"Here [Should] Be Dragons": Preserving Equity in Maritime Delimitation Disputes

J. Connor Daughton[*]

Recent decades have seen a drive by interstate tribunals toward consistency in the maritime delimitation regime. Elaborating beyond the vague "equitable solution" that United Nations Convention on the Law of the Sea Articles 74 and 83 prescribe, the International Court of Justice, International Tribunal for the Law of the Sea, and interstate arbitral tribunals have crafted a methodology that is predictable across fora. This cross-fertilization extends beyond legal rules to touch the factual considerations ensuring an "equitable solution," particularly those accommodated in the "relevant circumstances" stage of the maritime delimitation analysis. States and scholars alike have welcomed the resulting crystallization of equity in maritime delimitation. Nonetheless, crystallization comes at an underappreciated cost: the loss of equity itself. Examining the nature of equity and its history in the law of maritime delimitation, this Article demonstrates that crystallization is doctrinally inconsistent with the "equitable solution" requirement and risks desensitizing tribunals to states' underlying concerns. It advocates for an open, case specific approach to equity in maritime delimitation. In doing so, this Article also adds a cautionary note to current discourse on cross-fertilization and reflects on equity's importance to interstate dispute settlement as a whole.

[*] Judicial law clerk, United States District Court for the Northern District of Florida. J.D./LL.M., Duke University School of Law (2022); M.Phil., Clare College, University of Cambridge (2018); B.A., University of Virginia (2017). The views expressed here do not reflect the views of any past, current, or future employer. I am grateful to Professor Laurence R. Helfer and Coalter Lathrop, who provided invaluable perspectives; to Alex Lenk for his excellent editing skills; and, most of all, to Verena Daughton for her support. All errors are entirely my own.

I. INTRODUCTION

The last two decades have seen a deliberate drive by international tribunals toward consistency in the maritime delimitation regime. Heeding states' calls for clarity and predictability, the International Court of Justice (ICJ), International Tribunal for the Law of the Sea (ITLOS), and arbitral tribunals resolving maritime delimitation disputes have sought to elaborate the legal framework under Articles 74 and 83 of the United Nations Convention on the Law of the Sea (UNCLOS).[1] These articles provide little guidance of their own. They require, generally, that a maritime boundary between states' exclusive economic zones (EEZs) and continental shelves, respectively, reflect "an equitable solution" reached "by agreement on the basis of international law." If states cannot reach an agreement, they must submit to the dispute resolution

[1] U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

procedures outlined in Part XV of UNCLOS. Tribunals[2] have responded to this lack of direction by building on past cases and ensuring similar analyses across fora—a "cross-fertilization"[3] of the legal rules in maritime delimitation. They have taken similar steps regarding equitable considerations, resulting in a crystallization of equity as applied in the maritime delimitation regime.[4]

The crystallization of equitable considerations bolsters consistency, but that benefit comes at an underappreciated cost: the loss of equity itself. Since the adoption of UNCLOS, tribunals delimiting maritime boundaries have treated the requirement of an "equitable solution" as constituting equity *infra legem*, or equity under the law: a flexibility permitting tribunals to address parties' specific circumstances and concerns, which vary from case to case, within an established legal framework. Constraining equity through crystallization will strip equity of its intrinsic flexibility, distorting equity *infra legem* into mere law by another name. Accordingly, crystallization conflicts doctrinally with UNCLOS's demand for an equitable solution. Equally significantly, crystallization desensitizes tribunals to the concerns and circumstances underlying a dispute, resulting in less effective resolutions of maritime boundary disputes.

This Article argues that the development of set legal principles in maritime delimitation should not extend to equitable considerations, particularly as embodied in the "relevant circumstances" phase of tribunals' maritime delimitation analysis. Instead, tribunals, while adhering to the existing framework of legal rules, should employ an open, case-specific approach to equity *infra legem* that assesses claims of a circumstance's relevance on their own merits and with sensitivity to each party's underlying concerns. In doing so, this Article also adds a cautionary note to the current discourse on cross-fertilization and reflects on equity's importance to interstate dispute settlement as a whole.

This Article proceeds in four parts. Part II describes tribunals' current approach to equity *infra legem* in maritime delimitation and introduces the crystallization of equity *infra legem* that has begun to develop. It also describes how ICJ and ITLOS judgments and arbitral awards have contributed to and implicitly encouraged crystallization.

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[2] Unless otherwise specified, "tribunal" or "tribunals" refers to the ICJ, ITLOS, and arbitral tribunals.

[3] Makoto Seta, *Cross-Fertilisation and Conflicts Between Courts and Tribunals: An Analysis from the Perspective of the United Nations Convention on the Law of the Sea*, *in* INTERNATIONAL PROCEDURE IN INTERSTATE LITIGATION AND ARBITRATION 401, 402 (Eric De Brabandere ed., 2021).

[4] *See* Lucie Delabie, *The Role of Equity, Equitable Principles, and the Equitable Solution in Maritime Delimitation*, *in* MARITIME BOUNDARY DELIMITATION: THE CASE LAW: IS IT CONSISTENT AND PREDICTABLE? 145, 154–55, 159 (Alex G. Oude Elferink et al. eds., 2018) ("The reinforcement of the predictability of law has been obtained through a strict rationalization of the use of equity within the maritime delimitation process. In order to achieve this, the courts and tribunals have highlighted that the entire process of delimitation must be guided by the aim of obtaining an 'equitable solution' according to positive law . . . and make, at least prima facie, a strict use of equitable considerations in its method of delimitation . . . . The strict use of equitable considerations in [the maritime delimitation procedure] appears as a way of constraining equity to legal considerations."). "Crystallization" in this Article is used in the same way Delabie uses "rationalization."

Part III demonstrates that, contrary to conventional wisdom, crystallization conflicts with the law of maritime delimitation by constraining the equity that Articles 74 and 83 guarantee. It first briefly introduces theories of equity and recalls equity's history in the English tradition to illustrate how movements toward consistency and predictability can ossify equity into law. Having laid that groundwork, Part III next traces the concept of the "equitable solution" from the Truman Doctrine through the international conferences culminating in UNCLOS. In the *North Sea Continental Shelf* cases of 1969, the ICJ conflated the "equitable solution"—originally a subjective *negotiating* term—with the concept of equity *infra legem*, transforming the "equitable solution" into an objective for tribunals resolving *disputes* to achieve through their legal analyses. The drafters of UNCLOS, as its structure and *travaux préparatoires* reveal, preserved that term in its conflated sense, agreeing that tribunals should continue to seek an equitable solution and, thus, inject equity into maritime delimitation. Even so, the tension between equity as a negotiating term and equity as a directive in maritime delimitation continues today, as evidenced by tribunals' movement toward, and states' apparent approval of, crystallization. This historical survey concludes by considering what Articles 74 and 83's requirement of an "equitable solution"—without further elaboration—means for equity's role in the maritime delimitation methodology, with a particular focus on the circumstances to be considered relevant in the "relevant circumstances" phase.

In short, Part III reveals that crystallization, as a process that defeats the purpose of equity, is doctrinally inconsistent with the maritime delimitation regime as expressed in UNCLOS. States may prize predictability today, but until they express otherwise or the ICJ announces a doctrinal shift, the requirement of an "equitable solution" remains binding as a matter of customary and, for most states, conventional international law.

Equity holds far more than doctrinal significance, however. States navigating maritime delimitation issues are interested not in boundaries on a map, but in the natural resources and attendant benefits they delineate. In sweeping wide enough to contemplate states' underlying concerns, equity equips tribunals to craft more comprehensive resolutions—and to be transparent about doing so. Crystallization, in contrast, may fuel a loss of legitimacy and reduced compliance because of a lack of sensitivity to parties' genuine concerns. To demonstrate the importance of such sensitivity, Part IV discusses two interstate arbitrations whose tribunals, unlike most others, displayed it. Although these two tribunals did not apply solely Articles 74 and 83, their awards provide a notable alternative to other tribunals' favorable approach to crystallization and call into question the extent to which crystallization in fact benefits the maritime delimitation regime.

Part V begins with a proposal for restoring the proper use of equity *infra legem* and a discussion of how that proposal interacts with the need for consistency and the recent turn toward cross-fertilization in the maritime delimitation context. Crystallization should be abandoned in favor of a more open, case-specific approach to equity, but that approach should still exist within the trend toward a consistent *legal* regime—particularly through cross-

fertilization among tribunal case law. Part V then considers counterarguments to the proposal and, more broadly, to this Article's critique of crystallization. Alternative interpretations of the *travaux préparatoires* are plausible; so are policy arguments favoring crystallization, whether because of consistency concerns, the perceived lack of impact of crystallization on the use of equity *infra legem*, or crystallization's utility in bolstering compliance. These interpretations and arguments ultimately fail, and although one external constraint—tribunals' inability to provide a remedy other than establishing a boundary line, which inhibits their providing a comprehensive solution—is well founded, it does not oppose an open, case-specific approach. Part VI provides a brief conclusion.

Before continuing, it is worth clarifying that this Article focuses on delimitation of the EEZ (governed by UNCLOS Article 74) and continental shelf (governed by UNCLOS Article 83). It considers only in passing a related issue: delimitation of the territorial sea (governed by UNCLOS article 15). Article 15 does not follow the structure of Articles 74 and 83: it dictates that the equidistance line will be the presumptive boundary except "where it is necessary by reason of historic title"—a legal, not equitable, concept—"or other special circumstances to delimit the territorial seas of two States" differently. Thus, Article 15 does not mention "an equitable solution" as the aim of delimitation, and the methodology locates equity *infra legem* in the form of "special circumstances" as an exception, not as the general rule.[5]

Nonetheless, the *travaux préparatoires* of Article 15 indicate that it "require[s] that any delimitation effected pursuant to it must be equitable,"[6] suggesting the two approaches may arrive at similar results notwithstanding their differing texts. The case law attests to this conclusion. Tribunals have applied Article 15 using a method that is consistent with their methodology in applying Articles 74 and 83: namely, establishing a provisional equidistance or median line and then making equitable adjustments based on the circumstances raised by the parties.[7] Within that methodology, tribunals have applied the same standards to "special circumstances" under Article 15 as they have to "relevant circumstances" under Articles 74 and 83,[8] such that "special" circumstances are also "relevant" and vice versa.

Furthermore, tribunals have demonstrated an "increasingly restrictive approach" to considering special circumstances meriting adjustment of a

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[5] Davor Vidas, *The Delimitation of the Territorial Sea, the Continental Shelf, and the EEZ*, *in* MARITIME BOUNDARY DELIMITATION: THE CASE LAW: IS IT CONSISTENT AND PREDICTABLE?, *supra* note 4, at 33, 41, 43.

[6] Massimo Lando, *Judicial Uncertainties Concerning Territorial Sea Delimitation Under Article 15 of the United Nations Convention on the Law of the Sea*, 66 INT'L & COMP. L.Q. 589, 603–05 (2017) (explaining that Article 15's text was also debated in the same negotiating group as Articles 74 and 83, and deliberations on territorial sea delimitation were largely enveloped by those on EEZ and continental shelf delimitation);UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY PART VI, 139–40 (Myron H. Nordquist et al. eds., 2012) [hereinafter Virginia Commentary].

[7] Lando, *supra* note 6, at 618.

[8] Malcolm Evans, *Relevant Circumstances*, *in* MARITIME BOUNDARY DELIMITATION: THE CASE LAW: IS IT CONSISTENT AND PREDICTABLE?, *supra* note 4, at 222, 228.

provisional equidistance line under Article 15,[9] just as they have in considering "relevant circumstances" under Articles 74 and 83—even if the weight ultimately afforded types of circumstances in EEZ and continental shelf delimitation may, as an empirical matter, differ from that in territorial sea delimitation.[10] This Article's call for restoring equity in maritime delimitation speaks against said "restrictive approach," and its discussion of external constraints on equity *infra legem* applies equally to territorial sea delimitation. Consequently, this Article discusses territorial sea delimitation decisions to the extent that they shed light on the appropriate balance between law and equity in fixing maritime boundaries in general.

II. MARITIME DELIMITATION: THE CURRENT APPROACH

Beginning with *Maritime Delimitation in the Black Sea*,[11] tribunals have adopted a three-step procedure for delimiting the borders of the exclusive economic zone and the continental shelf. As the ICJ confirmed in *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*,

> [T]he Court proceeds in three stages . . . .
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> In the first stage, the Court will establish the provisional equidistance line from the most appropriate base points on the coasts of the parties . . . . "[T]he line is plotted on strictly geometrical criteria on the basis of objective data . . . ."
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> In accordance with Articles 74 and 83 of the Convention, the delimitation shall achieve an equitable solution . . . . "[T]he achievement of an equitable solution requires that, so far as possible, the line of delimitation should allow the coasts of the Parties to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way . . . ." The Court will therefore, in the second stage, "consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result" . . . . Various factors, referred to as "relevant circumstances," may call for the adjustment or shifting of the provisional line. These factors are mostly geographical in nature, although there is no closed list of relevant circumstances . . . . These relevant circumstances have been identified and developed in the practice of the Court, the International Tribunal for the Law of the Sea and arbitral tribunals in the context of each case . . . .

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[9] Vidas, *supra* note 5, at 57.

[10] Evans, *supra* note 8, at 243; *see also* Vidas, *supra* note 5, at 34–35 (noting that "[t]he legal status of the territorial sea, on the one hand, and that of the EEZ and the continental shelf, on the other, is profoundly different," with the former being a territorial regime rooted in the performance of sovereignty and the latter being "functional regimes" in which a coastal state's rights are determined by its purposes for exercising those rights) (citations omitted).

[11] Maritime Delimitation in the Black Sea (Rom. v. Ukr.), Judgment, 2009 I.C.J. 61, ¶¶ 115–22 (Feb. 3).

> In the third and final stage, the Court will subject the envisaged delimitation line, either the equidistance line or the adjusted line, to the disproportionality test. The purpose of this test is to assure the Court that there is no marked disproportion between the ratio of the lengths of the relevant coasts of the parties and the ratio of the respective shares of the parties in the relevant area to be delimited by the envisaged line, and thus to confirm that the delimitation achieves an equitable solution as required by the Convention . . . .
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> The Court will not use the three-stage methodology if there are "factors which make the application of the equidistance method inappropriate."[12]

Within the three-step equidistance method, equity functions as "a general aim," the "achieve[ment]" of which is ultimately verified by the third step of checking for disproportionality. Equity functions more proactively in the second step, serving as a "technical tool" for "the identification of potential relevant circumstances," which, "in the case law dating from the 1980s," were linked with "equitable principles."[13]

The *Maritime Delimitation in the Indian Ocean* judgment describes the flexibility of relevant circumstances, which have "no closed list" and depend on "the context of each case."[14] At the same time, general trends in identifying relevant circumstances have developed.[15] Geographical factors, such as a cut-off effect resulting from the concavity of a coast,[16] disparities in coastal length,[17] and the presence of islands,[18] are relevant circumstances. Factors relating to the functions of maritime zones, such as national security[19] and access to natural resources,[20] may be relevant but are subjected to greater scrutiny. Other circumstances, such as the unilateral conduct of states seeking to claim a given

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[12] Maritime Delimitation in the Indian Ocean (Som. v. Kenya), Judgment, 2021 I.C.J. 206, ¶¶ 122–29 (Oct. 12) (quoting, in paragraph 129, Territorial and Maritime Dispute Between Nicaragua and Honduras in Caribbean Sea (Nica. V. Hond.), Judgment, 2007 I.C.J. 659, ¶ 272 (Oct. 8)); *see also* Dispute Concerning Delimitation of Maritime Boundary Between Mauritius and Maldives in Indian Ocean (Mauritius v. Maldives), Case No. 28, Judgment of April 28, 2023, ¶ 97, https://www.itlos.org/fileadmin/itlos/documents/cases/28/Merits_Judgment/C28_Judgment_28.04.2023_orig.pdf (most recent summary of the three-stage methodology in a maritime delimitation dispute among all types of tribunals) (citing Maritime Delimitation in the Black Sea, *supra* note 11, ¶¶ 101–03; Dispute Concerning Delimitation of Maritime Boundary Between Bangladesh and Myanmar in Bay of Bengal (Bangl./Myan.), Case No. 16, Judgment of March 14, 2012, 2012 ITLOS Rep. 4, ¶ 240 [hereinafter Bangladesh-Myanmar Maritime Boundary Judgment]).

[13] Delabie, *supra* note 4, at 162.

[14] Maritime Delimitation in the Indian Ocean, *supra* note 12, ¶ 124.

[15] *E.g.*, Evans, *supra* note 8, at 261; MASSIMO LANDO, MARITIME DELIMITATION AS A JUDICIAL PROCESS, 167–68 (2019).

[16] LANDO, *supra* note 15, at 168–73; Evans, *supra* note 8, at 251–52.

[17] LANDO, *supra* note 15, at 173–78; Evans, *supra* note 8, at 249.

[18] LANDO, *supra* note 15, at 178–92; Evans, *supra* note 8, at 250–52.

[19] LANDO, *supra* note 15, at 205–10; Evans, *supra* note 8, at 256–58.

[20] LANDO, *supra* note 15, at 195–201; Evans, *supra* note 8, at 253–56.

boundary (including offshore petroleum extraction contracts), are of more questionable relevance.[21] Overall, circumstances implicating political and economic concerns have not been considered because of "the subjectivity inherent in those contexts and, more generally, by the subjectivity inherent in the second stage of delimitation."[22]

International tribunals have drawn from these trends within their analyses of relevant circumstances to develop a methodology to apply to future disputes. Their resulting approach affects the identification of relevant circumstances on two levels: tribunals have looked to prior cases to determine (1) whether a circumstance may be relevant in the abstract[23] and (2) whether the case's facts indicate that a circumstance is significant enough to be considered "relevant" and, thus, accounted for in the second step.[24] For instance, a "cut-off effect"—the effect an equidistance line has on restricting a state's coastal projections—will be considered a relevant circumstance only if it extends to "a significant portion" of the projections.[25] Meanwhile, access to fisheries may be a relevant circumstance only if the lack of access created by the provisional equidistance line would have "catastrophic repercussions" on one of the parties' fishing communities—a stricter standard than that applied to other circumstances.[26]

The 2017 Ghana-Côte d'Ivoire ITLOS judgment,[27] which delimited the two states' territorial sea, EEZ, and continental shelf within 200nm in the Atlantic Ocean, exemplifies this evolving methodology, as well as its risks. Introducing its discussion of the relevant circumstances claimed by each state, the ITLOS

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[21] *Compare* LANDO, *supra* note 15, at 211–17 (dismissing as "unpersuasive" the ICJ's suggestion in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 2012 I.C.J. Rep. 624, ¶ 220 (Nov. 19), that "conduct might need to be taken into account as a relevant circumstance in an appropriate case"; arguing that the ICJ's judgment in *Case Concerning Maritime Dispute (Perú v. Chile)*, 2014 I.C.J. Rep. 3 (Jan. 27), "confirms that conduct is evidence of an agreed boundary, and not a relevant circumstance"), *with* Evans, *supra* note 8, at 258–60 (concluding conduct-related factors are relevant "despite rarely being given direct effect": "they are a subservient species, and . . . issues connected to coastal geography will almost always take priority over conduct within the delimitation process, unless the conduct in question amounts to evidence of an agreement.").

[22] Delabie, *supra* note 4, at 162 (citing Dispute Concerning Delimitation of Maritime Boundary Between Bangladesh and Myanmar in Bay of Bengal (Bangl./Myan.), Case No. 16, Joint Declaration of Judges Nelson, Chandrasekhara Rao and Cot, 2012 ITLOS Rep. 134, 134) [hereinafter Maritime Boundary Joint Declaration]); *see also* LANDO, *supra* note 15, at 201 (in the context of access to natural resources, the adoption of a "restrictive approach . . . may have also been determined by the difficulty to formulate a possibly objective standard on the basis of which provisional equidistance lines could be adjusted to ensure access to natural resources. One could thus understand the reasons for adopting a standard which, being restrictive, shields international tribunals from having to make potentially difficult decisions on the adjustment of provisional equidistance lines.").

[23] LANDO, *supra* note 15, at 227–32.

[24] *See, e.g.*, Barbados v. Trinidad and Tobago, PCA Case No. 2004-02, Award of the Arbitral Tribunal, ¶ 267 (Perm. Ct. Arb. Apr. 11, 2006) ("Barbados has not succeeded in demonstrating that the results of past or continuing lack of access by Barbados fisherfolk to the waters in issue will be catastrophic"; applying the "catastrophic repercussions" test first developed in the *Gulf of Maine* case, (Can./U.S.), Judgment, 1984 I.C.J. Rep. 246, ¶ 237 (Jan. 20)).

[25] LANDO, *supra* note 15, at 170–71.

[26] *Id.* at 200–01.

[27] Dispute Concerning Delimitation of Maritime Boundary Between Ghana and Côte d'Ivoire in Atlantic Ocean (Ghana/Côte d'Ivoire), Case No. 23, Judgment of Sep. 23, 2017, 2017 ITLOS Rep. 4.

Special Chamber commented that "the overarching objective of maritime delimitation . . . is to achieve an equitable solution."[28] Immediately afterward, however, it acknowledged its "aware[ness] of the international jurisprudence which has been developed as to which circumstances may be considered relevant," which "has established the *purpose and limits* of the adjustment of a provisional equidistance line."[29] The Special Chamber was directly referring, by "purpose and limits," to the principle "that delimitation must not completely refashion geography or compensate for the inequalities of nature"[30]—a general, universally accepted limit on the use of equity originating in the ICJ's 1969 *North Sea Continental Shelf* cases.[31]

Implicitly, however, the Special Chamber used the jurisprudence itself to limit the specific relevant circumstances proposed. When it rejected Ghana's argument for a "recognized and applied maritime boundary" relating to oil concessions,[32] it did so not only by finding insufficient factual support and distinguishing the case on which Ghana had relied—1982's *Case Concerning the Continental Shelf*[33]—but also by commenting that, subsequent to that case, "international courts and tribunals have been consistent in their reluctance to consider oil concessions and oil activities as relevant circumstances."[34]

Similarly, when discussing the Côte d'Ivoire's argument, rooted in economic concerns, that "the location and distribution of hydrocarbon resources" constitute a relevant circumstance,[35] the Special Chamber presented a litany of prior cases to show that "[a]ccording to international jurisprudence, delimitation of maritime areas is to be decided objectively on the basis of the geographic configuration of the relevant coasts."[36] It continued,

> In assessing the international jurisprudence, the Special Chamber wishes to emphasize that such jurisprudence, at least in principle, favours maritime delimitation which is based on geographical considerations. Only in extreme situations—in the words of the Chamber of the ICJ in the Gulf of Maine case—if the envisaged delimitation was "likely to entail catastrophic repercussions for the livelihood and economic well-being of the

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[28] *Id.* ¶ 409.

[29] *Id.* (emphasis added).

[30] *Id.*

[31] (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 91 (Feb. 20) [hereinafter North Sea Continental Shelf].

[32] *Maritime Boundary Between Ghana and Côte d'Ivoire in Atlantic Ocean*, 2017 ITLOS Rep. ¶¶ 457–58.

[33] (Tunis./Libya), Judgment, 1982 I.C.J. 18 (Feb. 24).

[34] *Id.* ¶ 476.

[35] *Id.* ¶¶ 437–40.

[36] *Id.* ¶ 452 (citing Gulf of Maine (Can./U.S.), Judgment, 1984 I.C.J. 246, ¶ 237 (Jan. 20)).

> population of the countries concerned" may considerations other than geographical ones become relevant.[37]

This sweeping statement not only relied on existing jurisprudence, but also built on it to read even greater constraints into the relevant circumstances analysis. The Special Chamber's extension of the "catastrophic repercussions" standard from its original purview of fisheries access to *all* nongeographic considerations suggests a persistent ratcheting of restrictions on relevant circumstances—and, consequently, on the equity they provide.

At the same time, setting a single standard for an entire class of circumstances contributes to a streamlined methodology and greater consistency. Indeed, proponents of crystallization in the relevant circumstances phase laud it as a salutary constraint on the subjectivity and unpredictability inherent in Articles 74 and 83, which demand an equitable solution without specifying how to achieve it.[38] At least several states number among these proponents. In a 2015 workshop on the law and practice of maritime delimitation, representatives of governments and nongovernmental entities observed that adjudication's advantages over negotiating maritime boundaries lay in, *inter alia*, adjudication's "relatively predictable methodology," and several noted that the law of maritime delimitation, even decades after UNCLOS, "lacks specificity."[39] The workshop participants also emphasized "the importance of making reasonable claims, grounded in international law" and cautioned that "[p]ositions that would be perceived internationally as unreasonable or without apparent legal basis [were] counterproductive and detrimental to national interests."[40] One could construe these comments as disapproval of broad or creative arguments as to relevant circumstances.

Scholars and practitioners, similarly, view consistency as essential to the successful development of the law of the sea. Although tribunals retain some

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[37] *Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean*, 2017 ITLOS Rep. ¶ 453 (citing *Gulf of Maine*, *supra* note 36).

[38] Delabie, *supra* note 4, at 155; *see* Dispute Concerning Delimitation of Maritime Boundary Between Mauritius and Maldives in Indian Ocean (Mauritius/Maldives), Case No. 28, Judgment of Apr. 28, 2023, ITLOS 4, ¶ 95 ("[A]rticle 74, paragraph 1, and article 83, paragraph 1, of [UNCLOS] state the goal to be achieved, namely an 'equitable solution', yet they are silent as to the method to be employed in achieving it."); *see also* Maritime Boundary Joint Declaration, *supra* note 22, at 134 (commenting on the development of the three-phase delimitation analysis: "[t]he provisions of the Convention, articles 74 and 83, are imprecise to say the least. Courts and tribunals have progressively reduced the elements of subjectivity in the process of delimitation in order to further the reliability and predictability of decisions in this matter. We consider that the International Tribunal for the Law of the Sea should welcome these developments and squarely embrace the methodology of maritime delimitation as it stands today, thus adding its contribution to the consolidation of the case law in this field.").

[39] U.S. DEP'T OF STATE, SUMMARY REPORT OF WORKSHOP ON "INTERNATIONAL LAW AND BEST PRACTICES FOR MARITIME BOUNDARY DELIMITATIONS" (2015), paras. 1, 3, *in* 2015 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 509–10. Participants included "governmental and nongovernmental participants from the United States, ASEAN states, and other states." *Id.* at 509.

[40] *Id.* at 510, para. 4.

discretion, their current self-imposed adherence to consistent principles[41] has been read as preserving equity *infra legem*'s objective of "go[ing] beyond a strict reading of the law, but not [going] beyond the law."[42] At the same time, the ICJ and all other tribunals tasked with resolving disputes under Part XV of UNCLOS—including maritime delimitation disputes—"are expected to operate as similarly as possible to avoid fragmentation of the convention, the risk of which has been indicated since its conclusion."[43] Thus far, the various "UNCLOS tribunals . . . have successfully achieved this operation by interpreting and applying the convention uniformly," but the task will become more difficult as cases increase and tribunals must choose whether to follow their own past decisions or those of other tribunals."[44] Regardless of an individual tribunal's choice, calls for cross-fertilization will invite tribunals to resolve a dispute consistently with prior judgments and awards.

As the next Part explains, however, this approach, when extended from legal analysis to equity *infra legem*, miscomprehends equity's nature and role in the maritime delimitation regime and interstate dispute resolution.

III. THE NATURE AND ROLE OF EQUITY *INFRA LEGEM*

This Part demonstrates that, as a doctrinal matter, crystallizing equity *infra legem* is inconsistent with equity's proper role in maritime delimitation. It begins by introducing theories of equity and its history in the English chancery tradition—a history ending with equity's ossification into, and eventual reclassification as, law. This Part then turns to the history of equity and the "equitable solution" in the maritime delimitation context. Although the origins of the "equitable solution" are the origins of maritime delimitation beyond the territorial sea in general, equity was first an open-ended negotiating term as opposed to a legal requirement. Only with the *North Sea Continental Shelf* cases did equity acquire an objective, normative status, which UNCLOS then preserved.

A. Equity and the Equitable Solution; The Equitable Solution and (not) Equity

Equity is a slippery concept. It may be "that which is 'fair' and 'good,' acts

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[41] *See* Lando, *supra* note 6, at 619 ("With regard to continental shelf and EEZ delimitation, the only bastion against a case-by-case approach is the quest for consistency with previous judicial decisions, which is not a matter of binding positive law but only of good judicial policy.").

[42] Delabie, *supra* note 4, at 159–60; *see also* Delabie, *supra* note 4, at 164 (writing favorably of the "rationalization" of equity *infra legem*, a process that has been "firmly stated in the case law" on maritime delimitation).

[43] Seta, *supra* note 3, at 402; *cf.* Philippe Sands, *Of Courts and Competition: Dispute Settlement Under Part XV of UNCLOS*, *in* CONTEMPORARY DEVELOPMENTS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF BUDISLAV VUKAS 789, 797–98 (Rüdiger Wolfrum et al. eds., 2016) ("[E]ach of the courts and tribunals has been at pains to commit to a coherent and systemic approach to the identification of the applicable law," including methodologies in the maritime delimitation context.). Tribunals outside the UNCLOS context may, of course, also be interested in ruling consistently with past decisions and awards absent an expressed need for consistency.

[44] Seta, *supra* note 3, at 402–03.

'outside of the law,' or, more pejoratively, 'acts notwithstanding the law.'"[45] This conception of equity informs the notion of *ex aequo et bono*, which "holds that adjudicators should decide disputes according to that which is 'fair' and in 'good conscience'" as opposed to legal principles.[46]

In another conception, equity is a feature inherently *within*—indeed, integral to—all legal systems: the consideration that "lead[s] to an interpretation of a rule of law in the context of a concrete situation and . . . balance[s] all the elements of the relationship between the parties concerned," thus helping to "avoid decisions that are a reflection of abstract principles detached from the circumstances."[47] This conception of equity, thus, is the "link between the specific rule or provision of law and reality."[48] Equity *infra legem* encompasses this notion, which is reflected in the relevant circumstances and disproportionality check phases of the current maritime delimitation analysis.[49]

In a third conception, equity is specifically called for in a legal framework. Its content is distinguishable from the legal elements of the framework, similar to equity *ex aequo et bono*, and it is expressly—artificially—inserted into the framework rather than inherent within it. At the same time, unlike equity *ex aequo et bono*, it may be only one of many elements in an overarching legal framework; even where it is not, it *is* law in a way equity *aequo et bono* is not. This equity, too, is *infra legem*: equity injected into law rather than already present. The text of UNCLOS Articles 74 and 83, which identify an equitable solution as the objective of maritime delimitation, exemplifies this equity.[50]

Regardless of specific definition, equity involves two freedoms unavailable in law. The first is the freedom to consider circumstances external to legal rules (in other words, a case's factual context or "reality").[51] The second, which proceeds from the first, is the freedom to consider and address those circumstances on their own merits, not based on prior cases—for, even in the case of equity *infra legem*,

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[45] Leon Trakman, *Ex Aequo et Bono: Demystifying an Ancient Concept*, 8 CHI. J. INT'L L. 621, 622 (2008).

[46] *Id.*

[47] Manfred Lachs, *Equity in Arbitration and in Judicial Settlement of Disputes*, 6 LEIDEN J. INT'L L. 323, 325 (1993).

[48] *Id.* at 326; *see also* Delabie, *supra* note 4, at 157 (describing equity *infra legem*'s use by tribunals "as an adjustment factor of the legal rule to allow for the individualization of situations that a strict application of law would render unjust") (citation omitted).

[49] *See* Thomas M. Franck & Dennis M. Sughrue, *The International Role of Equity-as-Fairness*, 81 GEO. L.J. 563, 572, 576 (1993) (associating "special circumstances" with "corrective equity," a model of equity which, "[o]perating around the margins of strict law, embraces a notion of fairness but seeks to contain this impulse within a conservative rule"). Franck and Sughrue do not discuss the disproportionality check phase, given that the "relevant circumstances" phase is the major juncture for equity to enter the maritime delimitation analysis. Nonetheless, the disproportionality check's purpose of identifying inequities places it in the "corrective equity" model as well.

[50] *See* Lachs, *supra* note 47, at 325 (commenting on the text of Article 83: "One could hardly think of a more explicit and more precise definition of the role of equity within the framework of law."); *see also* Delabie, *supra* note 4, at 157 ("[E]quity *infra legem* . . . is implied by the reference to an 'equitable solution.'").

[51] Lachs, *supra* note 47, at 325–26.

one case's external circumstances inevitably differ from another's.

Ironically, equity *infra legem*, especially in the sense of a link between law and reality, may foreclose both freedoms as it develops over time within a legal framework:

> [W]hile equity performs a specific function in a particular case leading to a just judgment or a just resolution of a dispute, its functions go beyond and have a more general character. It is of course clear that in an individual case, the . . . . tribunal selects those equitable principles that are suitable for the resolution of the dispute in question and that lead to a just decision.[52]

Thus, repeated, conscious dispensations of equity in similar scenarios result in equity transforming into a set of rules. This transition is familiar in common law jurisdictions, when doctrines developed in chancery, such as unjust enrichment and estoppel, were transplanted into courts of law.[53]

A comparison with the history of equity in common-law jurisdictions also suggests that equity in interstate disputes may share a similar demise. The English courts of chancery initially conceived of equity as the link between law and reality, defining it as a

> righteousness that considers all the particular circumstances of the deed which is also tempered with the sweetness of mercy and must always be observed in every law of man and in every general rule thereof . . . .
>
> [W]hich is no other thing but an exception of the law of God or the of the law of reason from the general rules of the law of man.[54]

Over time, though, the English tradition saw equity harden into "rigid rules" in the name of "consistency and predictability";[55] "once they became rules, they became as non-discretionary, specific, formal and prescriptive as legal rules."[56] Today, equity in the English tradition is merely a source of law "developed in a forum other than the common law courts."[57] By the time the Judicature Acts

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[52] *Id.* at 327.

[53] *See, e.g.*, Dennis Klinck, *"Single Nature's Double Name": the Union of Law and Equity?*, *in* EQUITY AND LAW: FUSION AND FISSION 394, 405 (John C.P. Goldberg et al. eds., 2019) (describing as "unsustainable" the position that law and equity are "at a fundamental ontological level . . . distinct" and pointing out that, as early as the eighteenth century, equitable developments were being assimilated into common law).

[54] CHRISTOPHER ST. GERMAN, DOCTOR AND STUDENT, 91 SELDEN SOC'Y 97 (1974) (author's adaptation into present-day English).

[55] Klinck, *supra* note 53, at 406.

[56] *Id.* at 413.

[57] *Id.* at 397; *see also id.* at 418 ("I find it challenging to discern what is really, fundamentally distinctive about equity today. Without question, historically, legal rules and equitable norms emanated from different courts. Historically as well, the latter were probably more open-textured and discretionary in their application—although part of the difference was that equity took

folded equity into courts of law, the freedoms it once safeguarded had all but eroded away.

It should be noted that the doctrine and history discussed here refer to equity as a means for a third party to resolve cases. Equity *infra legem* yields a certain "interpretation of the rule of law"[58]—itself a means of governing interaction and settling conflict—or "lead[s] to a just judgment [by a] tribunal[]."[59] Likewise, *ex aequo et bono*, a term whose application all but guarantees an equitable solution, is a way for "adjudicators . . . to decide disputes."[60] Equity seeks an equitable result. An equitable result, however, does not require a third party consciously to dispense equity. Rather, because equity springs from shared extra-legal notions of what is "fair" and "good," two parties can themselves, through negotiation, reach a settlement they both deem agreeable. When they do, they need not invoke the equitable principles an adjudicator might apply, and their settlement neither advances nor impedes the development of equity in dispute resolution.[61] Their settlement circumvents equity as a doctrine; it must simply satisfy their shared baseline notion of acceptability. Thus, Articles 74 and 83's requirement that two parties agree on a delimitation reflecting an "equitable solution" does not, as a textual matter, implicate equity as a doctrine.

The following section recounts how and why tribunals nevertheless view equity not as a negotiating term, but as a directive in maritime delimitation dispute resolution. Along the way, it explores the tension between those two notions of equity—a tension that has reared its head in recent years.

B. The Development of Equity in Maritime Delimitation

1. The Origins of Delimitation Beyond the Territorial Sea

The Truman Proclamation of September 28, 1945[62]—"the first positive law on the subject" of delimitation of the continental shelf,[63] to which current delimitation methods for both the continental shelf and the EEZ trace their roots—was born of a shift in exploitation of the oceans and a need for rules to govern that exploitation. "[C]ompetent experts" had discovered petroleum and

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cognizance of factors that common law courts did not recognize. But, over time, the quality of rules in equity seems to have become similar to that of common law rules, albeit addressing different subject matters.").

[58] Lachs, *supra* note 47, at 327.

[59] *Id.* at 325.

[60] Trakman, *supra* note 45, at 622. Tellingly, *ex aequo et bono* translates literally to "out of what is equitable and good" or "out of equity and conscience"; it does not refer to what arises "out of" it.

[61] *See* Elihu Lauterpacht, *Equity, Evasion, Equivocation and Evolution in International Law*, 1977 PROC. AM. BRANCH INT'L L. 33, 37 (1977–78) ("[A]part from the use of equity as an element of decision, it is appropriate to mention the fact that equity, in the non-specific sense, is more and more coming to play a role in international legislative activity, be it in the form of treaties or of other documents which may gradually be absorbed into the body of international law . . . . Everybody appreciates that there is no intrinsic or objective concept of equity applicable in those circumstances, but that we are there dealing with a concept the content of which is closely related to the specific facts in any given case.").

[62] Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sep. 28, 1945).

[63] North Sea Continental Shelf, *supra* note 31, ¶ 47.

other valuable minerals under "many parts of the continental shelf off the coasts."[64] The development of the offshore drilling industry—as well as "self-protection," which "compel[led] the coastal nation to keep close watch over activities off its shores"—demanded a "recognized jurisdiction over these resources" beyond the three miles hitherto afforded under international law.[65]

The United Kingdom and Venezuela had, in 1942, asserted and harmonized their jurisdiction over one section of the continental shelf through the Treaty Relating to the Submarine Areas of the Gulf of Paria.[66] The pace of drilling, however, demanded a solution at a swifter clip than the pace of mutual governmental consent. The general rule enshrined in the Truman Proclamation—that the continental shelf should be viewed "as an extension of the land- mass of the coastal nation"[67] and, thus, that a state's continental shelf would depend on its geographical configuration[68]—would afford some quick certainty to a burgeoning industry.

That rule's exception, applicable "where the continental shelf extends to the shores of another State, or is shared with an adjacent State,"[69] exhibits a similar practicality. Rather than follow the lead of the United Kingdom and Venezuela and conclude treaties with an individual state with which it might share the continental shelf, the United States proactively declared that "the boundary shall be determined by the United States and the State concerned in accordance with equitable principles."[70]

This was not the first appearance of equitable principles in international law, which had featured—explicitly or implicitly—in tribunals' decisions since the nineteenth century.[71] Nor was it the first instance of emphasis on the equitable outside of third-party dispute resolution: Article 23(e) of the League of Nations Covenant of 1919 committed League members "to secure and maintain . . . . equitable treatment for the commerce of all Members of the League," a precursor to the "fair and equitable treatment" standard that is a

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[64] Proclamation, 10 Fed. Reg. at 12,303.

[65] *Id.*

[66] Treaty Relating to the Submarine Areas of the Gulf of Paria, U.K.-Venez., Feb. 26, 1942, 205 U.N.T.S. 121. This was the first international legal instrument enumerating rights to the continental shelf.

[67] Proclamation, 10 Fed. Reg. at 12,303.

[68] North Sea Continental Shelf, *supra* note 31, ¶ 96 (describing famously this principle as "the land dominates the sea").

[69] Proclamation, 10 Fed. Reg. at 12,303.

[70] *Id.*

[71] Louis B. Sohn & Russell Gabriel, *Equity in International Law*, 82 AM. SOC'Y INT'L L. PROC. 277, 288 (1988) ("Equity was used frequently in international law during the 19th century. Then somehow at the beginning of the 20th century things quieted down and equity was used much less . . . . [E]quity principles were applied in quite a number of [Permanent Court of International Justice and ICJ] cases, although often without express reference to equity. The Court would state it was well known that a particular principle existed as a general principle of international law accepted by most nations and then would apply it, never mentioning equity.").

cornerstone of international economic law.[72] Unlike these earlier appearances of equitable principles, the Truman Proclamation is an invitation to work directly—state to state—on what those principles require.

Like earlier appearances of "equitable principles," however, that term as used in the Truman Proclamation is vacuous, a placeholder: a recognition that the United States would conclude agreements in areas of overlapping claims without an indication of the agreement's substance. With the phrase "in accordance with equitable principles," the United States pledged to reach a fair agreement in good faith and invited other states to negotiate. The Truman Proclamation laid out the form of the resolution of conflicting claims and stated the United States' willingness to resolve them.

The Truman Proclamation did not, however, introduce an equitable solution as a substantive requirement of the agreements to be jointly reached. Nor did it declare achieving an equitable solution to be a rule for all states to follow. This single, unilateral instance of state practice could not, of itself, create positive international law: to the extent it was not outright rejecting the settled three-mile rule of maritime jurisdiction, the United States was proclaiming into the void of international legal norms. Additionally, this first reference to "equitable principles" in the continental shelf context did not come from a tribunal, which would be equipped to define and apply those principles, but from a state which would eventually negotiate on equal (at least from a legal standpoint) terms with other states.

Indeed, in the two decades following the Truman Proclamation, "equitable" was frequently mere shorthand for fair, reasonable, or—more practically—acceptable to a typical state. For example, Denmark, in the 1957 negotiations surrounding the Convention on the Territorial Sea and Contiguous Zone, decried as inequitable the notion that states which had previously determined a territorial sea of three miles should be bound to maintain that breadth as neighboring states—in light of growing state practice—expanded their territorial seas substantially further.[73] Iran, the following year, praised as "fair and equitable" a (phrase echoing the international trade principle) a Canadian proposal that states enjoy exclusive fishing rights up to twelve miles offshore,

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[72] Theodore Kill, Note, *Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations*, 106 U. MICH. L. REV. 853, 870 (2008). Despite the shared use of the term "equitable," no direct line of influence may be drawn between the fair and equitable treatment standard and the "equitable principles" espoused in the Truman Proclamation. Nine years after the 1919 Covenant, the League's Draft Convention on the Treatment of Foreigners, made pursuant to Article 23 of the Covenant, "mentioned neither fair and equitable treatment nor any noncontingent international minimum standard" for the treatment of foreign commerce, representing "a regression from the Covenant's broad commitment to equitable treatment to little more than a platitude." *Id.* at 870–71 (citing League of Nations Covenant art. 23(e)). Furthermore, the two concepts occupy different spheres within international law: Article 23's "equitable treatment" of foreigners presupposes a border and concerns commerce passing through it, while the Truman Proclamation's "equitable principles" determine territory and, in that act of determination, cut off potential claims to resources.

[73] Letter from the Permanent Mission of Denmark to the United Nations, Aug. 5, 1957, *in* Int'l L. Comm'n, Comments by Governments on the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at Its Eighth Session, U.N. Doc. A/CONF.13/5 and Add. 1 to 4, at 81 (Oct. 23, 1957).

regardless of the breadth of a state's territorial sea.[74] Still, other states opposed both of these positions, meaning that the positions could not have been wholly unfair or unreasonable. In these contexts, rather, the term "equitable" was subjective: although it purported to describe what any state would reject as unfair, it also coincided with the speaking state's opinion of fairness.

Notwithstanding that potential for subjectivity, fairness and reasonableness are worthy objectives, and international legal experts sought to incorporate them impartially into new international legal machinery.[75] At its first session in 1949, the International Law Commission set out to study the regime of the high seas. Those efforts led, in the International Law Commission's fifth session, to the formation of a Committee of Experts to entertain technical questions on the territorial sea.[76] The Committee of Experts, answering the question of how to delimit the territorial seas of two adjacent states, commented that drawing an equidistance line would be the best method but, in some instances, would "not lead to an equitable solution, which will have to be sought in negotiations."[77]

The Committee's answer suggests—without confirming—two developments in the methodology of maritime delimitation. First, the Committee's indication that negotiation is necessary when drawing an equidistance line will not yield an equitable solution portrays the two processes—negotiation and drawing an equidistance line—as distinct. In not specifying whether the equidistance line would itself be the result of negotiation, the Committee leaves open the possibility that another entity would draw it. Second, the Committee's warning that parties may have to resort to negotiation to achieve an equitable solution implies an understanding that an equitable solution is at least a *desideratum* (though not necessarily a requirement) of maritime delimitation. On the other hand, the Committee of Experts—an ad-hoc body formed to answer technical questions—did not speak for the International Law Commission itself, which may not have intended the implications of the Committee's answer.[78]

A draft article from the same session, however, confirms that the International Law Commission had considered both a new delimitation method and an adjustment mechanism to ensure, if not an "equitable solution," then one that reflects the circumstances of a given case:

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[74] Statement of Iran, Consideration of the Report of the First Committee, *in* United Nations Conference on the Law of the Sea (UNCLOS I), *Summary Records of the Fourteenth Plenary Meeting*, ¶ 78, U.N. Doc. SR/14 (Apr. 25, 1958).

[75] *See, e.g.*, Kill, *supra* note 72, at 871–73 (outlining the development of the fair and equitable treatment principle during negotiations for the Havana Charter for an International Trade Organization and the Economic Agreement of Bogotá, both drafted in 1948).

[76] Attached Report of the Committee of Experts on Certain Technical Questions Concerning the Territorial Sea, Annex to the *Twentieth Report of M. J. P. A. François, Special Rapporteur on the Regime of the Territorial Sea*, U.N. Doc. A/CN.4/61/Add.1 & Corr.1 (May 18, 1953) (in French).

[77] *Id.* at 79.

[78] *See* North Sea Continental Shelf, *supra* note 31, ¶ 53 ("The Court moreover thinks it to be a legitimate supposition that the experts were actuated by considerations not of legal theory but of practical convenience and cartography.").

> *Article 7*
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> 1. Where the same continental shelf is contiguous to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, the median line every point of which is equidistant from the base lines from which the width of the territorial sea of each country is measured.
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> 2. Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, determined by application of the principle of equidistance from the base lines from which the width of the territorial sea of each of the two countries is measured.[79]

Both paragraphs in this draft article provide three mutually exclusive possibilities for delimitation: agreement between the states, application of the equidistance principle, and use of another boundary line as justified by special circumstances. The first option, agreement, can obviously be effected by the two states. The second, application of the equidistance principle, can be effected by either a third party or the two states, assuming they agree on the relevant base points for the equidistance line. The third, in contrast, must be understood to require third-party involvement or otherwise be surplusage: if two states can agree on a non-equidistant boundary line, their agreement necessarily accounts for circumstances they deem special. Therefore, unlike earlier instruments and declarations on maritime delimitation, this draft article contemplates a situation in which the states cannot agree on a delimitation line and permits a third entity, distinct from either state, to weigh whether special circumstances justify a non-equidistant boundary line.

Another draft article from the same section names arbitration as this third-party process: "[a]ny disputes which may arise between States considering the interpretation or application of these articles should be submitted to arbitration at the request of any of the parties."[80] The commentary to that draft article reveals how the International Law Commission intended for the two articles to be used in conjunction:

> [W]hile . . . . the rule of equidistance is the general rule, it is subject to modification in cases 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

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[79] *Report of the International Law Commission Covering the Work of its Fifth Sessio*n, *in* U.N. GAOR, 8th Sess., Suppl. No. 9 (A/2456), *reprinted in* 2 Y.B. Int'l Law Comm'n 216, U.N. Doc. A/CN.4/76, at 213.

[80] *Id.* at 213.

> departures necessitated by any exceptional configuration of the coast, as well as of the presence of islands or of navigable channels. To that extent the rule adopted partakes of some elasticity. . . . [A]rbitration [under these articles], while expected to take into account the special circumstances calling for modification of the major principle of equidistance, is not contemplated as arbitration *ex aequo et bono*. That major principle must constitute the basis of the arbitration, conceived as settlement on the basis of law, subject to reasonable modifications necessitated by the special circumstances of the case.[81]

Both draft articles, thus, specify that an arbitral tribunal must consider whether special circumstances call for delimitation using a method other than an equidistance line. They also describe the existence of special circumstances as affording tribunals "some elasticity." Said elasticity, however, falls short of equity *infra legem*, because it considers not "all the elements of the relationship between the parties,"[82] but only a narrow set of geographic circumstances: namely, the coastal configuration and presence of islands and channels. Relatedly, as the commentary on the draft article on arbitration signals, the regime depends on rejecting equity *ex aequo et bono* in favor of a legal framework:

> [T]he articles on the continental shelf represent an attempt to reconcile the established principles of international law governing the régime of the high seas with the recognition of the rights of the coastal State over the continental shelf. Any such reconciliation, based as it must be on the continuous necessity of assessing the relative importance of the interests involved, must leave room for a measure of elasticity and discretion . . . . The new régime of the continental shelf, unless kept within the confines of legality and of impartial determination of its operation, may constitute a threat to the overriding principle of freedom of the seas and to peaceful relations between States.[83]

The arbitral tribunals contemplated in the draft articles, thus, would need to acknowledge the need for elasticity based on special circumstances while obeying the directives of legality and impartiality. Even if the discretion afforded tribunals were broad enough to be considered equity, these directives guaranteed that they would dispense only equity *infra legem*. At the same time, the restrictions in the draft articles did not apply to the "agreement[s]" to be reached by negotiation between the parties. Only those negotiated agreements would necessarily guarantee a boundary that—in the view of the two parties—was equitable.

Eventually, the International Law Commission's draft articles formed the

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[81] *Id.* at 216.

[82] Lachs, *supra* note 47, at 325.

[83] *Report of the International Law Commission Covering the Work of its Fifth Session*, *supra* note 79, at 217.

basis for the 1958 Geneva Convention on the Continental Shelf. That convention did not include a provision on submission of disputes to arbitration. Correspondingly, its language on delimitation of the continental shelf both confirmed the importance of negotiation and receded from expressly mentioning any form of third-party intervention:

> *Article 6*
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> 1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial 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.[84]

This article preserved the equidistance principle and its "special circumstances" exception, but both rules were relegated to secondary importance. Although states were permitted to resort to those rules "in the absence of agreement," opposite and adjacent states were directed that their boundaries "*shall* be determined by agreement between them." At the same time, the article followed the lead of Article 7 in the fifth conference by implying that some unidentified entity could become involved to determine special circumstances "in the absence of agreement."

In sum, leading up to the *North Sea Continental Shelf* cases, equity existed in the negotiation context, albeit as a subjective term, and equity *infra legem* as applied by a third party did not exist, though a related elasticity—which encompassed only a limited class of circumstances—did come into play when (1) negotiations failed and (2) the circumstances justified (in the view of an unidentified entity) a departure from the equidistance line.

2. The North Sea Continental Shelf Cases

In 1967, Denmark, the Federal Republic of Germany, and the Netherlands applied to the International Court of Justice to delimit the continental shelf of the North Sea that pertained to each of them.[85] Denmark and the Netherlands were parties to the 1958 Geneva Convention on the Continental Shelf; Germany

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[84] Convention on the Continental Shelf art. 6, Apr. 29, 1958, 499 U.N.T.S. 311.

[85] North Sea Continental Shelf, *supra* note 31, ¶¶ 3–4.

was not. All three parties acknowledged that, as a result, the Convention did not bind Germany as a matter of conventional international law.[86] Furthermore, the ICJ held that Germany had not become bound to the 1958 Convention under a theory of estoppel.[87] At any rate, too, Denmark and the Netherlands were not adjacent states, and the three states were not opposite one another; accordingly, the ICJ observed, the delimitation provisions in the 1958 Convention were inapplicable.[88]

Nonetheless, Denmark and the Netherlands contended that all three states were bound—whether as a logical necessity or as a matter of customary international law—to define their boundaries based on "a line drawn on equidistance principles."[89] Although it recognized that "the equidistance method of delimitation is a very convenient one, the use of which is indicated in a considerable number of cases,"[90] the ICJ rejected their arguments.[91] Accordingly, the ICJ set out to clarify the international legal rules applicable independently of the Convention on the Continental Shelf. In the task of clarifying, however, the ICJ introduced four developments in the law of maritime delimitation.

The first and perhaps most obvious development is the elaboration of the "special circumstances" to be considered in maritime delimitation—an elaboration which tribunals today, notwithstanding the trend toward crystallization, at least cite. Although the ICJ began its discussion of this point by cautioning that "[e]quity does not necessarily imply equality" and that "[t]here can never be any question of completely refashioning nature,"[92] it outlined an expansive view of potentially relevant circumstances:

> [T]here is no legal limit to the considerations which States may take into account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.
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> In balancing the factors in question it would appear that various aspects must be taken into account. Some are related to the geological, others to the geographical aspect of the situation, others again to the idea of the unity of any deposits. These

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[86] *Id.* ¶ 27.

[87] *Id.* ¶¶ 27–30.

[88] *Id.* ¶ 36.

[89] North Sea Continental Shelf, *supra* note 31, ¶¶ 37, 39, 49, 61, 70.

[90] *Id.* ¶¶ 22–23.

[91] *Id.* ¶¶ 46, 49–50, 55, 62, 69, 81–82.

[92] *Id.* ¶ 91.

> criteria, though not entirely precise, can provide adequate bases for decision adapted to the factual situation.[93]

Thus, at least during this period, the class of "special circumstances" was not limited to geography, such as the concavity of coastlines, alone, but also extended to exploitation (though not to purely economic considerations). Indeed, on the third, exploitative category, the ICJ explained that a deposit straddling a delimitation line may result in inequity, "since it is possible to exploit such a deposit from either side, [resulting in] a problem . . . on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned."[94]

The ICJ's inclusion of factors directly related to seabed mining reflected that the legal regime of the continental shelf—and, therefore, of delimitation of the shelf—was a consequence, after all, of mankind's interest in the seabed: "[t]he institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal régime."[95] This observation suggests that, so long as a given circumstance is related to seabed mining of the continental shelf, it may potentially be "special" in the maritime delimitation analysis. It also suggests, conversely, that relevance to the object of the legal regime is an external constraint on the range of "special circumstances."

It should be noted that the ICJ's consideration of the unity of deposits implies the importance of permitting only one state to exploit the deposit—not of permitting the deposit to be shared among states. In other words, one may not cite the consideration of an exploitative factor in the *North Sea Continental Shelf* cases to support the proposition that tribunals may shift a delimitation line to permit the sharing of resources, but one may cite it to support the proposition that tribunals may shift a delimitation line to preclude such sharing (and, thus, any conflict that may arise therefrom).

The second development is the express inclusion of equity and equitable principles—not merely an equitable solution—as part of the maritime delimitation analysis, as well as the association of equity with a mandatory "special circumstances" inquiry meant to guarantee it: "the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied."[96] In fact, following its examination of the history of the continental shelf regime, beginning with the Truman Proclamation, the ICJ took their association to be a principle "which [has] always underlain the development of the legal régime of the continental shelf in this field . . . ."[97] The ICJ also recognized that "the application of equitable principles" to achieve "a reasonable result"—independent of a particular principle or method of delimitation—was the

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[93] North Sea Continental Shelf, *supra* note 31, ¶¶ 93–94.

[94] *Id.* ¶ 97.

[95] *Id.* ¶ 95.

[96] *Id.* ¶ 85(b).

[97] North Sea Continental Shelf, *supra* note 31, ¶ 85.

overarching requirement of continental shelf delimitation.[98]

The ICJ, in contextualizing equity's role in the maritime delimitation analysis, identified the equity at play as equity *infra legem*:

> The legal basis of [the rule of equity] in the particular case of the delimitation of the continental self as between adjoining States has already been stated. It must however be noted that the rule rests also on a broader basis. Whatever the legal reasoning of a court of justice, *its decisions must by definition be just, and therefore in that sense equitable*. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying *not outside but within the rules*, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision *ex aequo et bono*, such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court's Statute.[99]

The ICJ situates the applicable equity *infra legem*, thus, within both definitions discussed above: both the rule "in the particular case" of maritime delimitation, being a rule of equity expressly inserted into a legal analysis, and the equity's "broader basis" in any dispensation of law. This theoretical description of equity also matches that present in the "special circumstances" analysis: susceptible to "no legal limit" or rule of "relative weight to be accorded to different considerations,"[100] but constrained only by the purposes of the legal regime itself. Consequently, in contrast to elasticity envisioned in the commentary on the draft article on arbitration in the fifth negotiating session of the 1958 Convention, the special circumstances analysis laid out in the *North Sea Continental Shelf* cases is consistent with equity *infra legem*.

The third development is the simultaneous affirmation of negotiation as the primary method of settling maritime delimitation disputes and recognition of secondary dispute settlement methods—including settlement by a tribunal. Alongside the association of equity with special circumstances, the ICJ recognized the "obligation to enter into negotiations with a view to arriving at an agreement" as a principle underlying the development of the continental shelf delimitation regime.[101] The ICJ focused its discussion of this obligation, though, on denying that negotiation was "a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement. "[102] Other "certain method[s]," thus, had been acknowledged, and indeed, the ICJ, quoting the Permanent Court of International Justice, named judicial settlement as "simply an alternative to the direct and friendly settlement of . . . disputes"

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[98] *Id.* ¶ 90.

[99] *Id.* ¶ 88 (emphases added).

[100] *Id.* ¶ 93.

[101] North Sea Continental Shelf, *supra* note 31, ¶ 85(a).

[102] *Id.*

more generally.[103]

Relatedly, the ICJ implied that the same principles it had laid down in the case before it—for the Netherlands, the Federal Republic of Germany, and Denmark to follow in their subsequent negotiations—were the same ones that a tribunal would follow if it were delimiting the continental shelf boundaries itself:

> Although the Parties have made it known that they intend to reserve for themselves the application of the principles and rules laid down by the Court, it would, even so, be insufficient simply to rely on the rule of equity without giving some degree of indication as to the possible ways in which it might be applied in the present case, it being understood that the Parties will be free to agree upon one method rather than another, or different methods if they so prefer.[104]

In drawing the line between rule and application—the former the task of courts, the latter, here but not exclusively, the task of states—the ICJ names "the rule of equity" as a requirement in delimitation by negotiation as well as adjudication and other methods. Thus, delimitation of the continental shelf, regardless of method, was governed by the same principles, among them the requirement of deploying equity *infra legem*.

The overarching need for equity in all methods of delimitation yields the fourth development: the separation of equitable principles from their original context in negotiation and their assumption of an independent, objective meaning. In using the Truman Proclamation as the source of "the rules of law" in the field of continental shelf delimitation, the ICJ looked past the Proclamation's purpose as an invitation to negotiate in good faith within a void of accepted legal principles. In that context, the phrase "in accordance with equitable principles" meant simply what the parties involved subjectively found mutually agreeable. Again, the Truman Proclamation referred to equity as a placeholder; it did not accord equity the standalone, objective meaning that term enjoyed in law.

The ICJ, however, elevated the Truman Proclamation to a source of law, to be followed not only by parties in negotiations, but also by tribunals in adjudication. Along the way, it conflated the negotiation-based equity mentioned in the Truman Proclamation with both the broader principle of equity *infra legem* and the narrower "elasticity" embodied in the special circumstances inquiry in the 1958 Convention on the Continental Shelf.

This conflation may well have been unintentional.[105] On the other hand, it

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[103] *Id.* ¶ 87 (quoting Free Zones of Upper Savoy and District of Gex (Fr. v. Switz.), Order, 1929 P.C.I.J. (ser. A) No. 22, at 13 (Aug. 19)).

[104] North Sea Continental Shelf, *supra* note 31, ¶ 92.

[105] *See* Lauterpacht, *supra* note 61, at 44–45 (criticizing the ICJ's reasoning in the *North Sea Continental Shelf* cases, and attributing its deficiencies to the fact that "equity may not have been fully or sufficiently developed by the parties in the course of the pleadings . . . . And so it was that, when the Court came to consider the whole concept of equity as an element in delimitation, it did

was inevitable: the result of expanding a concept from a context that did not require third-party involvement into one that did. An interstate tribunal relies on the semblance of objectivity to ensure compliance. A tribunal is an entity that forms an opinion on an issue, just as the parties before it have already formed theirs. Part of what lends the tribunal's opinion authority, such that the parties are inclined to put aside their opinions and follow the tribunal's, is that it is rooted in legal norms; that is, its opinion reflects underlying legal standards that are common to all potential parties—not just the parties before it.[106] But an interstate tribunal also *projects* the semblance of objectivity. The opinion that a tribunal pronounces necessarily assumes a normative character that a party's opinion—or even the shared opinion of two parties—does not. For that reason, an originally subjective term, when introduced into third-party dispute resolution, takes on independent, objective meaning, informed by those legal standards.

In the case of "equitable principles," then, the expansion from negotiation into third-party dispute resolution imbued that term with a generally accepted understanding of equity: not only an understanding of equity's content, informed by the ICJ's enlargement of "special circumstances" beyond the "elasticity" contemplated in the 1958 Convention on the Continental Shelf, but also an understanding of equity's purposes and functions, including the expectation that "a rule of law . . . calls for the application of equitable principles."[107]

Accordingly, the *North Sea Continental Shelf* cases transformed equity from a negotiating term into the chief directive in continental shelf delimitation. That directive embodied the dispensation of equity—whether by adjudication, negotiation, or otherwise—within a regime of rules: equity *infra legem*.

3. The United Nations Convention on the Law of the Sea

In response to continued technological developments permitting exploitation of maritime natural resources on, above, and under the ocean floor further away from the mainland,[108] states again came together in 1973 to negotiate a new convention on the law of the sea. The result would provide not only a regime governing the continental shelf, but also a new regime that would expand partial domestic jurisdiction far beyond the previously accepted twelve-mile limit: the EEZ. UNCLOS preserved the developments of the *North Sea Continental Shelf* cases in the continental shelf context and expanded them to delimitation of the

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not really have the benefit of argument by either party specifically directed to the question which the Court was considering.").

[106] *See, e.g.*, Andreas Follesdal, *Survey Article: The Legitimacy of International Courts*, 28 J. POL. PHIL. 476, 485 (2020) ("The core task of [international courts] is to adjudicate disputes by issuing judgments on the basis of legal sources and legal methods—rather than, for example, resolving disputes by diplomatic bargains or threats. They should be loyal to their mandate and follow agreed legal standards of treaty interpretation and legal reasoning to arrive at impartial judgments—and be seen to do so.") (citing David D. Caron, *The Multiple Functions of International Courts and the Singular Task of the Adjudicator*, 111 AM. SOC'Y INT'L L. 231, 231–40 (2017)); Karen J. Alter et al., *How Context Shapes the Authority of International Courts*, 79 LAW & CONTEMP. PROBS. 1, 26 (2016) ("[G]overnment officials, lawyers, civil society groups, and actual or potential litigants expect [international courts] to act like domestic courts in the sense of following predetermined rules of procedure and justifying their decisions on the basis of legal reasoning and argumentation.").

[107] North Sea Continental Shelf, *supra* note 31, ¶ 88.

[108] *See generally* UNCLOS, pmbl.

EEZ. UNCLOS also affirmed the centrality of equity to the maritime delimitation analysis in both contexts, replacing the requirement of resorting to "equitable principles" to "an equitable solution."

At the outset of negotiations, however, the drafters had to decide whether to repeat language from the 1958 Convention on the Continental Shelf—whose status as customary international law the ICJ had rejected[109]—that, in the event of a dispute, the boundary would be the median line "unless . . . justified by special circumstances" or whether to endorse the ICJ's focus on delimitation simply "arrived at in accordance with equitable principles."[110] Faced with these ambiguous developments, the states negotiating UNCLOS split into groups supporting one "of two virtually irreconcilable approaches, namely: (i) delimitation should be effected by the application of the median line or equidistance line coupled with an exception for special circumstances; and (ii) delimitation"—even absent an agreement—"should involve a more emphatic assertion of equitable principles."[111]

Many drafts, unlike the current Articles 74 and 83, detailed the elements of the maritime delimitation process. Some early texts enumerated which "circumstances" were "special" or "relevant." Turkey, for example, proposed the following text for continental shelf delimitation:

> In the course of negotiations, the States shall take into account all the relevant factors, including, *inter alia*, the geomorphological and geological structure of the [continental] shelf up to the outer limit of the continental margin, and special circumstances such as the general configuration of the respective coasts, and the existence of islands, islets or rocks of one State on the continental shelf of the other.[112]

Over time, however, states decided not to enumerate these circumstances. Their proposals instead came to follow the structure of a second-session (1974) proposal by Romania to account for "all relevant geographical, geological or other factors," including islands, and to effect a delimitation based on "the method or

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[109] North Sea Continental Shelf, *supra* note 31, ¶ 69.

[110] *Id*. ¶ 85.

[111] Virginia Commentary, *supra* note 6, Part VI, at 954.

[112] Third United Nations Conference on the Law of the Sea, *Turkey: Draft Article on Delimitation Between States; Various Aspects Involved*, ¶ 2, U.N. Doc. A/CONF.62/C.2/L.23 (Vol. III) (Jul. 26, 1974); *see also* Third United Nations Conference on the Law of the Sea, *Kenya and Tunisia: Draft Article on the Delimitation of the Continental Shelf or the Exclusive Economic Zone*, ¶ 2, U.N. Doc. A/CONF.62/C.2/L.28 (Vol. III) (Jul. 30, 1974) ("[S]pecial account should be taken of geological and geomorphological criteria, as well as of all the special circumstances, including the existence of islands or islets in the area to be delimited."); Virginia Commentary, *supra* note 6, Part VI, at 964 ("A proposal by Morocco provided that delimitation should be by agreement in accordance with equitable principles, 'employing, where appropriate, the median or equidistant line, and taking account of all relevant circumstances.' It then listed several factors to be taken into account in the delimitation, including geomorphological factors and natural resources in the zone to be delimited, and also provided for the consideration of the 'present or possible future effects of any other delimitation effected between adjacent States in the same region.'").

combination of methods which provides the most equitable solution."[113] Subsequently, a ninth-session (1980) proposal by states supporting the use of equitable principles proposed that delimitation take "into account all relevant circumstances," without other qualification, "and employing any methods, where appropriate, to lead to an equitable solution."[114] Other proposals from that session called for "taking into account of all circumstances prevailing in the area concerned"[115] and "taking into account any special circumstances where this is justified"[116]—two formulations that did not mention the objective of an equitable solution yet retained some general criteria for a circumstance's relevance or specialness.

Articles 74 and 83's final text—the result of years of disagreement and a final push of focused negotiations[117]—does not mention "special" or "relevant circumstances." Indeed, it provides little guidance on the steps for delimitation at all, other than that they must be "in accordance with international law." Rather, the text focuses not "on the method of delimitation," but "on the objective of delimitation": reaching "an equitable solution."[118] This objective, free from any particular doctrine, determines the means of its achievement: the means must "be assessed in light of its usefulness for the purpose of arriving at an equitable result."[119] Hence, using a provisional equidistance line in the first phase of

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[113] Third United Nations Conference on the Law of the Sea, *Romania: Draft Articles on Delimitation of Marine and Ocean Space Between Adjacent and Opposite Neighbouring States and Various Aspects Involved* U.N. Doc. A/CONF.62/C.2/L.18 (Vol. III) (Jul. 23, 1974). The objective of an "equitable solution" appeared in proposals and drafts intermittently during negotiations, including in the fourth (1976), sixth (1977), and seventh (1978) sessions. Virginia Commentary, *supra* note 6, at 961, 964, 966.

[114] Virginia Commentary, *supra* note 6, Part VI, at 977 (quoting U.N. Doc. NG7/10.Rev/1 (Mar. 25, 1980)). The pro-equitable principles group had proposed the same language two years earlier, during the seventh session. Virginia Commentary, *supra* note 6, Part VI, at 976, 978.

[115] Third United Nations Conference on the Law of the Sea, *Informal Composite Negotiating Text*, *Revision 2*, art. 83, U.N. Doc. A/CONF/62.WP.10/Rev.2 (Vol. VIII) (Apr. 11, 1980). This was a proposal not by a state, but by the Chairman of the group negotiating these provisions. This proposal's inclusion was, for that reason, controversial. *See* Virginia Commentary, *supra* note 6, Part VI, at 978.

[116] Virginia Commentary, *supra* note 6, Part VI, at 977 (quoting U.N. Doc. NG7/2/Rev.2 (Mar. 28, 1980)) (proposal of states supporting the use of the median or equidistance line). The pro-equidistance group had proposed the same language two years earlier, during the seventh session. Virginia Commentary, *supra* note 6, Part VI, at 976–77.

[117] Virginia Commentary, *supra* note 6, Part VI, at 981. This formulation resulted from tenth-session negotiations with the incoming President of the Conference and the delegations of Ireland and Spain, with assistance from the ambassador of Fiji. *Id.* Part VI, at 979. Ireland represented the group favoring equitable principles, and Spain represented the group favoring an equidistance line. *Id.* The two states had been key in developing their groups' positions throughout the Conference. *Id.* Part VI, at 952–85. Many states considered this formulation to be a "compromise" and opposed future amendments to the draft text for that reason. *Id.* at 981.

[118] *Id.* Part VI, at 983.

[119] Franck & Sughrue, *supra* note 49, at 582 (quoting Case Concerning the Continental Shelf (Tunis./Libya), Judgment, 1982 Rep. 18, ¶ 49 (Feb. 24). The judgment in the *Case Concerning the Continental Shelf* between Tunisia and Libya predated the opening of UNCLOS for signature, but by the time of the judgment's release, the delimitation groups had already agreed to the form paragraph 1 of Articles 74 and 83 would eventually take—that is, the enumeration of "an equitable

maritime delimitation is justified by the fact that "[e]quidistance, or a variant closely resembling it, is an equitable solution in the vast majority of delimitation cases."[120]

On the other hand, the portions of Articles 74 and 83 requiring "an equitable solution" also require that delimitations "be effected by agreement."[121] Additionally, they contemplate third-party settlement of delimitation disputes only "if no agreement can be reached within a reasonable period of time"—thus carrying forward the obligation to negotiate that the ICJ had recognized in the *North Sea Continental Shelf* cases—but rather than enumerate the principles for the third party to apply, the articles merely refer to "resort to the procedures provided for in Part XV,"[122] which also provides no principles specific to maritime delimitation. One could interpret the dichotomy between negotiation and third-party procedures as a rejection of the ICJ's conflation of the two in the *North Sea Continental Shelf* cases and a signal that only negotiation should prioritize the "equitable solution." This separation would not deprive tribunals interpreting Articles 74 or 83 of principles to apply, but free them to refine their analysis over time independently of a treaty text, focusing on a more predictable metric than equity.[123]

The *travaux préparatoires* of Articles 74 and 83 foreclose this interpretation. The articles on the continental shelf and EEZ, *inter alia*, were the responsibility of the Second Committee of the Conference,[124] and the General Committee later formed a smaller, separate negotiating group—Negotiating Group 7—to tackle both the "delimitation of maritime boundaries between adjacent and opposite

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solution" without mention of specific analytical steps. *See* Virginia Commentary, *supra* note 6, Part VI, at 980 (citing statements from 1981 when explaining that the proposal of emphasizing an equitable solution "received the support of both delimitation groups").

[120] Lando, *supra* note 6, at 244.

[121] UNCLOS art. 74, para. 1; *id.* art. 83, para. 1.

[122] *Id.* art. 83, ¶ 2; *id.* art. 74, ¶ 2; North Sea Continental Shelf, *supra* note 31, ¶ 85.

[123] Some judges may have welcomed such an opportunity. Dissenting in the *North Sea Continental Shelf* cases, Judge Koretsky foresaw in the ICJ's holding the potential for unnecessary interventions into interstate political or economic questions. *See* North Sea Continental Shelf, *supra* note 31, at 168 (dissenting opinion by Vice-President Koretsky) ("The Court has put forward considerations that are, rather, economico-political in nature, . . . but it has not given what I personally conceive to be a judicial decision consonant with the proper function of the International Court."). This criticism of unbridled equity extends still further back. Judge Koretsky refers to a statement by James Brown Scott at the Hague Peace Conference of 1907:

> A court is not a branch of the Foreign Office, nor is it a Chancellery. Questions of a political nature should . . . be excluded, for a court is neither a deliberative nor a legislative assembly. . . . If special interests be introduced, if political questions be involved, the judgment of a court must be as involved and confused as the special interests and political questions.

Id. at 168 (internal citations omitted).

[124] Organization of the Second Session of the Conference and Allocation of Items: Decisions Taken by the Conference at its 15th Meeting on 21 June 1974, *Official Records of the Third United Nations Conference on the Law of the Sea*, U.N. Doc. A/CONF.62/29 (Vol. III), 60 (July 2, 1974).

States *and settlement of disputes thereon*."[125] Thus, the questions of delimitation (by agreement) and dispute settlement[126] (delimitation in the absence of agreement) were considered by the same bodies—and deliberately so:

> Initially, there was discussion in the Plenary concerning whether the issue of delimitation of maritime boundaries between adjacent or opposite States should be linked with the discussions on dispute settlement [eventually housed under Part XV]. The President pointed out that, although the two questions would be considered together, the matter of delimitation would remain within the purview of the Second Committee, and that of dispute settlement "would still be the subject of a separate part of the future convention." Negotiating Group 7 addressed dispute settlement only in terms of the settlement of maritime boundary disputes.[127]

The Virginia Commentary's own gloss on the articles attests that delimitation by negotiation and third-party settlement are subject to the same analysis: "[u]nder article 74 (and article 83) no predominance is given to any one method of delimitation. Both those parties negotiating an agreement and those deciding a delimitation dispute are free under article 74 (and 83) to choose any method that will lead to an equitable solution."[128]

Therefore, UNCLOS reaffirmed, if not underscored, the same overarching focus on equity the ICJ had set out in the *North Sea Continental Shelf* cases. By the same token, both UNCLOS and the ICJ's holding in the *North Sea Continental Shelf* cases discourage crystallizing equity in the maritime delimitation regime. Crystallization would erode the freedoms equity is meant

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[125] Organization of Work: Decisions Taken by the Conference at its 90th Meeting on the Report of the General Committee, *Official Records of the Third United Nations Conference on the Law of the Sea*, U.N. Doc. A/CONF.62/62 (Vol. IX), 7–8 (Apr. 13, 1978) (emphasis added).

[126] By "dispute settlement," both the primary UNCLOS documents and those discussed in the Virginia Commentary refer exclusively to third-party dispute settlement, such as adjudication, arbitration, and conciliation. The latter, for example, mentions "dispute settlement" and "settlement of disputes" only with regard to what became paragraph 2 of Articles 74 and 83. Although those paragraphs now refer only to "the procedures provided for in Part XV," that Part's title is "Settlement of Disputes." *See* Virginia Commentary, *supra* note 6, Part VI, at 965, ¶ 83.10 (citing Organization of Work: Decisions Taken by the Conference at its 90th Meeting on the Report of the General Committee, *supra* note 125, at 7–8, ¶ 5(7)).

[127] Virginia Commentary, *supra* note 6, Part VI, at 965, ¶ 83.10 (citing Ninetieth Plenary Meeting, *Official Records of the Third United Nations Conference on the Law of the Sea*, U.N. Doc. A/CONF.62/SR.90 (Vol. IX), ¶¶ 21–35 (Apr. 12, 1978)).

[128] Virginia Commentary, *supra* note 6, Part V, at 814, ¶ 74.11(b). At least two states understood negotiation and third-party settlement to be governed by the same principles. *See id.* at 967–68, ¶ 83.11 (citations omitted) ("The United States of America . . . proposed that questions relating to the 'specific principles and factors' in a particular case of delimitation should be submitted to the procedures for dispute settlement. The principles and factors specified by the court or tribunal were to serve as a basis for further negotiations. The Federal Republic of Germany . . . suggested that cases should be submitted to judicial determination particularly when the parties were in disagreement with respect to the method of delimitation to be applied."); *see also* Statement by Colombia, Ninetieth Plenary Meeting, *supra* note 127, ¶ 25 (commenting that the question of delimitation between adjacent and opposite states and the question of the settlement of disputes thereon "were indissolubly linked").

to provide, just as equity's development in chancery did. In favoring consistency over flexibility, it would transform equity into rules indistinguishable from law.[129] UNCLOS and the *North Sea Continental Shelf* cases, in contrast, pronounce equity—not consistency or predictability—the regime's controlling aim. An equitable solution, in other words, "is not a corrective aspect of another legal rule, but rather, is itself a rule of law" backed by legal authority.[130] Although UNCLOS did not set out the analytical steps for tribunals to follow, all analytical steps tribunals do take are subordinate to, and must be assessed in light of, that rule.

UNCLOS's non-mention of specific analytical steps in Articles 74 and 83, however, does not establish that UNCLOS left untouched the *methodology* laid out in the *North Sea Continental Shelf* cases. Neither those articles nor the rest of UNCLOS implicitly or explicitly impact the analytical steps themselves. Perhaps the nearest UNCLOS's drafters came was in Articles 63 and 64, which mandate the creation of regimes for the shared exploitation of sea life inhabiting the EEZs of multiple states or migrating through them. Because these articles facilitate resolution of issues related to exploitation of the EEZ, they could be interpreted to eliminate the need for tribunals to consider exploitative factors as "relevant circumstances" for delimiting the EEZ—a contrast to the ICJ's consideration of the unity of deposits in the *North Sea Continental Shelf* cases.

Nonetheless, the *travaux préparatoires* of these articles do not reveal any intention to affect the range of relevant circumstances or the maritime delimitation analysis more broadly. Furthermore, the articles could also be read to permit tribunals, in their pursuit of an "equitable solution," to adjust provisional boundaries for the sharing of wildlife stocks. In contrast to a petroleum deposit, which can be drilled only once (for which reason the ICJ cited the interest in the unity of deposits[131]), sea wildlife—proper conservation measures permitting—can be sustainably exploited jointly. Thus, these articles could just as well encourage consideration of "relevant circumstances" with regard to EEZ delimitation.

Instead, if UNCLOS's drafters did deliberately affect the steps in the maritime delimitation analysis, it was by declining to address the analysis and entrusting it to tribunals. From the seventh through the ninth sessions, both sides of the "median or equidistance line" versus "equitable principles" debate proposed as broad a range of circumstances as possible as opposed to one limited, for example, to geographical factors.[132] Their consensus, thus, followed the

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[129] *See also* Joseph Hendel, Note, *Equity in the American Courts and in the World Court: Does the End Justify the Means?*, 6 IND. INT'L & COMPAR. L. REV. 637, 650 (1996) (discussing equity in the maritime delimitation context: "Owing to the small number of maritime delimitation cases decided by the [ICJ] to date, a significant body of equitable rules has yet to develop. It is thought that as more decisions are made in which the rules of equity are applied, an increasingly hardened, coherent body of doctrine will emerge.") (citing Sohn & Gabriel, *supra* note 71, at 288).

[130] Franck & Sughrue, *supra* note 49, at 580.

[131] *See supra* section III.B.2.

[132] *See, e.g.*, Virginia Commentary, *supra* note 6, Part VI, at 977 (proposal of the group "favoring the use of the median or equidistance line" within Negotiating Group 7 deliberations in the ninth session:

ICJ's observation in the *North Sea Continental Shelf* cases that the circumstances to be considered have "no legal limit." Then, the compromise text deleted all references to relevant or special circumstances. One could interpret states' ultimate silence on these circumstances to reflect a decision to leave them—and all other analytical steps—for tribunals to develop in the future.

This interpretation finds support in the articles' mention of resort to "international law, as referred to in Article 38 of the Statute of the International Court of Justice." Because the ICJ is the quintessential interpreter of international law, and because both articles reference the Statute of the International Court of Justice[133] as the foundation of the applicable law, the drafters delegated to the ICJ at least some discretion on methodology. Indeed, delegation of methodology may have been the driver of compromise between the two final negotiating groups: the ICJ would have been responsible for resolving the equitable principles versus equidistance-plus-relevant circumstances debate and, by implication, also for creating methodologies for reaching an equitable solution.[134] According to this view, the ICJ must be afforded the analytical space to create a consistent structure where states—because they disagreed on the content of that structure despite a shared desire for one—could not.[135]

"The delimitation of the Exclusive Economic Zone/Continental Shelf between adjacent or opposite States shall be effected by agreement employing, as a general principle, the median or equidistance line, *taking into account any special circumstances where this is justified*.") (emphasis added) (quoting U.N. Doc. NG7/2/Rev.2 (Mar. 28, 1980)); *id.* (proposal of the group "supporting the use of equitable principles" within Negotiating Group 7 deliberations in the ninth session: "The delimitation of the exclusive economic zone [or continental shelf] between adjacent or/and opposite States shall be effected by agreement, in accordance with equitable principles *taking into account all relevant circumstances* and employing any methods, where appropriate, to lead to an equitable solution.") (brackets in original) (emphasis added) (quoting U.N. Doc. NG7/10.Rev/1 (Mar. 25, 1980)); *id.* at 974 ("The delimitation of the continental shelf between adjacent and opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and *taking account of all the relevant circumstances*.") (quoting Informal Composite Negotiating Test Revision 1, U.N. Doc. A/CONF/62.WP.10/Rev.1 (Apr. 26, 1979) (created at the close of the first part of the eighth session)) (emphasis added). As mentioned above (*supra* notes 114 and 116), these ninth- session proposals were the same that the two groups had submitted in the seventh session. Virginia Commentary, *supra* note 6, Part VI, at 976–78.

[133] Statute of the International Court of Justice, June 26, 1945, T.S. No. 993, art. 59 [hereinafter ICJ Statute].

[134] It is true that a reference to "international law" as opposed to specific analytical criteria long predated the compromise provision. The Chairman of Negotiating Group 7 had floated such a proposal as early as the seventh session. Virginia Commentary, *supra* note 6, Part VI, at 968–69 (citing U.N. Doc. NG7/21). The Chairman's proposal had gained little traction as of the eighth session and was criticized during the ninth session "as not providing adequate guidance for the process of delimitation." Virginia Commentary, *supra* note 6, Part VI, at 974, 976. The compromise text may have provided the modifier "as referred to in article 38 of the Statute of the International Court of Justice" as "[a] more precise formulation" to alleviate these earlier concerns. *Id.* at 980. Ultimately, the lack of guidance may have made the reference to international law an attractive addition to a compromise text tossing the problem of methodology to the ICJ.

[135] *See* LANDO, *supra* note 15, at 290–91, 294 ("States codified rules governing EEZ and continental shelf delimitation in Articles 74 and 83 of the United Nations Convention on the Law of the Sea (UNCLOS). Nonetheless, the vagueness of such rules has determined an active role by international tribunals in shaping the judicial process for maritime delimitation. International tribunals could be considered the makers of the delimitation process. The legal basis of their law-making function stems both from the impossibility for customary rules of international law to develop in maritime

Regardless of the validity of this interpretation, though, the space that UNCLOS's drafters afforded the ICJ is not boundless. Articles 74 and 83's enumerated objective of an "equitable solution" demands flexibility within whatever structure the ICJ develops: a constraint on excessive constraint. In accordance with the nature of equity, determining whether a solution is equitable requires being able to consider and address external circumstances on their own terms. A restriction on this freedom, however conducive to predictability, runs counter to the foundations of equity *infra legem*—and, consequently, to the *North Sea Continental Shelf* cases, UNCLOS, and any customary international law those sources have come to embody.

Thus, tribunals' recent turn toward crystallization in the maritime delimitation dispute context is inconsistent with the international law expressed in UNCLOS. Narrowing the range of relevant circumstances into a set of rules thwarts the requirement of an equitable solution, which demands the freedom to consider external circumstances on their own case-specific merits.

This is so even despite states' apparently welcoming attitude toward predictability and crystallization's reversal of any error by the ICJ in conflating equity as a negotiating term with equity *infra legem* in the *North Sea Continental Shelf* cases. Crystallization, it is true, holds back equity's unruliness, and it may free the participants in maritime delimitation to play to their strengths: the states, to achieve an "equitable solution" using shared, baseline notions of fairness; the tribunals, to apply predictable, developed rules when negotiating toward an "equitable solution" fails. Moreover, although Articles 74 and 83 require states to look to "international law"—suggesting that they must also follow the analysis the ICJ and other tribunals set out—no tribunal could, *sua sponte*, look past the agreement of two states to scrutinize whether their negotiations reflected a proper understanding, for example, of "relevant circumstances." Correspondingly, a tribunal will necessarily consider "international law," and though it must also work toward an "equitable solution," few today would criticize it for implicitly forsaking strict adherence to equity.

Nevertheless, states have *not* come together to explicitly express a preference for predictability over the equitable solution Articles 74 and 83 prescribe, and tribunals have *not* explicitly announced that international law has developed away from a completely equitable solution. Absent one of those occurrences, Articles 74 and 83 remain good law, and crystallization conflicts with the equity they prescribe.

Crystallization is more than doctrinally fraught, however. The following Part, discussing three interstate arbitral awards by two tribunals, illustrates that crystallization also desensitizes tribunals to parties' genuine, underlying concerns. Because this sensitivity is essential to resolving a dispute definitively,

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delimitation, and from the inability of states to agree on clear treaty rules governing delimitation. Confronted with this normative void, international tribunals seem to have had little choice but to exercise a creative function, which, owing to their jurisprudence over half a century, has crystallised in the three-stage delimitation process . . . . Judicial law-making is justified so long as the applicable law in a given case is sufficiently indeterminate so as not to provide for the manner in which specific rules of international law are practically to be applied.").

crystallization threatens an element crucial to interstate dispute settlement in general.

IV. EQUITY AS SENSITIVITY TO STATES' CONCERNS

Crystallization's harm to equity extends beyond issues of theory and drafting history. Interstate tribunals cannot unilaterally enforce their judgments; achieving their objective of resolving disputes peacefully requires the parties to comply with their judgments voluntarily. Tribunals craft their decisions to encourage compliance by the parties before them, as well as to safeguard and augment their own legitimacy for future disputes.[136] Equity lends itself to this "implicit purpose of promoting compliance with [tribunals'] judicial decisions"[137] by permitting tribunals to be sensitive to states' concerns and, accordingly, to deliver judgments that resolve disputes rather than prolonging—or, worse, exacerbating—them.

This Part examines awards from two interstate arbitrations whose tribunals' mandates included maritime delimitation. Because the arbitration agreements creating the tribunals bestowed broader jurisdiction and powers than Articles 74 and 83 do, they do not directly conflict with maritime delimitation cases embracing a crystallizing approach to equity *infra legem*. They are included, rather, to illuminate the viability and benefits of considering states' underlying concerns in maritime delimitation disputes—concerns to which a crystallizing approach gives insufficient weight.

The first arbitration, the Eritrea-Yemen dispute (1998), involved the parties' territorial sovereignty over a group of islands in the Red Sea and the maritime boundary between them.[138] The Arbitration Agreement directed the tribunal to resolve the dispute in two stages. First, the tribunal would resolve the territorial claims to the islands "in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles."[139] The tribunal was also required, in this first stage, to define "the scope of the dispute" based on the parties' positions, which the tribunal subsequently defined as the "sovereignty in respect of all the islands and islets to which the Parties have put forward conflicting claims."[140] Second, the Arbitration Agreement directed the tribunal to set the maritime boundary, "taking into account [the tribunal's opinion] on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any

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[136] *See, e.g.*, LANDO, *supra* note 15, at 237 ("In the international legal order, with no centralized judicial authority and a lack of enforcement mechanisms for judicial decisions, a judgment's authority is . . . tightly intertwined with the reasons given in its support.") (quoting GLEIDER I. HERNÁNDEZ, THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION 99 (2014)).

[137] LANDO, *supra* note 15, at 238.

[138] Eritrea v. Yemen, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute) ¶ 81 (Oct. 9, 1998) [hereinafter Eritrea-Yemen First Award].

[139] *Id.* ¶ 7.

[140] *Id.* ¶¶ 7, 90.

other pertinent factor."[141] Given the Red Sea's narrowness, the tribunal's self-defined task in the second stage was to create "a single international [maritime] boundary for all purposes"—thus, comprising each party's territorial sea, EEZ, and continental shelf.[142]

This award predated the current consensus on the three-step approach to maritime delimitation.[143] Instead, the tribunal focused solely on reaching the equitable solution that Articles 74 and 83—despite their being, in the tribunal's words, "consciously designed to decide as little as possible"—envisioned.[144] It then adopted the "generally accepted view, as is evidenced in both the writings of commentators and in the jurisprudence, that between coasts that are opposite to each other the median or equidistance line normally provides an equitable boundary" in accordance with both articles.[145] Thus, although the tribunal's reliance on an equidistance line—which most of the international boundary it created followed—was consistent with prior authorities, it was not motivated by a desire for consistency with them. Rather, it applied the equidistance principle as a trusted means to achieving equity.

The tribunal then turned to "pertinent factors," which it interpreted to be "a broad concept [that] doubtless includes various factors that are generally recognized as being relevant to the process of delimitation such as proportionality, non-encroachment, the presence of islands, and any other factors that might affect the equities of the particular situation."[146] Consistent with analyses by tribunals in prior and future cases, its consideration of pertinent factors reflected the significance of geographic features, especially islands.[147] Unlike later tribunals, however, it considered the parties' offshore petroleum contracts (though only as support for using an equidistance line).[148] It also, unlike most of them, considered international navigation interests.[149] The Arbitration Agreement's preamble stressed that both parties recognized "their responsibilities toward the international community as regards . . . the safeguard of the freedom of navigation in a particularly sensitive region of the world,"[150] a recognition that led the tribunal toward "a neater and more convenient

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[141] *Id.* ¶ 81.

[142] Eritrea v. Yemen, Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation) ¶ 132 (Dec. 17, 1999) [hereinafter Eritrea-Yemen Second Award].

[143] *See* Delabie, *supra* note 4, at 154–55 (remarking that the "rationalization" of the use of equity began in the 2000s, with Land and Maritime Boundary Between Cameroon and Nigeria, Judgment, 2002 I.C.J. 303, ¶ 294 (Oct. 10)).

[144] Eritrea-Yemen Second Award, *supra* note 142, ¶ 116.

[145] *Id.* ¶¶ 131–32.

[146] *Id.* ¶ 130.

[147] *Id.* ¶¶ 160–63.

[148] Eritrea-Yemen Second Award, *supra* note 142, ¶ 132.

[149] Tamar Meshel, *225 Years to the Jay Treaty: Interstate Arbitration Between Progress and Stagnation*, 3 INT'L COMPAR., POL'Y & ETHICS L. REV. 1, 50 (2019).

[150] Annex 1: The Arbitration Agreement, *in* Eritrea-Yemen Second Award, *supra* note 142, pmbl.

international boundary."[151]

The tribunal did not consider the traditional fishing practices by artisanal fisherfolk in both Yemen and Eritrea to be a pertinent factor for its delimitation analysis, but its resolution of both stages of the dispute focused heavily on preserving them. Introducing the fishing regime as a "particular feature[] of [the] case" and examining it in relation to the "historic titles" advanced by the parties,[152] the tribunal decided to craft a regime in which, notwithstanding one state's sovereignty over an island, both states' fisherfolk would still be able to use it as a waystation and fish on both sides of the maritime boundary.[153] This solution respected the common Islamic heritage of the area and "classical Islamic law concepts, which practically ignored the principle of 'territorial sovereignty' as it developed among the European powers and became a basic feature of 19th Century western international law."[154]

Neither party requested or argued for the creation of a fishing regime, and the tribunal's doing so—including its discussion of Islamic legal principles—was controversial.[155] Nonetheless, "[t]he issue of fishing rights . . . was of great importance to the parties," both economically and culturally, and the parties praised the tribunal's work.[156] Eritrea predicted the award "will not only pave the way for a harmonious relationship between the littoral states of the Red Sea, but also opens a new window of opportunity for the consolidation of peace and stability in the region and the creation of a zone of peace, development and mutual benefit."[157] Yemen, for its part, viewed the award as "'represent[ing] a culmination of a great diplomatic effort and an important historic development in political and diplomatic relations between two neighboring countries . . . . a way that should be followed for resolving Arab, regional and international disputes.'"[158]

The second arbitration, the Croatia-Slovenia dispute (2017), concerned the parties' land and maritime boundaries, but its Arbitration Agreement also, notably, directed the tribunal to resolve "Slovenia's junction to the High Sea"

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[151] Eritrea-Yemen Second Award, *supra* note 142, ¶162; *cf.* Territorial and Maritime Dispute (Nica. v. Colom.), Judgment, 2012 I.C.J. Rep. 624, ¶ 235 (Nov. 19) ("The method used in the construction of the weighted line . . . results in a line which has a curved shape with a large number of turning points. Such a configuration of the line may create difficulties in its practical application. The Court therefore proceeds to a further adjustment by reducing the number of turning points and connecting them by geodetic lines.").

[152] Eritrea-Yemen First Award, *supra* note 138, ¶¶ 93, 102, 127–30; Eritrea-Yemen Second Award, *supra* note 142, ¶ 95.

[153] Eritrea-Yemen First Award, *supra* note 138, ¶¶ 525–26.

[154] *Id.* ¶ 130.

[155] Meshel, *supra* note 149, at 54–58.

[156] *Id.* at 51, 56.

[157] *Id.* at 51 (citing Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution*, 32 U. PA. J. INT'L L. 1, 40 (2010); Barbara Kwiatkowska, *The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation*, 32 OCEAN DEV. & INT'L L. 1, 3 (2001)).

[158] Meshel, *supra* note 149, at 51 (citing Spain, *supra* note 157, at 40; Kwiatkowska, *supra* note 157, at 3).

and the "regime for the use of the relevant maritime areas."[159] For the territorial and maritime delimitation issues, the tribunal was to apply "the rules and principles of international law."[160] In delimiting the territorial sea and Piran Bay, the tribunal relied exclusively on UNCLOS. Its analysis of the territorial sea boundary focused on geographic "special circumstances," particularly the "boxing in" of Slovenia's territorial sea if the unadjusted equidistance line were used as the boundary.[161] The tribunal did not delimit an EEZ or continental shelf boundary, because it had determined that Slovenia's territorial sea was completely circumscribed by other existing maritime boundaries.[162]

For the junction and regime for use of the maritime areas, in contrast, the Arbitration Agreement required the tribunal to apply "international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances."[163] This provision, the tribunal decided, called for it to consider "the vital interests of the Parties" and any modifications to the conclusion dictated under international law which "might be necessary in order to achieve that fair and just result."[164]

Applying this understanding, the tribunal interpreted the "junction to the High Sea" as implying the existence of "an area in which ships and aircraft enjoy essentially the same rights of access to and from Slovenia as they enjoy on the high seas" and which, notwithstanding the circumscription of Slovenia's territorial sea, connected its territorial sea with an area beyond those of Croatia and Italy.[165] Accordingly, the tribunal created and delimited a "Junction Area" within Croatia's territorial sea,[166] set out a framework governing permitted activities in the Area, and outlined the parties' duty of cooperation within the regime.[167] In doing so, the tribunal paid particular attention to the relevant circumstances of "rights of access to and from Slovenia by sea and by air and of jurisdiction over ships and aircrafts exercising that right,"[168] with an expressed aim of achieving "a fair, just, and practical result."[169]

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[159] Arbitration Agreement Between Government of Republic of Croatia and Government of Republic of Slovenia, Annex HRLA-75, art. 3(1) (Nov. 4, 2009).

[160] *Id.* art. 4(a).

[161] In the Matter of an Arbitration Under Arbitration Agreement Between Government of Republic of Croatia and Government of Republic of Slovenia (Croat. v. Slovn.), PCA Case No. 2012-04, Final Award, ¶¶ 1011–14 (Perm. Ct. Arb. 2017).

[162] *Id.* ¶¶ 1014, 1103, Map VI.

[163] In the Matter of an Arbitration Under Arbitration Agreement Between Government of Republic of Croatia and Government of Republic of Slovenia, PCA Case No. 2012-04, Annex HRLA-75 (Arbitration Agreement), art. 4(b) (Perm. Ct. Arb. 2017).

[164] PCA Case No. 2012-04, Final Award, ¶ 1079.

[165] *Id.* ¶ 1081.

[166] *Id.* ¶¶ 1082–83.

[167] *Id.* ¶¶ 1122–40.

[168] Tamar Meshel, *The Croatia v. Slovenia Arbitration: The Silver Lining*, 16 LAW & PRAC. INT'L CT. & TRIBUNALS 288, 304 (2017).

[169] PCA Case No. 2012-04, Final Award, ¶ 1132.

The Croatia-Slovenia Arbitration is also controversial, though more for its context and procedural history[170]—namely, ex parte communications between Slovenia's Agent and a Slovenian arbitrator—than for the award itself. In light of that procedural history, Croatia withdrew from the arbitration in 2015 and still contests the award's binding effect and validity.[171] Nonetheless, scholars have written approvingly of the tribunal's approach to the "Junction Area" notwithstanding some criticism of the activities it permitted and excluded.[172] The parties have also contemplated a cooperative fishing regime in the Bay of Piran,[173] suggesting the tribunal, using its power to determine the regime for use, should have followed the Eritrea-Yemen Arbitration's lead in creating one in the Bay.

Neither the traditional fishing regime in the Eritrea-Yemen Arbitration nor the junction to the high seas in the Croatia-Slovenia Arbitration was considered as a special or relevant circumstance for maritime delimitation purposes. The parties and their arbitration agreements—not UNCLOS—led the respective tribunals to craft creative solutions tailored to each dispute. This yielded, in both cases, a more equitable result,[174] but the equity was broader than that within

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[170] *See, e.g.*, Arman Savarian & Rudy Baker, *Arbitration Between Croatia and Slovenia: Leaks, Wiretaps, Scandal*, EJIL: TALK! (Jul. 28, 2015), https://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal/; Arman Savarian & Rudy Baker, *Arbitration Between Croatia and Slovenia: Leaks, Wiretaps, Scandal (Part 2)*, EJIL: TALK! (Aug. 7, 2015), https://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal-part-2/; Arman Savarian & Rudy Baker, *Arbitration Between Croatia and Slovenia: Leaks, Wiretaps, Scandal (Part 3)*, EJIL: TALK! (Aug. 25, 2015), https://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-final-part-3/.

[171] *Croatia Wins Battle with Croatia Over High Seas Access*, BBC (Jun. 29, 2017, 1:01 AM), https://www.bbc.com/news/world-europe-40449776 [https://web.archive.org/web/20220403160305/https://www.bbc.com/news/world-europe-40449776].

[172] *See generally* Sandra F. Gargo, *The Concept of 'Junction Area'—Sui Generis Solution to Reconciling the Integrity of Territorial Sea and 'Freedoms of Communication'?*, 1 PÉCS J. INT'L & EUR. L. 91 (2020); Marcella Ferri, *A New (and Questionable) Institute to Guarantee the Right of Access to the High Seas: the Junction Area Established in Croatian Territorial Sea*, 36 DIRITTO PUBBLICO COMPARATO ED EUROPEO ONLINE 639, 670–71 (2018).

[173] Hina B. Ban, *FOTO: OVO JE NOVA HRVATSKA IDEJA ZA RJEŠENJE KRIZE U PIRANSKOM ZALJEVU! Hoće li Slovenci pristati na taj prijedlog?*, JUTARNJI LIST (Sep. 14, 2017, 4:32 PM), https://www.jutarnji.hr/vijesti/hrvatska/foto-ovo-je-nova-hrvatska-ideja-za-rjesenje-krize-u-piranskom-zaljevu-hoce-li-slovenci-pristati-na-taj-prijedlog/6549354/; Hina B. Ban, *PRVA CERAROVA REAKCIJA NA NOVU HRVATSKU IDEJU O RJEŠENJU GRANIČNOGPITANJA 'I dalje smo za provedbu arbitraže, ali proučit ćemo i sve nove prijedloge'*, JUTARNJI LIST (Sep. 14, 2017, 11:35 PM), https://www.jutarnji.hr/vijesti/svijet/prva-cerarova-reakcija-na-novu-hrvatsku-ideju-o-rjesenju-granicnog-pitanja-i- dalje-smo-za-provedbu-arbitraze-ali-proucit-cemo-i-sve-nove-prijedloge-6550887.

[174] *See* Meshel, *supra* note 149, at 57 (explaining how the Eritrea-Yemen tribunal's decision on the fishing regime "can best be seen as equitable in nature, reflecting the tribunal's understanding of the fairest result in light of the history and culture of the parties"); Meshel, *supra* note 168, at 297, 304 (describing the tribunal's resolution of the issue of Slovenia's junction to the high sea exemplified "quasi-diplomatic arbitration," in which "dispassionate intermediaries bring the facts of a dispute to light, evaluate rival claims based on their merits, and make a judgment grounded in justice, equity, and respect for international law") (citation omitted); *cf.* Kwiatkowska, *supra* note 157, at 1, 18 (describing the award in the second phase as the result of "the complex decision-making process which led the Arbitral Tribunal to equitable delimitation of the Eritrea-Yemen international

Articles 74 and 83. Nevertheless, these arbitrations demonstrate that states in a dispute may harbor genuine concerns that the maritime delimitation regime does not currently address,[175] such as fishing regimes. These concerns may, like Slovenia's desire not to be boxed in by other states' territorial seas,[176] be one of the dispute's underlying causes.[177]

A tribunal with an overly crystallizing approach risks preemptively dismissing or downplaying these concerns simply because past tribunals either did not consider them or did not consider them relevant.[178] That, in turn, ignores that the aims of interstate adjudication and arbitration include not only promoting consistency and predictability so that third states may order their conduct within the bounds of the law, but also definitively settling the parties' dispute.[179] By requiring adherence to an abstract framework, crystallization reduces the sensitivity tribunals can demonstrate in a judgment, undermining

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maritime boundary" and interpreting traditional fishing practices as "not germane to the task of equitable maritime boundary delimitation" in the second phase precisely because of their importance—recognized by both sides—in the first phase and the prior creation of the cooperative fishing regime for the benefit of both sides).

[175] *See also* Evans, *supra* note 8, at 254 (commenting that the scrutiny of economic factors as a relevant circumstance is "paradoxical . . . since the entire point of the continental shelf regime was to facilitate orderly exploration and exploitation of its natural resources and the EEZ is by its very name an exclusive *economic* zone").

[176] Indeed, Slovenia asserted that it had a "*right* to maintain direct access to the high seas." Matej Avbelj & Jernej L. Černeč, *The Conundrum of the Piran Bay: Slovenia v. Croatia—The Case of Maritime Delimitation*, 5 J. INT'L L. & POL'Y 1, 8 (2007) (emphasis added).

[177] *See* LANDO, *supra* note 15, at 201 (discussing access to natural resources as a relevant circumstance: "[a]lthough states have shown, directly and indirectly, that resource-related factors may be the reasons for litigating maritime disputes, international tribunals have adopted a restrictive approach. [That] approach could be criticized as indifferent to the real concerns of states, yet not for having been consistent in upholding their restrictive approach to resource- related factors."); *see also* Evans, *supra* note 8, at 247–48 ("It is a fair supposition that if states continue to raise the relevance of factors which are not, on the face of it, accorded direct relevance in the case law as a relevant circumstance within the delimitation process, they do so because they believe that they nevertheless may have some impact upon the overall evaluation which is being made.").

[178] In *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS did identify Myanmar's concern regarding its right of free, unimpeded navigation around an island in Bangladesh's territorial sea, but ITLOS did not resolve this concern; rather, Bangladesh, in the hearing before ITLOS, stated that it would continue to allow Myanmar such navigation rights, regardless of its legal obligations following the case. Bangladesh-Myanmar Maritime Boundary Judgment, *supra* note 12, ¶¶170–76.

[179] *See, e.g.*, J.G. Merrills, *International Dispute Settlement*, *in* LITIGATING INTERNATIONAL LAW DISPUTES 291, 293–95 (Natalie Klein ed. 2011) (explaining that, though two advantages of arbitration and adjudication—here, both classified under "adjudication"—are their "rational, orderly, and authoritative" natures, their "most striking feature . . . is that [they are] dispositive"); YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 38–42 (2014) (identifying as goals of international courts not only "norm support"—including "clarifying and updating international law norms . . . as a legitimate and effective articulation of the policy or value preference that the lawgivers sought to pursue"—but also "[r]esolving international disputes and problems"—namely, "specific conflicts of interests whose prolongation or exacerbation may harm international relations, cooperative structures, and peaceful coexistence"). Within this latter goal, "application of the relevant norms and the resolution of specific cases can be viewed as an intermediate means to an end, serving the higher purpose of contributing to the bigger policy objective: reversing the proclivity to go to war, curbing widespread lawlessness and criminality, creating a hospitable economic climate, etc." *Id.*

an element crucial to maritime delimitation and interstate dispute resolution as a whole.

"It is easy to point to [equity's] defects and limitations, and to assert that it does not serve the cause of predictability in the law."[180] Nonetheless, equity *infra legem* and the freedoms it provides are both required under the law of maritime delimitation and essential to the successful resolution of interstate maritime delimitation disputes. Crystallization, as a fundamental constraint on equity *infra legem*, should be rejected, even as consistent case law in maritime delimitation continues to develop through cross-fertilization. The next Part proposes how to preserve equity *infra legem* in maritime delimitation before engaging with its supposed "defects and limitations."

V. PROPOSAL FOR LIFTING THE CONSTRAINTS ON EQUITY—AND ITS IMPLICATIONS

In light of the foregoing discussion, this Part calls for tribunals to abandon crystallization and instead consider the circumstances raised by each party on their own merits to determine their relevance and weigh them in each case. It begins by describing how to implement this open, case- specific approach to equity *infra legem*, paying attention to its implications for trends in disputes and scholarship. It then considers arguments against, and constraints on, this approach to equity *infra legem*.

A. An Open, Case-Specific Approach

As mentioned above,[181] international maritime delimitation cases and awards have crystallized the use of equity in the relevant circumstances phase in two regards: whether a given type of circumstance may theoretically be relevant; and whether a circumstance in a case is sufficiently important to be considered relevant. A complete proposal for safeguarding equity *infra legem* demands replacing both of these aspects of the relevant circumstances phase. In the first regard, rather than looking to past cases for guidance on whether a type of circumstance may be relevant, a tribunal should focus on the parties' arguments, identifying and evaluating the concerns underlying their claims in the context of the dispute at hand. These concerns will differ in substance and relative importance among parties and cases, but because their genuineness is assessed in the adversarial atmosphere of litigation or arbitration, tribunals should not exclude them in the name of consistency.

In the second regard, tribunals should not adhere to different standards of proof for different types of circumstances. In particular, the "catastrophic repercussions" test—the more restrictive standard applied when considering the relevance of access to natural resources[182]—should be abandoned. Because applying different standards of proof typically results in prioritizing one type of circumstance over another, it conflicts with the need for sensitivity to *all* concerns that the parties advance. Tribunals should instead employ a single

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[180] Lauterpacht, *supra* note 61, at 43.

[181] *See supra* Part II.

[182] Discussed *supra* Part II.

standard of proof to ensure even-keeled consideration of each circumstance.

Additionally, as an overarching recommendation, tribunals should refrain from making sweeping proclamations about the scope of a given type of relevant circumstance, such as that made by the Special Chamber in Ghana-Côte d'Ivoire.[183] Abstract statements such as these only hinder equity's flexibility in specific disputes.

Notwithstanding its breadth, this proposal for restoring equity in the relevant circumstances phase does not displace the three-phase maritime delimitation analysis currently used, but exists within it. Nesting the proposal within that analysis "ensures that a degree of certainty, predictability, and transparency is achieved."[184] The initial phase of equidistance places the later phases—adjustment based on relevant circumstances and the disproportionality check—on solid footing: "[r]elevant circumstances can only determine the adjustment of an equidistance line, and not the adoption of an entirely different delimitation method."[185] Although the adjustment of that line "can be substantial . . . its effect remains that of modifying the line established at the first stage of delimitation, and not of determining the adoption of a delimitation method other than the three-stage approach."[186] Accordingly, even a broad application of equity within the maritime delimitation phase "neither removes nor reduces the benefits of a standard approach to delimitation,"[187] but is instead—true to the nature of equity *infra legem*—inherent within it. Consistency, in short, does not require crystallization, thanks to other consistency-building elements in the maritime delimitation analysis.

Moreover, the broader use of equity proposed here should be understood as complementing, not conflicting with, the turn toward cross-fertilization when envisioned as references to past analyses across fora to ensure predictability. Cross-fertilization contributes to the consistent legal framework within which equity *infra legem*, through the relevant circumstances phase, operates. Equity *infra legem*, correspondingly, ensures that cross- fertilization does not entail doctrinal stagnation but instead results in a respect for flexibility and sensitivity in maritime delimitation disputes.

This complementary relationship between cross-fertilization and equity *infra legem* relies on maintaining a firmer distinction between legal rules and equity. In the law of the sea context, the need for such a distinction is strongest in tribunals' recent treatment of the equidistance and relevant circumstances phases. One scholar has noted that both within and after *Maritime Delimitation in the Black Sea*,[188] when forming provisional equidistance lines and their constituent baselines, tribunals have taken into account considerations (usually

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[183] Discussed *supra* Part II.

[184] LANDO, *supra* note 15, at 244.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] Maritime Delimitation in the Black Sea, *supra* note 11.

geographical ones) that would otherwise have been considered in the relevant circumstances phase.[189] An inference from this trend is that relevant circumstances, instead of occupying only their eponymous phase,

> actually infuse the entire process[, whose stages] are blurred and permeable: the relevance of the potentially relevant . . . circumstances *as* relevant circumstances at the second stage of the process turns out to be entirely contingent on cases taken . . . when generating the its provisional equidistance line at the first stage of the process.
>
> . . . .
>
> [Consequently, t]he point of the second, as well as the third, stage [of the delimitation process] has become to demonstrate that the [tribunal] has made the right choices [in setting the correct provisional equidistance line].[190]

This emerging approach, in other words, acknowledges and embraces that "the generation of the provisional equidistance line can be as much the product of choice as it is of geography."[191]

The three-phase methodology's directive to "establish the provisional equidistance line from the most appropriate base points on the coasts of the parties"[192] permits this approach, to the extent that (1) "appropriate" is read to ensure an equitable solution and (2) the directive to plot the provisional equidistance line "on strictly geometrical criteria on the basis of objective data"[193] is limited to determining the equidistance line's exact coordinates once base points have been set. Instead, the challenge this approach presents for balancing equity with legal rules is the admixture of "choice"—including choice based on equitable considerations—and "geography"—a more objective criterion historically discussed in opposition to equity[194]—in a single phase.

The current three-phase delimitation process facilitates cross-fertilization by demarcating the rules-driven first phase from the equity-driven second phase; one tribunal can easily extract rules from the former while respecting the flexibility in the latter. Without that formal distinction, two issues could arise. First, particularly because the equitable considerations brought into the first phase are themselves geographical ones, tribunals could merge them with the rules regarding geography, resulting in crystallization. Second, regardless

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[189] *See* Evans, *supra* note 8, at 233–34, 236–38, 240–43 (identifying this trend through analyses of several cases); *but see* Dispute Concerning Delimitation of Maritime Boundary Between Mauritius and Maldives in Indian Ocean, *supra* note 12 (treating as a relevant circumstance Blenheim Reef, a low-tide elevation on which the Special Chamber had declined to place a base point when forming the provisional equidistance line).

[190] Evans, *supra* note 8, at 236, 238.

[191] *Id.* at 237.

[192] Maritime Delimitation in the Indian Ocean, *supra* note 12, ¶ 123.

[193] *Id.* (quoting Maritime Delimitation in the Black Sea, *supra* note 11, ¶ 118).

[194] *See* North Sea Continental Shelf, *supra* note 31, ¶ 91.

of whether a tribunal correctly distinguishes a rule from an equitable consideration, their coexistence in the first phase neglects the provisional equidistance line's role in creating a predictable, transparent foundation for the rest of the maritime delimitation process.[195] Introducing equitable considerations in the first phase would not make the resulting delimitation more or less equitable, but it would provide a weaker foundation by depriving the three-stage delimitation methodology of its major consistency-building element: an initial step completed using exclusively constant criteria. Accordingly, it could decrease the certainty and transparency across cases that cross-fertilization and the maritime delimitation methodology (like any methodology) are meant to provide. Only with a firm distinction between legal rules and equity can cross-fertilization exist without crystallization; if tribunals in future cases continue to blur the boundary between the first and second phases of delimitation, they will have to provide that distinction by other means.

B. "Defects and Limitations"?

This section responds to several potential objections that could be raised to the identification of crystallization as a harmful development and to the proposal to restore the place of equity *infra legem*.

1. Balancing Equity and Consistency

As mentioned above,[196] one critique is that emphasizing an equitable solution discounts the need for stability in interstate dispute resolution and international law more generally[197]—whether to promote certainty in interstate relations,[198] reinforce the norms of the existing regime,[199] or provide a longer-lasting (because principled) resolution to an interstate dispute.[200] This critique finds support in state practice and in conventional international law. Far from rejecting the existing maritime delimitation methodology, states have embraced

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[195] LANDO, *supra* note 15, at 244.

[196] Discussed *supra* Part II.

[197] *See generally* Delabie, *supra* note 4.

[198] *See* Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT 5, 17 (2011) ("[T]he demand of transparency and coherence [among arbitral awards] . . . . is stronger in interstate relations than in commercial relations."); HERSCH LAUTERPACHT, DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 6 (1958) (explaining that one of the reasons for the establishment of the Permanent Court of International Justice was discontent with the "absen[ce] in the awards of the tribunals of the Permanent Court of Arbitration the necessary tradition of continuity, with all the advantages of a resulting relative certainty of the law. There was no assurance that the decisions of the arbitrators would serve a purpose other than that of disposing of the dispute between the parties. They could not invariably be relied upon to develop and clarify international law.").

[199] SHANY, *supra* note 179, at 38–39 (identifying "norm support" as an objective of international courts: "[i]nternational courts are often established as the institutional counterpart to the normative densification process of international relations. Moreover, clarifying and updating international law norms strengthens their conduct-regulating quality, and maintains the norms as a legitimate and effective articulation of the policy or value preference that the lawgivers sought to pursue.").

[200] Merrills, *supra* note 179, at 292 ("A further aspect of adjudication . . . is that the resolution of disputes by legal means employs a special sort of justification . . . . [T]he reference of a dispute to arbitration or to the International Court demonstrates . . . . that the parties want a decision which can be justified . . . in terms of rules or principles rather than expediency or the judges' whim.").

it: maritime boundaries between states based on a treaty have been established using methods similar to the three-phase delimitation process,[201] and several states have voiced satisfaction with the existing regime, especially with the consistency it provides.[202]

Furthermore, the interpretation of Articles 74 and 83 espoused above is not the only one. Under another interpretation, the phrase "on the basis of international law, as referred to in article 38 of the Statute of the International Court of Justice" speaks to what the ICJ and other tribunals *cannot* do. Article 38(1) provides the four sources of international law, none of which explicitly includes equity or equitable principles; the reference to Article 38 of the ICJ Statute, then, could specify that equity may be the objective of maritime delimitation but not the means, which is limited to international legal principles. In this sense, relevant circumstances would not reflect equitable considerations at all, but merely facts to be accommodated within the ever-developing case law.

Against this counterargument stands the fact that equity *infra legem*, true to its name, inheres in law and requires no express mention. Again,[203] equity *infra legem*, particularly in the relevant circumstances context, encompasses the link between reality and law that is integral to all legal systems: the "exception of the law of God or of the law of reason from the general rules of the law of man."[204] Given its universal applicability, this conception of equity *infra legem* is a "general principle[] of law" under Article 38(1)(c) of the ICJ Statute.

Nonetheless, the idea of relevant circumstances as facts to be accommodated within a developing case law raises another question. Relevant circumstances may have "no closed list"[205] doctrinally, but as a practical matter, scholars have created general classifications: geographic, geologic, functional, unilateral conduct-related, and political-economic.[206] Assuming, *arguendo*, that these classifications encompass all circumstances that tribunals may foreseeably find relevant, as tribunals hear more disputes and fact patterns, they may eventually manage to accommodate all potential relevant circumstances (albeit in differing, dispute-specific combinations) within the existing case law—itself a standalone source of international law under Article 38(1)(d) of the ICJ Statute. Equity *infra legem* would also remain a possible source, but tribunals would no longer need to rely on it to introduce relevant circumstances. In such a situation, the consideration of relevant circumstances could comprise an application entirely of legal rules as opposed to equity *infra legem*; the ICJ and other tribunals *could* dispense equity pursuant to Article 38 of the ICJ Statute, but in practice (and

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[201] LANDO, *supra* note 15, at 308–09.

[202] *Id.* at 311 (citing Rep. of the Meeting of the States Parties to UNCLOS, ¶ 19, U.N. Doc. SPLOS/263 (July 8, 2013); Rep. of the Meeting of the States Parties to UNCLOS, ¶ 26 U.N. Doc. SPLOS/251 (June 11, 2012); Rep. of the Meeting of the States Parties to UNCLOS, ¶ 109 U.N. Doc. SPLOS/184 (July 21, 2008)).

[203] *Supra* section III.A.

[204] ST. GERMAN, *supra* note 54, at 97 (author's adaptation into present-day English).

[205] Maritime Delimitation in the Indian Ocean, *supra* note 12, ¶ 124.

[206] *Supra* Part II.

although they would likely never specify the source of international law on which they relied), they might choose not to do so. Would this situation leave a role for equity *infra legem*?

Recalling the second freedom provided by equity confirms an answer in the affirmative. Namely, equity involves the freedom to consider and address circumstances on their own merits, not based on prior cases.[207] In contrast, the ICJ typically "takes full account of its previous decisions in its judgments";[208] though it is not bound by a formal system of precedent,[209] it recognizes the need for consistency among cases as a necessary "guarantor of certainty and equality of treatment" to parties.[210] Interstate arbitral tribunals, for their part, "are essentially faithful to the precedent that they cite abundantly,"[211] given both states' "demand of transparency and coherence"[212] and the fact that many arbitrators belong to other international tribunals (especially the ICJ).[213] Equity *infra legem*, thus, allows greater flexibility than tribunals' decisions typically offer. Even if both equity *infra legem* and reliance on prior decisions would permit considering the same types of circumstances, only the former permits considering and addressing them on a case-by-case basis without disrupting the consistent case law; this, too, is crucial to achieving an equitable solution.

Additionally, the gulf between consistency and equity as required in Articles 74 and 83 is not so wide as proponents of consistency would estimate. An equitable solution does not preclude reliance on legal principles; such a reading would indeed conflict with the requirement that a decision be crafted "in accordance with international law." The ICJ has developed a consistent structure in the maritime delimitation regime, and rightly so in order to provide certainty for states. Nevertheless, the overarching requirement of an equitable solution requires flexibility within that structure. The relevant circumstances and disproportionality check phases of the current maritime delimitation analysis provide that flexibility, softening the blow of legal principles "when the letter of the law would kill its spirit."[214] Their crystallization, in contrast, would kill the equitable spirit of maritime delimitation—and, consequently, defy the requirements of Articles 74 and 83.

2. The Impact of Crystallization

Another counterargument observes that any harm caused by the crystallization of equity would not materialize for decades. Equity in the English tradition took centuries of deliberately consistent decisions within a single

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[207] *Supra* Section III.A.

[208] Guillaume, *supra* note 198, at 9.

[209] ICJ Statute, *supra* note 133, art. 59.

[210] Guillaume, *supra* note 198, at 6.

[211] *Id.* at 15.

[212] *Id.* at 17.

[213] *Id.* at 15.

[214] Franck & Sughrue, *supra* note 49, at 572.

national legal system to ossify into a parallel regime of law.[215] Given the dearth of maritime delimitation disputes decided by the ICJ, ITLOS, and arbitral tribunals, a similar result in this area would take far longer to achieve—if it is even achievable across the limited number of maritime boundaries yet to be delimited. Providing some consistency for states in the present, according to this rejoinder, poses little risk. On the contrary, as one author has opined, "a reading of the existing delimitation decisions gives the impression that international tribunals [already] endeavour to find equitable solutions."[216] Accordingly, a reactionary turn in the name of preserving equity may be premature.

This counterargument correctly observes that the fora[217] and caseloads of interstate dispute resolution are sparser than those of chancery courts and courts sitting in equity. Even so, international tribunals are more aware today of developments in their sister fora, as well as of the effects of their own decisions. In the law of the sea context, this increased awareness is deliberate, as the phenomenon of cross-fertilization attests. The pace of crystallization of equity in maritime delimitation, if left unchecked, will consequently be faster than that of crystallization in English chancery; it should be corrected sooner rather than later.

A related counterargument questions the impact of crystallization by citing its virtues. Crystallized principles of equity have survived and proven helpful in municipal legal regimes and would do the same in international law. For example, expanding and regularizing the equitable principles of unjust enrichment, estoppel, and acquiescence at the international level discourages opportunistic conduct among states and aids them in ordering their affairs, just as these principles have in municipal law. The ICJ and arbitral tribunals have already considered these principles as potentially relevant circumstances in maritime delimitation disputes.[218]

Even in their strictest, most crystallized sense, however, relevant circumstances include geographical features and other factors external to conduct between states.[219] Unlike equitable principles, these circumstances are not created or shaped by the interactions between states. The *sui generis* nature of many geographical factors, moreover, may impede distillation of any useful

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[215] CHRISTOPHER R. ROSSI, EQUITY AND INTERNATIONAL LAW: A LEGAL REALIST APPROACH TO INTERNATIONAL DECISIONMAKING 246 (1993).

[216] LANDO, *supra* note 15, at 238.

[217] *But see id.* at 308 ("Similarly to the English common law, the development and consistency of the law of maritime delimitation depends on the existence of a small group of judges within which consensus could coalesce around common approaches.").

[218] *See, e.g.*, Barbados v. Trinidad and Tobago, *supra* note 24, ¶¶ 361–66 (considering estoppel and acquiescence arguments by both parties). Arguments regarding oil extraction contracts as relevant circumstances often involve estoppel and acquiescence principles. *E.g.*, *id.*

[219] *See generally* LANDO, *supra* note 15. For an expansive example of relevant factors in a similar context, see the Helsinki Rules on the Uses of the Waters of International Rivers, ch. 2, art. IV, 52 ILA 477 (1966), which enumerates climate, hydrology, geography, each state's economic and social needs, past utilization, the population dependent on the rivers, the relative cost of alternative measures to satisfy those needs, the practicability of compensation, and the avoidance of waste as "relevant factors."

principles from multiple cases.

3. Crystallization as Cover

Another critique is that crystallization provides a justification for tribunals to avoid addressing factors—including, but not limited to, those advanced in bad faith or unrelated to the task of maritime delimitation—whose frank evaluation could needlessly exacerbate a dispute rather than resolve it. A professed need to adhere to past cases, including their use of equity in the relevant circumstances phase, grants tribunals an uncontroversial means of diplomatically explaining away their decisions, allowing them to reach an equitable solution even as they couch their use of equity in restrictive terms. Indeed, if the parties' chief desire is "a decision which can be justified . . . in terms of rules or principles rather than expediency or the judges' whim,"[220] crystallization as a justification may serve an important, practical purpose. Depriving tribunals of this justification and forcing them to consider all claimed circumstances on their own merits makes their task substantially more difficult.

This counterargument, despite its practical appeal, neglects the need for consistency that animates crystallization. Merely intermittent resort to an existing body of decisions does not elaborate the case law in a consistent or sustainable manner. Furthermore, a body of law to be invoked (and developed) only when a tribunal sees fit and otherwise left dormant is more discretionary than the unrestrained equity *infra legem* crystallization seeks to control. For example, regardless of whether a tribunal recognizes a circumstance as relevant, the circumstance arises because of discernible phenomena that the parties chose to bring to the tribunal's attention; the tribunal's range of equitable considerations is limited by the facts before it. Applying the body of law formed by crystallization when it is subjectively needed to avoid providing a subjectively unpopular (for one party) conclusion is entirely the tribunal's choice, introducing a degree of arbitrariness.

This counterargument also ignores that transparency is a pillar of compliance and legitimacy in interstate disputes. Going back to the early decades of the Permanent Court of Arbitration, states have voiced a desire for transparency in dispute resolution.[221] This desire creates a tension in maritime delimitation because "the quest for transparency is not necessarily the best way to get an equitable result."[222] Creating, over a system of disputes, a body of rules to be applied for reasons other than those expressed in a judgment only increases that tension. No matter how attractive a fallback to crystallization may be in a single case, the ends of preserving tribunal legitimacy and state acceptance of boundary delimitations over time will fall short of justifying the means. Providing few or infelicitous reasons for an adjustment or non-adjustment to a provisional equidistance line may be uncomfortable for a tribunal, but both are better than concealing reasons behind a selective need for consistency.

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[220] Merrills, *supra* note 179, at 292.

[221] Lauterpacht, *supra* note 198, at 5–6.

[222] Delabie, *supra* note 4, at 163.

4. Remedies as External Constraints on Equity

Although an open, case-specific approach to equity *infra legem* imposes no limits on the concerns tribunals may consider, the remedy available in the maritime delimitation regime—namely, the creation or shifting of a boundary line—limits tribunals' ability to address those concerns. As mentioned above,[223] the tribunal in the Eritrea-Yemen Arbitration considered a genuine concern of both parties: the traditional fishing regime. The tribunal did not consider it as a relevant circumstance, however; instead, the tribunal found jurisdiction outside the maritime delimitation regime and elsewhere in the arbitration agreement. Even if that concern were treated as a relevant circumstance, however, the equitable solution the tribunal implemented—a regime for cooperative use of one party's section of the delimited area—would not have been compatible with the line-shifting powers afforded tribunals under Articles 74 and 83.[224] Correspondingly, a mere adjustment to the equidistance line would not have solved the problem. The tribunal would have reached a legal conclusion without truly concluding the dispute.

In contrast, ITLOS did just that in *Bangladesh-Myanmar*. The tribunal's delimitation of the continental shelf tribunal created a "grey area" which was in Myanmar's EEZ but on Bangladesh's side of the delimitation line for the continental shelf. The tribunal noted the existence of the "grey area" and reiterated the parties' rights in the zone but created no regime for each state to fulfill its international law obligations, though it encouraged the states to do so themselves through an agreement or other cooperative arrangements.[225] The arbitral tribunal in the Bangladesh-India Arbitration acted similarly when its delimitation also created a "grey area."[226] The two tribunals identified the issue and encouraged the parties to reach an agreement, but the tribunals did not—and could not—resolve the issue themselves.

The inadequacy of the maritime delimitation regime to accommodate what could theoretically be a relevant circumstance suggests that it cannot, in fact, be one. The same could be true for other political and economic circumstances, particularly those that, as in Eritrea-Yemen, arise from historical or cultural arrangements not rooted in the western legal tradition. This inference differs from arguments that political and economic factors should not be considered because of their subjectivity.[227] Rather, it bars their consideration because the equitable solutions they merit require legal powers the regime does not provide. Such a limit to relevant circumstances would be an external legal constraint: part of the *lex* under which equity *infra legem* exists.

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[223] *Supra* Part IV.

[224] *Cf.* Vidas, *supra* note 5, at 60 (discussing the Croatia-Slovenia Arbitration: "[h]ad the tribunal subsumed the determination of these (functional) issues [of Slovenia's junction to the high sea] under the determination of the territorial sea boundary, or assimilated them, it would have contradicted international law as stated in Article 15").

[225] Bangladesh-Myanmar Maritime Boundary Judgment, *supra* note 12, ¶¶ 462–63, 472–76.

[226] In the Matter of the Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), PCA Case No. 2010-16, Award of the Arbitral Tribunal, ¶¶ 498–99, 504–08 (Perm. Ct. Arb. 2014).

[227] Delabie, *supra* note 4, at 162 (citing Maritime Boundary Joint Declaration, *supra* note 22, at 134).

On the other hand, there is still value in identifying and discussing relevant circumstances and in proposing comprehensive solutions, even if a tribunal cannot implement those solutions itself. *Bangladesh-Myanmar* represents an effort to guide the parties toward settling an issue that it has helpfully highlighted. At the most, the parties would conclude an agreement creating a regime for use of the "grey area." At the very least, though, its discussion of the "grey area" would assist Bangladesh and Myanmar in pinpointing a potential cause of continuing contention—itself a boon for ordering their interactions. Detecting an issue and encouraging its resolution differ from providing a binding judgment on an issue, because a state guided to a resolution may choose not to conclude it. In this regard, a tribunal's inability to bind states to a cooperative regime—its mandate to set a boundary and not more—is indeed an external constraint. That conclusion does not, however, foreclose considering the full range of relevant circumstances, which aids tribunals in promoting the peaceful settlement of disputes, whether through obligation or through invitation.

Tribunals' inability to rely solely on binding decisions to resolve disputes reinforces the fact that maritime delimitation, notwithstanding the equitable solution it requires, is no panacea—nor have scholars or participants in maritime delimitation described it as such. Even with a proper understanding of equity *infra legem*, and even when the concern a state raises is essential to definitively resolving a dispute, a tribunal applying Articles 74 and 83 must honor the bounds of those texts. Consequently, the equitable solution a tribunal dispenses might not—and, under UNCLOS, need not—be the *most* equitable solution. States harboring more complicated concerns (political, economic, or otherwise) must be deliberate in choosing the methods to address them. Negotiation is an obvious solution: it affords an opportunity for creative solutions that range beyond delimitation[228] and even for delimitation based on alternative methods.[229] In recent decades, states have concluded treaties delimiting boundaries[230] and treaties establishing zones for joint development of maritime resources.[231] States could go further and negotiate treaties that expressly take account of a range of political, economic or environmental circumstances that are intertwined with delimitation issues.

In addition, states could, as in the arbitrations between Eritrea and Yemen and between Croatia and Slovenia, negotiate an agreement delegating to a third party the authority to render a decision based on more than only Articles 74 and

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[228] *See Workshop Report*, *supra* note 39, para. 3 ("Many participants noted advantages of negotiation between claimants, as opposed to resorting to adjudication before a court or tribunal. In negotiation, for example, the countries have more control over the result and can generate creative options.").

[229] Vidas, *supra* note 5, at 39.

[230] Coalter Lathrop, *Why Litigate a Maritime Boundary? Some Contributing Factors*, *in* LITIGATING INTERNATIONAL LAW DISPUTES: WEIGHING THE OPTIONS 230, 230 (Natalie Klein ed., 2014) ("Of those [maritime delimitation] disputes that have been resolved, the vast majority have been resolved by negotiation."); *see, e.g.*, Treaty on The Delimitation of The Boundary Line for The Part Not Indicated as such In The Peace Treaty of 10 February 1947 (with Annexes, Exchanges of Letters and Final Act), Ital.–Yugo., Nov. 10, 1975, 1833 U.N.T.S. 937.

[231] LANDO, *supra* note 15, at 196–97 (citing VASCO BECKER-WEINBURG, JOINT DEVELOPMENT OF HYDROCARBON DEPOSITS IN THE LAW OF THE SEA (2014), providing a list of treaties establishing joint development zones in Annex 2).

83—including a decision based on a broader notion of equity. These agreements typically call for arbitration, likely because of the greater control it provides over a dispute; the parties may, for example, appoint as arbitrators not only legal experts, but also individuals with technical or regional expertise.[232] Even so, states can opt for an agreement submitting a dispute to the ICJ,[233] whose Statute also allows for appointment of ad-hoc judges[234] (though these must be legal experts in addition to any other expertise for which the parties may appoint them).[235] Both dispute settlement options provide not only a predictable methodology, but also "an international imprimatur with binding effect"[236]—and, if needed, political cover[237]—"that can help justify compromises to domestic stakeholders."[238] Nonbinding options involving third parties, such as conciliation and mediation, are also available.[239]

The possibility of only a partial solution to disputes is a shortcoming not of the maritime delimitation regime in particular, but of interstate dispute resolution in general. For states with long-standing points of contention, the aforementioned "international imprimatur" and "political cover" third-party

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[232] *See, e.g.*, Meshel, *supra* note 149, at 15 ("In contrast to the largely fixed composition of a permanent court, such as the International Court of Justice ('ICJ'), state parties in arbitration are free to choose their decision makers. This allows them to appoint arbitrators with specific non-legal expertise, or those who are familiar with the dispute and the parties' interests.") (citations omitted).

[233] The following cases have been referred to the ICJ by special agreement between the parties: Maritime Delimitation in the Black Sea, *supra* note 11; Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, Merits (Qatar/Bahr.), Judgment, 2001 I.C.J. 40 (Mar. 16); Case Concerning the Continental Shelf (Libya/Malta), Judgment, 1985 I.C.J. 13 (Jun. 3); Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1984 I.C.J. 246 (Oct. 12); Case Concerning the Continental Shelf (Tunis./Libya), Judgment, 1982 I.C.J. 18 (Feb. 24). *supra* note 33. *See also* ICJ Statute, *supra* note 133, art. 36(1) (contemplating such a submission: "[t]he jurisdiction of the Court comprises all cases which parties refer to it").

[234] ICJ Statute, *supra* note 133, art. 31.

[235] *Id.* art. 2, 31(6). A minority of scholars view interstate arbitration as inherently superior to interstate adjudication in resolving politically sensitive disputes. *Compare* Meshel, *supra* note 149, at 7 ("The political dimension of interstate arbitration allows state parties to submit politically sensitive questions to an arbitral tribunal and to advance extra-legal arguments based on political, historical, and economic considerations, or local and traditional customs.") *with* Michael Wood, *Choosing Between Arbitration and a Permanent Court: Lessons from Inter-State Cases*, 32.1 ICSID R. 1, 3–4 (2017) ("In the early days, arbitration was seen more as a diplomatic means of dispute settlement than as a legal one . . . . There are still occasional echoes of this thinking today, but they are very faint. In 1953, the ILC, in its topic on arbitral procedure, described arbitration in the following terms: 'According to established law and practice, international arbitration is a procedure for the settlement of disputes between States by a binding award on the basis of law and as the result of an undertaking voluntarily accepted.'") (citing ILC YB 1953, vol. 2, 202). Although the ability to appoint an arbitrator with technical or regional, but not legal, expertise likely makes arbitration preferable in maritime delimitation disputes, current arbitral awards and ICJ decisions exhibit no inherent differences in their analytical approaches to these disputes.

[236] Workshop Report, *supra* note 39, para. 3.

[237] Meshel, *supra* note 149, at 14.

[238] Workshop Report, *supra* note 39, para. 3.

[239] *Id.* para 3. For a comparison of these dispute settlement mechanisms, *see generally* Merrills, *supra* note 179.

dispute resolution provides make it the most viable option.[240] Typically, however, the interstate dispute resolution system contemplates prescribed legal causes of action and prescribed remedies.[241] Particularly if a claim is rooted in a framework convention, such as UNCLOS, the prescribed remedy is not tailored to the dispute's context. Even where equity *infra legem* is faithfully dispensed, states seeking a comprehensive solution—even a fully equitable solution—to their disputes are best served by crafting an agreement which includes the desired rules but is not limited by any one of them.

VI. CONCLUSION

This Article has advocated for a vision of equity *infra legem* in maritime delimitation that is unencumbered by crystallization yet exists within the consistent legal framework developed over the last forty years. Specifically, instead of limiting relevant circumstances based on determinations in past cases, tribunals should evaluate the parties' claims on their own merits. They should also refrain from applying different standards for different types of circumstances, as well as from making sweeping statements about a circumstance's relevance in the abstract.

In advancing this proposal, the Article has explored equity's theoretical underpinnings and fate in chancery to demonstrate that restriction of equity conflicts with its own nature; it has also examined proclamations, treaties, cases, and *travaux préparatoires* from the Truman Proclamation to UNCLOS to confirm the paramountcy of equity *infra legem* in maritime delimitation. In addition, it has described how equitable flexibility strengthens the international legal framework by ensuring sensitivity to the concerns of states—the litigants who are also the clients of international tribunals.

This Article has not concluded, however, that equity *infra legem* in maritime delimitation is entirely boundless. Specifically, the constraint on the remedy tribunals can provide—setting a boundary line under articles 74 and 83—may preclude them from comprehensively addressing relevant circumstances, yielding results that, while equitable, are not the *most* equitable. Tribunals can and should nevertheless consider and highlight all relevant circumstances, as well as propose nonbinding suggestions for addressing them; these actions can guide parties toward achieving a fuller solution themselves.

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[240] *See* Meshel, *supra* note 149, at 10 ("Diplomatic dispute resolution mechanisms may also prove unsuccessful where the parties are 'enduring rivals,' the dispute has experienced negotiation stalemate, and where commitment problems exist that make it difficult for either party to bind itself to an agreement. These mechanisms have also proven less effective in overcoming the 'critical barriers' that prevent successful resolution of territorial claims, such as the absence of agreed-upon principles that may lead to a solution as well as the parties' reluctance to make concessions.") (citations omitted).

[241] *See also* Vidas, *supra* note 5, at 38–39 ("Courts and tribunals are to decide (maritime) disputes on the basis of international law—which means that their decisions must reflect the legal *entitlements* on which the claims of states . . . are based . . . . Claims may be (and often are) in the political sphere, whereas entitlements to support these lie within the realm of law."). Resolution *ex aequo et bono* is an exception but is seldom chosen, notwithstanding its benefits. For a discussion of the viability and utility of adjudication *ex aequo et bono*, see generally Trakman, *supra* note 45.

This Article also suggests that, in light of the limited available remedies, states with complex political, historical, or economic issues would benefit from drafting agreements—whether to resolve the dispute directly or to submit it to a third party—that enable a comprehensive solution. UNCLOS Articles 74 and 83 are notable in international law for their emphasis on an equitable solution. If even their broad conception of equity cannot singlehandedly address states' underlying concerns, efforts to do so under other multilateral arrangements are only more likely to founder.

Finally, this Article has acknowledged that states—once again, the clients of international tribunals—have welcomed predictability in maritime delimitation disputes, signaling their preference to leave creative solutions to the negotiation process. That crystallization is inconsistent with a strict definition of equity—and, therefore, with UNCLOS's requirement of an "equitable solution"—does not make states' calls for predictability any less understandable. In UNCLOS, states delegated to tribunals the task of developing a methodology of maritime delimitation. The "equitable solution" requirement may well have afforded the analytical space to develop that methodology so that tribunals could consider cases holistically. Four decades on, however, that methodology has been developed, and states may be satisfied with the range of relevant circumstances tribunals have permitted. Where they once desired an all-embracing approach—one that equity guarantees—they may now prefer consistency from tribunals. Such a preference, ironically, would be consistent with the original (that is, pre-*North Sea Continental Shelf* cases) understanding of equity in maritime delimitation as an open-ended negotiating term.

In this regard, this Article sheds light on how states' expectations of international legal machinery (here, UNCLOS and tribunals as UNCLOS's interpreters) shift as that machinery develops. That shift will become only more pronounced, in the law of the sea and other contexts, as the post-World War II international legal machinery continues to mature.