based on the equidistance principles, with the exception that the presence of all islands in the Persian Gulf was disregarded[321]. The agreement between Bahrain and Iran is not based soley on the equidistance principle[322]. Such a trend was identically followed in the agreement between Iran and Oman. It gave emphasis to just, equitable and precise manner in accomplishing the boundary line between the respective areas of the continental shelf[323]. The boundary agreement between Iran and the United Arab Emirates regarding the boundary line for the continental shelf also was not based on the equitable principle[324].

The agreement between Netherlands and United Kingdom[325], Norway and United Kingdom[326], Denmark and Norway[327], Denmark and United Kindom[328] and Denmark and Netherlands[329] adopted equidistance principle for delimittng the continental shelf. Furthermore, the Netherlands and the United Kingdom provided provision giving effect to the deviation of the equidistance line for

the delimitation of the continental shelf between them. This was actually made to help exploit the resources of the shelf between the countries. In this regard Article 1 of the agreement[330] says :

> If any single geographical mineral oil or natural gas structure or field extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line, the contracting Parties will seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited.

It shows that no boundary such as the equidistance line was treated as binding upon the parties.

The equidistance method was incorporated in the agreement of 1 December 1964 between the Federal Republic of Germany and the Netherlands for the delimitation of the continental shelf up to 54·N latitude[331]. The agreement of 9 June 1965 between Denmark and Federal Republic of Germany[332], governing a small part of the Gulf in the immediate vicinity of the two states, contains an identical provision but for a larger area no solution could be found during the negotiations in 1965 and 1966, and so, early in 1967 it was decided by special agreement between Denmark and Federal Republic of Germany[333] and between Federal Republic of Germany and Netherlands that their disputes would be settled by the International Court of Justice[334].

The Federal Republic of Germany signed treaties in Copenhagen and the Hague on 28 January 1971, whereby disputes were finally settled between Denmark and the Federal Republic of Germany on the one hand[335] and between the Federal Republic and the Netherlands on the other[336], regarding the delimitation of the North Sea Continental Shelf. These treaties which had been initiated on 30 October 1970, followed the judgment of the International Court of Justice on the continental shelf of 20 February 1969. According to the judgment the area of the continental shelf originally alloted the Federal Republic of Germany comprised 23700 square kilometres, this was expanded by 35600 square kilometres by the cession of about 5000 square kilometres on the part of the Netherlands and of about 7000 on the part of Denmark zone to adjoin the British area in the centre of the North Sea[337]. The judgment brought forth some deviation of the equidistance principle as provided in the above agreement for delimiting the continental shelf in the North Sea.

The agreement of Denmark and the Netherlands with the Federal Republic of Germany followed the ruling of the Court. Accordingly the delimitation should be effected subject to a "reasonable degree of proportionality--between the extent of the continental shelf appertaining to the states concerned and the length of their respective coastlines[338].

In consequence of the judgment the boundary of the continental shelf bordering the British zone under the North Sea though remained unchanged, Denmark[339] and Netherlands had to make amendments to their earlier agreement with the United Kingdom[340]. As a result, the Federal Republic of Germany was required to enter into an agreement with the United Kingdom[341].

Finland and Soviet Union delimited the continental shelf by the boundary line drawn according to the agreement between them[342]. The two countries determined the boundary of the continental shelf in the Baltic Sea by median line as adopted in the agreement[343]. In 1969 the agreement enforced between Norway and Sweden concerning the delimitation of the continental shelf basically provided the principle of equidistance for measuring the shelf between the countries, but from the strict point of view, the principle could not be exercised[344].

The three countries German Democratic Republic, Poland and the Soviet Union agreed the continental shelf to be determined by bilateral or multilateral treaty[345]. Poland and Soviet Union[346] determined the boundary of the continental shelf in the Gulf of Gdansk and the southeastern Baltic Sea by the line equidistant from the nearest points of the baselines from which the breadth of the territorial waters of each of the contracting Parties is measured. Furthermore an insignificant division of the equidistance line was given effect to the delimitation.

The agreement between Italy and Yugoslavia prescribed some lines not being based on the true equidistance line. Article 1 of the agreement speaks of the validity of a deviation from the equidistance principle applicable to the delimitation[347].

An agreement between Italy and Tunisia of 20 August 1971 is of extreme interest[348]. It prescribed a boundary some 13 miles seaward where the Italian islands of Lampione, Lampedusa, Linosa and Pantellaria face the Tunisian coast. The choice of 13

miles indicates an intution to accord the island same shelf, outside the 12-mile territorial limit, but of course, the solution is not a strict median line solution[349].

France and Spain on 29 January 1974 signed two agreements on the delimitation of their continental shelf and territorial waters in the Bay of Biscay. Under the agreements, the first which France had signed on her continental shelf, the seabed and subsoil of which she already permitted to exploit under the 1958 Geneva Convention—the dividing line would begin at French—Spanish border at Irun-Hendaye, bisecting the virtual right angle formed by the coasts of France and Spain, and then running almost parallel to the northern coast of Spain for about 300 kilometres. A special zone was established, some 5 kilometres square, in which the two countries would co-operate in the exploitation of hydrocarbon resources[350]. Maritime delimitation agreement between the Government by His Most Serene Highness the Prince of Monaco and the Government of the French Republic has been effected on 16 Feberary 1984[351].

Canada and Denmark by their agreement of 1974 established the dividing line in the area and the Canadian Arctic Islands for the purpose of each Party's exploration and exploitation of the natural resources of that part of the continental shelf which in accordance with international law appertains to Denmark and to Canada respecting, is a median line which has been determined and adjusted by mutual agreement[352].

The Senegal-Guinea-Bissau agreement of 26 April 1960[353] does not adopt an equidistance line, nor do the many islands off the Guinea-Bissau shore influence the boundary. The boundary is a straight line, projected seaward from the land boundary along 24.0 azimuth, A somewhat similar method is seen in the Colombia-Ecuador agreement of 23 August 1975[354], in that the boundary is a straight line projecting from land boundary along the geographical parallel 1·27'24 N.

The agreement between Brazil and Uruguay, 21 January 1972 provides a rhumb line (a straight line on a projection) from the land boundary, but "in a direction nearly perpendicular to the general line of the coast" (the words used in the agreement) so. that, in effect, the line is a modified equidistance line. It should be noted that there are no off-shore islands to complicate matters in this case, nor in the case of the Colombia-Ecuador agreement[355].

The Argentina-Uruguay agreement, 19 November 1073, is similary uncomplicated by islands and adopts a straight line which is a projection at right angles from the midpoints of a straight closing line across the estuary of the Rio de la Plata. The boundary is described in Article 70 as an equidistance line, determined by the adjacent coasts method[356].

An agreement between Japan and the Republic of Korea (South Korea) for the joint development of the continental shelf adjacent to the two countries was signed in Seoul on 5 February 1974. Described by the Korean Newsreview (Seoul) as the "first case of joint development of a continental shelf in the history of world", the agreement provided for the joint exploration and exploitation by the two countries of the seabed of the continental shelf, where large quantities of petroleum and natural gas are believed to exist. The Joint Development Zone covers an area of 1000000 square kilometres lying south-east of the Korean peninsula and west of Kyushu the southern-most of the main islands of Japan, the area in question being divided into nine subzones[357]. Maritime borders have been effected between Kampuchea and Vietnam by agreement in 1984[358].

The continental shelf boundaries between Indonesia and Malaysia in the straits of Malacca and the South China were fixed by geographic co-ordinates[359]. The two countries provided provision similar to Article 1 of the 1965 agreement between the Netherlands and the United Kingdom[360]. That is to say, the equidistance line cannot be regarded to have been followed strictly in the agreement. According to the 1971 agreement[361], Indonesia, Malaysia and Thailand decided to measure the respective area of the continental shelf by means of straight lines extending from a common point whose co-ordinates are Latitude 5.57'N and Longitude 98 01'E, The median or equidistance line was not considered to be the sole basis for delimiting the continental shelf. Similar to this agreement, Australia and Indonesia delimited the seabed by agreement in 1972 [362].

The 1974 agreement[363] between India and Sri Lanka concluded the historic waters to be delimited between them on the principle which would be "fair and equitable" to both sides. India and Indonesia redefined their respective sea boundaries extending the

existing median line 48 n.m of the coast of both the Nicobar Islands (India) and Sumatra (Indonesia) (established under a 1974 agreement) north eastwards into the Andaman Sea (towards the Island of Kra) to a possible tri-junction point between the waters of India, Indonesia and Thailand, and south-westwards into the Indian Ocean up to a distance of 200 miles from the two countries' respective coasts. Each country would be able to exercise sovereignty and exclusive jurisdiction over the continental shelf and to exploit or explore seabed resources falling on its own side of the agreed boundaries [364].

Maldives and India came into an agreement on the delimitation of maritime boundaries from the tri-junction point with Sri Lanka along the median line between the west coast of India and the Maldives and between Minicoy Island in the Lakshadweep archipelago and the northern atoll of Jhavandiffulu in the Maldives, extending westwards into the Arabian Sea up to 200 n m (320 kilo metres) from Minicoy and the western atoll of the Maldives. According to the agreement, each party would have sovereignty over all the islands on its own side [365]. India and Thailand determined the seabed bouudary in the Andaman Sea in 1978. The delimitaion of the seabed between them was effected by straight lines joining some geographical co-ordinates [366].

The agreement between India, Indonesia and Thailand resolved the tri-junction point and delimited the related boundaries of the three countries [367] in the Andaman Sea in the year 1979. Article 4 of the former agreement and 3 of the latter equally provided the geological petroleum or natural gas structure or other mineral deposit of any character, if at any time, extending across the boundary lines, the three Goverments decided, such structures, field or deposit to be equally shared by the agreement to be reached in the future. New Delhi Radio announced on 13 March 1984, that a draft agreement had been initiated in New Delhi by India and Burmese officials on the delimitation of the two countries' maritime border in the Bay of Bengal, the Andaman Sea and the Coca Channel [367].

From the above discussions, it can be concluded that the equidistance principle was applied in different agreements not as the only principle for delimiting the continental shelf between

opposite and adjacent states. Actually the equidistance line was adopted in the agreement where the delimitation of the continental shelf by this line resulted in an equitable solution.

6. 2. 3. Claims to the Continental Shelf and the EEZ—An Analysis

It has already been known that different problems arise out of the regime of the continental shelf and the EEZ. As regards the continental shelf, the right of the coastal state is concerned with the natural resources. That is to say, the coastal state is entitled to exercise over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources[369]. The rights of the coastal state are exclusive "in the sense that if this State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without express consent of the coastal State"[370].

The legal regime of the continental shelf is governed by international customary law and for the practice to it by the Geneva Convention on the Continental Shelf, 1953. Both internatinnal customary law and the Continental Shelf Convention confer upon the coastal state sovereign and exclusive rights for the purposes of exploration and exploitation of the natural resources of the continental shelf.

As has been stated, at present the regime of the continental shelf practically deals with the seabed and subsoil beyond the 200 n.m EEZ, because within the 200 n.m EEZ the regime of the continental shelf can be treated as part of the EEZ[371]. That means, within the 200 n.m EEZ whether there exists or does not exist the continental shelf, the coastal state is entitled to explore the seabed and subsoil and exploit its resources—both living and non-living.

As a matter of fact, the coastal state is entitled to exercise sovereign rights over all the resources of the EEZ. Neither the Continental Shelf Convention nor the LOS Convention can specify whether it is possible for the coastal state to assert claims to the continental shelf or the EEZ as belongimg to its territory. But by implication[372], it seems that the coastal state is required to exercise sovereign rights over the resources only. In other words, neither the Continental Shelf Convention nor the LOS Convention has given authority to the coastal state to regard the continental

shelf or the EEZ as sovereign part of its territory. But in several cases the principle is not observed in practice.

The situation can be clarified by examples. In the year 1950 Pakistan declared the continental shelf extending to the one hundred fathom contour into the open sea to be included in its territory [373]. The Korean proclamation specified the continental shelf to be treated as part of its territory [374].

Full sovereignty over the continental shelf is claimed explicitly in some proclamation, such as those of Argentina. Chile, Peru, Costa Rica, Nicaragua, Honduras and El Salvador. The same applies to the Brazillian decree of 1950, which declares the incorporation in the national territory of that part of the seabed which corresponds to that territory. Apart from this, Argentina, Brazil, El Sanvador and Peru are exercising 200 n.m territorial sea.

So far as is known, fourteen states are claiming a 200 n m territorial sea [375]. The states such as Chile, Costa Rica, Honduras, Korea and Pakistan are not claiming a 200 n.m territorial sea but are claiming the continental shelf as a sovereign part of the land territory. From this observation, it is feared, how long the 200 n.m EEZ will be in practice in its entirety. It will not be surprising if, with the passage of time, coastal states come to regard the 200 n.m EEZ as territorial sea.

Speaking generally, the continental shelf within the 200 n.m EEZ cannot be regarded as belonging to the territory of the coastal state But while the 200 n.m sea zone is treated as the territorial sea, it is then immaterial to point out that the continental shelf lying in this zone is a part of the coastal state. In fact, the regime of the continental shelf for the states who are claiming a 200 n.m territorial sea can be applicable if there exists either the shelf, slope or the rise beyond this zone.

In this regard if the UNCLOS III is applicable, then the coastal state will have to determine the outer limit of the continental margin subject to Article 76 of the LOS Convention. But as has been stated, the fixation of basepoints for measuring the outer limit of the continental margin, practically will not be an easy task.

According to the LOS Convention the continental shelf is to be considered as the "natural prolongation" of the coastal state.

This criterion has resulted in conflict among the states as to the delimitation of the continental shelf lying in the coastal sea concerned. As has been mentioned, while in the *North Sea Continental Shelf Cases*, 1969 the continental shelf was regarded as "natural prolongation", the United States began to assert claims to the shelf lying in the Gulf of Maine as its "natural prolongation" [376]. In the Aegean Sea the *Greek-Turkey* conflict appears to be centred upon the assumption of claiming the continental shelf as "natural prolongation" one against another [377]. Iceland and Norway seem to have fallen in conflict equally. In order to settle the conflict, the two countries referred it to the conciliation Commission [378]. It has been revealed by the Conciliation Commission that "geologically Jan Mayen Ridge is a microcontinent that predates both Jan Mayen and Iceland which is composed of volcanics ; therefore, the ridge is not considered a "natural geological prolongation of either Jan Mayen or Iceland" [379].

Anyway, it cannot be concluded that in the application of "natural prolongation" criterion for the continental shelf, there will arise no conflict between the states.

7. 2. 4. **Issues arising out of the New-Born Islands**

With the development of the law of the sea, the regime of islands is also developing. The LOS Conferences provided certain provisions for the regime of islands [380]. The LOS Conferences can deal with different maritime zones of islands.

Islands may emerge near and off the coastal state. They may emerge in any part of the sea. The LOS conferences cannot deal with the ownership of the islands even they rise in different maritime zones. In effect, the regime of islands is subject to the international custonary law.

If any formations rise in rivers, lakes, or within the territorial sea, they are, according to the law of Nations, considered accretions of the neighbouring land. No other state can overlap its claim. Islands may be formed in the coastal sea out of the alluvial deposits brought down by the river flowing through the territory of the neighbouring coastal state. The coastal state may have some consistency in such formations [381].

The basis of claims over the islands in the territorial sea is subject to its sovereignty in this sea. But if the islands rise on the

high seas outside the territoral sea, they belong to no state and may be acquired through occupation on the part of any state[382].

As regards the acquisition of an island formed in the coastal sea, an instructive example is the case of *The Anna*[383]. In 1805 during, war between Great Britain and Spain, the British privateer *Minerva* captured the Spanish vessel the *Anna* near the mouth of the river Mississippi. When the *Anna* was brought before the British Prize Court, the United States claimed her on the ground that she was captured within the American territorial waters. Lord Stowell gave judgment in favour of this claim, because, although it appeared that the capture did actually take place more than three miles off the coast of the continent, the place of capture within three miles of some small mud islands composed of earth and trees which had drifted down into the sea.

It is not clear from the judgment whether the mud island arose within the territorial water, nor does it seem to have considered relevant by Lord Stowell. The point was that "they are the natural appendages of the coast on which they border, and from which, indeed, they are formed". Lord Stowell in his judgment stated :

> If they do not belong to the United States of America, and other Power might occupy them, they might be embanked and fortified. What a thorn would this be in the side of America ! It is physically possible at least that they might be so occupied by European nation, and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil[384].

The impact of the judgment appears to have given priority to the adjoining United States for its dominion over the island formed in the coastal sea. But whose is the island if formed in the EEZ or on the continental shelf ? Neither the regime of the EEZ nor the continental shelf nor the islands can solve it. If the coastal state is only entitled to the ownership of the islands emerged in the territorial sea, then the islands rising in the EEZ or on the continental shelf would be as if rising in the high seas. No state, then

can claim the islands so emerged unless it can occupy them effectively. It signifies that the position of the coastal state concerned is equal to any other state.

The rights of the coastal state over the continental shelf do not depend on occupation, effective or notional[385]. But if an island surfaced on the continental shelf is occupied by an alien state, this state would have sovereign rights under the regime of continental shelf. The coastal state cannot claim such rights unless the island is effected by occupation. As regards these islands, it seems that the occupation criterion is practicable for the regime of the continental shelf.

Before the emergence of the continental shelf doctrine, the coastal state was entitled to safeguard its interests in the territorial sea. But from the economic point of view, the coastal state at present can safeguard interests in the EEZ and the continental shelf more than in the territorial sea. According to the LOS Conferences the coastal state is entitled to exercise sovereign rights over the resources in the EEZ and the continental shelf. To this end, no state can overlap the coastal state.

Then it would not be rational to substantiate the claims of an alien state over the islands formed in the EEZ or on the continental shelf of a coastal state. If occupation criterion is the deciding factor, then the ownership of the islands would be subject to the physical force. Therefore, it is easy for the big and strong state to assert claims to the islands by physical force against its small and weak neighbour.

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10 The continental shelf is a bearing of the following : Width : Average : 42 miles (67.6 kms). Range : Less than 1 mile to over 750 miles. Depth (outer edge) : Average : 436 feet (133 metres). Range : 164-1804 feet (50-550 metres). General range : 436-656 feet (133-200 metres). See E. D Brown, *The Legal Regime of Hydrospace* (1971), Stevens, 77-79.

11 The continental slope comprises the following : Width : Average 10-20 miles (16. 1-32.2 kms). Range ; 9.3-50 miles (15-80 6 kms). Depth (outer edge) : Average : 5998.4 feet (1830 metres or 1000 fathoms). Range : 3189-16400 feet (1600-5000 metres). Gradient : Common range : 2-6°. Average : 1 : 14 (4). *Ibid.*

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13 The continental rise conforms the following : Width : Range : May be as much as 620 miles (1000 kms) Depth : Range : 4920-16400 feet (1500-5000 metres) Gradient : Less-than 1 : 40 (about 1.5°) down to 1 : 1000. Thickness : may be 0.5 6. miles 91-10 kms). See E. D. Brown, 78 ; M. K. Nawaz, "Alternative Criteria for Delimiting the Continental Shelf", 13(1973) IJIL 25-40, 28.

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244 See R. Y. Jennings "The Limits of Continental Shelf Jurisdiction Some Possible Implications of the North Sea Case Judgment", 18(1969) ICLQ 829.

245 Colombia, Mexico and Venezuela : Draft Articles for a Treaty on Territorial Sea, Article 13. UNDoc. A/AC. 138/SC. II/L. 21, 2 April 1973. 12(1973) ILM 571,

246 Union of Soviet Socialist Republics: Rough Draft of Basic Provisions on the Question of the Outer Limit of the Continental Shelf, UNDoc. A/AC. 138/SC. II/L. 26, 13 July 1973. *Ibid.*, 1213. The draft formulated the outer limit of the continental Shelf to extend either at 100 n.m from baselines or 500 metre isobath.

247 China : Working Paper on Sea Area within the Limits of National Jurisdiction. UN. Doc. A/AC. 138/SC. II/L. 34, 16 July 1973. *Ibid.* Accordingly, the continental shelf beyond the territorial sea or the economic zone was suggested to be determined through consultations among the states.

248 Netherlands : Proposal concerning on Intermediate Zone. UNDoc. A/AC. 138/SC. II/L. 59, 17 August 1973. *Ibid.* 1271. Article 1 of the proposal enshrined the continental shelf to be extended not exceeding 200 metre isobath or 40 n m measuring from the baselines. Where the 200 metre isobath for the shelf does not reach 40 n.m, the article enables to extend the shelf up to 40 n.m.

249 United States of America : Draft Articles for a Chapter on the Economic Zone and the Continental Shelf, Article 22. UNDoc A/CoNF. 62/C. 2/L. 47. 3(1974) UNCLOS III OR 224

250 Bangladesh : Territorial Waters and Maritime Zones Act (No. XXVI) of 1974, Section 7(a). 2334 *The Bangladesh Gazette Extraordinary*, 14 February 1974, Part V.

251 India : Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, Section 6(1) (No. 8) of 1976. *The Gazette of India Extraordinary*, No. 121 New Delhi, 26 August 1976.

252 Article 62. 4(1975) UNCLOS III OR 162.

253 Article 64 5(1976) UNCLOS III OR 164.

254 Article 76. 7(1977) UNCLOS III OR 16.

255 The formulation of the provisions concerning the outer edge of the continental shelf was a difficult job for the UNCLOS III. At

the eighth session, New York (19 July—24 August 1979) of the Conference progress was made in a newly established smaller group of 33 on the compromise formula put forward by Andres Anguilar (Venezuela), Chairman of Negotiating Group 6, on the outer limit of the continental shelf and revenue sharing. The Group was able to set up a compromise formula over the Soviet (Doc. 2/Informal Meeting 14 dated 27 April 1978) and Irish (Doc. N. 66/1 dated 1 May 1978) proposals. The compromise formula came into being in the Draft Convention. See 11(1979) UNCLOS III OR 123-124 ; Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea : The Seventh Session (1978)", 73(1979) AJIL 1-41, 19-21, R. P. Bartson and P. W. Birnie (eds), *The Maritime Dimension* (1980) 165 ; 10(1978) UNCLOS III OR 2, 83-87.

256 See pp. 169-190.

257 E. D. Brown, "Delimitation of Offshore Areas : Hard Labour and Bitter Fruits at UNCLOS III", 5/3(1981) *Marine Policy* 175.

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259 The North Sea Continental Shelf Cases (1969) ICJ Judgment, para. 19. 8(1969) ILM 357.

260 There are basically three types of slopes. (i) Slopes connecting a shallow shelf and normal deep ocean floor. These may cross terraces, ridges, canyons, etc. which give rise to rapid changes of gradient. (ii) Slopes concerning a shallow shelf and extra-deep ocean floor in oceanic trenches. The region between the shelf edge and the axis of the trench may contain ridges parallel to the trench axis giving rise to general reversals of gradient in profiles. (iii) Slopes from shallow shelves to normal deep ocean floor, interrupted by areas of intermediate or shallow depth. Preliminary study indicates that examples of these types, especially of the third type, occur outside the 200 mile limit. See Study of the Implications of Preparing Large Scale Maps for Third United Nations Conference on the Law of the Sea in UNDoc. A/CONF. 62/C. 2/L. 99. 11(1979) UNCLOS III OR 122.

261 See p. 171.

262 See 11(1979) UNCLOS III OR 124.

263 Paragraphs 1, 2, 4 and 7 of the Article 76 of the LOS Convention correspond with paragraphs 1, 2, and 3 of the Informal Sugges-

tion by Ireland (Doc. NG/1 dated 1 May 1978). See 11(1979) UNCLOS III OR 123.

264 See n. 265.

265 Article 76(5).

266 L. F. E. Goldie, "The Management of Ocean Resources : Regime for Structuring the Maritime Environment" in Cyril E. Black and Richard A. Falk (eds), *The Future of the International Legal Order* 4(1972) 187.

267 L. F. E. Goldie, "Where is the Continental Shelf's Outer Boundary" ?, 1(1969-70) JMLC 468.

268 E. D. Brown, *The Legal Regime of Hydrospace* (1971) 39, n. 155 ; John L. Mero, "A Symposium on the Geneva Conventions and the Need for Future Modifications" in Lewis M Alexander (ed), *The Law of the Sea-Off-Shore Boundaries and Zones* (1967) 293-295, 204.

269 L. F. E. Goldie, "Where is the Continental Shelf's Boundary" ?, 1(1969-70) JMLC 462.

270 The Soviet Union proposed that only the 350 mile criterion should apply in such areas. A proposal by Argentina, Australia, Canada, India, Ireland, New Zealand, Norway, the United Kingdom and Uruguay regarded the submarine ridges as long, narrow submarine elevations formed by oceanic crust, and it was formulated that in areas of such ridges, the outer limit of the continental shelf should not exceed a distance of 350 miles. Bulgaria proposed that the extension of the continental shelf on the basis of depth and distance would be subject to the shelf not being extended to submarine oceanic ridges. Japan suggested that ridges formed of oceanic crust should be excluded from the definition of the continental margin as well as the ocean floor and the subsoil thereof. Singapore proposed the deletion of the combined depth—distance criteria, so that only the 350 mile outer limit would apply. See *United Nations Press Release SEA/375, 24 August 1979 : Eighth Session (Second Part) of Third UNCLOS*, New York, 19 July-24 August 1979, 12-13.

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272 See Wolfgang Graf Vitzthum, "Peaceful Change Through International Lawmaking" 23(1981) *Law and State* 32, n. 17 According to Charles Fincham and William Van Rensburg

(*Bread Upon the Waters*, 1960, 222) the continental margin of 31 states exceed 200 nautical miles.

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282 Report of the ILC to the General Assembly, 8 UNGAOR Supp. (No. 9) 16 UNDoc. A/2456(1953) Add. 1(1959).

283 6(1958) UNCLOS I OR, C. 4 (32nd Meeting) 93, 93, UNDoc. A/CONF. 13/42(1953).

284 *Ibid.*, 95.

285 *Ibid* (31st Meeting) 91, 92. Iran : Proposal, UNDoc. A/CONF. 13/C. 4/L. 60(1958), reprinted in 6(1958) UNCLOS I OR, C. 4 Annexes 142, UNDoc. A/CNF. 13/42(1958).

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349 Pantellaria is 38 miles from Tunisia (and 54 from Sicily) ; Lampione is 60 miles from Tunisia (and 118 from Sicily). Note that the Tunisian islands of La Galita, which lies 20 miles off the Tunisan coast, seem to be taken fully into account. *Ibid.*

350 See (1974) KCA 26377.

351 Maritime Delimitation Agreement between Monaco and France, 9(1987) *Law of the Sea Bulletin* 58-60.

352 Canada—Denmark : Agreement on the Delimitation of the Continental Shelf between Greenland and Canada, signed at Ottawa, 17 December 1973, enforced on 13 March 1974. 13(1974) ILM 506.

353 The agreement originally took place between France and Portugal but it is presumed to be operated between Senegal (independent 1960) and Guinea-Bissau (independent 1975) as successor states. See D. W. Bowett, 179.

354 *Ibid.*

355 *Ibid.*, 180.

356 *Ibid.* See also (1973) KCA 26233 ; Shigeru Oda, *The International Law of the Ocean Development—Basic Documents* 2(1972), A.W. Sijthoff 72.

357 Japan—South Korea : Agreement on Joint Development of Continental Shelf. See (1974) KCA 26396 ; Shigeru Oda, *Ibid.*, 95.

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369 1958 Continental Shelf Convention, Article 2.

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371 *Supra.*, 168.

372 See 1958 Continental Shelf Convention, Articles 2, 3 ; 1982 LOS Convention, Articles 77, 78.

373 *Supra.*, 148.

374 *Ibid.*

375 E. g. Argentina, Benin, Brazil, Cameroon, Colombia, Congo,

Ecuador, El Salvador, Ghana, Guinea, Liberia. Peru, Sierra Leone, Somalia. See Robert B. Krueger, Myron H. Nordquist, "The Evolution of the 200-mile Economic Zone : State Practice in the Pacific Basin", 19/2(1979-80) *Virginia Journal of International Law* 321-398.

376 See chapter VI, 3, 1.

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CHAPTER VI

SETTLEMENT OF MARITIME BOUNDARY DISPUTES

1 General Approach

Law is not an end in itself. If law would be an end, there would arise no dispute about it. But the disputes are not unprecedented almost in every field of domestic and international law. International disputes frequently become acute because, in default of rules of international law, the parties have no basis of agreement and their views are in complete opposition. Such disputes, persisting year after year, are indeed not without danger to the parties, even though they have for their object questions in themselves insignificent[1].

A state is regarded to be a political institution, and all questions affecting in as a whole, in particular in its relation with other states, appear to be important[2]. As regards the sovereignty of a state in its external sphere of activity, that is, in the relations between the sovereigns of different states, it is necessary to rest upon the assumption that these sovereigns are equally independent[3]. But the states in many respects differ one from another. They differ geographically, geologically, geomorphologically, economically, ideologically, theologically, linguistically, culturally and in other matters. According to Charles G. Fenwick :

> What a strange world of nations! Geographically, some large, some highly developed, some underdeveloped ; some with vast natural resources, some with scarcely enough arable land to feed their people; politically, some highly organized, with historic traditions and stable governments, others with little national unity and conflicting elements with no bond of common interest. How did such diversities come about, and can a world of law and order be made up to such elements[4] ?

International law bears the aspects of international polities which reflect most sharply the essential difference between domestic and world affairs. That is to say, international law has the need of dealing with international politics involving the interests of different nations. But in dealing with these interests, disputes arise out of different issues. Because of the manifold issues, it is difficult to think about stability of international law. That means :

> The ideal condition for stability can be defined as 'evenness' in the situation of the major units-just as a large degree of identity

> in the members of the state is necessary for the emergence of the general will. Conversely, the process of deterioration which leads to disturbances within the system and might provoke its breakdown beyond a certain point can be summed up as the reintroduction of unevenness or heterogeneity[5].

In varied situations it is not possible to apply law uniformly. Apart from this, it is desired that the law should be uniformly applicable. From the strict point of view, it is not possible to think of uniform situations. As a matter of fact, the points of differences among the states are not limited. Consequently there are many reasons that raise disputes among the states. History can present the evidence of disputes—domestic and international. The phenomenon is taking place at present and it cannot be concluded that it will not take place in the future.

The real difficulties between the nations arise in the application of law and policy to particular issues. In international relations, legislative, administrative and judicial questions constantly call for decision.

The idea of entrusting the settement of international disputes to an impartial authority, which would give a decision on the basis of law, is a very old one[6]. Examples are to be found in ancient Greece, but the modern development of international arbitration dates from the Jay Treaty of 1794, between Great Britain and the United States which provided for the establishment of mixed commissions for the settlement of a number of disputes existing between the two countries. These commissions were composed of an equal number of members appointed by each of the parties and presided over by an umpire. During the nineteenth century, the movements in favour of arbiration gathered momentum. "A major development in the history of international adjudication occured in the well-known "*Alabama Case*" between the United States and Great Britain in 1872[7]. In the years that followed, several other international disputes were settled by arbitration.

The regime of the pacific settlement of disputes resulted from the first Peace Conference at the Hague in 1899[8]. In 1907 the second Peace Conference at the Hague undertook a re-examination of the 1899 Convention with a view to its improvement with the result that a new Convention on "Pacific Settlement of Internatio-

nal Disputes" was designed to replace the earlier Convention as between the contracting powers[9].

The havoc of the World War I led different nations of the world to establish the League of Nations. The League of Nations faced several disputes ; made efforts to settle the same but failed. On the eve of World War II the League of Nations lost its control. After the war the United Nations came into being with the main aims of maintaining international peace and security. The United Nations offers the widest possible choice of legal and non-legal devices for the settlement of disputes[10]. In principle, it is for the parties to decide whether to avail themselves of these opportunities[11]. But, if the continuance of a dispute is likely to endanger the maintenance of international peace and security, matters are no longer left exclusively to the parties.

The Charter of the United Nations has embodied several provisions for the settlement of disputes. One of the purposes of the United Nations as defined by the Charter is to "bring about by peaceful means, and in accordance with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace[12]. Members of the United Nations by the Charter are obliged to "settle their disputes by peaceful means in such a manner that international peace and security are not endangered[13].

They also agree more specifically that if the parties to any dispute the continuance of which is likely to endanger the maintenance of international peace and security "shall, first of all, seek solution by negotiation, enquiry, mediation, conciliation, arbitration, resort to regional agencies or arrangements, or other peaceful means of their own choice"[14]. They further agree that, in recommending to the parties to a dispute appropriate procedure or methods of adjustment, the Security Council should take into consideration "legal disputes should as a general rule be referred to the International Court of Justice in accordance with the provision of the statute of the Court[15]. In defining the purpose of the United Nations the Charter formulates two criteria for the adjustment or settlement of disputes "by peaceful means" and "in conformity with the principle of justice and international law",

There is nothing corresponding to this principle in detailed provisions of the Charter concerning the pacific settlement of disputes and action with respect to breaches of the peace. The Charter embodies an undertaking by Members "to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations"[16]. The obligation would appear to apply to any unlawful threat or use of force in violation of international obligation. The inherent right of individual or collective defence prescribed by the Charter is in fact specifically limited to defence against armed attack. The practical result appears to be that the Charter embodies the principle of third-party judgment reasonably effective in respect of matters involving armed intervention by one state in the affairs of another ; but not to the breach of principle of justice and international law. It implies that the principle of third-party judgment is resonably effective under the Charter as regards breach of the peace than as regards other breaches of law and justice.

In fact, the pacific settlement of disputes between states has remained a fundamental issue in modern international law[17]. The LOS Conferences are aimed at settling the disputes peacefully. In this regard, the Conferences have complied with the UN Charter. Besides this, the UNCLOS III has incorporated some device such as the "International Tribunal for the Law of the Sea"[18] and elaborate provisions as well.

2. Impact of the LOS Provisions

The "Optional Protocol" prescribed by the UNCLOS I deals with the chapter "Settlement of Disputes" purely in conformity with the Charter of the United Nations[19]. The UNCLOS III also complies with the Charter. Nevertheless, the device such as the "International Tribunal for the Law of the Sea" and its "Sea-Bed Dispute Chamber" or "adhoc Chamber" can be regarded as s permanent judicial body destined for settling the LOS disputes. Whatever may be, the establishment of an effective system for the "settlement of disputes arising out of the convention should be regarded as one of the pillars of the new world order in the ocean space itself"[20].

2. 1. UNCLOS I

According to the "Optional Protocol"[21] the states parties to it should undertake compulsory jurisdiction of the International

Court of Justice, unless some other form of settlement is provided in the Convention or has been agreed upon by the parties. To this end, Article I of the protocol says :

> Disputes arising out of the interpretation or application of any Convention on the Law of the Sea shall lie within the compulsory jurisdiction of the International Court of Justice, and may accordingly be brought before the Court by an application made by any party to the dispute being a party to this protocol.

It signifies that the states who have accepted the compulsory jurisdiction of the ICJ and the states who have signed this protocol are equally entitled to apply to the Court for the adjudication of the dispute. But it was provided that certain disputes should be settled by the provisions of the convention concerned[22]. Generally it is not possible to exert pressure on the parties for settling the dispute. But if the dispute endangers internatinnal peace and security ; then the dispute should be settled subject to Article 33(2) of the UN Charter. If a party to the dispute does not comply with the judgment rendered by the ICJ, then other party is entitled to have recourse to the Security Council under Article 94 of the Charter. Practically the peaceful settlement of a dispute depend on the goodwill of the parties concerned. Short of this, it is no possible to settle the dispute peacefully.

2. 2. UNCLOS III

The chapter/"Settlement of Disputes" as has been embodie in the UNCLOS III is complicated. Professor Brown has regarde it as of "considerable length and complexity"[23]. Compared to th UNCLOS I, the UNCLOS III has prescribed a number of provisior for the settlement of disputes between the states. The provisior actually are the outcome of the suggestions made by differer states. In the Caracas session, 1974 of the UNCLOS III there aros proposals on the settlement of disputes. Initiatives were taken b the delegation of the United States and importance was given t the topic/"Settlement of Disputes" in the session. The topic w authorised to be dealt with by the Informal Working Group of th Single Negotiating Text. The Informal Group held discussions c this topic on the basis of the proposal of the United States submi ted to the Seabed Committee[24].

Despite this proposal, the working Group dealt with the ta independently to formulate provisions applicable to the settleme

of disputes[25]. The provisions which were suggested by the Working Group on different subjects were included in a working paper[26]. The working paper was officially submitted to the conference on the last day of the Caracas session. The purpose was to allow government the opportunity to study the proposal and focus attention on the importance of the topic "Settlement of Disputes". Anyway, in view of a number of delegations, the establishment of an effective system for the settlement of disputes was regarded as a part of the treaty package itself.

The working group proceeded with the subject at the Geneva session, 1975 of the UNCLOS III. Thereafter, the ISNT dealt with the subject as an important function of the Conference[27].

After prolonged discussions on the working paper regarding the settlement of the LOS disputes at the New York session, 1976 the ISNT formulated provisions for the chapter "Settlement of Disputes"[28]. The RSNT[29] and the ICNT[30] basically do not differ one from another in respect of the provisions formulated for the settlement of disputes. But, compared to these texts, the LOS Convention has formulated quite a number of provisions for the settlement of disputes[31]. In fact, the UNCLOS III has incorporated some new devices[32] for the purposes. The LOS Convention has offered wide choices of modes for settling the disputes.

The LOS Convention imposes basic obligations on states parties to settle disputes arising between or among them[33]. Parties may settle their disputes by means of choice, but if such means do not lead to binding settlement of the dispute, the parties may, choose one or more of the following devices : (i) the International Tribunal for the Law of the Sea, (ii) the International Court of Justice, (iii) an Arbitral Tribunal, (iv) a Special Tribunal[34]. But if a dispute involves deep seabed mining then the state is required to submit the dispute to the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea[35].

In any case, questions may arise how far all these devices will be effective to the settlement of disputes. From a practical point of view :

> --it is sometimes difficult to remember that international law is still in large part a system of auto-interpretation in which the unqualified acceptance by States of an obligation to submit their disputes to a binding form of third-party settlement is still highly

exceptional. Moreover, even when accepted, such obligations are frequently not honoured[36].

In these circumstances, practical application of the provisions arising out of international law depends on the willingness of the states concerned. There is nothing to question that the impact of all the device incorporated by the UNCLOS III is to help the states settle the LOS disputes peacefully. But if the states do not accept the device for settling the disputes as binding, then the failure of all the device would be inevitable.

3. Disputes arising out of different Sea Zones

It is known that different issues are involved in the delimitation of the sea zones. Disputes arise out of these issues between the states. The phenomenon takes place as to each of the sea zones[37].

As a matter of fact, the jurisdiction of the coastal state varies inversely with the distance seaward from the coast. That is to say, the degree of jurisdiction of the coastal state decreases as the sea zone situates seaward from the coast. What authority the coastal state can exercise in the continental shelf, more can in the EEZ and more in the territorial sea.

3. 1. What causes the LOS Disputes

Disputes may arise wherever there is competition between two or more parties to use the same sea space for the same purpose or for different but incompatible purposes[38]. Where a dispute arises out of a sea zone, the coastal state having any authority in that zone wants to treat the disputes to be fallen under its territorial jurisdiction.

As regards the delimitation of the "waters area" on the landward side of the baselines, and the "territorial sea" the coastal state lays stress on the exercise of its territorial jurisdiction. The *Anglo-Norwegian Fisheries Case* (1951) is an example of the dispute of this category. From the Norwegian viewpoint, the dispute seems as falling under its territorial jurisdiction. Nevertheless, it was disposed of by the third-party settlement. This was possible because of the parties' acceptance of the jurisdiction of the International Court of Justice.

One country may claim jurisdiction over a certain ocean area through unilateral declaration or national legislation which other countries resist it as a violation of international law. Disputes over delimiting continental shelf and economic zone may also be

incluedd in this category. These disputes over the interpretation of international law are of a most orthodox type and the International Court of Justice or an arbitral tribunal will be sent suited for their settlement. The judgment delivered by the International Court of Justice in the *North Sea Continental Shelf Cases* (1969), and the arbitral awards of the *Beagle Channel Case* (1977) between Argentina and Chile and the *United Kingdom/France Channel Case* (1977), are such examples.

Another type of disputes may arise as to whether any domestic law applied to the case may or may not be considered with the requirements set forth in the new law of the sea. In this connection, fishing can be taken as an example. If the optimum utilization of the resources within the exclusive economic zone becomes a rule in international law, then the coastal state is required to grant fishing rights to other for surplus stocks But it may give rise to disputes between the coastal state and other fishing states over what constitutes 'surplus'[39].

Disputes may arise between the coastal state and the land-locked and geographically disadvantaged states out of the claims to exploit the surplus of the "allowable catch" of the living resources. In regard to the management of the "andromous stock"[40] and "catadromous species"[41], disputes may arise between the coastal states and the states claiming the right to high seas fisheries. As a matter of fact, the anadromous species have been given separate treatment as they represent a special species which travel far to sea, away from their rivers of origin and return to these rivers to reproduce[42].

As the state of origin is really the sole party in a position to assure the continuance of the runs, this state would possess sole management authority over them, in principle, the sole right of harvest. This would foreclose the fishing of these species on the high seas. In this regard disputes appear not only to arise between the coastal states concerned. Other states claiming the right to the high seas fisheries would proceed to challenge the coastal states.

In the case of pollution if a coastal state is allowed to set legislation for ships to observe pollution-prevention measures that meet international standards, then question would arise whether a specific piece of legislation by a coastal state meets international standards for pollution.

The regime of the 200 n.m EEZ raised disputes among different coastal states. Disputes arise out of its delimitation between opposite and adjacent states.

Disputes may take place on different issues of the continental shelf. In determining the outer limit of the continental shelf particularly beyond 200 n.m, disputes may arise between the coastal state and the claimants to the "common heritage principle". As regards the delimitation of the continental shelf, disputes arise between the states with opposite and adjacent coasts. Different pleas may arise as to the principle applicable to the delimitation. A state may raise pleas to delimit the shelf by "median line" principle whereas, the counterpart by "special circumstances" cum "equitable principles". These pleas were put forward in the *North Sea Continental Shelf Cases* and in the *Anglo-French Arbitration*.

As regards the Barents Sea continental shelf delimitation Norway followed median line principle whereas the Soviet Union invoked sector line principle arising out of "special circumstances". The Soviet Union clarified "special circumstances"/situation mainly in two ways : (i) arctic legal arguments, which were based on the physical and climatic peculiarities of the region ; (ii) the other arguments generally arising out of practical consideration, in the sense that they are not specifically characteristic of the Arctic but may be applied to any region whatever. The population density in the area is one example of this[43].

Norway rejected the sector principle on the grounds that its use is highly controversial in international law. Apart from the Soviet Union, only Canada maintained this principle as the basis for a territorial claim in the Arctic. The USA and Denmark likewise rejected the principle. Moreover, according to the official Soviet view, the sector principle applies exclusively to islands, not to ocean and continental shelf. The Norwegian view consequently was that it could not be invoked in this case. Furthermore, Norway maintained that the term "special circumstances" referred to geographical factors. such as configuration of the coastline, the existence of islands, and so forth. For this reason, the economic, demographic and security—political aspects of the area have no relevance in international law[44].

Libya and Tunisia have experienced a dispute regarding application of the principles of delimiting the continental shelf between

them. In spite of claims and counter-claims over the matter the two countries entered an agreement to solve the delimitation by "equitable principles" subject to taking account of the relevant circumstances and by that agreement they referred the topic to the International Court of Justice for decision of the principles and rules of international law specifically to be applicable for the delimitation[45].

Disputes have arisen as to the delimitation of the continental shelf in the Aegean Sea between Turkey and Greece. The situation draws attention of international law and scholarly views on the subject[46]. The continental shelf claim by Greece pertaining to her islands near the shore of Turkey's mainland is disclaimed by Turkey. The plea for Turkey to reject Greece's claim is that the continental shelf surrounding the islands is the natural prolongation of Turkey's land territory. Both Greece and Turkey have agreed to study "state practice and international rules" on the subject with a view to educing certain principles and practical criteria which could be of use in the delimitation of the continental shelf between two countries[47].

As regards the deltmitation of the continental shelf in the region west of the mainland of Scotland, off the Hebridean Islands and Rockall Islet, disputes have arisen between the United Kingdom and Ireland. The disputes centre on the question of whether Rockall, a tiny uninhabited rock 180 miles west of Barra, can be used as a basepoint. But Ireland disclaims it. However, the United Kingdom and Ireland have agreed to refer the dispute to an arbitratian, following Irish protests after the United Kingdom designated under the Continental Shelf Act areas of the Rockall Bank which Ireland considered as falling within her sector. The Court's decision is likely to be influenced not only by the *North Sea Cases* but by the 1977 and 1978 decisions in the United Kindom and French Channel and south western approaches arbitration. Since it will not raise questions concerning the outer limit of the shelf, as in that case, delimitation between opposite and adjacent states, as the United Kingdom and Ireland face both situations because of the geography and geology of the disputed areas[48].

In the Gulf of Siam the continental shelf claimed by Kampuchea passes through the islands belonging to Thailand and Vietnam.

Kampuchea has to face a dispute both with Thailand and Vietnam for delimiting boundaries of the continental shelf. The dispute centres on the historical basis of the claims to various islands. Various attempts at negotiations have failed[49].

Canadian-American disputes in the Gulf of Maine area started over oil rather than fish. As far back as 1964 Canada asserted her jurisdiction over the eastern part of Georges Bank by issuing offshore oil and gas exploratory permits out to the equidistance line. The United States did not object to Canadas' claim until the *North Sea Continental Shelf Cases*. Based on the 1958 Continental Shelf Convention as regards the definition of the "continental shelf" and the interpretation of the opinions of the International Court of Justice in the *North Sea Cases*, the United States advanced its claim that the entire Georges Bank is a "natural prolongation" of the United States, separate from Canada's shelf by the North-east Channel which is deeper than 200 metres. The equidistance vs. special circumstances battle was on with both sides having a number of good arguments supporting their respective positions[50].

On 14 February 1979 Canadian and American negotiation teams announced a heart-to-heart conclusion to negotiations in terms of (i) a proposed treaty to delimit the maritime boundary in the Gulf of Maine area ; and (ii) a proposed agreement on East coast fishery resources[51]. The documents directly linked to each other, were formally signed on 29 March 1979. The agreement has come into force on 20 November 1981[52].

3. 2. Delimitation Disputes : Settlement Procedures Analysed

The delimitation of the maritime boundaries such as the territorial sea, EEZ and the continental shelf between opposite and adjacent states is to be effected by agreement[53]. But if it is not possible to come upon an agreement, then neither the TS&CZ Convention nor the Continental Shelf Convention can specify the measures to be taken for the settlement of such disputes. That is to say, in settling the disputes the states concerned have been considered as the sole arbiter. No machinery can be effective to the dispute without the authority of these states.

However, if these states are signatory to the "Optional Protocol", then they may accordingly be brought forward to the International Court of Justice. That means, each of the states to

the dispute will be entitled to apply to the Court for its settlement[55]. But, if the dispute endangers international peace and security, then any member of the United Nations may bring the dispute to the attention of the Security Council or the General Assembly.[55]

As regards the disputes arising out of the delimitation of the territorial sea, EEZ and the continental shelf the UNCLOS III has also laid stress on the states to settle the disputes by the agreement they entered or to be entered. From the articles of the ISNT[56], RSNT[57], ICNT[58] and LOS Convention[59] concerning the delimitation of these zones, it can be pointed out that on the failure of an agreement the states are required to settle the dispute by the devices as adopted in Article 287 provided that the disputants accept and ratify the LOS treaty. But if the dispute endangers international peace and security, it will be automatically dealt with by the United Nations[60].

As a matter of fact, it can be observed that in setlling the disputes arising out of different sea zones the provisions of the First and the Third Conferences do not differ one from another. However, to this end, it is to be noted that the "International Tribunal for the Law of the Sea" and its "Sea-Bed Chambers" of the UNCLOS III appear as a constituted judicial body of the LOS treaty.

3. 3· Scientific Research Disputes : Juridical Viewpoint

As regards the marine scientific research[61] to be carried out in the EEZ and the continental shelf, disputes may arise between the coastal state, other states and the International Organisations[62]. It should be noted that Article 246 of the LOS Convention clearly recognises coastal state's right to "regulate, authorise and conduct marine scientific research" 'within its jurisdiction in accordance with the relevant provisions of this Convention. Article 246(2) accentuates this trend by stating that "research activities··· shall be conducted with the consent of the coastal state". The-jurisdiction of the coastal state extends to its EEZ and the continental shelf. The initial weighing is thus in favour of the coastal state rather than the researching state.

Article 246(3) which states that the coastal state "...in normal circumstances" is required to grant its consent for marine scientific

research—to be carried out for peaceful purposes", qualifies this coastal state consent precondition. Regarding the phrase "in normal circumstances", presumption may be drawn that when a state carried out research activities not exclusively for peaceful purposes[63], the coastal state consent is always required. Even when a state carries out scientific research exclusively for peaceful purposes, however, the coastal state in its discretion may withhold consent in four instances[64]. The coastal state appears to be unaffected of its sovereign rights over the resources both living and non-living of the EEZ and the continental shelf.

As a matter of fact, almost every project carried out in a coastal state's EEZ, or on its continental shelf area agreeably has direct significance for the exploration and exploitation of resources. This potentially gives the coastal state considerable grounds to withhold its consent.

Beyond the 200 n m limit of the continental shelf the coastal state ought not to exercise provisions of Article 246(5)[65] in order to withhold its consent for carrying out scientific research. But if the coastal state designates certain areas of such continental shelf for undertaking exploratory operations, then the researching state will be entitled to conduct scientific research on other areas[66] even the research project is of "direct significance for the exploration and exploitation of natural resources".

The main problem occurs when Article 246 interacts with Article 297(2) (b) according to which the coastal state cannot be called "in question the exercise" of "its discretion to disregard specific areas as referred to in Article 246, paragraph 6, or of its discretion to withhold consent in accordance with Article 246, paragraph 5". The question is whether the LOS Convention contemplates that the coastal state will be the sole arbiter of whether a project has "direct significance for the exploration and exploitation of natural resources". Again, the problem is whether the coastal state has any duty to grant its consent under Article 246(3). Article 246(3) seems to be lacking in establishing any normative standard, as such, the coastal state generally will have the prerogative to determine what constitutes "normal circumstances". That is to say, the LOS Convention is concerned almost exclusively with protecting the interests of coastal state as opposite to those of researching states.

Thus to speak generally, there are so many issues of disputes to be arising between the coastal state and the researching states but the compulsory disputes settlement procedures will not apply in the majority of potential disputes over scientific research[67].

4. Disputes Settlement Device : Practical Application

As a matter of fact, the UNCLOS III has dealt with the chapter "Settlement of Disputes" as a package deal of the LOS treaty. Whatever device and provisions have been prescribed by the LOS Conferences, they cannot basically be regarded as different from the provisions of Article 2(3) and 33(1) of the UN Charter and the statute of the International Court of Justuce[68]. However, the UNCLOS III has made contributions considerably to the development of the LOS disputes settlement procedures.

It ought not to be forgotten that law is not merely a convenient device for the settlement of disputes. The law is something that can be made effective instrument at a crisis and left out of account at other times. It is useful as a means on settlement only when, and so far as a society has accepted the rule of law as its way of life.

4.1. ICJ's Compulsory Jurisdiction : A Case-Study

There was a suggestion for conferring general compulsory jurisdiction on the International Court of Justice when the United Nations Charter was framed. It was apparent in the debates at the San Francisco Conference that a majority of the delegates considered that time had arrived for a further advance towards compulsory jurisdiction. But the ideal could not be achieved due to the opposition of the Soviet Union and the United States. These two countries forced the Conference to adopt the old "Optional Clause" formula[69].

In spite of the enthusiasms apparent among the states that attended the San Francisco Conference, not many have accepted the compulsory jurisdiction of the Court. As far back as 31 July 1965 only 59 in all[70], out of United Nations membership of 115 states accepted the compulsory jurisdiction under Article 36 of the International Court of Justice. As time passed, new states emerged and the number of members of the United Nations has been increased. But the states are not taking an interest in accepting the compulsory jurisdiction of the Court. As for instance, till 31 July 1780, only 44 in all[71], out of 154 members of the United Nations

have accepted the compulsory jurisdiction of the Court. The reluctance in accepting the jurisdiction of the Court is seen not only among the developed nations. It is equally seen among the developing nations.

Without reservation no state appears to have accepted the compulsory jurisdiction of the Court. In fact, none of the big powers has shown great faith in the Court. With negotiations and compromises as the prevalent methods of dealing with all threats to war, each nation remains intent upon preserving intact its own freedom of independent decisions and action in each situation that arises[72].

It signifies that the number of acceptors of the compulsory jurisdiction of the ICJ is not encouraging. That is to say, the third-party dispute settlement procedure practically is not inspiring. As to its practical approach in the law of the sea Professor Brown says :

> The background in the law of the sea area is similarly uninspiring. Only 34 States are bound by the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes associated with the 1958 Geneva Conventions on the Law of the Sea and the attitudes of Iceland in *Fisheries Jurisdiction Cases*, France in the *Nuclear Tests Cases* and Turkey in the *Aegean Continental Shelf Case* hardly reflect a very positive attitude to international adjudication[73].

In the *Fisheries Jurisdiction Case*[74] and the *Nuclear Test Cases*[75], Ireland and France challenged the jurisdiction of the Court through Court proceedings. In the *Aegean Sea Continental Shelf Case* Turkey informed the Court on 20 April 1978 that it did not accept its jurisdiction and as such it was not represented before the Court. The Court found that it had no jurisdiction.

The distribution of the acceptance of the jurisdiction categorically now in force is of interest. The states such as Colombia, Dominican Republic, Egypt, Haiti and Nicaragua accepted the jurisdiction having faith in the ICJ[76]. Twenty states[77] recognised as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the State of the Court. Each of these states provided the right to add, amend and withdraw the acceptance by notice. Fifteen states[78] accepted the jurisdiction of the Court for a period

of five years Provisions also were made to enable the state concerned to terminate and extend the period.

Democratic Kampuchea accepted the compulsory jurisdiction of the Court for a period of five years, But it was stated that after expiry of this period the jurisdiction will be treated as enforced until notice to the contrary is given by the country[79]. Nicaragua, Panama, Uganda and Uruguay accepted the jurisdiction purely on reciprocal basis[80].

It is important to note that several big powers for example, France[81], Soviet Union and the People's Republic of China are not at present bound by the "Optional Clause". In fact, the negative and hostile attitude of the Soviet Union and other communist countries towards the Court is well-known. They regard the present International Court as merely a tool of Anglo-American imperialism and do not expect that arbitrals or International Court of Justice can guarantee impartiality and justice in the settlement of international conflicts. Relying on the Marxist theory that law is based on the will of the ruling class, the communist countries believe that the interests and policies of the communist and the capitalist states are so basically opposed that impartial adjudication of disputes between them is practically impossible. So long as the world is dominated by capitalist states and the communist states in a minority, judges of an International Court according to this view, are bound to have sympathies towards capitalism.

The attitude of the Afro-Asian states towards judicial settlement is not encouraging. The more immediate interest to this end is the apparently sceptical attitude of these states towards the International Court of Justice as a means for the judicial settlement of international disputes. It is frequently suggested that this is an indirect manifestation of the rebellion of the Afro-Asian states against the present system of international law and its alleged Euro-centric institutions. "It seems to be too much of a generalization to say that the oriental countries do not believe in the settlement of their disputes through legal means"[82]. Moreover, it can be observed that the small and weak states usually do not want to be under some obligations. As such, they hesitate to accept the compulsory jurisdiction of the ICJ. That means, "the historical record does not--justify any great optimism as to the possibility

that by degrees the 'Optional Clause' may bring about a general system of compulsory jurisdiction"[83].

4. 2. ICJ's Compulsory Jurisdiction and the LOS Disputes

It is significant to point out that the international law of the sea became conventional in the 1958 Geneva Conference. As a matter of fact, the states which came into being in Asia and Africa after this Conference could not avail themselves of taking part in the Conference. But the states in number have participated in the UNCLOS III. After a decade of its efforts, the UNCLOS III has come into being. Throghout this period, the states have already been acquainted quite well with the LOS provisions.

With the passage of time, the states used to add, amend, extend and terminate the acceptance of the compulsory jurisdiction of the ICJ. As regards the law of the sea the states for example, Canada (1972), Philippines (1971), El Salvador (1973), India (1974), New Zealand (1976) and Norway (1976) made exceptions to the compulsory jurisdiction of the Court[84]. Canada specified that "disputes arising out of or concerning jurisdiction or rights claimed or exercised in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention of pollution or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada"[85] would not be treated subject to the compulsory jurisdiction of the ICJ. New Zealand made exceptions equally[86].

El Salvador mentioned that the disputes arising out of the territorial sea, continental shelf, continental slope, islands, bays, gulfs and the airspace superjacent to its land and maritime territory would be treated exception to the compulsory jurisdiction of the Court[87]. Similar to this, exceptions were made by India. Furthermore, it was specified that the disputes relating to the continental margins, exclusive fishery zones, exclusive economic zone and the conduct of scientific research by foreign vessels would not be treated under the compulsory jurisdiction of the Court[88]. In respect of the LOS disputes Norway stated that the compulsory jurisdiction would be effective subject to its outcome of the UNCLOS III on the chapter "Settlement of Disputes"[89]. Philippines made exceptions to the compulsory jurisdiction of the Court over the disputes arising out of the internal waters, archipelagic

waters, territorial sea, continental shelf and the resources thereof[90].

As time goes on, the states tend to extend claims to the seas and their resources out of the provisions concerning baselines, territorial sea, EEZ and the continental shelf. The 200 n.m EEZ and the continental shelf practically will result disputes outnumbered on the delimitation of these zones between opposite and adjacent states. But they are not taking interests in accepting the compulsory jurisdiction of the ICJ to settle such disputes.

From the above observation, there arises no difficulties to reach an assumption that third-party compulsory settlement procedure as made by the UNCLOS III has little chance of being ratified by the states.

5. Principles Applicable to the Settlement of the LOS Disputes

Generally speaking, the states may be in conflict as regards any issues between them. Since international law in large part is a system of auto-interpretation, therefore, the degree of conflicts in this law is unending. If a dispute arises from a difference of opinion as to the existence or the interpretation of rights and obligations existing between states, this dispute can be settled by the ordinary procedure of comtemporary international law. Conflicts between states, however, do not only arise because of difference of opinion as to the existence or the meaning of the law in force, but also not infrequently from the fact that one of the parties wishes to change the existing legal situation on the ground that it is inequitable and contrary to objective justice.

Certain authors maintain that the latter disputes cannot be settled by a judicial procedure. They are of the opinion that the duty of the judge is always limited to the application of rights and obligations obtaining between the parties An appeal to judicial settlement in international law, according to this conception, can never have as its object a change in the existing law. Consequently they say, all differences which cannot be settled by applying the rules of law in fact should not be brought before the judge and should be considered as non-justiciable.

The law of the sea is the most conflicting part of international law. Different issues are involved in this law. In delimiting the sea zones geographical, geological, geomorphological, historical

and socio-economic issues arise between the states. The issues take place seriously particularly with the delimitation of water zones for example, the EEZ and the continental shelf. According to Sir Humphery Waldock :

> The difficulty is that the problem of delimition the continental shelf is apt to vary from case to case in response to an almost infinite variety of geographical circumstances. In consequence, to attempt to lay down precise criteria for solving all cases may be to cause a chimera ; for the task is always essentially one of appreciating the particular circumstances of the particular case[91].

That is to say, it is not wise to rely upon a single principle as to the settlement of marine boundary disputes. In order to settle a dispute arising out of the LOS provisions the UNCLOS III has not relied only upon any single machinery. Questions may arise as to what law should be applicable by the Court on the tribunal authorised to adjudicate a dispute between the states. The UNCLOS III seems to have complied with the provisions of the International Court of Justice as adopted in its Article 38. As has been seen, where the EEZ or the continental shelf delimitation dispute between opposite and adjacent states is not settled by agreement, the d spute ought to be settled subject to the device embodied in Article 287[92].

The 1958 TS&CZ Convention and the Continental Shelf Convention suggested that the delimitation of the sea zones should be effected by agreement. But what law should be applicable to the agreement in relation to the delimitation was not mentioned in the articles of these Conventions[93]. If the states are the signatory to the "Optional Protocol", then they should settle the dispute subject to the compulsory jurisdiction of the International Court of Justice[94]. In deciding the dispute the Court will apply the law arising out of Article 38 of its statute[95]. That means, Article 38 appears to be applicable when the dispute is adjudicated by the Court.

But if the states wish to settle their dispute by 'agreement', according to the 1958 Conventions mentioned, these states are not required to apply the law arising out of Article 38 of the International Court of Jurtice. However, there is no restriction to apply the law subject to Article 38 of the Court.

According to the LOS Convention, delimitation of the EEZ and the continental shelf between opposite and adjacent states is to be

effected by 'agreement'[96]. The 'agreement' should be effected in conformity with Article 38 of the International Court of Justice. That is to say, they will have to apply the law arising from the : (i) LOS Conventions, (ii) international custom, (ii) general principles of law, (iv) judicial decisions and the teachings of most highly qualified publicists, and (v) case *ex aequo et bono*.

It signifies that the principles to be effected in the delimitation of the EEZ and the continental shelf should be based mainly upon general principles and norms of international law. At the same time they should be based upon international conventions such as the LOS Convention expressly recognised by the contesting states and international custom. As far as judicial precedent and doctrine are concerned, they may serve too as subsidiary means for the determination of the rules of law. The judicial decisions and the teaching of highly qualified publicists cannot have binding force except between the parties and in respect of that particular case. If the statement of law is not authoritative and impartial, precedence may be given to the judicial decisions. According to Sir Hersch Lauterpacht :

> It is to be expected that in a society of States in which opportunities for authoritative and impartial statements of the law are rare, there should be a tendency to regard juridical determination as evidence or, what is in fact the same, as a source of international law[97].

If there is similarity of the dispute already adjudicated by the Court with the dispute existing between the states, then the judicial decision can be treated as a precedent for settling the dispute. It is a fact that infinite variety of circumstances is involved in the sea zones such as the EEZ and particularly in the continental shelf. Therefore, it is not surprising that in certain cases the laws arising out of the conventions, customs, general principles, judicial decisions and the teaching of the publicists may not be suitable to the adjudication of the dispute on the delimitation of these zones between opposite and adjacent states. However, if the parties agree, then any of these provisions can be made applicable to the settlement of disputes between the states.

Besides these provisions, the parties to the dispute may decide a case *ex aequo et bono*. The *ex aequo et bono* clause means, the extraordinary procedure, actually cannot be effected where there

exists positive law. But if the dispute cannot be settled by the law in force equitably, then *ex aequo et bono* clause should be applicable. According to M. O. Hudson :

> The expression *ex aequo et bono* is used by way of contrast to the legal criteria enumerated--The intention, it is submitted, is precisely to provide for cases where the application of rules and principles of law is either inappropriate or impossible, and to enable the Court to arrive at a decision according to what appear to it fair, reasonable, and expedient in the particular circumstances[98].

It should be borne in mind that "*A decision ex aequo et bono* presupposes the special consent of the parties"[99]. In any case, the Court should be desired to settle the dispute and to satisfy the parties through a decision which will ensure peace. "An *ex aequo et bono* decision, which disregards the rights and obligations in force, will only be made on the basis of a special request from both parties"[100]. The *ex aequo et bono* principles should not be confused with law or equity in the strict legal sense. But it should be applied to the solution of a problem when no conventional rules, whether customary law or general principles of law, seem directly applicable to the case in hand. "It is a principle which is intended as a last resort in the judicial process of the Court when all other measuaes cannot supply a solution or remedy...[101].

According to Article 293 of the LOS Convention :

> 1. A Court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not inconsistent with this Convention.
> 2. Paragraph 1 does not prejudice the power of the Court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.

Basically there is no difference between this article and Article 38 of the Statute of the International Court of Justice. The expression "other rules of international law" of paragraph 1 of Article 293 stated above may be used as regards the international custom, general principles of law, judicial decisions and the teaching of the most highly qualified publicists as adopted in paragraph 1 of Article 38 of the Court. Actually paragraph 1 of Article 38 of the Court is more specific than paragraph 1 of Article 293 of the LOS Convention. That is to say, it is easy to formulate the rules from paragraph 1 of Article 38 than paragraph 1 of Article 293.

It is suggested that the vague expression "other rules of international law" should as far as possible be replaced by specific terms. From this point of view, it is a feeling that it would be better if paragraph 1 of Article 293 of the LOS Convention is replaced by paragraph 1 of Article 38 of the International Court of Justice.

Whatever device and provisions the UNCLOS III has provided for the settlement of disputes, they cannot be effected unless the states accept and ratify them. The system of dispute settlement whether will be an integral part of the LOS Convention or will be treated as an optional protocol depends on the acceptance and ratification by the states. An optional protocol would be totally inadequate way of dealing with the problem. As such, it is important to state that legal procedures should be accepted by the states so that the dispute arising between them can be settled by such procedures. In this regard Professor Louis B. Sohn says :

> Effective legal procedures for dispute settlement are necessary to avoid political and economic pressures. While the larger and richer Countries can apply extralegal, political and economic pressures to achieve their ends, it is especially important for small Countries and for developing Countries to have disputes directed into legal channels where the principle of equality before the law prevails[102].

In any case, the settlement of dispute procedures as provided by the LOS Convention has been formulated as an integral part of the LOS "package deal". Article 309 of the Convention enables to come to this assumption. According to this Article : "No reservation or exception may be made to this Convention unless expressly permitted by other articles of this Convention". That means :

> The choice for states is thus clear. They may accept or reject the Convention as a whole. The assessment of the pros and cons of this immense instrument in terms of the national interest will be exceedingly difficult. Evolution of its provisions for dispute settlement and of the adequacy of reservations built into the Convention will be an important part of that assessment[103].

At the present time, it is difficult to conclude whether the third-party dispute settlement procedures will be ratified as an integral part of the LOS treaty. It may be fully understandable that a group of states which believe that their interests, views and

legal approach represent a minority in position in the international community should be reluctant to ratify the compulsory jurisdiction of an international tribunal. When the minority holds a political, economic and legal philosophy which is based on the denial of the possobility of objectivity it is almost inevitable that they should take this view.

It is equally natural that the states which have recently become independent and are passing through internal, political, economic and social changes of unpredictable extent should hesitate to ratify compulsory jurisdiction which they are apt to regard as a possible embarassment in the completion of their national and social revolutions. If, however, these attitudes are perpetuated beyond a certain stage, they weaken seriously the whole principle of third-party judgment which is an essential element in any satisfactory legal order. The question whether these attitudes represent a stage in development or a permanent attitude is therefore of primary importance for the future development of a universal system.

As has been stated, it should keep in mind that there is no permanent attitude among the states to accept or avoid the compulsory jurisdiction of the International Court of Justice.[104]. But the states actually appear to have accepted the compulsory jurisdiction subject to some reservations. There is no clear indication to be confident of a future development among the states to the ratification of the LOS dispute settlement procedures unconditionally.

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28 The ISNT provided 18 articles and a number of articles under the following annexes. Annex 1A : Conciliation—9 articles ; Annex 1B : Arbitration—11 articles ; Annex 1C : Statute of the Law of the Sea Tribunal—36 articles : Annex IIA : Special procedures—Fisheries—9 articles ; Annex IIB : Special Procedures —Pollution—9 articles ; Annex IIC : Special Procedures—Scientific Research—9 articles ; Annex III—Information and Consultation—2 articles. See 5(1976) UNCLOS III OR 112-122.

29 Part IV of the RSNT deals with the settlement of disputes. See 6(1976) UNCLOS III OR 145-155.

30 Part XV (Articles 279-297) and Annexes I-VII) of the ICNT deals with the settlement of disputes.

31 The LOS Convention has accomplished provisions for the settlement of disputes in Part XV (Articles 277-299). Accordingly, the disputes concerning the interpretation or application of this Convention requires to be settled by : (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 with Annex VII ; (d) a special arbitral tribunal in accordance with Annex VIII for one or more of the categories specified therein.

32 E. g. The International Tribunal for the Law of the Sea (Annex VI), Sea-Bed Disputes Chamber (Annex VI-Section 4) and the *ad hoc* Chambers of the Sea-Bed Disputes Chamber (Annex VI-Section 4, Article 36).

33 Subject to Section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to Section I, be submitted at the request of any party to the dispute, to the Court or tribunal having jurisdiction under this section (Article 286).

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54 See p. 225.

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60 Articles 33, 34, 35.

61 Regarding "Marine Scientific Research" the ISNT (Part II : Articles 1-37), RSNT (Chapter II : Articles 339-278) and the LOS Convention (Part XIII : 338-265) basically do not differ one from another. However, the LOS Convention has made some additions such as, paragraphs 4 and 6 of Article 246.

62 See LOS Convention, Article 238,

63 Article 246(3) of the LOS Convention does not define the term "Peaceful purposes".

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CHAPTER VII

FUNCTION OF DELIMITATION PROVISIONS

1. Law, its emerging Trends

Law always develops according to the needs of society. Traditional international law developed according to the needs of the international society at various times during the last three centuries. International law is becoming a more and more complex and many sided subject. Its scope is bound to expand as the organisation of mankind, on a universal or regional basis, increases[1]. International law is largely built up from the adjustment of a vast number of national policies seeking to find certain common minimum standards[2].

In recent years international law has expanded, essentially in two directions. First, the number of states has increased ; the international legal order is now for the first time really universal, and it includes, on an equal footing, almost all distinct human communities on the globe. Second, the scope of international law has greatly expanded as to subject matter ; it now regulates, in whole or in part, a great number of topics such as nuclear energy and space law which did not exist in the past.

This expansion in scope is directly relevant to the interests and concerns of the third world, consisting of the states from Africa, Asia and Latin America. As regards the extent of the expansion, there would have been a need for changes in the existing legal rules even if all the present members of the international society were similar to one another in culture, interests, mentality and stage of economic development. The fact that they are not, and the presence of important differences between the older and new members of the world community is an additional compelling reason for international legal change.

The most important differences, and the one bound to play a significant role in fashioning the 'new' international law, is that between the stages of economic growth of the old and the new states. The 'underdevloped' sector of the world is a basic factor which leads to an extensive, though by no means total, divergence of the national interests of the new and the old states. The nations of the third world aspire to a rapid economic development that will consumate their recently acquired political independence. It can be pointed out that :

> The international law of the sea is a very dynamic part of international law, and clearly, no single work can hope to cover thoroughly all of the aspects which have caused difficulties even during the last—1945 period[3].

Initially the law of the sea emerged from the defence or security interests of the coastal state. With the progress of science and technology, the law of the sea has acquired greater importance among the nations in the context of possible exploration and exploitation of the resources of the sea. It is a fact that the United Nations Law of the Sea Convention, 1982 has resulted in a drastic change. This change is the out of the third world countries' attitude essentially based on socio-economic rather than defence or security considerations.

In so far as the future is concerned, one can speculate or make tentative forecasts, based firstly on their attitudes and intentions and secondly, on the assumption that the present, albeit shaky, political alignment will remain for as long as possible, bearing in mind that "political solidarity" is likely to alter with changes in socio-economic circumstances. Political and economic development in the third world countries depend to a large extent on the attitude and assistance of the developed states.

The future of the law of the sea may be of permanent duration only if the developed industrialised states recognise that the aspirations of the third world countries are not to be ignored, and if the developing countries acknowledge that political success is of little or no importance without the co-operation of the technologically advanced countries. It is noticeable that :

> --the very function of the law of the sea is to protect and secure the common interests of the people of the world. Its entire purpose is to serve the common interests, both inclusive and exclusive, of the different communities and to reject all claims of special interest. This is indeed the function of law in any community, national or international [4].

The First and the Second Conferences on the Law of the Sea reflected the existing customary legal norms of the international law of the sea. The Law of the Sea Convention, 1982 is described as a monumental achievement in international law, codifying existing rules and divising new ones to meet modern circumstances[5]. It has taken into consideration the changed conditions brought

about by the rapid technological advances and the significant increase in the membership of the family of nations.

According to the Law of the Sea Convention, it is possible for the coastal states to exercise jurisdiction over the wider sea zones such as the 200 n.m EEZ and the continental margin extending even beyond the economic zone. These sea zones have made many coastal states neighbours to each other. As such, it is necessary for the coastal states to delimit the boundaries of these zones.

As a matter of fact, these zones have introduced a new international regime for economic and political order. But the delimitation of these zones between two opposite or adjacent states is a source of conflict.

2. Traditional Law of the Sea—Inadequate

The international law of the sea evolved over a long time. Its beginnings are shrouded in the mists of the early middle ages in Europe[6]. For centuries the public ordering of the oceans has been directed against the exclusive use-*mare clausum*—and towards common, equal use—*mare liberum*. The traditional and enduring precepts of international law include the principle of freedom and the absence of sovereignty on the high seas[7]. The traditional law of the sea was much more the creature of customary than conventional development[8].

Until the end of World War II the law of the sea was almost entirely based on custom. The main features of this customary law were acceptance of the existence of a narrow "territorial sea" and the doctrine of the "freedom of the seas". A general acceptance of these two principles was adequate because the uses of the sea were few (chiefly navigation and fishing). There was no real conflict among the maritime states in peacetime, no danger of over-utilizing the sea's resources.

In the development of the law of the sea by custom, individual states make claims about the nature of the law by way of their own maritime practice. If these claims are left unchallenged and if the practice forms a pattern and is long standing, then a new customary law may be said to develop. If, on the other hand, claims by one state are challenged by counter-claims from other states, and if one nation's practice is countered by the country or opposing practice of another nation, the customary process continues until the claim or the counter-claim predominates.

Soon after World War II, the United Nations decided that it would be useful to codify customary law in the form of one or more treaties, taking into account postwar technological developments, particularly the possibility of getting oil and gas from the seabed and the potential danger of overfishing as a result of improved fishing techniques. Accordingly, the First Conference on the Law of the Sea was held in Geneva 1958.

The Conference succeded in adopting four conventions, one dealing with questions concerning the territorial sea and the contiguous zone, one with the high seas, a third with fishing and the conservation of living resources, and a fourth with the continental shelf.

The Convention on the Territorial Sea and the Contiguous Zone faild to prescribe the breadth of the territorial sea. As a result, none of the limits ranging from three to two hundred miles for the breadth was considered as established in international law. Nevertheless, the three-mile limit for the territorial sea existed without protests.

The Convention on the High Seas was based purely on the freedom of the seas doctrine. The Convention on Fishing and Conservation of the Living Resources of the High Seas recognised a special status for the coastal states in the seas adjacent to the territorial sea. The Convention was clearly drafted "in terms of a legislative (albeit by agreement) act recognising need and then adopting measures to meet the need[9].

The Convention on the Continental Shelf failed to prescribe a precise outer limit of the continental shelf. According to this Convention all coastal states, continental or insular, are entitled to extend the outer limit of the continental shelf "to a depth of 200 metres or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas". For legal purpose the 200 metre depth was adopted, although in nay particular instance the edge of the geological shelf may actually occur at either a greater or a lesser depth. It has already been expressed that the exploitability criterion has made the outer limit of the continental shelf open-ended[10].

The exploitability criterion was adopted on the assumption that it would not be possible for the states with the then scientific

advances to explore the seabed and subsoil and exploit their resources at greater depths[11]. But since 1960 the situation was radically changed.

The states particularly the developed states attained the scientific advances quite sufficient to achieve the riches at any depth of the seas. But no Convention of the First Law of the Sea Conference, 1958 can deal with the regime of the seabed and subsoil beyond continental shelf.

On the contrary, the newly independent states and the developing states of Africa, Asia and Latin America were afraid of the scientific advances of the developed states. They feard that the resources of the seas beyond continental shelf were going to be grabbed by the developed states.

Differences over the territorial sea arose between the developed and the developing nations in connection with the breadth and the passage through it. The maritime powers like the United States, United Kingdom, France, Germany, Japan and others claimed the eighteenth century principle of three-mile territorial sea. According to them a larger extent for this sea would mean an infringement on the freedom of the seas doctrine. This doctrine they claimed, would maintain equity among all the states.

But freedom of the seas doctrine leads to inequity to the developing nations in respect of the use of the seas. The developed maritime powers can have greater advantage over their underdeveloped counterparts.

There is little wonder that only those few maritime powers are champions of the doctrine of unrestricted freedom of the seas. They urge its unquestioned acceptance. On the other hand, a large majority of the coastal states—small, weak, poor, underdeveloped nations, whether of Europe, Latin America or the newly independent countries of Africa and Asia—are getting deeply concerned about the continued exploitation of their coastal areas by the big powers[12].

In fact, for a long time it was felt that the erosion of the old law was the only certainty. The freedom of the seas doctrine is inadequate and inapt to the present world and its needs[13].

3. New Law of the Sea not uniformly Practicable

The Law of the Sea Convention, 1982 has been adopted and signed. A large number of states have signed the Convention. But

its ratification by the states still is not encouraging. Nevertheless, the states are practicing the provisions of this Convention.

As has been observed, the coastal state is entitled to enclose certain indentations, and different formations such as, bays, gulfs, islands, reefs and the like within baselines.

As a matter of fact, such formations for example, the islands may situate at some distance one from another and from the mainland. Neither the First Conference nor the Law of the Sea Convention can specify the distance which the coastal state is required to follow in fixing the baselines.

As regards the archipelagic baselines, the archipelagic states are required to comply with some limitations. The limitations are concerned with the area of the archipelagic waters, the area of the land and the length of these baselines as well[14]. But practically these limitations cannot stricly be said to have been followed by the archipelagic states[15].

Regarding the territorial sea, the remarkable success of the Third Conference is the incorporation of the 12 n.m limit for its breadth. It is now unquestioned that every coastal state is entitled to prescribe the territorial sea extending up to a 12 n.m limit from the baselines.

Uniformity in law is desired. When a provision is concerned with more than a single state the essence of uniformity is more and more desired. But provision to be dealing uniformly may not be enough to give solution to all problems arising out of different situations. That is to say, the law of the sea, if framed uniformly, may fail to tackle different situations.

The fact is that the situation of islands, rocks, shoals, bays, coves, river mouths, ports, roadsteads etc. cannot be equated to one another[16]. If they are equated, conflict may not be avoided. While these are dealt separately, they give rise to different situations. Ultimately in order to formulate provisions, they should be considered with due regard to the configuration of the coast and the underwater situation of the coastal sea. Furthermore, due regard should be given to the extent of dependence of the coastal state on the coastal sea.

It is submitted that the prescription of the uniform breadth such as, the 12 n.m limit for the territorial sea may not prove

adequate to settle the issues arising among the coastal states. If the 12 n.m limit of the territorial sea is uniformly followed and applied in all cases without any regard to peculiar circumstances, its effects will be felt in most of the international straits. According to D. W. Bowett :

> --a twelve-mile limit would result in 116 of the major international Straits coming under the sovereignty of coastal States, whereas with a six-mile limit only 52 would be so affected[17].

Every coastal state wants to project her interests and as such, proceeds to enlarge the extent of the territorial sea. If all the coastal states of the world go on enlarging the territorial sea, a large part of the seas would come under the territorial jurisdiction of the coastal states. In this regard William Bishop states :

> It is estimated that a general extension of the territorial sea by one mile reduces the area of the high sea, where freedom of fishing and other freedoms exist, by an estimsted 280000 square miles. Likewise, it is estimated that a general extension of the territorial sea by an additional nine miles would reduce the area of the seas by 2500000 square miles, an area roughly equal to the size of the United States of America[18].

A wide extent of the territorial sea can secure interests of the coastal state but may adversely affect others. It is obvious that a wide extent of the territorial sea gives rise to new problems which does not arise from the narrow extent of the territorial sea. If the breadth of the territorial sea is enlarged, certain international straits come under the authority of the strait states. That is to say, the freedom of navigation will be affected. It seems that the navigation through these straits will depend on the authority of the strait states.

In consideration of the freedom of navigation through the straits the narrow extent like the three-mile limit should be welcome. But at present it is impossible even to conceive of this limit for the territorial sea. It is the time now to welcome the 12 n m limit.

The 12 n.m limit has been adopted in the LOS Convention as the maximum breadth of the territorial sea. But in practice this limit is becoming the minimum limit[19]. Still different states are showing an interest in adopting a maximum like the 200 n.m limit for the territorial sea[20].

It is a fact that the 12 n.m limit has come into being as a result of the persistence and support of the larger number of the states. As such, this limit has been prescribed by the UNCLOS III. If the 12 n.m limit of the territorial sea receives a universal acceptance, it will be a landmark in the history of the codification and advancement of international law of the sea,

In presence of the 12 n.m territorial sea, the 12 n.m contiguous zone of the 1958 Convention[21] has become redundant. In keeping pace with the 12 n m territorial sea the LOS Convention, has formulated 24 n.m Contiguous zone[22].

The important achievement of the UNCLOS III is the 200 n.m EEZ. This zone has come into being as a result of claims and support of the developing states. As regards its resources, the 200 n.m EEZ has brought larger areas of the high seas under the jurisdiction of the coastal states.

As has been stated, all the coastal states of the world cannot equally be benefited from the 200 n.m EEZ[23]. Because of the geographical constraints a number of coastal states cannot extend this zone up to 200 n.m from the baselines. As a result, these states join the group of the land-locked states with a view to securing their interests in the 200 n.m EEZ of the neighbouring coastal states in the sub-region or region concerned. As such, delimitation of this zone has been a problem between the states. Furthermore, as regards the exploitation of the living resources of the EEZ conflicts arise between the coastal states and the land-locked, zone-locked and the shelf-locked states[24].

It has already been mentioned that at present regime of the continental shelf is concerned virtually with the seabed and subsoil beyond 200 n.m EEZ. In order to determine the outer limit of the continental margin, the coastal state is required to delineate the baselines on the foot of the continental slope[25]. After that the coastal state is entitled to fix the outer limit of the continental margin subject to the 350 n.m, 2500 metre cum 100 n.m criteria[26]. The purpose of these criteria is to check an unscrupulous attempt of the coastal state to extend the outer limit[27].

As has been observed, the continental shelf bordering a limited number of coastal states extends beyond 200 n.m[28]. The coastal states will have to fix the outer limit of the shelf subject to decision

of the Commission on the Limits of the Continental Shelf[29]. It is feared, whether it will be possible for the Commission to disregard the claim of these states up to the outer edge of the geological shelf and the continental margin beyond 200 n.m EEZ.

As a matter of fact, in different matters, the coastal states are taking interests in exercising jurisdiction over larger areas of the high seas. If at present it is possible for the coastal states to take measures for deep sea mining[30], then the claims of the coastal states to the outer edge of the continental shelf extending beyond 200 n.m and the continental margin as well will not be irrational.

From the consideration of its physical features[31], it is not possible to prescribe a uniform regime for the continental shelf. There is no doubt that the regime of the 200 n.m EEZ and the continental shelf is a conflicting phenomenon. It should be kept in mind that due to extreme eagerness for exploitation of unestimable sea resources and the resulting conflicting interest among the states, the sea is likely to remain a perennial problem in international law.

4. How to Effect the Delimitation of Maritime Boundaries Between Oppoaite or Adjacent States

The fact that the international law is constantly being challenged by changes and development in the international coumunity. Indeed, the UNCLOS III negotiations are nothing but an attempt to write a new international law of the sea adopted to the political and technological realities of the present time[32]. At present the delimitation of the maritime boundaries between opposite or adjacent states is the key issue in the law of the sea. Regarding the delimitation, what problems arise out of the narrow sea zones, more and more problems arise out of the wider zones.

The Third Conference is a package deal on the law of the sea. But it is fair to say that the "institutions and procedures" which have been laid down by the UNCLOS III are the basic rules on international customary law. According to Professor Brown :

> It is to public international law that one looks for the rules on such fundamental questions of the division of the seas into various jurisdictional zones for different purposes, and the provision of procedures for the settlement of disputes concerning such matters. Leaving the labors of UNCLOS III on one side for a moment, it is fair to say that the 'institutions and procedures' which have created these basic rules are simply the law creating

process of public international law. Thus, for example, the scope and status of the various jurisdictional zones are combined product of international customary law, based on State practice, and treaties, negotiated at *ad hoc* Conferences such as UNCLOS I (1958). Similarly, the allocation to States of rights to use these zones for various purposes has been effected in the same way. Finally, only the relatively primitive provisions of genearal international law for the settlement of disputes have been available for the resolution of conflicts concerning such questions[33].

According to the Territorial Sea and the Contiguous Zone Convention, 1958, delimitation of the territorial sea between two opposite or adjacent states is to be effected by 'agreement'. If the states fail to enter an agreement and if there exists no "historic title" or other "special circumstances", then the median/equidistance line would be the boundary of the territorial sea.

As to the territorial sea, the application of a median or equidistance line was found to be the most convenient and just method of delimitation. Particularly with regard to boundaries between two countries the coast of which are opposite each other, the median line had much support in previous state practice[34].

With some modifications the median line was considered to be the main rule. This view was also represented by the Committee of Experts consulted in 1953 by the International Law Commission, as to the subject of the regime of the territorial sea. The Committee stated that an "international boundary between countries the coasts of which are opposite each other---should as a general rule be the median line every point of which is equidistant from the baselines of the states concerned". It added, however, that there may be "special reasons, such as navigation and fishing rights, which may divert the boundary from the median line.

The Commission approved of the Experts proposal and took the same as a basis for respective provisions contained in its final report. Also the more complicated question of delimitation of the territorial sea between two adjacent states was considered by the Committee of Experts. After having discussed 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". In this case, however, the Committee added a reservation which is interesting because it indicates the purpose the

Committee thought the delimitation should serve.

As a matter of fact, in a number of cases the application of the principle of equidistance may not lead to an equitable solution, which should be then arrived at by negotiation, without particularly referring to the later observations, the International Law Commission agreed with the view with regard to the delimitation of the territorial sea between adjacent states. The final outcome is Article 12 of the Territorial Sea and the Contiguous Zone Convention, 1958, which in the said respect makes no distinction between states with opposite and adjacent states. The Law of the Sea Convention, 1982 has equally laid down the principle in its Article 15.

As regards the contiguous zone the delimitation is to be effected by agreement of the states concerned[36]. Otherwise, the median/equidistance line would be the boundary of this zone. This boundary is applicable regardless of special circumstances.

The UNCLOS III has provided provisions for delimiting the territorial sea[37], EEZ[38] and the continental shelf[39]. But it has not provided any provision for the delimitation of the contiguous zone between two opposite or adjacent states.

The lack for provision leaves the question open whether the delimitation of contiguous zone boundaries should be effected in accordance with the principle of delimitation of territorial sea boundaries that of Article 15 of the LOS Convention or that of Article 74 of the EEZ boundaries. According to Professor Nakamura :

> —in so far as the contiguous zone is interpreted to be further seaward expansion of the coastal State's authority in its land territory and territorial sea, the principle of its delimitation should be devised in line with that of the territorial sea[40].

It is noticeable that the delimitation of the contiguous zone and the EEZ practically is to be effected beyond the outer limit of the territorial sea. From the strict point of view, the provisions applicable to the delimitation of the territorial sea (Article 15) and the EEZ (Article 74) between two opposite or adjacent states are not alike. As such, if Article 15 is given effect to the delimitation of the contiguous zone, then the boundaries of the zone and the EEZ between two adjacent states may be different. For practical purposes, such boundaries are not convenient. To this end, it is

suggested that the contiguous zone and the EEZ should have a common boundary.

The provision of delimitation contained in Article 6 of the 1958 Continental Shelf Convention is based upon the equidstance-special circumstances formula as adopted in Article 12 of the TS&CZ Convention. In this case too, the International Law Commission and the UNCLOS I followed the recommendation of the Committee of Experts, who had :

> 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[41].

Needless to say, the legislative history of Article 6 of the Continental Shelf Convention has given rise to different interpretations. After a careful study of the subject, the International Court of Justice in its judgment in the *North Sea Continental Shelf Cases* came to the conclusion that :

> the principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis---and not at all---as an emerging rule of customary international law[42].

This interpretation, however, was not adopted unanimously by all the members of the Court. In his dissenting opinion Judge Lachs considers the facts presented by the Court as not being conclusive. According to his view, "they constitute but part of the history---of how Article 6 paragraph 2 came into being". He admits that :

> doubts and hesitations did exist. But is the same not true of many new rules of law---? Even if it be considered that the Committee of Experts in which the equidistance rules originated, was guided by considerations of practical convenience and cartography, this can have no effect on its legal validity [3].

The question concerning the relevance of the principle of equidistance as a legal rule relating to delimitation has not been answered by the International Court of Justice definitely and with regard to all possible situations. The Court was requested to decide what are the principles and rules of international law which are applicable to the delimitation of the continental shelf in a sea with particular configuration of the North Sea. Although many of the conclusions drawn by the Court concerning delimitation in general, its main considerations had referred to lateral boundaries between

adjacent states.

The Court carefully made a distinction between opposite and adjacent coasts. Although no other methods of delimitation than that of equidistance, has the same combination of practical convenience and certainty of application, it can in certain circumstances produce results that "appear---to be extraordinary, unnatural or unreasonable"[44]. This is the case particularly concerning lateral boundaries.

The Court took into account the difficulties of the median line boundary between states with opposite coasts. The Court gives explanation as follows :

> The continental shelf area off and dividing, opposite States can be claimed by each of them to be natural prolongation of its territory. The prolongations meet and overlap, and can therefore only be delimited by means of a median line; and---such a line must effect equal division of the particular area involved[45].

For these reasons Court regards :

> the case of median line delimitation between opposite States as different in various respects, and as being sufficiently distinct not to constitute precedent for the delimitation of lateral boundaries[46].

The relevance of the said distinction between states with opposite and adjacent coasts is limited to continental shelf delimitation. Because, it is primarily based upon geographic circumstances, it has a bearing upon the drawing of boundaries between all kinds of marine areas. Due to shorter borderlines, the problems concerning lateral delimitation of territorial waters may be less difficult than those connected with delimitation of continental shelf and other more extensive marine areas. In this context it is to be noted that the TS&CZ Convention has common rules on delimitation for both opposite and adjacent states, while the Continental Shelf Convention makes at least a formal distinction between such states.

As observed above, the judgment of the International Court of Justice was not unanimous and it has also been criticised by some writers. In the view of Professor Brown, the judgment :

> sufffers from an excess of deductive reasoning from vague premises and a failure to give due weight to the evidence pointing to the establishment in international customary law of the three-point rule expressed in Article 6 of the Geneva Convention[47].

In any case. it cannot be denied that the conclusion upon which the judgment is grounded is very important as guide "in other similar controversies, to help states settle by negotiation or other peaceful means of their own choice their eventual differences[48].

The same applies to the Arbitration Award of 1977 concerning the delimitation of the continental shelf in the English Chaanel between the United Kingdom and France[49]. In its award of 1977 the Court of Arbitration concluded that :

> the role of the special circumstances condition in Article 6 is to ensure an equitable delimitation and the combined equidistance-special circumstances rule, in effect, gives particular expression to a general norm that, failing agreement, the boundary between State abutting on the same continental shelf is to be determined on equitable principles[50].

Consequently the Court added :

> even under Article 6 the question whether the use of the equidistance principle or some other method is appropriate for achieving an equitable delimitation is very much a matter of appreciation in the light of the geographical and other circumstances. In other words, even under Article 6 it is the geographical and other circumtances of any given case which indicate and justify the use of the equidistance method as the means of achieving an equaitable solution rather than the inherent quality of the method as a legal norm of delimitation[51].

The court did not consider the rules of customary law discussed in the judgment in the *North Sea Continental Shelf Cases* to be inapplicable in the *Channel Case*, but it expressed that :

> the provisions of Article 6 do not define the conditions for the application of the equidistanc -special circumstances rule ; moreover, the equidistance special circumstances rule and the rules of customary law have the same object—the delimitation of the boundary in accordance with equitable principles[52].

As a matter of fact, in the light of the judgment in *North Sea Continental Shelf Cases*, the UNCLOS III provided provisions for the delimitation of the EEZ and the Continental shelf between two opposite or adjacent states. Accordingly, the delimitation of the EEZ and the continental shelf should be effected by :

> agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all relevant circumstances. If no agreement can be reached within

> a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV of the present Convention[53].

But there was no consensus of opinion among the states as to the acceptance of these provisions. Consequently an open ended negotiating group (NG)[54] was established in 1978 for the purpose to find consensus with regard to the question of delimitation criteria and some related problems. After more than two years of negatiations the group submitted its final report to the Conference stating that it had not been possible to agree on a formula acceptable to all participants.

As a result, the provisions of the ICNT[55] in connection with the delimitation of the EEZ and the continental shelf between two opposite or adjacent states were prescribed by the Draft Convention (Informal Text)[56]. But after more negotiations and consultations these provisions were changed. The final outcome is the present Articles 74 and 83 of the LOS Convention. According to these articles the EEZ and the continental shelf between to opposite or adjacent states should be effected by "agreement on the basis of international law as referred to Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".

The LOS Convention has enabled the coastal state to exercise jurisdiction over the continental shelf as its "natural prolongation". It does not mean that the "natural prolongation" criterion should be treated as the only legal basis for equitable delimitation of the continental shelf between opposite or adjacent states. It was observed in the *Tunisia-Libya Contionental Shelf Case* (1982) :

> that certain geomorphological configurations of the seabed which do not amount to such an interpretation of the natural prolongation of the Party with regard to that of the Other, may be taken into account for the delimitation, as relevant circumstances charaterizing the area---In such a situation, however, the physical factor constituting the natural prolongation is not taken as a legal title, but as one of several circumstances considered to be the elements of an equitable solution[57].

It infers that in order to arrive at an equitable solution no criterion should be considered rigid for the delimitation of sea zones between opposite or adjacent states.

From the above study, it is clear that the impact of the LOS provisions and the judicial decisions is to accomplish the delimita-

tion equitable. That is to say, there is no restriction to apply the median/equidistance line or any other boundary line in order to achieve an equitable solution. But the fact that the median/equidistance principle cannot be treated as the predominant principle for the delimitation of the EEZ and the continental shelf between two opposite or adjacent states,

Compared with the abstract nature of the equitable principle, the equidistance formula is far more clear-cut and definite. But the foregoing seems to suggest that from the theoretical, legal and practical points of view, it would not be proper to adopt the equidistance line formula as the primary norm, leaving no choice but to rely on the general norm. Greater is the extent of sea zones lesser is the scope of applying equidistance principle for their delimitation between two opposite or adjacent states. The function of delimitation provisions is to accomplish the sea zones equitably apportioned between the contending states whose coasts are opposite or adjacent to each other. In fine, it ought to remember that the delimitation of sea zones must be equitable and in so doing, all reasonable considerations should be taken into account.

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CHAPTER VIII

BANGLADESH-INDIA SITUATION

1. Introduction

Bangladesh is located at the eastern end of the Indo-Gangetic Plain in Southern Asia. It extends 477 miles (768 km) SSE to NNW and 267 miles (429 km) ENE to WSW.

Bangladesh's total international land boundary of 1750 miles (2816 km) is shared with two countries : India (1605 mi, 2583 km) and Burma (145 mi, 233 km). The Indo-Bangladesh boundary line was determined by the Radcliffe Award at the time of the partition of the Indian Empire into India and Pakistan in 1947. The border was ratified by the Bangladesh legislature in 1974. The Burma-Bangladesh border was fixed in 1937 at the time of the separation of Burma from India.

Topographically, Bangladesh may be divided into the vast alluvial plain comprising most of the country and small Chittagong Hill Tracts in the extreme southeast. The Bengal plain, also known as the lower Indo-Gangetic Plain, is a large delta, in fact, the largest delta in the world. The Chittagong Hill Tracts constitute roughly one-sixth of the country. They form a minor hill system with its greatest elevation at Keokradong (4034 ft, 1229 m). Towards the east they form a series of parallel hill chains, while towards the west they slope gradually into a small, coastal plain.

Bangladesh has one of the most complex river systems in the world forming an interlacing grid. The three principal rivers of this network are : the Ganges (known as Padma in Bangladesh), the Brahmaputra (known as Jamuna in Bangladesh), and the Meghna. The Ganges-Padma flows southeast after it enters Bangladesh and brauches into hundreds of distributaries of which the largest are the Madhumati and the Arial Khan Rivers. Known as the many mouths of the Ganges, these rivers dissect the delta before entering the Bay of Bengal. The delta land east of the Padma-Meghna estuary is known as the Sundarbans ; that to the west between the Indian border and the Madhumati is known as the old delta.

The Brahmaputra-Jamuna, rising in the high Himalayas, receives four tributaries before it joins the Ganges about 45 miles (72 km) west of Dhaka ; the Dharla, Tista, Karatoya and Atrai

Rivers. The region enclosed by the Brahmaputra and Atrai Rivers is known as the Barind

The Meghna is formed of two branches of the Barak River, the Surma and the Kushiyara, entering the country from India, which join to become the Kalni River. It is later enlarged by the Baulai River. Before joining the Ganges, the Meghna recieves two tributaries of the Brahmaputra, the old Brahmaputra and the Dhaleswari.

From the junction of the three rivers below Dhaka to the Bay of Bengal is the stem to the river system. The triangular estuary contains a number of temporary islands, known as chars, as well as permanent islands. The largest of the permanent islands are Shabazpur, North Hatia, South Hatia and the Sandwip. The tides from the Bay of Bengal are felt as far as inland as Kalipur, 168 miles (279 km) away. These tidal waves, called bores, often cause disastrous floods.

Rivers are the greatest natural asset of Bangladesh. They drain a total area of 45000 square miles (549000 sq. km), provide a cheap and convenient form of transportation, furnish vast supplies of fish, and bring in or carry away over 2.4 billion tons of sediment load annually[1].

Bangladesh has a tropical climate governed by the monsoons. Though it is comparatively temperate and equable, there are marked seasonal variations. The three main seasons are a hot, summer season from March to June, a cooler but still warm and humid monsoon season from June through September and a cool, dry, winter season from October to February. January is the coolest month and April and May the hottest.

The average temparatures range from 7°C (45°F) in January to 31°C (88°F) in August and 32°C (90°F) in May. Temperatures up to 40.6°F) have been occasionally recorded. Daily temperature changes are moderate.

Nearly 80% of the annual rain falls from June through September when the moisture-laden monsoon blows from the south and the southwest. The average annual rainfall varies between 50 and 60 inches (127 and 152 cm) in the west to over 100 inches (254 cm) elsewhere.

Bangladesh ranks eighth in the world in size of population[2]. Bangladesh is the second most densely populated nation in the world after Singapore. The population density in 1974 was 1380 per square mile (533 per sq.km) for the country as a whole. If the arable and populated areas are considered separately, the density rises to 4014 per square mile (1550 per sq.km).

The Bangladesh economy has been described as an "international basket case". By all accepted criteria it is one of the poorest countries in the world. It is one of the 49 low-income countries of the world, and one of the 45 countries considered by the United Nations as most seriously affected by recent adverse economic conditions. With a population one-third that of the United States packed into a country the size of Wisconsion and with no known natural resources, Bangladegh's prospects for economic growth are bleak[3].

India, the second largest country in Asia, is located in the Indian subcontinent in South Asia.

India shares its total international land boundary of 6202 miles (9988 km) with six neighbours : China, excluding the Pakistani controlled portion of Kashmir (1176 mi, 1893 km) ; Nepal (937 mi, 1508 km) ; Bhutan (356 mi. 573 km) ; Burma (872 mi, 1403km) ; Bangladesh (1905 mi, 2583 km) and Pakistan (1260 mi, 2028 km)[4]. The borders with Pakistan and Bangladesh are based on the Redcliffe Award of 1947[5].

Mainland India comprises four well-defined regions : the northern mountain zone, or the Himalayas, the Indo-Gangetic Plain, the desert region and the southern region, including a narrow coastal plain along the Arabian Sea and a broader one along the Bay of Bengal.

The Himalayas (literally, the abode of snow) comprise three parallel ranges interspersed with large plateaus and valleys, like the Kashmir and Kulu Valleys. The Greater Himalayas, with an average height of 20000 feet (6700 m), includes such famous peaks as Mount Everest (29028 ft, 8847 m) and Mount Kanchenjunga (28208 ft, 8507 m).

The Indo-Gangetic Plain, about 1500 miles (2400 km) long and 140 to 200 miles (240 to 320 km) broad, is formed by the basins of three river systems : the Ganges, the Indus and the

Brahmaputra. The plain is the product of millennia-long deposits of alluvium in what was once a gulf between the peninsula and the Himalayas.

The rivers of India are generally divided into Himalayan rivers and Peninsular rivers. Of the Himalayan rivers the longest—and also the holiest—is the Ganges. The Ganges has two main headwaters in the Himalayas, the Bhagirathi and the Alaknanda, the former rising from the Gangotric glacier and the latter from the Alakapuri glacier. It enters the plains at the sacred city of Hardwar and joins with its major tributary, the Jamuna at Allahabad. During the rest of its course the Ganges is joined by a number of other Himalayan rivers, such as the Jamuna, Ghagra, Gandak and Kosi, and Central Indian rivers, such as the Chambi, Betwa and Son.

Four of the six major rivers of the Deccan Peninsula—the Mahananda, Godavari, Krishna, and Cauvery—flow into the Bay of Bengal and two—the Narbada and Tapti—flow into the Arabian Sea. The Deccan rivers are generally rain-fed and therefore fluctuate in volume.

India is a tropical country but is subject to a wide range of climates, from subfreezing Himalayan winters to 50'C (122'F) in the shade in the Indo-Gangetic Plain, from the highest annual rainfall in the world (423 in, 1096 cm) in Cherrapunji in Meghalaya to almost permanent rainlessness in the Thar Desert. Four fairly distinct seasons are common to all regions: a relatively cool winter monsoon, a hot and rainless transitional season, a rainy monsoon season, and a humid season during the retreating monsoon. Although the duration of the seasons varies according to the region, the northeast monsoon lasts from December to March, the transitional hot weather from April to May, the rainy southwest monsoon from June to September, and the transitional humid season from October to November.

Assam and West Bengal which are adjacent to Banglacesh have humid and rainy weather. Assam has torrential rainfall and moderately high temperatures, while West Bengal has rainfall between 50 and 60 inches (127 to 152 cm) and an average annual temperature between 18-3'C and 29.4'C (65'F and 85'F).

In the Indo-Gangetic Plain temperatures run as high 50'C (122'F) and as low as—2.2'C (28'F). The monsoon becomes weaker as it moves north : Patna receives 47 inches (119 cm), Delhi 28 inches (71 cm) and the Rajasthan deserts less than 10 inches (25 cm) per year.

India ranks 22nd in the world in overall density, with 471 persons per square mile (182 per sq. km), and 32nd in the world in density in agricultural areas, with 780 persons per square mile (301 per sq. km), Nearly 40% of the population is concentrated in the Ganges Basin states of West Bengal, Bihar, Uttar pradesh, Punjab and Haryana, which have densities of 1305, 839, 777, 696 and 587 persons per square mile (604, 324, 300, 269 and 227 per sq. km), respectively. The highest density is recorded in the southern state of Kerala with 1422 persons per square mile (549 per sq. km).

India is one of the 49 low-income countries of the world, and it is also one of the 45 countries considered by the United Nations as most seriously affected by recent adverse economic conditions[6].

The Bay of Bengal occupies an area of about 879375 square miles[7] ; and its mean depth is 2586 metres[8]. The continental slope terminates at less than 3000 metres depth[9]. To the west of the Bay are Indian states—West Bengal and Urissa. In its southern part are Sri Lanka and Nicobar and Andaman Group of Islands (India) and to the east lies Burma. To the north and east lies Bangladesh.

The rivers of Baugladesh and India flowing from the highest mountain of the world—the Himalayas—carry down to the Bay a colossal discharge of silts. Its effects, together with a heavy monsoon rainfall, cyclonic storms and tidal surges, have contributed to a continuous process of erosion and shoaling both in land and in the mouth of the mighty rivers.New islands such as South Talpatty/New Moore/Purbasha are being formed in the coastal zone of the Bay of Bengal. The shoaling bed of the Bay is believed rich in resources—both food and mineral.

Bangladesh emerged as an independent and sovereign Republic on 16 December 1971[10]. This area was under Muslim rule for five and a half centuries and passed into British hands in 1757 A.D. During the British rule it was a part of the British Indian provinces of Bengal and Assam. In August 1947 it gained independence

with the rest of India and formed a part of Pakistan and was known as East Pakistan. It remained in Pakistan for about 24 years i.e. from 14 August 1947 to 25 March 1971.

Bangladesh is a unitary, independent and sovereign republic known as the People's Republic of Bangladesh. The population of the country is 84655207[11] squeezed in about 55598 square miles. It is one of the most densely populated countries in the world.

The country is surrounded by India in the north, west and east, with Burma having a considerable length of border in the east. To the south lies deeply indented coastline of the Bay of Bengal. Bangladesh's plains, excessively humid, have swamp soils. Most of the delta has young alluvial soils of considerable fertility. Older, less fertile alluvium also occurs, notably in Barind, between the Ganges and Brahmaputra in the northwest corner of the country[12].

Bangladesh is a geographically disadvantaged state. The length of her coastline is about 310 miles[13]. It is a peculiar coastal state. Its peculiarity is not only with the concave configuration of the coasts but also with the presence of deltas in the estuaries and islands in the coastal bay[14]. That is to say, its peculiarity is also with the topography of the coastal bay.

Bangladesh is a land of rivers. The Bay of Bengal and the rivers are the sources of various fish. Extensive fishing-grounds exist in the northern region of the bay[15]. From the coastal bay fish like the 'hilsa' fish migrate to the rivers and therefrom to other inland waters for breeding[16]. The Bay of Bengal is rich not only in fish and sea weeds but also in mineral resources[17].

Bangladesh has no mineral ores. It produces salt from the bay waters. The bay is the only channel that enables Bangladesh to be linked with other countries. The people of the coastal areas of this country live by fishing. As regards the foreign exchange, the country has to depend on the fishery resources[18]. Its trade and commerce solely depend on the sea routes through the bay. The entire country is the hinterland of the Bay of Bengal. Thus, the importance of the bay to Bangladesh is unquestioned.

In all respects, the Bay of Bengal can serve Bangladesh as if a part of the country. Bangladesh cannot imagine running itself without having relation with the bay. Pursuant to these circum-

stances, the country is becoming very much concerned with the law of the sea.

Bangladesh initially followed the law of the sea (LOS) provisions as were applied by Pakistan. Following independence, Pakistan complied with the Territorial Waters Jurisdiction Act, 1878[19] and the Fisheries Act, 1897 of Great Britain[20]. While different states began to pass enactments soon after the Truman Proclamations, 1945[21], Pakistan on 9 March 1950 by the Declaration of the Governor-General specified the seabed extending to the one hundred fathom contour into the open sea as belonging to its territory[22]. Pakistan participated in all the UNCLOS I proceedings. But it signed only the Continental Shelf Convention on 31 October 1958, but did not ratify[23]. On 19 February 1966 by the Proclamation of the President of Pakistan, the country asserted claims to the 13 n.m exclusive fishing zone and the 100 n.m conservation zone in the areas of the high seas adjacent to the territorial waters[24].

However, as an independent state Bangladesh felt the need to apply the law of the sea provisions according to its own situation. Accordingly, she enacted the Territorial Waters and Maritime Zones Act[25] on 14 February 1974. The act was promulgated before the second session of the UNCLOS III. Originally, the act did not prescribe the breadth of the territorial sea and the EEZ. But it specified the contiguous zone to be extending up to 6 n.m beyond the outer limit of the territorial sea[26] and the seabed and subsoil of the submarine areas adjacent to the coast but beyond the limits of the territorial waters up to the outer limits of the continental margin bordering on the ocean basin or abyssal floor. The seabed and subsoil of the rock or any composite group thereof were declared as constituting part of the territory of Bangladesh[27].

Futhermore, being authorized by this Act, the Ministry of Foreign Affairs on 13 April 1974 notified that the country would be exercising 12 n.m limit for the territorial sea and 200 n.m for the EEZ measuring from the baselines[28].

Bangladesh is a least developed country[29]. It is now generally assumed that the country will have to explore and exploit the resources, both mineral and food, in order to save her teeming millions from starvation and possible extinction.

India[30] is a unity of diversities. The scenery varies from the long palm-backed beaches and the dense game jungles of the south, the brown flat topped hills of the Deccan, the green rice fields of Bengal, and the wheat plains of the Punjab to the tea terraces of the foothills and the jagged snow-clad peaks of the Himalayas.

India is a developing country. It has an area about 1269497 square miles. The population of the country is about 650982000 [31]. It has nearly 2759 miles coastline [32] adjoining the Bay of Bangal, the Gulf of Manaar and the Arabian Sea. The country has over 1280 islands, islets, with half of them constituting the archipelagos of the Andaman and the Nicobar Islands[33], and the Laccadive[34]. The Andaman and the Nicobar Islands have made India a neighbour opposite to Burma, Thailand, and Indonesia. Geograpically, these islands are opposite to Bangladesh as well.

The fact that the continental slope and the rise in the Bay of Bengal go several hundred miles from the coast and the position in the Arabian Sea is also comparable in the northwest. The striking of the first off shore oil in 1974, in the Bombay High, which is about 176 kilometres from the coast, points to great potentiality of oil from such enterprises and of reduction in the dependence of the country on the import of oil.

India emerged as an independent state on 15 August 1947 from the British rule. At present it is known as the Republic of India. For a decade after its emegence, the country complied with the Territorial Waters Jurisdiction Act, 1878 and the Indian Fisheries Act, 1897 as adopted by Great Britain[35]. That is to say, during this period India complied with three-mile territorial waters. On 22 March 1956 by the Presidential Proclamation the country declared its territorial waters to be extending to 6 n.m measured from the appropriate baseline[36].

By the Presidential Proclamation of 29 November 1956, India enacted the laws for extending conservation zones in areas of the high seas adjacent to the territorial waters but within a distance of 100 n.m from the outer limits of those waters[37]. The Proclamation declared the limit of the contiguous zone as fixed at 12 n.m measuring from the baseline.[38].

India took part actively in the UNCLOS I proceedings but did not sign any of its conventions. On 30 September 1967 the

Presidential Proclamation of the country declared the territorial waters to be extending to 12 n.m limit[39].

In the year 1976 by its Act[40] India renewed the 12 n.m limit for the territorial waters and extended the contiguous zone to 24 n.m and the EEZ to 200 n.m measuring from the baseline. The continental shelf was declared as comprising the seabed and subsoil of the submarine areas extending beyond the limit of territorial waters throughout the natural prolongation of the land territory to the outer edge of the continental margin. As regards the continental margin not extending up to a distance of 200 n.m from the baseline, the Act empowered the country to exercise the regime of the continental shelf up to 200 n.m.

It is to be noted that India adopted this Act while the RSNT already came into being. The provisions of the Act regarding the territorial sea, contiguous zone, EEZ and the continental shelf basically are similar to those of the RSNT.

Bangladesh and India became members of the Drafting Committee at the first session[41] and have been participating actively in the deliberations of the UNCLOS III. As regards the acts passed by Banglandsh, 1974 and India, 1976 it is possible to state that their approaches to the law of the sea are to safeguard interests in compliance with the UNCLOS III provisions.

Bangladesh and India are adjacent states. The configuration of the coast of Bangladesh is concave. But the configuration of the coast of India adjoining the Bay of Bengal is convex.

It is self evident that in case of two adjacent states every sea zone is to be delimited between them. But in case of two opposite states the delimitation cannot be effected unless the sea zone concerned is at a distance less than twice the breadth of the zone from the baselines of these states For example, there arises no question of delimiting the 200 n.m EEZ between two opposite states unless this zone is at a distance less than 400 n.m from the baselines of these states. Anyway, in all circumstances, every sea zone requires to be delimited between Bangladesh and India.

The situation arising out of the delimitation of the maritime zones involves a conflict of interest between Bangladesh and its neighbours. The issues of conflict arose mainly with India when in 1974 the Government of Bangladesh signed production sharing

contracts with six oil companies granting them exploration rights of oil and natural gas in its territorial waters in the Bay of Bengal.

In this respect the Bangladesh line moved towards the south from the end of its land boundary, while the Indian line took a south-easterly direction creating an angle within which lies thousands of square miles of the bay claimed by each country as its economic zone[42]. It has become a crucial problem between the two neighbouring countries. As such the delimitation of the maritime boundaries has become the all important matter for Bangladesh and India on which will depend their areas of authority in the seas for example, in the form of the territorial sea, EEZ and the continental shelf.

Though negotiations have been going on since 1974, Bangladesh and India have not been able to settle the problem of delimitation mainly due to the concave nature of the Bangladesh coast.

Bangladesh's position is that no rigid principle can be applied in the present case. The basic guideline is equity. India, on the other hand, attempts to apply the principle of 'equidistance' in delimiting the boundary ignoring the physical features of the coast.

Furthermore, it is important to mention that new islands are rising in the coastal bay. By this time, the ownership of the newly emerged island (s) South Talpatty/New Moore/Purbasha in the estuary of the border river Haribhanga between Bangladesh and India has been claimed both by Bangladesh and India as forming part of their respective territories[43]. The boundary between Bangladesh and India in this area is the midstream of the main channel of the border river Haribhanga.

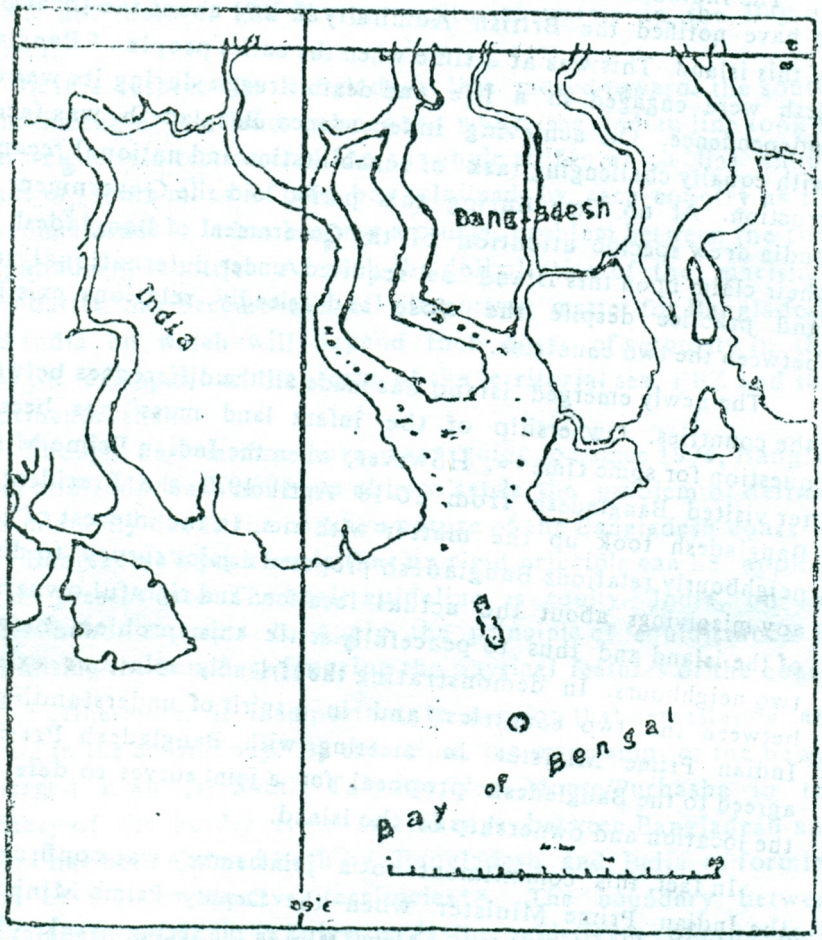
The island was formed in the estuary of the border river Haribhanga and the internal river Raimangal most probably after the cyclone and tidal bore of 1970, it being a new land rising initially as a low-tide elevation[44]. The island is known as "South Talpatty" island in Bangladesh. It is of U-shaped formation with the eastern arm elongated towards the north and had an approximate area at low-tide of about 2 square miles in 1978, which may have further grown in size in the meantime. It was uninhabited, though fishermen from Bangladesh mainland were obseved on the island seasonally during the dry seasoon.

The Indian authorities called it "New Moore" island and claim to have notified the British Admiralty in 1971 about the location of this island. This was at a time when the entire people of Bangladesh were engaged in a life and death struggle during its war of independence. On achieving independence Bangladesh was faced with equally challenging task of rehabilitation and national reconstruction. At no time during this period did the Government of India drew specific attention of the Government of Bangladesh to their claim upon this island as required under international law and practice despite the close and friendly relations existing between the two countries.

The newly emerged island has made all the differences between the countries. Ownership of the infant land mass has been in question for some time[45]. However, when the Indian Prime Minister visited Bangladesh from 16-18 April 1979 the President of Bangladesh took up the matter with him. In the interest of good neighbourly relations Bangladesh proposed a joint survey to dispel any misgivings about the actual location and rightful ownership of the island and thus to peacefully settle this problem between two neighbours. In demonstrating the friendly relations existing between the two countries and in a spirit of understanding the Indian Prime Minister in meeting with Bangladesh President agreed to the Bangladesh proposal for a joint survey to determine the location and ownership of the island.

In fact, this commitment to a joint survey was confirmed by the Indian Prime Minister when the Deputy Prime Minister of Bangladesh called on him in New Delhi in the second week of May 1979. Since then the Indian side has been repeatedly requested to expedite the proposed joint survey. The Bangladesh High Commissioner in New Delhi in his message dated 30 May 1980 informed Dhaka that he had three meetings in the Indian External Affairs Ministry and that the Indian side had agreed to study this case more thoroughly before taking up a joint survey.

As regards this island, both Bangladesh and India are still passing through conflict[46]. Bangladesh lays claim to this island on the assumption that the midstream of the border river Haribhanga flows to the west of the island. But India claims it on the assumption that the midstream flows to the east of the island.



Map No. 1. The Sundarbans (Haribhanga and Raimangal Rivers)
Source; I(1958) UNCLOS I OR 23.

Moreover, in March 1980, the Indian daily "Ananda Bazar Patrika" and other West Bengal (India) newspapers carried news mentioning the emergence of a second island. Several items were publisihed according to which another island on the estuary of the Haribhanga river was reportedly detected by the Naval Hydrographic survey of India sometime in 1975. It was reported that the State Government of West Bengal called this new island 'Purbasha'. From the description of the location of this new island given by the West Bengal Press, it appeared that the island was situated very near to the south Talpatty Island on its western side.

Satellite imageries available in Bangladesh indicated the presence of a low-tide elevation conforming to the location mentioned in the West Bengal (India) press of the 'Purbasha' island. The satellite photograph sent by the Indian Ministry of External Affairs under their Note of 9 April 1980 to the Bangladesh Ministry of Foreign Affairs also showed a similar low-tide elevation in the midstream of the border river Haribhanga.

India Government subsequently denied that there was indeed, a second island and adopted the position that "New Moore" and 'Purbasha' were one and the same island[47]. At this stage it is significant to note that all misgivings regarding the location of the newly emerged islands in the estuary of the border river Haribhanga and their rightful ownership could be easily dispelled by a physical joint survey of this area. This would also remove existing confusion over the names and establish facts on the ground regarding the number of islands, their location and ownership.

There seems to be no doubt to say that the subject matter of the conflict between Bangladesh and India over the newly emerged island is concerned with the issues of fact rather than the law.

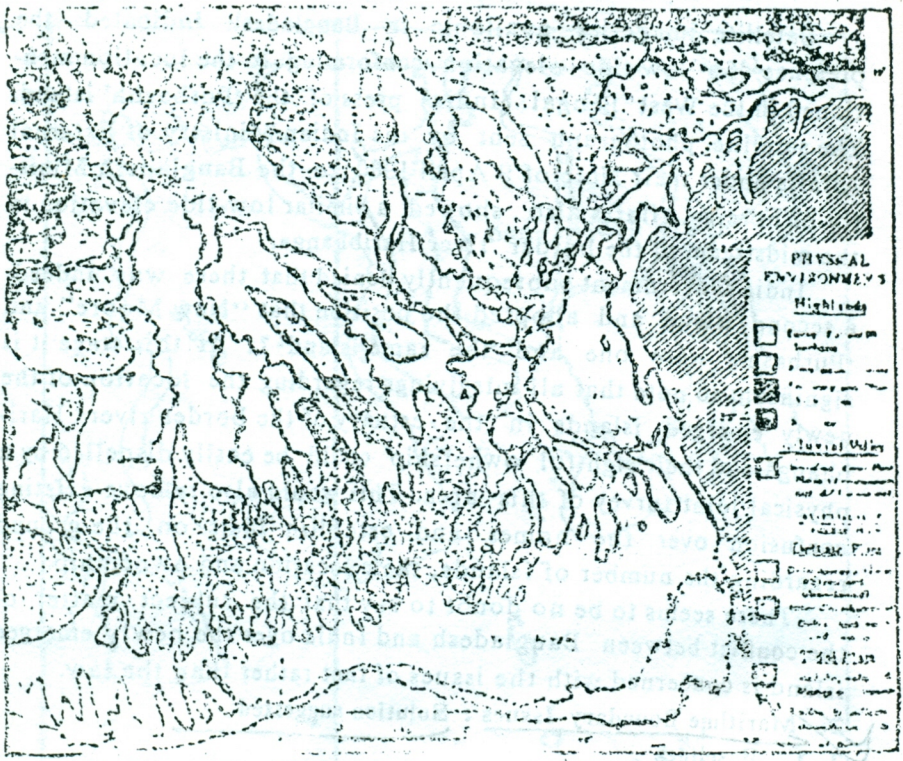
2. Maritime Boundary Issues : Solution suggested

2. 1. Baselines

As adjacent states Bangladesh and India require to delimit all the sea zones between them. The topography of the Bay of Bengal adjoining Bangladesh and India is very peculiar[48]. The bay is neither a closed bay nor a bay as defined under the semi-circle criterion[49]. It is not a historic bay, as such, no coastal state can exercise territorial rights[50].

A close look at the map of Bangladesh[51] clearly illustrates the peculiar characteristics of the coastline. Almost the entire area of Bangladesh constitutes one integrated river basin involving a plain tract. Geological features play a major role in the evolution and behaviour of the coastal regions of Bangladesh. The rivers of Bangladesh carry down to the bay a colossal discharge of silt. The cumulative effects of monsoon rainfall, cyclonic storms and the tidal surges have contributed to a continuous process of erosion and shoaling[52]. The results of all the factors have been monumental on Bangladesh's coast. It has the following characteristics :

(i) The estuary of Bangladesh is such that no stable water line or demarcation of landward and seaward exists;



Map No. 2. The Environments of the Ganges-Brahmaputra Delta, from J. Morgan (1970). Source : F. P. Shepard, *Submarine Geology* (1973) Third edition, 168.

(ii) the continual process of alluvion and sedimentation forms mud-banks and the area is so shallow as to be non-navigable by other than small boats ;

(iii) the navigable channels of land through the aforesaid banks are continuously changing their courses and require soundings and demarcation so that they pertain to the character of the river mouths and inland waters.

It is because of these considerations, neither the normal baseline nor the straight baselines as contemplated in Article 3 and 4 of the TS&CZ Convention suits the "local requirements". Bangladesh, therefore, took the view that Article 4 needed amendment so as to incorporate these basic attributes and proposed amendments at the past session of the UNCLOS III. The basic thrust of the amendment is to delineate the baseline by means of straight lines linking geographical coordinates on the outermost limit of the coastal waters which effectively demarcates the landward and

seaward areas. In other words, it is a delineation of baseline on certain depth-method without reference to landmark.

In the Caracas session of the UNCLOS III, 1974 the Bangladesh delegation submitted the proposal on the basis that Article 4 of the TS&CZ Convention implicitly recognises the depth-method of baseline and what is required is to make Article explicit. Moreover, the geomorphological considerations seek to justify the depth-method baseline[53]. It is under the compulsion of both law and fact that Bangladesh had presented its case. It is not the intention of Bangladesh to take unilateral action in a matter which is of general international interest. This was precisely the reason that Bangladesh had placed its case for consideration before the international community[54].

As regards Article 7(2) of the LOS Convention, there arises a question, whether it permits the delineation of baselines by depth-method. As has been stated, it cannot be concluded that the article does not permit the depth-method[55]. In essence, it is to be pointed out that Bangladesh has adopted this method as to its peculiar geographical, geological and geomorphological situations. From a practical point of view, the formula as incorporated in the LOS Convention (Asticle 7(2) does not meet the demand of the situation of Bangladesh though it appears to have taken into account certain attributes of a deltaic country like Bangladesh[56].

Bangladesh is facing peculiar situation with the coastal bay. To the western coast bordering with India off a few miles from the joint estuary of the river Haribhanga and Raimangal are deltas near each other. From the mouth of the rivers a deep channel with depth from 8 to 20 metres have the shallow bank between the deltas. A small area is dried up at low-water[57]. Like situation arises with the river Naaf near eastern coastal border with Burma[58]. The river discharges into the sea between "Shapura Point" and "Cypress Point" about a mile just south eastward. Its entrance with sea is mounted by shallow flat to which forms a bar known as "Shapura Flat" and the south of Cypress, "Cypress Sands"[59]. Near to them is St. Martin's Island arouud which a considerable region is with least depth of water[60]. Actually, all these have posed perennial problems to Bangladesh to delineate

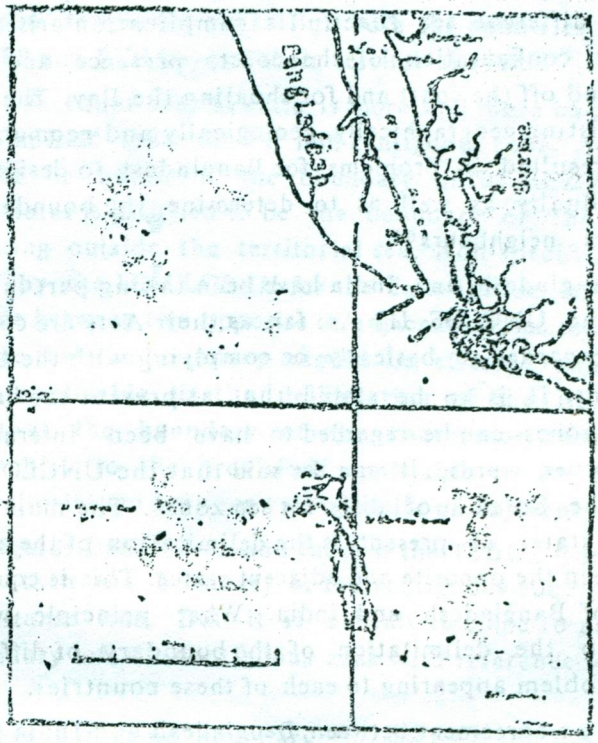
the baselines. However, the country has enacted an Act in 1976[61]. In addition to this Act, certain rules have been prescribed with particular reference to the UNCLOS III provisions[62].

Taking into account the geological peculiarities of the coast and the peculiar topographical features of the coastal bay Bangladesh has drawn baselines on the basis of the depth-method that is, geographical coordinates which in certain depth of coastal waters have been linked by straight lines to delineate the baselines. The baselines so formulated have been fixed at ten fathoms extending to 16 to 30 miles from the coastline[63]. The baselines from which territorial waters shall be measured seaward are straight lines linking successively the baseline points set out below[64] :

Baseline point	Geographical Coordinates	
	Latitude	Longitude
No. 1	21·12'00"N	89·06'45"E
No. 2	21·15'00"N	89 16'00"E
No. 3	21·29'00"N	89·36'00"E
No. 4	21·21'00"N	89 55'00"E
No. 5	21·11'00"N	89·33'00"E
No. 6	21·07'30"N	91·06'00"E
No. 7	21·10'00"N	91·56'00"E
No. 8	20·21'45"N	92·17'30"E

It is a fact that India already fixed the baselines subject to Article 4 of the TS&CZ Convention. As regards the delineation of baselines, the LOS Conferences have made provisions. But these provisions do not enable to delimit the internal waters (waters on the landward side of the baselines) between two states. Non-specification of the provisions by the LOS Conferences has posed difficulties to suggest the principles to be applicable to the delimitation of such internal waters.

If the coastline is the baseline of two adjacent states, then there will arise no issue of the delimitation of internal waters between then. To this end, the territorial sea will be the waters areas in the immediate vicinity of the coastline. From the topographical features of the coastal sea in the immediate border of Bangladesh and India, it seems that there exists a part of the coastal sea on the landward side of the baselines[65]. These internal



Map No. 3. Naaf River.
Source; 1(1958) UNCLOS I OR 234.

waters require to be demarcated between them by some boundary extending from the end of their land boundary to the baselines.

If the equidistance line requires to be treated as binding to the delimitation of the maritime zones then, it seems good to apply this line for the boundary of the internal waters. But in all cases, the boundary as determined by agreement is the best boundary. As regards the boundary of the internal waters between Bangladesh and India this should be welcome.

2. 2. Territorial Sea and Contiguous Zone

Bangladesh and India are two coastal states facing adjacent to each other. The configuration o fthe coast of Bangladesh is concave. But the configuration of the coast of India to be considered in the delimitation of maritime boundaries with Bangladesh is convex. Bangladesh, being a coastal state with its peculiar situation

vis-a-vis its neighbour like India is faced with complicated issues in designing different sea zones. Its complication arises due to the peculiar configuration of the coast, presence and rising of deltas near and off the coast and for shoaling the Bay. The peculiar situations existing geographically, geologically and geomorphologically have resulted in problems for Bangladesh to design the sea zones individually as well as to determine the boundary of the zones with its neighbours[66].

Both Bangladesh and India have been taking part in the proceedings of the UNCLOS III. As far as their Acts are concerned, they can be regarded to basically be complying with the UNCLOS III provisions. It is to be stated that at present the breadth of different sea zones can be regarded to have been internationally solved. In other words, it can be said that the UNCLOS III has prescribed the breadth of different sea zones. The main problem among the states at present is the delimitation of the zone concerned between the opposite and adjacent states. This is equally true in respect of Bangladesh and India. What principle would be applicable to the delimitation of the boundary of different sea zones is a problem appearing to each of these countries.

There is no agreement between Bangladesh and India in regard to the delimitation of maritime boundaries. As a result no principle can be imposed on these countries for the delimitation. It is also to be noted that there exists no "historic title" neither for Bangladesh nor for India to exercise such claims over sea zone concerned.

Consequently, it is required for the two countries whether the territorial sea is to be delimited by equidistance line or in considerations of "special circumstances". It has been realised that the situations existing geographically, geologically and geomorphologically between Bangladesh and India have constituted "special circumstances"[67]. Therefore, there arises justification of departure from the equidistance line for delimiting the boundary of the territorial sea. That is to say, delimitation of the territorial sea between the countries cannot be effected by equidistance line.

As a matter of fact, the extent of the contiguous zone beyond the territorial sea requires to be delimited subject to the provisions dealing with this zone. That means, Bangladesh shall have to delimit 6 n.m contiguous zone[68] and India 12 n.m zone[69] beyond

their 12 n.m territorial seas. But both the countries will have to delimit 188 n.m EEZ beyond their territorial seas.

It is a fact that coastal state is more and more concerned with the 200 n.m EEZ than the 24 n.m contiguous zone. As a result, it would not be unfair if the boundary of the EEZ between two adjacent states is assumed to be the boundary of the contiguous zone existing outside the territorial sea. Non-specification of any principle by the UNCLOS III for the delimitation of the contiguous zone between two opposite or adjacent states makes possible to presume that the boundary should be effected subject to the principle applicable to the delimitation of the EEZ. It is also viewed that the boundary of the contiguous zone should be effected subject to the provisions applicable to the delimitation of the territorial sea between two opposite or adjacent states.

As regards Bangladesh and India if the TS&CZ Convention is effective, then the boundary of the contiguous zone be delimited by equidistance line. But it is difficult to come to an end about the boundary of the contiguous zone with reference to the UNCLOS III.

However, if same boundary for the EEZ and the contiguous zone particularly between two adjacent states is effected, it would practically be much more convenient. From this point of view, the boundary of the contiguous zone between Bangladesh and India should be delimited subject to the principle applicable to the delimitation of the EEZ.

2. 3. Fishing Zone and Exclusive Economic Zone

Bangladesh and India as coastal states are adjacent to each other. The entire coast of Bangladesh lies around the Bay of Bengal. The coast of India which is to be concerned with the boundary delimitation of the sea zones between these states also lies around the Bay. The delimitation of different sea zones has been an important phenomenon between Bangladesh and India. To this end, it is necessary to suggest some principle for them to apply for determining the boundary of the EEZ. In order to conclude this for the two states, it is essential to be acquainted with different situations which need to be taken into account for delimiting the EEZ.

2. 3. 1. Geo-physical Impact

The configuration of the coast of Bangladesh is concave. But the coast of India which is to be concerned with the boundary delimitation of the sea zones with Bangladesh is convex. To the north of the two states lines the highest mountain—the Himalayas and other mountain ranges. The largest rivers of the two states—the Ganges and the Brahmaputra have originated from these mountain ranges. They have flowed over the hilly territories of Nepal, India and the plain land of Bangladesh and finally have met the Bay of Bengal. A large number of their tributaries has made Bangladesh a riverine state. As a matter of fact :

> (Bangladesh) lies almost entrely in the very humid part of the joint delta of the Ganges and Brahmaputra rivers. There is also a tongue of alluvial plain along the Surma rivers, in the angle between Assam Plateau and the Lushai Hills, on the border of Burma. Most of this alluvial region is still growing by the accretion of silt ; there are areas of higher, older and less fertile alluvial between the Ganges and Brahmaputra[70].

The entire territory of Bangladesh is a monsoon area—a lowlying plain. Monsoon rains can make the components such as mud, sands and silts of its soil fragmented. Bangladesh particularly its coastal area is a domain of cyclonic storms and tidal surges. The effects of all these have resulted in the deposit of sediments in the coastal Bay. The sediments are primarily derived from lands and contributed by (i) streams, (ii) wave erosion of coasts and (iii) winds. Moreover, it may not be ignored that the formation of (iv) shells and skeletons of marine animals and plants, and (v) chemical precipitation together have caused the deposit of sediments in the coastal Bay.

It is a fact that geographical features play a major role in the evolution and behaviour of the coastal regions of Bangladesh. The rivers of Bangladesh carry down to the Bay a colossal discharge of 2 billion tons of silt and combine flow of the river system during monsoon is about 5 million cubic feet per second[71]. All such deposits have resulted in the formation of deltas near and off the coastal Bay. According to F. P. Shepard :

> There appears to be no place in the deep ocean where the topography has been so influenced by deposition coming from the adjacent land as in the Bay of Bengal. The gently sloping plain, extending for 2000 km from the slope base off the great Ganges-Brahmaputra Delta to

> the 5000 m contour far south of Ceylon, is unique. The slope has an almost even gradient of 1.5m/km, and the fan is crossed by many anastomosing channels with low levees on the side[72].

Outside the 450 km wide Ganges-Brahmaputra Delta a trough shaped marine valley, called the Swatch of no Ground crosses the shelf diagonally in a south westerly direction[73]. Deltas are usually favoured sites for agriculture because of their alluvial soils, but flood danger and poor drainage in swales and depressions generally are present as local problems[74]. The densely populated Ganges-Brahmaputra deltas are criss-crossed with a close network of large and small rivers. They provide drainage and silt that may be added to the fields to help maintain soil productivity, and irrigation water for rice cultivation.

One of the most significant types of fragmental surface material is alluvium, or the rock debris carried and deposited by streams and rivers. It is found principally along the flood plains of rivers and on the gently sloping surfaces which usually mark the junction of mountains and plains. The alluvium of flood plains and deltas generally provides unusually fertile soil material. Its texture usually intermediate between sand and clay, is not too fine, yet is open enough for easy cultivation and drainage. It is composed of a wide of variety of small rock fragments recently derived from the entire drainage basin and thoroughly mixed by the turbulent river waters ; hence it is not likely to be deficient in any of the essential plant-food minerals. It is generally dark in colour, owing to the organic material derived from topsoils upstream or formed in place, and the organic content improves its ability to hold plant food and moisture.

The principal disadvantage of alluvium lies in its position. Having been formed from river overflow, it is subject to flooding, and its flat, low position is a handicap in drawing off surplus water. When adequately ditched and protected, however, alluvial soils are among the most productive in the world. Most of the dense rural populations of the globe are located on alluvial soils[75]. In its entirety, this principle is applicable to the Ganges-Brahmaputra Delta.

As regards the Ganges Trough F. P. Shepard states :

> The Ganges Trough has a seaward continuation for almost 2000 km down the Bay of Bengal in the form of fan valleys with levees. This

> can be detected even south of Ceylon. The fan valleys wind across the great fan with many distributaries, and in some places have a braided pattern. The huge fill in the Bay is apparently derived primarily from the Ganges and Brahmaputra[76].

Actually, there exists a great many variations in the topographical features of the Bay of Bengal. The thickness of its sediments as has been known is 16.5 km, the thickest of any place in the world[77].

To the east, Bangladesh has some little border with Burma. The topography of the coastal sea bordering Bangladesh and Burma is also peculiar. According to D. G. Moore, J. R. Curray and F. J. Emmel :

> Reflection profiling in a region of anamalous topography and structure in the Bay of Bengal off Burma has revealed the presence of a large submarine slide (olistostrome) at the base of the continental slope off the Bassein River. The slide overlies a thick section of Bengal Deep-Sea Fan turbidites and has a complex internal structure consisting of two primary elements. The lower element is pervasively disturbed and is interpreted as a mudflow generated at the time of the slide which spread over a large area to as much as 35 km beyond the topographic toe. This mudflow poured into a distributary channel on the Bengal Fan and virtually filled it for 145 km along its length. The upper element comprises a series of relatively coherent blocks of stratified sediments (olistoliths) bounded by curved fault planes. The blocks have been transported as much as 55 km from the original Sunda Trench Wall. Their dimensions, up to 300 m thick and 2.8 km between faults, are similar to olistoliths of the slide terrain in the Appennines. The blocks are blanketed by the younger slope strata. The total area convered by the slide, including the mudflow, is almost 4000 km^2, and total volume of the slide is over 900 km^3. Material of the slide comes of Bengal Fan turbidities offscraped above the Sunda Subduction Zone and blanketed by rapidly deposited slope sediments from a western Irrawardy River distributary (the Bassein River) during the Late Quaternary glacial low sea level. This rapid loading probably coupled with a large earthquake, triggered the slide[78].

To the south of Burma, there exists Indian occupied Andaman and Nicobar Group of Islands in the Bay of Bengal. These rocky and hilly islands geologically are regarded to be the submerged continuation of the outer fold ranges of the Arakan Yoma (Burma)[79]. The fact is that the fluvial activities of the Great

rivers, Ganges, Brahmaputra and their tributaries primarily have resulted and been resulting sediment deposits in the coastal Bay.

From these considerations, it would not be irrational to draw conclusion that any formations under and above the Bay waters would be a concern mainly of the coastal land territory whose fragmentary soil components in different forms such as mud, sand, and silts are deposited there. Furthermore :

> Waves breaking on the shore are capable of transporting large amounts of sediment. During storms the courser material is thrown high on the beach above the normal high-tide level, while at the same time the eroded and a certain amount of material carried out below low-tide level. During periods of very large waves the whole beach may undergo temporary erosion. Between storms the smaller waves return sediment from shallow water to the beach. Rip currents that are associated with the waves contribute to the removal of sediment from the beach[80].

The Ganges-Brahmaputra plain is subject to excessive flooding by storms surges. The plain is also subject to tectonic activity and small recent faults are found, some of them producing basins[81]. The cumulative effects of monsoon rainfall, cyclonic storms and tidal surges have contributed to a continuous process of erosion and shoaling. All these have made the entire coast of Bangladesh to be unstable. They have also resulted and are resulting in irregular formations in the coastal Bay. As time passes, such formations are emerging in the form of islands constituted of different components.

The sediment deposits have made the continental shelf extensive in the Bay. The shelf is appearing to be rich in oil and other natural resources. Apart from this, the Bay of Bengal is a ground of different fish stocks. To this end :

> A report of Food and Agricultural Organisation (FAO) of the United Nations suggested that a total of 4 thousand tons shrimps would be available for catch in average annually in the Bay of Bengal which will be able to fetch 20 lakh dollars from abroad if exported.
>
> Another survey conducted by the Bangladesh Planning Commission suggested that the total catch of fish in the northern Bay of Bengal was 1.10 lakh tons in average per year[82].

As a matter of fact, the Bay of Bengal is the main source of fishery resources for Bangladesh. From the geographical, geological and geomorphological considerations, Bangladesh appears to be

inherently related with and overwhelmingly depended on the resources of the coastal Bay.

2. 3. 2. **Socio-economic Impact**

The economy of Bangladesh is predominantly agricultural. The land is fertile but densely populated and average income per capita is extremely low by international standards. The disruption usually arises from the frequent cyclones and floods. With population growing at about 3 percent a year, the need to import rice and wheat to make up the deficiency has taxed Bangladesh's foreign exchange resources. Massive foreign aid has kept the country going.

Bangladesh has few mineral resources, although some natural gas has been produced, and there are the beginnings of steel and oil industries[83]. The existing mineral resources can seldom meet the needs of its teeming millions.

The economy of India is partially agricultural. The country is promoting irrigation, the use of chemical fertilizers and the introduction of high-yield strains or rice and wheat are increasing production. Furthermore, India has large resources of iron ore in Bihar and Orissa as well as bauxite titanium ore, manganese, rare metals and mica. Oil is found in Assam, Gujrat and in the "Bombay High" off-shore region[84].

The long coastline enabled the country to avail itself of the resultant benefit. That is to say, India is one of the states with the largest economic zone in the world[85]. The country can be facilitated extensively for exercising trade and commerce with other countries through different sea routes.

2. 3. 3. **Delimitation how to be effected**

As regards the delimitation of maritime boundaries, there is no agreement between Bangladesh and India. Therefore, it is required to conclude whether the equidistance principle or the principle of equity should be applicable to them. As a matter of fact, in normal case it is suggested that the delimitation of maritime boundaries should be effected by equidistance principle. That is to say :

> The normal case, in which the application of the equidistance method leads to a just and equitable apportionment, is a more or less straight coastline, so that the areas of the shelf apportioned through the equidistance boundary more or less correspond to the shorelines

(*facades*) of the adjacent States. Should this not be the case, and should therefore no equitable and apropriate solution result, the clause of the 'special cirumstnnces' applies[87].

If there exists no "special circumstances" then the delimitation of maritime boundaries should be effected by equidistance principle. The basis of applying this principle is that the apportionment of the sea zones so delimited would be equitable. Because, in normal case, the equidistance principle can lead to equity in the apportionment of the sea zones. That means, the greater is the degree of similarity the greater will be the degree of equity in the delimitation of maritime boundaries between two coastal states.

But taking into account the (i) concavity and convexity of the configuration of the coastlines, (ii) the presence of islands, and the (iii)geo-physical and socio-economic inequalities between the countries, the Bangladesh-India situation cannot be regarded as constituting a normal case. That means, the equidistance principle cannot lead to equity in the apportionment of the maritime zones between them. Therfore, the delimitation of the EEZ between Bangladesh and India cannot be treated subject to the equidistance principle. Finally, it is to be concluded that the delimitation of the EEZ between Bangladesh and India should be effected by "special circumstances" cum "equitable principles".

2. 4. Continental Shelf

The Ganges-Brahmaputra Delta of the Bay located at the combined mouths of the Ganges and Brahmaputra rivers is a subject important to both Bangladesh and India over the issues of the continental shelf. In the words of J. P. Morgan and W. G. McIntire :

> (The) plain is subject to excessive flooding by storm surges, causing great loss of life to the fishing population living on the higher sand bars. The tides scour out deep channels and produce much overlapping of sediment on the inside. Huge quantities of sediments are brought in by rivers from the Himalayas and other high mountain ranges to the north. Many of the braided channels in the flood plain have been abandoned, leaving large masses of sands.....According to J. Morgan (1970), old channels should be ideal places for oil reservoirs if such deposits have been preserved in ancient rocks. The Ganges plain is subject to tectonic activity and small recent faults are found, some of them producing basinsss.

As time passes, this area is attracting the surrounding countries of which one's claim is facing confronted by the counter-claim of another. Consequently, its importance is unquestioned in relation to delimitation of maritime boundaries.

Neither Bangladesh nor India is a party to the 1958 Geneva Convention on the Continental Shelf. But they are particpating in the UNCLOS III. Still there is no agreement between Bangladegh and India on the delimitation of maritime boundaries. But India has entered agreements with different countries for example, Indonesia, Maldives, Sri Lanka and Thailand[89]. Each of these countries is opposite to India.

As has been stated, the adjacency of location, concavity and convexity in the configuration of the coasts, presence of islands and mud banks and the rising of new islands near and off the coasts have made the delimitation of maritime boundaries between Bangladesh and India a conflicting phenomenon. Since there is no agreement, therefore, it is not possible to enforce on these countries any principle concerning the delimitation of maritime boundaries between two adjacent states.

However, if the Geneva Convention or the LOS Convention is applicable to them, it is necessary to decide the principle which both countries should implement for the delimitation. Such delimitation should be effected through Article 6(2) of the Geneva Convention and Article 83(1) of the LOS Convention.

As a matter of fact, the equidistanee line can give resultant benefit to the coastal state with convex coast against its counterpart with concave coast[90]. That is to say, in dissimilar situations the equidistance line cannot lead to an equitable solution. But it is difficult to think of similarity in the configuration of the coasts, in the existance of near and offshore islands and in different matters between two coastal states. As no two coastal states had identical continental shelves, there could be no single formula for delimitation of the continental shelf[91].

Basically, the impact of equidistance line is to result in equal apportionment in the sea zones between the states concerned. This is possible in identical situations. But in fact, it is difficult. In this connection Shigeru Oda says:

> The fact is that situations and conditions in different parts of the world are too varied to permit a categorical adoption of the equidistance or median line as a rule for boundaries. The cases where the equidistance or median line offers an equitable solution are likely to occur infrequently and exceptions will probably be more numerous than the rule[92].

Needless to say, the dissimilar configurations create a great many exceptions in the delimitation of the continental shelf between the states. Therefore, no principle such as the equidistance principle can be uniformly applicable. In other words, engineering 'equality' in specific situation is notoriously difficult : one man's compensatory discrimination may seem like a privilege to another[93].

As a successor state, Bangladesh is complying with certain laws adopted by Pakistan. It has already been mentioned that Pakistan is one of the states which claims the continental shelf as belonging to its territory. Bangladesh has prescribed the continental shelf extending up to the margin and adopted the right to explore the margin and exploit its natural resources. The continental shelf has been regarded as belonging to the territory of the country[94].

As has been observed, geographically and geomorphologically it is not easy to apply the thickness cum distance criteria[95] for fixing basepoints to help measure the outer limit of the continental margin lying in the Bay of Bengal adjoining Bangladesh and India. That means, the 60 n.m distance criterion[96] appears to be applicable. But it is not possible for Bangladesh or for India to freely extend the continental margin to 350 n.m from the baselines or 100 n m from the 2500 metre isobath[97]. Taking the use of these criteria, if Bangladesh extends the continental margin, it will overlap the continental margin of India extending from her mainland and the Andaman group of Islands as well.

From the geological point of view, the continental margin in the Bay of Bengal adjoining Bangladesh extends near to Sri Lanka[98]. In other words, while Bangladesh and India will take measures as to the delimitation of the continental margin, Sri Lanka may take an interest in the delimitation.

India is a coastal state having a number of coastal islands. Not only that, it has several mid-ocean islands. The Andaman and Nicobar Group of Islands are its mid-ocean islands. Taking into

account these islands it is not possible for India to exercise the provisions applicable to the archipelagic states. As long as these islands will not have a separate political identity, it is not possible for them to make use of these provisions.

While in relation to the Andaman and Nicobar Group of Islands, it is necessary for India to delimit the continental margin with Bangladesh, the country for example, Burma may not keep itself aloof from taking an interest. It has been mentioned earlier that geologically the Andaman and Nicobar Group of Islands are the continuation of the Arakan Yoma[99]. From this point of view, Burma may regard the continental shelf surrounding these islands as "natural prolongation" of her territory.

It has been stated that the phenomenon of delimitation of maritime boundaries between Bangladesh and India falls under "special circumstances"[100]. Therefore, according to Article 6 of the Geneva Convention the equidistance principle cannot be given effect to the delimitation.

According to Article 83(1) of the LOS Convention, the delimitation of the continental shelf should lead to an "equitable solution". In doing so, any principle whatever necessary should be effected to the delimitation. But from the geo-physical features, it is obvious that the equidistance principle cannot lead to an "equitable solution" as regards the Bangladesh and India situation. Therefore, it is to be concluded that the delimitation of the continental shelf between Bangladesh and India should be effected subject to "special circumstances cum equitable principles".

2. 5. Settlement of Maritime Boundary Disputes

Bangladesh and India have been participating actively in different deliberations of the UNCLOS III. Regarding the settlement of the LOS disputes the two countries basically do not differ.

Still Bangladesh has not accepted the compulsory jurisdiction of the ICJ. This cannot be regarded as a surprising phenomenon happening to Bangladesh. The country seems to be following the trend of the states who have not accepted the compulsory jurisdiction of the Court.

The statement of Bangladesh delegation made in the 62nd meeting of the UNCLOS III enables to state that Bangladesh

regards the settlement procedures as substantive part of the LOS Convention [101]. She also prefers incorporation of a mandatory procedure applicable to the settlement of disputes. As a matter of fact, the chapter "Settlement of Disputes" can now be regarded to have been formulated as the substantive part of the UNCLOS III [102]. That means, if the LOS treaty is accepted, the chapter "Settlement of Disputes" will be automatically accepted.

Regarding the LOS matters, it is to be noted that the states which are asserting claims to an excessive area of the seas and the resources thereof are seen not to have accepted the third-party settlement procedures as binding. Neither of the states for example, sixteen in number, who have been mentioned as the excessive claimants [103] to the baselines appears to have accepted the compulsory jurisdiction of the ICJ over the disputes arising out of such matters. Out of these states, Dominican Republic, Haiti, Philippines and the United Kingdom seem to have accepted the compulsory jurisdiction of the Court [104]. But from a practical point of view, such disputes cannot be regarded as falling under this jurisdiction. Moreover, Philippines clearly declared the disputes resulting from certain LOS matters should be treated as exception to the compulsory jurisdiction of the Court [105].

The excessive 200 n.m territorial sea claimants [106] such as, Argentina, Benin, Brazil, Congo, Ecuador, Ghana, Guinea, Peru, Sierra Leone have not accepted the compulsory jurisdiction of the ICJ [107]. The 200 n.m territorial sea claimant states like El Salvador, Panama and Somalia have become signatories to the compulsory jurisdiction but they made no statement as to the acceptance of the jurisdiction over the disputes resulting from the territorial sea. Furthermore, El Salvador specified the disputes arising out of certain LOS matters to be considered as exception to the compulsory jurisdiction of the Court. Regarding the claimants to the EEZ and the continental shelf no state still has made acceptance of the compulsory jurisdiction of the ICJ over the disputes arising out of these sea zones.

As has been seen, it is true to say that Bangladesh is facing certain peculiarities in designing different sea zones individually and in delimiting the same with her neighbours particularly with India. In view of this and from the above observations it is easy

to conclude that if the country accepts the compulsory jurisdiction of the ICJ, the acceptance will be subject to some reservations. It can also be submitted that the disputes arising from the LOS matters will be treated as exception to the jurisdiction of the Court. That is to say, there arises nothing to be confident of the compulsory jurisdiction of the ICJ over the LOS matters to be accepted by Bangladesh. In respect of the UNCLOS III settlement of disputes procedures, the assumption can equally be applicable to the country.

From the very beginning of her independence, India like most other countries of the world, has not shown much interest in third-party settlement of international disputes. Generally, she has preferred the less formal procedures of negotiation, conciliation and mediation, which do not involve an element of compulsion, to any third-party binding judgment as is involved in arbitration and judicial settlement. It is interesting to note here that the Indian constitution makes it the duty of the Government to "foster respect for international law" and "encourage settlement of international disputes by arbitration[108].

In spite of this principle embodied in the constitution, India has been extremely cautious in submitting her disputes to arbitration. Subject to certain exceptions India accepted the compulsory jurisdiction of the ICJ in 1959. With the passage of time, India began to specify more and more exceptions. In the year 1974 she renewed her acceptance of the jurisdiction and specified several exceptions. In the exceptions certain LOS disputes were specified not be considered subject to the compulsory jurisdiction to the Court[109].

The attitude of India towards third-party settlement of the LOS disputes is practically similar to her attitude towards the compulsory jurisdiction of the ICJ. This assumption can be followed through the statement of Indian delegation made in the 59th meeting of the UNCLOS III[110]. The delegation expressed that "procedures for settling disputes should be reserved for cases when the disputes could not be resolved by negotiations between the states concerned and should be based on the express agreement of the parties[111].

Viewing with this, it was stated that the "Optional Protocol" as adopted in the UNCLOS I should be provided for the settlement of disputes. It realises that there is no possibility of India to accept any far-reaching obligations towards the third-party settlement.

But if the LOS treaty is ratified, the chapter "Settlement of Disputes" as formulated by the UNCLOS III appears to be automatically ratified[112]. In this respect, it is to be pointed out that while the states fail to settle the dispute by negotiation, conciliation and by any other means, then the third-party settlement under Article 287 of the LOS Convention will be binding. If there is no obligation of the states to be a signatory to this treaty then, it is to be submitted that the chapter "Settlement of Disputes" will be the reason for the states not to sign the treaty. The statement of Mr. Figueredo of Venezuela enables to reach the assumption. He is reported to have said that his delegation would not agree to a formula which would give a blank cheque to an international jurisdiction "to settle matters affecting the sovereignty and interests of our countries"[113].

It is a fact that India took active part in the deliberations of the UNCLOS I. But she had not been a signatory to any of the conventions[114]. It signifies to be sure of the probable negative attitude of India towards the third-party settlement to be arising from the UNCLOS III. However, if the LOS treaty is ratified and both Bangladesh and India are signatories to it, then the LOS disputes should be settled subject to Article 287 of the LOS Convention. But the chapter "Settlement of Disputes" whether will be adopted with the adopting of the LOS treaty comes into question.

Furthermore, questions may arise whether Bangladesh and India will be the signatories to it. If not, then, in any circumstances, they will have to settle the LOS disputes by their own means. That is to say, they must be determined to settle the boundaries of different sea zones between them. Otherwise, no third-party settlement can be made effective unless they accept the same. Pursuant to the "special circumstances" situations existing between the countries, it is reasonable to conclude that they have no reservation towards the *ex aequo et bono* clause while the arbitration tribunal feels necessary to apply the clause for adjudicating the disputes.

2. 6. Conclusion

As has been stated, both Bangladesh and India are complying with the UNCLOS III provisions. The LOS Convention las still not received the force of law[115]. Nevertheless, these two countries are exercising jurisdiction over different maritime zones in the light of the UNCLOS III provision. Generally speaking, the wide variety of geological, oceanographic, biological, economic and other conditions in different parts of the world make extremely difficult to apply uniform rules governing different maritime zones.

It is a fact that as the breadths of the maritime zones increase, more and more problems of delimitation arise. From this point of view, the regime of the 200 n.m EEZ and the continental shelf is more complicated than the other sea zone.

The subject of delimitation of the continental shelf includes three aspects : first, the delimitation between the continental shelf and the deep seabed, secondly, the delimitation between states with opposite and adjacent coasts and thirdly, the impact of delimitation.

The first aspect dealing with the delimitation between the continental shelf and the deep seabed related to the question of the definition of the continental shelf seems to have wide spread support. But the provisions are very complicated.

As to the question of the delimitation between states with opposite or adjacent coasts wich relates to the second and third aspects still no agreement has been reached despite the intensive negotiations. There still remains opposing views between the two groups, one supporting the median/equidistance and the other supporting the equitables principles.

As has been mentioned, dissimilar configuration of the coasts, presence of deltas and islands near and off the coasts and the peculiar underwater situations of the coastal bay have made delimitation of boundaries between Bangladesh and India a conflicting phenomenon.

The two countries are now in question—whether the 'equidistance' or the 'equitable' principles will be applicable to the delimitation. Bangladeshs suggests that the delimitation should be effected by "equitable principles". She comes into view that the concave configuration of her coast against the convex configuration

of the coast of her counterpart gives reasons for the application of "equitable principles". On the other hand, India speaks for "equidistance principle" to give effect to the delimitation of maritime boundaries with Bangladesh.

If the delimitation of the maritime boundaries is effected by equidistance principle, Bangladesh takes the view that the result of the delimitation will not be equitable. The reason arises mainly out of the concave nature of her coast against the convex nature of Indian coast. From this consideration, Bangladesh assumes that the country will suffer if equidistance principle is applied to delimit the maritime zones. As regards the configuration of the coasts, there arises no doubt to say that Bangladesh is in a disadvantaged position. Practically the Bangladesh position can be compared with that of the Federal Republic of Germany against Denmark and the Netherlands in the *North Sea Continental Shelf Cases*.

As far as the configuration of the coast is concerned, India is in a favourable position. It has also been stated that India is one of the countries which can greatly be benefited from the 200 n.m EEZ. Because of the convex configuration of the coast, it is convenient for India to delimit the maritime boundaries by equidistance principle.

The geographical, geological and geomorphological peculiarities in the Bangladesh-India situation can be described as chaos in the law of nature. In this regard an attempt to deal with the law of the sea means to deal with the chaos of nature. But the science of this law is to maintain order which is the dream of man.

The newly born island for example, South Talpatty/New Moore has given rise to conflicts between these two adjacent countries[116]. As has been noted, in this area of this coastal bay the mid-stream of the border river—Haribhanga is the boundary between Bangladesh and India. Because of the continuous erosion and the deposit of silts the entire coastlines of Bangladesh, and of India concerned are unstable. In this area, it is obvious that any change may take place at any time. If there would be a fixed boundary, then there would arise no conflict between the countries out of the ownership over this island.

Whether the ownership is effected by Bangladesh or by India, it can rightly be pointed that the two countries will have to delimit the maritime boundaries extending from the coastline to the outer limit of the continental margin. But the aim is to conclude whether the equidistance or equitable principles will be applicable to the delimitation of the maritime boundaries between the countries

As has been stated, the Bangladesh-India situation falls under "special circumstance"[117]. It is, therefore, clear that according to the UNCLOS I provisions[118] the delimitation of maritime boundaries between these two countries cannot be effected by the equidistance principle.

As a matter of fact, the Bangladesh-India situation corresponds with the subject-matter involed in the *North Sea Continental Shelf Cases*. Consequently, The judgment in these cases can give guidelines as to the delimitation of maritime boundaries between these countries,

The International Court of Justice, by eleven votes to six found that the use of the equidistance method[119] of delimitation was not obligatory as between the parties and laid down two "principles and rules" :

> (1) 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 ;
>
> (2) if, in the application of the preceding sub-paragraph, the delimitation leaves of the areas that overlap, these are to be divided between them in agreed proportions or failing agreement, equally, unless they decide on a regime of joint jurisdiction for the zones of overlap or any part of them.

The Court specified that the factors to be taken into account in the course of the negotiations should include :

> (1) the several configuration of the coasts of the Parties, as the presence of any special or unusual features ;
>
> (2) so far as known or readily ascertainable, the physical and geological structural resources, of the continental shelf areas involved ;
>
> (3) the element of a reasonable degree of proportionality which

> a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitation between adjacent States in the same region[120].

It is important to state that :

> the factors which may be taken into consideration to carry out the equitable principle are of diverse nature and susceptible of different evaluations. Consequently, it appears extremely doubtful whether the negotiations could be effected to achieve a successful result, and more likely that they would endanger new complications and chaos[121].

It can, according to Professor Brown, be rightly pointed out that "...the concept of special circumstances is more limited in scope and less open to arbitrary conglomeration than the general principle of equity as interpreted by the Court". That is to say,

> it would clearly be wrong to attempt to draw up a closed list of case of special circumstances, it would equally be unjustifiable to ignore the evidence in the records of the International Law Commission, the Geneva Conference and in State practice which suggests guide lines for a reasonably restrictive interpretation of this difficult concept[122].

As regards the Bangladegh-India situation, it is possible to conclude that the delimitation of maritime boundaries cannot be effected equitably by equidistance principle. But what kind of boundary will be applicable—it is really difficult to specify. However, Franco Florio states :

> If general principles are understood as an indication of contemporary social needs and trends that direct the interpreter in the application of conventional rules the principles set forth for delimiting continental shelf between Bangladesh and India may be used as a starting point for further studies Finally, if the interested parties substantially agree on the need for common objectives and concerted action, only technical rules are needed for general principles[123].

In consideration of the geographical, geological and geomorphological peculiarities it is fair to suggest that in delimiting the maritime boundaries between Bangladesh and India "technical rules" should be taken into account.

The LOS Convention (Articles 74, 83) has given stress on the impact that the delimitation of the EEZ and the continental shelf should be equitable. In these articles there is no specification to

give effect of the equidistance principle to the delimitation. Nevertheless, it is to be assumed that if the equidistance principle can effect the delimitation equitable, then this principle can be applicable to the delimitation.

From the observations throughout this study,it is fair to state that as regards the Bangladesh-India situation the equidistance principle cannot lead to an equitable solution. In all cases, it is suggested that the delimitation should be effected by agreement. Regarding the Bangladesh-India situation everybody will welcome this suggestion. Moreover, in consideration of the geographical, geological, gemorphological and other related factors, it is concluded that the delimitation of maritime boundaries between Bangladesh and India should be effected by "equitable principles".

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27 Section 7(1) of the Act.

28 The Ministry of Foreign Affairs Circular No. LT-1/3/74, para. 2 ; LT-1/3/74 para. 1.

29 See General Assembly Resolution 34·7(XXX). The following is a list of the twenty-eight "hard-core" underdeveloped countries : Afganistan, Bangladesh, Benin, Bhutan, Botswana, Burundi, Central African Republic, Chad, Democratic Yemen, Ethiopia, Gambia, Guinea, Haiti, Laos, Lesotho, Malawi, Maldives, Mali, Nepal, Niger, Rwanda, Somalia, Sudan, Uganda, United Republic of Tanzania, Upper Volta, Western Samoa, Yemen Arab Republic.

30 It is located between 8· and 33·15'N and 68·5' and 97·25'E.

31 The figure is correct up to 1 July 1979. See 31(1979) *Demographic Yearbook, United Nations* (1980) 222. At present the population exceeds 900 millions.

32 See Lewis M. Alexander (ed), *The Law of the Sea—Offshore Boundaries and Zones* (1967) 73.

33 The Andaman Islands number over 200 and lie between 10. and 14·N, and 92· and 94·E, south of Burma. The Nicobar Islands number in 19 (seven uninhabited) lie south of the Andaman between 6· an d10·N. See Frank Debenhum & William A. Burns (eds), *op. cit.*, 390.

34 Surya P. Sharma, "Ocean Law on the Eve of New York Session"", 16(1976) IJIL 116.

35 See Un. Leg. Ser. ST/LEG/SER. B/6(1957) 24, 517.

36 *Ibid*.. 23.

37 Se Un. Leg Ser. ST/LEG/SER. B/16(1974).

38 The Proclamation issued by the President of India and published with the notification of the Government of India in the Ministry of External Affairs No. S. R. O. 2920 deted 3 December 1 956

39 See *New Directions* !(1973) 26.

40 The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act (No. 80) 25 August 1976.

41 See 27(1973) YUN 44-46.

42 *The Bangladesh Observer* (Dhaka) 8 May 1977, 1. See also Map No. 1 at p. 280.

43 See Map. No. 1 at p. 280.

44 KCA, 18 September 1981, 31090.

45 *The Financial Times* (London). 19 May 1981, 4

46 *The Times* (London). 12 April 1981, 5.

47 This has been stated in the *White Paper on the South Talpatty* (hereafter cited as White Paper) by the Ministry of Foreign Affairs, Government of the People's Republic of Bangladesh, Dhaka, 26 May 1981. See M. Habibur Rahman, "Delimitation of Maritime Boundaries : A Survey of Problems in the Bangladesh Case", 24/12(1984) *Asian Survey* 1302-1317, 1309 ; ..., "Practice of UNCLOS between Developing Countries with Reference to the Conflict over the South Talpatty Island", (1988) *Verfassung Und Recht in Ubersee Law and Politics in Africa Asia and Latin America* 210-220, 216.

48 See pp. 288-292.

49 TS&CZ Convention, Article 7(2). LOS Convention Article 10(2).

50 C. J. Colombos, *The International Law of the Sea* (172) Sixth edition 285.

51 See Map No. 2 at p. 232.

52 See p. 273.

53 See 1(1974) UNCLOS III OR 102, para. 54.

54 At the Geneva session in 1975, a Sub-Committee was set up on the question of baseline consisting of Canada, UK, USA, Norway, Nicaragua, Bangladesh and El Salvador. The Sub Committee had before it the TS&CZ Convention (Article 4) formula on straight baseline and the Bangladesh proposal. While broadly symathetic to Bangladesh's position, arguments resolved around the fact that this might tend to increase the territorial limits of the sea if other countries arbitrarily do the same and secondly the depth-method baseline was an unstable line. There was reluctance among some of the delegates to delineate the straight baseline which did not have direct connection with the land. However, to meet Bangladesh situation, UK in consultation with USA and Canada proposed a formula which was incorporated in the ISNT and this has virtually been accomplished in the UNCLOS III. See 4(1975) UNCLOS III OR 18, para. 20.

55 See *Supra.*, pp. 37-39.

56 However, it is to be mentioned that in the eleventh session of the UNCLOS III Bangladesh expressed that Article 7 of the LOS Convention cannot preclude the founding of its baseline on depth criteria and bathymetric factors (UNCLOS III Doc. A/CONF. 62/L. 140, 28 April 1982). This has been communicated by the President as an official Document of the Conference.

57 See Map No. 1 at p. 280 See also 1(1958) UNCLOS I OR 210.

58 See Map No. 3 at p. 285.

59 See 1(1958) UNCLOS I OR 210.

60 *Ibid.*

61 The Territorial Waters and Maritime Zones Act (Act No. XXVI), 1974.

62 The Territorial Waters and Maritime Rules, 1977.

63 *The Bangladesh Observer* (Dhaka), 9 May 1977, editorial.

64 Soon after the "Territorial Waters and Maritime Zones Act, 1974, these baselines were declared by the Bangladesh Ministry of Foreign Affairs (Circular No. LT-1/3/74)

65 See Map. 2 at p. 282.

66 See *infra*, p 292.

67 *Infra*.. pp. 175-178.

68 According to Bangladesh's Territorial Waters and Maritime Zones Act, 1974 : "The zone of the high seas contiguous to the territorial waters and extending seawards to a line six nautical miles measured from the outer limits of the territorial waters is declared to be the contiguous zones of Bangladesh" (Section 4(1)).

69 According to India's Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 : "The contiguous zone is an area beyond and adjacent to the territorial waters and the limit of the contiguous zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baselines" (Section 5(1).

70 Frank Debenham and William A. Burns (eds), *Illustrated World Geography* (1960) 434, 435.

71 The data have been mentioned in an article entitled "Law of the Sea : Certain Issues Relating to Deltaic Countries" by the Director-General of Bangladesh, Ministry of Foreign Affairs presented in 1976 UNITAR-ESCAP International Law Refresher Course Seminar held at Dhaka from 7-20 December 1976.

72 Francis P. Shepard, *Submarine Geology* (1973) Third edition 394.

73 *Ibid*., 225, 334.

74 Joseph E Van Riper, *Man's Physical World* (1952) 56.

75 *Ibid*. 150.

76 F. P. Shepard, *op. cit*., 334, 396.

77 *Ibid*., 418.

78 David G. Moore, Joseph R. Curray and Frans J. Emmel, "Large Submarine Slide (Olistostrome) Associated with Sunda Arc Subduction Zone, Northeast Indian Ocean", 21(1976) *Marine Geology* 211.

79 See F. J. Monkhouse, *Principle of Physical Geography* (1972) Fourth edition 342.

80 U. V. Sverdrup, Martin W. Johnson and Richard H. Fleming, *The Oceans Their Physical Chemistry and General Biology* (1949) Third Printing 1017.

81 F. P. Shepard, *op. cit*., 168.

82 *The Bangladesh Observer* (Dhaka), 17 June 1979, p. 7.

83 See *Europa Year Book 1976—A World Survey*, vol. 2, p. 122.
84 *Ibid.*, 650.
85 *Ibid.*
86 See Lewis M. Alexander, Robert D. Hodgson, "The Impact of the 200-Mile Economic Zone on the Law of the Sea", 12/2 (1975) *The San Diego Law Review* 574, 575.
87 See Memorial of the Federal Republic of Germany, 1(1968) *North Sea Continental Shelf Cases*, ICJ, Pleadings, Oral Arguments, Documents 70, p. 68.
88 Quoted in F. P. Shepard's *Submarine Geology* (1973) Third edition 168.
89 *Supra.*, 219 n. 361, 364.
90 Se E. D. Brown, "Rapparteur's Report" in Lewis M. Alexander and Gordon Ros Hawkins (eds), *Law of the Sea Workshop June 1971* Canada—U. S. Maritime Problems 86.
91 See Statement of Mr. Gayan in the UNCSOS III, 20th meeting. 2(1974) UKCLOS III OR 163, para 42.
92 Shigeru Oda, "International Law of the Resources of the Sea", 127/2(1969) *Academie De Droit International* 447.
93 Ian Brownlie, "Legal Status of Natural Resources in International Law", 162/1(1979) *Academie De Droit International* 320.
94 Territorial Waters and Maritime Zones Act (No. XXVI) 1974, Section 7.
95 See LOS Convention, Article 76(4) (i).
96 *Ibid.*, Article 76(4) (ii).
97 *Ibid.*, Article 76(5).
98 *Supra.*, 224.
99 *Supra.*, 229.
100 *Supra.*, 175-178, 293.
101 See 5(1976) UNCLOS III OR 41.
102 See LOS Convention, Article 309.
103 *Supra.*, 89.
104 *Supra.*, 397.
105 *Supra.*, 399-401.
106 See Robert B. Krueger, E.Myron H. Nordquist, "The Evolution of the 200-M Exclusive Economic Zone : State Practice in the Pacific Basin", 19/2/(1979-80) *Virginia Journal of International Law* 390 398.

107 See 34(1979-80) *ICJ Yeerbook* 51-64.

108 Part IV, Directive Principles, Article 57.

109 That is to say, the disputes with India concerning or relating to : (a) "the status of its territory or the modification or delimitation of its frontiers or any other matter concerning boundaries ; (b) the territorial sea, the continental shelf and the margins, the exclusive fishery zone, the exclusive economic zone, and other zones of national maritime jurisdictton including for the regulation and control of marine pollution and the conduct of scientific research by foreign vessels; (c) the condition and status of its islands, bays and gulfs and that of the bays and gulfs that for historical reasons belong to it ; (d) the airspace superjacent to its land and maritime territory ; and (e) the determination and delimitation of its maritime boundaries". See 30(1975-76) ICJ *Yearbook* 62.

110 See 5(1976) UNCLOS III OR 17, 18.

111 *Ibid.*, 17, 42.

112 See LOS Convention, Article 309.

113 UN Press Release SEA/102, 24 April 1979, 2.

114 TS&CZ Convention, High Seas Convention, FCHS Convention, and the Continental Shelf Convention.

115 To be binding the United Nations Convention on the Law of the Sea (LOS Convention) requires 60 ratifications. Until 5 December 1990 the LOS Convention has received 45 ratifications. In addition to 43 States as mentioned (p. 22, n. 40) two States—Uganda and Angola have ratified the Convention. See 16(1990) *Law of the* Sea *Bulletin* 1.

116 *Supra.*, 41.

117 *Supra.*, 329.

118 See TS&CZ Convention, Article 12 ; Continental Shelf Convention, Article 6.

119 *ICJ Reports* (1969) 53-54.

120 *Ibid.*

121 Dissenting Opinion of Judge Tanaka. See 8(1969) ILM 114.

122 E. D. Brown, "The North Sea Continental Shelf Cases", 23(1970) *Current Legal Problems* 214.

123 Franco Florio, "Water Pollution and Related Principles of International Law", 17(1979) CYIL 155.

ERRATA

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